

challenging his termination under the Veterans Preference Act, Minn. Stat. § 197.46, and he selected to have his case heard before a three-member panel. A Veterans Preference Act hearing was held on April 3, 2013 at which each party was given a full opportunity to present their case through the testimony of witnesses and the introduction of exhibits.

LEGAL STANDARD

The Veterans Preference Act provides that a covered veteran may be discharged from public employment only for incompetence or misconduct. Minn. Stat. § 197.46. The Minnesota Supreme Court has interpreted these grounds as the equivalent of a “just cause” standard for discharge. AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295, 297-98 (Minn. 1984). In Ekstedt v. Village of New Hope, 292 Minn. 152, 193 N.W.2d 821 (1972), the Court explained that:

. . . the cause [for discharge] must be one which specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office.

193 N.W.2d at 828. The burden of establishing the statutory grounds for discharge lies with the public employer. Johnson v. Village of Cohasset, 263 Minn. 425, 116 N.W. 2d 692, 698 (1962).

The Minnesota Supreme Court also has clarified the responsibilities of the hearing officer(s) in applying this standard. In Matter of Schrader, 394 N.W.2d 796 (Minn. 1986), the Court stated that:

“[in] conducting a veterans preference hearing the task of the hearing board is twofold: first, to determine whether the employer has acted reasonably; second, to determine whether extenuating circumstances exist justifying a modification in the disciplinary sanction.”

394 N.W.2d at 801-02.

ISSUES

1. Did the Employer act reasonably in deciding to terminate Roger Jorgenson from his position as a part-time, paid-on-call firefighter?
2. Even if the Employer did act reasonably, do extenuating circumstances warrant a modification of the termination penalty?

FACTUAL BACKGROUND

Roger Jorgenson is an honorably discharged veteran of this nation's armed forces. He has worked with the Employer as a part-time, paid-on-call firefighter since 1997. In that capacity, he is expected to respond to fire, hazmat, rescue, medical and other emergency incidents and to participate in training and maintenance activities. As a paid-on-call firefighter, Jorgenson must maintain Minnesota firefighter certification which requires, among other things, that he be capable of using a self-contained breathing apparatus (SCBA) and that he can conduct a search and rescue in a structure operating as a member of a team.

Mr. Jorgenson received satisfactory performance evaluations during most of his tenure. During the past five years, however, his reviews have noted a decline in both his performance and his attitude. The Employer also has imposed discipline on Mr. Jorgenson as follows:

- On May 27, 2009, he received a written reprimand for making inappropriate verbal comments during a training session relating to respectful workplace conduct;
- On October 12, 2009, he received a written warning for failing to meet minimum training drill attendance requirements; and
- On October 7, 2011, he received another written warning for failing to meet minimum training drill requirements.

Two more significant incidents took place during May 2012. The first occurred on May 9, 2012, during a scheduled training exercise at Hennepin Technical College. One of the exercises was a rapid intervention training drill in which a three-person firefighter team was required to navigate a confined space using SCBA equipment in order to rescue a downed firefighter. Approximately half way through this exercise, Mr. Jorgenson indicated that he could not go any further and turned back toward the entrance. After climbing over one of his teammates and exiting to the sidelines, Mr. Jorgenson's low air alarm sounded which required the entire team to abandon the exercise. At the arbitration hearing, the instructor and Mr. Jorgenson's two teammates testified that the rapid exhaustion of air supply likely represented panic or over-exertion.

Mr. Jorgenson was asked to repeat the exercise later that same day. According to the grievant, he performed the second exercise without any problem. Instructor Dennis Niles, however, testified that Mr. Jorgenson again turned back at about the same spot in the course and that he failed to complete this second attempt at the simulation exercise.

Four days later, on May 13, 2012, Mr. Jorgenson and the other firefighters assigned to Station # 2 were paged for a commercial fire alarm. As the firefighters were preparing to leave for the fire, Lt. Todd Walock verbally directed Jorgenson to drive in the front position of the tiller truck while directing firefighter Thibodeau to drive in the rear position. Lt. Walock testified that he directly looked at Jorgenson while issuing this directive and that Jorgenson could not possibly have misconstrued that command. Nonetheless, Mr. Jorgenson climbed into the rear position, and Lt. Walock ended up assigning another firefighter to drive in the front of the vehicle.

Assistant Chiefs Tim Bush and Rob Pearson met with Mr. Jorgenson on May 16 to review the tiller truck incident. The meeting quickly became heated. Jorgenson testified that the two supervisors kept interrupting his explanation and would not let him tell his side of the story. The two supervisors each testified that Mr. Jorgenson kept changing his description of events and that he became quite confrontational. Jorgenson received a two-week suspension for the tiller truck incident.

Another meeting was held on June 12, 2012 for the purpose of discussing options for dealing with Mr. Jorgenson's performance issues. The meeting was attended by Fire Chief Scott Anderson, Deputy Chief Kurt Kramer, HR Specialist Claudia Schmoyer, and Mr. Jorgenson. At this meeting, Chief Anderson informed Mr. Jorgenson that he had three available options: 1) participate in a performance improvement plan (PIP), 2) resign, or 3) be terminated. Mr. Jorgenson responded that he likely would agree to the PIP.

Deputy Chief Kramer and Assistant Chief Bush met with Mr. Jorgenson on June 26 to review the terms of the proposed PIP. Kramer testified that he viewed the plan as providing a basis for Jorgenson to improve his performance and succeed as a firefighter. Jorgenson testified that he thought the plan was broader than necessary and that it was intended to set him up for failure. Kramer told Jorgenson that the City needed to know by June 29 whether Jorgenson would participate in the plan.

Kramer telephoned Jorgenson on June 29 to ascertain his decision. Jorgenson became argumentative, said he was busy, and hung up. Chief Anderson subsequently sent a written memo to Jorgenson extending the deadline to July 10, 2012. The memo advised Mr. Jorgenson that a failure to respond within this timeline likely would result in termination. Jorgenson sent an email message to Kramer on July 10 stating that he needed more time to meet with his

attorney before responding to the PIP request. The Employer issued a notice of termination on July 13, 2012.

The Employer subsequently provided Mr. Jorgenson with notice of his right to request a hearing under the Veterans Preference Act. Mr. Jorgenson submitted a timely written request for a hearing on September 11, 2012. Pursuant to the act, the Employer has continued Mr. Jorgenson's compensation throughout the pendency of this proceeding.

In December 2012, Mr. Jorgenson sent a series of email messages to fellow fire department employees. Jorgenson sent the first email message at 3:40 p.m. on December 10, 2012 to Assistant Chief Rob Pearson. That message stated, in part, "I am like the shit on your ass! No matter how hard you try to wipe, it does not go away. When your lies come out what then?" At the arbitration hearing, Mr. Jorgenson testified that Pearson had subjected him to continual harassment over the past decade. The record also establishes that Pearson is gay.

At 4:55 p.m. that same day, Mr. Jorgenson sent another email message to 27 recipients, most of whom were Maple Grove firefighters. This message again focused on Pearson, referring to him as "Roberta" and the "chief cornholer." The message also described Assistant Chief Bush as the "chief fat man." Jorgenson's message stated that no one from the City had let him tell his side of the story, and he compared City administrators to Hitler. Jorgenson concluded with the following admonition:

This message is for friendly people to the cause. Any asshole who gets this is not allowed to share this with the City or any shit heads like the City. You will be punished by Roger's law. He will kick your ass and more so, do not send this on to the City and the gay guys.

Jorgenson also sent two other similar, although more innocuous, email messages to City employee recipients on that same day.

The City sent Mr. Jorgenson a letter dated December 12, 2012, advising him not to utilize any of the City's communications systems, including the email system, to contact Maple Grove employees. Mr. Jorgenson, nonetheless, sent another email message on December 15 to 98 recipients, many of whom worked for the Employer. In this message, Jorgenson accused the Employer of violating his First Amendment rights, and he repeated a variety of grievances against City officials.

City Administrator Alan Madsen sent Mr. Jorgenson a second Notice of Termination on January 11, 2013. This notice also advised Jorgenson of his rights under the Veterans Preference Act. Mr. Jorgenson replied with a letter dated March 14 requesting a hearing on this second termination charge.

Shortly before the arbitration hearing, Mr. Jorgenson requested a postponement due to the additional charges noted in the second Notice of Termination. The arbitrator ruled that the hearing should proceed, but that he would decide on the propriety of considering the allegations raised in the second notice in conjunction with his ruling on the merits.

POSITIONS OF THE PARTIES

Employer

The Employer contends that it had just cause to terminate Mr. Jorgenson's employment for two reasons. First, the Employer maintains that Mr. Jorgenson exhibited serious performance problems during May 2012 and that his refusal to correct those problems by participating in a performance improvement plan constitutes just cause. Second, the Employer asserts that Mr. Jorgenson sent offensive and threatening email messages to fellow employees in December 2012. The Employer argues that these emails constitute an appropriate basis for discipline since

Mr. Jorgenson was still on the payroll as a City employee at the time. In sum, the Employer contends that either or both of these infractions constitute a sufficient basis to support its termination decision and that no extenuating circumstances warrant a reduction in penalty.

Veteran

Mr. Jorgenson argues that the Employer's termination of his employment is not supported by just cause. In terms of the first termination notice, Mr. Jorgenson claims that the two May incidents did not represent serious deficiencies in performance sufficient to justify the imposition of a performance improvement plan. In particular, Mr. Jorgenson contends that the tiller truck incident resulted from a misunderstanding in communications rather than an act of deliberate insubordination. Mr. Jorgenson also asserts that the email messages sent after the initial notice should not be considered as relevant evidence to support a discharge decision that already had been made. Even if relevant, Mr. Jorgenson maintains that the messages should be discounted as off-duty banter between friends. Finally, Mr. Jorgenson argues that discharge is too severe of a penalty for an employee with fifteen years of service.

DISCUSSION AND OPINION

As noted above, the Employer bears the initial burden of establishing that it acted reasonably by discharging the veteran for just cause. If that proof is established, the remaining question is whether extenuating circumstances warrant a reduction in penalty. Each of these steps is discussed below.

The Alleged Misconduct

The Employer alleges that its termination decision is supported by two independent grounds. The Employer's first discharge notice was premised on the claim that Mr. Jorgenson

exhibited significant performance problems during the two May 2012 incidents, but that he nonetheless refused to participate in a performance improvement plan to ensure that he could meet essential job qualifications. The second discharge notice was based on the allegation that Mr. Jorgenson violated City policies by sending derogatory and threatening email messages while still on the Employer's payroll.

The May 2012 Performance Concerns

In support of the first allegation, the Employer initially points to Mr. Jorgenson's difficulties during the May 9 training exercise. While engaged in a rapid intervention drill designed to simulate the rescue of a downed firefighter, Mr. Jorgenson failed to complete the exercise and demonstrated a disregard for his mission and his fellow firefighters in his scramble to exit the course. According to Employer witnesses, the fact that Mr. Jorgenson depleted his oxygen supply in such quick fashion demonstrates that Mr. Jorgenson likely experienced a panicked response to the simulation. The training instructor, Mr. Niles, testified that Mr. Jorgenson similarly failed at a second attempt of the exercise. The Employer argues that the ability to assist in this type of rescue mission is an essential function of the firefighter position.

The Employer additionally relies on the May 13 tiller truck incident. Lt. Todd Walock testified that he directed Mr. Jorgenson to take the front driving position on the tiller truck in responding to a fire call, but that Mr. Jorgenson instead assumed the rear driver's seat. Lt. Walock testified that he had made eye contact with Mr. Jorgenson when he issued this directive and that Mr. Jorgenson could not possibly have misunderstood his clear command. The Employer contends that this act of insubordination is consistent with Mr. Jorgenson's pattern of exhibiting disrespect toward his supervisors. The Employer further asserts that compliance with supervisory orders is essential in a paramilitary, public safety organization.

Mr. Jorgenson argues in response that the Employer has exaggerated the importance of these two incidents. He testified that his difficulties in the training session were attributable to a low air supply and that he successfully completed the exercise on his second attempt. As to the tiller truck incident, Mr. Jorgenson testified that he thought that Lt. Walock had countermanded his initial directive and had told him to "hurry up and jump in the back of the truck." While acknowledging that he became argumentative during his subsequent meeting with the two assistant chiefs, Mr. Jorgenson claimed that this occurred only because the two supervisors would not let him tell his side of the story.

Based upon the evidence submitted, I believe that the Employer has established a genuine basis for concern with regard to Mr. Jorgenson's ability to perform the duties of his position. Clearly, a firefighter must be able to carry out a rescue mission and to follow orders. While these deficiencies, standing alone, might not support an immediate termination decision, an employee's refusal to participate in a performance improvement plan in order to rectify these problems amplifies these concerns by several degrees. The combination of Mr. Jorgenson's performance problems and his refusal to participate in corrective efforts adequately establishes the reasonableness of this first misconduct allegation as well as the reasonableness of the Employer's response.

The December 2012 Email Messages

The second notice of termination implicates a significant procedural issue: whether post-discharge conduct in the form of the December 2012 email messages is an appropriate basis for Mr. Jorgenson's termination. In the context of labor arbitration, evidence of post-discharge conduct generally is deemed irrelevant because such evidence could not have influenced the employer at the time the decision was made and because the grievant was no longer a member of

the workforce at the time such conduct occurred. *See Elkouri & Elkouri, HOW ARBITRATION WORKS* 406-08 (6th ed. 2003). In this Veterans Preference Act proceeding, however, such conduct is relevant because Mr. Jorgenson was still on the payroll in December 2012 and subject to the Employer's rules and regulations. Accordingly, the December email messages may be considered as a possible basis for justifying the Employer's discharge decision.

The first email message sent on December 10 by Mr. Jorgenson to Assistant Chief Pearson ("I am like the shit on your ass") certainly exhibited disrespect for a supervisor. The second message, sent to 27 recipients, goes even further and denigrates Pearson's sexual orientation ("Roberta" and "chief cornholer"). That message also denigrates Assistant Chief Bush ("chief fat man"). In addition, Jorgenson appears to convey a threat in this second message by stating that he will be enforcing "Roger's law" and "kicking the ass" of any recipient who shares the message with a City supervisor. These offensive and threatening comments violate several Employer policies and demonstrate the impossibility of reintegrating Mr. Jorgenson back into the Employer's workforce.

Mr. Jorgenson argues that he should receive some slack for these messages since they were made while off duty. In his post-discharge brief, Mr. Jorgenson asserts that the email messages were sent to a "select group" and that the messages were "like sitting round with friends and shooting your mouth off."

It is well recognized that off-duty conduct should not serve as a basis for discipline unless such conduct has a nexus to the workplace. *See Elkouri & Elkouri, HOW ARBITRATION WORKS* 938-41 (6th ed. 2003). In this instance, there is a clear nexus between the email messages and Mr. Jorgenson's fitness for the job. His messages ridiculed and harassed department supervisors and threatened co-workers with retribution. These messages were not limited to a select group of

friends. The second message sent on December 10, for example, was sent to 27 recipients, most of whom were fire department supervisors and co-workers. The messages denigrated supervisors before a wide audience and clearly undermined proper working conditions.

Thus, the Employer has demonstrated that the email messages constitute another reasonable basis to sustain Mr. Jorgenson's discharge.

Extenuating Circumstances

In spite of the Employer's proof of reasonableness, a hearing officer may modify a discharge decision in light of sufficiently compelling extenuating circumstances. Mr. Jorgenson asserts the existence of two mitigating considerations. First, Mr. Jorgenson maintains that he has been subject to many years of harassment by Assistant Chief Pearson and that Mr. Pearson and his friends have manipulated the circumstances to justify his termination. Second, Mr. Jorgenson has worked for the Employer for 15 years, and he argues that termination should not be lightly imposed on a long-term employee with a minimal disciplinary record.

With respect to the first assertion, the record contains no evidence in support of Mr. Jorgenson's claims of having suffered a pattern of harassment at the hands of Assistant Chief Pearson. No other witness corroborated this allegation, and Mr. Jorgenson does not point to any objectively established instances of harassing conduct.

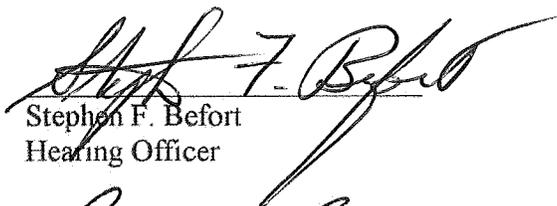
Second, while it is true that Mr. Jorgenson is a long-term employee, this fact alone does not insulate him from the consequences of his conduct. Mr. Jorgenson has exhibited significant difficulties both in performing his duties and in his interactions with supervisors. The December 2012 email messages, in particular, preclude any reasonable possibility for his successful return to the Employer's workforce.

Under these circumstances, the Employer had just cause to terminate Mr. Jorgenson's employment, and Mr. Jorgenson failed to establish the existence of any extenuating circumstances that would warrant a modification of such a result.

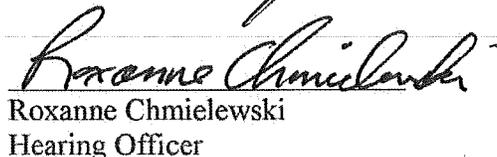
ORDER

The decision of the Employer to terminate Roger Jorgenson is sustained.

Dated: May 14, 2013



Stephen F. Befort
Hearing Officer



Roxanne Chmielewski
Hearing Officer

Separate Opinion of Rick Strahl

Mr. Jorgenson is a fire fighter with 15 years' service. He has an acceptable record of service as shown with his performance reviews. The reprimands and warnings issued were responded to and addressed. It was common knowledge that Mr. Jorgenson has personal history with Asst. Chief Rob Pearson. Yet when presenting the reprimands and warnings, Asst. Chief Tim Bush chooses Rob Pearson, from Fire Station 3, to accompany him rather than leaders from Station 2.

In the events immediately preceding the PIP, Mr. Jorgenson was suspended for failing to follow orders in the ladder truck incident. Testimony indicated a heated exchange during a

meeting with Mr. Jorgenson, Asst. Chief Bush and Asst. Chief Pearson. Subsequently a conversation with Mr. Jorgenson, Asst. Chief Bush and Chief Anderson, Mr. Jorgenson related the conversation was “quit or be fired,” to which he threatened to “get a lawyer”.

On June 26, after completing the recertification on the ladder truck with Lt. Walock as required from his suspension, Mr. Jorgenson was presented with his PIP by Asst. Chief Bush and Chief Anderson. He was informed if he did not complete the PIP, he would be terminated and that he had the option to quit. The PIP called for recertification including online training as well as completing instructor based training. Mr. Jorgenson felt the PIP was punitive and meant to force his resignation.

I believe by completing the recertification for the ladder truck and having addressed the previous reprimands and warnings; Mr. Jorgenson met the requirements to continue as a firefighter. I did not hear evidence that Mr. Jorgenson had been informed that his performance was declining and that next step, should he not improve, would be a PIP potentially followed by dismissal.

I understand Mr. Jorgenson’s position that after completing the certification for the ladder truck and addressing past warnings on training and attendance that the PIP was a surprise. I also understand his assertion the PIP seems excessive and was intended to force his resignation.

On the merit of the termination for failure to complete the PIP, I disagree the termination was justified.

The email incident demonstrates a lack of self-control and unacceptable behavior. The abusive and threatening content cannot be tolerated in any work environment. I support the decision to terminate Mr. Jorgenson as a result of the email exchanges.

May 14, 2013

A handwritten signature in cursive script that reads "Rick Strahl".

Rick Strahl
Hearing Officer