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**A09-1154**

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**STATE OF MINNESOTA  
In the Court of Appeals**

**Minneapolis Police Department,**

**Appellant,**

**vs.**

**James F. Cannon,**

**Respondent,**

**City of Minneapolis,  
Commission on Civil Rights,**

**Respondent.**

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**ON APPEAL FROM CITY OF MINNEAPOLIS,  
COMMISSION ON CIVIL RIGHTS**

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**REPLY BRIEF OF APPELLANT**

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## FACTS

The Respondent asserts that the Mr. Cannon was threatened with arrest. Officer Hagen said that the next person to touch the plexi-glass window would be arrested. (T. 28, 57-58, 78, 104, 168). No threat was made to arrest the Respondent or his family.

In his November 6, 2006, statement to the Civilian Review Authority (“CRA”) Mr. Cannon stated that “I told my wife, ‘Look I’m - We should go down to this First Precinct and just file a complaint. This doesn’t make any sense to me.’” (Trial Exhibit 5, p. 3). Mr. Cannon appears to have been concerned with rudeness and getting an explanation for the problem in retrieving his son’s vehicle.

At trial Mr. Cannon testified that he turned around to Officer Hagen and said, "I think this is discrimination, we're going to file a complaint" (T. 30, 82) or [w]e’re going to file a complaint, I think this is discrimination.” (T. 44-45).

In her November 6, 2006, statement to CRA, Mrs. Cannon made no mention of a discrimination complaint. Mrs. Cannon stated that her husband said “‘Ma’am, we're just going to go and file a complaint.” (Trial Exhibit 6, p. 5).

## ARGUMENT

### **I. THE MINNEAPOLIS POLICE DEPARTMENT IS NOT SUBJECT TO SUIT.**

The Respondent asserts that the Appellant admitted that the Minneapolis Department of Civil Rights (“MDCR”) had ‘jurisdictional authority’ over the

Minneapolis Police Department. The Appellant admitted that Mr. Cannon asserted his claim pursuant to the authority granted to the MDCR to investigate Charges of Discrimination. (A-2).

Appellant does not argue that that MDCR cannot investigate and make recommendations concerning the actions and activities of employees of the Minneapolis Police Department. However, the enforcement action must be brought against the City of Minneapolis, not the individual department within the City. The police department is only a subdivision of the City. Minneapolis, Minn., Charter, Ch. 6 (A. 56-58) and Minneapolis, Minn., Code of Ordinances Ch. 171. (A. 59-60).

Respondent misapprehends Appellant's argument. The police department provides services and complaints about its employees may be processed through the MDCR and Commission. The Appellant asserts that for the reasons cited, the proper party against whom the *Charge of Discrimination* must be brought is the City of Minneapolis, not the individual department within the City.

The manner in which the Charge was asserted is relevant in that the Panel made erroneous findings concerning the legal status of the police department. The Panel ordered the Appellant to pay the City of Minneapolis a civil penalty, yet any payments would be made by the City to the City.

## **II. PANEL CONDUCT, FINDINGS AND CONCLUSIONS.**

A reviewing court may reverse an agency decision if the agency's findings, conclusions, or decisions are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) legally erroneous;
- (5) unsupported by substantial evidence; or
- (6) arbitrary and capricious.

Minn. Stat. § 14.69.

The court will reverse the department's findings if they are unsupported by substantial evidence on the record, are arbitrary and capricious, or affected by other errors of law. Substantial evidence is defined as

- (1) Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;
- (2) More than a scintilla of evidence;
- (3) More than some evidence;
- (4) More than any evidence; and
- (5) Evidence considered in its entirety.

*Hazelton v. Dep't of Human Servs.*, 612 N.W.2d 468, 471 (Minn. App. 2000).

The decision of the Panel is in excess of its statutory authority; made upon unlawful procedure; legally erroneous; unsupported by substantial evidence; arbitrary and capricious and not supported by the evidence considered in its entirety.

**1. No Objective Good Faith Complaint.**

The good-faith, reasonable-belief standard requires that an objection to discrimination be an objectively reasonable opposition to a discriminatory practice. *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir.1997). Scrutiny of the retaliation cannot be avoided “merely by claiming such a belief” of a discriminatory practice, but rather, the party must provide facts supporting the claim that her belief was objectively reasonable. *Id.*; *Bahr v. Capella University*, 765 N.W.2d 428, 436 (Minn. App., 2009).

Before Mr. Cannon allegedly made his complaint of discrimination, the only objective facts that could serve as the basis of his ‘good faith’ complaint were that the group was spoken to as a whole, Officer Hagen was loud to the group and that Mr. Cannon was told that Officer Hagen did not care how long Mr. Cannon had been waiting.

While Respondent argues correctly that Mr. Cannon did not have to prove that the underlying discrimination complaint was valid, a review of the underlying complaint is relevant to the objective good faith analysis. In the instant case the underlying complaint is so problematic that a reasonable person could not objectively believe that discrimination had taken place. As noted by the Respondent, unlawful discrimination in the area of public services may be proven by conduct "so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation." *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 202 (Minn. 1976). The Panel concluded that the conduct was *not* so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation. (Ad. 27, Memorandum p. 22). Mr. Cannon's had no objective reason to believe that discrimination had taken place. At most it was his subjective impression.

The decision of the Panel that the alleged complaint had been made in good faith was legally erroneous, unsupported by substantial evidence, arbitrary, capricious and not supported by the evidence considered in its entirety.

## **2. No Complaint of Discrimination.**

The finding by the Panel that Mr. Cannon made a complaint of discrimination is unsupported by substantial evidence, arbitrary, capricious and not supported by the evidence considered in its entirety.

As previously argued, it is not clear what Mr. Cannon said. In his initial statement to the Civilian Review Authority, discrimination is not mentioned. Mrs. Cannon in her initial statement made no mention of a discrimination complaint. Mr. Cannon's statement that he was going to make a complaint, if actually uttered, was nothing more than a comment on the general conditions and actions by Officer Hagen. *See, Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 326 (Minn.1995).

### **3. No Adverse Action was taken toward Mr. Cannon.**

The Respondent and Panel cite three instances of adverse action; Officer Hagen's alleged statement that Mr. Cannon could not do anything to her; Officer Hagen speaking to the Respondent's wife in a disrespectful manner; and Officer Meath writing of a license plate number. (Ad. 12, Conclusion 11; Resp. Br. 26).

Officer Hagen took no action toward Mr. Cannon. She did not follow him, touch him, threaten him, issue him a citation or have any contact with him of any type. The allegedly disrespectful conversation regarding the badge number was not with Mr. Cannon. It is only the subjective impression of Mr. Cannon that the language of Officer Hagen amounted to harassment or retaliation. The words uttered by Officer Hagen, even if in response to a complaint of discrimination, do not amount to adverse action.

Officer Meath never spoke with Mr. Cannon or any member of his family. There is no evidence that Officer Meath was aware of the alleged complaint by Mr.

Cannon. The Panel relied solely on Officer Meath's presence in the same room as Mr. Cannon and Officer Hagen for the supposition that he had knowledge of the alleged complaint. The Panel and Respondent disregarded the testimony regarding the loud conditions in the room and the fact that Mrs. Cannon did not corroborate Mr. Cannon's alleged Complaint in her prior statement. The decision of the Panel was arbitrary, capricious and the evidence was not considered in its entirety.

#### **4. Pretext.**

The Panel, over objection, admitted into evidence Trial Exhibit 14, Minneapolis Department of Civil Rights interview notes. The Panel found that Exhibit 14 was 'the type of evidence which reasonable, prudent persons are accustomed to rely on in the conduct of their serious affairs.' (Ad. 2-3, Finding 6, fn. 1). The Panel relied on Exhibit 14 in making Findings 6, 13, 16 and 21. (Ad. 2-3, 4, 5).

The Panel and Respondent rely on notes of the interview between Mohamud Isse and an investigator with the MDCR to tip the credibility balance between the officers and the Cannons. (Exhibit 14). For reasons argued previously, it was error to admit the exhibit. Prejudice is demonstrated by the reliance on the truth of the statements to support both the arguments of the Respondent and decision of the Panel. While the personal notes of a conversation in which the MDCR investigator participated may be relevant to the probable cause determination by the MDCR,

the admission and reliance on the notes by the Panel violated the due process rights of the Appellant to confront witnesses and participate in a full and fair hearing.

**5. Statements of Lois Cannon.**

The Panel cited testimony by the officers that customers alleged a racial conspiracy between the towing company and the police (Ad. 3, Finding 11); that Mrs. Cannon had called Officer Hagen a racist and said that Officer Hagen's conduct was racially motivated (Ad. 5, Finding 23); that Mrs. Cannon said you are doing this because you are white and we are black (Ad. 6, Finding 24); and that Officer Meath heard Mrs. Cannon call the officers racist (Ad. 6, Finding 25). The Panel went on to conclude that Mrs. Cannon had not engaged in the alleged conduct (Ad. 6, Finding 27), yet, found that the conduct in which Mrs. Cannon had *not engaged* "establishes that they [the officers] were clearly aware that the Cannon family had voiced its opposition to their allegedly discriminatory conduct." (*Id.*).

The Findings and related arguments by the Respondent defied logic, common sense and the laws of nature. The Panel found, and the Respondent argues, that Mrs. Cannon made none of the statements alleging that the officers' actions were racially motivated. Yet, the Panel found, and Respondent argues, that the officers knew that the Cannon's were making a complaint of race discrimination because the officer heard the statements. The Findings that

statements were not made but that the officers heard the statements and acted on them is arbitrary, capricious and erroneous.

These particular Findings are, perhaps, the starkest indication of the erroneous findings and bias permeating the decision by the Panel. The Panel has selectively adopted clearly contradictory bits and pieces of testimony best suited to support the claim asserted by the Respondent, even when logic and the weight of the evidence led to a contrary conclusion. While the decision of the Panel must be afforded deference, such is not the case when the decision is arbitrary, capricious and not supported by the evidence.

#### **6. Officer Hagen's opinions.**

The Panel found that “[r]ather than professionally let the claim "roll of her back" if it was indeed not true, Officer Hagen was upset and angered by the accusation that she was discriminatory and believed it was "extremely inappropriate" for the Cannon's to accuse her of discrimination. (Ad. 12, Conclusion 12).

The Respondent argues in support of the Panel finding that Officer Hagen believed that it was extremely inappropriate for the Cannon family to raise the issue of discrimination. For the reasons set out in Appellant's initial brief, the only accurate part of the argument and finding is that Officer Hagen used the words “extremely inappropriate.” The Panel ignored the testimony explaining the

conduct to which Officer Hagen referred and the evidence in its entirety. Officer Hagen was being cross examined about her prior CRA statement where she stated,” Mrs. Cannon seemed to rally the group into getting more angry than they even were by calling me a racist and by saying, ‘You're doing this because your (sic) white and I'm black.’ And I thought that was extremely inappropriate, especially from a judge's wife.” (Trial Ex. 8, p. 8).

It is clear that Officer Hagen believed that escalating the situation and trying to rally the group into a confrontational situation was what she believed to be inappropriate.

**7. Officer Hagen’s badge number.**

Respondent argues that Officer Hagen loudly reciting her badge number served no legitimate purpose. The argument ignores the facts and circumstances that a small room was filled with disgruntled towing victims. Had Officer Hagen quietly recited her badge number and Mrs. Cannon not heard or had to ask that the number be repeated, Appellant would now be addressing the argument that Officer Hagen had attempted to conceal her badge number by talking softly.

**8. Panel opinion regarding reputation of Minneapolis Police Department.**

The Panel relied on information outside the record. The Panel stated that “Each of the panel members had experiences with Minneapolis Police Officers where the officers acted uncourteous, disrespectful, and impolite. It was agreed by

the panel that the Minneapolis Police Department unfortunately has a bad reputation of treating the individuals they stop in a disrespectful manner.” (Ad. 27-28, Memorandum, p. 22-23).

The Respondent argues that the statement by the Panel regarding their belief in the bad reputation of the police department does not constitute bias because the Panel decided that the police department had not discriminated. The Respondent argues that the statement does not constitute bias because the Panel was instructed to rely on their personal experience, an instruction to which the Appellant had not objected.

There is a substantive difference between a fact finder relying on personal experiences related to the common experiences in life and personal experiences related to the bad reputation of one of the parties litigating before it. While the statement made by the Panel referenced the analysis of the discrimination allegation, the statement revealed an underlying bias and prejudgment related to the entire analysis made by the Panel.

The Respondent argues that the Appellant did not object to the instruction nor claim bias on the part of the Panel. The instruction referenced by the Respondent is a general instruction and given to all fact finders. The Panel was also instructed “[y]ou must not let events outside the courtroom influence you. Your most important duty is to be impartial. You cannot take sides based on

personal likes, dislikes or prejudices.” (T. 221). The panel was instructed that “[y]ou must not allow sympathy, prejudice or emotion to influence your verdict.” (T. 237-238).

Unlike a trial before a jury, there was no voir dire of the Panel that would allow the parties to explore any potential preconceptions or prejudices. The Appellant had already moved to recuse the Commission without success.

The Respondent argues that to excuse Commission members from service who had negative experience with the police department would reward bad conduct by the police. The Appellant asks for a fair hearing before an impartial fact finder; not a fact finder that believes that one party is a bad actor or a fact finder that assumes its role to be that of an ‘advocate’ rather than an impartial judge of the evidence. Had a prospective juror expressed opinions and experiences similar to those stated by the Panel, the juror would most likely have been stricken for cause and certainly peremptorily excused.

### **III. THE PANEL ERRED BY NOT RECUSING ITSELF.**

Respondent argues that the Minneapolis Code of Ordinances allows any person to file a complaint with the MDCR and does not prohibit former Commissioners from such a filing. (Resp. Br. 33).

Appellant does not argue that Mr. Cannon is precluded from filing a Charge of Discrimination. State and federal agencies exist that could investigate his

claims. Appellant is concerned with the appearance of impropriety and the ability of the Appellant to appear before a fair and impartial fact finder. Appellants submit that the proper course would have been for the Commission on Civil Rights to have recused itself and appointed an independent hearing officer to hear the case.

**IV. THE DAMAGES AND PENALTIES WERE NOT SUPPORTED BY THE LAW AND THE FACTS.**

All parties admit that the Panel awarded Respondent \$10,000.00 for past pain, embarrassment and emotional distress; \$5,000.00 for future pain, embarrassment and emotional distress and doubled the award to \$30,000.00. (Ad. 14, 18-19; Resp. Br. 35).

Minneapolis, Minn., Code of Ordinances § 141.50(m) provides that the Commission may award “compensatory damages in an amount up to three (3) times the actual damages sustained.”

Minneapolis, Minn., Code of Ordinances § 141.50(m) provides further that “[i]n all cases, the hearing committee may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorneys fees in addition to punitive damages in an amount not more than eight thousand five hundred dollars (\$8,500.00).”

Respondent argues that the \$8,500.00 cap does not apply to the damages awarded to Mr. Cannon and that the damages may be doubled.

It is clear from the language cited that only compensatory damages that are also 'actual damages' may be multiplied. The provision regarding multiplication of damages is contained in one unmodified sentence that clearly limits the type of compensatory damages that may be multiplied. The ordinance distinguishes between actual damages, such as expenses incurred and property damaged, and the more subjective damages such as mental anguish and punitive damages. The Respondent suffered no 'actual damages' under the ordinance. Damages should not have been doubled. The Respondent would be entitled to no more than \$15,000.00 in damages.

The Respondent argues that the \$8,500.00 cap does not apply to mental damages. The Respondent argues in support of his theory that the Appellant did not challenge the award of attorney's fees that exceeded \$8,500.00. Admittedly, the Appellant erred in examining only the reasonableness of attorney's fees and not the statutory cap in not opposing the fee award. The attorney's fees issue is not before this Court. However, the ordinance clearly limits the more subjective type of damages such as mental anguish, pain and suffering and punitive damages to \$8,500.00.

## CONCLUSION

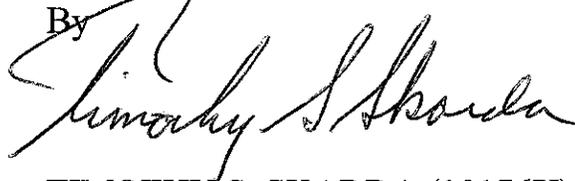
For the reasons stated herein the decision of the Panel of the Minneapolis Civil Rights Panel should be reversed and judgment entered for the Appellant.

Dated: November 10, 2009

SUSAN L. SEGAL

City Attorney

By

A handwritten signature in black ink, appearing to read "Timothy S. Skarda". The signature is written in a cursive style with a large initial "T".

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## CERTIFICATE OF COMPLIANCE

Timothy S. Skarda, Attorney for Respondent, certifies that this brief complies with the type-volume limitation contained in Rule 132 of the Rules of Civil Appellate Procedure as follows:

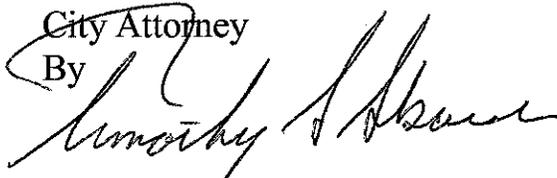
There are 3,147 words in this brief. The word processing software used to prepare this brief was Microsoft Office Word 2003, (11.8237.8221) SP 3, using Times New Roman 14 point proportional spaced font containing Serifs.

Dated: November 10, 2009

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