

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

Larry A. Erickson,

Petitioner,

vs.

City of Ham Lake,

Respondent.

RECOMMENDED ORDER
GRANTING RESPONDENT'S
MOTION TO DISMISS

This matter is before the Administrative Law Judge on Respondent's motion to dismiss. Barbara R. Hatch, King & Hatch, P.A., Suite 800, St. Paul Building, Six West Fifth Street, St. Paul, Minnesota 55102, filed the motion on Respondent, the City of Ham Lake. There was no response filed by Petitioner, Larry A. Erickson, 200 157th Avenue N.E., Ham Lake, Minnesota 55304. The record on this matter closed on October 16, 1995, when the deadline for Petitioner's responsive filing passed.

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

RECOMMENDED ORDER

The Administrative Law Judge recommends that the Commissioner of Veterans Affairs issue an Order that GRANTS Respondent's motion to dismiss.

Dated this 17th day of November, 1995.

s/ Allen E. Giles

ALLEN E. GILES

Administrative Law Judge

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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.

MEMORANDUM

This matter arises under the Minnesota Veterans Preference Act, Minnesota Statutes Sections 197.46-197.481. Under Minn. Stat. § 197.46, municipal employees who are honorably discharged military veterans cannot be removed from their employment except for incompetence or misconduct shown after a hearing, upon due notice with charges stated in writing. Petitioner is a Volunteer Firefighter with the City of Ham Lake (hereinafter also referred to as "the City"), a position he has held since February 1982. Affidavit of David R. Tews, page 1. Petitioner was given a disciplinary suspension for a period of one year beginning on May 2, 1995. No discharge proceeding has been initiated against Petitioner. Id. at paragraph 16. Following the completion of the suspension and after completion of any necessary retraining, Petitioner will be entitled to return to service as a Volunteer Firefighter with the City. Id. at paragraph 17. Petitioner does not claim in the petition filed with the Department of Veterans Affairs that he was discharged from his employment or that problems are anticipated with respect to his return to work as a Volunteer Firefighter with the City.

The City's motion requests that the Judge dismiss the Petition. The motion is based on a claim that the matter is moot or has already been decided in a case previously decided by Administrative Law Judge, George Beck and adopted by the Commissioner of the Department Veterans Affairs, Libby v. City of Ham Lake, OAH Docket No. 1-3100-9742-2 (September 1, 1995), adopted by Decision and Order, Department of Veterans Affairs (November 3, 1995). In the Libby v. City of Ham Lake case, a veteran employed by the City of Ham Lake was held to have no veterans hearing right when the action complained of was a one-year suspension. The City's motion for dismissal does not state a procedural basis for the request. Therefore the Judge must determine the proper procedural posture of the City's motion.

Prior to hearing any evidence in a case, the Judge may dismiss a matter pursuant to Minn. Rules 1400.5500 J and K where either a judgment on the pleadings or a summary judgment is appropriate in accordance with Minnesota Rules of Civil Procedure Rules 12.03 and 56. Insofar as the City claims that the Petitioner has failed to state a claim upon which relief might be granted, the request for dismissal is appropriately treated as a motion for a judgment on the pleadings. The petition filed by Mr. Erickson with the Department of Veterans Affairs constitutes the pleadings in this case. However, because the City has requested that the Judge consider other documents in addition to the pleadings, the City's motion must be treated as a motion for summary judgment. See Minn. R. Civ. P., Rule 12.03.

The Administrative Law Judge is empowered by Minn. Rules pt. 1400.5500K and 1400.6600 to rule on contested cases by summary disposition in accordance with the standards established under Minnesota Rules of Civil Procedure, Rule 56. Summary disposition is appropriate where the pleadings, admissions, affidavits and other documents on file "show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03, Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955). A genuine issue is one which is not sham or frivolous and a material fact is a fact whose resolution will affect the result or

outcome of the case. Highland Chateau, Inc. v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), rev. den (Minn. 1985).

Because a disciplinary suspension does not constitute a "removal", a Veterans Preference Act petitioner ordinarily would not have a right to a hearing as a result of the suspension. Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987). However, as Judge Beck explained in Libby v. City of Ham Lake, OAH Docket No. 1-3100-9742-2 (September 1, 1995), adopted by Decision and Order, Department of Veterans Affairs (November 3, 1995), a decisionmaker must look to the substance of a disciplinary suspension to determine whether the practical effect of the suspension is a "removal". Referring to the Myers decision, Judge Beck stated as follows:

The court held that "under the Veterans Preference Act, a veteran is removed from his or her position 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." Myers, 409 N.W.2d 850-51 (emphasis added). Thus, the Myers decision instructs that, when construing "removal" within the Act, a Minnesota decisionmaker must look to the substance of an employer's action and not only the form given the action. Id. at 850 (agreeing with the premise "that whether an employer has by its action removed a veteran is a matter of substance and not of form"); see also, Gorecki v. Ramsey County, 419 N.W.2d 76, 79-80 (Minn. Ct. App. 1987) (following Myers emphasis on substance over form).

Petitioner's disciplinary suspension does not automatically entitle him to a hearing under the Veterans Preference Act. The uncontested facts establish that Petitioner will be allowed to return to his position at the end of the suspension period. Based on the standards discussed above there is no genuine issue as to a material fact and the City is entitled to judgment in its favor as a matter of law.

AEG