

that they are entitled to some weight. When a witness participates in a police investigation and gives a recorded statement to an officer about a matter that has no direct effect on her and is consistent with her immediate 911 call, the statement should be considered. Ms. Johansen saw what she believed was inappropriately aggressive behavior by the Respondent and reported it immediately. Ms. Johansen's initial call and statement generally corroborated Mr. Dahl's complaint to Internal Affairs and his recorded statement to Sergeant Case. The consistency of the statements, made by two people who had no connection to each other, lends additional credibility to them. In addition, Mr. Dahl's statement was later confirmed by his verified complaint.

Although the statements are entitled to some weight, it is not necessary to rely solely on them to determine that the Respondent acted inappropriately. Whether he forced Mr. Dahl off the bicycle or distracted him so that he fell off is not determinative, nor is the disagreement about whether Respondent shouted and acted aggressively. There is no dispute that Respondent chased after Mr. Dahl, handcuffed him, detained him, took Mr. Dahl's license out of his backpack, delayed Mr. Dahl from leaving while Respondent checked the license, and issued two citations.

Although Sergeant Case was not called as a witness in this case, he testified and was cross-examined before the Civil Service Commissioner. The Respondent was represented by counsel at that proceeding, and Sergeant Case's testimony was crucial to the issue presented in that proceeding, and specifically, what occurred on June 9, 2010. Although available for cross-examination, Sergeant Case was not questioned about Ms. Johansen's and Mr. Dahl's statements, the circumstances under which they were taken, or his recollection of the interviews.³⁸ The City's failure to call Sergeant Case to testify again in this proceeding, when his interviews were conducted according to established police department protocol, was not bar admission of the witness statements.

Deputy Chief Gerlicher was clear that the Respondent had no basis at all to chase or stop Mr. Dahl. As the officer in charge of police training and Internal Affairs, his opinion was given great weight. He is familiar with the role played by off-duty officers assisting parking ramp owners, he has directed traffic on many occasions, and he has trained and overseen other officers who do so. In his opinion, the Respondent was hired to help cars leave the parking ramp and enter traffic, but he was not directing traffic. If the bicyclist had been confused or had not heard the Respondent, the request to stop, even if appropriate, would not have been a lawful order. Even if the Respondent and Mr. Johnson were correct that Mr. Dahl was not forced off his bicycle, the Respondent's decision to handcuff him, hold him, and search his backpack for identification was not justified. Although the Respondent claimed that he had made a split-second decision, Deputy Chief Gerlicher did not believe that the situation warranted any action at all. In the Deputy Chief's view, the Respondent's actions went beyond what was reasonable under the circumstances, and by clipping Mr. Dahl's driver's license, he was just "messing" with Mr. Dahl to impose his authority. When the

³⁸ See Ex. 16A at 190-236.

Respondent issued a citation, he should have notified the dispatcher and received an incident number.

Deputy Chief Gerlicher did not dispute that an off-duty officer has the authority to take action when he or she witnesses a violation of the law, but he could not find any reason to believe that the law had been violated. Except for his own testimony, the Respondent offered no evidence that his actions were warranted.

The Respondent also objected to any reference to other incidents, specifically, an incident with a taxi driver that led to his 20-day suspension. The ALJ agrees that past acts are not evidence of his behavior on the day in question. However, the ALJ agrees with Deputy Chief Gerlicher that the complaints made by Ms. Johansen and Mr. Dahl should be given some additional weight because the behavior they alleged and the Respondent's attitude about the event on June 9, 2010, were consistent with his actions and his attitude about the July 2010 incident with the taxi driver. That is, it was not out of character for the Respondent to have an overly aggressive response to a minor incident, and to unnecessarily inconvenience a member of the public.

Minnesota Rule of Evidence 406 states that evidence of the habit of a person is relevant to prove that the conduct of the person was consistent with that habit. Concerns were raised when the Respondent was disciplined for his treatment of the cab driver that Respondent was overly rigid and failed to appreciate that his treatment of members of the public was heavy-handed and mean-spirited.³⁹

Respondent also objected to the admission of Exhibit 12, the Civil Service Commission report. The report was admitted, but given little weight. It is not evidence of the facts disputed in this proceeding. Rather, the transcript of the hearing was better evidence of the information presented during the Commission's proceeding. That hearing involved the same parties, the June 9, 2010, incident and related CAPRS report were at issue, the Respondent was represented by counsel, and the testimony was given under oath. Because his job was at stake, Respondent could be expected to vigorously defend his position in that proceeding.

The transcript of the proceeding, Exhibits 16A and 16B, was admitted and its use limited to five purposes: to review the testimony of the unavailable witness, Jacob Johnson; to review any testimony of Sergeant Case concerning interviews of Ms. Johansen, Mr. Dahl, and Respondent about the events of June 9, 2010; to compare the Respondent's statements; to consider testimony about entry of information into CAPRS; and as evidence that Respondent's conduct on June 9, 2010, was consistent with his habit of taking an overly aggressive, rigid approach to minor infractions.

The Respondent offered into evidence photos taken during the winter, several months after the incident.⁴⁰ The photographs were admitted for demonstrative purposes only, showing the location of the parking ramp entrance and exits, and to

³⁹ Ex. 12 at ¶10.

⁴⁰ Ex. 18.

assist the Respondent in his testimony concerning the location of the bicyclist and himself on June 9, 2010.

The City argues that the Respondent is not entitled to defense because he did not act in the performance of the duties of the position and was guilty of malfeasance in office, willful neglect of duty, or bad faith. An employee acts in the performance of the duties of his position when he furthers his employer's legitimate interests.⁴¹ As the Deputy Chief testified, the officer's presence on the streets in uniform has a generally salutary effect. For this reason, the City permits its officers to work off-duty in uniform. An off-duty officer would act in the performance of the duties of his position if he took appropriate action to address criminal behavior.

Respondent claimed that his actions were justified, but no person familiar with the standards for police conduct supported his claim. To the contrary, Deputy Chief Gerlicher was clear that Respondent had no basis to chase after Mr. Dahl, to apprehend and handcuff him, to issue him a citation or to cut his driver's license. Whether Respondent forced Mr. Dahl off his bike or shouted at him, as alleged by Mr. Dahl and verified by Ms. Johansen, is not determinative of the matter. The Respondent clearly stated that he believed he was acting within the scope of his authority to address Mr. Dahl's decision to start to move in front of the parking ramp exit without permission, and to invalidate Mr. Dahl's license. Deputy Chief Gerlicher strongly disagreed.

"Malfeasance" is willful, illegal or malicious conduct that affects the performance of official duties rather than conduct that is purely personal, and relates to something substantial that affects the rights and interest of the public.⁴² Respondent acknowledged that he took action in his role as a police officer and not as a private individual. The Deputy Chief concluded that the Respondent's actions were willful and malicious, that they affected the rights of Mr. Dahl, and, because Respondent was in uniform, his actions reflected poorly on the police department.

"Neglect of duty" is "a careless or intentional failure to exercise due diligence in the performance of an official duty."⁴³ Respondent's failure to call the dispatcher to get an incident number and failure to properly enter the citation into the CAPRS system were evidence that he failed to exercise due diligence in the performance of an official duty. Perhaps of less significance, his failure to call the dispatcher when he reported to work at the parking ramp also violated the police department's policy.

The Respondent's choice to detain Mr. Dahl and then to cut his driver's license were intentional acts with no legal justification. In the similar context of official immunity,

⁴¹ *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 15 (Minn. 1979).

⁴² *Jacobsen v. Nagel*, 255 Minn. 300, 304, 96 N.W.2d 569, 573 (Minn. 1959); *State v. Burnquist*, 141 Minn. 308, 321-22, 170 N.W. 201, 203 (Minn. 1918) (citations omitted); see also Minn. Stat. § 351.14, subd. 2, relating to resignations, vacancies, and removals from public office, malfeasance defined as "the willful commission of an unlawful or wrongful act by a state officer other than a judge in the performance of the officer's duties that is substantially outside the scope of the authority of the officer and that substantially infringes on the rights of any person or entity."

⁴³ *Anderson v. St. Louis County*, No. A-04-2048, 2005 WL 1389881 (Minn. App. 2005) (unpublished), citing *In re Olson*, 211 Minn. 114, 117, 300 N.W. 398, 400 (1941).