

U.S. Department of Labor

Office of the Assistant Secretary for
Veterans' Employment and Training
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July 30, 2010

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Ms. Crystal R. Freiberg
Assistant City Attorney
City of Chattanooga
100 E. 11th Street, Suite 200
Chattanooga, TN 37402

Re: Mickel G. Hoback
TN-2010-00026-20-R-IRQ

Dear Ms. Freiberg:

The Veterans' Employment and Training Service (VETS), acting under authority mandated by 38 United States Code (U.S.C.) § 4322, is responsible for rendering aid to persons seeking assistance under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4335 and 20 Code of Federal Regulations (CFR) Part 1002. We have completed our investigation of a complaint filed against the City of Chattanooga ("City") by Mr. Mickel G. Hoback. Based on the results of the investigation, we find that the evidence supports Mr. Hoback's allegations enumerated below.

The claimant's allegations are: (1) he was wrongfully terminated on or about July 21, 2009, based solely on the fact that he has been diagnosed with service-connected Post Traumatic Stress Disorder (PTSD); (2) he has been an exemplary patrol officer since his employment with the Chattanooga Police Department beginning on or about July 21, 2000; (3) he deployed to Iraq with his National Guard unit in June 2004 and returned to his position as patrol officer in February 2006, receiving numerous awards and recognition during his employment with the Chattanooga Police Department (CPD), including a promotion; (4) on April 15, 2009, he was approached by Chattanooga Police Internal Affairs to undergo a psychological evaluation based on information received from the U.S. Department of Veterans Affairs Hospital and was placed on administrative leave; (5) between April 2009 and June 2009, he underwent mental evaluations by three separate psychologists. Two of the evaluations deemed him "fit for duty" and one evaluation stated he was "unfit for duty". Furthermore, the doctor who diagnosed him as "unfit for duty" reviewed private medical information he received by medical release signed by the claimant. This medical release was signed under fear and intimidation that he would be terminated if he did not sign it; (6) he states his termination was based on the one evaluation that found him "unfit for duty", even though he had always been an upstanding and professional police officer with no incidents; (7) he states on November 9, 2009, there was a hearing conducted by the Chattanooga City Council and his termination was upheld by a vote of two to one.

Your position is: (1) Mr. Hoback was deployed on active duty military service from June 22, 2004 until November 28, 2005; (2) he was reemployed as a Police Officer with the City following completion of his military service; (3) on or about April 13, 2009, the Internal Affairs Division of the CPD became aware that he was being ordered to involuntary commitment by Dr. Acosta. While awaiting transportation to the VA Hospital in Murfreesboro, TN, he left the outpatient clinic in an effort to avoid hospitalization. He contacted Mr. Michael Bearden and was convinced to drive himself to the VA Hospital in Murfreesboro. He did so and was hospitalized voluntarily overnight and released the next morning; (4) based on the incident described in item 3. above, Police Chief Freeman Cooper placed him on administrative leave and required him to complete a fitness for duty psychological exam. Dr. Donald Brookshire, Psy. D., issued a report finding that he was not “psychologically fit to safely perform the duties as a police officer.”; (5) he was informed of Dr. Brookshire’s findings and told he need to apply for another position with the City or to file for FMLA benefits. Chief Cooper met with him three times (June 10, 2009; June 30, 2009; and July 21, 2009) regarding his status with the CPD; (6) Mr. Hoback requested an additional psychological exam on May 26, 2009, which the City honored and he underwent an additional exam on July 2, 2009, conducted by Dr. Terrell McDaniel, Ph.D. Dr. McDaniel determined he was fit for duty, with certain restrictions; (7) on July 21, 2009, he exhausted all of his personal leave time, had refused to apply for any other positions in the City, and had refused to apply for FMLA benefits; therefore, his employment was terminated based on Dr. Brookshire’s findings; (8) exercising his rights under Chattanooga City Code § 2-174, he appealed the decision of Chief Cooper to a panel of the Chattanooga City Council. A full hearing before this panel, on November 9, 2009, resulted in his termination being upheld based upon his being unfit for duty as a police officer; (9) he underwent a third psychological evaluation by a doctor, hired by his attorney, who performed an evaluation prior to the hearing before the City Council. This doctor determined he was fit for duty and this information was provided to the City Council; (10) As he was found to not meet the qualifications to be a police officer, reasonable accommodations could not be made for him and are not required by either the ADA or USERRA.

Based on facts, as determined in our investigation, and the application of the law to those facts, it is our opinion that Mr. Hoback’s allegations are sustained. Accordingly, we believe Mr. Hoback is entitled to the following relief afforded under the statute: reemployment by the City of Chattanooga; compensation for all loss of wages for the period of the date first placed onto Personal Leave in 2009 until proper reinstatement with the City of Chattanooga at the Police Officer rate of pay, including any raises, less mitigated damages and lawful deductions; reinstatement of his pension plan; reinstatement of the accumulation of all benefits, including, but no limited to, personal and sick leave for the period of the date first placed onto Personal Leave in 2009 until proper reinstatement with the City of Chattanooga; restoration of his continuous service date to the date of his original hire on or about July 17, 2000.

Specifically, we find that the City is not in compliance with 38 U.S.C. §§ 4313 and 20 CFR §§ 1002.197, 1002.225, and 1002.226.

To comply with the law the City should take the following immediate actions: reemploy Mr. Hoback and compensate Mr. Hoback for any loss of wages or benefits for the inclusive period of the date first placed onto Personal Leave in 2009 until the date he is properly reinstated with the City of Chattanooga, less mitigated damages and lawful deductions.

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We were unfortunately unable to reach a satisfactory resolution to this matter, and have advised Mr. Hoback of our findings. Mr. Hoback has been further advised that he may request that the case be referred to the U.S. Department of Justice for further review and possible representation in U.S. District Court. If the Attorney General is reasonably satisfied that Mr. Hoback is entitled to the relief sought, the Justice

Department may seek enforcement on Mr. Hoback's behalf, by initiating legal proceeding in U.S. District Court. We have also advised Mr. Hoback that he may continue to pursue the matter through private counsel in a court of competent jurisdiction.

In the meantime, if VETS may assist in resolving this issue amicably between the City and Mr. Hoback, we would be pleased to continue to work with you. Please be aware; however, that we have closed this case without resolution, effective July 30, 2010, and Mr. Hoback may elect to continue to pursue relief through referral to the Attorney General or with private counsel.

Sincerely,

//original signed//

Mari J. Papageorge
Assistant Director – TN

cc: Mickel G. Hoback