

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Jerold Lundgren,

Petitioner,

vs.

Town of Canosia,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATIONS**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 9:30 a.m. on Friday, May 22, 1998, at the St. Louis County Veterans Service Office, 222 East Superior Street, Duluth, Minnesota. The administrative record closed on May 29, 1998, when the Administrative Law Judge received the parties' supplemental exhibits relating to Mr. Lundgren's potential back pay claim.¹

The Petitioner, Jerold C. Lundgren, 5061 Martin Road, Duluth, Minnesota 55803, was not represented by an attorney and appeared at the hearing on his own behalf. Kenneth D. Butler, Attorney at Law, Suite 200, 222 Superior Street, Duluth, Minnesota 55802-1907, appeared at the hearing as attorney for the Respondent, the Town of Canosia.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minnesota law,² the Commissioner may not make his final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party

¹ Exhibits 10 and S.

² Minnesota Statutes, section 14.61 (1996). (Unless otherwise specified, citations to Minnesota Statutes refer to the 1996 edition.)

adversely affected by this report an opportunity to file exceptions and present argument to him. Parties should contact the office of Bernie Melter, Commissioner, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota 55155-2079, to find out how to file exceptions or present argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are:

After experiencing a medical problem in August 1996, Mr. Lundgren requested and received a 120-day unpaid medical leave of absence from his position as a part-time police officer. The Town extended the leave of absence to December 1997. While on leave, he neither complied with the Town's request for a doctor's opinion on his fitness for duty nor requested to return to work. But he did apply for and receive SSDI and PERA disability benefits. The Town eventually ended his employment without giving him notice of his veterans preference rights.

1. Did Mr. Lundgren resign or retire from his position, thereby relieving the Town of an obligation to advise him of his veterans preference rights?
2. If not, did the Town remove him from his job without notifying him of veterans preference rights?
3. If so, to what relief is Mr. Lundgren entitled?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mr. Lundgren resides at 5061 Martin Road, Duluth, Minnesota. He served on active duty in the United States Navy from June 25, 1959, until August 7, 1964, after which he was honorably discharged.³
2. The Town of Canosia is an organized township located about 13 miles northeast of the City of Duluth and is a political subdivision of the State of Minnesota. It is governed by a three-person supervisory board, whose members serve part time and are compensated by a fixed stipend for attending Town meetings and by hourly compensation for other time spent on Town business.

³ DD Form 214 attached to Petition for Relief.

The Town supervisors meet once a month for regular meetings and at other times during the month for special meetings.⁴

3. The Town's board of supervisors is directly and solely responsible for making all personnel decisions about Town employees. During the times that this proceeding involves, the Town had no full-time employees. Before August of 1996, the Town employed five part-time employees — namely, an operator for its recycling center, a maintenance person and groundskeeper, a road maintenance foreman, a police chief, and a police officer and assistant road foreman.⁵

4. The Town hired Mr. Lundgren for the position of part-time police officer and assistant road foreman in 1978.⁶ He continued to serve actively in that capacity until August 28, 1996. The Town paid him an hourly rate for twenty-seven hours of police work per week and for roadwork on an as-needed basis. Mr. Lundgren's road work duties varied seasonally, with virtually no work in the winter, ten to fifteen hours of work per week in the spring, and about two hours per week in the summer. His part-time position did not include any benefits, and he has never been a full-time employee of the Town.⁷

5. In about mid-August of 1996, Mr. Lundgren experienced some medical problems associated with an enlarged heart. He sought medical treatment both at the Veterans Administration clinic in Superior, Wisconsin, and at the VA Medical Center in Minneapolis.⁸ He informed the Town's police chief about his medical problems and asked the chief to request a Town Board meeting because Mr. Lundgren then believed that he might have to resign or retire from his employment with the Town. After talking with Mr. Lundgren, the police chief prepared a first report of injury⁹ and passed Mr. Lundgren's request on to the Town's board of supervisors, which scheduled an emergency board meeting for August 28, 1996, to discuss the matter.¹⁰

6. After talking with the police chief but before attending the emergency Town Board meeting, Mr. Lundgren discussed his medical problems and their effect on his employment with a county Veterans Service Representative. He was advised not to resign or retire from his employment but

⁴ Testimony of Russell Georgesen.

⁵ *Id.*

⁶ Testimony of Jerold Lundgren.

⁷ Testimony of Russell Georgesen.

⁸ Testimony of Jerold Lundgren; Exhibit A.

⁹ Exhibit A.

¹⁰ Testimony of Russell Georgesen.

rather to request a 120-day unpaid medical leave of absence during which he should consider his options, including applying for available disability benefits.¹¹

7. At the August 28th emergency Town Board meeting, Mr. Lundgren made a written request for a 120-day medical leave of absence so that his physician could evaluate his fitness for duty as a police officer.¹² The Town Board voted to grant Mr. Lundgren a 120-day unpaid medical leave of absence but with three conditions. First, if he were ever informed by his physician that he was able to return to work as a police officer, he would be required to take a physical examination to establish his fitness for duty. Second, he was to notify the Town Board of his medical progress every time he saw his doctors, and third, Mr. Lundgren was to provide the Town Board with progress reports on any applications for Social Security or other disability benefits.¹³

8. After Mr. Lundgren went on medical leave of absence, the Town did not hire another part-time police officer to replace him. Rather, it increased the weekly work hours of its police chief to cover the police functions that Mr. Lundgren had formerly performed.¹⁴ The Town's police officers normally kept their patrol cars at their homes when off duty. Shortly after Mr. Lundgren went on medical leave, the Town placed the patrol car assigned to him into storage to protect it from the elements.¹⁵ Mr. Lundgren kept the other police equipment that the Town had provided to him until November 17, 1997.

9. As a part-time Town police officer, Mr. Lundgren was also a member of the Public Employees Retirement Association's (PERA) police and fire fund¹⁶ and, therefore, potentially eligible for the PERA disability benefits available to police officers and firefighters.¹⁷ Sometime during the fall of 1996, Mr. Lundgren applied for the PERA disability benefits available to police officers.¹⁸ In connection with that application, he submitted medical evidence to PERA establishing that he was disabled and physically unfit to perform duties as a police officer. He did not, however, directly inform the Town Board that he had made that application although the Town Board became aware of it when PERA

¹¹ Id.; Exhibit B.

¹² Id.; Exhibits 1 and C.

¹³ Testimony of Russell Georgesen; Exhibit C.

¹⁴ Testimony of Russell Georgesen.

¹⁵ Id.

¹⁶ See Minnesota Statutes, section 353.64, subdivision 1.

¹⁷ See Minnesota Statutes, section 353.656, subdivision 1.

¹⁸ Testimony of Jerold Lundgren and Russell Georgesen.

requested verification of Mr. Lundgren's earnings.¹⁹ Mr. Lundgren did not provide the Town Board with the medical evidence he had submitted to PERA.²⁰

10. Also, on September 1, 1996, Mr. Lundgren applied to the Social Security Administration (SSA) for social security disability (SSDI) benefits.²¹ In connection with that application, he submitted medical evidence to the SSA establishing that he was unable to engage in any substantial gainful activity by reason of a medically determinable physical impairment.²² But again, he did not directly inform the Town Board that he had made that application although the Town Board also became aware of it when the SSA requested verification of Mr. Lundgren's earnings.²³ Mr. Lundgren also did not provide the Town Board with the medical evidence he had submitted to the SSA.²⁴

11. Mr. Lundgren's 120-day medical leave of absence expired on December 26, 1996. During that 120-day period, he did not take a physical examination to establish his fitness for duty. He also did not notify the Town Board of his medical progress every time he saw his doctors and did not provide the Town Board with progress reports on the applications that he had made for SSDI and PERA disability benefits. Mr. Lundgren also made no request to return to work.

12. On January 5, 1997, the Town Clerk sent Mr. Lundgren a letter requesting him either to extend his leave of absence or resign by January 8, 1997.²⁵ Mr. Lundgren did not respond to that letter. Mr. Lundgren was present for much of the Town Board's regular monthly meeting on January 8, 1997, but the Town Board did not take up the matter of his medical leave while he was there. Instead, the Town Board tabled discussion of that until a special closed meeting that occurred on February 4, 1997.²⁶ On January 16, 1997, the Town Board sent Mr. Lundgren a letter asking him to present medical reports signed by his physician and his own statement of his medical condition referring specifically to his ability to return to work as a part-time police officer and road foreman.²⁷

13. Sometime after January 29, 1997, Mr. Lundgren provided the Town Board with a written statement from his treating physician, Randall L. Johnson, M.D., that Mr. Lundgren was being treated for cor pulmonale, chronic obstructive

¹⁹ Testimony of Russell Georgesen.

²⁰ Id.

²¹ Testimony of Jerold Lundgren.

²² See Title 42, United States Code, Section 423.

²³ Testimony of Russell Georgesen; Exhibit G.

²⁴ Id.

²⁵ Exhibit 2.

²⁶ Testimony of Russell Georgesen; Exhibits 3 and F.

²⁷ Id.

lung disease, and sleep apnea. The statement that the Town Board received contained no opinion on whether Mr. Lundgren was physically fit to perform duties as a police officer or able to engage in any substantial gainful activity.²⁸

14. On February 4, 1997, the Town Board conducted a special closed meeting to discuss his medical leave of absence.²⁹ Mr. Lundgren was present and told the Town Board that his doctor had said his condition was guarded and that there was no possibility of his returning to work as a part-time police officer.³⁰ Without a specific request from Mr. Lundgren, the Town Board voted to extend his medical leave of absence “to such time as his Doctor tells him he can return to work or that he needs to terminate his position.”³¹ Although he had not requested the extension, Mr. Lundgren did not object to extending his unpaid medical leave of absence, nor did he request to return to work as a police officer.

15. Sometime later in February of 1997, the SSA concluded that Mr. Lundgren was unable to engage in any substantial gainful activity by reason of a medically determinable physical impairment and awarded him SSDI benefits of approximately \$701.00 per month. Sometime in March of 1997, PERA concluded that Mr. Lundgren was disabled and physically unfit to perform duties as a police officer and awarded him PERA disability benefits of approximately \$500.00 per month.³² Mr. Lundgren never informed the Town Board of these two disability benefit awards, although it eventually learned of those awards from other sources.³³

16. On April 22, 1997, the Town Board held a special personnel meeting with Mr. Lundgren to discuss his medical leave of absence. During the meeting, Mr. Lundgren indicated that he would give the Town Clerk a letter from his doctor stating that he was still unable to return to work.³⁴ Sometime after July 17, 1997, Mr. Lundgren provided the Town Clerk with a letter from Dr. Johnson again indicating that Mr. Lundgren was being treated for cor pulmonale, chronic obstructive lung disease, and sleep apnea. But that letter again contained no opinion on whether Mr. Lundgren was physically fit to perform duties as a police officer or able to engage in any substantial gainful activity.³⁵

17. During the period from August 13th through November 10th, 1997, there were several exchanges of correspondence between the Town’s attorney

²⁸ Exhibits 6 and E.

²⁹ Exhibit H.

³⁰ Id.

³¹ Id.

³² Testimony of Jerold Lundgren.

³³ Testimony of Russell Georgesen.

³⁴ Exhibits 4 and R.

³⁵ Exhibit J.

and Mr. Lundgren about whether he would be providing the Town with a copy of his SSA disability determination and medical records.³⁶ Mr. Lundgren never responded to the Town's request for a copy of his disability determination, and there was never a meeting of the minds about which medical records Mr. Lundgren would authorize the Town to examine. On November 10, 1997, the Town's attorney wrote to Mr. Lundgren indicating that the Town was prepared to take action to terminate his employment because he had failed to provide it with the information it needed to determine whether or not he would ever be able to return to his position as a part-time police officer. The letter also asked Mr. Lundgren to return all township property immediately.³⁷ After receiving the letter, Mr. Lundgren returned what township property was still in his possession.³⁸

18. During a closed meeting on December 18, 1997, at which Mr. Lundgren was present, the Town Board again considered the matter of his medical leave of absence. At that time, Mr. Lundgren told the Town Board that his doctor had not given him a medical release to return to work. The Town Board then voted to rescind Mr. Lundgren's unpaid medical leave of absence and to terminate his employment with the Town.³⁹

19. At no time between August 28, 1996, and December 18, 1997, did Mr. Lundgren provide the Town with any medical opinion about his ability to return to work, nor did he ever request to return to work. At the time of the hearing in this proceeding, Mr. Lundgren's physician was still of the opinion that he was still physically unfit to perform duties as a police officer and unable to engage in any substantial gainful activity. But Mr. Lundgren is now willing to return to work as a part-time police officer for the Town against medical advice.⁴⁰

20. At no time between August 28, 1996, and the present did the Town notify Mr. Lundgren of his right to have a hearing to establish incompetency or misconduct or of any other right under the Veteran's Preference Act.

21. Mr. Lundgren is currently receiving a combination of SSDI and PERA disability benefits totaling about \$1,200.00 per month. If he were currently working as a part-time police officer and assistant road foreman for the Town, he would be earning approximately \$1,600.00 from that employment.⁴¹

22. Mr. Lundgren's average monthly income from his jobs with the Town in fiscal year 1996 was \$1,476.05, and his average monthly income from

³⁶ Exhibits 5 and L through P.

³⁷ Exhibit 5 and P.

³⁸ Testimony of Jerold Lundgren; Exhibits 7 and D.

³⁹ Testimony of Russell Georgesen; Exhibits 7 and D.

⁴⁰ Testimony of Jerold Lundgren.

⁴¹ Id.

December of 1993 through August of 1996 was \$1,369.52.⁴² Mr. Lundgren would have received \$9,526.14 from the Town as pay for serving as a part-time police officer from August 18, 1996, through March of 1997, when he began receiving disability benefits.⁴³ The difference between what Mr. Lundgren received in disability benefits and what he would have earned as a police officer from March of 1997 until the end of June of 1998 is \$5,783.00.⁴⁴ Mr. Lundgren would have earned \$4,000.00 as pay for performing duties as the Town's assistant road foreman from November of 1996 and now.⁴⁵

23. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

24. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law⁴⁶ gives the Commissioner of Veterans Affairs and the Administrative Law Judge authority to consider the Veterans Preference Act⁴⁷ issues that have been raised in this contested case proceeding.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all of the law's substantive and procedural requirements.

3. The Department gave the Town proper and timely notice of the hearing in this matter.

4. Mr. Lundgren is an honorably discharged "veteran" within the meaning of the Minnesota Veterans Preference Act,⁴⁸ and he is entitled to all of the protections and benefits of that Act.

⁴² Exhibit S.

⁴³ Exhibit 10.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Minnesota Statutes, section 14.50 and section 197.

⁴⁷ Minnesota Statutes, section 197.46.

⁴⁸ Minnesota Statutes, section 197.447, and section 197.46.

5. The Town is a political subdivision of the state within the meaning of the Veterans Preference Act⁴⁹ and its personnel practices are therefore subject to the provisions of that Act.

6. Minnesota law⁵⁰ requires a public employer to give a veteran notice of the right to a hearing to establish incompetency or misconduct prior to any action to remove the veteran from his or her position.

7. The Town has never notified Mr. Lundgren of his right to have a hearing to establish incompetency or misconduct nor of any other right under the Veteran's Preference Act.

8. From August 28, 1996, up to December 18, 1997, Mr. Lundgren was on a medical leave of absence from his employment as a part-time Town police officer, and he neither resigned nor retired from that employment.

9. On December 18, 1997, the Town ended Mr. Lundgren's employment as a part-time Town police officer for two reasons. The first was that he had not complied with the terms of his leave of absence by failing to supply the Town with a doctor's opinion about his fitness for duty. Second, the Town believed he was medically incompetent to perform the duties of a police officer.

10. By removing Mr. Lundgren from his position as a part-time police officer both for violating the terms of his medical leave of absence and for medical incompetence, without first informing him of his right to a hearing to establish that was the case, the Town violated Mr. Lundgren's veterans preference rights.⁵¹

11. As a part-time police officer for the Town, Mr. Lundgren was a member of the police and fire fund of the Minnesota Public Employee's Retirement Association (PERA). Under Minnesota law,⁵²

[a] member of the police and fire fund who becomes disabled and physically unfit to perform duties as a police officer or firefighter subsequent to June 30, 1973, as a direct result of an injury, sickness, or other disability incurred in or arising out of any act of duty, which has or is expected to render the member physically or mentally unable to perform duties as a police officer or firefighter for

⁴⁹ Minnesota Statutes, section 197.46.

⁵⁰ Id.

⁵¹ Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987).

⁵² See Minnesota Statutes, section 353.656, subdivision 1.

a period of at least one year, shall receive disability benefits during the period of such disability.

12. In order for a police officer to establish unfitness for duty and eligibility for PERA disability benefits, the officer must furnish

adequate proof . . . to the association of the existence of such disability, and during the time when disability benefits are being paid, the association has the right, at reasonable times, to require the disabled member to submit proof of the continuance of the disability claimed. A person applying for or receiving a disability benefit shall provide or authorize release of medical evidence, including all medical records and information from any source, relating to an application for disability benefits.

13. In the fall of 1996, Mr. Lundgren applied to PERA for disability benefits as a police officer. To support his application, he provided PERA with medical evidence that he was unfit to perform duties as a police officer.

14. In March of 1997 and based on the medical evidence that Mr. Lundgren had submitted, PERA made a determination that he was unfit to perform duties as a police officer and began paying him disability benefits. Mr. Lundgren continues to receive PERA disability benefits, and PERA still considers him to be medically unfit to perform duties as a police officer.

15. In order to establish eligibility for SSDI benefits an applicant must furnish medical evidence that he or she is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than 12 months.”⁵³

16. On September 1, 1996, Mr. Lundgren applied to the SSA for SSDI benefits. To support his application, he provided the SSA with medical evidence that he was unable to engage in any substantial gainful activity by reason of a medically determinable physical impairment that could be expected to last for a continuous period of not less than 12 months.

17. In March of 1997 and based on the medical evidence that Mr. Lundgren had submitted, the SSA made a determination that a medically determinable disability made him unable to engage in any substantial gainful activity. Mr. Lundgren continues to receive SSDI disability benefits, and the SSA still considers him to be unable to engage in any substantial gainful activity.

⁵³ Title 42, United States Code, Section 423(d)(1) and (5)(A).

18. Beginning on August 28, 1996, and continuing to the present, Mr. Lundgren has been physically unfit to perform his duties as a part-time Town police officer and unable to engage in any other substantial gainful activity.

19. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

20. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATIONS

The Administrative Law Judge recommends:

- (1) That the Commissioner reinstate the Petitioner, Jerold Lundgren, to his former position as part-time police officer and assistant road foreman for the Town of Canosia, effective immediately; but
- (2) That the Commissioner only require the Town of Canosia to reinstate Mr. Lundgren to an unpaid medical leave status, rather than to an active duty status; and
- (3) That the Commissioner not award back pay to Mr. Lundgren; and
- (4) That the Commissioner order the Town to notify Mr. Lundgren of his right under the Veterans Preference Act to request a hearing on whether cause exists for his removal if the Town should seek to terminate Mr. Lundgren's employment in the future because of medical or other incompetence or for misconduct.

Dated this _____ day of June 1998.

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape Recorded (two tapes); No Transcript Prepared.

NOTICE

Under Minnesota law,⁵⁴ the Commissioner of Veterans Affairs is required to serve his final decision upon each party and the Administrative Law Judge by first class mail.

⁵⁴ Minnesota Statutes, section 14.62, subdivision 1.

MEMORANDUM

Minnesota law⁵⁵ permits an honorably discharged veteran, who believes that a public employer has violated his rights under the Veterans Preference Act, to petition the Commissioner of Veterans Affairs for relief. Under the law,⁵⁶ the Commissioner then starts a contested case proceeding before an administrative law judge. After hearing the evidence and the legal arguments made by the parties, the administrative law judge is then required to submit a report to the Commissioner, consisting of findings of fact, legal conclusions, and recommendations about what action the Commissioner should take.⁵⁷ After receiving Mr. Lundgren's petition for relief, the Commissioner began this contested case proceeding by issuing a Notice of Petition and Order for Hearing on March 3, 1998. The Notice scheduled the hearing in this matter for 9:30 a.m. on April 17, 1998, at the St. Louis County Veterans Service Office in Duluth, Minnesota. The administrative law judge later postponed the hearing until May 22, 1998, to allow both parties time to make discovery requests.

In his Petition, Mr. Lundgren alleged that the Town removed him from his job as a part-time police officer and assistant road foreman without first notifying him of his veterans preference rights — specifically his right to request a hearing to establish that there had been incompetence or misconduct on his part to justify removing him from his position.⁵⁸ For its part, the Town concedes that it did not notify Mr. Lundgren of any veterans preference rights, but it claims it was not required to give him that notice because Mr. Lundgren either effectively resigned or retired from his position with the Town. There was very little conflict in the evidence presented by both the parties and relatively little dispute about the underlying facts. The issues in this case relate primarily to the sufficiency of the evidence and to application of the law to the facts.

Mr. Lundgren Established a Prima Facie Case

Under Minnesota law,⁵⁹

[n]o 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

⁵⁵ Minnesota Statutes, section 197.481.

⁵⁶ Minnesota Statutes, sections 14.57 through 14.62 and section 197.481, subdivision 4.

⁵⁷ Minnesota Statutes, section 14.50.

⁵⁸ Minnesota Statutes, section 197.46.

⁵⁹ Id.

misconduct shown after a hearing, upon due notice, upon stated charges, in writing. [Emphasis supplied.]

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.

In a case such as this, Minnesota law first requires Mr. Lundgren to establish a prima facie case — that is, to show that under normal circumstances he would be entitled to his veterans preference rights and that those rights were apparently violated. The parties both agree that Mr. Lundgren is an honorably discharged veteran who is entitled to the protections of the Veterans Preference Act whenever they are available. They also do not dispute that Mr. Lundgren's employment with the Town ended on December 18, 1997. Finally, the parties agree that the Town did not inform Mr. Lundgren that he had a right to a hearing at which the Town was required to show incompetency or misconduct on his part before terminating his employment as a part-time police officer. In short, Mr. Lundgren did establish a prima facie case that the Town violated rights afforded him under the Minnesota Veteran's Preference Act.

Mr. Lundgren Did Not Resign or Retire

The Town's defense here was that it did not really terminate Mr. Lundgren's employment. Rather, it argues that by failing to abide by the terms of his medical leave of absence and by seeking and obtaining SSDI and PERA disability benefits, Mr. Lundgren effectively (or constructively) resigned or retired from his position. Where a veteran voluntarily resigns or retires from his employment, no "removal" from a position occurs within the meaning of the Veterans Preference Act.⁶⁰ Since the Town claims Mr. Lundgren resigned or retired, it argues that under existing law it did not need to notify Mr. Lundgren of his right to a hearing to establish incompetence or misconduct.

A resignation occurs when an employee abandons his or her employment — that is, leaves a job while intending never to return to it. Proving that an employee resigned requires showing three things: first, that the employee intended to abandon the job; second, that the employee performed some act of abandonment; and third, that surrender of the position was voluntary.⁶¹ Whether

⁶⁰ See Chase v. Independent School District No. 31, 1993 WL 459883 (Minn. App. 1993).

⁶¹ State ex rel. Young v. Ladeen, 116 N.W. 486, 487 (Minn. 1908); Byrne v. City of St. Paul, 163 N.W. 162, 163 (Minn. 1917); Hosford v. Board of Education of the City of Minneapolis, 275 N.W. 81, 82 (Minn. 1937).

these three elements exist in a particular case are questions of fact.⁶² In terms of legal status, there is no real difference between a resignation and a retirement. When an employee retires, he or she is surrendering the position for the special purpose of withdrawing from the work force and receiving retirement benefits.

But “absence from work because of illness may not be construed as an abandonment where the facts show the employee intended to return to work as soon as he was able.”⁶³ Here, the Town argues that some of Mr. Lundgren’s actions while he was on medical leave of absence imply that he intended never to come back to work as a part-time police officer. For example, the Town points to the fact that Mr. Lundgren ignored the terms of his medical leave of absence by failing to obtain a physical exam to establish that he was physically fit to resume his duties. It also points to his failure to notify the Town about the status of his applications for disability benefits, as well as his failure to provide the Town with any medical opinion about his fitness for duty. But none of these acts demonstrate an unmistakable intent never to come back to work, and statements Mr. Lundgren made at the December 18, 1997, Town Board meeting⁶⁴ indicate the contrary — that is, an intent to return to work as soon as he was medically able to do so.

The Town points to Mr. Lundgren’s successful applications for SSDI and PERA police disability benefits as being acts of abandoning his position. It also suggests that those acts were so inconsistent with an intent to return to work that the Administrative Law Judge should imply an intent by Mr. Lundgren never to return to his position as a part-time Town police officer. But neither application represents an unmistakable act of abandonment. The Social Security system makes a distinction between retirement and disability benefits. Applying for and receiving Social Security retirement benefits might be considered as an unmistakable act of abandoning one’s job and intending never to return to it. But Social Security disability benefits are conditional, and a person is entitled to receive them only as long as he or she is “unable to engage in any substantial gainful activity by reason of a medically determinable physical impairment.”⁶⁵ The Social Security Act requires recipients of SSDI to re-establish the existence of their qualifying disabilities periodically, and the SSA reduces or withdraws benefits when a recipient becomes able to engage in substantial gainful activity.⁶⁶ The same is true of PERA police disability benefits.⁶⁷ Finally, the evidence suggests that Mr. Lundgren’s reluctance to relinquish his position was motivated,

⁶² Id.

⁶³ 62 C.J.S. Municipal Corporations § 732 (1949).

⁶⁴ Exhibits 7 and D.

⁶⁵ See Title 42, United States Code, Section 423(d).

⁶⁶ See Title 42, United States Code, Section 423(f).

⁶⁷ See Minnesota Statutes, section 353.656, subdivision 5.

in part, by concern that his physician might conclude later on that he is physically able to return to work as a police officer.

Rather, the evidence established that the real reasons why the Town Board ended Mr. Lundgren's employment were that it believed he had committed some misconduct by ignoring the terms of his medical leave of absence but, more important, that he was medically incompetent to perform his duties as a police officer. In other words, the Town Board really discharged Mr. Lundgren for what it believed to be good cause. And that is precisely the situation where the Veterans Preference Act requires a public employer to give a veteran the opportunity for a hearing on whether cause for removal really exists. In Myers v. City of Oakdale,⁶⁸ the Minnesota Supreme Court held that physical inability to perform the duties of a police officer constitutes "incompetence" within the meaning of the Veterans Preference Act.⁶⁹ And terminating a police officer's employment because he is physically or medically unable to perform his duties constitutes a "removal" that brings veterans preference rights into play.⁷⁰ The legally appropriate course for the Town is to give Mr. Lundgren notice of his right to a hearing on whether he is now and will continue to be medically incompetent to perform the duties of a police officer and then to hold that hearing if he requests it. Such a hearing would not be superfluous. For example, no inference may be drawn from Mr. Lundgren's receipt of SSDI and PERA benefits about the permanency of his disabling medical condition or about whether he might someday be able to perform his duties as a police officer with some reasonable accommodations.⁷¹ The Town has the burden of proving medical incompetence, and Mr. Lundgren has a right to require the Town to meet that burden in a veterans preference hearing on whether there is cause for his removal.

Remedy

But the inquiry here cannot end with the conclusion that the Town violated Mr. Lundgren's veterans preference rights. There remains the question of what should be done about it. Mr. Lundgren has requested reinstatement to his position as a part-time police officer and assistant road foreman, along with back pay to January 5, 1997, when he claims he was asked to resign because of his illness.⁷² First of all, no evidence established that the Town asked Mr. Lundgren to resign on January 5, 1997, because of his illness. At the hearing, Mr.

⁶⁸ 409 N.W.2d 848 (Minn. 1987).

⁶⁹ Id. at 851-852.

⁷⁰ Id. at 852-853.

⁷¹ These are just examples of issues that might be raised at a hearing on whether Mr. Lundgren is medically competent to serve as a police officer. The Administrative Law Judge draws no conclusions about what the actual issues in such a hearing might be.

⁷² Petition for Relief, p. 1.

Lundgren argued that he should receive pay all the way back to August of 1996, when the Town placed his patrol car into storage. But that event was not legally meaningful, since the evidence established that the only reason the Town put his patrol car into storage was to protect it from the elements. In his post-hearing submission, Mr. Lundgren made the following claim for back pay: (1) \$9,526.14, representing lost wages as a police officer from August 18, 1996, until May of 1997, when he began receiving disability benefits; (2) \$5,783.00, representing the difference between his disability benefits and what he would have earned as a police officer from March of 1997 until the end of June, 1998; and (3) \$4,000.00 in lost income as an assistant road foreman from November of 1996 until now.

One thing the evidence did establish was that Mr. Lundgren was on an unpaid medical leave of absence at his own request until about December 26, 1996. He clearly is not entitled to back pay for a period of unpaid leave he himself requested. Though he himself made no formal request, the Town extended that unpaid medical leave of absence until December 18, 1997, when it formally ended his employment. Under Myers v. City of Oakdale, a key inquiry is whether that extension of his medical leave should be considered involuntary. During all that time, Mr. Lundgren never objected to remaining on medical leave, nor, more important, did he ever request to return to active duty before the Town terminated his employment. To the contrary, Mr. Lundgren consistently told the Town that he could not return to work because his doctor considered him medically unfit to serve as a police officer. This case differs in these respects from Myers, where the Minnesota Supreme Court directed that the veteran receive back pay. There, the police officer's treating physician signed a work and activity release indicating that the officer could return to his job without any restrictions on his activities,⁷³ and the officer himself requested the City to rescind his medical leave of absence and allow him to go back to work.⁷⁴ When the city rejected the veteran's medical evidence and accepted its own conflicting evidence without a hearing, the Supreme Court likened what it did to placing the officer on involuntary suspension without pay.⁷⁵ Presumably, one of the main issues at that later hearing on cause in that case was how to resolve those conflicts in the medical evidence. Here, there has been no conflict in medical evidence. During the extension of his leave of absence, Mr. Lundgren unquestionably was medically unfit to work either as a police officer or as a road foreman. And by not asking the Town to allow him to return to work, he effectively adopted the Town's extension of his leave of absence. For these reasons, Mr. Lundgren is not entitled to back pay between December 26, 1996, and December 18, 1997, when the Town Board rescinded his medical leave of absence and ended his employment.

⁷³ 409 N.W.2d at 849.

⁷⁴ Id. at 851, n.1.

⁷⁵ Id. at 852, citing Mitlyng v. Wolff, 342 N.W.2d 120 (Minn. 1984).

Mr. Lundgren's claim for back pay from December 18, 1997, until now also presents some significant difficulties. He continues to receive SSDI benefits of approximately \$701.00 per month and therefore remains unable to engage in substantial gainful activity. He also continues to receive approximately \$500.00 per month in PERA police disability benefits and therefore remains physically unfit to perform duties as a police officer. In other words, the evidence at the hearing, including his own admissions, clearly established that he remains physically unfit to perform the duties of a police officer. The Town's violation of Mr. Lundgren's veterans preference rights warrant reinstating him to his former position. But it would be inappropriate to reinstate Mr. Lundgren to active service as a part-time police officer, since PERA, the Social Security Administration, and his own doctor all still consider him medically unfit to perform those duties. The facts only support reinstating him to the status he had on December 18, 1997 — that is, on unpaid medical leave of absence.

Back pay is a restorative remedy designed to compensate a veteran for income he would otherwise have earned if his preference rights had not been violated.⁷⁶ There is no authority for employing back pay as a penalty in order to punish a public employer for violating a veteran's preference rights. When considering a back pay award, one confronts the same difficulty that one encounters in considering reinstating Mr. Lundgren to active service as a police officer — namely, that he has acknowledged that he has remained medically unfit to perform those duties from December 18, 1997, to the present.⁷⁷ To put it another way, Mr. Lundgren could not have earned anything as a police officer for the last six months, so a back pay award could not be compensatory. It would necessarily be punitive — something that the law does not allow. It is for these reasons discussed above that the Administrative Law Judge recommends that the Commissioner reinstate Mr. Lundgren as an employee of the Town but without back pay and on unpaid medical leave status rather than on active duty status.

B.H.J.

B. H. J.

⁷⁶ See, for example, Myers, supra.

⁷⁷ Although Mr. Lundgren indicated at the hearing that he was willing to return to work against the medical advice of his doctor, that belated and qualified request to return to work is insufficient to support a claim for back pay.