

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

Date:

April 1, 2009

To:

Ways & Means/Budget Committee

Referral to:

None

Subject:

Defense and Indemnification of Officers Robert J. Kroll and Wallace M. Krueger in the matter of

Jackson Mahaffy et al v. Kroll, Krueger, Bennett, Hanson, John Does Nos. 1-8 and City of

Minneapolis.

Recommendation: That the City Council deny defense and indemnification of Robert J. Kroll and Wallace M. Krueger in connection with <u>Jackson Mahaffy et al v. Kroll, Krueger, Bennett, Hanson, John Does Nos. 1-8 and City of Minneapolis</u>, U.S. District Court, District of Minnesota Court File No. 08-CV-04992 (JMR/SRN).

Previous Directives: None.

Prepared by:

Trina Chernos, Assistant City Attorney, 673-2186

Approved by:

Susan L. Segal City Attorney

Presenter in Committee: Susan L. Segal, City Attorney

Financial Impact (Check those	e that apply)
X No financial impact - or - A	Action is within current department budget.
(If checked, go directly to I	Background/Supporting Information)
Action requires an appropri	riation increase to the Capital Budget
Action requires an appropri	riation increase to the Operating Budget
	revenue for appropriation increase
Action requires use of cont	
Other financial impact (Expl	olain): Payment from Fund/Org. 6900 150 1500 4000
Request provided to the Bu	udget Office when provided to the Committee Coordinator

Background/Supporting Information

Community Impact: None

This matter comes before you pursuant to the City's Defense and Indemnification Policy and Procedures. On August 27, 2008, the City of Minneapolis was served with a Summons and Complaint asserted by Jackson Mahaffy and other plaintiffs ("Plaintiffs"). Plaintiffs' Complaint referenced an incident involving Minneapolis Police Officers Robert J. Kroll and Wallace M. Krueger on May 14, 2004 in front of the Old Science Renovation Art Studio located at Marshall Avenue and 13th Street N.E. in the City of Minneapolis. Kroll and Krueger were

traveling southbound on Marshall Street N.E. in Krueger's personal vehicle. Neither Kroll nor Krueger was on duty or in uniform.

Plaintiffs alleged that after Krueger's personal vehicle passed the Art-A-Whirl crowd, which included J. Mahaffy, Krueger stopped his vehicle, exited the vehicle, rapidly approached J. Mahaffy unprovoked and shoved J. Mahaffey to the ground. Krueger and Kroll proceeded to punch and kick J. Mahaffy in the head, face and stomach. Plaintiffs further alleged that when J. Mahaffy's sister, F. Mahaffey, attempted to intervene, Krueger attacked F. Mahaffey and punched her in the face. Plaintiffs further alleged that when Plaintiff Paul Von Arx attempted to leave, he was attacked by Krueger and punched in the face. The other officers named in the Mahaffy Complaint were on duty and responded when law enforcement was summoned to the scene.

Officers Kroll and Krueger submitted a Request to Defend to the City Attorney's Office. The City Attorney's Office and the Police Department determined that the conduct alleged in Plaintiffs' Complaint did not occur within the performance of Officer Kroll's and Krueger's duties as Minneapolis Police Officers. The City Attorney's Office notified them of the City's decision not to provide them with defense and indemnification. The City Attorney's Office further notified them of their option to challenge this decision. Kroll and Krueger notified the City that they wanted to challenge this decision at a hearing in front of an administrative law judge.

On December 5, 2008, Kroll and Krueger, through their attorney Ann Walther of Rice, Michels & Walther LLP, filed an Answer to Plaintiffs' Complaint. The Answer admitted the following: Kroll and Krueger were in Krueger's personal vehicle with Krueger's wife; Kroll and Krueger were not in uniform; Kroll and Krueger were off duty when the alleged incident occurred; Kroll and Krueger did not identify themselves as police officers and they were not acting under their authority as police officers.

The City Attorney's Office served Kroll and Krueger ("Respondents") with a Notice of Hearing scheduled for February 13, 2009. Through their attorney, Respondents notified the City Attorney's Office that they would argue to the Administrative Law Judge ("ALJ") that equity requires the City to defend and indemnify Respondents because of the Civilian Review Authority's findings regarding the incident on May 14, 2004. Respondents reiterated that they were off duty and not acting in the performance of their duties as police officers on May 14.

On January 28, 2009, the City Attorney's Office filed a Motion for Summary Disposition asking the Office of Administrative Hearings to dismiss Respondents request for defense and indemnification because the City had met its burden of proof. At the hearing on February 13, 2009, the ALJ granted the City's motion.

By written Order received in the City Attorney's Office on March 31, 2009, the ALJ issued the enclosed Order and Memorandum (5 pages). Therefore, the City Attorney's Office requests that the City Council deny defense and indemnification of Robert J. Kroll and Wallace M. Krueger.

STATE OF MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF MINNEAPOLIS

City of Minneapolis, Petitioner,

VS.

ORDER GRANTING SUMMARY DISPOSITION

Robert J. Kroll and Wallace M. Krueger, Respondents.

This matter is before Administrative Law Judge Manuel J. Cervantes (ALJ) on a motion for summary disposition brought by the City of Minneapolis (City). The City's motion was received on January 30, 2009. The reply to the City's motion, submitted by Respondent's counsel, Ann E. Walther, Esq., was received on February 5, 2009. The matter was argued orally on February 13, 2009, commencing at 9:30 a.m. at the Office of Administrative Hearings, 600 Robert Street North, St Paul, MN 55164-0620. The record on this motion closed on March 25, 2009, with the receipt of the jointly proposed order.

Trina Chernos, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, MN 55402-2453 appeared on behalf of the City of Minneapolis.

Ann Walther, Esq., Rice Michels & Walther LLP, 206 East Bridge – Riverplace, 10 Second Street Northeast, Minneapolis, MN 55413 appeared on behalf of Robert Kroll and Wallace Krueger (Respondents).

Based upon the record in this matter, and for reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

- The Petitioner's Motion for Summary Disposition is GRANTED.
- This matter is DISMISSED.

Dated: March 30, 2009

MANUEL J. CERVANTES
Administrative Law Judge

MEMORANDUM

The issue in this case is whether the City is obligated to defend and indemnify two police officers, Robert Kroll and Wallace Krueger, in litigation based on their conduct on May 14, 2004. The ALJ and the City have jurisdiction pursuant to Minn. Stat. §§ 14.55, 466.07, and Article 26 of the Labor Agreement between the City and the Police Officers' Federation of Minneapolis. The Respondents were given notice of the hearing in this matter and the City has complied with all relevant procedural requirements.

On December 26, 2008, the City served a Notice and Order for Hearing on Respondents by U.S. mail through their counsel. The Notice scheduled a hearing for February 13, 2009.¹ The ALJ issued a Scheduling Order, dated January 7, 2009, requiring the parties to exchange evidence and to disclose the witnesses that the party intended to call.²

On January 28, 2009, the City served and filed a Notice of Motion and Motion for Summary Disposition pursuant to Minn. R. 1400.6600 and requested a hearing on the motion, to be heard by the ALJ on February 13, 2009.³ The City submitted an affidavit supporting its Motion for Summary Disposition.⁴ The City requested Summary Disposition due to Respondents' acknowledgement that they were not acting in the performance of the duties of their position and thereby, did not satisfy the requirements of Minn. Stat. § 466.07.

On February 2, 2009, Respondents' counsel, Ann Walther, submitted an affidavit in opposition to the City's Motion for Summary Disposition. Ms. Walther attested that the issue Respondents would assert to the ALJ on February 13, 2009 would be:

[w]hether equity requires the City to defend and indemnify Lt. Kroll and Sgt. Krueger in the Mahaffy lawsuit even though they were off duty and were not acting in the performance of the duties of their position at the time the incident giving rise to the lawsuit occurred.⁶

The Notice of Hearing contains the following facts which Respondents do not dispute: the City of Minneapolis was served with a Summons and Complaint in the matter of Jackson Mahaffy, et al. v. Robert J. Kroll, et al. and City of Minneapolis on August 27, 2008; the lawsuit references an altercation involving Robert J. Kroll and Wallace Krueger on May 14, 2004, in the City of Minneapolis; Robert J. Kroll and Wallace Krueger are Minneapolis Peace Officers; on May 14, 2004, Kroll and Krueger were off duty, not in uniform, and in Krueger's personal vehicle; and the altercation

¹ Notice and Order for Hearing.

² Scheduling Order.

³ Notice of Motion and Motion.

Chernos Affidavit.

⁵ Walther Affidavit.

⁶ Walther Affidavit, paragraph 5.

involving Respondents on May 14, 2004 did not occur in the performance of Respondents' duties as police officers.

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters. A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case. When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. All doubts and factual inferences must be resolved against the moving party. If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. Summary judgment should only be granted in those instances where there is no dispute of fact and where there exists only one conclusion.

Analysis

Minn. Stat. § 466.07 specifies that subject to certain limitations set forth in section 466.04:

[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.

8 See, Minn. R. 1400.6600 (2004).

¹¹ Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).

¹³ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986).

¹⁴ *ld*.

⁷ Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1995); Louwegie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

⁹ Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Dep't of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

¹⁰ Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).

¹² See, e.g., Thompson v. Campbell, 845 F. Supp. 665, 672 (D. Minn. 1994); Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971).

Article 26 of the Labor Agreement between the City and the Police Officer's Federation of Minneapolis reflects the statute and states, in pertinent part, as follows:

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 related 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.

Equitable Relief

The parties presented arguments at the motion hearing on February 13, 2009. Respondents argued for equitable relief, specifically, they framed the issue as:

whether equity requires the City to defend and indemnify Lt. Kroll and Sgt. Krueger in the *Mahaffey* lawsuit even though they were off duty and were not acting in the performance of the duties of their position at the time the incident giving rise to the lawsuit occurred.¹⁵

The substance of Respondent's equitable argument is that the City is collaterally estopped from taking a position in this case, that Respondent's were not in the performance of their police duties on May 14, 2004, which is at odds with the findings and conclusions of another City agency, the Minneapolis Civilian Police Review Authority (CRA) which Respondent's claim found that Respondent's were on duty on May 14, 2004 at the time of the altercation. There are several problems with this argument.

First, it is Respondents themselves that maintain that they were off duty and not performing their duties as police officers on May 14, 2004.

Second, a review of the CRA Findings of Fact contained in its Determination, dated August 7, 2006, indicate that the Respondent's **were not on duty** on the date of the altercation, contrary to Respondent's assertion. Likewise, the CRA found that neither of the Respondents identified themselves as police officers to a victim "[n]or any other civilians present during the [May 14, 2004] incident." Therefore, the ALJ finds little merit in this argument.

Third, assuming arguendo that the facts were as claimed by Respondents that the CRA found that Respondents were on duty on May 14, and at odds with the City's position in this case, equitable relief is not something that may be granted by this tribunal. The District Courts, which reside in the Judiciary branch, have inherent

¹⁶ Ex. M. p. 3, III, 3,

¹⁵ Paragraph 5, Walther Affidavit.

equitable power, stemming from its genesis in common law.¹⁷ This tribunal, the Office of Administrative Hearings resides in the Executive branch, is a legislative statutory creation, and is subject to the statutes conferring authority. Jurisdiction to preside over this matter is found in Minn. Stat. §§ 14.55 and 466.07. Nothing contained therein confers this tribunal with the authority to grant equitable relief.

Under Minn. Stat. § 466.07, the City has the burden of proof to establish by a preponderance of the evidence that the Respondents are not entitled to defense and indemnification. Respondents conceded a major element of Minn. Stat. § 466.07, specifically, that they were not acting in the performance of their duties on May 14, 2004. The City has demonstrated by a preponderance of the evidence that its decision not to defend or indemnify the Respondents was proper. The conduct of Robert Kroll and Wallace Krueger on May 14, 2004 did not occur in the performance of their duties as Minneapolis Peace Officers. Therefore, the City is entitled to the granting of its motion for summary disposition. This matter is dismissed.

M. J. C.

¹⁷ See, generally, Holmberg v. Holmberg, 588 N.W. 2d 720 (Minn. 1999) (http://www.lawlibrary.state.mn.us/archive/supct/9901/c797926.htm).