

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

Arthur G. Hodapp,

V. Petitioner,

St. Louis County,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on June 2, 1992, at 10:00 a.m. in the Veterans Service Office, 222 East Superior Street, Duluth, Minnesota. David W. Adams, Legal Aid Service of Northeast Minnesota, 302 Ordean Building, Duluth, Minnesota 55802 appeared on behalf of the Petitioner, Arthur G. Hodapp. Mary L. Peterson, Assistant County Attorney, Room 501, Courthouse, Duluth, Minnesota 55802 appeared on behalf of St. Louis County (hereinafter "the County"). The record closed on this matter on June 2, 1992, at the end of the hearing.

Petitioner testified on his own behalf. The County called Richard M. Griffith, Assistant Director of Civil Service for the County, George H. Palo, Superintendent of the County Public Works Department, and Kris Terry, Probation Officer of Arrowhead Regional Corrections, to testify in this matter.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision in this matter after a review of the record which may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. parties should contact Gerald Bender, Department of Veterans Affairs, Veterans Service Building, 2nd Floor, St. Paul, Minnesota 55155, telephone 297-5828, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Petitioner was removed from his position entitling him to relief under Minn. Stat. 197.46 (the Veterans Preference Act), or whether his absence from the job constituted a voluntary resignation.

Based on the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner served in the United States Army on active duty from February, 1972, to February 24, 1975. Petitioner received an Honorable Discharge from the U.S. Army.

2. On February 22, 1983, Petitioner was hired by the County in the position of Highway Maintenance Worker. He was promoted to Equipment Operator Junior on July 9, 1984, and to Equipment Operator Senior on July 9, 1986.

3. Petitioner held the Equipment Operator Senior position until September 19, 1991. His most recent wages for a typical two-week pay period were \$1010.61. There were no problems with his job performance. Ex. 4.

4. Petitioner has a recent criminal history involving matters unrelated to his job that did not affect his job. His supervisor was generally aware that Petitioner had some legal problems. In 1989, he had been sentenced to one year in jail, but that was stayed on condition he comply with certain terms of probation. In May 1991, he was sentenced to thirty days in jail but was allowed to leave jail during week days to work. In August 1991, he was sentenced to six months of electronic monitoring which required him to remain at home at all times he was not working. On September 6, 1992, he pled guilty to violating his probation as a result of an incident on August 31, 1992. Sentencing was set for September 13, 1992.

5. On September 11, 1991, Petitioner orally requested an unpaid leave of absence to begin Monday, September 16, 1991, from his immediate supervisor, George Palo, and the general supervisor, Dave Skelton. Petitioner explained that he was attending a court hearing on September 13, 1991, and expected to be incarcerated for an unknown length of time. Based upon advice from the County's Civil Service Department, Petitioner's request for a leave of absence was denied.

6. It is the policy of the County not to grant leaves of absence for jail time. It is the stated policy of the County to grant leaves of absence only where such leaves are in the best interest of the County. In practice, such leaves are only given where required by law.

7. Mr. Palo discussed with the Petitioner what employment options were available to him. Petitioner was informed that three days of unexcused absence would result in a resignation not in good standing. He was also advised to contact the Civil Service Department about resigning. Petitioner did not do so. He told Mr. Palo that he didn't want to go through the paper work and that Mr. Palo "should do what he had to do."

8. Petitioner was not at work on Thursday, September 12, 1991, or Friday, September 13, 1992. He was given vacation for those days.

9. On September 13, 1991, Petitioner was sentenced to one year in jail, with credit for time served. He was released on March 25, 1992, owing to

"good time" credit earned during his sentence.

10. Petitioner was absent from work without authorized leave or September 16, 17 and 18, 1992. An Employee Separation Form was completed for Petitioner and signed by Mr. Skelton on September 20, 1992. The form indicated that the Petitioner was separated through a resignation effective September 19, 1991. The reason indicated was "On unauthorized leave of absence without notification as per Article VII, Section 5, contract. (C.S. Rule XI, 11.1)." Exhi bit 2 .

11. A letter was directed to Petitioner on September 26, 1991, which cited Rule 11.1 and advised Petitioner that the County considered him to have resigned not in good standing effective September 19, 1991. The September 26, 1991 letter was addressed to Petitioner's Post Office Box, Evelyth, Minnesota. Petitioner had arranged for the Post Office to forward his mail to his mother, who would deliver it when she visited him in jail. However, Petitioner did not receive the letter of September 26, 1991.

12. At no time did the County advise the Petitioner of any right to a hearing under the Veterans Preference Act.

13. The County is familiar with Minn. Stat. 197.46. When a veteran is terminated for cause, the County gives the veteran notice of his or her rights under the statute. On resignations, no such notice is given.

14. On April 6, 1992, the Department of Veterans Affairs received Petitioner's petition alleging that his veterans preference rights had been denied by the County. The Notice of Hearing for this matter was served by U.S. Mail upon the County by the Department on April 27, 1992.

Based on 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. 197.481 and Minn. Stat. 14.50. The Notice of Hearing was proper in all respects and the Department has complied with all substantive and procedural aspects of law and rule.

2. Minn. Stat. 197.46 states in pertinent part:

No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions of the state, who is a veteran separated from the military service under honorable conditions, shall be

removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

3. Petitioner is a "veteran separated from the military service under honorable conditions" within the meaning of Minn. Stat. 197.447 and 197.46.

4. The collective bargaining agreement between the County Board of Commissioners and the Minnesota Teamsters Public and Law Enforcement Employees Union, Local No. 320 is the contract governing the terms of employment between the County and Petitioner. Article VII, Section 5 of that contract provides:

Section 5. Termination. Such employee not on sick leave or authorized leave of absence but absenting himself without notice of any kind for three (3) continuous working days shall be considered terminated at the discretion of the County. The County may, however, consider any written request of the employee or the UNION on his behalf.

5. The rules and regulations of the County Civil Service Commission also apply to the conduct of employees. Rule 11.1 states, in pertinent part:

Rule 11.1 Resignation. Any employee wishing to leave the classified service in good standing shall file with his appointing authority and the Director at least two weeks before leaving, a written resignation stating the date it shall become effective and the reason for leaving.

Failure to comply with this rule shall be entered on the service record of the employee and may be the cause of denying him future employment by the County. Unauthorized absence from work for the period of three consecutive working days shall be construed by the appointing authority and the Director as a resignation not in good standing.

An employee who has submitted his resignation, may, with the approval of the appointing office and the Director, withdraw such resignation within ten days from the effective date thereof and be continued in his position as though the resignation had not been filed if there is a vacancy in that class and organization unit at the same rate of pay. If such resignation has been approved by the appointing authority and the Commission at the next regular meeting following receipt by the Director of the resignation, the employee may withdraw his resignation within one year and the Director shall place his name on the re-employment list for the appropriate class. Re-employment rights of an employee who has withdrawn his resignation will be for one year only from the date of the resignation unless extended for an additional year by action of the Director.

No form of resignation found by the Director to have been filed with any appointing authority without date or with a future date, and that is not intended to be bonafide and voluntary resignation to be acted upon at the time of filing, shall be accepted as a resignation. Each separation under such circumstances shall be deemed a dismissal and the provisions of the act and these rules

relating to dismissals shall apply.

6. Rule 10.10 specifically treats the question of unauthorized leaves. That rule states:

Rule 10.10 Unauthorized leave. (Absence without leave.) Any absence of an employee from duty, that is not authorized by a specific grant of leave of absence under the provisions of these rules or taken as earned vacation leave about to expire, shall be deemed to be an absence without leave. Any such absence shall be without pay and may be made grounds for disciplinary action. In the absence of such disciplinary action, any employee who absents himself on three consecutive work days without leave shall be deemed to have resigned; but such absence may be covered by a subsequent leave without pay in accordance with the Rule 10.6.

7. The County's refusal to grant Petitioner's requested leave of absence was legitimate and based upon the written policies governing such employment decisions. The County has consistently maintained a past practice of denying leaves of absence for incarceration. Denial of a leave of absence was not a subterfuge for denying Petitioner rights under the Veterans Preference Act.

8. Petitioner ceased to be an employee of the County on September 19, 1991.

9. Petitioner's failure to attend work without a leave of absence or other cognizable excuse for three continuous days constitutes a voluntary resignation not in good standing under St. Louis County Civil Service Rule 11.1.

10. Since Petitioner voluntarily resigned, he was not removed from his position within the meaning of Minn. Stat. 197.46. Therefore, Petitioner was not entitled to a veteran's removal hearing or any notice of a right to such a hearing.

11. The County did not deny the Petitioner any rights under the Veterans Preference Act by failing to advise him of his rights under that Act.

Based on 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 Arthur G. Hodapp for relief under the Veterans Preference Act.

Dated: June 24th 1992.

-STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the Commissioner is required to serve his final decision on each party and the Administrative Law Judge by first class mail.

Reported: Taped (Tape Nos. 11,900 and 12,133)

MEMORANDUM

Petitioner argues that his actions do not constitute resignation under the contract and civil service rules. If Petitioner did not resign, he was removed from his position. When a veteran is to be removed, the Veterans Preference Act requires the employer to advise the veteran of his right to a hearing prior to the removal. There is no obligation to provide a prior hearing when the veteran is not removed.

Petitioner was aware that he would be unable to attend his work site beginning September 13, 1991. He discussed the situation with his supervisors and he requested a leave of absence. That request was denied. Petitioner knew that he was not authorized to be away from his work site and that being away without authorization would result in his termination from employment with the County. Petitioner acknowledges that his absence from work was improper, but he maintains that his absence constituted "cause" which would justify dismissal.

The contract between the Petitioner's union and the County does not resolve the issue of whether the County removed Petitioner or whether Petitioner resigned. Article VII, Section 5, provides that a employee may be considered terminated" at the County's discretion when "not on sick leave or authorized leave of absence but absenting himself without notice of any kind for three (3) continuous working days. Petitioner did not have an authorized leave, but he did give notice that he would be away from work. Thus, it would appear that the contract does not apply to this situation here.

Civil Service Rule 11.1 applies to employees away from work without authorization. The specific sentence relating to that situation reads:

Unauthorized absence from work for a period of three (3) consecutive working days shall be construed by the appointing authority and Director as a resignation not in good standing.

Civil Service Rule 10.10 makes any unauthorized absence grounds for discipline at the discretion of the County. It also states that in the absence of disciplinary action, where an unauthorized absence extends three consecutive days, the employee is deemed to have resigned. Thus, the Civil Service Rules clearly require that Petitioner's unauthorized absence be considered a resignation.

Petitioner argued that no resignation is effective without approval by the appointing authority and the Civil Service Commission under the language of the third paragraph of Rule 11.1. But that language applies to written resignations submitted by employees, not unauthorized absences deemed resignations.

Petitioner also argued that the County's action in deeming Petitioner's absence a resignation was intended only to avoid meeting Petitioner's rights under the Veteran's Preference Act. As discussed in the foregoing paragraphs, the County's actions are in accord with its civil service rules and its normal practices. Nothing in the record would suggest the County is engaged in a subterfuge or acting in bad faith.

Where an employee leaves work without authorization or legally cognizable excuse, the employee has abandoned employment and voluntarily terminated the employment relationship. 56 C.J.S., Master and Servant, 40 at 424. Petitioner has not shown that his absence was authorized or for a cognizable excuse. While there may be some hesitancy to say that Petitioner "voluntarily" absented himself from the job, the fact is that his voluntary actions led to his incarceration. The County has not taken disciplinary action against Petitioner for his unauthorized absence. It did not refuse to let him work. Under these circumstances, the absence must be treated as a resignation.

S.M.M.