

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
Case Type: Civil Other/Miscellaneous

David Bicking, Michelle Gross, Janet Nye,
and Jill Waite,

Petitioners,

v.

Casey Joe Carl,
City Clerk, City of Minneapolis,

and

Grace Wachlarowicz,
Director of Elections, City of Minneapolis,

and

Ginny Gelms,
Elections Manager, Hennepin County,

and

Minneapolis City Council,

and

City of Minneapolis,

Respondents.

**PETITIONERS' REPLY
MEMORANDUM FOR CORRECTION
OF BALLOT ERROR AND FOR
DECLARATORY JUDGMENT**

Court File No. 27-CV-16-11839

Introduction

The City has narrowed the issues in this case to express preemption and conflict preemption. As the proposed amendment is not on the same subject as Minn. Stat. §§ 466.06 or 466.07, state law does not expressly preempt it. With regard to the alleged conflict with state law, the proposed amendment allows Minneapolis to furnish legal counsel, defend its officers,

pay litigation costs, and indemnify its officers as required by state statutes. In addition, the formulation of a policy regarding the selection of police officers, based in part on the proposed amendment's requirement that officers carry individual liability insurance, is not a new term or condition of employment about which Minneapolis must meet and negotiate with the Police Officers Federation of Minneapolis ("Federation"). For these reasons, the ballot for the November 2016 election must include the proposed amendment.

I. The City Concedes that State Law Does Not Occupy the Field or Impliedly Preempt the Proposed Amendment

State law and the proposed amendment occupy different fields. The City argues that state preemption of local ordinances occurs in four situations, but it concedes that two of those situations are not applicable here:

State preemption of local ordinances occurs in four situations: (1) when a conflict exists between a state statute and a local ordinance; (2) where the legislature intended to occupy the field; (3) where the statutory scheme includes implicit preemption of the subject matter; and (4) where the legislature explicitly preempts the field. *Mangold Midwest Co. v. Vill. of Richfield*, 143 N.W.2d 813, 819 (Minn. 1966); *see also State v. Kuhlman*, 722 N.W.2d 1, 4 (Minn. App. 2006). Here, the proposed amendment is invalid due to express and conflict preemption.

Respondents' Memorandum, p. 6.

The City has therefore narrowed the issues in this case to express preemption and conflict preemption.

II. State Law Does Not Expressly Preempt the Proposed Amendment

The City argues that Minn. Stat. § 466.11, "by its plain language, expressly preempts *any* local charter provision." *Respondents' Memorandum*, p. 6 (emphasis added). This flatly contradicts the statutory language: "Sections 466.01 to 466.15 are exclusive of and supersede all home rule charter provisions and special laws *on the same subject* heretofore and hereafter adopted." Minn. Stat. § 466.11 (emphasis added).

The proposed amendment is not on the same subject as Minn. Stat. §§ 466.06 or 466.07. The subject matter of Minn. Stat. § 466.06 is blanket or group liability insurance procured by municipalities against liability resulting from torts. The subject matter of the proposed amendment is individual liability insurance, not group liability insurance; procured by each Minneapolis police officer, not by the City; and for willful or malicious acts and acts outside the scope of officers' employment (e.g., intentional violations of state statutes such as the Minnesota Human Rights Act, Minn. Stat. Chapter 363A;¹ federal statutes such as the Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et seq.*;² or the Bill of Rights), not the City's "torts and those of its officers."

The subject matter of Minn. Stat. § 466.07 is the circumstances under which a municipality must indemnify its police officers. The proposed amendment is not on the same subject as Minn. Stat. § 466.07, because the proposed amendment does not address when a municipality must indemnify its officers. Indeed, the proposed amendment expressly recognizes the City's obligations under state law regarding indemnification, and only prohibits indemnification when state law does not require it.³

Therefore, state law does not expressly preempt the proposed amendment.

III. State Law Does Not Conflict with the Proposed Amendment

The City argues that the proposed amendment precludes it from furnishing legal counsel, defending its officers, paying litigation costs, and indemnifying its officers. Yet the City concedes that "the proposed charter amendment says *nothing* explicitly about defense against

¹ See, e.g., *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567 (Minn. 1994).

² See, e.g., *McDonough v. Anoka County*, 799 F.3d 931 (8th Cir. 2015).

³ The City concedes that state law does not occupy the field, but even if the City had not conceded this, it is substantiated by the fact that § 466.07 leaves ample room for the City Council's discretion, on a case-by-case basis, regarding whether to defend or indemnify its officers.

claims or legal representation and only expressly mentions liability insurance.” *Respondents’ Memorandum*, p. 12 (emphasis added). The proposed amendment would require individual liability insurance, but would never prevent the City from deciding to defend an officer. As to indemnification, the proposed amendment requires individual liability insurance that indemnifies officers only when state law does not require the City to indemnify them.

The City also argues that under the proposed amendment, some officers will personally pay a portion of their insurance premium payments, which are “payments for their eventual defense” and thereby (somehow) in conflict with Minn. Stat. §§ 466.07 and 471.44. *Respondents’ Memorandum*, p. 12. This analysis is cut from whole cloth. Section 466.07 only requires the City to defend and indemnify an officer when the officer “was acting within the scope of his or her job duties and was not guilty of malfeasance, willful neglect of duty or bad faith.” Minn. Stat. § 466.07. Similarly, Minn. Stat. § 471.44 only requires the City to furnish legal counsel and pay litigation costs when the arrest that resulted in a lawsuit was “made in the good faith performance of official duties.” Minn. Stat. § 471.44.

The proposed amendment requires individual liability insurance for willful or malicious acts and acts outside the scope of officers’ employment. Although some officers will pay a portion of their insurance premium payments, such payments are *not* for their “eventual defense” required by Minn. Stat. §§ 466.07 or 471.44. Instead, such payments are for their defense (or indemnification) for willful or malicious acts, or acts outside the scope of their employment, as Minneapolis is not required to defend (or indemnify) them for such acts.

Therefore, state law does not conflict with the proposed amendment.

IV. The Insurance Coverage Proposed by the Amendment is Legal

The insurance coverage required by the proposed amendment would not relieve officers from the consequences of serious criminal acts. Insurance policies protect insureds from the

financial consequences of their acts, “even those undertaken with breathtaking stupidity and resulting in serious injury.” *State Farm Fire and Cas. Co. v. Schwich*, 749 N.W.2d 108, 115 (Minn. App. 2008). Yet insurance policies, even those covering wrongful acts,⁴ do not protect insureds from criminal charges.

The City also argues that when Minneapolis and an insurance company could cover a specific act, both entities “will demand to provide the defense or . . . will refuse to indemnify the officer.” *Respondents’ Memorandum*, p. 15. Many officers, however, choose to purchase their own homeowners insurance or renters insurance, which frequently carries personal liability insurance coverage. Even though such insurance could in some situations cover an act the City is also required by state law to cover, the City has been and will remain free to furnish legal counsel, defend its officers, pay litigation costs, and indemnify its officers when required by state law.⁵

With regard to punitive damages, the amendment does not address whether the proposed insurance would cover such damages. Notably, state law requires Minneapolis to indemnify officers for punitive damages under certain circumstances. *See* Minn. Stat. § 466.07. To argue that this is a fatal flaw in the amendment therefore strains credulity.

V. The Language in the Proposed Amendment Requires Individual Liability Insurance Only for Willful or Malicious Acts and Acts Outside the Scope of Employment

The City argues that the language in the proposed amendment requires individual liability insurance not merely for willful or malicious acts and acts outside the scope of employment, but for acts already addressed by Minn. Stat. §§ 466.07 or 471.44. Even if the Court agrees that the

⁴ *See, e.g., New Madrid County Reorganized School Dist. No. 1, Enlarged v. Continental Cas. Co.*, 904 F.2d 1236, 1240-41 (8th Cir. 1990).

⁵ Even if another entity providing liability insurance demanded to provide a defense, this would not preclude the City from also furnishing legal counsel.

plain language of the amendment suggests individual liability insurance would cover additional acts, the City has not shown that those additional acts are ones already addressed by state law. For example, the individual liability insurance could, in addition to covering willful or malicious acts and acts outside the scope of employment, also cover malfeasance, willful neglect of duty, or bad faith without conflicting with state law.⁶

The word “primary” does not in any way necessitate that the proposed insurance cover any acts addressed in Minn. Stat. §§ 466.07 or 471.44. Primary insurance only takes precedence when more than one policy covers the *same* loss. It does not expand the acts that a specific insurance policy covers. For example, an insurance policy covering a specific vehicle is primary coverage when it “is designed to cover liability from zero to certain policy limits,” as opposed to “excess coverage,” which “is designed to cover liability only after those initial limits are exhausted.” *Contl. Cas. Co. v. Reserve Ins. Co.*, 238 N.W.2d 862, 865 (Minn. 1976). The word “primary” does not mean such a policy covers other vehicles.

VI. The Police Officers Federation of Minneapolis Does Not Have Standing to Intervene

The Federation argues that it has “an interest relating to the property or transaction which is the subject of the action and . . . is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest.” Minn. R. Civ. P. 24.01. Yet the Federation is not a person; nor is it a taxpayer. *See Hous. and Redevelopment Auth. of Minneapolis v. City of Minneapolis*, 198 N.W.2d 531, 539 (Minn. 1972) (Kelly, J., dissenting). Furthermore, any interest the Federation has “is adequately represented by existing parties.” Minn. R. Civ. P. 24.01.

⁶ The Court “must afford” the proposed amendment “the same presumption of constitutionality as [it] would apply to a duly enacted legislative statute.” *Minneapolis Term Limits Coalition v. Keefe*, 535 N.W.2d 306, 310 (Minn. 1995) (Gardebring, J., dissenting) (citing *Guilliams v. Commissioner of Revenue*, 299 N.W.2d 138, 142 (Minn. 1980)).

Even if the Court grants intervention, the Federation incorrectly defines “term or condition of employment,” a phrase essential to its argument. The Federation cites *City of Richfield v. Loc. No. 1215, Intern. Ass’n of Fire Fighters*, 276 N.W.2d 42, 49 (Minn. 1979) for the proposition that “when a labor issue affects the employees’ welfare, it is a term or condition of employment.” In fact, the Minnesota Supreme Court in *City of Richfield* stated that “[i]f an issue in a labor dispute affects employees’ welfare, *and is not part of managerial function*; it is a term or condition of employment.” *City of Richfield, supra*, 276 N.W.2d at 49 (emphasis added).

The managerial function includes, but is not limited to, “selection of personnel.” Minn. Stat. § 179A.07, subd. 1. The formulation of policy is also part of the managerial function. *See LELS v. City of Luverne*, 463 N.W.2d 546, 548 (Minn. App. 1990) (“At the outset, respondent does not challenge the determination of the trial court that the formulation of the physical examination policy is a matter of inherent managerial right.”). Therefore, the formulation of a policy regarding the selection of police officers, based in part on the proposed amendment’s requirement that officers carry individual liability insurance, is not a new term or condition of employment about which Minneapolis must meet and negotiate with the Federation.

Conclusion

For the reasons stated above, Petitioners respectfully request that this Court issue an Order, pursuant to either Minn. Stat. § 204B.44 or Minn. Stat. § 555, requiring Respondents to prepare a ballot for the November 8, 2016 election that includes the proposed amendment.⁷

⁷ If the Court concludes it is a close question, the ballot should include the proposed amendment, which can be crossed out if a higher court so rules. Otherwise the City may have to pay millions of dollars for a special election in the event Petitioners prevail on appeal.

Dated: August 19, 2016

LAW OFFICE OF JOSHUA R. WILLIAMS



Tim M. Phillips, MN Bar No. 390907
2836 Lyndale Ave. S, Suite 160
Minneapolis, MN 55408
Telephone (612) 486-5540
Fax (612) 605-1944
tphillips@jrwilliamslaw.com

ATTORNEY FOR PETITIONERS