

3100-4199-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Larry D. Kerr,

Petitioner,

vs.
LAW,

FINDINGS OF FACT,
CONCLUSIONS OF
AND RECOMMENDATION

Olmsted County Sheriff's Department,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson of the Minnesota Office of Administrative Hearings at 10:00 a.m. on Tuesday, December 19, 1989, in the Morris; Hayden Room of the Olmsted County Courthouse, Rochester, Minnesota. Michael D. Klampe of the law firm of Klampe I, Nordstrom, 300 Broadstreet on the Park, 300 First Avenue Northwest, Rochester, Minnesota 55901, appeared on behalf of the Petitioner, Larry D. Kerr ("Kerr"). Gregory J. Griffiths of the law firm of Dunlap, Finseth, Berndt & Sandberg, P.O. Box 549, Rochester, Minnesota 55903, appeared on behalf of the Olmsted County Sheriff's Department ("the Department"). The record in this matter closed upon receipt of the parties' post-hearing briefs on January 8, 1990.

Notice is hereby given that, pursuant to Minn. Stat. . 14.61, the final decision of the Commissioner of Veterans Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Parties should contact William J. Gregg, Commissioner, Minnesota Department of Veteran Affairs, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155-2079, to ascertain the procedure for filing exceptions or presenting

argument.

STATEMENT OF ISSUES

The issue to be determined in this proceeding is whether the Department violated the Minnesota Veterans Preference Act, Minn. Stat. 197.46, when it placed Kerr on an indefinite medical leave of absence without written notice of charges and an opportunity for a hearing and, if so, what relief, if any, is appropriate..

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. A Notice of Petition and Order for Hearing was issued by the Commissioner of Veterans Affairs in this matter on November 8, 1989, in response to a petition filed by Kerr with the Minnesota Department of Veterans Affairs alleging denial of his veterans preference rights.

2. The parties have stipulated that Kerr is a veteran within the meaning of the Minnesota Veterans Preference Act, Minn. Stat. 197.46.

3. Kerr has been employed by the Department as a Deputy Sheriff in the Patrol division since 1978. Duties of Deputy Sheriffs in the Patrol Division include traditional law enforcement duties such as; traffic, patrol, investigation of crimes up to the time detectives take over, and first response in the event of an emergency or accident.

4. The Department has three divisions: a Detective Division, a Civil and Warrants Division, and a Patrol Division (which was also referred to as the Traffic Division during the hearing). There are also several special assignments within the Department which require special skills. All deputies are required to be able to function as patrol officers and must be able to respond to emergency situations regardless of the division in which they are employed.

5. Kerr has received satisfactory performance evaluations throughout his employment with the Department.

6. Kerr was diagnosed as having non-insulin-dependent diabetes mellitus in 1981. He informed the Department of the diagnosis and supplied the Department with medical reports concerning his condition.

7. During 1983-1984, Kerr was able to control his diabetes through weight loss and diet control and did not require insulin therapy.

8. Kerr's condition currently requires that he take- insulin. He takes a total of 80 units of insulin each day. He takes 50 units of insulin in the morning, and 30 units at night.

9. Insulin-requiring diabetics are subject to potential hypoglycemic reactions, which result from low blood sugar. Hypoglycemia may produce confusion, unconsciousness, seizures, or even death.

10. Since his diagnosis as a diabetic, Kerr has never had a hypoglycemic reaction that he was unable to recognize. He has noticed that certain symptoms precede such a reaction, including a slight headache, nervousness and perspiration. He carries candy with him in a briefcase or bag to eat in the event that he notices such symptoms, or buys a soft drink or orange juice to drink if he is close to a store. He has never had a hypoglycemic reaction that caused him to lose control or consciousness.

11. In 1987, Kerr provided the Department with medical reports concerning

his diabetes from Dr. H.K. Ivy, Dr. F. John Service, and Suzanne M. Banholzer, R.N., C.D.E. These reports advised the Department of the general risk of hypoglycemia and emphasized that the low blood sugar that causes hypoglycemia can, if untreated, cause loss of consciousness. The reports stressed the need for Kerr to maintain regularly scheduled mealtimes. A memorandum issued by Dr. Ivy on April 7, 1987, stated that, while Kerr had had "minimal difficulty with hypoglycemic episodes in the past," he "fortunately

. . . is able to recognize the symptoms of hypoglycemia and take appropriate steps to avoid any disabling symptom."

12. Kerr has indicated an interest at various times during his employment with the Department in being transferred to the Civil and Warrants Division of the Department, where the work schedule was more predictable, and has applied for transfers to that division in the past.

13. The Patrol Division of the Department instituted a shift change in July of 1989. The prior schedule required traffic deputies to work straight day or night shifts. The new schedule required the deputies to work 32-day rotations of four days on and four days off. Under the new schedule, deputies worked 12-hour shifts in a pattern which alternated day and night shifts. The rotating shift change was limited to the Patrol Division, and the jobs in the Detective and Civil and Warrants Divisions remained largely daytime jobs.

14. Kerr expressed concerns related to the impact of the proposed shift change on his medical condition when the shift change was first under discussion during 1987 and again during the early months of 1989. Kerr told his supervisor, Captain Steve Von Wald, in late February or early March of 1989 of these concerns. Captain Von Wald told Kerr that the Department would need additional medical information before it could evaluate his ability to work rotating shifts.

15. Kerr never told the Department that he would refuse to work rotating shifts under the new schedule.

16. Kerr supplied Captain Von Wald with a letter dated March 30, 1989, from Dr. Bruce Zimmerman, an endocrinologist with the Mayo Clinic. The letter stated that Kerr "will have more difficulty controlling his diabetes and thus, an increased risk of hypoglycemia if he is unable to maintain a regular work schedule and regular eating habits." Dr. Zimmerman recommended that Kerr's work hours not vary substantially and that his work schedule allow him to eat meals at approximately the same time each day. Dr. Zimmerman asserted that, if these recommendations were followed, "Mr. Kerr's work performance should not be impaired by his diabetes and treatment with insulin."

17. After receiving the letter described above, Captain Von Wald noted that the letter did not address the issue of rotating shifts. Captain Von Wald then called Dr. Zimmerman. Dr. Zimmerman told Captain Von Wald that the letter did not mean that Kerr could not work twelve-hour shifts, and said that he was not aware of anything that would prevent diabetics from working a twelve-hour shift.

18. Following his conversation with Dr. Zimmerman, Captain Von Wald told Kerr that he needed more medical information, and asked Kerr to have Dr. Zimmerman supply an updated letter.

19. Dr. Zimmerman sent Kerr a letter dated June 14, 1989, and enclosed an additional letter for submission to the Department. In the latter letter, Dr. Zimmerman stated, inter alia:

A delay in meal, a lighter meal than usual, or an unexpected increase in activity increase the chances of Mr. Kerr having a hypoglycemic reaction. Although hypoglycemia can often be recognized and promptly treated averting serious difficulty, there is always the risk with hypoglycemia that the patient will be distracted by other activities which will prevent the recognition of of [sic] hypoglycemia or that the patient will not develop the usual warning signs of hypoglycemia. In such instances, hypoglycemia may manifest by confusion, unconsciousness, seizures, and even death. The nature of Mr. Kerr's employment is such that adherence to a rigid eating schedule may be difficult. Emergencies may arise which call upon him to act in a prompt fashion delaying a meal or increasing his physical activity, increasing the risk of hypoglycemia. The danger to Mr. Kerr, his colleagues, and the general public of unrecognized hypoglycemia leading to confused behavior and inappropriate actions is significant.

There is no way to avoid this concern without assuring that Mr. Kerr works a regular schedule with an ability to eat in a consistent pattern. This requirement does not preclude shift work, but does require that shift changes not be too frequent.

On the other hand, a related issue is the general

diabetes, question of the employability of patients with
general particularly those treated with insulin. As a
restrict rule, I do not believe that it is wise to
merely employability of patient's [sic] with diabetes
judgement because of the fact that they are diabetic. A
an [sic] of the risk of hypoglycemia has to be made on
hours, individual basis related to the specific job tasks,
in and patient. Although I can relate, the medical issues
detail Mr. Kerr's case, I cannot make a judgement [sic] in
employment about the wisdom of his continuing his current
job. and the potential risk of hypoglycemia while on the
acquainted This judgement [sic] must be made by individuals
[sic] with a day to day situation in Mr. Kerr's job.

20. Kerr supplied Dr. Zimmerman's letter of June 14, 1989, to Captain Von Wald.

21. Captains Von Wald and Borchardt testified that, based upon Dr. Zimmerman's letter dated June 14, 1989, they believed that allowing Kerr to remain cm patrol duty could create serious risk to Kerr, the public, and fellow deputies.

22. On July 5, 1989, Kerr met with Sheriff Charles R. Von Wald, Captain Steve Von Wald, and Stan Anderson. Sheriff Von Wald said that

he was sorry and hated to do this, and then gave Kerr a sealed envelope containing a letter dated July 3, 1989, which was addressed to Kerr from Sheriff Von Wald.

23. The July 3, 1989, letter that Kerr was given in the meeting informed him that he was being relieved of his duties, The letter indicated, in pertinent part:

I have reviewed the letter from Dr. Zimmerman, dated 6-14-89, regarding your present medical condition. My staff and I are deeply concerned about the danger your condition presents to yourself, your fellow deputies and the general public. Our interpretation of the letter gives us no choice but to relieve you of your duties as a Deputy Sheriff. It is my opinion that we have no positions available, on the Sheriff's Department, that you can fill with your present medical problems, and I don't see any such positions in the foreseeable future.

If in the future your condition improves to the point that you are physically able to perform the duties of a Deputy Sheriff, your re-employment will be considered.

There was no mention of sick leave or medical leave of absence in this letter.

24. Later that day, Kerr returned to work and asked Captain Von Wald for clarification concerning what he was to do. Captain Von Wald said that, as far as he and the Sheriff were concerned, Kerr was terminated and that Kerr should make arrangements with Sergeant Berge to turn in his weapons and equipment and clean out his locker. Kerr complied with this request.

25. Kerr had never been asked to turn in his weapons and equipment or clean out his locker when he was placed on medical leave on two occasions prior to July, 1989, nor is he aware of anyone else within the Department who has been asked to do so when placed on a medical leave of absence. Russell Stierlen, a deputy sheriff in the Civil and Warrants Division, has suffered two heart attacks that required that he be away from his job and has never been directed to turn in his equipment on

those occasions.

26. On July 5, 1989, Captain Von Wald told the Petitioner's brother, Harry Kerr (who is employed by the Department as a detective) that the County had laid Larry off or fired him.

27. Dale Ignatius, Assistant Director of the Olmsted County Department of Human Resources, sent Kerr a form letter dated July 11, 1989, in which he notified Kerr that Kerr had the right under Minn. Stat.

197.46 to a hearing "on the termination of [his] employment with Olmsted County Sheriff's Department." The letter further indicated where Kerr should send a written request if he wished to request a hearing concerning [his] discharge." There was no mention of sick leave or a medical leave of absence in this letter.

28. Kerr sent Dale Ignatius two letters requesting a Veterans Preference hearing. The first was dated July 13, 1989, and the second was dated July 18, 1989.

29. Nancy Vollertsen, one of the attorneys for the Department, prepared a letter dated July 26, 1989, in which she informed Kerr that "the County has reviewed their decision concerning your employment" and that, "[s]ince it was not clear from your physician's letter whether you are able to perform the duties of the position of deputy sheriff, the County has decided to place you on paid sick leave retroactive to July 3, 1989." Ms. Vollertsen requested that Kerr complete release forms to permit her to communicate with Kerr's doctors. She stated that, "For the present time, you remain an employee of Olmsted County, entitled to all the usual benefits of employment. Since you have raised the issue of your ability to perform certain functions of your job, the County has a duty to investigate. We are anxious to have a determination as to what limitations, if any, your doctor recommends." She also advised Kerr that, "[s]ince you have not been removed from your position, you are not now eligible for a veteran's preference hearing. In the event your medical condition necessitates your removal, you will be entitled to such a hearing." Ms. Vollertsen's letter was the first occasion on which Kerr had been told that the County's action should be characterized as a decision to place Kerr on paid sick leave.

30. Harry Kerr, the Petitioner's brother, picked up Ms. Vollertsen's July 26, 1989, letter at Ms. Vollertsen's office in order to deliver it to the Petitioner. Ms. Vollertsen told Harry Kerr that, in her opinion, the County had "fucked up." She said that the conversation was confidential and that she would disavow it.

31. In a subsequent letter to counsel for the parties dated August

23, 1989, Dr. Zimmerman reiterated that, because of his need for insulin, Kerr's medical care would be best if he was in a job with regular hours and the ability to eat on schedule. He also stated that Kerr "could work rotating shifts. They would require adjustment in his insulin program to accommodate to the shift changes. In an ideal world, patients with insulin requirement should not work rotating shifts So long as Mr. Kerr is not hypoglycemic, he is able to perform the regular duties of his job." In describing the specific dangers to Kerr, his colleagues, and the public, Dr. Zimmerman indicated that, as Kerr explained his work conditions to Dr. Zimmerman, the potential of an unexpected delay in a meal in an emergency situation in which Kerr could not test his blood sugar or eat seemed to be a real possibility. Under those circumstances, Dr. Zimmerman indicated that Kerr might not recognize the onset of hypoglycemia and his judgment might be impaired by hypoglycemia and confusion, unconsciousness, seizures, coma and death might occur.

32. In an additional letter to counsel for the parties dated October 5, 1989, Dr. Zimmerman stated that Kerr is "physically capable to perform deputy sheriff functions" to the best of Dr. Zimmerman's judgment, and indicated that, while Dr. Zimmerman can point out the potential risks, he is not in a position to evaluate the potential seriousness with respect to Kerr's employment of impaired judgment due to hypoglycemia.

33. Dr. Zimmerman issued a letter dated December 15, 1989, in which

he states that, based upon certain limitations, it is his opinion that Kerr's diabetic condition and the risk of hypoglycemia has not changed adversely to any significant medical certainty since 1987.

34. Kerr received vacation pay, sick pay and holiday pay from the Department until these benefits ran out during the pay period ending October 9, 1989. Information supplied by the Department following the hearing indicates that Kerr was compensated in the following manner after July 4, 1989:

7/4/89 - 7/17/89	80 hours of sick leave used
7/18/89 - 7/31/89	84 hours of sick leave used
8/1/89 - 8/14/89	72 hours of sick leave used
8/15/89 - 8/28/89	84 hours of sick leave used
8/29/89 - 9/11/89	21.28 hours of sick leave used; 74.72 hours of vacation used
9/12/89 - 9/25/89	3.69 hours of sick leave used; 37.75 hours of vacation used; 8 hours of holiday pay used; and 18.5 hours as courtroom guard at \$11.97 per hour.
9/26/89 - 10/9/89	24 hours of holiday pay used; 3.69 hours of sick leave used; 6.15 hours of vacation used; and 12 hours as a transportation guard at \$3.50/hour.

Kerr remains entitled to 7.5 hours of compensatory time owed to him through August 29, 1989. Since October 9, 1989, Kerr has been on an unpaid medical leave of absence. His status will be reconsidered by the County in early February, 1990.

35. The Department paid the cost of Kerr's health, dental, and life insurance benefits through October 31, 1989. Kerr had to borrow money from a fellow deputy in order to continue these insurance coverages. Kerr paid approximately \$130.00 in November and December of 1989 to continue these coverages, and will have to pay \$140.00 per month to continue them after January 1, 1990.

36. In order to terminate an Olmsted County employee through proper procedures, a recommendation for termination must be received by the County Board. The proposed termination is placed on the agenda of the

County Board, and the Board makes the ultimate decision regarding termination.

37. The Olmsted County Board has never taken any action with respect to the termination of Kerr's employment with the Department.

38. There is no evidence that Olmsted County or the Department ever completed a personnel action form with respect to the termination of Kerr's employment or supplied a form to the State of Minnesota with respect to unemployment benefits for Kerr.

39. Kerr has not been taken off the Olmsted County payroll. He remains entitled to certain benefits that are not geared to hours worked,

such as the grievance procedure available through the Department's contract with the Sheriffs Association and the tuition reimbursement program.

40. At least two other deputies within the Department (Captain Sikking and Deputy Russell Stierlen) are diabetic," It. Stierlen, a deputy sheriff in the Civil and Warrants Division, takes 80 units of insulin each day, just as Kerr does. Mr. Stierlen has never been asked to bring in any medical information regarding his diabetes or to provide medical releases to the Department, and has never been placed on a medical leave of absence due to his diabetes.

41. Kerr has undergone an ophthalmologic examination in recent months which found no indication that his diabetes has caused any damage to his eyes.

42. Through proper diet and weight control, it is possible that Kerr may be able to control his diabetes without insulin therapy and thereby minimize the risk of a hypoglycemic reaction. Kerr has been losing weight recently. Whether or not Kerr will remain insulin-requiring will depend upon his dietary compliance and his pancreatic insulin reserve,

43. The Department has a Convalescent Limited Duty policy which was in effect during 1989 and remained in effect as of the date of the hearing in this matter. The policy, which is denominated SOP 24, sets forth criteria for the consideration of employees on a case-by-case basis for light duty positions. The criteria for application of the policy include the requirement that (1) a job must exist that the employee can perform, and (2) the employee must be expected to be able to return to full active duty status within a foreseeable time frame.

44. Kerr was never offered light duty work or a temporary change in jobs.

45. Kerr was paid a base rate of \$15.26 per hour while actively employed as a deputy sheriff.

46. Since October 31, 1989, Kerr has been employed full-time as a mechanic with Rush Bus Company at a rate of \$5.50 per hour. Although Kerr has applied for unemployment compensation with respect to his position with the Department, the Department has contested the request. An unemployment compensation hearing had been held, but no decision had been issued as of the date of the hearing in this matter. Kerr thus had not received any unemployment compensation as of the date of the hearing in this matter.

47. Kerr worked 18.5 hours for Olmsted County as a courtroom guard for a trial in September of 1989 at an hourly rate of \$11.97, and 12 hours for Olmsted County as a transportation guard in September or October of 1989 at an hourly rate of \$3.50. Counsel for the County notified Kerr in December of a potential job opening as a corrections officer at a wage rate of \$11.97 an hour. The County has also encouraged Kerr to apply for part-time jobs within the County.

48. Kerr alleges that he is willing, able and desires to return to his Deputy Sheriff position.

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

CONCLUSIONS-OF-LAW

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction over this matter pursuant to Minn. Stat. 14.50 and 197.481. The Notice of Hearing issued by the Commissioner of Veterans Affairs was proper and all substantive and procedural requirements of law and rule have been met.

2. The Petitioner, Larry Kerr-, is a veteran within the meaning of Minn. Stat. 197.46 and 197.447 and is entitled to all of the protections of the Veterans Preference Act.

Olmsted County and the Olmsted County Sheriff's Department are political subdivisions of the State of Minnesota within the meaning of Minn. Stat. 197.46.

4. The burden is on the Petitioner in this proceeding to establish by a preponderance of the evidence that he was removed or discharged from employment in violation of Minn. Stat. 197.46.

5. For the reasons set forth in the Memorandum below, the Administrative Law Judge has concluded that the Petitioner has satisfied his burden of establishing by a preponderance of the evidence that he was removed from his employment without due notice of charges in writing and a hearing showing incompetency or misconduct, in violation of the provisions of Minn. Stat. 197.46.

6. The Petitioner is entitled to reinstatement to his position as a Deputy Sheriff in the Olmsted County Sheriff's Department and an award of backpay retroactive to July 4, 1989, with interest calculated from the time each paycheck was due at six percent per annum (in accordance with Minn Stat. 334.01). Due to the safety issue involved in this case,

the Department should be permitted to suspend the Petitioner with pay pending the outcome of a Veterans Preference hearing. The amounts of any unemployment compensation the Petitioner may have received and all earnings from other employment since July 4, 1989, should be deducted from this award. The sums received by the Petitioner with respect to his National Guard service should not be deducted from this award because he would have received those monies regardless of his status with the Olmsted County Sheriff's Department. The Petitioner is also entitled to receive all sick leave, vacation pay, and other benefits that he would have accumulated had he been actively employed as a Deputy Sheriff since July 4, 1989, and to have all sick leave, vacation pay, and any other benefits restored that were depleted due to his placements on sick leave and medical leave of absence status.

7. The Memorandum below is incorporated by reference in these Conclusions of Law.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs issue an Order requiring the Olmsted County Sheriff's Department to (1) reinstate the Petitioner to his position as Deputy Sheriff (with the proviso that, due to the safe" issue involved in this case, the Department may suspend the Petitioner with pay pending the outcome of a Veterans Preference hearing), (2) award him back pay retroactive to July 4, 1989, with simple interest at six percent, subject to deductions for any unemployment compensation and earnings from other employment Kerr may have received since July 4, 1989, (3) compensate him for all sick leave, vacation pay, and other benefits that he would have accumulated had he been actively employed as a Deputy Sheriff since July 4, 1989, and (4) restore all sick leave, vacation pay, and other benefits that were depleted due to his placement on sick pay and leave of absence status.

Dated this 7th day of February, 1990.

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

Pursuant to 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.

Reported: Tape recorded.

MEMORANDUM

Minn. Stat. 197.46 requires that no veteran employed by a county or other political subdivision of the State may be removed from employment "except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing." The issue in the present case is whether the Petitioner has in fact been "removed" from employment by virtue of his placement on a paid sick leave followed by an unpaid

medical leave of absence.

The Minnesota courts have recently addressed the issue of whether placement on an indefinite medical leave may constitute a "removal" from employment under Minn. Stat. 197.46. In *Meyers v. City of Oakdale*, 409 N.W.2d 848 (Minn. 1987), a police officer who was a veteran suffered a back injury. The city placed Myers on an indefinite leave of absence and informed him that he would be placed on active status if, at some future time, he was considered by medical doctors to be able to perform all of the duties and responsibilities of the police officer classification. The city contended that Myers had not been removed because the opportunity existed for him to return to his job. The Supreme Court disagreed and held that, "under the Veterans Preference Act, a veteran is removed from his or her 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." *id.* at 850-51. The Court emphasized that "whether an employer has by its action removed a veteran is a matter

of substance and not of form." Id. at 850. The Court further concluded that a veteran who is removed from his job because of his alleged physical inability to perform the job is in fact being removed for incompetence and thus is entitled to a Veterans Preference hearing. The Court stated that the hearing board should determine whether the employer acted reasonably in light of an), restrictions placed on the veteran's activity by his examining and treating doctors.

The Minnesota Court of Appeals recently had the opportunity to apply the Myers case in the context of a city patrol officer who took sick leave in order to undergo voluntary psychological treatment. Lee v. City of Maplewood, No. C8-89-825 (Minn. Ct. App., Sept. 12, 1989). While the city alleged that Lee's job remained open to him, the evidence established that the city was disinclined to rehire him, believed that he could not return to the police department in any capacity at the time his sick leave and vacation benefits ran out, and told him that he could not be assured of any eventual return to his Job. Even though Lee himself opted to take sick leave and his disability was not by definition permanent in nature, the Court of Appeals concluded that the holding and analysis in the Myers case supported the trial court's decision to grant a writ of mandamus:

Whether an employer removes a veteran from his or her employment is a question of substance, not form. . . . In this case, respondent's condition made him unable to return to work after his sick leave and other benefits expired. The effect of the City's actions, including the prerequisites it has imposed on respondent and its evident disinclination to rehire him, 'make it unlikely or improbable' that respondent will be able to return to his job.

The Court of Appeals therefore upheld the trial court's decision that the city was required by the Veterans Preference Act to provide Lee with notice of his termination and a hearing, and that it had violated the Act by failing to do so.

Taken as a whole, the evidence in the present case compels the conclusion that Mr. Kerr has in fact been "removed" from his Deputy Sheriff position without notice or a hearing, in violation of the Veterans Preference Act. Several factors were significant in persuading the Administrative Law Judge that Mr. Kerr has been removed. The Department initially informed Mr. Kerr that he was being relieved of his duties and that there were no positions available at that time or in the foreseeable future that Mr. Kerr could fill with his present medical problems. The Department directed him to clean out his locker and turn in his equipment, and told his brother that he had been laid off or fired. Only later, after apparently receiving the advice of counsel, did the Department inform Mr. Kerr that he was in fact being placed on sick leave. The Department's perception of the anticipated duration of Mr. Kerr's absence from his job and the likelihood of his return to work is implicit in the Department's initial treatment of the situation, and was also reflected in the testimony of Department representatives that the limited duty policy was inapplicable to Mr. Kerr's situation because there was no anticipated specific period of "convalescence." All of this evidence clearly suggests that the Department was disinclined to bring

Mr. Kerr back to work and believed that it was unlikely or improbable that Mr. Kerr would ever return to his Deputy Sheriff position. Although the Department apparently lacks the authority to terminate deputies and there is no evidence that the Olmsted County Board ever took any adverse action with respect to Mr. Kerr, a requirement that a formal termination action must have occurred in order to find that an employee has been "removed" would elevate form over substance and would conflict with the purposes of the Veterans Preference Act.

In addition, it is evident that the Department will bring Mr. Kerr back to work as a Deputy Sheriff in any of the three divisions only if he no longer requires insulin (and thus does not run the risk of a hypoglycemic reaction) or if his doctors indicate that his medical condition no longer poses any danger to himself, his colleagues, or the public. As long as Mr. Kerr requires insulin to control his diabetes, it appears that his doctors will have to concede that there is a potential risk associated with a hypoglycemic reaction. Although it is possible, according to Mr. Kerr's doctors, that he may be able to control his diabetes through proper diet and weight control and forego insulin therapy at some point in the future, Mr. Kerr has only been able to control his diabetes without insulin during two of the One years since his diagnosis, and a considerable length of time has gone by since then. Mr. Kerr's diabetic condition and the risk of hypoglycemia have not changed to any significant degree of medical certainty since 1987 and, even though he testified that he is currently losing weight, there was no evidence that his insulin requirements have diminished as a result. It also is by no means assured that weight loss and proper diet will eliminate the need for insulin. Dr. Zimmerman indicated that whether insulin therapy could be discontinued would also depend upon the insulin

reserve in Mr. Kerr's pancreas--a matter over which Mr. Kerr obviously has no control.

Based on these facts, the effect of the Department's decision to place Mr. Kerr on indefinite medical leave until he no longer requires insulin or his doctors indicate that there is no risk associated with hypoglycemia has the effect of making it unlikely that Kerr will be able to return to his Deputy Sheriff position. The Administrative Law Judge thus recommends that the Commissioner issue an order that Mr. Kerr be reinstated and receive appropriate relief, including back pay, interest, and restoration of lost benefits.

B.L.N.