6-6010-16110-3

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

In the Matter of:

Edith Madora Hudson,

v.

The City of Minneapolis.

FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDED DECISION

The above-entitled matter came on hearing before Administrative Law Judge Allan W. Klein, acting as hearing officer for the Minneapolis City Council, commencing at 9:30 a.m. on January 11, 2005, 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.

Gregg M. Corwin, Attorney at Law, Corwin & Associates Law Office, P.C., 1660 East Parkdale Plaza, St. Louis Park, MN 55416, appeared on behalf of John R. Mills. Mike Bloom, Assistant City Attorney, 333 South 7th Street, Suite 300, Minneapolis, Minnesota 55402-2453, appeared on behalf of the City of Minneapolis ("City"). There was no appearance on behalf of Petitioner.

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 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 police officer was

guilty of malfeasance, willful neglect of duty, or bad faith when the police officer engaged in acts that allegedly caused harm to Petitioner.

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

FINDINGS OF FACT

1. John Mills was employed as a police officer with the Minneapolis Police Department ("MPD") from February 1998 to October 26, 2004. He was hired as a uniformed officer and was in that position as of July and August, 2003. Officer Mills was assigned to the Third Precinct and he frequently patrolled the area of Lake Street and Cedar Avenue in the Phillips neighborhood.[1]

2. On July 24, 2003, Officer Mills was working his shift for the MPD. He was in uniform and operating a marked MPD squad car while patrolling in the Phillips-Lake Street area. While on patrol at about 12:30 a.m., Officer Mills was approached by Petitioner. The Petitioner was known to Officer Mills as a prostitute and person who used controlled substances. Petitioner told Office Mills that she had information for him, but she did not want to be seen talking to a police officer. Petitioner entered the back seat of the squad car. Officer Mills drove Petitioner into the neighboring Seward area (east of Hiawatha Avenue).[2]

3. The standard MPD practice when transporting persons in squad cars is to call in to dispatch. The officer then identifies the odometer reading and the destination of the person being transported. Upon arrival at the destination, the officer calls in to dispatch to confirm the location, odometer reading, and time of arrival.[3] Office Mills did not notify dispatch that he was transporting Petitioner.

4. While in the back seat, Petitioner began to move around and expose herself. The Petitioner exposed her breasts and vaginal and anal areas. She simulated masturbation and digitally penetrated her vagina and anus. Officer Mills photographed the Petitioner while she engaged in this conduct. Most of the photographs were taken while Petitioner was in the back seat of the MPD squad car. The remaining photographs were taken with Petitioner standing outside the vehicle, in front of a blank wall. Officer Mills took at least eight photographs of Petitioner.[4]

5. Officer Mills photographed Petitioner using his own personal digital camera. He later downloaded the photographs onto his own notebook computer. The photographs were included in collection of thousands of photographs taken by Officer Mills. Almost none of the other photographs were lewd or pornographic. Three of the photographs were of persons believed to be street prostitutes in Minneapolis, but they

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[1] Testimony of Mills.
[2] Testimony of Mills.
[3] Testimony of Deputy Chief Gerold.
[4] City Exs. 1-8.

were not lewd photographs.[5] At no time were the photographs of Petitioner considered evidence in any MPD investigation conducted by Officer Mills, nor were they used for any official purpose.[6]

6. After he took the photographs, Officer Mills drove Petitioner back to her neighborhood.[7] Petitioner told other people about the events of that evening. By August 3, 2003, other MPD officers picked up this information (describing the information as coming from "street sources") and initiated an investigation.[8]

7. After identifying Petitioner as the person who made the original allegation, she was interviewed by MPD Internal Affairs.[9] The Petitioner confirmed the interaction with a uniformed MPD officer, but declined to identify who the officer was who took the photographs. Some of Petitioner's actions caused the investigators to suspect Officer Mills was the officer involved.[10]

8. The Internal Affairs investigators interviewed Officer Mills, who cooperated with the investigation. Officer Mills gave the investigators access to the computer and the particular photographs at issue in this matter. Internal Affairs concluded that no criminal conduct was engaged in, but that disciplinary proceedings were appropriate.[11] Office Mills was discharged from the MPD on October 26, 2004, after a hearing before the Minneapolis Civil Service Commission. The discharge was based upon Officer Mills' violation of MPD Regulation 5-102 [Code of Ethics] by taking the photographs of Petitioner. This violation was held to constitute severe initial misconduct warranting discharge.[12]

9. Petitioner filed suit in Federal District Court alleging that Officer Mills violated a number of her civil rights and requesting damages. The City of Minneapolis was named as a defendant to the suit.[13] In July 2004, Petitioner asked the City to defend and indemnify Officer Mills. Officer Mills joined in that request on August 2, 2004.[14]

10. On August 4, 2004, the City informed Petitioner and Officer Mills that the City Attorney's Office had determined Officer Mills' conduct to be "outside the course and scope of his duties ... [and constituting] malfeasance of office and that he acted in bad faith.[15] The City concluded that Officer Mills was not entitled to defense and

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[5] City Ex. 11, at 6-7.
[6] City Ex. 11, at 11.
[7] Officer Mills testified that the photographs taken outside the squad car were taken after he dropped off the Petitioner back in her neighborhood. This description conflicts with the Petitioner's description of where those photographs were taken, but the location is not relevant to the outcome of this matter.
[8] City Ex. 11, at 2.
[9] The interview was conducted in the Hennepin County Jail, where Petitioner was being held on auto theft, handgun possession, and narcotics violations. City Ex. 11, at 2.
[10] City Ex. 11, at 3-4.
[11] City Ex. 11, at 8-11.
[12] City Ex. 11.
[13] The lawsuit is captioned ***Hudson v. City of Minneapolis***, File No. 04-313 JEL/JGL.
[14] City Ex. 10.
[15] City Ex. 10.

indemnification, but that he would be afforded a hearing before an Administrative Law Judge on that decision, upon request.[16]

11. Officer Mills requested an administrative hearing on the denial of defense and indemnification. The Notice of Hearing initiating the present hearing was issued on September 13, 2004. The hearing was originally scheduled for October 29, 2004. The hearing was continued to January 11, 2005, at the request of the parties.

12. 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.

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

14. 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.

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, whether elected or appointed, 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

[16] *Id.*

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.[17]

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 malfeasance in office, willful neglect of duty or bad faith.[18]

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."[19]

7. 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.

8. The City has shown that no legitimate police purpose was advanced by Officer Mills' photographing of Petitioner. The photographs are pornographic in nature. Taking pornographic pictures under the circumstances of this case, is conduct outside the scope of a police officer's duties. An officer taking such photographs while in uniform, on duty, and in an MPD squad car is engaging in conduct that constitutes malfeasance in office, willful neglect of duty, and bad faith.

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

10. 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:

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[17] City Ex. 9.
[18] Notice of Complaint and Notice of Hearing, Attachment.
[19] Ex. 5.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Minneapolis City Council affirm the decision not to defend or indemnify the Respondent, John Mills, in connection with ***Hudson v. City of Minneapolis***, File No. 04-313 JEL/JGL.

Dated: February 8th, 2005.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape-recorded (One Tape) - 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 greatly credited much of Officer Mills' testimony. The few discrepancies between his testimony and matters identified in the documentary evidence are not significant. Officer Mills maintains that his conduct on July 24, 2003 was within the scope of his duties because he encountered Petitioner in his patrol area and he transported her for the purpose of obtaining information. Officer Mills acknowledged that his taking lewd photographs of Petitioner was a "stupid decision."[20] Officer Mills maintains, however, that this conduct does not rise to the level of seriousness to deny him defense and indemnification by the City.

Whether the City should defend and indemnify Officer Mills in the federal court action filed by Petitioner is the ultimate issue in this matter. 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 within the scope of that employee's duties and is "not guilty of malfeasance in office, willful neglect of duty, or bad faith." Those terms are not defined in the statute. The City maintains that defense and indemnification are appropriately denied under all four grounds.

Officer Mills maintains that his activities was within the scope of his duties since he came in contact with Petitioner will patrolling. He also asserts that the practice of

[20] Testimony of Office Mills.

transporting informants to other locations and the taking of photographs are common practice in police work. The City maintains that the question of scope should be narrowly drawn to the taking of the lewd photographs.

The issue of scope is determined by whether the conduct complained of furthers the employer's legitimate interests.[21] Officer Mills was acting appropriately by transporting a potential informant to be questioned, even if the MPD protocol for such transports was not followed. When Petitioner began engaging in lewd conduct, Officer Mills responded by taking lewd photographs for his personal collection of photographs. This conduct is outside the scope of Officer Mills' duties and forms the basis for the complaint against him. The City can appropriately deny defense and indemnification on that basis.

For conduct to constitute malfeasance or nonfeasance, it 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."[22] Malfeasance is "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."[23]

Based on the foregoing authorities, malfeasance requires that a public officer, in his or her official capacity, take some action arising from that officer's official duties that is willful, malicious, or illegal. Under the circumstances of this case, the willfulness standard is met. Officer Mills was on duty and acting as a police officer during the morning of July 24, 2003, and he was in contact with Petitioner under the pretext of acquiring information from Petitioner. While the ALJ accepts Officer Mills' description of Petitioner initiating the lewd conduct, it was Officer Mills who willfully photographed Petitioner engaging in that lewd conduct. The taking of those photographs is without procedural or legal justification. Accordingly, the Respondent's conduct rose to the level of malfeasance.

Neglect of duty is "a careless or intentional failure to exercise due diligence in the performance of an official duty."[24] Police officers are public officials placed in positions of trust. Officer Mills, as a police officer, has a duty to exercise diligence when conducting police business. Taking lewd photographs while on duty and in a squad car violates the public trust and constitutes neglect of duty.

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. "Bad faith" was described by the Court of Appeals as "the

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[21] ***Edgewater Motels, Inc. v. Gatzke,*** 277 N.W.2d 11, 15 (Minn. 1979).
[22] ***Jacobsen v. Nagel***, 96 N.W.2d 569, 573 (Minn. 1959).
[23] ***Claude v. Collins***, 518 N.W.2d 836, 842 (Minn. 1994) (citations omitted).
[24] *In re Olson*, 211 Minn. 114, 117, 300 N.W. 398, 400 (Minn. 1941).

commission of a malicious, willful wrong."[25] 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";[26] conduct that involves not only erroneous judgment, but malicious intent;[27] a willful or malicious wrong;[28] or an act committed with malice.[29] "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."[30]

Based upon a consideration of these standards, the Administrative Law Judge concludes that Officer Mills was acting in bad faith he photographed Petitioner. Officer Mills was dressed in his police uniform and was acting as a police officer during his conduct. Much of the activity took place in an MPD squad car. Officer Mills failed to follow the MPD protocol for transporting civilians in his squad car, suggesting knowledge of some wrongful conduct that would involve Petitioner. Officer Mills intentionally took photographs of Petitioner. Whether such conduct was with Petitioner's consent (as maintained by Officer Mills) or a violation of constitutional rights (as maintained by Petitioner), the conduct was an intentional wrongful act. The willful taking of lewd photographs by Officer Mills constitutes bad faith.[31]

Based on the foregoing analysis, the Administrative Law Judge has recommended that the City's decision not to afford defense and indemnification to Officer Mills be affirmed on the grounds that he was acting outside the scope of his duties, was guilty of malfeasance, committed willful neglect of duty, and acting in bad faith under Minn. Stat. § 466.07 and Article 25 of the Labor Agreement.

A.W.K.

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[25] *Mjolsness v. Riley,* 524 N.W.2d 528, 530 (Minn. App. 1994)(in the context of the Minnesota Civil Commitment Act).
[26] *Rico v. State*, 472 N.W.2d 100 (Minn. 1991).
[27] *Elwood v. Rice County*, 423 N.W.2d 671, 679 (Minn. 1988).
[28] *Susla v. State*, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976).
[29] *Price v. Sheppard*, 307 Minn. 250, 261, 239 N.W.2d 905, 912 (1976).
[30] *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).
[31] It is not merely the willfulness in taking the pictures that constitutes bad faith. An officer can be taking a legitimate picture of a person consistent with official duties, which, due the subject's actions, results in a lewd photograph. Officer Mills took the photographs at issue here because of Petitioner's lewd conduct. The intentional taking of the photographs without legitimate reason to do so constituted bad faith.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
100 WASHINGTON SQUARE, SUITE 1700
MINNEAPOLIS, MINNESOTA 55401

CERTIFICATE OF SERVICE

In the Matter of Edith Madora Hudson v. City of Minneapolis	OAH Docket No. 6-6010-16110-3

Michael Lewis certifies that on February 8, 2005 he served a true and correct copy of the attached **FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDED DECISION** by placing it in the United States mail, properly enveloped, with postage prepaid, addressed to the following individuals:

Merry Keefe, City Clerk
Council Information Division
350 South Fifth Street, Room 304
Minneapolis, MN 55415-1382

Mike Bloom, Asst. City Attorney
333 South 7th Street, Suite 300
Minneapolis, MN 55402-2453

Gregg M. Corwin
Corwin & Associates Law Office
1660 East Parkdale Plaza
St. Louis Park, MN 55416