

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Richard Earl Simon,
Petitioner,

RECOMMENDED-ORDER

REGARDING
Vs
JUDGMENT

MOTION FOR SUMMARY

City of Saint Paul,
Respondent.

The above-captioned matter is pending before the undersigned Administrative Law Judge pursuant to a Notice of Petition and Order for Hearing dated November 9, 1989. On December 8, 1989, the City of St. Paul ("the City") filed a Motion for Summary Judgment and a supporting Memorandum. On December 22, 1989, the Petitioner ("Simon") filed an Affidavit in response to the City's Motion for Summary Judgment,

Oral argument concerning the motion was heard on December 29, 1989. John B. McCormick Assistant City Attorney, St. Paul City Attorney's Office, 647 City Hall, St. Paul, Minnesota 55102, appeared on behalf of the City. Seldon H. Caswell, Caswell and Associates, P.A., 6070 50th Street North, Oakdale, Minnesota 55109, appeared on behalf of Simon. In a conference call between the Administrative Law Judge and counsel for the parties on January 3, 1990, the parties agreed to indefinitely postpone the hearing in the case pending consideration of the summary judgment motion.

Notice is hereby given that, pursuant to Minn. Stat. 14.61, the final decision of the Commissioner of the Department of Veterans Affairs will 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 Veterans Affairs, Veterans Service Building, 20 West
12th Street,
St. Paul, Minnesota 55155-2079, to ascertain the procedure
for filing
exceptions or presenting argument.

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:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of the
Department of
Veterans Affairs issue an order granting the City's Motion
for Summary
Judgment, denying the City's motion for reimbursement of
its costs ,
disbursements , and attorneys' fees , and dismissing the Notice of Petition
and
order for Hearing.

Dated this - 29th day of January, 1990.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The Petitioner, Richard Earl Simon ("Simon"), is currently on lay-off status from his position as a Rehabilitation Advisor I with the City of St. Paul's Department of Planning and Economic Development. In this proceeding, Simon has challenged his layoff under the provisions of the Minnesota Veterans Preference Act, Minn. Stat. .5 197.46. Pursuant to Minn. Stat. 197.46, no veteran employed by a city or other political subdivision of the State of Minnesota may "be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing." The Department of Veterans Affairs ("DVA") asserted in the Notice of Petition and Order for Hearing that, based upon the Petition filed with the DVA by Simon, it appeared that the City denied Simon his Veterans Preference rights by removing him from his position of employment without providing him with written notice of his veterans preference rights and a hearing as required by Minn. Stat. 197.46. The city has moved for summary judgment based upon an argument that a short-term lay-off with a definite reinstatement date does not constitute a "removal" from employment.

I. Background Information

In essence, the petition and supporting documents filed by Simon with the DVA and the brief and supporting documents filed by -the city in support of its motion indicate that the City proposed to discharge Simon on two occasions during 1988 and 1989, the arbitration proceedings in each instance overturned the proposed discharges, and Simon was eventually laid off without pay from his position in October 1989. Kenneth R. Johnson ("Johnson"), the Director of the

City's Department of Planning and Economic Development, first indicated his intent to discharge Simon in a letter to Simon dated October 19, 1988. The proposed discharge primarily was based upon allegations of misconduct relating to Simon's relationship with Elia Chahla, a contractor who worked on some of the rehabilitation projects administered by the Department of Planning and Economic Development. Johnson's letter notified Simon of his right as a veteran to appeal the proposed discharge.

A grievance was filed by Council No. 14 of the American Federation of State, County and Municipal Employees ("AFSCME") on behalf of Simon, and the dispute went to arbitration. The City, Simon, and AFSCME Council No. 14 agreed that Simon's veterans preference hearing under chapter 197 of the Minnesota Statutes would be combined with the arbitration proceeding under the provisions of the collective bargaining agreement, and that the arbitration hearing would thus resolve all issues relating to Simon's appeal of his proposed discharge.

Arbitrator Nancy D. Powers ruled on February 12, '1989, that the City did not have just cause to terminate Simon, and ordered that Simon should be suspended without pay for one month and then returned to full employment status. The City accordingly notified Simon in a letter dated February 16, 1989, that he was suspended without pay for one month beginning February 16, 1989, and that he was expected to report for work on March 16, 1989.

Just a few days before the arbitration award was issued, Thomas T. Feeney, manager of the Minneapolis-St. Paul office of the U.S. Department of Housing and Urban Development ("HUD"), issued a letter notifying Simon that HUD had decided to impose on Simon a limited denial of participation in all HUD Community Planning and Development programs. The HUD action prohibited Simon's participation in Community Planning and Development programs in any manner and his receipt of any benefit or financial assistance (including the payment of wages from funds provided by community planning and development programs) for a period of twelve months from the date of the letter, which was February 10, 1989. The letter stated that the limited denial of participation was taken because of Simon's "irregularities and [his] noncompliance with the community development block grant conflict of interest requirements (24 CFR 570.611) in [his] dealings with Elia Chahla." After an informal conference, the HUD action was affirmed in a letter dated March 22, 1989. Simon's formal appeal of the HUD action is still pending.

After Johnson requested and received a letter from HUD clarifying the effect of the limited denial of participation, the notified Simon in a letter dated March 15, 1989, that he intended to discharge Simon based upon his determination that the limited denial of participation would render Simon incompetent to perform the duties of his job. The letter notified Simon of his right as a veteran to appeal the proposed discharge. A grievance was filed by AFSCME Council No. 14, and the dispute proceeded to arbitration. No evidence

has been presented indicating that Simon appealed the proposed discharge under the Veterans Preference Act or that the parties agreed that the veterans preference hearing would be combined with the arbitration proceeding in this instance, as they had in connection with the prior hearing.

Arbitrator Kenneth J. 'Tri issued an award on August 21, 1989, sustaining the grievance and ordering that Simon be reinstated effective March 16, 1989, and made whole. The arbitrator further ordered that, "The City and Council 14 shall exhaust all avenues of remedy to seek to find appropriate employment for Simon until the limited restrictions of HUD are lifted. Failing that, Simon may be laid off without pay until the limited restrictions are lifted by HUD and shall then be returned to full employment status as a Housing Rehabilitation Advisor I." Simon alleged in the petition he filed with the DVA that, to his knowledge, Arbitrator Tri was not made aware that Simon was a veteran entitled to benefits. The City contends in the memorandum in support of its motion that Simon's veteran status was mentioned in oral testimony and in documents introduced at the arbitration proceeding, and provided copies of the transcripts and exhibits.

Johnson informed Simon in a letter dated October 5, 1989, that the City's efforts to temporarily relocate him in a position in a City department or office had not been successful and that the City was "laying [Simon] off without pay, effective October 6, 1989, until such time as the limited denial

of participation expires or is lifted by the Department of Housing and Urban Development through [Simon's] appeal." With the exception of the one-month disciplinary suspension authorized by Arbitrator Powers, Simon had continued to receive salary and benefits from October 7, 1988, to the date of the lay-off. Simon filed a petition with the DVA on October 18, 1989, in which he provided the following statement of the facts giving rise to the veteran's rights:

Having grieved two separate discharges and won both discharges, I'm now layed [sic] off without salary & related benefits i.e. hospitalization coverage, pension contributions, vacation & paid holidays. To my knowledge the second arbitrator, Kenneth Tri was not made aware that I was a veteran entitled to benefits.

II. Appropriateness of Summary Disposition

Summary judgment is appropriate if there is no genuine issue as to any material fact and one party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. A genuine issue is one which is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984). The moving party, in this case the City, has the burden of proof. The nonmoving party, Simon, has the benefit of that view of the evidence which is most favorable to him. *Greaton v. Enich*, 185 N.W.2d 876 (Minn. 1971). The decisionmaker's opinion as to the chance of a party prevailing at a hearing is not a proper criterion for whether or not to grant summary judgment. The decisionmaker's function is not to resolve fact questions but to determine whether or not issues of fact exist. *Anderson v. Mikel Drillin Company*, 102 N.W.2d 293 (Minn. 1960). In the absence of a genuine issue as to a material fact, there is no right to an

evidentiary hearing and the matter may be decided as a matter of law Minn. Rules 1400.5500 (K) authorizes the Administrative Law Judge in a contested case proceeding to "recommend a summary disposition of the case or any part thereof where there is no genuine issue as to any material fact

In its motion for summary judgment, the City argues that the Veterans Preference Act does not apply to this case because Simon has not been "removed" from his job. The City alleges that Simon has merely been laid off from his position and that he will be reinstated once HUD's limited denial of participation expires or is lifted through Simon's appeal to HUD. The City contends that it made a good-faith effort to find Simon another temporary position with the City and emphasizes that Arbitrator Tri's award in fact authorized a lay-off without pay until the HUD restriction was lifted if the City and Council 14 could not find appropriate temporary employment for Simon. The City argues that this proceeding is not the proper forum for review or enforcement of the arbitration award.

In response to the city's motion for summary judgment, Simon submitted only a brief affidavit indicating, in pertinent part, that "Affiant believes that the city and council 14 did not exhaust all avenues of remedy to find him other employment and that the city did not comply with the decision of arbitrator Kenneth Tri; therefore affiant is entitled to a hearing under Minn.

Stat. 197.46. " At the hearing on the motion for summary judgment, Simon conceded that there is no doubt that the HUD restriction will expire on February 10, 1990. Because the pendency of the HUD restriction is the only impediment to Simon's active employment as a Rehabilitation Advisor, it is evident that Simon will be able to return to work on February 10, 1990, assuming that his appeal of the HUD action is not decided prior to that date.

The major factual dispute between the parties apparently concerns whether the City and Council 14 in fact made exhaustive attempts to find alternative employment for Simon, and thus whether the lay-off was 'in fact justified.*/ This fact, however, is not material because its resolution will not affect the outcome of this case. Even if the lay-off did not follow exhaustive attempts to find Simon another job, Simon's rights under the Veterans Preference Act have been violated only if, by virtue of the lay-off, he has been "removed" from his employment without due notice of charges and a hearing within the meaning of Minn. Stat. 197.46. Because there is no genuine issue as to any material fact, the question for decision in this case is whether the City is entitled to a judgment as a matter of law that a four-month lay-off with a definite reinstatement date does not constitute a "removal" under Minn. Stat. 197.46.

The Minnesota Supreme Court recently considered what it means to be "removed from such position of employment" under the Veterans Preference Act. In *Myers v. City of Oakdale* 409 N.W.2d 848 (Minn. 1987), the court addressed the question of whether the City of Oakdale removed a veteran from his job when it placed him on an indefinite medical leave. The court noted that veterans are not entitled to a hearing prior to being suspended because a suspension does not constitute a removal. 110 at 850, citing *Wilson v. City of Minneapolis*, 283 Minn. 348, 354, 168 N.W.2d 19, 22-23 (Minn. 1969), and *Mayor of Newton v. Civil Service Commission* 333 Mass. 340, 344, 130 N.E.2d 690, 692

(1955). The Myers court stated that it "agree[d] with the premise of Mayor of Newton Newton that whether an employer has by its action removed a veteran is a matter of substance and not of form" 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 Meyers 409 N.W.2d at 850 (emphasis added).

Other issues of fact have been raised in Simon's original petition with respect to whether the City encouraged HUD to issue the limited denial of participation with respect to Simon and another employee, Jim Hillman, whether the City requested that HUD's limited denial not encompass a third employee, David Schiller, whether Mr. Hillman has returned to his position as a Rehabilitation Advisor despite his inclusion in the limited denial of participation and whether Arbitrator Tri was aware of Simon's veteran status. Although these are genuine issues of fact, they are not material in deciding the purely legal issue presented in this case, i.e., whether the lay-off was a "removal" requiring adherence to Minn. Stat. 197.46, and thus are not a bar to summary disposition herein.

Although the Myers case arose in the context of an indefinite medical leave rather than an unpaid lay-off, the court's holding concerning the proper definition of "removal" and its discussion of the differences between a suspension and a removal are instructive in this case. As in the case of a disciplinary suspension, the lay-off imposed with respect to Simon offers the opportunity to return to work once the reason for the employer's action is no longer operative. The effect of the City's lay-off of Simon does not make it unlikely or improbable that Simon will be able to return to his job. To the contrary, there is every reason to expect that Simon will be returned to his job as soon as the HUD restriction is lifted on February 10, 1990.

The Administrative Law Judge concludes that the lay-off action involved here simply does not constitute a "removal" within the purview of Minn. Stat.

197.46. Although the Judge understands that Simon disputes the necessity of the lay-off based upon his concern that the City and the Union may not have made exhaustive efforts to locate other employment for him, this is not the proper forum in which to seek interpretation or enforcement of the arbitration award.

Therefore, the Administrative Law Judge recommends that the City's motion for summary judgment be granted and that the Notice of Petition and Order for Hearing be dismissed. Because proper authority has not been established for an award of costs, disbursements or attorneys' fees in this administrative proceeding, the Judge recommends that the City's motion for reimbursement of such expenses be denied.

B.L.N.

