STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2310

Robert B. Dryden,
Relator,

vs.

City of Rochester,
Respondent,

Commissioner of Veterans Affairs,
Respondent.

Filed October 7, 2013
Affirmed
Johnson, Chief Judge

Department of Veterans Affairs
No. 15-3100-22525-2

Andrea B. Niesen, Bird, Jacobsen & Stevens, P.C., Rochester, Minnesota (for relator)

Patricia Y. Beety, League of Minnesota Cities, St. Paul, Minnesota (for respondent City of Rochester)

Lori Swanson, Attorney General, David F. Strohkirch, Assistant Attorney General, St. Paul, Minnesota (for respondent Commissioner of Veterans Affairs)

Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Chief Judge

Robert B. Dryden, an honorably discharged veteran, performed software programming for the City of Rochester. After his work was discontinued, he sought back pay and reinstatement to a position of employment under the Veterans Preference Act. An administrative law judge determined that he is not entitled to the protections of the act because he was employed by the city as a temporary employee and, in addition, because his position was abolished in good faith. The commissioner of veterans affairs adopted the findings and recommendation. We affirm.

FACTS

In January 1984, Dryden was honorably discharged from the United States Navy. From 1988 to 1998, Dryden worked for Rochester Public Utilities (RPU), a division of the city, as an Operations, Fleet and Facilities Manager. From 2004 to 2008, Dryden operated a business, Dryden Co., which provided software consulting on a contract basis, predominantly to RPU.

In 2008, Dryden and the manager of RPU, William Cook, discussed the possibility of Dryden becoming an employee of RPU so that Dryden could devote 40 hours per week to certain software and information-systems projects. Cook estimated that the projects would require approximately one year of work. In August 2008, Dryden completed an employment application form entitled "Employment Application/Seasonal and Temporary" and began working for RPU as an employee.

The precise nature of Dryden's employment status is disputed. Dryden contends that Cook offered him a "provisional" position with no specified end date. The city contends that Cook offered Dryden a temporary position. The city explains that, in its human resources processes, the term "provisional" is synonymous with the term "temporary" and that Dryden's position was intended to be temporary because it was intended to end when Dryden completed certain projects.

At the beginning of Dryden's employment, Dryden and Cook established a list of projects for Dryden. Cook added projects to the list throughout Dryden's employment. Dryden was paid only an hourly rate, did not receive full benefits, and was issued a temporary-employee badge. He did, however, receive vacation and sick leave. The city also made contributions on Dryden's behalf to a retirement fund at the Public Employees Retirement Association.

In December 2009, Cook notified Dryden that his employment would be terminated the following month due to budget constraints. On January 6, 2010, the city terminated Dryden's employment but requested that Dryden continue as an independent contractor. At that time, Dryden had worked for the city as an employee for 16 months and 23 days.

On January 7, 2010, Dryden began working for the city as an independent contractor. Dryden testified that his tasks as an independent contractor were the same as when he was an employee. But the city increased Dryden's hourly rate to account for the fringe benefits he no longer received after becoming an independent contractor.

In June 2011, Cook notified Dryden that his work as an independent contractor would be discontinued. Dryden's last day as an independent contractor was September 30, 2011. Between June and September 2011, Dryden took steps to wrap up his work on assigned projects so that RPU employees could utilize his software programming after his departure. Dryden did not complete work on several programs before leaving. The city did not hire anyone to replace Dryden. The projects that he did not complete were not done by any other person.

In December 2011, Dryden petitioned the Minnesota Department of Veterans Affairs for relief under the Veterans Preference Act (VPA), seeking back pay and reinstatement. In April 2012, an administrative law judge (ALJ) held a hearing at which both the city and Dryden presented evidence related to the nature of Dryden's employment. In June 2012, the ALJ issued a written decision in which she found that Dryden was a temporary employee. The ALJ also found, in the alternative, that even if Dryden was not a temporary employee, the city eliminated his position in good faith. Each of these findings independently supports the ALJ's conclusion that the VPA does not apply. The commissioner of veterans affairs adopted most of the ALJ's findings and also concluded that the VPA does not apply. Dryden appeals by way of a writ of certiorari.

D E C I S I O N

The VPA requires most public employers in Minnesota to provide notice and a hearing whenever they intend to terminate the employment of an honorably discharged veteran:

> No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in 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.

Minn. Stat. § 197.46 (2012). This appeal focuses on the question whether the VPA applies to Dryden in light of the nature of his employment by the city.

I. Temporary Employment

Dryden argues that the ALJ and the commissioner erred by finding that he was merely a temporary employee and, thus, not entitled to the protections of the VPA.

The VPA applies to a "person holding a position by appointment or employment in," among other things, a political subdivision, such as the City of Rochester. *See id.* The VPA does not contain a definition of the term "employment." The supreme court, however, has held that the VPA does not apply to temporary employees. *Crnkovich v. Independent Sch. Dist. No. 701*, 273 Minn. 518, 521, 142 N.W.2d 284, 286 (1966). An employee is a temporary employee if he is employed "'for a temporary purpose or for a fixed term,'" such that the employment ends "'upon completion of the work he is employed to do, or upon the expiration of the time for which he is hired.'" *Id.* (emphasis omitted) (quoting *State ex rel. Castel v. Village of Chisholm*, 173 Minn. 485, 490, 217 N.W. 681, 682-83 (1928)). Whether a position of employment is temporary for purposes of the VPA is a question of fact, and this court reviews such a finding of fact to determine whether it is reasonably supported by the evidence. *Id.* at 523, 142 N.W.2d at 287.

In this case, the ALJ made several findings relevant to the nature of Dryden's employment. The ALJ found that the city did not hire Dryden through its normal process for hiring permanent employees. The ALJ found that Dryden knew that he was not a permanent employee and that, after he became an employee, he periodically requested that his employment be made permanent. The ALJ found that Dryden's supervisors never considered Dryden to be a permanent employee. The ALJ found that Dryden's work was largely project-based. In light of these findings of historical fact, the ALJ made an ultimate finding that Dryden was a temporary employee from August 2008 to January 2010. The commissioner of veterans affairs adopted those findings. In an attached memorandum, the commissioner reasoned that the city hired Dryden for a limited purpose, that the city treated him as a temporary employee, and that Dryden understood the temporary nature of his employment and sought permanent employment.

The evidence in the record reasonably supports the ALJ's findings of fact as well as the commissioner's ultimate finding that Dryden was a temporary employee. The city hired Dryden "'for a fixed term,'" intending that his employment would end "'upon completion of the work he [was] employed to do.'" *See id.* at 521, 142 N.W.2d at 286 (quoting *Castel*, 173 Minn. at 490, 217 N.W. at 682-83). The actual duration of his employment is not as important as the fact that his employment was intended at the beginning to be finite and limited in scope. Thus, the ALJ and the commissioner did not err by finding that Dryden's employment was temporary. For that reason alone, the VPA does not apply.

II. Position Abolished in Good Faith

Dryden also argues that the ALJ and the commissioner erred by finding that the city abolished his position in good faith. This issue would be relevant only if we were to conclude that the ALJ and the commissioner erred by finding that Dryden's employment was not temporary. But we concluded in part I that Dryden was a temporary employee. Nonetheless, for purposes of this part of the opinion, we will assume that Dryden's employment was permanent.

On its face, the VPA permits a veteran to be removed from his or her position only "for incompetency or misconduct shown after a hearing." Minn. Stat. § 197.46. The supreme court, however, has held that the VPA does not "prevent public employers from abolishing positions in good faith." *Young v. City of Duluth*, 386 N.W.2d 732, 737 (Minn. 1986). As the supreme court explained,

> The purpose of this section [the Veterans Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position. The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veteran's preference act.

Id. (alteration in original) (quoting *State ex rel. Boyd v. Matson*, 155 Minn. 137, 141, 193 N.W. 30, 32 (1923)). Whether a position was abolished in good faith is a question of fact, which this court reviews for clear error. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985).

In this case, the ALJ found that, even if Dryden was a permanent employee, there was no evidence that the city eliminated his position in bad faith. The commissioner adopted this finding. The evidence supports the ALJ's and the commissioner's finding. It is undisputed that the city had a limited budget for Dryden's position and that no other person assumed Dryden's duties after his departure. Some of Dryden's programming projects never were completed because the city could not afford to pay for those services. Thus, the ALJ and the commissioner did not err by finding that Dryden's position, even if permanent, was abolished in good faith. This finding provides an additional legal basis for the conclusion that the VPA does not apply.

In sum, the ALJ and the commissioner did not err by concluding that Dryden is not entitled to the protections of the VPA.

Affirmed.