

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF VETERANS AFFAIRS

Michael T. Earsom,
Petitioner,
v.
Hennepin County Medical Center,
Respondent.

**FINDINGS OF FACT, CONCLUSIONS,
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, on April 22, 2004, at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, MN 55401-2138. The hearing was consolidated with the hearing in the related matter of *In the Matter of the Dismissal of Michael T. Earsom* being held for the Hennepin County Human Resources Board, OAH Docket No. 12-6220-15885-3. The record closed at the conclusion of the hearing that day.

Eric R. Lee, Milavetz, Gallop & Milavetz, P.A., 2995 Coon Rapids Blvd., Coon Rapids, MN 55433, appeared on behalf of Petitioner Michael T. Earsom (Petitioner).

Mary L. Egan, Assistant Hennepin County Attorney, C200 Government Center, 300 South Sixth Street, Minneapolis, MN 55487, appeared on behalf of Respondent Hennepin County Medical Center (HCMC).

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make a final decision after a review of the record. The Commissioner may adopt, reject or modify this Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this report to file exceptions and present argument to the Commissioner. Parties should contact Clinton Bucher, Department of Veterans Affairs, Room 206C, 20 West 12th St., St. Paul, MN 55155-2079, (651) 284-3408, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline

for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUES

Whether HCMC's letter of August 29, 2003, to Petitioner counsel, notifying him that HCMC no longer had work available for Petitioner within his treating physician's most recent restrictions, although it might be able to bring him back to work once the restrictions were clarified, during which time HCMC would pay Petitioner Workers Compensation temporary total disability benefits, constituted a removal for the purposes of the Veterans Preference Act, Minn. Stat. § 197.46?

The Administrative Law Judge concludes that it was not a removal.

Based upon the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner is an honorably discharged veteran of the United States Marine Corps.
2. Petitioner became a Nursing Assistant in the Coronary Care Unit (CCU) at HCMC on January 2, 2000. General physical requirements of a nursing assistant include lifting up to 60 pounds on occasion, physical restraint of patients, pushing and pulling up to 200 pounds, bending/twisting/turning, sitting, standing, walking, stooping, and reaching overhead.^[1]
3. On April 7, 2000, Petitioner received a verbal reprimand for failure to complete tasks delegated by an RN. Two years later, on August 20, 2002, he received a verbal reprimand regarding communication with his supervisor, accountability for completing job responsibilities "with a good attitude," and ability to prioritize work.
4. In the Spring of 2002, Petitioner completed Licensed Practical Nurse (LPN) coursework; he was licensed as an LPN in September, 2002.^[2]
5. On January 20, 2003, Petitioner received an injury to his right shoulder while performing his duties as a Nursing Assistant in the CCU. On February 5, 2003, he had arthroscopic surgery to diagnosis and treat the injury. Lee Korems from the Hennepin County Workers Compensation Claims Administration was the claims specialist assigned to Petitioner's Workers Compensation claim. Petitioner's was also assigned a Qualified Rehabilitation Consultant (QRC), who served as a liaison between the physicians, Petitioner, and the HCMC Worker's Compensation Administration.

6. Petitioner returned to work on February 19, 2003, in a light duty capacity with work restrictions. Specifically, Dr. Randall Norgard, Petitioner's treating physician, instructed Petitioner to avoid right upper extremity work including lifting, gripping and grasping activities and to refrain from lifting or carrying items in excess of 20 pounds. Petitioner returned to work in the CCU and was assigned light duty, non-nursing assistant tasks such as stocking carts, organizing supplies, and sending oxygen tanks to be re-filled.^[3]

7. Petitioner continued to have problems with his supervisors in the CCU. On February 28, 2003, he received coaching that it was unacceptable to use an angry tone and hang up on his supervisor.

8. Petitioner saw Dr. Norgard for periodic re-evaluations of his injury. Dr. Norgard recommended that Petitioner maintain his work restrictions and further recommended that Petitioner avoid overhead work and pushing and pulling activities on the right side. Petitioner was allowed to perform some patient transfer activities in the CCU as tolerated.

9. In late 2002 to early 2003, HCMC faced significant budgetary stresses and implemented a hiring freeze for new employees while reorganizing and laying off some of the hospital's full-time employees.^[4] As a result of these changes, Petitioner's hours in the CCU were proposed to be reduced. Therefore, he was offered a full-time Nursing Assistant position in the Cardiac-Renal Unit (CRU), formerly called A6/B6.^[5]

10. Petitioner began working full-time in the CRU during the first week of May, 2003, with Paula Varhol as his direct supervisor. Ms. Varhol assigned Petitioner short-term projects, such as entering data into a patient database, to keep him within his restrictions until he could assume light duty nursing assistant tasks.^[6] The typical duties of a nursing assistant in the CRU include taking patients' blood pressure and temperature, often reaching overhead to activate or adjust the equipment; lifts and transfers of patients; and discharging patients by helping them to pack their bags, wheeling them out to a car, and assisting them into a vehicle.^[7] Petitioner worked on a block shift of rotating days, nights, and weekends.

11. On May 8, 2003, Petitioner received a one-day suspension for refusing to speak to a supervisor, unacceptable behavior, and disrespectful and ineffective communication with a supervisor. On May 12, 2003, he received a three-day suspension for disrespectful and unacceptable behavior toward his supervisor.^[8] Shortly after he began working in the CRU, Petitioner requested a transfer to another unit. Ms. Varhol denied his request.

12. From June 30 to July 7, 2003, Petitioner did not work due to severe right shoulder pain. During that week, Petitioner visited Dr. Norgard, who recommended a right shoulder MRI to rule out a recurrent tear. The doctor also offered cortisone injections, but Petitioner refused them.

13. On July 22, 2003, Petitioner was suspended for two weeks for misconduct. The basis for the ten working day suspension was his refusal to comply with a directive that he give adequate notice to his supervisor when unable to attend work or before leaving early, working an unscheduled shift without prior approval, and inappropriate and disrespectful communication with his supervisor. The letter notified Petitioner of his right to an administrative appeal, along with the right to either grieve the suspension or appeal to an Administrative Law Judge.^[9] Petitioner requested an administrative appeal.

14. Due to Petitioner's continuing problems with his shoulder, Ms. Korems requested that he undergo an independent medical examination (IME) so that the hospital could clarify Petitioner's work restrictions for workers' compensation purposes. Dr. John Dowdle conducted the IME of Petitioner on August 1, 2003, and noted that Petitioner was not at "Maximum Medical Improvement," but could perform certain light duty nursing assistant activities on a full-time basis.^[10] Dr. Dowdle further noted that there was no evidence at the time of permanent impairment.

15. Based upon the results of the IME, Petitioner's supervisors intended to start assigning him light duty nursing assistant duties beginning in August and generated a list of duties that they believed Petitioner could do.^[11] The list included the following duties: empty water pitchers; take patient temps and document on chart; make admission packets; take patients' blood pressures and document on chart; stock carts and rooms with small supplies; wipe off equipment and cables with disinfectant; answer phones and take messages; set up patients for bed baths and brushing their teeth or dentures; and make patient beds with fresh linen.

16. Dr. Norgard examined Petitioner on August 5, 2003, and notified HCMC that Petitioner could only work with certain reduced lifting restrictions, "as tolerated," and should avoid push/pull activities and overhead work.^[12] After receiving and reviewing the list of duties referenced above, Dr. Norgard clarified, on August 26, 2003, that he would not permit Petitioner to perform even light duty patient care duties because of the possibility of an unexpected event with a patient.^[13] He also restricted Petitioner's use of both his left and right shoulders as to overhead tasks due to some indication that Petitioner's neck was also injured in the initial incident and lowered the lifting restriction to ten pounds.^[14]

17. In August of 2003, Petitioner requested an alternative work schedule in the CRU to accommodate his need for a regular schedule because of ADHD. Ms. Varhol intended to accommodate Petitioner's request when he returned from his two-week suspension.^[15]

18. In response to Petitioner's administrative appeal of the two-week suspension, on August 18, 2003, HCMC's Medicine Clinical Administrator affirmed the suspension, which was to be effective from August 20 through September 1, 2003.^[16]

19. On August 18, 2003, Petitioner's symptoms flared up and he left work early. On August 19, he saw Dr. Norgard, who ordered that Petitioner not return to work

until he could be further evaluated. Dr. Norgard referred Petitioner to Dr. Garry Banks, a spine surgeon.^[17]

20. By letter of August 29, 2003, HCMC's attorney notified Petitioner's attorney that HCMC had no work available for Petitioner within Dr. Norgard's most recent restrictions, but would reassess the situation after Petitioner's next visit with Dr. Norgard, which was expected to be September 29, 2003. The letter further stated that Hennepin County would pay Petitioner temporary total disability benefits beginning September 2, 2003, the day Petitioner was due to return to work after his suspension.^[18] It was Ms. Varhol's anticipation that Petitioner would likely recover eventually and her intent to bring Petitioner back to work at least temporary light duty when he was able. It was not her intent to terminate him at that time.^[19]

21. On September 18, 2003, Petitioner saw Dr. Banks who diagnosed a herniated disc in Petitioner's spine, apparently also caused by Petitioner's initial work injury.^[20] Dr. Banks recommended physical therapy and the possibility of surgery to repair the herniated disc. He advised Petitioner to remain out from work until further information was gathered. On Petitioner's return visit the next month, Dr. Banks further recommended surgery to Petitioner, who felt that the physical therapy he had received was not helpful. When Petitioner declined to have the surgery, Dr. Banks communicated to the QRC that Petitioner was restricted to lift/carry/push/pull activities of five pounds maximum and that he was prohibited from any flexing, rotation, static, and overhead activities involving his shoulders and neck. Dr. Banks predicted that Petitioner would reach maximum healing and permanent restrictions would be issued after six weeks.^[21]

22. On November 5, 2003, Petitioner sought a second opinion from Dr. Daryll Dykes, who did not recommend the same highly invasive surgery as Dr. Banks.^[22] Over the next two months, Petitioner saw Dr. Dykes on at least three occasions while Petitioner continued to undergo physical therapy. Petitioner declined any surgical procedures, and Dr. Dykes recommended as work restrictions no patient lifting or transfers and occasional (0-33% of the time) handling of up to 25 pounds. Dr. Dykes did not expressly rule out direct patient care, but he did recommend that Petitioner refrain from lifting or transferring any patients.

23. Petitioner filed a Petition for Relief under the Veterans Preference Act on December 1, 2003, claiming that HCMC was refusing to offer him work within his restrictions and that the August 29, 2003, letter from HCMC constituted a removal for the purposes of the Veterans Preference Act.

24. By letter dated December 8, 2003, HCMC's counsel contacted Petitioner's counsel to request that Petitioner chose one doctor's set of work restrictions, as required under the Workers Compensation law, to rely on in the determination of disability benefits. Ms. Varhol and Ms. Korems wanted the chosen doctor to review the list of CRU light-duty tasks created back in August, 2003, with a focus on returning Petitioner to work at HCMC.

25. Petitioner began to apply for other nursing positions outside HCMC. On December 15, 2003, he began working as a LPN at Walker City View, a long-term care facility in Minneapolis. Petitioner passes medication, changes dressings, administers insulin, does charting, and performs similar tasks.^[23]

26. The Department of Veterans Affairs issued a Notice of Petition and Order for Hearing on December 15, 2003, setting the hearing for February 19, 2004.

27. In early February, 2004, when HCMC received word from Dr. Dykes and Dr. Norgard that, in their medical opinions, Petitioner had reached "maximum medical improvement" as defined under Minnesota Workers Compensation law.^[24] In HCMC's view, Petitioner's work restrictions became permanent at this point in time and it then appeared unlikely that he would be able to return to work as a nursing assistant. HCMC felt unable and unwilling to offer Petitioner light duty work on a permanent basis.^[25]

28. The original hearing date of February 19, 2004, for the Veteran's Affairs matter was used for a prehearing conference. At that time, HCMC stated that it would be placing Petitioner on a Medical Leave of Absence that would include a notice of his right to Veterans Preference hearing. It was agreed that Petitioner would request such a hearing before the Hennepin County Human Resources Board, which would be referred to the Office of Administrative Hearings and consolidated for hearing with the Veterans Affairs matter. It was also determined that Petitioner would file a motion for summary disposition in the Veterans Affairs matter and that if testimony was necessary, it would be heard along with the hearing in the Human Resources Board matter. The motion and a response were filed. The Administrative Law Judge subsequently ruled that material fact issues existed and that testimony was necessary.

29. By letter dated February 23, 2004, Ms. Varhol placed Petitioner on Medical Leave of Absence effective February 9, 2004. In compliance with the Family and Medical Leave Act, the leave of absence is effective for 180 days and if Petitioner is unable to return to work at that time, he will be placed on Medical Layoff. The letter cited the work restrictions of both Dr. Norgard and Dr. Dykes as rendering Petitioner medically and physically unable to perform the duties of a nursing assistant. The letter also contained a "Veteran's Notice" acknowledging that the Medical Leave of Absence constituted a "removal" under the Veterans Preference Act and informing him of his right to request a hearing.^[26]

30. Petitioner has not worked at HCMC since August 18, 2003. During the month prior to the hearing, Petitioner applied for two Hennepin County LPN positions at satellite clinics. He had not received a response regarding either job at the time of the hearing. He still is employed at Walker City View. He maintains that he is able to perform LPN duties similar to those he performs at Walker City View.^[27] However, he has not received clearance from his physicians, and did not claim that his is able to perform the necessary functions of a nursing assistant at HCMC at this time or in the future.

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

CONCLUSIONS

1. Pursuant to Minn. Stat. §§ 14.50 and 197.481, the Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter.

2. The Department of Veterans Affairs has complied with all procedural and substantive requirements of law or rule. In all respects, the Notice of Hearing was proper as to form and content.

3. Petitioner is an honorably discharged disabled veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447 entitled to all benefits and protections of the Minnesota Veterans Preference Act.

4. HCMC is a political subdivision in the State of Minnesota within the meaning of Minn. Stat. § 197.46.

5. Minn. Stat. § 197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges, in writing.

6. Under the Veterans Preference Act, a veteran is removed from his position or employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job.^[28]

7. HCMC's August 29, 2003, action of stating that it had no work available for him under his most recent medical restrictions and would reconsider the situation in a month did not make it unlikely or improbable that Petitioner would be able return to his job. The action was a temporary response to an indefinite restriction from the physician and made under reasonable assumptions that Petitioner's condition would likely improve and that he would likely return to work.

8. Petitioner was not "removed" from his employment within the meaning of Minn. Stat. § 197.46 by the notice of August 29, 2003. Thus, he was not denied any rights under that statute.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATIONS

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs dismiss the petition of Michael T. Earsom.

Dated May 21, 2004

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped (3 tapes).

MEMORANDUM

Under the Veterans Preference Act, a veteran is removed from his position or employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job.^[29]

Petitioner contends that a removal took place when he received the August 29, 2003, letter from HCMC. He argues that the practical effect of the letter was that he never returned to work at HCMC. And Petitioner suggests that Ms. Varhol used this letter as a means of "getting rid" of Petitioner due to the conflicts she was having with him as shown by the prior disciplinary actions.

The language of the August 29, 2003, letter conveys HCMC's intent to keep Petitioner's position in the CRU open for him. Based upon Dr. Norgard's temporary restrictions essentially limiting Petitioner to sedentary computer work, the CRU did not have even limited duties available for him. HCMC reserved any conclusive decision about Petitioner's employment until it had the results of any further diagnostic testing done by Dr. Norgard or a final determination about Petitioner's maximum medical improvement. Moreover, HCMC complied with the Workers Compensation law and paid Petitioner Temporary Total Disability during that period. That is an indicator that HCMC considered the situation to be temporary. At the hearing, Ms. Varhol credibly expressed her intent and expectation to have Petitioner return to his position, with or without work restrictions. Even as late as December 8, 2003, the CRU staff was focused on Petitioner returning to work when it asked Petitioner to choose one doctor's opinion for purposes of workers' compensation law and have that doctor review again the list of light duty tasks created in August, 2003, around the time of Petitioner's IME. Ms. Varhol did not fill Petitioner's position during the interim period between August 29, 2003, and February 23, 2004, and Petitioner had the opportunity to return to his job if his physical condition improved.

Petitioner's removal did not occur until February 23, 2004, when Ms. Varhol put Petitioner on a medical leave of absence and gave him a notice of his Veterans Preference rights. There is no violation of Minn. Stat. § 197.46.

S.M.M.

- [1] Ex. 6.
- [2] Testimony of Petitioner.
- [3] Affidavit of Lee Korems; testimony of Petitioner.
- [4] Testimony of Stephanie Secret.
- [5] Patients in the CRU are acutely ill and in need of assistance with up to 80% of their daily living activities. They are generally hooked up to monitors, pumps, or catheters. HCMC previously cared for these types of patients in the intensive care unit.
- [6] Affidavit of Paula Varhol.
- [7] Testimony of Paula Varhol.
- [8] Affidavit of Paula Varhol.
- [9] Affidavit of Paula Varhol, Ex. 4.
- [10] Ex. 5, sub-Ex. 2.
- [11] Ex. 2.
- [12] Ex. 4(a).
- [13] Affidavits of Paula Varhol and Lee Korems.
- [14] Ex. 5, sub-Ex. 5.
- [15] Ex. 3.
- [16] Affidavit of Eric R. Lee, Ex. B. Petitioner served the suspension as ordered. On October 30, 2003, Susan Kramer, Cardiology Program Manager, reduced the suspension to eight days. Petitioner's payroll was adjusted accordingly.
- [17] Affidavits of Paula Varhol and Lee Korems.
- [18] Ex. 8, attachment.
- [19] Testimony and Affidavit of Paula Varhol.
- [20] Ex. 4(b).
- [21] Ex. 5, sub-Ex. 6, facsimile memo dated October 8, 2003.
- [22] Ex. 4(c).
- [23] Testimony of Petitioner. Petitioner left the position at Walker City View for two weeks in February, 2004, but has since returned to the job. Affidavit of Lee Korems.
- [24] Ex. 5, sub-Ex. 11.
- [25] Testimony and Affidavit of Paula Varhol.
- [26] Ex. 1, sub-Ex. 5.
- [27] Testimony of Petitioner.
- [28] *Myers v. Oakdale*, 409 N.W.2d 848, 850-51 (Minn. 1987).
- [29] *Myers v. Oakdale*, 409 N.W.2d 848, 850-51 (Minn. 1987).