



State of West Virginia  
Office of the Attorney General

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Via E-mail and Regular Mail

Morgantown City Council  
389 Spruce Street  
Morgantown, WV 26505

Re: Proposed Community Police Review and Advisory Board

Dear Members of the Council,

My Office recently reviewed the *Resolution Affirming and Strengthening Community Policing* the Council passed during its September 1, 2020 regular meeting that calls for the establishment of a Community Police Review and Advisory Board, as well as two draft Ordinances that would establish such a Board in part "to provide a prompt, impartial, and fair investigation of complaints relating to the Morgantown Police Department."

I applaud the Council for seeking to ensure that the residents of Morgantown can live in a community that values both public safety and the rights of its citizens to express their First Amendment rights in a peaceful, non-violent manner. Improving officer training and preventing the unwarranted use of deadly force are worthy goals that I share. However, the Office of the Attorney General is of the opinion that the Morgantown City Council does not have the legal authority to enact any municipal ordinance purporting to conduct investigations of complaints relating to members of the Morgantown Police Department, as any such ordinance would conflict with the provisions of W.Va. Code §8-11-1(a)(2), §8-14-6, §8-14-20, §8-14-23, and §§8-14-A-1, *et seq.* This Office also believes that several of the items in the Council's September 1, 2020 *Resolution Affirming and Strengthening Community Policing* run afoul of various provisions of the W.Va. Code and the Constitutions of the United States and the State of West Virginia. For those reasons, we urge you to change course and come into compliance with the law.

The West Virginia Supreme Court has held on multiple occasions that "A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. **If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.**" Syllabus Point 2, *State ex rel. Charleston v. Hutchinson*, 154 W.Va. 585, 176 S.E.2d 691 (1970)(emphasis added); Syllabus Point



1, *City of Fairmont v. Investors Syndicate of America, Inc.*, 172 W.Va. 431, 307 S.E.2d 467 (1983). The Court has also repeatedly held that “When a provision of a municipal ordinance is inconsistent or in conflict with a statute enacted by the Legislature the statute prevails and the municipal ordinance is of no force and effect.” Syllabus Point 1, *Vector Co. v. Board of Zoning Appeals*, 155 W.Va. 362, 184 S.E.2d 301 (1971); Syllabus Point 1, *Davidson v. Shoney’s Big Boy Restaurant*, 181 W.Va. 65, 380 S.E.2d 232 (1989).

It is our understanding that Morgantown’s population is approximately 31,000<sup>1</sup>, which would make it a Class II city per W.Va. Code §8-1-3(2). W.Va. Code §8-14-6(a) mandates that “all appointments and promotions in all paid police departments of Class I and Class II cities shall be made **only according to qualifications and fitness** to be ascertained by examinations which, so far as practicable, shall be competitive as hereinafter provided” (emphasis added). Additionally, W.Va. Code §8-14-6(b) prohibits Class I and Class II cities from appointing, promoting, reinstating, removing, discharging, suspending, or reducing in rank any member of their paid police departments “in any manner or by any means other than those prescribed in the following sections of this article” through their respective Policemen’s Civil Service Commission. This Office believes the term “member of a paid police department” as defined in W.Va. Code §8-14-6(c) applies to those police officers whose actions likely would be the subject of review by the proposed Community Police Review and Advisory Board described in the draft Ordinances that the Council appears to be considering.

W.Va. Code §8-14-20 indicates that “no member of any paid police department subject to (the Policemen’s Civil Service Commission system). . .may be removed, discharged, suspended or reduced in rank or pay except as provided by the civil service provisions of this article. . .” Moreover, W.Va. Code §8-14-23 reflects the Legislature’s clear intent for the Policemen’s Civil Service Commission to “furnish a **complete and exclusive system** for the appointment, promotion, reinstatement, removal, discharge, suspension and reduction of all members of all paid police departments” as well as its decision to expressly repeal “all acts, whether general, special, local or special legislative charters, or parts thereof, in relation to any civil service measure affecting any paid police department (that are) inconsistent with the civil service provisions of this article” (emphasis added).

Article 14A, Chapter 8 of the W.Va. Code – entitled “Municipal Police Officers and Firemen; Procedure for Investigation” – establishes the exclusive procedures to be followed when any municipal police officer or firefighter “becomes the focus of inquiry **regarding any matter which may result in punitive action**” (emphasis added).<sup>2</sup> Per W.Va. Code §8-14A-1(7), the term “punitive action” means “any action which may lead to dismissal, demotion, suspension, reduction in salary, **written reprimand or transfer** for purposes of punishment” (emphasis added). Because Section 181.05 of the draft Ordinances purports to vest a proposed Community Police Review and Advisory Board with the authority to develop and administer a separate process to receive and investigate complaints that could result in punitive action against police officers, it is our opinion the draft Ordinances improperly infringe upon the powers that the Legislature has exclusively assigned and reserved to the City’s Policemen’s Civil Service Commission system.

In evaluating the legality of the proposed Ordinances, it is important to note that even though individual members of the Legislature have periodically introduced bills for more than 20 years that, if enacted, would have amended the W.Va. Code to permit municipal corporations like the City of Morgantown to create their own “local police review boards” or “local law-enforcement review boards,” the Legislature has repeatedly declined to pass such legislation. See H.B. 2920, 84<sup>th</sup> Leg., Reg. Sess. (W.Va. 2019) and H.B. 2762, 74<sup>th</sup> Leg., Reg. Sess. (W.Va. 1999). Because Legislators have repeatedly attempted

<sup>1</sup> <https://www.census.gov/quickfacts/morgantowncitywestvirginia>

<sup>2</sup> W.Va. Code §8-14A-1(8).



to amend the W.Va. Code to vest municipal corporations with the legal authority to create a "local police review board" with functions similar to those envisioned for the proposed Community Police Review and Advisory Board in the draft Morgantown Ordinances, it stands to reason that ***municipal corporations currently lack the legal authority to create such review boards*** due to the Code provisions described above.

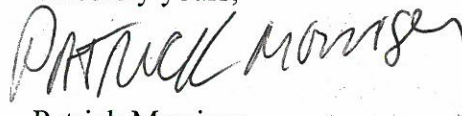
Notwithstanding the Council's goals, as noted above this Office also believes several items in the September 1, 2020 *Resolution Affirming and Strengthening Community Policing* run afoul of various provisions of the W.Va. Code and the Constitutions of the United States and the State of West Virginia in violation of W.Va. Code §8-11-1(a)(2). For instance, Item 3 appears to call for the City to implement a hiring policy that would establish unconstitutional racial quotas in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution per the U.S. Supreme Court's decision in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and a long-established line of similar judicial cases. Item 3 would also appear to violate the equal protection principle that is part of the Due Process Clause in Article III, Section 10 of the West Virginia Constitution.

Additionally, Items 5, 6 and 7 appear to call for the City's police officers to refrain from arresting individuals who have violated West Virginia's criminal laws in favor of more lenient alternative courses of action. Such an approach appears to conflict with W.Va. Code §8-14-3, which establishes the powers, authority and duties of municipal police officers. Under that Code section, Morgantown's police officers have a **mandatory** ("shall") obligation to "aid in the enforcement of the criminal laws of the state within the municipality, independently of any charter provision or any ordinance or lack of an ordinance with respect thereto, and **to cause the arrest of, or arrest, any offender and take him or her before a magistrate to be dealt with according to the law**" (emphasis added). That Code section further provides that "Failure on the part of any such (police) officer to discharge any duty imposed by the provisions of this section **is official misconduct for which he or she may be removed from office**" (emphasis added).

Item 9 appears to instruct Morgantown's police officers to refrain from enforcing the State's criminal laws regarding crimes against property due to the Council's subjective perception that such crimes "are not to be equated" with other crimes involving "the violation of human life." The Legislature has enacted laws prohibiting both crimes against property (under Article 2, Chapter 61 of the W.Va. Code) as well as crimes against the person (under Article 3, Chapter 61 of the W.Va. Code), and Morgantown's police officers are obligated to enforce all of those laws pursuant to W.Va. Code §8-14-3.

There are several other potential problems with the September 1, 2020 Resolution and the draft Ordinances that need not be addressed here, as the language in the draft Ordinances we have reviewed is still under consideration and subject to change during the drafting process. However, as the Council continues seeking to improve the outcomes when the City's officers come into contact with members of the public, this Office encourages you to engage and communicate closely with law enforcement throughout that process, as hearing their personal experiences may provide the Members of the Council with valuable insight that could prove helpful in accomplishing the Council's goals.

Sincerely yours,



Patrick Morrissey  
West Virginia Attorney General

cc: Emily Muzzarelli, Assistant & Interim City Manager