

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Kenneth E. Erickson, Jr.,

Petitioner,
vs.

City of Proctor,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on Thursday, November 21, 1991 at the Veterans Service Office located in the St. Louis County Health Department Building, 222 Superior Street, Duluth, Minnesota. The record closed at the conclusion of the hearing.

Kenneth E. Erickson, Jr., 10225 Stark Road, Duluth, Minnesota 55810, appeared pro se. Thomas F. Andrew, Attorney at Law, 300 Alworth Building, 306 West Superior Street, Duluth, Minnesota 55802, appeared on behalf of the Respondent, City of Proctor.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of the Minnesota Department 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.

Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner, Minnesota Department of Veterans Affairs, Second Floor Veterans Service Building, 20 West Twelfth Street, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Petitioner was removed from his position of employment with the City of Proctor in violation of Minn. Stat. § 197.46.

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

FINDINGS OF FACT

1. Kenneth E. Erickson is a 45-year-old male who was honorably discharged from the United States Army on January 31, 1967.

2. During the relevant time period herein, Mr. Erickson was employed as a street maintenance foreman for the City of Proctor, Minnesota. On March 8, 1990, Mr. Erickson was involved in a truck rollover while performing his job duties for the City. As a result of that accident, Mr. Erickson sustained injuries to the ring finger on his left hand, his left wrist, his neck and left shoulder. His finger was broken in two places and required surgery to repair. A "first report of injury" was filed by Mr. Erickson immediately after the accident. These injuries prohibited Mr. Erickson from returning to his employment as an equipment operator-street foreman until June of 1990 when his physician, Dr. T. G. Patnoe, determined that he could return to work on a "light duty" assignment. At that time, Mr. Erickson returned to work on a three-hour per day basis, performing essentially administrative-type functions.

3. At the time Mr. Erickson returned to work in June of 1990, he was experiencing continuing discomfort in his neck and left shoulder. He was regaining mobility in his left hand, however, there was angular deformity and discomfort in the ring finger. Dr. Patnoe discussed with Mr. Erickson additional surgeries to further correct the injury sustained to the ring finger on his left hand.

4. On July 31, 1990, Mr. Erickson had another surgery on his left hand ring finger to increase mobility and reduce deformity. Mr. Erickson returned to work on August 13, 1990, working three hours per day on light duty.

5. In late September 1990, Mr. Erickson underwent another surgery to repair the ring finger on his left hand. In October 1990, Mr. Erickson was seen by a chiropractor whom he had seen in the past, Dr. Steven D. Audette, for an evaluation of his neck injury. Dr. Audette determined that due to a cervical spine restriction, Mr. Erickson had a seven percent permanent partial disability. However, because x-rays revealed a cervical disc herniation, Dr. Audette added a ten percent permanent partial disability resulting in a total permanent partial disability of 17% for Mr. Erickson. Dr. Audette gave the opinion that Mr. Erickson should be restricted to lifting no more than 30 pounds and that it was possible for further cervical disc slippage to occur.

6. On January 2, 1991, Dr. Mark E. Holm, a medical doctor at Hand Surgeons of Minnesota in St. Paul, released Mr. Erickson to return to work with restrictions. This release was discussed by the Proctor City Council on January 7, 1991. At that time, the Council authorized Mr. Erickson to return to work in a light duty capacity on a three-hour daily schedule. However, before this could be implemented, Mr. Erickson separated his shoulder as a result of a fall and could not return to work.

7. On March 19, 1991, Mr. Erickson was given a neurologic evaluation by Dr. David R. Johnson, M.D. As a result of this evaluation, Dr. Johnson gave the opinion that

with respect to Mr. Erickson's neck and shoulder injuries, he could go back to his regular job as a supervisor in the street department for the City of Proctor. However, Dr. Johnson gave no opinion with respect to Mr. Erickson's wrist and hand disability. At that time, Mr. Erickson was scheduled for surgery on his hand on April 12, 1991. At this time, Dr. Holm also authorized Mr. Erickson to return to employment in a limited-hours temporary position. Subsequently, on March 22, 1991, the City authorized Mr. Erickson to return to employment on a three-hour per day basis beginning March 25, 1991.

8. Mr. Erickson remained employed on that basis until he underwent another surgery on his left hand on April 12, 1991.

9. The street department for the City of Proctor was a three-man operation, one of those three functioning as the foreman for the crew. When Mr. Erickson left work in March of 1990 due to the injuries he sustained, one of the remaining two street department employees was made the acting foreman. In addition, a third employee was transferred from the park and recreation department into the street department to make up a full complement. No one was hired on a permanent basis to replace Mr. Erickson as the foreman for the street department.

10. During Mr. Erickson's absence from work, he was receiving workers compensation benefits in the amount of two-thirds of his normal wage. In addition, Mr. Erickson received sick leave benefits through the spring of 1991 when those benefits were exhausted. The City took action on March 18, 1991, to prohibit any employee, while off duty due to a workers compensation illness or injury, to continue the accumulation of sick leave or vacation leave benefits.

11. On May 30, 1991, Dr. Mark Holm authorized Mr. Erickson to return to light duty employment beginning June 3, 1991. Dr. Holm listed Mr. Erickson's restrictions as: "Light use with left hand. Avoid heavy lifting (<max. 20 lbs.) and firm repetitive gripping with left hand. May operate heavy equipment."

12. On June 3, 1991, the Proctor City Council met to consider Mr. Erickson's request to return to work. Because the City Council was aware that Dr. Holm had only treated Mr. Erickson for his hand injuries, and that there had been continuing problems resulting from the neck and shoulder injuries, a decision was made by the Council to not allow Mr. Erickson to return to work until after a functional capacity assessment had been completed. At that time, there was no light duty work for Mr. Erickson to perform and the City wanted to make sure he was able to perform more strenuous work before allowing him to return to the job.

13. On July 9, 1991, an occupational therapist performed a work hardening job site analysis which summarized Mr. Erickson's abilities to do the specific job functions of a street department foreman and equipment operator. The occupational therapist stated that, "In general, the tasks observed were within Mr. Erickson's physical capacities as related to his left hand."

14. On July 11, 1991, Mr. Erickson returned to see Dr. Holm for a reevaluation. On that date, Dr. Holm authorized Mr. Erickson to return to work on July 12, 1991 with the following restrictions: "Mr. Erickson is allowed to return to work running levers of heavy equipment but he should not left over 30 lbs. until functional capacity assessment is completed."

15. Subsequently, on July 22, 1991, the Proctor City Council did not approve Mr. Erickson's return to work until "Mr. Erickson obtains a return to work permission report from a medical doctor who would sign after evaluating Mr. Erickson's shoulder, neck and back, and any work restrictions caused by the same." Additionally, the Council required that Mr. Erickson obtain a functional capacity assessment.

16. On August 23, 1991, the Proctor City Council informed Mr. Erickson's QRC what documentation was required in order to authorize Mr. Erickson's return to work.

17. On August 28, 1991, Mr. Erickson was examined by Richard E. Freeman, M.D., with respect to his neck injury. Dr. Freeman concluded that, "In short, there is no contraindication to his returning to work as a heavy equipment operator in terms of his neck problems." In addition, Dr. Freeman stated that, "Because of the additional hand, forearm problems as defined by Dr. Holm, Dr. Holm's limitations should be recognized and utilized at this time."

18. On September 3, 1991, the Proctor City Council met and on the basis of Dr. Freeman's evaluation, they authorized Mr. Erickson to return to work on a full-time basis beginning September 5, 1991. Mr. Erickson did return to work on a full-time basis on September 5 and received his normal hourly rate of \$13.60 per hour.

19. From June 3 through September 4, 1991, Mr. Erickson received two-thirds of his normal full-time income in the form of a workers compensation benefit.

20. When Mr. Erickson returned to work on September 5, 1991, he assumed his regular, street foreman job responsibilities. The acting foreman had previously been injured on the job and was out on workers compensation so Mr. Erickson's return resulted in the normal complement of three in the street department.

21. Mr. Erickson filed a Petition with the Commissioner of Veterans Affairs on June 13, 1991. In his Petition, Mr. Erickson alleges that the City refused to let him return to work despite the authorization by his physician, Dr. Mark Holm. On October 22, 1991, Mr. Erickson filed an amendment to his Petition which requests relief as follows: "Lost wages and benefits from June 3, 1991 to September 5, 1991 and to return to my previous position as foreman for the City of Proctor street department, 50% administration and 50% equipment operation."

22. At no time during any of the periods that Mr. Erickson was off work did the City of Proctor notify him that he was entitled to a veterans preference hearing pursuant to Minn. Stat. § 197.46.

23. The Commissioner of Veterans Affairs issued a Notice of Petition and Order for Hearing dated August 12, 1991, directing that a contested case hearing be held on this matter to determine whether or not the Petitioner's veterans preference rights had been violated.

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

CONCLUSIONS

1. The Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481. The Notice of Hearing issued by the Department of Veterans Affairs was proper and all procedural and substantive requirements of law or rule have been met.
2. The Petitioner, Kenneth E. Erickson, Jr., is an honorably discharged veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447 and is entitled to all the protections and benefits of the Minnesota Veterans Preference Act.
3. The City of Proctor is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. § 197.46.
4. For the reasons set forth in the Memorandum below, the Judge concludes that Kenneth Erickson was not removed from his position of employment with the City of Proctor during the periods of his disability in 1990 and 1991 within the meaning of Minn. Stat. § 197.46.
5. The Memorandum below is incorporated by reference herein.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs DISMISS the Petition of Kenneth E. Erickson, Jr.

Dated this 4th day of December, 1991.

s/Peter C. Erickson
PETER C. ERICKSON
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, No Transcript Prepared.

MEMORANDUM

Pursuant to Minn. Stat. § 197.46, no veteran employed by a city 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 and in writing. The primary issue in this case, whether the Petitioner was removed from his job and thus entitled to a veterans preference hearing, is largely controlled by the case of Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987). In Myers, the Petitioner, a police officer for the City of Oakdale, suffered a low back injury and was placed on indefinite medical leave by his employer. The trial court found that: (1) Myers suffered a work-related lower back injury and that it was unlikely his condition would improve to a significant degree; (2) both doctors who examined Myers placed restrictions on his activities; (3) Oakdale's decision to place Myers on indefinite medical leave was based on the medical reports of those doctors; and (4) Oakdale would not permit Myers to return to his duties until such time as he was considered able by medical doctors to perform all of the duties and responsibilities of the Oakdale police officer job classification. Myers at 851. Based on these facts, the Minnesota Supreme Court found that the effect of Oakdale's action was to make it "unlikely that Myers will be able to return to his job." *Id.* The Supreme Court held that Myers had been removed from his job and was entitled to a veterans preference hearing due to that removal. *Id.* In a footnote to the decision, the Court noted that Myers had contended throughout the proceedings that he was able to return to his job in spite of his injury. Footnote 1 at 851.

In the Myers case, the court stated that "whether an employer has by its action removed a veteran is a matter of substance and not of form." 409 N.W.2d at 850. The court went on to hold that "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 unable to return to the job." *Id.* at 850-51. The Judge has concluded that the Proctor City Council did not take any actions which made it "unlikely or improbable" that Mr. Erickson would be able to return to his job. The record shows that no permanent replacement was hired during the periods of Mr. Erickson's absences from work. Mr. Erickson could have been reinstated to his former job of street maintenance foreman at any time as long as there was documented medical authorization. The record shows that after medical authorization was received in late August of 1991, Mr. Erickson was reinstated to his foreman position beginning September 5, 1991.

Additionally, there is a critical difference between this case and the Myers case wherein the Supreme Court found that there had been a "removal". In Myers, the

documentary evidence submitted to the trial court showed that the veteran had suffered a permanent partial disability and that it was unlikely his condition would improve to a significant degree. This disability made it impossible for Mr. Myers to resume his duties as a police officer. In this case, the medical documentation concerning Mr. Erickson's neck injury is inconsistent and the "hand" doctor put certain restrictions on Mr. Erickson's job activities, but only until a functional capacity analysis could be performed. There was never any conclusive medical evidence in this case, upon which the City Council relied, which indicated that Mr. Erickson's physical condition would not improve sufficiently for him to return to his duties as a street maintenance foreman-equipment operator. Although the effect of the City's actions in this case did not allow Mr. Erickson to return to work as soon as he would have liked, those actions did not have the effect of removing Mr. Erickson from his job.

The Judge wants to make clear that this recommendation and discussion herein only applies to the period up through September 5, 1991. Any absences from work and/or actions by the Proctor City Council subsequent to that date may be the basis for another cause of action and have not been addressed herein.

P .C. E.