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Members of the Charter Commission

CC: Mark Ruff, City Coordinator
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DATE: September 4, 2020

RE: Minnesota Licensed Peace Officers

MEMORANDUM

QUESTION PRESENTED

Several questions have been posed to our office inquiring what law enforcement actions are required by state statutes or rules to be performed exclusively by “Peace Officers” licensed by the Minnesota Board of Peace Officer Standards and Training (“POST Board”). The POST Board is a division of the State of Minnesota Department of Public Safety.

SUMMARY CONCLUSION

There is no comprehensive list of tasks in state statutes, rules and case law that sets forth the law enforcement tasks that only licensed peace officers are authorized to perform in Minnesota. There are guidelines but there are many more less clear citations in state laws and rules as to law enforcement tasks that are to be performed only by peace officers. Additionally, there are practical considerations pertaining to the successful prosecution of criminal cases and risk management considerations for policy makers to consider. As public safety is restructured and reimaged in

Minneapolis in the coming years, the information in this memorandum is meant only as a reference guide for what already exists in state statutes and laws on the subject of “peace officers.”

ANALYSIS

Minnesota Statute Section 626.84 defines a “Peace Officer” as:

an employee or an elected or appointed official of a political subdivision or law enforcement agency who is licensed by the board, charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and who has the full power of arrest . . .

See Minn. Stat. §626.84.

Minn. Stat. §626.84 also defines a “Part-time peace officer as:

an individual licensed by the board whose services are utilized by law enforcement agencies no more than an average of 20 hours per week, not including time spent on call when no call to active duty is received, calculated on an annual basis, who has either full powers of arrest or authorization to carry a firearm while on active duty. The term shall apply even though the individual receives no compensation for time spent on active duty, and shall apply irrespective of the title conferred upon the individual by any law enforcement agency.

The Minnesota legislature has in recent years been phasing out part-time peace officers as a matter of public policy. Minn. Stat. §626.8461 provides:

The legislature finds and declares that it is necessary to establish minimum training requirements for part-time peace officers in certain specified areas to maximize protection of the rights and safety of the public and to minimize liability on the part of Minnesota counties and municipalities. The legislature further finds that part-time peace officers are most effectively utilized as a supplement to regular, fully trained and licensed, peace officers and does not encourage the use of part-time peace officers when needs for service would otherwise justify the use of peace officers.

Part-time peace officers who were employed on or before June 30, 2014 may continue to be employed with that law enforcement agency. Part-time officers can only take law enforcement actions under the direct supervision of full-time officers. Minn. Stat. §626.8461, .8463, .8465, .8468.

A “reserve officer” is defined as an individual whose services are utilized by a law enforcement agency to provide supplementary assistance at special events, traffic or crowd control, and administrative or clerical assistance, and shall include reserve deputies, special deputies, mounted or unmounted patrols, and all other employees or volunteers performing reserve officer functions. A reserve officer's duties do not include enforcement of the general criminal laws of the state, and the officer does not have full powers of arrest or authorization to carry a firearm on duty. Minn. Stat. §626.84(e).

What categories of 911 calls must be responded to by licensed peace officers?

Many of the following Minnesota statutory provisions mandate that only licensed peace officers can take certain actions or that when a peace officer responds, that they are mandated to do certain things:

1. When responding to reports of domestic abuse, peace officers must produce reports of the incident and have policies governing domestic abuse reporting. Minn. Stat. §629.341 and §629.342.
2. Responding to a report of a DWI if a chemical test for intoxication is to occur. Minn. Stat. §169A.51

3. Responding to a report of a crime being currently committed. Minn. Stat. §626.84, subd. 1(c)(1). (Note that other statutory provisions provide for citizen arrests in defined circumstances).
4. Responding in a manner that will require an expedited response (lights only, or lights and sirens) or the use of a marked patrol car. See Minn. Stat. §169.98.
5. Responding to any report of bias in the commission of any crime. See Minn. Stat. §626.5531.
6. Responding to any incident that might result in an arrest that only licensed peace officers are authorized to make (e.g. arrests made through execution of a warrant; arrests made for non-felony offenses not directly observed by the officer). See Minn. Stat. §626.84, subd. 1(c)(1), §626.862, §629.34 and §629.37; non-peace officer has no greater authority to arrest an individual than any member of the public relying on the authority in the state's citizen's arrest statute.
7. Responding to an incident that may require a firearm. See Minn. Stat. §626.84, subd. 2.
8. Responding to an incident where a citation in lieu of an arrest may be issued that requires a court appearance. See Minn. Stat. §626.862.
9. Responding to the scene of an accident. See Minn. Stat. §169.09, subds. 3, 4, 8 and 9.
10. A citizen's arrest has been made or backup police are needed to transport an arrestee. See Minn. Stat. §629.39.
11. A child must be taken into custody. A probation or parole officer may take a child into custody when it is reasonably believed that the child has violated the terms of probation,

parole, or field supervision. However, probation or parole officers are not Minneapolis employees. See Minn. Stat. §260C.175.

12. A search warrant must be executed. See Minn. Stat. §626.11.

13. A motor vehicle must be stopped (e.g., to investigate a DWI, traffic violation or other offense); also, a non-peace officer cannot require driver(s) to produce documentation. It is noteworthy that in most cases there is no penalty for not providing identification to or for fleeing from a non-peace officer, or for failing to comply with the lawful order of a non-peace officer, and only a limited penalty for obstructing a non-peace officer. See Minn. Stat. 609.506 (name and date of birth), 169.791 (proof of insurance), 169.792 (proof of insurance), 169.7995 (vehicle rental or lease agreement) 169.81 (firewood load), 169.86 (permit to exceed size, weight, or load), 609.487 (fleeing peace officer), and 609.50 (obstruction or interference with first responder).

There are many other places in Minnesota statutes and rules that mention the duties and obligations of licensed peace officers. A full list of references is linked to this memo at its conclusion.

Unauthorized Practice of Peace Officer Duties

Minn. Stat. 626.863 provides that (a) A person who is not a peace officer or part-time peace officer is guilty of a misdemeanor if the person: (1) makes a representation of being a peace officer or part-time peace officer, or (2) performs or attempts to perform an act, duty, or responsibility reserved by law for licensed peace officers and part-time peace officers.

Field Regulation and Preemption

The statutes cited above, and the other statutes and rules that reference peace officers, could be interpreted as an expression of the Legislature's intent to stop other classes of employees from performing peace officer duties. A legal challenge is possible if the above policy principles are violated and a determination is made that Minneapolis has created a class of law enforcement officers that state law has expressly prohibited or that the state has preempted the field of law enforcement. Basic principles of preemption provide that a higher level of government has the authority to limit, or even eliminate, the power of a lower level of government to regulate a certain issue. This means that if a local government entity passes a law that conflicts with a state law, the state law generally prevails. Such preemption can be expressly passed by the legislature, or in the case of the regulation of peace officers, the legislative intent to preempt conflicting local regulations could be implied.

As stated above, preemption could be an issue if a local rule or ordinance would be in conflict with any state law provisions or is otherwise preempted by state law. *See Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 819 (Minn. 1966). In the event of a conflict, state law supersedes local regulation. The state also has the power to preempt (prevent local regulation), either expressly or by implication. *Id.* To determine whether an ordinance conflicts with a state law, a court must consider whether the ordinance would permit what a statute forbids or forbid what a statute permits. *Northern States Power, v. City of Granite Falls*, 463 N.W.2d 541, 544-45 (Minn. Ct. App. 1990).

Any local rule or ordinance conflicting with state law or public policy is invalid. *A.C.E. Equip. Co. v. Erickson*, 152 N.W.2d 739, 741 (Minn. 1967). No conflict exists where an ordinance

is additional or complementary to a statute, or in furtherance of a statute's goals. *Northern States Power*, 462 N.W.2d at 544-45.

Preemption occurs when state law so extensively and intensively occupies a particular field or subject that there is no reason or room for municipal regulation. *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 348 (Minn. Ct. App. 2002). If preemption has occurred, any local law purporting to control any aspect of the preempted field is void, regardless of whether the local provision actually conflicts with state law.

In deciding whether the state legislature has taken that preemptive step, Minnesota courts consider four factors:

- (1) the subject matter regulated;
- (2) whether the subject matter is so fully covered by state law that it has become solely a matter of state concern;
- (3) whether any partial legislation on the subject matter evinces an intent to treat the subject matter as being solely a state concern; and
- (4) whether the nature of the subject matter is such that local regulation will have an adverse effect on the general state population.

Nordmarken, 641 N.W.2d at 348.

When state law and a local charter provision or ordinance deal with the same general subject matter, courts may find by implication that a conflict exists between the state and local regulations or that the local regulation is preempted by the state law. For example, in *State v. Kuhlman*, 729 N.W.2d 577 (Minn. 2007), the Minnesota Supreme Court struck down an ordinance of the City of Minneapolis imposing a petty misdemeanor fine on owners of vehicles when their

vehicle was caught on camera running a red light. The Court found the City ordinance in conflict with state traffic laws that punished only the driver of the vehicle for the offense of failing to stop for a red light, regardless of the identity of the vehicle owner. The Court concluded that a conflict existed even though the City ordinance was arguably complementary to state law. The state traffic statutes, however, contain an express admonition that the state traffic code is to be “applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein.” 729 N.W.2d at 580, quoting Minn. Stat. §169.022. The Court concluded, based in part on this uniformity requirement, that the City’s ordinance imposing responsibility on the vehicle owner created an inconsistency that was in conflict with the state scheme and struck down the ordinance.

The profession of a peace officer, as with many other professions in Minnesota, is a heavily regulated profession that includes extensive POST Board licensing and training requirements. Peace officers have extensive reporting requirements for issues involving cannabis, adverse incidents relating to drug overdoses, discharges of a firearms in the course of their duties, criminal violations that they have reasons to believe were motivated by bias, pursuits of fleeing suspects, evidence of welfare fraud, maltreatment of minors and vulnerable adults, the use of deadly force, and much more. Additionally, there are many requirements for agencies and chief law enforcement officers.

Body-Worn Camera Considerations

Body-worn camera use is regulated under Minnesota Statutes, §13.82 and §13.825. The use and dissemination of body-worn camera footage is limited in its applicability to “device[s]

worn by a peace officer.” See Minn. Stat. §13.825, subd 1(b)1. “Peace officers” are presumably licensed peace officers. See Minn. Stat. §13.82, subds. 1 and 15; §626.05, subd. 2; and §626.84 (2019).

First, it is uncertain whether the state law preempts the City from allowing non-peace officers to use body-worn cameras. Second, even if a non-peace officer could wear body-worn cameras, the application of the body-worn camera statute would be unclear.

Typically, after a criminal case is inactive, the subject of the data may access their own image and voice on the body worn camera, as well as the image and voices of peace officers who are not undercover. If a non-peace officer uses a body-worn camera, the actions of the non-peace officer may not necessarily be public and available to the subject of the data.

After a criminal case is inactive, BWC footage involving a *peace officer’s* discharge of a firearm or the use of force by a *peace officer* causing substantial bodily harm are publicly available. This mandate does not expressly apply to non-peace officers, so it is unclear whether any possible use of force by a non-peace officer in body worn camera footage would be public. See Minn. Stat. §13.825, subd. 2(a)(1).

In addition, “[d]ata collected by [BWCs] are private data on individuals or nonpublic data,” subject to several exceptions. This means that private individuals have a certain level of control over the release of much of the BWC footage on which they are the subjects. If §13.825 is only applicable to body worn camera footage of licensed peace officers, and the City hires a non-peace officer to wear a body worn camera during their work for the City, the footage might be deemed public from its creation. Thus, an individual could lose their privacy rights, including their rights to control of the release of the data, under Minn. Stat. §13.82 and §13.825.

Finally, the statutory requirements that BWC footage be maintained for at least 90 days and destroyed according to the agency's records retention schedule may not apply to BWC footage from cameras worn by non-peace officers. *See* Minn. Stat. §13.825, subd. 3.

Criminal Prosecutions and Testimony Considerations

The US Supreme Court case, *Brady v. Maryland*, 373 U.S. 83, 87 (1963), requires that the prosecution turn over all “material” information to the defense that might exonerate the defendant or evidence going to the credibility of a witness. “Material” evidence includes exculpatory evidence as well as impeachment evidence concerning government witnesses. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The State must disclose the complete criminal record of witnesses. Failure to do so is a violation of Minn. R. Crim Proc. 9.01. *State v. Miller*, 754 N.W.2d at 705-706. “Under *Brady*, the suppression by the State, whether intentional or not, of material evidence favorable to the defendant violates the constitutional guarantee of due process.” *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010). Where a witness’s reliability “may be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the *Brady* rule.” *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)). This disclosure under *Brady* applies to all witnesses for the State, not just MPD or other law enforcement. There is a process for prosecutors to obtain this information from MPD for the purpose of disclosure. Without MPD, a process for efficiently obtaining this information about the witnesses working with the Office of Violence Prevention or another Minneapolis department would need to be established and readily available.

Peace Officer and Law Enforcement Involvement in Accident Reports

Pursuant to Minn. Stat. §169.09, subd. 8, all law enforcement officers who, in the regular course of duty, investigate a motor vehicle accident which results in bodily injury to or death of any person or total property damage to an apparent extent of \$1,000 or more , MUST forward a written report of that accident, within ten days thereof, to the Commissioner of Public Safety. Minn. Stat. §169.09, subd. 8. The format of such accident reports is set by the Commissioner of Public Safety. Minn. Stat. §169.09, subd. 9 (2019).

Without the MPD, it is unclear how a non-peace officer would fit into accident reporting requirements. Minn. Stat. §169.09 is predicated on the involvement of peace officers in the accident reporting process. For example, subd. 3 of Minn. Stat §169.09 requires the involvement of a peace officer in specific circumstances as follows:

(a) The driver of any motor vehicle involved in a collision the driver knows or has reason to know results in bodily injury to or death of another, or damage to any vehicle driven or attended by another, shall give the driver's name, address, and date of birth and the registration plate number of the vehicle being driven. The driver shall, upon request and if available, exhibit the driver's license or permit to drive to the individual struck or the driver or occupant of or individual attending any vehicle collided with. The driver also shall give the information and upon request exhibit the license or permit to any peace officer at the scene of the collision or who is investigating the collision. The driver shall render reasonable assistance to any individual injured in the collision.

(b) If not given at the scene of the collision, the driver, within 72 hours after the accident, shall give, on request to any individual involved in the collision or to a peace officer investigating the collision, the name and address of the insurer providing vehicle liability insurance coverage, and the local insurance agent for the insurer.

Minn. Stat §169.09, subd. 3 (2019).

Without a local police department made up of peace officers tasked with responding to and investigating accidents, it is unclear how accident reporting will continue within the municipality. This could have unintended consequences for insurance claims, as many insurers require or expect an accident report when evaluating accident related claims/injuries.

Other Considerations

- Response issues – we understand that presently the Co-Responder teams are not functioning due to the COVID crisis. First responders of any kind or title must be prepared to respond to all dispatched calls 24/7/365.
- OAI – originating agency ID number – 9-character identifier assigned to an agency. This is needed from the BCA in order to charge any case (complaint or citation). This issue is raised only to point out that a law enforcement agency will need to be a part of any future planned public safety agency to access the criminal complaint process.
- Social workers, crisis intervention counselors, health care providers – already exist and interact with law enforcement (one current example is the Co-Responder Program) and also practice in heavily regulated professions.

Relevant Minnesota Statutes and Rules Pertaining to “Peace Officer” and “Law Enforcement” References

A comprehensive list of Minnesota statutes and rules that include references to peace officers is contained in a separate document with hyperlinks to the sites.