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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1775**

Richard Duncan,
Relator,

vs.

County of Chisago,
Respondent.

**Filed June 24, 2019
Affirmed
Cochran, Judge**

Chisago County Board of Commissioners

Marshall H. Tanick, Teresa J. Ayling, Meyer Njus Tanick, PA, Minneapolis, Minnesota
(for relator)

Janet Reiter, Chisago County Attorney, Center City, Minnesota; and

Dyan Jean Ebert, Cally R. Kjellberg-Nelson, Quinlivan & Hughes, P.A., St. Cloud,
Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Florey, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Relator Richard Duncan, the former Chisago County Sheriff, is subject to a federal
lawsuit by another former employee of the sheriff's office. The lawsuit is related to

Duncan's conduct towards the employee during the time that Duncan was sheriff. Duncan requested that Chisago County (the county) defend and indemnify him in the lawsuit pursuant to Minn. Stat. § 466.07 (2018). The Chisago County Board of Commissioners (the board) declined to defend and indemnify Duncan, finding that the underlying conduct, which Duncan admitted to, was not done in the performance of his duties as sheriff. The board also found that Duncan's conduct constituted malfeasance and that Duncan acted in bad faith. Duncan appeals the board's decision by writ of certiorari. Because we conclude that the board's decision is consistent with the law and supported by substantial evidence, we affirm.

FACTS

Relator Richard Duncan was the county sheriff from January 2011 until May 2018, when he voluntarily retired. In the fall of 2017, in a one-on-one meeting in his office, Duncan told a subordinate employee of the sheriff's office that he had received three letters from an anonymous person. He showed one of the letters to the employee. The letter said that the author wanted to control Duncan and the employee. The author demanded that Duncan and the employee spend several nights at a hotel together in Bemidji. The letter threatened the employee's children and referenced where the employee lived and that she was married.

Duncan expressed concern for the employee's children and suggested that they follow the author's instructions. He told the employee that he had not told anyone, including other law enforcement personnel, about the letters and instructed the employee

to not tell anyone about the letters. Duncan told the employee that he would find a training in Bemidji during the dates that the author wanted them to stay in a hotel together.

Four days after he showed the employee the letter, Duncan sent an email from his personal email account to the employee indicating that the author had sent three more letters. Duncan stated that the letters were signed by a person who called himself “Control Freak.” Duncan typed the letters into the email.

The first letter was addressed to both Duncan and the employee. Control Freak said that the two must stay at a particular hotel in Bemidji in a room with a king sized bed, drive a particular route to get to the hotel, and bring swimsuits and several other items. Duncan told the employee that he would make reservations at the hotel.

The second letter was addressed only to the employee. Duncan claimed that he found the letter near the employee’s home. Control Freak said that he knew where the employee lived and that he could have hurt her kids while she was out of town.

The third letter was addressed only to Duncan. It contained threats to Duncan’s wife.

The employee began to believe that Duncan was writing the letters under the Control Freak alias. The employee feared that Duncan would escalate the situation. Duncan again emailed the employee, noting his belief that Control Freak would demand that they have sex on the Bemidji trip. He again expressed concern that his family or the employee’s family would get hurt if they did not follow Control Freak’s demands. Duncan later sent the employee an email suggesting that they not discuss the letters while at work.

Two days after he sent the employee the email with the Control Freak letters, Duncan emailed the employee and told her that if she did not want to go on the trip, she did not have to go. Duncan said that he was still going to Bemidji and that he planned to try to identify Control Freak. The following day, the employee told Duncan that she would not go on the trip.

Eleven days after Duncan first discussed the letters with the employee, Duncan discussed Control Freak with the employee for the last time. Duncan told the employee that Control Freak hacked into his phone and destroyed his personal data.

After several months, the employee reported the incident to human resources. The county retained outside counsel to conduct an investigation. Duncan did not participate in an interview for the investigation, but he admitted that he wrote the Control Freak letters. Duncan voluntarily retired in May 2018.

The employee brought a civil lawsuit in federal court that alleged several claims against both the county and Duncan. Duncan requested that the county defend and indemnify him in the lawsuit pursuant to Minn. Stat. § 466.07. In support of his request, he submitted a letter from his doctor that explained that Duncan suffered from Post-Traumatic Stress Disorder (PTSD). The doctor said that PTSD affected Duncan's behavior.

At an October 2018 meeting, the board addressed Duncan's request for defense and indemnification. Duncan chose not to attend the meeting. At the meeting, the board considered a report prepared by outside counsel summarizing the results of her investigation, the complaint that the employee filed in the federal lawsuit, Duncan's written

request for defense and indemnification, a letter sent by Duncan’s attorney in support of his request for defense and indemnification, and the letter written by Duncan’s doctor about his PTSD diagnosis. The board decided that the county would not defend or indemnify Duncan in the lawsuit because Duncan’s conduct was not related to the performance of his duties as sheriff, Duncan’s acts constituted malfeasance, and Duncan’s acts were carried out in bad faith with the intent to deceive and manipulate the employee. At the meeting, the board passed a formal resolution denying Duncan’s request for defense and indemnification.

Duncan appeals by writ of certiorari.

D E C I S I O N

In reviewing the merits of a certiorari appeal, this court examines whether “the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.” *Anderson v. Comm’r of Health*, 811 N.W.2d 162, 165 (Minn. App. 2012), *review denied* (Minn. Apr. 17, 2012). Appellate courts review quasi-judicial decisions, such as this one, under a “limited and nonintrusive standard of review.” *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 635 (Minn. 2012) (quotation omitted). “[Q]uasi-judicial determinations will be upheld unless they are unconstitutional, outside the agency’s jurisdiction, procedurally defective, based on an erroneous legal theory, unsupported by substantial evidence, or arbitrary and capricious.” *Cole v. Metro. Council HRA*, 686 N.W.2d 334, 336 (Minn. App. 2004) (quotation omitted). Under this standard, appellate courts “may not substitute [their] own findings of fact” for those of the county, or “engage in a de novo review of

conflicting evidence.” *Sawh*, 823 N.W.2d at 635. We will uphold the county’s decision if it “has explained how it derived its conclusion and [its] conclusion is reasonable on the basis of the record.” *Id.* (quotation omitted).

A municipality must defend and indemnify its officers and employees if 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. The board decided not to defend and indemnify Duncan because it found that Duncan’s conduct failed both of the statutory requirements—it found he was not acting in the performance of the duties of sheriff and that he was guilty of malfeasance and bad faith.

Duncan challenges the board’s determinations on both of the statutory requirements. With regard to the first prong, he argues that the board’s decision was contrary to law and was not supported by substantial evidence. He also challenges the second prong, arguing that the evidence does not support the board’s finding that his conduct was malfeasance and done in bad faith. We are not persuaded.

I. The board did not erroneously apply the law in determining whether Duncan was “acting in the performance of the duties of the position” under Minn. Stat. § 466.07, subd. 1.

Duncan argues that the board interpreted the language “acting in the performance of the duties of the position” too narrowly when it concluded that Duncan was not acting in the performance of his duties within the meaning of Minn. Stat. § 466.07, subd. 1(1). Duncan contends that the performance-of-duties prong of Minn. Stat. § 466.07, subd. 1(1), should be interpreted to require defense and indemnification when the officer or

employee's conduct is within his or her "course and scope of employment." The statute, however, does not contain that language—it instead specifically requires defense and indemnification if the officer or employee "was acting in the performance of the duties of the position." *Id.* Duncan relies on principles of vicarious liability and respondeat superior to support his argument. But Duncan cites no authority to support his contention that these vicarious liability principles are incorporated into the statute, or that the statute is ambiguous and should be interpreted to incorporate them.

"If a statute is unambiguous, we apply the statute's plain meaning." *State v. Overweg*, 922 N.W.2d 179, 183 (Minn. 2019) (quotation omitted). The clause "acting in the performance of the duties of the position" is not ambiguous. Its terms have a readily understandable, single meaning. Under the plain language of the statute, the board needed only to determine whether Duncan was "acting" (as in, taking some action or engaging in some conduct) "in the performance of the duties of the position" (as in, while fulfilling some requirement and expectation of a sheriff).

Duncan also asserts that we should apply legal principles concerning an insurer's duty to defend and indemnify its clients in interpreting whether the county is required to defend and indemnify in this case. *See Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 390 (Minn. 1979) ("Any ambiguity [regarding an insurer's duty to defend] is resolved in favor of the insured, and the burden is on the insurer to prove that the claim clearly falls outside the coverage afforded by the policy."). An insurer's duty to defend, however, is "contractual in nature." *Id.* The county's obligation to defend and indemnify its officers and employees is statutory, and only triggered when specific requirements are met. Minn.

Stat. § 466.07. We are not persuaded that insurance-coverage principles apply to this case given the unambiguous language of the statute.

Because the statute's unambiguous language requires defense and indemnification only when the officer or employee "was acting in the performance of the duties of the position," the board's decision to decline defense and indemnification to Duncan was proper if substantial evidence supported its finding that Duncan was not acting in the performance of his duties as sheriff.

II. Substantial evidence supports the board's determination that Duncan was not acting in the performance of his duties as sheriff.

Duncan argues that the board's finding that he was not acting in the performance of his duties was not supported by substantial evidence. He offers several arguments to support his assertion that the conduct was done in the performance of his duties. He argues that some of the conduct occurred while he was at work, that the conduct was directed toward a subordinate employee, and that there was a discussion of attending a work-related conference. Moreover, he argues that addressing threats, such as the ones that he made to the employee, is a duty of the sheriff. The county maintains that the evidence in the record clearly supports the board's finding.

The duties of a county sheriff are expressly defined by statute:

The sheriff shall keep and preserve the peace of the county, for which purpose the sheriff may require the aid of such persons or power of the county as the sheriff deems necessary. The sheriff shall also pursue and apprehend all felons, execute all processes, writs, precepts, and orders issued or made by lawful authority and to the sheriff delivered, attend upon the terms of the district court, and perform all of the duties pertaining to the office, including investigating recreational vehicle accidents

involving personal injury or death that occur outside the boundaries of a municipality, searching and dragging for drowned bodies, and searching and looking for lost persons. When authorized by the board of county commissioners of the county the sheriff may purchase boats and other equipment including the hiring of airplanes for search purposes.

Minn. Stat. § 387.03 (2018).¹

Considering the statutorily defined duties, we conclude that substantial evidence in the record supports the board's finding that Duncan was not acting in the performance of his duties when he attempted to convince his subordinate employee to spend several nights in a hotel with him by creating an alias who threatened the employee and her family. As the board correctly determined, the letters by Duncan under the Control Freak alias were not related to any work of the sheriff's office in keeping and preserving the peace of the county or any other actual work function of the sheriff's office.

Duncan's arguments that his conduct was done in the performance of his duties as sheriff because he discussed attending a conference with the employee and because he was addressing a threat to the employee are unpersuasive. Duncan suggested that the two attend a conference as an excuse to get the employee to spend several nights at a hotel with him, not to fulfill any of his duties as a sheriff. Similarly, there is no evidence to support Duncan's argument that he was addressing a threat to an employee. Rather, the record shows that Duncan *made* the threat to the employee; he encouraged her not to discuss it with anyone else; and he did not discuss it with anyone at the sheriff's office. Though

¹ Minn. Stat. § 387.04 (2018) provides additional duties of sheriffs in counties with a population of 300,000 or more.

some of Duncan's conduct occurred while he was at work, Duncan was not fulfilling any requirement of the duties of sheriff when he engaged in the conduct at issue. Substantial evidence supports the board's finding that Duncan was not acting to fulfill his duties as sheriff when he carried out the Control Freak ploy.

Duncan makes an additional argument regarding the performance-of-duties prong—that his conduct was a product of his PTSD that was aggravated by his work as sheriff. In support of this position, Duncan submitted a letter from his doctor to the board. The letter stated in part: “All of his behavior toward the [subordinate employee] took place during the performance of his job. None of these behaviors had an ulterior motivation or illicit purpose. Rather, it seemed to be attributable to work-related stress occurring in his law enforcement activities, especially in Chisago County.” Based on the contents of this letter, Duncan argues that the board's decision that he was not acting in the performance of his duties was not supported by substantial evidence and was arbitrary. The record reflects otherwise.

The board expressly noted that it considered the doctor's letter in its resolution to deny Duncan defense and indemnification. The board denied the request because it found that Duncan's conduct was not done in the performance of his duties. The record supports the board's determination. While the doctor's letter may provide insight as to why Duncan engaged in the conduct towards the subordinate employee, the letter does not contain any information relevant to whether Duncan's acts towards the employee were done to fulfill any duty, requirement, or expectation of the sheriff. There is no evidence to suggest that Duncan even subjectively believed that he was acting in the performance of his duties by

creating the Control Freak alias and threatening the employee. In fact, the evidence supports instead that Duncan actively attempted to conceal his conduct from other employees of the sheriff's office by telling the employee not to tell anyone about the Control Freak letters. Consequently, we reject Duncan's argument and conclude that substantial evidence supports the board's finding that Duncan was not acting in the performance of his duties despite the evidence of his PTSD diagnosis.

Because the board could properly deny defense and indemnification solely by finding that Duncan was not acting in the performance of his duties, we do not reach Duncan's arguments regarding the board's findings of malfeasance and bad faith. See Minn. Stat. § 466.07, subd. 1 (requiring defense and indemnification only when 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" (emphasis added)).

In sum, because the board's decision to deny defense and indemnification was consistent with Minn. Stat. § 466.07 and was supported by substantial evidence, we affirm.

Affirmed.