8-2402-8175-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF PEACE OFFICERS STANDARDS AND TRAINING

In the Matter of a Disciplinary
Hearing Regarding the Peace Officer
License of Darrin P. Waletzki

ORDER ON MOTION FOR DISMISSAL

By written motion dated April 13, 1994, the peace officer in the above captioned matter, Darrin P. Waletzki (Officer Waletzki or Respondent), sough an order of the Administrative Law Judge recommending to the POST Board a dismissal of the pending disciplinary charges against his peace officer's license. On April 27, 1994, the POST Board and the Respondent filed initia simultaneous written briefs. Simultaneous reply briefs were filed with the Administrative Law Judge on May 25, 1994. On that date, the record on the motion closed.

Appearances: Ann E. Walther, Gregg M. Corwin & Associates, Attorneys a Law, 508 East Parkdale Plaza Building, 1660 South Highway 100, St. Louis Pa Minnesota 55416-1534, appeared on behalf of the Respondent, Darrin P. Walet and John Docherty, Assistant Attorney General, Suite 1400, 445 Minnesota Street, St. Paul, Minnesota and Mary J. Theisen, Assistant Attorney General, Suite 1400, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2131, appeared on behalf of the Minnesota Board of Peace Officer Standards and Training.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the fina decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Board. Exceptions to this Report, i any, shall be filed with the Board at 200 Spruce Tree Center, 1600 Universi Avenue, St. Paul, Minnesota 55104-3825. Pursuant to Minn. Stat. § 214.10, subd. 2, a board member who was consulted during the course of an investiga may participate at the hearing, but may not vote on any matter pertaining t the case.

Based on the motion, the written submissions of counsel and on all the files and records herein, the Administrative Law Judge makes the following:

RECOMMENDED ORDER

The motion of the Respondent, Darrin P. Waletzki, to dismiss the propos sanctions against his peace officer's license is appropriately GRANTED.

Dated this ____ day of June, 1994.

JON L. LUNDE
Administrative Law Judge

Reported: No Hearing Held.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to se its final decision upon each party and the Administrative Law Judge by firs class mail.

MEMORANDUM

The Respondent, Darrin P. Waletzki, has moved the Administrative Law J for an Order determining that the charges contained in the complaint filed the Board of Peace Officer Standards and Training Complaint Investigation Committee does not state a ground for taking sanctions against his peace officer's license under Minn. Rules, pt. 6700.1600 B (1991), or Minn. Stat. 609.066 (1992). The Respondent has styled his motion as one for dismissal. The Administrative Law Judge believes that consideration of the motion is appropriate under Rule 12.02 of the Minnesota Rules of Civil Procedure if u the uncontested facts presented, the Board has no jurisdiction to grant rel or take action against the Respondent's peace officer's license.

Dismissal for failure to state a claim for which relief can be granted appropriate when it is apparent from the face of the complaint that the requested legal remedy is not available. See, e.g., Pederson v. American Lutheran Church, 404 N.W.2d 887 (Minn. App. 1987). When considering a moti to dismiss for failure to state a claim for which relief can be granted, th Administrative Law Judge must accept the truth of all facts asserted in the complaint by the Board. Schommer v. Flower City Ornamental Ironworks, 129 Minn. 244, 152 N.W. 535 (1915); City of Minneaplis v. Minneapolis Lt. Ry. C 238 Minn. 218, 56 N.W.2d 564 (1952). All interpretations of the facts presented must also be interpreted in the light most favorable to the nonmo party. Stephenson v. Plastic Corp. of America, 276 Minn. 400, 150 N.W.2d 6 (1967).

For purposes of this motion, the Administrative Law Judge assumes the truth of the facts hereinafter stated. Mr. Darrin P. Waletzki holds peace officer license number 11281. Mr. Waletzki was appointed as a peace officer Minneapolis, Minnesota on December 29, 1991. On the night of December 15, 1992, at about midnight, Darrin Waletzki, while in the company of an additio individual, discharged a handgun several times in a Mall of America parking ramp. An undetermined number of shots were fired towards the floor of

the parking ramp. At least four shell casings were recovered. It is undisputed that Mr. Waletzki was not on duty as a police officer at the time the shots were fired. Reply Brief of the Minnesota Board of Peace Officer Standards and Training, p. 1. It is also undisputed that Officer Waletzki w not attempting to act as a peace officer at the time the shots were fired in that he was not attempting to arrest any suspect, prevent the commission of crime, or prevent the escape of a captured suspect. Officer Waletzki was severely intoxicated and fired his pistol in the parking ramp as a response having been earlier ejected from a drinking establishment in the Mall.

For the reasons hereinafter discussed, the Administrative Law Judge determines that Minn. Stat. § 609.066 (1992), and Minn. Rules, pt. 6700.1600 (1991) apply only to a peace officer who is attempting to act as such, while either on duty or off duty, in affecting an arrest, preventing the commissio of a crime or preventing the escape of an arrested individual. Because it i undisputed that Officer Waletzki's conduct did not occur while he was attempting to act as a peace officer, dismissal of the Complaint is appropriate.

The Complaint of the Investigation Committee charges that Officer Walet violated Minn. Stat. § 609.066 (1992), and Minn. Rules, pt. 6700.1600 B (199 when he fired shots into the floor of a Mall of America parking ramp on December 15-16, 1992. Minn. Stat. § 609.066 (1992), provides:

> Authorized use of deadly force by peace officers.
>
> Subdivision 1. Deadly force defined. For the purposes of this section, "deadly force" means force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm. The intentional discharge of a firearm in the direction of another person, or at a vehicle in which another person is believed to be, constitutes deadly force.
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> Subd. 2. Use of deadly force. Notwithstanding the provisions of section 609.06 or 609.065, the use of deadly force by a peace officer in the line of duty is justified only when necessary:
>
> (1) to protect the peace officer or another from apparent death or bodily harm;
>
> (2) to effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the threatened use of deadly force; or

(3) to effect the arrest or capture, or prevent the escape, of a person whom the officer knows or has reasonable grounds to believe has committed or attempted to commit a felony if the officer reasonably believes that the person will cause death or great bodily harm if that person's apprehension is delayed.

> Subd. 3. [No defense in civil actions.] This section and section 609.06, 609.065 and 629.33 may not be used as a defense in a civil action brought by an innocent third party.

It is admitted by the POST Board that Officer Waletzki did not violate subdivision 2 of section 609.066 in that he was not acting "in the line of duty" as required by subdivision 2. The Board apparently argues that Office Watletzki, in some fashion, violated subdivision 1 of Minn. Stat. § 609.066 (1992). As correctly recognized by the Respondent, however, subdivision 1 o Minn. Stat. § 609.066 (1992) is simply a definitional section. Its purpose to define the term "deadly force". In Johnson v. Morris, 453 N.W.2d 31, 36 (Minn. 1990), the Minnesota Supreme Court recognized that Minn. Stat. § 609.066, subd. 1 (1992), merely defines deadly force for purposes of subdivision 2 of the statute. It is impossible to violate a definitional section of a statute, since its purpose is merely to state the meaning of te that are used in a further substantive portion of the statute. The United States Supreme Court in Tennessee v. Garner, 471 U.S. 20, 105 S. Ct. 1694, 1 (1985), states:

> Eighteen others [states] allow, in slightly varying language, the use of deadly force only if a suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested.[18]

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[18] . . . Minn. Stat. § 609.066 (1984).

The Administrative Law Judge also agrees with the statement of the Respondent regarding the legislative history of Minn. Stat. § 609.066 (1992) and the reason for the adoption of the statute. Respondent Licensee Waletzki's Memorandum in Support of Motion to Dismiss, pp. 8-11. The Administrative Law Judge does differ, in one respect, from the interpretatio of Minn. Stat. § 609.066 (1992), offered by the Respondent. The Administrat Law Judge believes that the section could possibly apply to off-duty conduct a peace officer in attempting to effectuate an arrest, prevent a crime, or prevent the escape of a suspect. While that matter may be open to some dispute, it is entirely clear to the Administrative Law Judge that Minn. Sta § 609.066 (1992), by its legislative history and express terms, does not app to off-duty conduct by a peace officer in which he or she is not attempting act as a peace officer in making an arrest, preventing a crime, or preventi the fleeing of a suspect.

That does not, however, end the inquiry. Irrespective of the limiting comment made by committee counsel before the disciplinary committee, the

Complaint also charges Officer Waletski with a violation of Minn. Rules, pt 6700.1600 B (1991). A violation of that rule was charged in the Complaint a in the Notice and Order for Hearing. Minn. Rules, pt. 6700.1600 (1991), provides, in part:

> Violations of the following standards of conduct by a licensee shall be grounds for revocation, suspension, or nonrenewal of license:

* * *

> B. the use of deadly force when not authorized by Minnesota Statutes, section 609.066; . . .

It is, apparently, the position of the POST Board that conduct by a person w is also licensed as a peace officer outside of the line of duty which create risk of bodily harm to another party violates the rule in that it is a use o deadly force which is not permitted or specifically authorized by Minn. Stat 609.066, subd. 2 (1992). For the reasons hereinafter discussed, the Administrative Law Judge believes that Minn. Rules, pt. 6700.1600 B (1991), must be read in accordance with the statute, as applying only to a peace officer while he or she is attempting to act as such while either officially duty or off duty in attempting to effectuate an arrest, prevent the commissi of a crime, or prevent the escape of a person arrested. With respect to any other off-duty conduct which creates a danger of death or serious bodily har to another person as a result of activity by the actor outside of such circumstances, a sanction against a peace officer's license is authorized by rule only if the conduct amounts to a felony. Minn. Rules, pt. 6700.1600 A (1991).

The dispositive issue, then, is whether the phrase "the use of deadly force" as contained in Minn. Rules, pt. 6700.1600 B (1991), includes any conduct dangerous to human life and safety or refers only to actions by a pe officer attempting to act as such, whether on or off duty, to effect an arre prevent a crime, or prevent the fleeing of a suspect. Minn. Stat. § 645.08 (1992), provides:

> Words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition. . . .

The same canon of construction applies to the interpretation of a rule. Min Stat. § 645.001 (1992). The Administrative Law Judge believes that the phra "use of deadly force" has acquired a special meaning and unless specifically qualified, refers to conduct by a peace officer attempting to act as such in effectuating an arrest, preventing the commission of a crime, or preventing escape of an apprehended subject.

In Johnson v. Morris, 453 N.W.2d 31, 38 (Minn. 1990), the court adopts Model Penal Code definition of deadly force. The court also notes that the United States Supreme Court has adopted for Fourth Amendment analysis purpos and for purposes of 42 U.S.C. § 1093 the Model Penal Code's rule as to permissible use of deadly force. That Model Penal Code provision, however,

specifically limited to the use of deadly force by a peace officer attemptin to act as such in either arresting an individual, preventing a crime, or preventing escape from custody. See, ULA, Model Penal Code § 3.07 (1974). That is the definition of the use of deadly force also largely adopted by th United States Supreme Court in Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 1699 (1985). The Restatement of Torts Second, in section 131 (1965), when commenting on the use of force intended or likely to cause death,

deadly force, likewise limits the use of such force to a situation in which privileged arrest is made. In comment C to section 131, the author states:

> This section states the rule which determines the existence of a privilege to use force intended or likely to cause death for the purpose of affecting any arrest which is privileged.

ALI, Restatement of Torts Second, 234 (1965). Other comments to the Restatement of Torts Second also specifically limit the phrase "use of deadl force" to a situation in which a peace officer or a private person is attempting to effectuate an arrest, prevent a crime, or prevent a suspect fr fleeing. A review of the legal literature on the subject also affirmatively discloses that the sole context in which the phrase "use of deadly force" occurs with respect to a peace officer is in a situation similar to that previously discussed, that is, where a peace officer, on or off duty, is attempting to effectuate an arrest, prevent the commission of a crime, or prevent a suspect from fleeing.
Annotation, Deadly Force in Arrest of Fleeing Felon, 83 ALR3d 174, 176-77 (1978), states:

> This annotation, without attempting to be exhaustive, collects and analyzes illustrative civil and criminal cases defining the modern status of the rules governing a peace officer's right to use deadly force in arresting or attempting to arrest a fleeing felon.

Annotation, Arrest of Misdemeanant -- Intentional Force, 83 ALR3d 238, 241 (1978), states:

> This annotation collects and analyzes the cases in which a civil action was initiated against a peace officer to recover damages for death or personal injuries caused by the officer's use of intentional force in arresting or attempting to arrest a person suspected of having committed a misdemeanor.

Similarly, at page 243 of the same annotation, the following statement is made:

> The basic rule governing the conduct of a peace officer in making an arrest is that he may use whatever force is necessary to effect the arrest, but he may not use excessive force. This rule is, of course, generally applicable to the arrest involving misdemeanants. However, despite the broad implications of such rule, it has been universally held that a peace officer may not use deadly force against a fleeing misdemeanant even though such force is necessary to prevent the suspect's escape.

A review of both annotations and all of the commentary cited in the annotati
uniformly discloses that the phrase "the use of deadly force" when applied t
peace officer is meant to have a specialized meaning related to a situation
arrest, prevention of crime, or the prevention of escape of a suspect. As
such, the phrase has acquired a specialized meaning.

The Board admits that every case in Minnesota dealing with Minn. Stat. § 609.066 (1992) and the applicable rule relate to a peace officer acting as such. That is no mere coincidence: it results from the limited scope of th statute and rule. If the construction of the statute and rule advocated by Disciplinary Committee is adopted, there would always be grounds for sanctio against a peace officer's license when he or she used deadly force off-duty self defense or other legally recognized justified situations.

The committee argues that Officer Waletzki's conduct might have endange other persons and characterizes the construction of the rule and statute suggested by the Respondent as sanctioning dangerous conduct. That certainl is not the intention of the Administrative Law Judge. The criminal conduct Officer Waletzki might, if appropriate, have been charged as a felony and so prosecuted. It was not. The City of Minneapolis, under their Civil Service Code, could have discharged Officer Waletzki for his conduct. It did not do so. The only issue before the Administrative Law Judge is the proper construction of Minn. Rules, pt. 6700.1600 B (1991). The Board, in its rule has stated that it does not intend or wish to review civil service determinations on discipline by other police departments. Minn. Rules, pt. 6700.1500 (1991). The Board's apparent dissatisfaction with the resolution the disciplinary proceeding against Officer Waletzki by the City of Minneapo does not provide a basis for enlarging the application of Minn. Rules, pt. 6700.1600 B (1991).

The Administrative Law Judge determines that Minn. Rules, pt. 6700.1600 (1991), applies only when a peace officer is attempting to act as such, in effectuating an arrest, preventing the commission of a crime, or preventing suspect from fleeing. When private conduct is involved in which the peace officer is not attempting to act as a peace officer, Minn. Rules, pt. 6700.1 A (1991), which relates to conviction for a felony offense, applies. That provision does not apply to Officer Waletzki's conduct. It is undisputed th Officer Waletzki was charged with a misdemeanor violation involving reckless discharge of a weapon. After a plea of guilty and after satisfactory completion of the requirements of his stayed sentence, Officer Waletzki's pl was vacated and the matter was dismissed on motion of the prosecutor. Memorandum in Opposition to Motion to Dismiss and in Support of Jurisdiction of POST Board, p. 5.

JLL