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Request for City Council Committee Action
From the City Attorney's Office

Date: March 31, 2003
To: Ways & Means/Budget Committee
Referral to: None

Subject: Steven Tatro v. City of Minneapolis, O.A.H. file no. 11-6010-15156-3

Recommendation: That the City Council adopt in its entirely the Findings of Fact, Conclusions of Law and Recommendation of Administrative Law Judge Barbara L. Neilson that Steven Tatro not be defended or indemnified in the matter of Kevin Leroy Buford v. City of Minneapolis, et al., Federal District Court File No.: 00-1868 MJD/JGL, for the reasons stated therein.

Previous Directives: None.

Prepared by: Timothy S. Skarda, Assistant City Attorney, 673-2553

Approved by: _____
Jay M. Heffern
City Attorney

Presenter in Committee: Jay M. Heffern, City Attorney

Financial Impact (Check those that apply)
__x No financial impact - or - Action is within current department budget.
(If checked, go directly to Background/Supporting Information)
___ Action requires an appropriation increase to the Capital Budget
___ Action requires an appropriation increase to the Operating Budget
___ Action provides increased revenue for appropriation increase
___ Action requires use of contingency or reserves
___ Other financial impact (Explain):
___ Request provided to the Budget Office when provided to the Committee Coordinator

Community Impact: None

Background/Supporting Information

This Request for City Council Committee Action is in regard to the request of former Minneapolis Police Officer Steven Tatro for defense and indemnification pursuant to Minnesota Statute Section 466.07 and Article 25 of the Labor Agreement. An administrative hearing was held on the request on January 1, 2003, and January 27, 2003. On March 26, 2003, Administrative Law Judge Barbara L. Neilson issued Findings of Facts, Conclusions of Law and a recommendation that Steven Tatro not be defended in the underlying federal court lawsuit filed by Kevin Buford.

On May 12, 1999, Steven Tatro was working off duty in uniform at the Dayton-Radisson parking ramp located at 24 South 8th Street. A confrontation arose between Kevin Buford and Tatro in which Tatro used force upon Mr. Buford. The Civilian Review Authority and the Minneapolis Police Department Internal Affairs Unit investigated allegations of the improper use of force by Mr. Tatro. The Department investigation sustained violations of Department rules regarding the use of non-deadly force, the use of discretion and complaint investigation through violation of the Garrity warning. Mr. Tatro was terminated from employment.

On August 4, 2000, Kevin Buford filed a civil lawsuit in federal district court seeking damages for the violation of his civil rights. Pursuant to the previously adopted *Policy and Procedures for Defense and Indemnification of Employees*, the City Attorney and Police Department reviewed the allegations and conduct of Mr. Tatro and jointly determined that he was not entitled to defense and indemnification. Mr. Tatro was advised of the determination and that, if requested, a hearing to determine whether the City had an obligation to provide defense and indemnification would be held. Mr. Tatro did not request an administrative hearing and this Committee determined on March 19, 2001, that he was not entitled to defense and indemnification. Mr. Tatro appealed the decision to the Minnesota Court of Appeals and on February 5, 2002, the court ruled that Mr. Tatro's request for a hearing was timely and reversed the decision of the City Council. The administrative hearing was held on January 9, 2003, and January 27, 2003. The decision from Judge Neilson is attached.

11-6010-15156-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNEAPOLIS CITY COUNCIL

In the Matter of:

Steven Tatro,

v.

The City of Minneapolis.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED DECISION

The above-entitled matter came on hearing before Administrative Law Judge Barbara L. Neilson, acting as hearing officer for the Minneapolis City Council, commencing at 9:30 a.m. on January 9, 2003, at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing continued on January 27, 2003. The OAH record closed on February 18, 2003, upon receipt of the final written brief from a party.

Dennis B. Johnson, Attorney at Law, Chestnut & Cambronne, P.A., 222 South Ninth Street, Suite 3700, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent, Steven Tatro. Timothy S. Skarda, Assistant City Attorney, 333 South 7th Street, Suite 300, Minneapolis, Minnesota 55402-2453, appeared on behalf of the City of Minneapolis.

NOTICE

This report is a recommendation and not a final decision. The Minneapolis City Council will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions of Law and Recommended Decision. The parties should contact the City Clerk, Council Information Division, 350 South Fifth Street, Room 304, Minneapolis, Minnesota 55415-1382, telephone (612) 673-3136, to learn when the City Council will consider this matter and whether the Respondent will have an opportunity to present argument to the City Council concerning this recommended decision.

STATEMENT OF THE ISSUE

The issue in this proceeding is whether or not the City of Minneapolis properly decided not to defend or indemnify the Respondent, a former Minneapolis Police Officer, under Minn. Stat. § 466.07 and Article 25 of the Labor Agreement, in connection with a matter currently pending in federal district court on the grounds that the Respondent was guilty of malfeasance, willful neglect of duty, or bad faith.

Based upon all of the proceedings, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent, Steven Tatro, was employed as a police officer with the Minneapolis Police Department from September of 1995 to April of 2000. He was hired as a street officer and remained in that position as of May of 1999. He performed part-time work when he was off-duty.[1]

2. On May 13, 1999, the Respondent was working off-duty in uniform at the Dayton-Radisson parking ramp located at 24 South Eighth Street in downtown Minneapolis. He had worked at the ramp on a part-time, off-duty basis for approximately 2 ½ years by that date. The Respondent was properly authorized to work off-duty according to the policies and procedures set up by the Police Department. Under these circumstances, the Respondent was still working as a police officer. The Respondent was instructed regarding what to do by the officer in charge of scheduling off-duty work at the ramp. He was told to sit at the podium between Seventh and Eighth Streets near the arcade by the main level by Dayton's Department Store (now known as Marshall Fields), observe people coming into and going out of the ramp, respond if he heard an emergency alarm go off in the ramp, and patrol the two parking lots owned by Columbus Corporation every half hour. In order to reach the second parking lot, it was necessary to cross the alley outside the area where the podium was located.[2]

3. At approximately 8:50 p.m., Kevin Buford and an acquaintance of Mr. Buford approached the Respondent in the ramp office. Mr. Buford had been drinking and the Respondent could smell alcohol on his breath. Mr. Buford asked the Respondent if he could use the bathroom. The Respondent told him that the bathrooms were locked at 6:00 p.m., as indicated on the door to the restroom, and he could not use them. Mr. Buford indicated that he would simply go to the alley to relieve himself. He said something like, "Fuck this shit, I have to piss. Where is the motherfucking alley?" The Respondent advised Mr. Buford that, if he urinated in the alley, he would be arrested. The Respondent followed Mr. Buford out of the office and into the alley where Mr. Buford began to urinate. The Respondent ordered Mr. Buford to stop urinating and informed him that he would be arrested if he continued. At that point, Mr. Buford swore at the Respondent and turned toward the Respondent in an apparent attempt to urinate on the Respondent. The Respondent had to jump back to avoid urine spraying on his uniform and shoes. The Respondent again told Mr. Buford that he would be placed under arrest when he was done urinating. After Mr. Buford finished urinating, he began running down the alley with the Respondent in pursuit. During the foot chase, the Respondent threw his flashlight at Mr. Buford's legs in an attempt to make his legs fold so that he would fall. The flashlight missed Mr. Buford. The foot chase continued to the

[1] Testimony of Tatro; Ex. 2.
[2] Testimony of Tatro, Belton; Exs. 2, 26-27, 39.

end of the alley, onto 8th Street, and across Hennepin Avenue, where the parties arrived at a parking lot located at 24 North Eighth Street.[3]

4. The events that occurred after the Respondent and Mr. Buford arrived at the parking lot were captured on a videotape from a surveillance camera located near the parking lot. The videotape was received as Exhibit 1. The videotape is black and white and does not include any audio. Although the video was taken from a distance, flickers at times, and is not of extremely high quality, it is possible to recognize the Respondent and Mr. Buford on the videotape and discern their physical movements. It is not always possible to tell whether punches thrown by the Respondent actually connected with Mr. Buford, although the Respondent's physical proximity to Mr. Buford make it likely.[4]

5. The videotape begins by showing that Mr. Buford is facing the Respondent and backing up in the area of the parking lot exit lane when the Respondent either pushed or punched Mr. Buford with enough force to send him crashing through the parking lot's wooden stop arm, breaking the stop arm. The Respondent stepped over the broken stop arm, got close to Mr. Buford, and then struck Mr. Buford in the head approximately four or five more times. Mr. Buford sat down on a railing near the exit lane, next to the broken stop arm, and it appears that the Respondent and Mr. Buford had some sort of a verbal exchange. After Mr. Buford had been seated for a short time, the Respondent delivered another eleven or twelve blows to Mr. Buford's head and torso. After that, it appears that Mr. Buford turned around and placed his hands behind his back to be handcuffed. At that point, the Respondent struck Mr. Buford at least another two times and brought him down to the ground. It appears that Mr. Buford was face-down on the pavement and the Respondent either had his knee in Mr. Buford's back or was sitting on Mr. Buford's back. Within seconds of the time when the Respondent got Mr. Buford on the ground, additional police officers arrived on the scene. Approximately two minutes elapsed between the first view of the Respondent and Mr. Buford on the videotape and the time that additional officers arrived to provide assistance.[5]

6. The Respondent used both his right and left hands to strike Mr. Buford. He was holding his handcuffs in his right hand when he hit Mr. Buford.[6] The Respondent was carrying mace at the time.[7]

7. The videotape shows that Mr. Buford did not attempt to run away after reaching the parking lot or take any type of aggressive action toward the Respondent. He did not bend over to pick up the stop arm, step toward the Respondent, or begin to approach or attack the Respondent at any time. Mr. Buford's arms and hands are only used defensively, in an obvious attempt to deflect the Respondent's blows. It appears

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[3] Testimony of Tatro, Belton; Ex. 2.
[4] Ex. 1.
[5] Ex. 1. The total number of blows observed by the Administrative Law Judge on the videotape is similar to that observed by Sergeant Doug Belton, who was in charge of the IAU investigation. Sgt. Belton testified that, based on his review of the videotape, the Respondent delivered approximately seventeen blows to Mr. Buford.
[6] Testimony of Tatro, Olson; Exs. 1, 2.
[7] Ex. 2 (CRA report).

that he is trying to stay out of striking distance of the Respondent.[8] Mr. Buford was unarmed during the altercation.[9]

8. The Respondent did not radio for back-up assistance during the foot chase. Once Mr. Buford was on the ground, the Respondent called for back-up. Only one call was made. The other officers arrived within seconds of the call. Two officers had to handcuff Mr. Buford because the Respondent alone could not do it. After Mr. Buford was handcuffed, the officers let him lay there for a time because he was mad and throwing his legs around. Mr. Buford was bleeding, using foul language to berate officers on the scene, and threatening to sue the Respondent and the City. After a while, Mr. Buford sat up.[10] A "code four" (meaning that the suspect was under control)[11] was issued for this call within sixty seconds of the time that the Respondent called for back-up.[12]

9. Mr. Buford was taken to Hennepin County Medical Center after his arrest. Mr. Buford's injuries required stitches above his eye and staples in the back of his head. Mr. Buford was verbally abusive with doctors and nurses at the hospital and refused to sit still to have pictures taken. Mr. Buford was taken to Hennepin County Jail, where he was also uncooperative. After he was released from jail, Mr. Buford had a dentist remove two teeth that had been broken off inside the gum.[13]

10. Under the Police Department's "Codefor" policy in effect in May of 1999, officers were to "clean up the streets" and aggressively enforce misdemeanor violations, including but not limited to arresting persons for minor crimes as opposed to writing them a citation. The Respondent attended a one-to-two-hour seminar on the Codefor policy prior to May of 1999. The Respondent does not know whether the alley near the Dayton-Radisson ramp was a particular hot spot under Codefor policy. The Respondent's decisions to arrest Mr. Buford rather than simply cite him and to chase him were consistent with the Codefor policy. However, officers continued to have discretion under the Codefor policy concerning whether it was appropriate to arrest or issue a citation to a suspect. In fact, the Respondent stated during his December 27, 1999, tape-recorded statement to the Police Department's Internal Affairs Unit that it was within an officer's discretion whether to arrest people for urinating in public and that he arrested very few of those people. He indicated that "99% of the time I tell them to take off."[14]

11. After the incident, an individual from the City Attorney's office called the Respondent and told him that she was happy that Mr. Buford had been arrested again because he was on the "top 10" list. She said that she was looking forward to incarcerating him.[15]

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[8] Ex. 1.
[9] Ex. 2.
[10] Testimony of Belton, Tatro; Ex. 2 (statement of Emily Olson); IAU Executive Summary.
[11] Testimony of Bennett.
[12] Ex. 2 (IAU Executive Summary).
[13] Testimony of Tatro; Exs. 2, 28.
[14] Exs 2, 29 at pp. 32-35; Testimony of Belton, Tatro, Olson.
[15] Testimony of Tatro.

12. Prior to this incident, the Respondent had performed satisfactorily as a police officer for the City. He had no history of violent conduct or disciplinary action, and had received various compliments and commendations from his superiors. On September 24, 1999, Chief Olson awarded him the Department's Award of Merit.[16]

13. Mr. Buford later filed a complaint with the Civilian Review Authority ("CRA"). After an investigation, the CRA determined that the Respondent had used excessive force that was unreasonable, unnecessary, and unprovoked, and that his conduct had been inappropriate. The CRA referred the matter to the Internal Affairs Unit ("IAU") of the Police Department on approximately November 29, 1999, because the Respondent was possibly untruthful in the statements he gave.[17]

14. The Respondent was relieved of duty with pay on December 1, 1999, pending a decision on his employment status.[18]

15. The IAU conducted an investigation regarding the incident and whether the Respondent had been truthful in the statements he gave to the CRA. The IAU adopted the conclusions of the CRA. The IAU file was presented to a disciplinary panel in the Minneapolis Police Department, which conducted a disciplinary hearing on April 4, 2000. The panel found that the Respondent had committed three violations: use of excessive non-deadly force in violation of section 5-304 of the Departmental Manual; improper use of discretion by throwing a flashlight at Mr. Buford and by failing to request back-up when time was available in violation of section 5-103; and lying in the police report and in CRA and IAU statements in violation of section 2-108. All three of these violations were characterized as Category D, the highest level of severity of an offense. The panel recommended that the Respondent's employment be terminated. The Division Commander concurred in the recommendation. On April 12, 2000, Chief of Police Robert K. Olson agreed and decided to terminate the Respondent's employment. The Respondent did not contest the findings or the decision to terminate his employment.[19]

16. Respondent was terminated from his employment with the Minneapolis Police Department as a result of the investigation and findings by the Department, including Chief Olson's conclusion that he had not been truthful regarding the incident. Chief Olson believed that the Respondent had acted in bad faith on May 13, 1999, since the videotape showed him beating the suspect with handcuffs even though the suspect was not doing anything. In Chief Olson's opinion, the Respondent had committed an assault.[20]

17. The Minneapolis Police Department turned the matter over to the FBI to investigate.[21]

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[16] Exs. 31-35; Testimony of Belton, Tatro.
[17] Testimony of Belton; Ex. 2.
[18] Ex. 2.
[19] Ex. 2; Testimony of Belton, Olson.
[20] Testimony of Olson, Belton.
[21] Testimony of Olson.

18. On August 4, 2000, Mr. Buford filed a civil action in federal district court against the City of Minneapolis, the owners of the Dayton Radisson ramp, the Respondent, and other police officers seeking damages for his injuries.[22] The City was served with the complaint on August 11, 2000. The Respondent was not served with the summons and complaint until approximately January 12, 2001.[23]

19. On August 18, 2000, the City notified the Respondent by letter that it had been served with the summons and complaint. The City further informed the Respondent that the City Attorney's Office and the Police Department had determined that he was not entitled to defense and indemnification, but that he would be afforded a hearing before an Administrative Law Judge on that decision if he requested one by September 8, 2000. The letter indicated that, if the Respondent did not make a timely request, the City Attorney and Police Department would present their recommendations directly to the Minneapolis City Council, which would make the final decision, and that the Respondent would be notified of the date of the City Council hearing and would have an opportunity to address the City Council before it rendered its decision.[24]

20. By letter dated September 8, 2000, the City extended the deadline for Respondent to request an administrative hearing to September 15, 2000.[25]

21. The Respondent did not request an administrative hearing by September 15, 2000.[26]

22. On March 19, 2001, the Ways and Means Committee of the Minneapolis City Council discussed the issue of the indemnification of the Respondent. At that meeting, the Respondent requested that his case be heard before an Administrative Law Judge. The City Council denied the Respondent's request and concluded that he had waived his opportunity to be heard. It also declined to defend and indemnify the Respondent for any potential damages in the federal court action because it determined that the Respondent was guilty of malfeasance in office, willful neglect of duty, or bad faith under Minn. Stat. § 466.07.[27]

23. The Respondent sought certiorari review of the City Council decision by the Minnesota Court of Appeals. The Minnesota Court of Appeals decided on February 5, 2002,[28] that the Respondent was entitled under applicable City policy to have the opportunity to present his case at an administrative hearing. The Court of Appeals indicated that the Respondent had "not directly challenge[d] the city council's determination that he was guilty of malfeasance, but argue[d] that the city did not follow its own policy in making its determination, because it denied his request for an

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[22] *Buford v. Tatro, et al.*, File No. 00-1868 MJD/JGL.

[23] *See* Letter of Aug. 18, 2000, appended to City's Court of Appeals Brief as Appendix A-2 and facts set forth in *Tatro v. Minneapolis City Council*, 2002 WL 172033 (2002) (both of which are attached to Notice of Hearing).

[24] *Id.*

[25] See Letter of Sept. 8, 2000, appended to City's Court of Appeals Brief as Appendix A-1.

[26] *See* facts set forth by Court of Appeals in *Tatro v. Minneapolis City Council*, 2002 WL 172033 (Minn. App. 2002).

[27] Ex. 30; Testimony of Tatro.

[28] *Tatro v. Minneapolis City Council*, 2002 WL 172033 (Minn. App. 2002).

administrative hearing." The indemnity question thus was not before the Court. The Court concluded that the City's Policy and Procedure for Defense and Indemnification of Employees required that four events occur before the City can make a final determination regarding defense and indemnification; "(1) the employee be served, (2) the employee requests indemnification, (3) the city attorney and department head make a preliminary determination that the employee is not eligible for defense and indemnification, and (4) the employee be given the opportunity for a hearing before an ALJ." The Court emphasized that the Respondent was not served with the summons and complaint until almost five months after the City made its determination, and ruled that the City must afford the Respondent the opportunity to present his case at an administrative hearing.

24. The Notice of Hearing initiating the present hearing was issued on November 19, 2002. The hearing was originally scheduled for December 6, 2002. The hearing was continued to January 9, 2003, at the request of the parties.

25. The Respondent filed for bankruptcy about one month prior to the hearing.

26. Chief Olson recommended that an officer not be indemnified in at least one other case in which there was a videotape showing the conduct of the officer.[29]

27. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references. Thus, references to exhibits in these Findings of Fact does not mean that the exhibits are the exclusive or the only support for the findings since most findings are also supported by oral testimony.

28. The Memorandum that follows explains the reasons for these Findings, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Findings.

29. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minneapolis City Council and the Administrative Law Judge have authority to consider the allegations against the Licensee and the adverse action, if any, that should be imposed by the City under Minn. Stat. §14.55 and the City's Policy and Procedure for Defense and Indemnification of Employees.

2. The City has compiled with all relevant substantive and procedural requirements of statute and rule.

[29] Testimony of Olson.

3. The Respondent received timely and appropriate notice of the allegations made by the City and the time and place of the hearing.

4. The City's Policy and Procedure for Defense and Indemnification of Employees specifies that "[i]t is the policy of the City of Minneapolis to provide defense and indemnification in accordance with the public policy implicit in Minnesota Statutes, Chapter 466 and to protect those performing governmental services on behalf of the City of Minneapolis against risk of liability resulting from lawsuits." The Policy goes on to state: "The City shall defend any officer or employee for any tortious conduct arising out of any alleged act or omission occurring in the performance of the duties of his/her position. If the City determines that any officer or employee is guilty of malfeasance in office, willful neglect of duty, or bad faith, it shall not defend or indemnify that officer or employee." The Policy further specifies that, if the employee desires, an Administrative Law Judge will be retained by the City to conduct a hearing to determine whether the City has an obligation to provide defense and indemnification to the employee and that the recommendation of the Administrative Law Judge will be submitted to the City Council for a final decision.[30]

5. Article 25 of the Labor Agreement between the City of Minneapolis and the Police Officers' Federation of Minneapolis states in pertinent part as follows:

> **Section 25.1 – Legal Counsel.** The City shall provide legal counsel to defend any employee against any action or claim for damages, including punitive damages, subject to limitations set forth in *Minnesota Statutes* §466.07, based on allegations relating to any arrest or other act or omission by the employee provided: the employee was acting in the performance of the duties of his or her position; and was not guilty of willful neglect of duty or bad faith.[31]

6. Minn. Stat. § 466.07 specifies in relevant part that, subject to the limitations set forth in section 466.04 (relating to maximum liability limits), "a municipality or an instrumentality of a municipality shall defend and indemnify any of its officers and employees, whether elective or appointive, for damages, including punitive damages, claimed or levied against the officer or employee, provided that the officer or employee: (1) was acting in the performance of the duties of the position; and (2) was not guilty of malfeasance in office, willful neglect of duty, or bad faith."[32]

7. Under Department rule 2-108 relating to complaint investigations and the *Garrity* decision, Department employees "shall answer all questions truthfully or render material and relevant statements to a competent authority in a departmental investigation when so directed, consistent with [their] Constitutional rights" and must "give a statement when ordered to do so regarding matters pertaining to the scope of their employment and their fitness for duty." The rules go on to state that "[a]ny

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[30] Ex. 6.
[31] Exs. 3-4.
[32] Ex. 5.

employee found to have purposely given a false statement shall be subject to departmental disciplinary procedures, up to and including dismissal."[33]

8. Department rule 5-103 relating to the use of discretion states:

> The police profession is one which requires officers to use considerable judgment and discretion in the performance of their daily duties. Officers have a large body of knowledge from Department policies and procedures, training, their own professional police experience and the experiences of their fellow officers to guide them in exercising proper judgment and discretion in situations not specifically addressed by Department rules and regulations. In addition, officers must always adhere to the following principles in the course of their employment with the Minneapolis Police Department:
>
> POLICE ACTION – LEGALLY JUSTIFIED Officers must act within the limits of their authority as defined by law and judicial interpretation, thereby ensuring that the constitutional rights of individuals and the public are protected.
>
> EQUALITY OF ENFORCEMENT Officers shall provide fair and impartial law enforcement to all citizens.
>
> LOYALTY Officers shall be faithful to their oath of office, strive to uphold the principles of professional police service, and advance the mission of the Department.[34]

9. Department rule 5-304 relating to the use of non-deadly force specifies as follows:

> Where deadly force is not authorized or required, officers shall assess the situation in order to determine what level of force is required. Officers shall utilize the appropriate level of force, techniques and/or weapons to best de-escalate the situation and bring it under control quickly.
>
> Officers are authorized to use department-approved non-deadly weapons and force techniques for the resolution of incidents as follows:
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> 1) To protect themselves or another from physical harm; or
>
> 2) To restrain or subdue a person resisting apprehension/arrest; or
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> 3) To bring an unlawful situation under effective control.[35]

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[33] Ex. 2.
[34] Ex. 2.
[35] Ex. 2.

10. The City has the burden of proof under Minn. Stat. § 466.07 to establish, by a preponderance of the evidence, that the Respondent is not entitled to defense and indemnification.

11. The City has demonstrated by a preponderance of the evidence that its decision not to defend or indemnify the Respondent was proper.

12. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Minneapolis City Council affirm the decision not to defend or indemnify the Respondent, Steven Tatro, in connection with *Buford v. Tatro*, File No. 00-1868 MJD/JGL.

Dated: March 26, 2003.

Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape-recorded (Four Tapes) - No Transcript Prepared.

NOTICE

The City is requested to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Administrative Law Judge has not credited much of the Respondent's version of what happened during the evening of May 13, 1999, because his accounts have varied over time and are greatly at odds with what is reflected in the videotape of the incident. For example, the Respondent indicated in his police report, told CRA and IAU investigators, and testified at the hearing that Mr. Buford, while running forward and looking backward, ran into the wooden parking lot stop arm and broke it, then assumed a "fighting stance" and looked down at the broken stop arm as if he was going to pick it up and use it as a weapon against the Respondent. The Respondent in his December

27, 1999, IAU statement, went so far as to say that he did not assist Mr. Buford in breaking the stop arm and wasn't even near him at the time. The videotape reveals that this was not at all the case; rather, the Respondent in fact shoved or punched Mr. Buford with sufficient force to cause him to break through the stop arm. It is apparent from the videotape that Mr. Buford never physically attacked or moved toward the Respondent or took any sort of offensive stance. At times, Mr. Buford was even seated on a railing near the parking lot exit. It was the Respondent who took aggressive action by closing the distance between Mr. Buford and himself and striking Mr. Buford in the head approximately four to five times. After a brief respite, the Respondent struck Mr. Buford again eleven to twelve times. Finally, after Mr. Buford turned his back to the Respondent and placed his hands behind his back, presumably to be handcuffed, the Respondent struck him at least two more times.

Other inconsistencies also undermine the Respondent's credibility. For example, although the Respondent indicated in his May 14, 1999, police report that Mr. Buford "quickly stepped toward [him]" after assuming the fighting stance and told the CRA investigator on July 19, 1999, that Mr. Buford "came at him with a quick step" after breaking the stop arm, he told the IAU investigator on December 27, 1999, that Mr. Buford did not lunge toward him or move aggressively toward him. In addition, he merely informed the CRA and IAU investigators that he struck Mr. Buford "several" times and couldn't be sure how many. He informed the IAU investigation that it was "more than once, it could be two," but assured him that he had not continued to strike Mr. Buford until he was handcuffed. The videotape demonstrates that the Respondent directed approximately seventeen blows at Mr. Buford and only stopped after Mr. Buford had been taken to the ground. Finally, the Respondent stated in his police report and CRA and IAU statements that he asked Mr. Buford repeatedly during the incident to *turn around and put his hands behind his back*. The Respondent claimed for the first time at the hearing that he demanded that Mr. Buford get *on his stomach and place his hands behind his back*. It is not credible that the Respondent would just now, more than three years later, remember for the first time that he had made this demand of Mr. Buford. Because the videotape clearly shows that Mr. Buford at one point turned around and put his hands behind his back, it is more likely that the Respondent fabricated this portion of his testimony in an attempt to show that Mr. Buford never complied with his demand until he forced him to the ground.

The Respondent's assertions that Mr. Buford was resisting arrest, verbally threatening to kill him, and endangering public safety because he might engage in some other criminal activity later that evening fall far short of justifying his use of force. Mr. Buford certainly was resisting arrest by fleeing from the officer and failing to immediately comply with a directive to put his hands behind his back to be handcuffed. However, by the time the Respondent and Mr. Buford are depicted on the videotape, Mr. Buford was no longer trying to run away and did not approach the Respondent in any sort of threatening manner. To the contrary, it appears that Mr. Buford largely was attempting to keep his distance from the Respondent, belying any angry remarks he may have made after the attack about wanting to kill the Respondent. Moreover, it is not unexpected that such statements might be made in the heat of the moment after being

struck several times in the head by a police officer with handcuffs in his hand. The Respondent's claim that he feared for his life or for the safety of the public is called into question by his failure to call for back-up at an earlier point in the incident. The videotape shows that there was ample opportunity for the Respondent to call for assistance after he arrived at the parking lot. It is also significant that, during his IAU statement, the Respondent said that Mr. Buford had not threatened to attack him, and said nothing about Mr. Buford allegedly threatening to kill him.

It is evident from the videotape that the Respondent struck Mr. Buford without physical provocation, and that Mr. Buford merely raised his arms and hands in an attempt to defend himself. Moreover, it is clear that, even when Mr. Buford turned around and placed his hands behind him to be handcuffed, the Respondent delivered additional blows. As the CRA and IAU found, the force used by the Respondent to effectuate the arrest of Mr. Buford was excessive, unnecessary, and unprovoked.[36] Mr. Buford was not attempting to run away or physically fight with the Respondent. His original offense was relatively minor in nature, and he fled on foot rather than in a vehicle. The Respondent could have waited for backup from the nearby[37] officers before attempting to take Mr. Buford into custody or possibly used mace if Mr. Buford started to flee.

The primary issue in this case is whether the City should defend and indemnify the Respondent in the federal court action filed by Mr. Buford. The City's Policy and Procedures, Article 25 of the Labor Agreement, and Minn. Stat. § 466.07 provide that defense and indemnification of employees shall be provided as long as the employee is "not guilty of malfeasance in office, willful neglect of duty, or bad faith." Those terms are not defined in the statute. The City argues that defense and indemnification should be denied under all three grounds.

It is helpful to look to other statutes and relevant case law for guidance in construing the term "malfeasance." Two other statutes define "malfeasance." Minn. Stat. § 351.14, subd. 2, relating to resignations, vacancies, and removals from public office, defines "malfeasance" to mean "the willful commission of an unlawful or wrongful act in the performance of a public official's duties which is outside the scope of the authority of the public official and which infringes on the rights of any person or entity." Minn. Stat. § 211C.01, subd. 2, relating to the recall of elected state officials, defines "malfeasance" to mean "the intentional commission of an unlawful or wrongful act by a state officer other than a judge in the performance of the officer's duties that is substantially outside the scope of the authority of the officer and that substantially

[36] Because a flashlight thrown at a suspect by an officer could, depending upon where it hit a suspect, amount to the use of deadly force and because officers are not trained to use their flashlights as weapons, it was also inappropriate for the Respondent to throw the flashlight at Mr. Buford during the foot chase.

[37] Some of these officers, including Emily Olson, estimated that they arrived on the scene within 30 seconds of the Respondent's radio call. Ex. 2.

infringes on the rights of any person or entity." In *State v. Burnquist*,[38] the Supreme Court elaborated on the concept of malfeasance:

> Malfeasance in office . . . has a well-defined and a well-understood meaning, and refers to and includes only such misdeeds of a public officer as affect the performance of his official duties, to the exclusion of acts affecting his personal character as a private individual; the character of the man must be separated from his character as an officer.
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> The misconduct or malfeasance under our law must have direct relation to and be connected with the 'performance of official duties,' and amount either to maladministration, or to willful and intentional neglect and failure to discharge the duties of the office at all. This does not include acts and conduct, though amounting to a violation of the criminal laws of the state, which have no connection with the discharge of official duties.

In *Jacobsen v. Nagel*,[39] the Minnesota Supreme Court stated that, to constitute malfeasance or nonfeasance, conduct must affect "the performance of official duties rather than conduct which affects the official's personal character as a private individual" and "relate to something of a substantial nature directly affecting the rights and interest of the public." The Court indicated that malfeasance was "evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful." In *Claude v. Collins*,[40] the Court indicated that malfeasance "in an official capacity is not susceptible of an exact definition [but 'has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful.'"

Based on these authorities, it appears clear that malfeasance requires that a public officer, in his or her official capacity, takes actions that relate to the officer's official duties that are willful, malicious, or illegal. Under the circumstances of this case, that standard is met. It is evident that the Respondent was acting as a police officer during the evening of May 13, 1999, even though employed off-duty under the Police Department's policies, and that he was making an arrest during his contact with Mr. Buford but was acting outside the law where he used excessive force. The circumstances here do not present a close question concerning whether the Respondent committed an illegal or wrongful act or whether he merely made a mistake. Rather, the situation, recorded on videotape, makes it clear that the Respondent, in his official capacity as a police officer, and in the process of carrying out his official duties, willfully and maliciously attacked Mr. Buford without legal justification. Accordingly, the Respondent's conduct rose to the level of malfeasance.

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[38] 141 Minn. 308, 321-22, 170 N.W.201, 203 (Minn. 1918) (citations omitted).
[39] 255 Minn. 300, 304-05, 96 N.W.2d 569, 573 (1959) (citations omitted).
[40] 518 N.W.2d 836, 842 (Minn. 1994) (citations omitted).

The City also argues that Respondent neglected his duty to protect the public when he stepped outside the law in his dealing with Mr. Buford. Neglect of duty has been found to be "a careless or intentional failure to exercise due diligence in the performance of an official duty."[41] Those occupying public offices are placed in positions of trust. Public offices are created for the benefit of the public, not the incumbent. The Respondent, as a police officer, has a duty to uphold the law and effectuate arrests in accordance with the law. In using excessive and unreasonable force while attempting to take Mr. Buford into custody, the Respondent neglected his duty to protect the public.

Finally, the City argues that the Respondent acted in bad faith, since he intentionally committed a wrongful act without legal justification, and the acts involved malicious and willful conduct. Although "bad faith" is not defined in Minn. Stat. § 466.07, the meaning of the phrase has been developed in case law. The Court of Appeals noted in a case involving the interpretation of the Minnesota Civil Commitment Act[42] that "[c]ase law defines bad-faith conduct as the commission of a malicious, willful wrong." Other cases involving the concept of "bad faith" or "willful or malicious wrong" in the context of deciding whether an exception should be made to the doctrine of official immunity have characterized bad faith conduct as "the intentional doing of a wrongful act without legal justification or excuse" or "the willful violation of a known right;"[43] conduct that involves not only erroneous judgment, but malicious intent;[44] a willful or malicious wrong;[45] or an act committed with malice.[46] "Bad faith" in commercial transactions has been described as "a refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's rights or duties, but rather by some ulterior motive."[47]

Based upon a consideration of these standards, the Administrative Law Judge concludes that the Respondent also acted in bad faith when dealing with Mr. Buford on May 13, 1999. The Respondent was dressed in his police uniform and was acting as a police officer during the incident. The actions taken by the Respondent in pursuing and arresting a criminal suspect were official actions permitted by his office and were part of the duties expected of him as a police officer. Minn. Stat. § 609.06, subd. 1, specifies that only "reasonable force may be used upon or toward the person of another without the other's consent when . . . used by a police officer . . . in effecting a lawful arrest." The Respondent's use of excessive or unreasonable force violated this statute and the constitutional rights of the suspect, and was outside the scope of his authority. The Respondent's use of excessive force also violated the policies and procedures of the Police Department, and led to the termination of his employment. The untruthful

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[41] *In re Olson*, 211 Minn. 114, 117, 300 N.W. 398, 400 (Minn. 1941).
[42] *Mjolsness v. Riley*, 524 N.W.2d 528, 530 (Minn. App. 1994).
[43] *Rico v. State*, 472 N.W.2d 100 (Minn. 1991).
[44] *Elwood v. Rice County*, 423 N.W.2d 671, 679 (Minn. 1988).
[45] *Susla v. State*, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976).
[46] *Price v. Sheppard*, 307 Minn. 250, 261, 239 N.W.2d 905, 912 (1976).
[47] *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 837 (Minn. App. 1994), *citing Anderson v. Medtronic, Inc.*, 365 N.W.2d 364, 366 (Minn. App. 1985).

statements that were later made by the Respondent concerning the incident are pertinent in the sense that they reveal that the Respondent recognized that his actions were wrong and wanted to cover them up.[48]

Moreover, it is clear that the Respondent was acting with willful or malicious intent toward Mr. Buford. He pursued Mr. Buford for a minor violation because he believed that Mr. Buford had attempted to urinate on him and he was angry about that. The Respondent pushed Mr. Buford through the parking lot stop arm and struck him on the head and torso approximately seventeen times with handcuffs and with his fist even though Mr. Buford had stopped running and never took any aggressive physical action toward the Respondent. The Respondent chose to impose physical punishment on Mr. Buford rather than simply calling for assistance from other officers or using less injurious means to gain control of Mr. Buford, such as the use of mace. The Respondent's claim that he was in fear for his personal safety and that Mr. Buford posed a threat to the public is not supported by the Respondent's failure to summon assistance when he was pursuing or subduing Mr. Buford. As Chief Olson testified, the Respondent's conduct amounted to the Respondent committing the criminal offense of assault against Mr. Buford.

Robert Bennett, an attorney who has experience in litigating allegations of police misconduct, testified that the injuries suffered by Mr. Buford were not nearly as serious as those suffered by many other civil plaintiffs in cases in which officers have been defended and indemnified by the City, and contended that the Respondent's actions were not as egregious as the actions of other police officers in cases with which he is familiar. However, that the level of injuries suffered by a person being arrested do not necessarily indicate whether the conduct of a police officer was proper or improper. The reasonableness of the force used must be evaluated based upon the particular

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[48] The Respondent points out that, in *Leonzal v. Grogan*, 516 N.W.2d 210, 213-14 (Minn. App. 1994), the Court of Appeals held that police officers were not guilty of bad faith. In that case, the officers responded to a 911 call alleging that an armed person was threatening the life of a neighbor. There was a longstanding dispute between the neighbors that suggested that the situation could become violent. Because a shotgun was potentially involved, the officers positioned themselves outside the home of the accused individual with their weapons drawn. A desk sergeant then called the accused on the phone to inform him of the allegation and ask if he would step outside to talk to them. The accused stepped outside, denied the allegation, and started shouting at the officers. The officers told him to "freeze and put his hands above his head." The accused continued his "verbal attack" and was told to lie face-down. When he again refused, two officers forced him to his knees, handcuffed him, and placed him in a squad car. The accused was bruised in the incident but did not seek medical treatment. The city brought a motion for summary judgment on the grounds of immunity. The Court found that the officers were protected by official immunity and the city was vicariously immune from liability for the protected actions of its officers. The Court determined that city had established a prima facie case that the officers responded to the 911 call "reasonably, lawfully, and in good faith," the accused had failed to present competent evidence of malicious conduct by the officers, and there was no specific evidence of bad faith. It is the view of the Administrative Law Judge that the circumstances presented in the present case are not analogous to those described in *Leonzal*. The Respondent in the present case cannot be viewed to have responded in a reasonable, lawful, or good faith manner in dealing with Mr. Buford. Moreover, the Respondent did not merely force Mr. Buford to his knees and cause bruising, but rather inflicted head injuries that required medical and dental attention.

circumstances at the scene. Moreover, in most if not all of the cases discussed by Mr. Bennett, the main issue to be decided by the fact-finder was whether the force used had, in fact, been excessive, and witnesses were divided about what force was used and whether that force in fact violated constitutional parameters. In the present case, the Police Department had already determined that excessive force was used and a videotape of the incident was available that clearly showed the actions of the Respondent and Mr. Buford and the nature of the force that was used. The Respondent's conduct can clearly be seen on the videotape and that conduct is shocking to the conscience of a reasonable person.[49] This case thus is different from other cases in which officers were defended and indemnified but there there was no clear and convincing evidence to support the claim, witnesses existed on both sides, and the determination of proper or improper conduct was a factual determination left to a jury. Chief Olson testified that he has also recommended the denial of defense and indemnification in another case in which the conduct at issue had been videotaped.

Accordingly, the Administrative Law Judge has recommended that the City's decision not to afford defense and indemnification to the Respondent be affirmed on the grounds that he was guilty of malfeasance, willful neglect of duty, and bad faith under Minn. Stat. § 466.07 and Article 25 of the Labor Agreement.

B.L.N.

[49] The Respondent points out that Minn. Stat. § 466.07 contemplates indemnification of an officer for damages, including punitive damages, and that punitive damages may only be awarded under Minn. Stat. § 549.20 "upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Section 549.20 defines the latter phrase to mean the defendant "has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others" and either "deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others." The Respondent contends that this supports an argument that, to warrant denial of defense and indemnification on the grounds of willful neglect of duty or bad faith, the officer's conduct must exceed an extremely high standard that shocks the conscience of the court. Assuming, *arguendo*, that the Respondent is correct, that high standard is satisfied here. It is difficult to fathom how effectuating an arrest for urinating in public and fleeing a short distance could, without aggravating conduct by the suspect, justify an officer hitting the suspect approximately seventeen times with handcuffs and fists.