STATE OF MINNESOTA
IN COURT OF APPEALS
A10-61

Jay R. Little,
Relator,

vs.

Arrowhead Regional Corrections,
Respondent,

Commissioner of Veterans Affairs,
Respondent.

Filed April 5, 2011
Affirmed
Wright, Judge

Minnesota Department of Veterans Affairs
OAH Docket No. 4-3100-19952-2

Paul Lelii, St. Paul, Minnesota (for relator)

Mark Rubin, St. Louis County Attorney, Thomas G. Stanley, Assistant St. Louis County Attorney, Duluth, Minnesota (for respondent Arrowhead Regional Corrections)

Lori Swanson, Attorney General, Jocelyn F. Olson, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Commissioner of Veterans Affairs)

Considered and decided by Stoneburner, Presiding Judge; Wright, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

WRIGHT, Judge

Relator challenges the denial of his petition for relief under the Veterans Preference Act. The Commissioner of Veterans Affairs determined that, because relator resigned from his employment, he is not entitled to the relief he seeks. We affirm.

FACTS

Relator Jay R. Little is an honorably discharged United States Navy veteran. Little worked as a probation officer for respondent Arrowhead Regional Corrections (Arrowhead) in St. Louis County. Arrowhead granted Little personal leave from March 2006 until March 2007 and additional leave under the Family Medical Leave Act (FMLA) from March 2008 until June 2008. Little did not return to work when his FMLA leave expired, and he made several requests for additional personal leave. Arrowhead permitted Little to use his accrued sick leave and vacation leave while those requests were pending. In July 2008, Arrowhead advised Little that he could request disability leave, but Little declined that option and maintained his requests for personal leave. Little's personal-leave requests were denied, and he exhausted his sick leave and vacation leave by August 1, 2008.

Arrowhead advised Little that he was expected to return to work on August 4, 2008, unless Arrowhead received a proper request for disability leave with supporting medical documentation. Little submitted a physician-signed form letter with a checked box indicating that he is unable to work and a letter stating: "If I am being coerced and forced into the only acceptable option for the same exact outcome or I can assume to

expect further negative consequences, then you can classify it as a disability request for one year." On August 7, 2010, Arrowhead sent Little a letter advising him that it was not forcing or coercing him to do anything and again invited him to request disability leave and provide supporting medical documentation. Arrowhead also advised Little that his absence was unauthorized and that he needed to return to work immediately or submit a disability-leave request. A disability-leave-request form was included with the letter directing Little to indicate how many months' disability leave he was requesting and to provide the medical documentation supporting his request. Little did not request disability leave, provide any medical documentation, or return to work.

On August 13, 2008, Arrowhead advised Little that his unauthorized absence constituted a resignation. Under a collective bargaining agreement between Arrowhead and its employees, an employee who is absent for three consecutive work days without authorization is deemed to have resigned unless the board approves a subsequent request for unpaid leave. Little knew of this provision at least as early as April 2008.

Little petitioned the Minnesota Commissioner of Veterans Affairs, claiming a denial of his rights under the Veterans Preference Act (VPA) because Arrowhead terminated him without a hearing, in violation of Minn. Stat. § 197.46 (2010).[1] After a hearing on the petition, an Administrative Law Judge (ALJ) recommended that the commissioner grant the petition for relief, but only to the extent of directing Arrowhead

[1] Because the 2010 version of the applicable statutes does not change or alter the rights of the parties, we refer to the 2010 version of these statutes in our analysis. *See McClelland v. McClelland*, 393 N.W.2d 224, 226-27 (Minn. App. 1986) (indicating that appellate court applies current version of statute unless doing so alters matured or unconditional rights of parties or creates other injustice), *review denied* (Minn. Nov. 17, 1986).

to pay Little any back pay and accrued vacation leave and sick leave to which he was entitled between August 7 and September 23, 2008. The ALJ found that Little resigned in August 2008 with good cause attributable to Arrowhead because Little requested disability leave and Arrowhead failed to advise Little of what medical documentation he needed to provide to support that request. But the ALJ also found that Arrowhead adequately advised Little on September 23, 2008, of what medical documentation he needed to provide to Arrowhead, and Little's subsequent failure to comply with the requirement for medical documentation constituted a resignation without good cause attributable to Arrowhead.

On June 2, 2009, the commissioner adopted the ALJ's findings and recommendation. Both parties sought reconsideration.[2] The commissioner ordered the parties to submit additional evidence and briefs. On December 16, 2009, the commissioner rejected and modified some of the ALJ's findings, determining that Little was offered the opportunity to request disability leave but failed to do so and that his failure to return to work in August 2008 constituted a resignation without good cause attributable to Arrowhead. The commissioner denied Little's petition for relief.

Little petitioned this court to permit the record to be reopened for consideration of newly discovered evidence. On April 13, 2010, we remanded the case, ordering the commissioner to reopen the record and review additional evidence. *Little v. Arrowhead*

[2] Little also filed a certiorari appeal with this court. We held that the commissioner lost jurisdiction to rule on the request for reconsideration once the appeal was taken but that judicial economy warranted a remand to the commissioner. *Little v. Arrowhead Reg'l Corrs.*, 773 N.W.2d 344, 346-47 (Minn. App. 2009).

Reg'l Corrs., No. A10-61 (Minn. App. Apr. 14, 2010) (order). The commissioner admitted a privilege log prepared by Arrowhead's counsel and copies of four emails listed in that log. But the commissioner denied Little's request to review or admit other evidence. On July 8, 2010, the commissioner issued supplemental findings of fact and conclusions of law, which did not substantively modify the December 16, 2009 order. This appeal followed.

D E C I S I O N

We review a decision of the Commissioner of Veterans Affairs under the Administrative Procedure Act, Minn. Stat. § 14.69 (2010). *Brula v. St. Louis Cnty.*, 587 N.W.2d 859, 861 (Minn. App. 1999), *review denied* (Minn. Mar. 30, 1999). We, therefore, review the record to determine whether the commissioner's decision is the product of an unlawful procedure, affected by an error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 14.69. "Conflicts in the testimony and the weight to be given facts and circumstances as well as the inferences reasonably to be drawn therefrom are matters to be resolved by the agency, not the courts." *Jenson v. Civil Serv. Comm'n*, 268 Minn. 536, 538, 130 N.W.2d 143, 146 (1964). When considering questions of statutory interpretation, we are not bound by the agency's determination. *Arvig Tel. Co. v. Nw. Bell Tel. Co.*, 270 N.W.2d 111, 114 (Minn. 1978). But an agency's statutory interpretation is entitled to some deference when "(1) the statutory language is technical in nature, and (2) the agency's interpretation is one of long-standing application." *Id.*

We first consider whether, in light of the facts, Little was entitled to a VPA hearing. An honorably discharged veteran cannot be removed from public employment "except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing." Minn. Stat. § 197.46. But "a veteran who resigns, voluntarily or involuntarily, without good cause attributable to the employer is not entitled to notice and hearing under the VPA." *Brula*, 587 N.W.2d at 862.

Little argues that the commissioner erred by determining that he resigned from his employment with Arrowhead. Thus, we examine the record to determine whether the factual findings regarding Little's conduct are supported by substantial evidence. Our careful review of the record establishes that Arrowhead repeatedly advised Little that he could request disability leave; Little did not request disability leave; and Little refused to provide the necessary medical documentation showing that he suffers from an "extended illness or injury" rendering him unable to work, specifying the expected duration of disability leave, and justifying that requested duration. Little testified that he did not have approved leave of any kind on or after August 5, 2008, that he did not attempt to report to work during that time, and that he did not submit or plan to submit a disability-leave request.

Under the collective bargaining agreement between Arrowhead and its employees, an employee who is absent for three consecutive work days without authorization is deemed to have resigned. The commissioner found that Little did not report to work on August 4, 2008, or thereafter, and that Little knew that he had not been approved for any

type of authorized leave of absence at that time. The commissioner's findings are supported by substantial evidence.

Little asserts error in the commissioner's finding that he resigned because there is no evidence of an intent to abandon employment, such as a resignation letter. Although the relator in *Brula* submitted a resignation letter, the *Brula* court expressly considered and rejected an argument distinguishing voluntary and involuntary resignation. *Id.* at 860, 862. Thus, under the VPA, a finding of resignation does not depend on whether a resignation letter was submitted, and Little's failure to return to work with knowledge of Arrowhead's unauthorized-absence policy is sufficient to evince an intent to leave his employment.

Little also argues that his resignation was with good cause attributable to Arrowhead because he requested disability leave when he advised Arrowhead that, if he was being forced or coerced, Arrowhead could classify his personal-leave request as a disability-leave request; and Arrowhead ignored this request. But the commissioner found that no reasonable person would have interpreted Little's actions as a legitimate or sincere disability-leave request. The commissioner also found that Little knew that he would have to submit additional medical documentation but refused to do so. These findings support the commissioner's determination that Little resigned without good cause attributable to Arrowhead.

Little next argues that absence from work because of illness should not constitute resignation under the VPA as a matter of law. Little contends that, because the *Brula* court relied by analogy on unemployment-insurance cases, *Brula*, 587 N.W.2d at 861, we

should similarly rely on a provision of the unemployment-insurance statute that allows an employee to remain eligible for unemployment benefits when a serious illness or injury makes quitting the employment medically necessary, *see* Minn. Stat. § 268.095, subd. 1(7) (2010). But the relator in *Brula* also resigned for health reasons, and that fact did not affect the *Brula* court's decision even though the serious-illness exception in the unemployment-insurance statute was in effect at that time. *See Brula*, 587 N.W.2d at 860 (stating that relator suffered from posttraumatic stress disorder); Minn. Stat. § 268.095, subd. 1(6) (1998).

Even if we applied the serious-illness exception in the instant case, Little would fail to meet his burden of proof. *See Minchew v. Minn. Odd Fellows Home*, 429 N.W.2d 702, 703 (Minn. App. 1988) (explaining that employee has burden of proving that serious-illness exception applies). The serious-illness exception requires the employee to (1) inform the employer of the medical problem, (2) request an accommodation, and (3) receive no reasonable accommodation. Minn. Stat. § 268.095, subd. 1(7) (2010). These requirements are not met here. Little did not adequately inform Arrowhead of his medical problem, and he expressly refused to provide Arrowhead with additional medical documentation. Although Little requested accommodations in the form of FMLA leave, sick leave, and vacation leave, he failed to formally request disability leave. And Arrowhead made reasonable accommodations available to Little, granting him FMLA leave and multiple extensions of sick leave and vacation leave. Arrowhead also repeatedly advised Little that he could request disability leave and continued to provide him opportunities to do so even after he had been deemed to have resigned.

We next address Little's arguments that the commissioner's decision was arbitrary or capricious and the product of unlawful procedure because the commissioner failed to articulate specific reasons for rejecting and modifying the ALJ's findings and conclusions and failed to admit additional evidence. An agency's decision is arbitrary or capricious when it represents the agency's will rather than its judgment. *Henry v. Metro. Waste Control Comm'n*, 401 N.W.2d 401, 404 (Minn. App. 1987). Although an agency owes no particular deference to the ALJ's report, an agency's failure to give reasons for rejecting the ALJ's recommendation is evidence that the agency's decision was arbitrary or capricious. *In re Grand Rapids Pub. Utils. Comm'n*, 731 N.W.2d 866, 870 (Minn. App. 2007). "A decision or order that rejects or modifies a finding of fact, conclusion, or recommendation contained in the [ALJ's] report . . . must include the reasons for each rejection or modification." Minn. Stat. § 14.62, subd. 1 (2010).

Here, the commissioner did not adopt the ALJ's conclusion 11 because it is unsupported by record evidence, and the commissioner did not adopt the ALJ's conclusion 12 because it is irrelevant given the commissioner's decision regarding conclusion 11. The commissioner also explained that he modified the ALJ's findings of fact to conform to or more fully analyze the record evidence, including supplemental evidence. These explanations satisfy section 14.62. *See Bloomquist v. Comm'r of Natural Res.*, 704 N.W.2d 184, 190 (Minn. App. 2005) (holding that commissioner's rejections, modifications, and additions to ALJ's report were supported by references to the record and a memorandum explaining deviations and were not arbitrary or capricious actions).

Little also contends that the commissioner failed to follow this court's remand order requiring the commissioner to admit additional evidence. But the commissioner admitted a privilege log and four email transmissions referenced in the privilege log, as required by this court's remand order. The commissioner considered this additional evidence and found that this evidence does not contradict the commissioner's December 16, 2009 finding that Little did not submit a legitimate or sincere disability-leave request to Arrowhead. Moreover, the additional discovery that Little sought is outside the scope of the remand order, and the commissioner did not err by declining to consider it. The commissioner reasoned, and we agree, that because the evidentiary hearing was held more than one year before Little sought to offer this new evidence and the matter had already been reopened for supplementation of the record and reconsideration in 2009, Little's offer of new evidence was untimely.

For the foregoing reasons, we conclude that the commissioner's decision was not arbitrary, capricious, or the product of unlawful procedure. Accordingly, we affirm.

Affirmed.