STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0874

Law Enforcement Labor Services, Inc.,
Respondent,

vs.

Carey G. Johnson,
Appellant,

Lake County,
Respondent.

Filed June 9, 2009
Affirmed
Kalitowski, Judge

Lake County District Court
File No. 38-CV-07-362

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Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Carey G. Johnson challenges an adverse grant of summary judgment, arguing that the district court erred in ruling that (1) the claims of respondent Law Enforcement Labor Services, Inc. (LELSI) were justiciable and not moot; (2) appellant committed an unfair labor practice; (3) appellant is not entitled to official immunity from LELSI's unfair labor practice claim; and (4) respondent Lake County has no duty to defend and indemnify appellant in the suit commenced by LELSI. We affirm.

D E C I S I O N

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 186 (Minn. 2005). On appeal from summary judgment we ask (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

This case arises from grievances filed by respondent LELSI under a collective bargaining agreement (the CBA). On behalf of one of its members, Lake County Sheriff's Deputy DeRosier, LELSI challenged the actions of appellant, Lake County Sheriff Carey G. Johnson.

Appellant took office as the elected sheriff of Lake County on January 2, 2007. Before appellant took office as sheriff, Lake County, along with Cook County, the City of Two Harbors, and the City of Silver Bay were awarded a state grant to fund the North Shore Drug Response Team (the task force). As the narcotics investigator for Lake County, DeRosier was actively involved in securing the grant and expected to be the deputy assigned to the task force. But on January 3, 2007, appellant informed DeRosier that he would not be assigned to the task force and would no longer be the Lake County narcotics investigator. Appellant then appointed a less experienced deputy as narcotics investigator and assigned that deputy to the task force.

On January 22, 2007, LELSI, on behalf of DeRosier, submitted two written grievances to appellant under the grievance procedure of the CBA. DeRosier sought reinstatement as the narcotics investigator and assignment to the task force.

The CBA effective during this dispute was negotiated pursuant to the Minnesota Public Employees Labor Relations Act (PELRA) and contained a two-level grievance procedure followed by arbitration. Level I required informal discussions between the grievant and the sheriff (appellant) and states "[i]f the grievance is not resolved through informal discussions, the Sheriff shall give a written decision on the grievance to the parties" within certain time limits. Appellant responded to the two grievances with a written decision, concluding that his actions did not violate the CBA.

LELSI then followed Level II of the grievance procedure, which provided for appeal to the Lake County Board of Commissioners (the board) for review of the sheriff's

Level I decision. Level II allowed the board to "affirm, reverse, or modify" the Level I decision. The board held a hearing, made findings, and concluded that appellant violated the "transfers" provision of the CBA when he transferred DeRosier from his position as the narcotics investigator. The board resolved that DeRosier "shall be immediately reinstated as Narcotics Investigator and assigned to exclusive duty with [the task force]." Appellant unsuccessfully sought reconsideration of the board's decision. The record indicates that no party sought arbitration pursuant to the provisions in the CBA.

In a complaint filed June 1, 2007, after appellant refused to implement the board's resolution, LELSI sought an order from the district court requiring appellant to implement the board's resolution. In October 2007, the task force was dissolved because of a lack of agreement among the members regarding joint powers. Subsequently both parties moved for summary judgment. LELSI's motion sought a declaration that appellant's failure to implement the board's resolution constituted an unfair labor practice under PELRA. Appellant argued that once the task force was dissolved, LELSI's claim became moot. Appellant also raised an official immunity defense, and sought indemnification from respondent Lake County. The district court determined the matter was not moot and granted LELSI summary judgment on its claim that appellant committed an unfair labor practice. The court also ruled that the official immunity doctrine did not protect appellant from LELSI's suit and that Lake County had no duty to defend or indemnify appellant.

I.

Appellant argues that the district court erred in determining that this matter was not moot and presented a justiciable controversy because the dissolution of the task force in October 2007 rendered relief impossible. We review issues of mootness and the justiciability of a declaratory judgment de novo. *See Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004) (mootness), *review denied* (Minn. Apr. 4, 2005); *Cincinnati Ins. Co. v. Franck*, 621 N.W2d 270, 273 (Minn. App. 2001) (justiciability).

Mootness

Generally, when an event makes an award of effective relief impossible or a decision on the merits unnecessary, the appeal should be dismissed as moot. *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). Determining mootness requires comparing the relief demanded and the circumstances of the case at the time of the decision to determine whether there is a live controversy that can be resolved. *Id.*

Appellant cites *Cincinnati Ins. Co. v. Franck* in support of his mootness argument, but that case did not consider mootness as a bar to declaratory judgment. 621 N.W.2d at 274 (concluding that the case was not justiciable because the controversy did not involve a concrete assertion of legal rights between the parties). Appellant also relies on *Kahn v. Griffin* where the court considered mootness as it relates to the justiciability of a declaratory judgment action. 701 N.W.2d 815, 821 (Minn. 2005). But in *Kahn*, the supreme court applied the exception to the mootness doctrine for cases "capable of

repetition yet evading review." *Id.* at 822. Here, the declaration LELSI seeks is not based on possible future harm and therefore we need not reach the exception to mootness.

Appellant is correct that assignment of an individual to the task force is no longer possible. But a live controversy exists with respect to the relief LELSI sought in its motion for summary judgment. LELSI sought judgment "declaring [that appellant] committed an unfair labor practice" by failing to implement the board's resolution. We thus conclude that this issue is not moot.

Justiciability

Appellant also argues that this matter does not present a justiciable controversy, contending that the district court misapplied the law when it concluded otherwise. We disagree.

"It is a well-established rule in Minnesota that a court only has jurisdiction to issue a declaratory judgment if there is a justiciable controversy." *Id.* at 821.

> A justiciable controversy exists if the claim (1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.

Onvoy, Inc. v. Allete, Inc., 736 N.W.2d 611, 617-18 (Minn. 2007). A merely possible or hypothetical injury will not satisfy this standard. *Kahn*, 701 N.W.2d at 821.

We reject appellant's argument that reversal is required because the district court did not expressly state or apply the *Onvoy* test. Caselaw suggests that there is no

mechanical test for determining whether a justiciable controversy exists. *Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Assoc. of Minneapolis*, 271 N.W.2d 445, 448 (Minn. 1978) (stating that the immediacy of the controversy is not subject to a mechanical test) (citations omitted). Moreover, because the district court here relied on authority that substantially sets forth the same justiciability inquiry as *Onvoy*, we reject appellant's argument that the district court erred merely by not citing *Onvoy*.

Finally, an application of the *Onvoy* factors leads us to conclude that this case presents a justiciable controversy. First, the controversy involves a definite and concrete assertion of rights emanating from a legal source: LELSI asserts its rights under the CBA and Minnesota's unfair labor practice law. Second, the controversy involves a genuine conflict between parties with adverse interests: the parties dispute whether appellant committed an unfair labor practice and the parties' interests are adverse. Third, this dispute is capable of specific resolution without resorting to hypothetical facts. We thus conclude that the district court did not err when it determined LELSI presented a live and justiciable controversy.

II.

Appellant challenges the district court's conclusion that he committed an unfair labor practice, arguing that the grievance procedure in the CBA does not expressly require him to implement the board's resolution and therefore his failure to do so cannot constitute an unfair labor practice. We disagree.

It is the policy of PELRA to promote orderly and constructive relationships between public employers and their employees. Minn. Stat. § 179A.01(a) (2008). To this end, PELRA prohibits "[p]ublic employers," and their "agents and representatives," from engaging in unfair labor practices including "refusing to comply with grievance procedures contained in an agreement." Minn. Stat. § 179A.13, subds. 1, 2(6) (2008). The district court concluded that appellant's failure to comply with the board's grievance resolution is an unfair labor practice under section 179A.13, subdivision 2(6).

Under the CBA, a grievance must be submitted in writing to the sheriff and an effort must be made between the grievant and the sheriff to resolve an alleged grievance informally. If the grievance is not resolved informally, the sheriff must issue a written decision on the grievance to the parties involved. Appellant's written decision denied that removing DeRosier as the Lake County narcotics investigator and assigning another deputy to the task force violated the CBA.

The next stage of the grievance procedure provides that "the decision [of the sheriff] may be appealed to the [board] and request made for review of the Level I decision. . . . " The board may "affirm, reverse or modify such decision." Here, the board disagreed with appellant's Level I determination and resolved that appellant should reinstate DeRosier as the narcotics investigator and assign him to the task force.

Appellant contends that the CBA is ambiguous as to whether he is required to implement the board's resolution and that this ambiguity precludes summary judgment. Summary judgment is inappropriate where terms of a contract are at issue and the terms

are ambiguous or uncertain. *Bank Midwest, Minn., Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004). But if terms of the contract may be given their plain and ordinary meaning, construction of the contract is a matter for the court and summary judgment may be appropriate. *Id.* And whether a contract is ambiguous is a question of law which we review de novo. *Murray v. Puls*, 690 N.W.2d 337, 343 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005). When interpreting a contract, certain principles apply: (1) language must be given its plain and ordinary meaning; (2) a contract term must be read in the context of the entire contract so as not to lead to a "harsh and absurd result"; and (3) a contract should be interpreted to give meaning to all its provisions. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998).

We conclude that the plain language of the CBA authorizes the board to review appellant's resolution of grievances and that implicit in the plain and ordinary language of the CBA is the requirement that appellant comply with the board's resolution of a grievance. The word "appeal" denotes "[a] proceeding undertaken to have a decision reconsidered by a higher authority." *Black's Law Dictionary* 105 (8th ed. 2004). Similarly, "review" means "[c]onsideration, inspection, or reexamination of a subject or thing." *Id.* at 1345. "Reverse" means "[t]o overturn (a judgment) on appeal." *Id.* at 1344. Based on these definitions, we conclude that the CBA is unambiguous in allowing the board to reexamine appellant's Level I decision and in requiring appellant to comply with the decision of the board. And the power to "affirm, reverse, or modify" requires that appellant comply with the decision of the board. Interpreting the CBA otherwise

would lead to harsh and absurd results because the grievance procedure of the CBA would be meaningless if appellant may choose whether or not to follow the board's resolution.

Appellant argues that the district court's decision must be reversed because it erroneously referenced "Level III" in its decision where the CBA does not contain a "Level III." We disagree.

We disregard error that does not affect the substantial rights of the parties. Minn. R. Civ. P. 61. The CBA effective when this dispute began provided a three-stage grievance procedure: Level I, then Level II, followed by arbitration. On March 27, 2007, Lake County and LELSI executed a new collective bargaining agreement (the second CBA). This agreement describes a four-step grievance procedure. In the second CBA, the first step is to present a grievance to the undersheriff, the second step is an appeal to the sheriff, the third step is an appeal to the board, and the fourth step is arbitration. Both collective bargaining agreements were submitted to the district court in connection with the parties' summary judgment motions. In the "Facts" section of its memorandum accompanying the district court's order, the agreement described by the district court conforms to the CBA governing this dispute, not the second CBA. But in its discussion of law, the district court states that appellant could have "appealed to Level III of the grievance procedure." Although the first CBA contains nothing entitled "Level III," the context of the court's use of the term "Level III" makes clear that the court is referring to

the correct CBA wherein arbitration was the third step in the grievance procedure. Consequently, we conclude that any error by the district court is harmless.

In sum, we conclude that once the board exercised its power to "affirm, reverse, or modify" appellant's resolution of a grievance, appellant was required to comply with and implement the board's resolution and that failure to do so constituted unfair labor practice. There is no dispute of fact concerning appellant's failure to do so. We therefore affirm the district court's award of summary judgment to LELSI on its unfair labor practice claim against appellant.

III.

Appellant argues that the district court erred in concluding that official immunity does not shield him from liability. We disagree.

The rationale behind the common-law doctrine of official immunity is to protect public officials from fears of personal liability that might deter independent action and impair effective performance of their duties. *Elwood v. County of Rice*, 423 N.W.2d 671, 678 (Minn. 1988) (holding that police officers, under the circumstances in which they entered a home and restrained the occupants, exercised the kind of judgment protected by official immunity). Under this doctrine, "a public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992) (holding that the decision of police officers to engage in and to continue a vehicular pursuit was protected by official immunity)

(quotation omitted). The applicability of official immunity is a question of law reviewed de novo. *Johnson v. State*, 553 N.W.2d 40, 45 (Minn. 1996).

"Official immunity protects all discretionary decisions made by a public figure, but does not protect the ministerial duties of a public official, that is, duties that are absolute, certain or imperative." *Dokman v. County of Hennepin*, 637 N.W.2d 286, 296 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Feb. 28, 2002). Whether official immunity is available in a given context requires a two-step inquiry: "(1) whether the alleged acts are discretionary or ministerial; and (2) whether the alleged acts, even though of the type covered by official immunity, were malicious or willful and therefore stripped of the immunity's protection." *Id.* The district court here concluded that because the implementation of the board's grievance resolution was a ministerial act, appellant was not protected from liability by official immunity. We agree.

The supreme court has described the distinction between "discretionary" and "ministerial" as "subject to enigmatic application and occasional breakdown." *Elwood*, 423 N.W.2d at 677. The crucial focus is on the facts of each case. *Id.* at 677-78. An official's duty is ministerial when it is "absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (holding that a decision to remove an unclassified policy-making employee, who may be discharged at any time without reason, is discretionary rather than ministerial) (quotation omitted). A ministerial duty is

one "in which nothing is left to discretion." *Cook v. Trovatten*, 200 Minn. 221, 224, 274 N.W.165, 167 (1937).

Applying these principles here, we conclude that official immunity does not protect appellant. Once the board issued its resolution, nothing was left to appellant's discretion. Because the board has the power to "affirm, reverse, or modify" appellant's resolution of the grievance, appellant's compliance with the board's resolution involves "merely execution of a specific duty arising from fixed and designated facts." *See Rico*, 472 N.W.2d at 107. We therefore conclude that the district court did not err when it denied appellant summary judgment on the ground of official immunity.

IV.

Appellant argues that Minnesota Statute section 466.07 (2008) requires respondent Lake County to indemnify him and claims the district court erred in concluding that his alleged good faith was irrelevant. We disagree.

Respondent Lake County argues that appellant waived this argument by failing to raise it before the district court. But the record shows that appellant argued to the district court, in the alternative, that section 466.07 requires indemnification. Therefore, we conclude that this argument is properly before us on appeal.

With regard to the issue of whether section 466.07 requires Lake County to defend and indemnify appellant in this action, the statute provides that,

> 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.

Minn. Stat. § 466.07, subd. 1 (emphasis added). Appellant argues that a 1987 amendment to section 466.07 extended a municipality's duty to indemnify its officers to encompass appellant's claims here. We disagree.

Prior to 1987, section 466.07 stated that the governing body of any municipality "may" defend and indemnify any of its officers "against any tort claim or demand." Minn. Stat. § 466.07, subd. 1 (1986). In 1987, the legislature, as part of a substantial amendment to section 466.07, removed the word "tort" from the statute. *See* Minn. Stat. § 466.07, subd. 1 (Supp. 1987). The 1987 amendment stated that the governing body of any municipality "shall" defend and indemnify any of its officers "for damages, including punitive damages, claimed or levied against the officer" provided the officer was acting in the performance of the duties of the position and was not guilty of malfeasance in office, willful neglect of duty, or bad faith. *Id.* The current statute as quoted above is unchanged from the 1987 amendment in all relevant respects.

This court has determined that the 1987 amendment to section 466.07 requires defense and indemnification only where "damages" are sought. In *Kroschel v. City of Afton*, we held that the defendant-city had no duty under section 466.07 to defend or indemnify plaintiffs who sought reimbursement for civil penalties and attorney fees resulting from the violation of open meeting laws. 512 N.W.2d 351, 355 (Minn. App.

1994)*, rev'd on other grounds*, 524 N.W.2d 719 (Minn. 1994). *Kroschel* discussed the 1987 amendments to section 466.07 and specifically addressed the argument that the removal of the word "tort" was intended to broaden a municipality's duty to defend and indemnify its employees. *Id.* at 354. The court observed that "while the 1987 amendment deletes the reference to 'tort,' it specifically incorporates the notion that the defense and indemnification requirements are directed to actions for 'damages.'" *Id.* The purpose of the amendment was to "reduce the risk that employees would be burdened with damage awards." *Id.* The *Kroschel* court concluded that the district court's imposition of a $100 civil penalty under Minnesota's open meeting laws is not the type of expense the legislature was concerned about when it enacted and amended the indemnification law. *Id.* at 354-55. The court also rejected the attempt to characterize the civil penalty as punitive damages. *Id.* at 355.

Here, LELSI's action seeks a declaration that appellant committed an unfair labor practice. It is not an action for damages. We therefore conclude that section 466.07 does not require Lake County to defend and indemnify appellant. Because we conclude that section 466.07 does not apply to this case, we do not reach appellant's "good-faith" argument.

Affirmed.