

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

Gary F. Frahm
v.
Independent School District No. 2859,
Glencoe-Silver Lake

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

A hearing was held on January 22, 2009, at the Office of Administrative Hearings, before Beverly Jones Heydinger, Administrative Law Judge, pursuant to a Notice of Petition and Order for Hearing, dated October 22, 2008.

Appearances: Bruce P. Grostephan, Peterson, Engberg & Peterson, on behalf of Gary F. Frahm (Petitioner); Patrick J. Flynn, Knutson, Flynn & Deans, P.A., on behalf of Independent School District No. 2859, Glencoe-Silver Lake (School District).

The hearing record closed upon the receipt of the posthearing reply briefs on April 15, 2009.

STATEMENT OF THE ISSUES

1. Is the Petitioner entitled to notice of his right to a veterans preference hearing prior to his termination from employment with the School District?
2. If the Petitioner was terminated without a hearing, is he entitled to back pay?

The Administrative Law Judge will recommend that the Petitioner be given notice of his right to a hearing under the Veterans Preference Act and back pay. However, this proceeding must be reconvened for the purpose of determining what back pay, if any, the Petitioner is entitled to receive until the proper notice of his right to hearing is given.

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

FINDINGS OF FACT

1. The Petitioner is a veteran of the United States Navy, honorably discharged on September 19, 1962. The Petitioner was employed by the School District as a bus driver for approximately 13 years.

2. During the school year, the Petitioner drove a route each school-day morning and afternoon, and also drove athletic and academic teams and for field trips. Some of the trips occurred in the summer before school began.¹ During the 2005-2006 school year, the Petitioner worked approximately 1,597 hours.² During the 2006-2007 school year, through April 2, 2007, the Petitioner worked approximately 1,077 hours.³

3. The School District authorized the Petitioner to take about 10 days of leave in March 2006.⁴

4. At a meeting on July 10, 2006, the School District's Board voted to award the transportation contract for 2006-2007 to Prairie Bus Services, also known as 4.0 School Services.⁵ The Petitioner continued to be an employee of the School District and subject to its collective bargaining agreement, but was under the supervision of Mike Hennek, the owner of 4.0 School Services.⁶

5. Throughout the 2006-2007 school year, the School District and the Service Employees International Union, Local 284 (Union), were in negotiations about the school bus drivers. As part of its effort to privatize the bus transportation, the School District wanted to terminate the bus drivers from its employment. The bus drivers were offered the opportunity to terminate their employment with the School District in December 2006, but the Union objected, and the bus drivers remained School District employees throughout the school year.⁷

6. In September 2006, Petitioner mentioned to Mr. Hennek or the Glencoe supervisor, Bob Becker, that he wanted to take vacation for a couple of weeks the following March. Either Mr. Hennek or Mr. Becker told the Petitioner that the request could probably be granted, but it would require the approval of the School District Superintendent, John Hurnung.⁸

7. In February 2007, Petitioner submitted his request for 13 days of leave the next month to the Superintendent. Mr. Hornung denied the request.⁹ The Petitioner called Mr. Hornung and was led to believe that Mr. Hornung was concerned about

¹ Testimony (Test). of Gary Frahm, transcribed, at 4-5.

² Petitioner's Exhibit (P. Ex.) 8.

³ P. Ex. 9.

⁴ R. Ex. 10; Test. of Frahm at 15.

⁵ Respondent's Exhibit (R. Ex.) 21.

⁶ Test. of Pamela Twiss at 8.

⁷ See P. Ex. 18; R. Ex. 8.

⁸ Test. of Frahm at 11; R. Ex. 1 at transcript pages 29-31, 87-88.

⁹ R. Ex. 4.

finding adequate substitutes for the Petitioner.¹⁰ The Petitioner and Mr. Becker arranged for substitutes to cover the Petitioner's routes during his requested absence.¹¹

8. On March 7, 2007, Petitioner obtained Mr. Becker's approval and resubmitted the leave request to the Superintendent, requesting 11 days of leave. The Petitioner clarified on the request that he planned to attend the 50-year reunion of the men who served on the U.S.S. Tombigbee and to visit his son. The Superintendent denied the request.¹²

9. Prior to leaving on vacation, the Petitioner left a message for Pamela Twiss, the Union business agent, raising concerns about his treatment and about being disciplined if he left on vacation.¹³ Ms. Twiss did not conclude from the message that the Petitioner voluntarily quit his job.¹⁴

10. The Petitioner's last day of work before leaving on vacation was March 16, 2007. On that day, he told Mr. Becker that it was his last day, that he was going on vacation.¹⁵ Mr. Becker sent a note to the School District office reporting that the Petitioner had stated that March 16 would be his last day working for the School District, and that Mr. Becker had told the Petitioner to submit a letter to the school administration stating his intent to resign.¹⁶ The Petitioner did not submit a letter of resignation.

11. Ms. Twiss confirmed that there was a long-standing history of the bus drivers receiving unpaid vacation, with the approval of the supervisor and the School District.¹⁷ Although she acknowledged that bus drivers had typically been denied paid vacation, there had been a cooperative approach to approving unpaid leave.¹⁸ Ms. Twiss's opinion was that the Superintendent denied the Petitioner's request for leave because of the on-going dispute between the School District and the Union over the School District's attempt to privatize the bus transportation.¹⁹

12. The Petitioner returned to work on April 2, 2007, but was not permitted to resume his duties.²⁰ There was no school in the district from April 5-9, 2007.²¹

13. 4.0 School Services offered to hire Petitioner as its employee to drive for the School District. The Petitioner accepted and drove the bus routes on April 10, 2007. On April 11, after driving the morning route, Mr. Becker called the Petitioner and told him not to take the afternoon route and to come into the office for a meeting. Mr.

¹⁰ Test. of Frahm at 16.

¹¹ Test. of Frahm at 16-17.

¹² R. Ex. 5.

¹³ Test. of P. Twiss at 24, 32.

¹⁴ Test. of P. Twiss at 28.

¹⁵ Test. of Frahm at 51-52; R. Ex. 1, transcript at 40 (Becker).

¹⁶ R. Ex. 6.

¹⁷ Test. of P. Twiss at 30.

¹⁸ Test. of P. Twiss at 31.

¹⁹ Test. of P. Twiss at 32.

²⁰ Test. of Frahm at 19; R. Ex. 1, transcript at 151.

²¹ P. Ex. 7.

Becker told the Petitioner that Mr. Hornung was upset and did not want 4.0 School Services to employ the Petitioner. To avoid dispute with the Superintendent, 4.0 School Services terminated the Petitioner.²²

14. The School District did not pay the Petitioner for work after March 16, 2007.²³

15. There was no evidence in this proceeding that the Petitioner's competence as a bus driver was at issue. At the arbitration proceeding, both Mr. Becker and Mr. Hennek confirmed that the Petitioner was a very good bus driver.²⁴

16. After being terminated by 4.0 School Services, the Petitioner requested retirement, fearing that he would lose the public pension which he believed he should receive. He submitted a slip to the School District, backdated to March 16, 2007. On or about April 5, 2007, the Superintendent denied the Petitioner's request for retirement on the basis that the Petitioner had previously quit.²⁵

17. On or about April 11, 2007, the Union submitted a grievance on behalf of the Petitioner; the Superintendent would not accept it on the basis that the Petitioner was no longer employed by the School District.²⁶ A second request was sent on April 19, 2007.²⁷

18. On April 24, 2007, the Union requested a veterans preference hearing for the Petitioner, enclosing a copy of Petitioner's honorable discharge.²⁸ No veterans preference hearing was held.

19. On May 21, 2007, the Union requested arbitration.²⁹ On March 27, 2008, the arbitrator issued a decision, determining that Petitioner had quit his employment, denying the grievance, and stating that the Petitioner's veterans preference claim was outside the scope of the arbitration.³⁰

20. The Petitioner submitted evidence of wages earned in 2007 and 2008,³¹ but there was insufficient evidence upon which to determine what the Petitioner would have earned if he had remained employed by the School District, what benefits he would have received during that employment, including contributions by the School District to the Public Employee Retirement Association (PERA), what income the

²² Test. of Frahm at 21-22; Resp. Ex. 1 at transcript page 80.-81.

²³ Test. of Frahm at 27 (statement of School District counsel).

²⁴ Resp. Ex. 1 at transcript pages 54-55, 105, 154-155.

²⁵ P. Ex. 20 (including copy of post-it note between School District staff from Dawn Peterson to Carol Dammann); Test. of P. Twiss at 10; Test. of Frahm at 24-25.

²⁶ P. Exs. 10, 21; P. Ex. 22.

²⁷ R. Ex. 17.

²⁸ R. Ex. 11.

²⁹ R. Ex. 18.

³⁰ R. Ex. 26 at 10.

³¹ P. Ex. 25.

Petitioner received in 2009 to date, and whether PERA benefits received should be an offset to the back pay that may be owing to the Petitioner.

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

CONCLUSIONS

1. The Department of Veterans Affairs and the Administrative Law Judge have jurisdiction to consider whether a petitioner has the right to a hearing under the Veterans Preference Act prior to discharge from employment, pursuant to Minn. Stat. § 197.481 and § 14.50.³²

2. The Department of Veterans Affairs has complied with all relevant procedural requirements and has given proper notice of the hearing.

3. Because the School District has raised the affirmation defense that Petitioner resigned, it bears the burden of demonstrating by a preponderance of the evidence that the Petitioner, a veteran, was not entitled to notice of his right to a hearing under the Veterans Preference Act prior to termination of his employment. Pursuant to Minn. Stat. § 197.46, "Any veteran who has been notified of the intent to discharge the veteran from ... 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."

4. A veteran who voluntarily quits or relinquishes employment is not considered to be "discharged" and is not entitled to the notice of right to request a hearing.³³

5. A resignation occurs when an employee abandons his employment by leaving the position with no intent to return to it and his actions are consistent with his intent.³⁴

6. The School District has failed to show by a preponderance of the evidence that the Petitioner resigned from his position. It failed to show by a preponderance of the evidence that the Petitioner left his position without the intention of returning, that he gave notice of his resignation or acted in any way consistent with resignation, or that any such action was voluntary.

7. The School District's failure to give notice to the Petitioner of his right to request a hearing violated the Veterans Preference Act.

8. The Petitioner is entitled to the wages he would have earned between the date of wrongful discharge and the date that he was formally discharged in accordance

³² Unless otherwise noted, the Minnesota Statutes are cited to the 2008 edition.

³³ *Brula v. St. Louis County*, 587 N.W.2d 859, 862 (Minn. App. 1999).

³⁴ *Anson v. Fisher Amusement Corp.*, 254 Minn. 93, 98, 93 N.W.2d 815, 819 (1958).

with his rights under the Veterans Preference Act.³⁵ Since the record is not clear on the compensation that the Petitioner would have received, or any offsets from earnings after March 16, 2007, the hearing will be re-opened for the presentation of evidence on the amount, if any, that the School District owes to the Petitioner.

9. Any Findings of Fact more properly designated Conclusions are adopted as such.

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

ORDER

1. The Administrative Law Judge recommends that the School District's decision to terminate the Petitioner without conducting a veterans preference hearing is REVERSED.

2. The hearing record will be reopened to take evidence concerning the compensation, if any, that the School District owes to the Petitioner.

3. A hearing will be held on **June 24, 2009, at 9:30 a.m.**, at the Office of Administrative Hearings.

4. By **June 17, 2009**, the parties shall exchange a list of exhibits that they intend to offer into evidence relevant to the determination of compensation, and the name and address of each witness to be called, with a brief summary of the testimony to be given. Evidence previously admitted need not be listed.

Dated: May 18, 2009

s/Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Digitally Recorded
A-bjh-012209
Transcribed in part

MEMORANDUM

The parties do not dispute that the Petitioner was an honorably discharged veteran who was employed by the School District for several years. Thus, he was

³⁵ *Pawelk v. Camden Township*, 415 N.W. 2d 47 (Minn. App. 1987); *Bolden v. Hennepin County Board of Commissioners*, 504 N.W. 2d 276 (Minn. App. 1993).

entitled to the rights conferred under the Veterans Preference Act. It is also not disputed that the School District denied the Petitioner a hearing under the Veterans Preference Act based on its position that the Petitioner had resigned from his job as a bus driver. A veteran who resigns or retires from his position is not “removed” from the position and is not entitled to notice of his right to a hearing under the Act.³⁶

The issue in this case is not whether the School District had adequate cause to discharge the Petitioner, but only whether the Petitioner was entitled to a Veterans Preference Hearing before the discharge took effect. The School District asserts that no hearing was required because the Petitioner effectively resigned by failing to report for work for 10 days without approval. The Petitioner does not deny that he took vacation without the School District’s approval, but he insists that he did not intend to resign. He claims that he was entitled to a veterans preference hearing to raise the question of whether the School District had good cause to terminate his employment. Thus, one must analyze the facts to determine whether the Petitioner voluntarily relinquished his job on March 16, 2007, or whether he took vacation with the knowledge that it had been disapproved, but with the intent of returning to work.

The parties dispute exactly what the Petitioner said on March 16, 2007. The Petitioner claims that he told Mr. Becker that he was leaving on vacation and that it was his last day, to clearly convey that the substitute would need to take over the routes on the next school day. The Petitioner claims that he did not intend to convey that he was quitting for good. Mr. Becker apparently interpreted the Petitioner’s statements to mean that he was resigning. Mr. Becker directed the Petitioner to put his resignation in writing, but the Petitioner did not do so.

Ms. Twiss did not interpret the Petitioner’s message to her as a resignation. Instead, she understood that the Petitioner was concerned about the discipline he might face when he returned.

The Petitioner acknowledged that he had told a member of the School Board, Glen Gruenhagen, that he would quit if he could not get vacation. The Petitioner did so because he was angry about the situation and the on-going dispute with the bus drivers.³⁷

It is clear that Petitioner did not submit any written notice that he was resigning, that Petitioner reported to work on April 2, 2007, that the Superintendent would not let him work, that 4.0 School Services hired the Petitioner to drive the bus routes beginning on April 10, and that the Petitioner reported for work and drove the routes until the Superintendent pressured 4.0 School Services to fire him on April 11.

³⁶ *Brula v. St. Louis County, supra.*

³⁷ Test. of Frahm at 58-59.

An employee voluntarily quits when he directly or indirectly exercises his choice to leave employment.³⁸ A resignation occurs when an employee abandons his employment. One must look for the intent to abandon, some act of abandonment and evidence that the surrender of the position was voluntary. Whether these three elements exist in a particular case is a question of fact.³⁹

In *State ex rel. McCarthy v. Civil Service Comm'n of Minneapolis*,⁴⁰ the Supreme Court considered facts similar to those presented here. A Minneapolis employee took vacation on July 6 and was scheduled to return on July 14. He did not return to work until July 20. On July 19, the City informed the veteran that absence for more than three days without approval constituted resignation under the civil service rules.⁴¹ The Civil Service Commission determined that the City had good cause to remove the veteran for misconduct. Appeal was to the district court. The district court held that the veteran was entitled to a hearing under the Veterans Preference Act to challenge the City's determination, and was entitled to his earnings and benefits until the hearing was held, and affirmed the Commission's determination that the veteran had committed misconduct. The City did not appeal the portion of the trial court's order requiring that the discharge could not be effective until the veterans preference hearing was held and the district court agreed that the veteran was entitled to receive his wages until discharge was effective.⁴²

It is noteworthy that, in this case, there is no provision in the collective bargaining agreement that states that failure to report for work without permission or notice to the employer constitutes resignation. The specific act that the School District relies upon as the basis for the resignation is the failure to report to work. But under these facts, where the Petitioner returned to his position at the time that he stated he would, that was not a clear act of abandonment. Failure to report to work is evidence that the Petitioner was absent without permission; it is not clear evidence of resignation. Moreover, Mr. Becker told the Petitioner to put his request to retire in writing, and the Petitioner did not do so. The only act that the School District relied upon as the basis for its conclusion that the Petitioner had quit was the Petitioner's statement on the day prior to leaving for vacation that it was his "last day." In light of the Petitioner's plan to be absent, the statement was ambiguous, and as consistent with the Petitioner's explanation that he was simply conveying to Mr. Becker that he would be leaving on vacation as it was with the School District's conclusion that this reflected the Petitioner's intention to quit his job. The obvious ambiguity should have been clear when the Petitioner reported for work immediately upon returning from his vacation.

The School District also claims that the Petitioner's application for PERA benefits reflects his intention to resign. However, the timing of that application is more

³⁸ *Seacrist v. City of Cottage Grove*, 344 N.W.2d 889, 891 (Minn. App. 1984); *Anson v. Fisher Amusement Corp.*, *supra*.

³⁹ *State ex rel. Young v. Ladeen*, 116 N.W. 486, 487 (Minn. 1908).

⁴⁰ 152 N.W.2d 462 (Minn. 1967).

⁴¹ The Civil Service Commission Rule 9.03 stated that the absence of an employee for three successive days or longer without leave or notice to his superior shall be considered resignation. *Id.* at 463.

⁴² *Id.* at 464.

consistent with the Petitioner's testimony that he applied for PERA because he could not return to work. He did not apply for the benefits until after he was terminated by 4.0 School Services.

In *Johnson v. County of Anoka*,⁴³ the Court of Appeals emphasized that the veteran's resignation must be voluntary. In that case, an employee was having difficulty adapting to a new computer system. After some time, the employer gave the employee the choice to resign or to be terminated, telling him that it would be in his best interest to resign and that he would be given a good recommendation. The employee was given 24 hours to make a decision. The employee resigned and was not given notice of his veterans preference rights. Years later, he learned of those rights and attempted to exercise them. The court dismissed the matter on the basis of the statute of limitations, but stated, in *dicta*, that there was substantial support for the employee's claim that the choice given to him was tantamount to being removed from employment, that the effect of the employer's action was to make it unlikely that the veteran would be able to continue in the job, and that he should have been given notice of his rights under the Veterans Preference Act.

The School District had the opportunity to minimize its risk when it became obvious that the Petitioner did not agree that he had resigned. If the School District had reason to terminate the Petitioner for failure to report to work, it could have immediately provided him with notice of its intent to discharge him, accompanied by notice of his right to a veterans preference hearing. Although the School District knew that the Petitioner disagreed with its position, it did not take steps to assure that the Petitioner received his rights under the Veterans Preference Act.

It is important to note that this result does not imply that the School District may not terminate the employee for incompetence or misconduct under the Veterans Preference Act. In conducting a veterans preference hearing, the task of the hearing board is twofold: first, to determine whether the employer has acted reasonably; second to determine whether extenuating circumstances exist justifying a modification in the disciplinary sanction. The purpose of the veterans preference hearing is not simply to review findings and approve or disapprove recommendations concerning the appropriate sanction, but to decide for itself what penalty, if any, is justified. The power to modify the proposed discipline is consistent with granting the veteran a meaningful hearing.⁴⁴ At the hearing, the hearing board will have the opportunity to determine if there were any extenuating circumstances that should have weighed into the School District's decision to terminate the Petitioner for failing to report for work. And to assure that there was not an arbitrary abuse of the power.⁴⁵

An employee may be entitled to a hearing under both the collective bargaining agreement under which he is employed and the Veterans Preference Act. Minnesota courts have held that, although conducting two proceedings may be inefficient and

⁴³ 536 N.W.2d 336 (Minn. App. 1995), rev. denied, Sept. 28, 1995.

⁴⁴ *Southern Minnesota Municipal Power Agency v. Schrader*, 394 N.W.2d 796, 800-01 (Minn. 1986); *AFSCME Council 96 v. Arrowhead Regional corrections Board*, 356 N.W.2d 295, 298 (Minn. 1984).

⁴⁵ *Garavalle v. City of Stillwater*, 168 N.W. 2d 336, 344 (1969).

could lead to conflicting results, the law dictates that a veteran is entitled to both proceedings. In *AFSCME Council 96 v. Arrowhead Regional Corrections Board*,⁴⁶ the Supreme Court stated: “There are practical as well as statutory and public policy reasons for allowing a veteran to employ both avenues of redress. The veteran who requests a preference hearing must either be suspended with pay or be allowed to continue in employment until after the hearing. The arbitration process provides no such umbrella.”⁴⁷ It further elaborated upon the reasons a veteran may choose to proceed in one forum or the other, recognizing that the two proceedings may lead to inconsistent results. Moreover, as the Supreme Court pointed out, the standard of review on appeal differs with the two proceedings.⁴⁸

Under the Veterans Preference Act, a veteran is entitled to compensation until he is formally discharged in accordance with the Act. It is within the discretion of the School District whether it wants the Petitioner to return to his duties until the necessary steps have been taken. If it believes that the Petitioner is unfit to perform his duties, it may place him on paid leave.

The record is insufficient to determine the compensation owing to the Petitioner for the time period between April 2, 2007, and resolution of this proceeding. He is entitled to the wages and benefits he would have received until the date that he was discharged in compliance with the provisions of the Veterans Preference Act. The amount that is owing to the Petitioner must be reduced by the amount that the veteran did earn, or with due diligence could have earned, in similar employment.⁴⁹ Thus, it is appropriate to reconvene the hearing to assure that the record is complete.

B. J. H.

⁴⁶ 356 N.W.2d 295 (Minn. 1984).

⁴⁷ *Id.*, at 298.

⁴⁸ *Id.*, at 298-299.

⁴⁹ *Pawelk v. Camden Township*, 415 N.W.2d 47, 51-42 (Minn. App. 1987) and cases cited therein.