



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

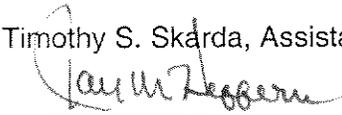
Date: August 16, 2004
To: Ways & Means/Budget Committee
Referral to: None

Subject: Request for Reimbursement of Legal Fees for Deputy Chief Lucy Gerold.

Recommendation: That the City Council authorize the payment of \$11,419.10 to Fredrickson & Byron P.A. as reimbursement of legal fees and expenses for its representation of Deputy Chief Lucy Gerold; payable from Fund/Org. 6900 150 1500 4000.

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)

- 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): Payment from Fund/Org. 6900 150 1500 4000
- Request provided to the Budget Office when provided to the Committee Coordinator

Community Impact: None

Background/Supporting Information

Deputy Chief Lucy Gerold has requested, through her attorneys, the reimbursement of legal fees pursuant to Minnesota Statute §465.76. The fees arose from her representation during an investigation regarding the handling of an internal memorandum prepared by Lt. Michael Carlson critiquing the Minneapolis Police Department Homicide Unit investigation into the shooting of Officer Duy Ngo. Deputy Chief Lucy Gerold, Captain Michael Martin and Lieutenant Michael Carlson were placed on paid administrative leave. A criminal investigation by the Minnesota Bureau of Criminal Apprehension ensued. The finding from the investigation were presented to the Bloomington City Attorney and reviewed for potential criminal charges. The investigation involved whether former Police Chief Robert Olson or Deputy Chief Lucy Gerold had ordered either Captain

Martin or Lieutenant Carlson to destroy a memorandum related to the investigation of Officer Ngo's shooting. The Bloomington City Attorney found the allegation was based on a misunderstanding and that no criminal wrongdoing occurred. David L Lillehaug of Fredrickson & Byron, P. A. represented Deputy Chief Gerold throughout the process.

David L. Lillehaug submitted itemized bills to this office for payment under Minn. Stat. § 465.76. Mr. Lillehaug's firm expended 89.8 hours on legal representation at an hourly rate of approximately \$350.00 and incurred \$194.10 in expenses for a total billing of \$31,644.19. Two issues have arisen concerning the reimbursement request, the first concerning the nature of the hours expended and the second involving the hourly billing rate.

In examining the hours expended, an issue was presented concerning whether hours related to contacts with the media would be considered fees incurred to defend charges of a criminal nature. Minnesota statutes and case law provide no guidance on the issue. However, a similar issue has been examined by the federal courts in analyzing claims for attorney's fees in § 1983 litigation. Courts have found that media communications publicizing the case and other activities unrelated to the case or the litigation cannot be recovered. The courts note that the type of fees not allowed would be "for public relations work, which did not contribute directly and substantially to the attainment of * * * litigation goals." *Davis v. City & County of S.F.*, 976 F.2d 1536, 1545 (9th Cir. 1992). Generally, the courts noted that the type of work for which a client would be billed by an attorney would be recoverable. In § 1983 civil litigation, the losing party is being billed by the prevailing party. In the matter under consideration, Deputy Chief Gerold had been billed by Mr. Lillehaug and is seeking reimbursement.

The itemized billing records were reviewed for the past several years in cases seeking the reimbursement of criminal defense fees. Criminal defense attorneys' routinely respond to requests from the media and bill their clients for the contact. On all prior cases the City has included media contacts as an element of criminal defense fees. Finally, as a practical matter, it would be extremely difficult to differentiate permissible from impermissible media contacts, however, such a determination is within the discretion of the City Council. Considering the past practice of the City and state of the law, the hours related to contacts with the media generally appear reasonable, especially considering the professional status of Deputy Chief Gerold and extensive media attention given to the investigation.

The second issue presented concerns the hourly billing rate. The \$350.00 hourly rate requested by Mr. Lillehaug is in excess of the standard hourly rate of \$125.00 normally approved by the City Council. The law firms representing Captain Martin and Lieutenant Carlson have reduced their hourly rate to \$125.00. The approval of requests for reimbursement of attorney's fees is entirely within the discretion of the City Council. This Committee and the City Council have the authority to increase or decrease the hourly fee rate requested if the facts warrant. In the past, the City Council has increased the standard hourly rate only twice. Each instance involved a council member. In 1999, the City Council approved a request for reimbursement from Council Member Steve Minn in the amount of \$1,732.50, with an hourly rate of \$158.00. In 2003, the City Council approved a request for reimbursement by Council Member Goodman at the hourly rate of \$265.00. In the past, the City also has reduced the requested hourly rate.

Minnesota Statute §465.76 provides:

"If reimbursement is requested by the officer or employee, the governing body of a home rule charter or statutory city or county may, after consultation with its legal counsel, reimburse a city or county officer or employee for any costs and reasonable attorneys fees incurred by the person to defend charges of a criminal nature brought against the person that arose out

of the reasonable and lawful performance of duties for the city or county, provided if less than quorum of the governing body is disinterested, that such reimbursement shall be approved by a judge of the district court."

In 1984 the City Council appointed a criminal legal fees task force. The task force was directed to consider and recommend appropriate policies for the City to follow with respect to payment of legal fees. The task force examined the statutes, policies of other jurisdictions, the present policy, case law and alternative procedures. In a letter dated June 18, 1984, the task force ratified the existing system in which the City Council, after the advice of the City Attorney upon the reasonableness of the fees and the scope of employment issues, acts formally on a request for reimbursement. Prior to acting, the Council reviews each case with reference to the general principles as follows:

1. Nature of the inquiry or allegations by the investigating authority.
2. Whether the action arose out of the performance of the officer or employee's duties.
3. Whether he or she acted in good faith.
4. Whether there was malfeasance or willful or wanton neglect of duty.
5. Whether he or she was acting pursuant to directions from a superior or pursuant to law.
6. Whether the morale of other City officers and employees would be adversely affected by paying or not paying the claim.

The above criteria were developed under Minn. Sess. Laws 1969, Chapter 790, Section 2, granting the City of Minneapolis authority to reimburse legal fees to employees in criminal proceedings. Minn. Stat. §465.76 was later enacted. The new section is fundamentally the same, except insofar as it adds the requirement that the incident arise from the "lawful" performance of the duties of the employee. It had been the practice under Chapter 790 to approve reimbursement only upon acquittal or failure to charge the employee. Minn. Stat. §465.76 makes this practice mandatory.

With regard to the first consideration set forth in the letter of the task force, the review of the conduct of the officer falls within the statute's parameters. The attorney's fees requested arise from a criminal investigation by the Bureau of Criminal Apprehension and the Bloomington City Attorney.

The second criterion is also satisfied. The allegations related to law enforcement activities.

Regarding the third consideration, the officer acted in good faith. The Bloomington City Attorney reviewed all the evidence and determined that the actions were not illegal or improper.

Regarding the fourth consideration, we conclude, based upon the investigation and decision by the Bloomington City Attorney, that there was no malfeasance or willful or wanton neglect of duty.

As to consideration number five, the officers were acting pursuant to law and exercising their duties as police officers. The actions of the officers were authorized by law and within their legal authority, as determined by the Bloomington City Attorney.

Finally, with regard to consideration number six, the denial of the request for attorney fees would have a negative impact on the morale of other City employees. Police officers who were making a good faith effort to enforce the law would be responsible for the payment of attorney's fees arising from investigations into conduct.

Based on the foregoing, it is our recommendation that the City Council authorize the reimbursement of Deputy Chief Lucy Gerold's legal fees at the hourly rate of \$125.00 per hour and reimbursement of \$194.10 in expenses pursuant to Minn. Stat. §465.76.