

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Teresa L. Koplin,

Petitioner,

v.

ORDER ON MOTION TO DISMISS

Kandiyohi County,

Respondent.

This matter is before Administrative Law Judge Steve M. Mihalchick on Respondent's Motion to Dismiss. The Motion was filed on February 7, 2013. Antonio Tejada, Law Office of Tejada Guzman, LTD, appeared for Petitioner Teresa L. Koplin. Ann R. Goering and Timothy A. Sullivan, Ratwik, Roszak & Maloney, P.A., appeared for Respondent Kandiyohi County.

Petitioner filed a Response to Motion to Dismiss on February 13, 2013, and replacement copies of Exhibits J and K, two unpublished opinions, on February 20, 2013. Oral argument on the Motion was held by telephone conference on March 14, 2013. The Administrative Law Judge requested further information regarding Respondent's use of Veterans Review Boards in prior cases. On March 19, 2013, Respondent filed the Affidavit of Lynn Travaglio providing that information. The record on the Motion closed that date.

Following the close of the record, Judge Cervantes was appointed to the Workers' Compensation Court of Appeals. Following Judge Cervantes' appointment this matter was reassigned to Administrative Law Judge Steve M. Mihachick. Judge Mihalchick reviewed the hearing record and oral argument on the Motion to Dismiss, conferred with Judge Cervantes and drafted this disposition that follows below.

Based upon the record, and for reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. This matter is reassigned to the Honorable Steve M. Mihalchick. The DOCKET NUMBER IS MODIFIED to: OAH 48-3100-30344.

2. Respondent's Motion to Strike and Request for Continuance is **GRANTED** as set forth in the attached Memorandum.

3. Respondent's Motion to Dismiss is **DENIED**.

4. By 4:30 p.m. on Friday, May 4, 2013 counsel shall confer and submit a joint status report detailing mutually-convenient dates for:

- (a) an evidentiary hearing;
- (b) a deadline to pre-filing witness lists and exhibits; and
- (c) a telephone pre-hearing conference.

Dated: April 19, 2013

s/Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Argument Digitally Recorded

NOTICE

This report is a recommendation, not a final decision. However, as ordered by the Commissioner of Veterans Affairs, this recommendation will not be referred to the Commissioner for a final decision on the Motion until after a hearing and report on Petitioner's removal under Minn. Stat. § 197.46.

MEMORANDUM

Background

This Motion involves the application of a time limit in Minn. Stat. § 197.46, a provision that is part of the Veterans Preference Act. Minn. Stat. § 197.46, in general, prohibits the removal of veterans from employment by political subdivisions except for incompetency or misconduct shown after hearing upon due notice. It provides, in relevant part:

Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section, shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or

misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.

Request for a hearing concerning such a discharge shall be made in writing and submitted by mail or personal service to the employment office of the concerned employer or other appropriate office or person.

In all governmental subdivisions having an established civil service board or commission, or merit system authority, such hearing for removal or discharge shall be held before such civil service board or commission or merit system authority. Where no such civil service board or commission or merit system authority exists, such hearing shall be held by a board of three persons appointed as follows: one by the governmental subdivision, one by the veteran, and the third by the two so selected. In the event that the hearing is authorized to be held before a three-person board, the governmental subdivision's notice of intent to discharge shall state that the veteran must respond within 60 days of receipt of the notice of intent to discharge, and provide in writing to the governmental subdivision the name, United States mailing address, and telephone number of the veteran's selected representative for the three-person board. The failure of a veteran to submit the name, address, and telephone number of the veteran's selected representative to the governmental subdivision by mail or by personal service within the provided notice's 60-day period, shall constitute a waiver of the veteran's right to the hearing and all other legal remedies available for reinstatement of the veteran's employment position.

(Underlining added.) The underlined portion was added by Minn. Sess. Laws, Ch. 230, § 1, which was adopted April 23, 2012, and became effective August 1, 2012.¹

It is not disputed that Petitioner is a “veteran” for purposes of Minn. Stat. § 197.46. She was employed as a Legal Secretary in the Office of the Kandiyohi

¹ See, Minn. Stat. § 645.02. In Petitioner's Response to Motion to Dismiss (Response) at 2, Petitioner asserts that the Revisor of Statutes did not publish the amendment until August 24, 2012, based upon a Tweet sent out by the Revisor's Office that day that encourages people to follow the Revisor on Twitter for up-to-date legislative information. Response Exhibit G. Respondent has moved that the argument and exhibit be stricken as false and misleading. The legislative history of the 2012 amendment can be traced on the Revisor's website and Petitioner misread and misapplied the Tweet. Respondent's Motion to Strike is granted.

County Attorney. The County terminated her employment with a Notice of Proposed Discharge signed by the County Attorney Jennifer Fischer and dated August 15, 2012, and hand-delivered to Petitioner on August 15 or 16, 2012.²

The Notice of Proposed Discharge alleged specific charges of incompetency and misconduct. It then stated:

As an honorably discharged veteran, pursuant to Minnesota Statutes, Section 197.46, the Veterans Preference Act, you may request a hearing on your proposed discharge within sixty (60) days of receiving this Notice. The request must be in writing and must be received by me within the sixty (60) day period at:

Ms. Jennifer Fischer
Kandiyohi County Attorney's Office
415 SW Sixth Street
Willmar, MN 56201

If you fail to request such a hearing within sixty (60) days after you first receive this notice, along with the name, United States mailing address, and telephone number of your selection for the three member panel who will be conducting the hearing, you will have waived all of your rights under the Veterans Preference Act on the question of the termination of your employment.

The Notice of Proposed Discharge then placed Petitioner on administrative leave and offered her the opportunity to resign.³

On August 21, 2012, Petitioner's Counsel faxed a letter to the County Attorney.⁴ He informed the County that he had been retained to represent the Petitioner in regard to her termination and the Notice of Proposed Discharge, asked for a copy of her employment file, asked if Petitioner's regular pay would be continued "as provided in the statute," and asked that he be contacted with any questions or concerns. In that letter, Petitioner's Counsel did not request a veteran's preference hearing on Petitioner's behalf or provide any information regarding a three-person board.

On October 5, 2012, Petitioner's Counsel emailed a message to Respondent's Counsel, who is outside Labor and Employment Counsel for the Respondent in this matter.⁵ On Petitioner's behalf, Petitioner's Counsel requested a hearing under Minn. Stat. § 197.46. Petitioner's Counsel noted in the email that this request for hearing was within 60 days and asked if his email request was sufficient or if she wanted him to write a letter to the County Attorney's Office requesting the hearing.⁶ The email said nothing

² Memorandum in Support of Motion to Dismiss (Motion) at 1-2, Exhibit 1 and Response at 2, Exhibit A.

³ Motion Exhibit 1.

⁴ Motion Exhibit 2.

⁵ There apparently was some prior contact between counsel.

⁶ Motion Exhibit 3.

about a three-member board. Respondent's Counsel responded by email on October 5, 2012, saying, "Please send the letter to the County Attorney as she specified in the Notice of Intent, as she has not requested that I accept an alternative."⁷

On October 8, 2012, Petitioner's Counsel mailed a letter to the County Attorney that was received the next day.⁸ As far as is relevant here, Petitioner's Counsel stated in the letter that Petitioner was requesting a hearing under Minn. Stat. § 197.46 regarding her proposed discharge. Counsel likewise requested that he be contacted about plans for a hearing and referring the matter to mediation.

On October 10, 2012, the County Attorney sent a letter to Petitioner's Counsel informing him that she had received his letter and had forwarded it to Respondent's Counsel for review.⁹

For purposes of Minn. Stat. § 197.46, sixty days after Petitioner received the Notice of Proposed Discharge on either August 15 or 16, 2012, occurred on Monday, October 15, 2012.

On October 18, 2012, Respondent's Counsel mailed a letter to Petitioner's Counsel. The letter quoted a portion of the Notice of Proposed Discharge, alleged that Petitioner was clearly on notice as to whom the request was to be made and the information to be included, and alleged that neither the letter addressed to Respondent's Counsel nor the letter addressed to the County Attorney included the statutory requirements set forth in the quoted portion of the Notice of Proposed Discharge and as set forth in the 2012 amendment to Minn. Stat. § 197.46. The letter quoted the 2012 amendment and concluded:

In light of the failure of Ms. Koplín to comply with the statutory provision, as set forth in the notice issued to her to submit the name, address and telephone number of her selected panel member within the 60-day period, she has waived her right to a hearing and all other legal remedies to reinstatement.¹⁰

On January 4, 2013, Petitioner signed a Petition for Relief under the Minnesota Veterans Preference Act and filed it with the Commissioner of Veterans Affairs, who received it on January 8, 2013. In describing the violation, the Petition for Relief states:

This veteran believes that Minnesota Statute 197.46 was violated. As on or about August 15, 2012, the Kandiyohi County Attorney's Office hand delivered a "Notice of Proposed Discharge" thereby terminating my employment with the County Attorney's Office. The Proposed Termination contains some precisely vague language as to my Veteran's Preference Act (sic). The Notice of Termination was not clear in explaining what my

⁷ Motion Exhibit 3.

⁸ Motion Exhibit 4.

⁹ Motion Exhibit 5.

¹⁰ Motion Exhibit 6.

rights, protections and benefits are. Since the Notice was vague, my protections under the Veteran's Preference Act were violated or denied. Since the Notice was precisely vague, the County Attorney's Office terminated my employment without a Veteran's Preference Hearing.¹¹

On January 18, 2013, the Commissioner of Veterans Affairs issued a Notice of Petition and Order for Hearing. It stated that the Petition for Relief alleged that Respondent denied Petitioner's rights under Minn. Stat. § 197.46 "by not providing proper Intent to Terminate Employment Notice." It ordered that a contested case hearing be conducted by the Administrative Law Judge and that if the Administrative Law Judge determined that the Petitioner's veterans preference rights (to a Veterans Preference Hearing) were violated, the Administrative Law Judge was to continue and complete the Veterans Preference Hearing that had not been provided. The entire contested case hearing was scheduled to occur on March 14, 2013, but the Administrative Law Judge continued the Veterans Preference Hearing portion pending resolution of Respondent's Motion to Dismiss.

Analysis

Respondent argues that because Petitioner failed to identify her selected representative for the three-person veterans preference panel in a timely manner as required by Minn. Stat. § 197.46, Petitioner has waived her right to a veterans preference hearing as well as all other available legal remedies for reinstatement, including a contested case hearing before an Administrative Law Judge. Therefore, Respondent argues, there is no jurisdiction for a hearing on the merits of Petitioner's discharge to go forward.¹²

Among the duties of an Administrative Law Judge in a contested case is to determine if a case should be dismissed.¹³ An agency's jurisdiction is limited in scope to the powers granted by statute.¹⁴ Where jurisdiction is lacking, the case must be dismissed.¹⁵

As stated in the Notice of Petition and Order for Hearing, the primary issue in this matter is whether the Notice of Proposed Discharge was proper. The Minnesota Supreme Court has held that the purpose of the removal notice is to make sure that the veteran is made aware of the veteran's right to a hearing and that the notice requirement must be strictly enforced. The notice requirements apply even if the veteran has actual knowledge of his or her rights.¹⁶

¹¹ Petition for Relief under the Minnesota Veterans Preference Act.

¹² Motion at 5.

¹³ Minn. R. 1400.5500 K.

¹⁴ *McKee v. Ramsey County*, 245 N.W.2d 460 (Minn. 1976) (citing *State ex rel. Spurck v. Civil Service Bd.*, 32 N.W.2d 583, 586 (Minn. 1948)).

¹⁵ See *In the Matter of Emmanuel Nursing Home*, 411 N.W.2d 511, 516 (Minn. App. 1987).

¹⁶ *Young v. City of Duluth*, 386 N.W.2d 732, 735-6 (Minn. 1986), citing with approval, *Young v. City of Duluth*, 372 N.W.2d at 57,59 (Minn. App. 1985).

Respondent argues that its Notice of Proposed Discharge met all of its obligations under Minn. Stat. § 197.46, as amended in 2012, by notifying Petitioner of her right to request a hearing, the sixty day deadline for doing so, “and the specific requirement that within the time period she must provide the ‘name, United States Mailing address, and telephone number of [Petitioner’s] selection for the three member panel who will be conducting the hearing’ within the 60-day period.”¹⁷

Petitioner argues that the language of the Notice of Proposed Discharge was “precisely vague” and did not clearly describe Petitioner’s rights.¹⁸

The Administrative Law Judge concludes that the Notice of Proposed Discharge did not comply with the requirements of Minn. Stat. § 197.46, and did not adequately inform Petitioner of her rights, particularly in regard to the three-person board.

Again, Minn. Stat. § 197.46 states that in governmental subdivisions that do not have a civil service board or commission or merit system authority, the discharge hearing shall be held by a board of three persons appointed one by the governmental subdivision, one by the veteran, and the third by the two so selected. The language added in 2012 then states:

In the event that the hearing is authorized to be held before a three-person board, the governmental subdivision's notice of intent to discharge shall state that the veteran must respond within 60 days of receipt of the notice of intent to discharge, and provide in writing to the governmental subdivision the name, United States mailing address, and telephone number of the veteran's selected representative for the three-person board.

The Notice of Proposed Discharge in this matter told Petitioner that under Minn. Stat. § 197.46 she had a right to request a hearing on her proposed discharge within 60 days and that the request must be in writing and must be received by the County Attorney within the 60 day period. It then stated:

If you fail to request such a hearing within sixty (60) days after you first receive this notice, along with the name, United States mailing address, and telephone number of your selection for the three member panel who will be conducting the hearing, you will have waived all of your rights under the Veterans Preference Act on the question of the termination of your employment.

The Notice of Proposed Discharge does not state that the hearing will be conducted by a three-person board and Petitioner may appoint one member of the board, as provided in Minn. Stat. § 197.46. Thus, the meaning of “your selection for the three member panel who will be conducting the hearing” in the Notice is vague and confusing, particularly to a person not familiar with the statute. The phrase could quite

¹⁷ Motion at 7.

¹⁸ Response at 2, Petition for Relief at 1.

reasonably be interpreted to mean an attorney the veteran has retained to represent him or her at the hearing. It may mean something else.

Moreover, the Notice of Proposed Discharge warned the Petitioner that failure to request a hearing within 60 days, “along with the name, United States mailing address, and telephone number of your selection for the three member panel,” would result in waiver of her rights. Obviously, Petitioner was not supposed to request the name of her selection for the three-member board, but the sentence is grammatically incorrect and its meaning is uncertain. The Notice of Proposed Discharge does not make clear that Petitioner was to appoint someone to the three-member board within 60 days, along with requesting the hearing. If instead of “along with the name, . . .” the Notice had used “and provide in writing the name . . .,” the meaning would have been more clear and more in accordance with Minn. Stat. § 197.46.

Finally, the Notice of Proposed Discharge did not notify Petitioner that her request for hearing and her appointment of a member of the three-person board must to be in writing and must be served by mail or personal service, all as required by Minn. Stat. § 197.46. Those omissions further clouded the nature of Petitioner’s obligations and rights.

Because the Notice of Proposed Discharge was improper and inadequate, and because Respondent refused to provide Petitioner with a Veterans Preference Hearing under Minn. Stat. § 197.46, Respondent has violated Petitioner’s rights under Minn. Stat. § 197.46. This matter should proceed to the Veterans Preference Hearing.

Petitioner correctly pointed out that she filed her Petition under the enforcement rights set forth in Minn. Stat. § 197.481. That statute is an election of remedies provision added in 1973. In addition to the right to seek mandamus in district court, it provided veterans the right to seek an administrative remedy from the Commission of Veterans Affairs for denials of rights “authorized by the Veterans Preference Act under section 43A.11, 197.46, 197.48, or 197.455.” Minn. Stat. § 197.481 is the authority for the Commissioner to enforce Minn. Stat. § 197.46 and for the Commissioner to order such relief the Commissioner finds justified. It does not, however, provide any right to a Veterans Preference Hearing that does not already exist under Minn. Stat. § 197.46.

S. M. M.