

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE VETERANS HOMES BOARD**

In the Matter of the Appeal of the
Discharge of Leonard Olson from the
Minnesota Veterans Home – Silver Bay

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 11:00 a.m. on Friday, March 2, 2001, in the conference room of the Minnesota Veterans Home at Silver Bay, Minnesota.

Donald E. Notvik, Assistant Attorney General, Suite 500, 525 Park Street, St. Paul, Minnesota 55103-2106, represented the Minnesota Veterans Home – Silver Bay (the Veterans Home), which is located at 45 Banks Boulevard, Silver Bay, Minnesota 55614. Leonard Olson lives at the Veterans Home and did not attend the hearing. He was represented in this proceeding by Dale W. Lucas, Attorney at Law, Legal Aid Service of Northeastern Minnesota, 302 Ordean Building, 424 West Superior Street, Duluth Minnesota 55802. The record closed on March 14, 2001, when the ALJ received all of the parties post-hearing submissions. The record was reopened on March 30, 2001 to allow for additional post-hearing submissions. The record closed on April 20, 2001, upon receipt of the parties' supplemental post-hearing submissions.

NOTICE

This Report is only a recommendation to the Minnesota Veterans Homes Board (the Board) and not a final decision. The Board will make its final decision after reviewing this report and the hearing record. In making that decision the Board may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendation that appear in this report. Under Minnesota Law,^[1] the Board may not make its final decision until after the parties have had access to this Report for at least ten days. During that time the Board must give any party adversely affected by this Report an opportunity to file objections to the Report and to present argument supporting its position. Parties should contact Stephen Musser, Executive Director, Minnesota Veterans Homes Board, Veterans Service Building, Room 122, 20 West 12th Street, St. Paul, Minnesota 55155, telephone (651) 296-2076, to find out how to file objections or present argument.

STATEMENT OF THE ISSUES

Whether the Veterans Home should discharge Mr. Olson for failure to make full payment of the maintenance charges that were established in his Admission Agreement.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Leonard Olson is a veteran of the armed forces of the United States. He is severely disabled, and his wife, Linda Olson, has been serving as his attorney-in-fact since April 1999.^[2]

2. Before he became disabled, Mr. Olson worked for Lake Superior Paper Industries where he participated in a 401(k) plan. On July 15, 1999, before Mr. Olson was admitted to the Veterans Home, Mrs. Olson inquired about making withdrawals from the proceeds of that plan. Lake Superior Paper informed her at that time that no withdrawal could be made from his 401(k) plan until he retired or terminated his employment.^[3] The effective date of Mr. Olson's separation from employment was August 17, 2000.^[4]

3. On September 1, 1999, Mr. Olson was admitted to the Veterans Home. At that time, Linda Olson, signed an Admission Agreement under which the Veterans Home agreed to provide Mr. Olson with residential care and nursing services. She, in turn, agreed to pay the Veterans Home a monthly maintenance charge. The Admission Agreement stated that the Veterans Home would have to calculate Mr. Olson's monthly maintenance charge in the way that is specified by the Veterans Home Board Rules. Specifically, paragraphs 5 and 7 of Mr. Olson's Admission Agreement provide that:^[5]

"5. CALCULATION OF MAINTENANCE CHARGE. Your maintenance charge is calculated according to Minnesota Rules, parts 9050.0500 to 9050.0900, and is based upon your financial ability to contribute to payment of your cost of care. You must provide accurate financial information to the Home so that your maintenance charge can be correctly determined. Based upon the Home's calculation of your income, assets, and other sources of benefits that are available to pay for your cost of care, your maintenance charge is \$3,720.87. A detailed calculation of the determination of your maintenance charge has been provided to you by the Home."

* * *

“7. RESIDENT’S OBLIGATION TO PAY MAINTENANCE. You must pay your maintenance charge by the due date. Payment is due by the last day of the month. If you do not pay your maintenance charge by the due date, the Home will notify you that your account is delinquent. In accordance with Minnesota Statute 334.01, simple interest may be charged by the Home on delinquent accounts. We may discharge you from the Home for not paying your maintenance charge by the due date.”^[6]

4. The full cost of caring for a veteran at the Veterans Home when Mr. Olson first became a resident was \$3,720.87 per month.^[7]

5. Based on a Veterans Homes Board rule that requires a resident to pay the full cost of care until the value of the resident’s assets are less than \$3,000,^[8] the Veterans Home began charging Mr. Olson a maintenance charge of \$3,720.87 per month beginning in September of 1999.^[9]

6. In establishing Mr. Olson’s initial monthly maintenance charges, the Veterans Home determined that one of Mr. Olson’s assets was his 401(k) plan, which then had a value of \$115, 872.75.^[10]

7. Mrs. Olson made no payments toward Mr. Olson’s cost of care during the months of September and October 1999.^[11]

8. Sometime after July 15, 1999, but before November 1, 1999, Mrs. Olson discovered she could apply for a hardship withdrawal of Mr. Olson’s 401(k) plan and she made such an application.^[12]

9. Effective October 1, 1999, the Veterans Home adjusted its full cost of care monthly maintenance charges to \$3,519.21 per month. This adjustment reflected a \$201.66 decrease in the full cost of care.^[13]

10. On or about November 5, 1999, the plan administrator approved the application for hardship withdrawal and made a net disbursement from Mr. Olson’s 401(k) plan to Mrs. Olson in the amount of \$92,698.20.^[14]

11. On November 15, 1999, Mrs. Olson disbursed some of the proceeds of the 401(k) distribution by making a payment to the Veterans Home in the amount of \$11,162.61. Based on the Veterans Home’s previous assessment of charges, this payment brought Mr. Olson’s account up to date for the months of September, October, and November 1999 and provided a \$403.32 credit for the month of December 1999.^[15]

12. In December of 1999, Mrs. Olson made another payment to the Veterans Home in the amount of \$3,179.12. This payment, based on the charges then being assessed by the Veterans Home, paid the full cost of care for the month of December and provided a credit of \$63.23 going into the month of January 2000.^[16]

13. Mrs. Olson made no payments to the Veterans Home in January 2000. However, in February 2000, she made two payments to the Veterans Home totaling

\$6,975.19 bringing her account, based on the charges assessed by the Veterans Home, to a zero balance.^[17]

14. Mrs. Olson made payments for the months of March and April 2000 and maintained a zero balance on the account for those months.^[18]

15. In April 2000, Mrs. Olson notified Ms. Michelle Redfield, an account clerk with the Veterans Home, that she had spent the funds received from Mr. Olson's 401(k) plan down below the \$3,000 threshold limit. Accordingly, Mrs. Olson indicated her expectation that the Veterans Home would thereafter be assessing the monthly maintenance charges based on monthly income. In response, Ms. Redfield requested Mrs. Olson to provide an accounting of how the 401(k) funds had been spent.^[19]

16. Mrs. Olson supplied to Ms. Redfield documentation for some of the expenditures that she had been making from the 401(k) proceeds. That documentation included evidence of repayment of a loan against Mrs. Olson's profit sharing account in the amount of \$11,564.80, \$201.61 paid to Bridge Rehabilitation, \$1,346.02 paid to Miller Dwan Medical Center, \$2,500 paid to Attorney Peter A. Schmidt, and \$28,355.34 paid to the Veterans Home.^[20]

17. The Veterans Home has received no further payment toward Mr. Olson's accumulating maintenance fees since April 19, 2000.^[21]

18. Veterans Home Board rules require the Veterans Home to recalculate the cost of caring for its veterans every year on July 1st.^[22] The Veterans Home did recalculate its cost of Mr. Olson's care as of July 1, 2000. And as a result of that recalculation, the cost of care increased to \$3,670.38 beginning in the month of July 2000.^[23]

19. On August 11, 2000, Jeffrey Brown, the Veterans Home's Administrator, sent to Linda Olson, as Mr. Olson's attorney-in-fact, a notice that the Veterans Home was going to involuntarily discharge him because he had failed to comply with his payment obligations.^[24] Among other things, the notice advised Mrs. Olson that if she did not request reconsideration within ten (10) days, the Veterans Home would issue an order discharging her husband. The notice also contained advice of Mr. Olson's other appeal rights.^[25]

20. Effective October 1, 2000, the monthly maintenance fee was again adjusted. As a result of this adjustment, the monthly maintenance charge for full cost of care decreased to \$3,645.13 per month.^[26]

21. On August 16, 2000, Mrs. Olson requested a reconsideration of the initial discharge notice.^[27] The administrator issued a decision on October 25, 2000 to uphold the discharge order.^[28]

22. On November 13, 2000, Mrs. Olson requested an administrative appeal of the decision to discharge Mr. Olson from the Veterans Home,^[29] and on January 23,

2000, the Veterans Home issued the Notice of and Order for Hearing that began this administrative appeal.

23. Mr. Olson has continued to live at the Veterans Home pending the outcome of this contested case proceeding, and the Veterans Home has continued to charge Mr. Olson monthly maintenance fees prescribed by law and rule.

24. The outstanding balance of Mr. Olson's account for the months of May 2000 through February 2001 is \$36,275.21.^[30]

25. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

26. The Memorandum that follows explains the reasons for these Findings, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Findings.

27. The Administrative Law Judge adopts as Findings any Conclusions which are more appropriately described as Findings.

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

CONCLUSIONS

1. Minnesota law^[31] gives the Administrative Law Judge and the Board authority to conduct this proceeding, to consider the issues raised here, and to make findings, conclusions, and orders.

2. Mr. Olson received proper notice of his proposed discharge and of the time and place of the hearing in this administrative appeal.

3. The Veterans Home and the Board have complied with all of the legal requirements for conducting this proceeding.

4. Veterans Homes Board rules require veterans homes to institute proceedings to discharge a resident "when an account is delinquent . . ."^[32] The Board's rules also require a veterans home to institute proceedings to discharge a resident who "fails or refuses to comply with payment obligations in the admission agreement . . ."^[33]

5. Under Minnesota law,^[34] the Veterans Home has the burden of proving that Mr. Olson is delinquent in the payment of his maintenance charges or that he has refused or failed to pay those charges.

6. Veterans Homes Board rules provide that "[I]f the applicant or resident owns property in excess of \$3,000 that is not excluded . . . [from consideration under

the rules], the applicant or resident must be determined to pay the full cost of care according to part 9050.0755.”^[35] That same rule goes on to provide that “[t]he person shall pay the full cost of care until the property is reduced to the limits . . . [specified by the rules].”^[36]

7. Board rules further provide that “[r]eal or personal property owned by or on behalf of an applicant is presumed legally available unless the applicant or resident documents that the property is not legally available to the applicant or resident.”^[37] The term “legal availability” is defined as “a person’s right under the law to secure, possess, dispose of, or control income or property.”^[38]

8. At the time of Mr. Olson’s admission, Mrs. Olson did not have a right to secure, possess, dispose of, or control her husband’s 401(k) plan. At that time, the only means available to Mrs. Olson to obtain access to the 401(k) prior to her husband’s retirement or separation from his employment was to apply for a hardship disbursement that was subject to the approval of the plan holder. As a result, the 401(k) plan did not become legally available to Mrs. Olson until the approval of her request for the hardship withdrawal and its disbursement on November 5, 1999.

9. Board rules also address lump sum payments received by or on behalf of an applicant or resident:

Lump sums received by or on behalf of an applicant or resident must be considered earned income under subparts 1 to 4 or unearned income according to subpart 5. Lump sums are considered income in the month received and property if retained beyond the month of receipt, unless it is a contractual payment or retroactive payment of benefits.^[39]

The rules go on to define “unearned income” in part as “...any form of gross income that does not meet the definition of earned income. Unearned income includes an annuity, retirement, or disability benefit...”^[40] And the rules provide that “[u]nearned income must be calculated according to part 9050.0710, subpart 5.” Finally, the rules specify that “[a]n amount must be deducted for costs necessary to secure payments of unearned income. These costs include legal fees, medical fees, and mandatory deductions such as federal and state income taxes.”^[41]

10. When Mrs. Olson received Mr. Olson’s 401(k) disbursement on November 5, 1999, those funds became “unearned income” attributable to Mr. Olson for the month of November 1999. The balance of the “unearned income” in November 1999 exceeded \$3,000 requiring an assessment of full cost of care.

11. In December 1999, the proceeds from the 401(k) distribution became a property asset of Mr. Olson, which thereafter became available to pay for his care.^[42]

12. The Veterans Home properly reduced the value of Mr. Olson’s equity in the 401(k) proceeds by the \$201.61 paid to Bridge Rehabilitation, the \$1,346.02 paid to Miller Dwan Medical Center, the \$2,500 paid to Attorney Peter A. Schmidt, and the \$28,355.34 paid to the Veterans Home.^[43]

13. Board rules require that “[a] current resident of a board-operated facility shall declare all transfers or sales of property within ten days of the transfer or sale. The value of the property transferred or sold must be treated as an available resource for payment of the resident’s maintenance charge.”^[44] And “[r]eal or personal property transferred by an applicant or resident in violation of part 9050.0650 is presumed legally available.”^[45]

14. When Mrs. Olson notified the Veterans Home in April 2000 that the funds from the 401(K) plan had been spent down, she failed to establish that the transfers she made were permissible transfers under the rules, nor did she document that the property was otherwise not legally available.

15. The Veterans Home properly considered the proceeds from the 401(k) plan, less the deductions for medical, legal and funds paid to the Veterans Home, to be available for the cost of care for Mr. Olson.

16. From December 1999, to the present date, Mr. Olson is presumed to have owned property in excess of \$3,000. The Veterans Home has therefore been obliged by law to base his monthly maintenance charge on the full cost of his care.

17. The legislature has enacted a statute pertaining to arrearages in maintenance charges.^[46] It provides that:

[r]esidents are liable for paying all of their overdue maintenance charges. Overdue maintenance charges incurred after May 1, 1990, may be charged interest according to section 334.01. A resident owing overdue maintenance to the state of Minnesota for charges incurred prior to May 1, 1990, may continue to stay in the home if the resident enters into an agreement, including a payment schedule, with the administrator for the payment of arrearages and abides by the agreement. Residents who do not promptly pay maintenance or who do not abide by their agreements to pay overdue maintenance to the state of Minnesota may be discharged from the home. The payment schedule agreed to between the administrator and the resident must provide for the prompt payment of the overdue maintenance owed by the resident, but it must not reduce the resident’s personal needs allowance below that which is provided for in the administrative rules of the facility.

18. No payments have been made on Mr. Olson’s account since April 2000. No evidence of a successful agreement for the payment of arrearages is contained within the record. The Veterans Home may therefore bring these proceedings to discharge him.^[47]

19. Since Mr. Olson has not promptly paid his monthly maintenance charges, the Board has the authority to discharge him from the Veterans Home.

20. The Memorandum that follows explains the reasons for these Conclusions, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Conclusions.

21. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

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

RECOMMENDATION

The Administrative Law Judge HEREBY RECOMMENDS that the Board affirm the Administrator's order discharging Mr. Olson for failure to pay his monthly maintenance charges.

Dated this 2nd day of May 2001.

S/Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

NOTICE

Under Minnesota law,^[48] the Commissioner must serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

Initially, Mr. Olson's right to the \$92,698.20 in the 401(K) plan was contingent on the approval of an early hardship withdrawal by the plan administrator. So, that sum was not legally available to pay for his cost of care until the disbursement actually occurred on November 5, 1999. It was therefore error for the Veterans Home to assess Mr. Olson the full cost of his care from September 1, 1999, to November 5, 1999, based on availability of funds in his 401(k) plan. To determine a correct balance, the Veterans Home must go back and determine the appropriate maintenance charge for Mr. Olson for the time period September 1, 1999 to November 5, 1999 without considering the 401(K) proceeds.

On the other hand, proceeds from the 401(k) plan did become legally available to pay for the cost of Mr. Olson's care after November 5, 1999 — as "unearned income" in November 1999 and as "property" thereafter. It has therefore been appropriate for the Veterans Home to base cost of care on the availability of that asset to Mr. Olson from the date the money was disbursed to Mrs. Olson.^[49] *What must be applied to the cost of Mr. Olson's care is his equity in the 401(k) proceeds* — that is, the proceeds less permissible charges against the fund.^[50] In determining his equity, it was appropriate for the Veterans Home to deduct from the net proceeds payments that Mrs. Olson had made for her husband's medical expense, for his legal expenses, and payments that she had made to the Veterans Home toward the cost of his care.^[51] But Mrs. Olson did not provide the Veterans Home with notice or documentation of any of the other permissible disbursements that she has made from the 401(k) funds. Because she failed to declare those other disbursements and to provide documentation establishing that the monies were spent for permissible expenditures, the law requires the Veterans Home to continue to treat the balance of the 401(k) proceeds as being available to pay for Mr. Olson's monthly maintenance charges after April 2000.^[52]

Although Mr. Olson's maintenance charges for the period from September 1 through November 5, 1999, appear to be much lower than what the Veterans Home originally calculated, his account is still in arrears because Mrs. Olson stopped making payments in April 2000. Maintenance charges have continued to accumulate since then. As a result, the Administrative Law Judge must conclude that Minnesota law allows the Veterans Home to go forward with proceedings to discharge Mr. Olson for nonpayment of the full amount of his monthly maintenance charges^[53] and to recommend that the order discharging him be upheld.

B.H.J.

^[1] Minnesota Statutes, section 14.61. (Unless otherwise specified, all references to Minnesota Statutes are to the 2000 edition.)

^[2] Testimony of Linda Olson.

^[3] Exhibit B; testimony of Linda Olson.

^[4] Exhibit C.

^[5] Exhibit 5.

^[6] Exhibit 5 at p. 3.

^[7] Exhibit 9.

^[8] Minnesota Rules, part 9050.0560, subpart 2 A. (Unless otherwise specified, all references to Minnesota Rules are to the 1999 edition.)

^[9] Exhibits 5 and 9.

^[10] Testimony of Michelle Redfield.

^[11] Exhibit 13.

^[12] Testimony of Linda Olson.

^[13] Exhibit 10.

^[14] Exhibit 7.

^[15] Testimony of Michelle Redfield; Exhibit 13.

^[16] *Id.*

^[17] *Id.*

^[18] *Id.*

^[19] Testimony of Michelle Redfield.

^[20] *Id.*

^[21] Exhibit 13.

^[22] Minnesota Rules, part 9050.0500, subpart 1.

^[23] Exhibit 11.

^[24] Exhibit 4.

^[25] *Id.*

^[26] Exhibit 12.

^[27] Exhibit 3.

^[28] Exhibit 2.

^[29] Exhibit 1.

^[30] Exhibit 13.

^[31] Minnesota Statutes, sections 14.50 and 198.003 and Minnesota Rules, part 9050.0220.

^[32] Minnesota Rules, part 9050.0520, subpart 2.

^[33] Minnesota Rules, part 9050.0200, subpart 3A.

^[34] Minnesota Rules, part 1400.7300, subpart 5.

^[35] Minnesota Rules, part 9050.0550, subpart 3.

^[36] *Id.*

^[37] Minnesota Rules, part 9050.0600, subpart 1 B.

^[38] Minnesota Rules, part 9050.0040, subpart 60.

^[39] Minnesota Rules, part 9050.0710, subpart 6.

^[40] Minnesota Rules, part 9050.0040, subpart 113.

^[41] Minnesota Rules part 9050.0710, subpart 5 A.

^[42] Minnesota Rule, part 9050.0600, subpart 1 B, provides that “[r]eal or personal property owned by or on behalf of an applicant or resident is presumed legally available unless the applicant or resident documents that the property is not legally available to the applicant or resident.” Moreover, Minnesota Rules, part 9050.0600, subpart 1 D requires that “facility financial staff shall consider as available an individual retirement account, Keogh account, or other pension or deferred compensation plan account.”

^[43] Minnesota Rules part 9050.0710, subpart 5; see also Minnesota Rules part 9050.0650, subpart 1.

^[44] Minnesota Rules, part 9050.0650, subpart 1.

^[45] Minnesota Rules, part 9050.0600, subpart 1 C.

^[46] Minnesota Statutes, section 198.03, subdivision 3.

^[47] Minnesota Rules, part 9050.0200, subpart 3 A.

^[48] Minnesota Statutes, section 14.62, subdivision 1.

^[49] Minnesota Rules, part 9050.0600, subpart 1, item D.

^[50] Minnesota Rules, part 9050.0650, subpart 1. *See also* Minnesota Rules, part 9050.0600, subpart

1.

^[51] Minnesota Rules part 9050.0710, subpart 5.

^[52] Minnesota Rules, part 9050.0600, subpart 1 C.

^[53] *See* Minnesota Rules, part 9050.0200, subpart 3 and part 9050.0520, subpart 2.