

NO. A10-528

State of Minnesota
 In Supreme Court

William A. Eldredge,

Appellant,

vs.

City of St. Paul,

Respondent,

and

Nancy Dudley Kelly, William Carter, and Mark Quayle, individually
 and as members of the Saint Paul Civil Service Commission,

Respondents.

APPELLANT WILLIAM A. ELDREDGE'S REPLY BRIEF

SARA R. GREWING
 City Attorney
 GAIL L. LANGFIELD (#184172)
 Assistant City Attorney
 400 City Hall and Court House
 15 West Kellogg Boulevard
 St. Paul, MN 55102
 (651) 266-8748

Attorneys for Respondent City of St. Paul

MANSFIELD, TANICK
 & COHEN, P.A.
 Charles A. Horowitz (#294767)
 Brian N. Niemczyk (#386928)
 220 South Sixth Street, Suite 1700
 Minneapolis, MN 55402
 (612) 339-4295

Attorneys for Appellant Eldredge

SARA R. GREWING
 City Attorney
 VIRGINIA PALMER (#128995)
 Assistant City Attorney
 400 City Hall and Court House
 15 West Kellogg Boulevard
 St. Paul, MN 55102
 (651) 266-8710

Attorneys for Respondents Kelly, Carter, Quayle and Saint Paul Civil Service Commission

TABLE OF CONTENTS

ARGUMENT 1

I. THE COURT IN *SCHRADER* MAY HAVE HELD THAT THE VPA GOVERNS EMPLOYERS' APPEAL RIGHTS 2

II. THE CIVIL SERVICE COMMISSION FUNCTIONED AT ALL TIMES AS VETERANS PREFERENCE BOARD, WHICH RENDERED ITS QUASI-JUDICIAL DECISION SUBJECT TO CERTIORARI REVIEW TO THE COURT OF APPEALS 4

A. THE CIVIL SERVICE COMMISSION SERVED AS A VETERANS PREFERENCE BOARD WHEN IT RULED IN ELDREDGE'S FAVOR 5

B. THE CIVIL SERVICE COMMISSION APPEAL STATUTE CANNOT, BY ITS TERMS, ALTER OR AMEND THE VPA, INCLUDING THE VPA'S APPEAL PROVISIONS 8

C. VETERANS PREFERENCE BOARD DECISIONS ARE ONLY REVIEWABLE BY EMPLOYERS VIA CERTIORARI APPEAL TO THE MINNESOTA COURT OF APPEALS 9

III. THE COURT OF APPEALS' FRAMEWORK FOR EMPLOYER APPEALS FROM ADVERSE VETERANS PREFERENCE BOARD DECISIONS IS UNWORKABLE AND CONTAINS NUMEROUS TRAPS FOR THE UNWARY 10

CONCLUSION..... 12

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Beardsley v. Garcia</i> , 753 N.W.2d 735 (Minn. 2008)	3
<i>Burkstrand v. Burkstrand</i> , 632 N.W.2d 206 (Minn. 2001)	3
<i>City of Elk River v. Rollins</i> , No. C0-96-2393, 1997 WL 370461 (Minn. Ct. App. July 8, 1997)	4
<i>City of St. Paul v. LaClair</i> , 479 N.W.2d 369 (Minn. 1992)	11
<i>Frieler v. Carlson Mktg. Group, Inc.</i> , 751 N.W.2d 558 (Minn. 2008)	3
<i>Hall v. City of Champlin</i> , 463 N.W.2d 502 (Minn. 1990)	11
<i>In re Matter of Schrader</i> , 394 N.W.2d 796 (1986)	1, 2, 3, 4
<i>Kratzer v. Welsh Cos., LLC</i> , 771 N.W.2d 14 (Minn. 2009)	3
<i>Leininger v. City of Bloomington</i> , 299 N.W.2d 723 (Minn. 1980)	6, 7
<i>MBNA America Bank, N.A. v. Commissioner of Revenue</i> , 694 N.W.2d 778 (Minn. 2005)	3
<i>Premier Bank v. Becker Devel., LLC</i> , 785 N.W.2d 753 (Minn. 2010)	4
<i>R.G.C. v. Minnesota Dept. of Corrections</i> 760 N.W.2d 329 (Minn. Ct. App. 2009).....	4
<i>Stafne v. City of Center City</i> , No. C1-98-835, 1998 WL 778931 (Minn. Ct. App. Nov. 10, 1998).....	4
<i>State v. Moseng</i> , 254 Minn. 263, 95 N.W.2d 6 (1959)	3

State v. Zais,
790 N.W.2d 853 (Minn. Ct. App. 2010).....3

Williams v. Board of Regents of University of Minnesota,
763 N.W.2d 646 (Minn. Ct. App. 2009).....1, 10

STATUTES

Minn. Stat. Ch. 216, *et seq.*5

Minn. Stat. § 44.09, subd. 111

Minn. Stat. § 484.01, subd. 2.....8, 9, 10, 11

Minn. Stat. § 645.16(6).....10

Minn. Stat. § 484.012, 4

Minn. Stat. § 518B.01, subd. 7(c).....3

Minn. Stat. § 606.014, 9, 11, 12

Minn. Stat. § 197.461, 2, 5, 6, 7, 8, 9, 10, 12

ARGUMENT

The parties agree on the standard of review, de novo, and the core question raised on this appeal: how does a public employer subject to the Minnesota Veterans Preference Act, Minnesota Statute section 197.46 (“VPA”) perfect its right to appeal a decision in a veteran employee’s favor? The parties also agree that, in accordance with this Court’s holding in *In re Matter of Schrader*, 394 N.W.2d 796 (1986), an employer has a right to appeal a Veterans Preference decision.¹ The parties agree on little more.

Ultimately, the fallacy of Respondent City of St. Paul’s (“the City”) legal argument rests on an ontological defect: that the Civil Service Commission for the City of St. Paul (“Commission”), when adjudicating Appellant William A. Eldredge’s (“Eldredge”) Veterans Preference claim, acted solely in its capacity as Civil Service Commission. In actuality, it served at all times as a statutorily designated Veterans Preference Board. On the basis of this mistake, the City invoked the incorrect statutory

¹ The City argues now for the first time that if this Court determines otherwise, and it has no right to appeal a VPA decision, this matter would have to be remanded to the St. Paul Civil Service Commission “to proceed to hearing” because the requisites for collateral estoppel (based on its prior, 2007 decision) would not be met. *Respondent’s Brief*, p. 5 n.1. The City ignores the obvious and seemingly uncontroversial fact that its employment decisions, while acting as a Veterans Preference Board, are “quasi-judicial” in nature. As such, they would always be subject to appeal. *See Williams v. Board of Regents of University of Minnesota*, 763 N.W.2d 646, 651 (Minn. Ct. App. 2009) (appeal by writ of certiorari to the Court of Appeals “is the exclusive method of reviewing the [employment] termination decisions of a state agency or local unit of government as a quasi-judicial administrative body.”) The City does not, nor can it plausibly argue that a Veterans Preference Board is something other than a “quasi-judicial administrative body.” Accordingly, if this Court reverses *Schrader*, and finds there to be no employer appeal right under the VPA, an employer always would have a default right of appeal under the general certiorari statute, Minnesota Statute section 606.01. As explained below, the City *did have* an appeal right. It just exercised it to the wrong court.

appeal source. The City's appeal should therefore be rejected as improper and untimely, and the Veterans Preference Board's decision reinstating Eldredge to his position as a firefighter should be upheld.

I. The Court in *Schrader* May Have Held that the VPA Governs Employers' Appeal Rights.

The VPA defines a veteran employee's right of appeal, but is mute as to an employer's appeal right. This Court for the first time recognized a public employer's appeal rights under the VPA in *In re Schrader*, 394 N.W.2d 796 (Minn. 1986). Its reference to this right arose while discussing appeal rights generally under the VPA; Minnesota Statute section 484.01 is mentioned nowhere in the decision. On this basis, this Court in *Schrader* may have meant (without expressly stating) that the VPA's 15-day appeal deadline applies equally to employees and employers. *Appellant's Brief*, p. 6. This has been the received wisdom – expressed by both unpublished Court of Appeals decisions and learned treatises – for decades under the VPA. *Id.*, pp. 7-8.

The City asserts that the Court cannot “engage in impermissible statutory construction by amending § 197.46 to include ‘employer,’” so as to apply the VPA's 15-day deadline to it as well as Eldredge. *See Respondent's Brief*, p. 19. In so arguing, the

City dismisses persuasive authorities cited to in Eldredge's brief, including Professor Stephen F. Befort and unpublished appellate decisions. *Appellant's Brief*, p. 7.²

Without "amending" the VPA, these authorities (and this Court in *Schrader*) reasonably might have construed the VPA as containing an implied right of appeal on the part of employers. As a general rule, failure of expression in a statute does not create ambiguity. See *State v. Moseng*, 254 Minn. 263, 269, 95 N.W.2d 6, 11–12 (1959). But that rule is not absolute. In *Burkstrand v. Burkstrand*, 632 N.W.2d 206 (Minn. 2001), this Court considered Minnesota Statute section 518B.01, subd. 7(c), which sets forth the time frame for protection order hearings. The statute did not specify any consequence for conducting the hearing outside of that time frame. Its silence led the Court to conclude that the statute was ambiguous and look to legislative intent to interpret it, essentially correcting the legislature's omission. See *id.* at 210.

The rule of *Burkstrand* was also applied in *MBNA America Bank, N.A. v. Commissioner of Revenue*, 694 N.W.2d 778 (Minn. 2005), to find a statute ambiguous even in the presence of plain language. This Court later clarified the rule by explaining that "the relevant statutes were *completely silent* on the contested issues." *Beardsley v.*

² The City attempts to minimize these authorities, diminishing them as not being "precedential." *Respondent's Brief*, p. 10. Eldredge has never claimed that they are binding on this Court. What cannot be denied is this Court often gives weight to Prof. Befort's scholarly opinions (e.g., *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 19 n.7 (Minn. 2009); *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 579 (Minn. 2008)), and unpublished decisions may have persuasive value. *State v. Zais*, 790 N.W.2d 853, 861 (Minn. Ct. App. 2010).

Garcia, 753 N.W.2d 735, 739 (Minn. 2008) (emphasis in original). The statute’s silence “cause[d] an ambiguity of expression resulting in more than one reasonable interpretation,” allowing the Court to interpret them by looking into legislative intent. *Premier Bank v. Becker Devel., LLC*, 785 N.W.2d 753, 760 (Minn. 2010).

Whatever might have been the rationale of Prof. Befort and the courts in *City of Elk River v. Rollins*, No. C0-96-2393, 1997 WL 370461 (Minn. Ct. App. July 8, 1997) (APP-27) and *Stafne v. City of Center City*, No. C1-98-835, 1998 WL 778931 (Minn. Ct. App. Nov. 10, 1998) (APP-22) in concluding the VPA provides employers and employees have the “same” right of appeal, this appeal allows the Court to clarify what it meant in *Schrader* when it recognized public employers’ right to appeal adverse VPA decisions.

II. The Civil Service Commission Functioned At All Times As Veterans Preference Board, Which Rendered Its Quasi-Judicial Decision Subject to Certiorari Review to the Court of Appeals.

Should this Court determine the source of a public employer’s appeal right falls outside of the VPA, the question turns to *who* adjudicated Eldredge’s Veterans Preference hearing: the Commission *qua* a civil service commission or the Commission *qua* a statutorily designated Veterans Preference Board? If the former, the civil service appeal statute for cities of the first class would apply. Minn. Stat. § 484.01. If the latter, the general certiorari statute is the City’s only appellate recourse. Minn. Stat. § 606.01; *R.G.C. v. Minnesota Dept. of Corrections* 760 N.W.2d 329, 330 (Minn. Ct. App. 2009) (“absent an explicit statutory or appellate rule authorizing review in the district court,

judicial review of all administrative quasi-judicial decisions must be invoked only by writ of certiorari to the court of appeals”).

The issue is not one of semantics; rights of appeal, and ultimately the outcome of this case, depend on the tribunal’s identity. As explained below and in Eldredge’s prior brief, the Commission served and functioned at all times as a statutorily designated Veterans Preference Board under the VPA. Accordingly, the general certiorari statute governed the City’s appeal rights.

A. The Civil Service Commission Served As a Veterans Preference Board When It Ruled in Eldredge’s Favor

The VPA both sets forth the parties’ substantive legal rights (*e.g.*, the “misconduct or incompetency” standard for removal) and establishes an adjudicative body to hear disputes (*viz.*, an *ad hoc* “board of three persons” or a civil service commission sitting by designation as a Veterans Preference Board). In this regard, it is not unique. *See, e.g.*, Minn. Stat. Ch. 216, *et seq.* (establishing the quasi-judicial Minnesota Public Utilities Commission and granting it the power to issue decisions relating to electricity, natural gas, and telephone regulation). What makes the VPA distinctive is its two-tiered system for adjudicating Veterans Preference claims. For governmental units subject to an “established civil service board or commission, or merit system authority veterans,” that body adjudicates the hearing. Minn. Stat. § 197.46. For all others, it is a three-person, *ad hoc* Veterans Preference Board. Either way, however, the adjudicative body functions at all times as a *Veterans Preference* Board.

The City argues that a “plain reading” of the statute indicates the Commission served as a civil service commission when it decided Eldredge’s case, not a

Veterans Preference Board. In support of this contention, Respondent cites to the following: "... such hearing for removal or discharge shall be held *before* such civil service board or commission or merit system authority." *Respondent's Brief*, p. 15. (emphasis added). Later on in the paragraph, however, the Legislature made clear its intention that civil service commissions, when hearing Veterans Preference cases, function as statutorily designated Veterans Preference Boards to the very same extent as *ad hoc* boards:

The veteran may appeal from the decision of the *board* upon the charges to the district court by causing written notice of appeal, stating the grounds thereof [. . .].

Minn. Stat. § 197.46. Any other interpretation would mean that only appeals of *ad hoc* board decisions could be maintained. That is clearly not so, and not the City's position on this appeal.

The City fails to address prior court decisions reinforcing this interpretation. The case law is legion with references to the Commission and like bodies "sitting as" or "acting as" a Veterans Preference Board when called upon to decide Veterans Preference cases under Section 197.46. *Appellate Brief*, pp. 11-12. These references are neither superfluous nor accidental. They accurately track the letter and intent of the VPA.

Finally, the City cites to *Leininger v. City of Bloomington*, 299 N.W.2d 723 (Minn. 1980) for the proposition that the Commission's "substantive powers" may derive from sources other than the VPA. *Respondent's Brief*, p. 17. Reasonable minds can differ on this point; the Court there only purported to deal with inconsistent powers

arising under different statutes.³ *Leininger*, 299 N.W.2d at 729. What *is* apparent from that case is a reaffirmation of this Court's oft-repeated view that civil service commissions and boards become Veterans Preference Boards when called upon to adjudicate Veterans Preference hearings:

Clearly, the legislature could have specified in s 197.46 one scope of authority or the other. In fact, it said nothing. Section 197.46 merely provides for a veterans preference hearing before an established civil service board or commission or merit system authority, the method of comprising a board if no such established system exists, and then, with no direction for the procedure or authority of *the board*, provides directly for appeal from *the board's* decision.

Leininger, 299 N.W.2d at 729 (emphasis added). Again, the Court's reference to the civil service commission as "the board" is laden with significance, and not accidental.

The City's remaining arguments are mainly straw persons and non sequiturs. Never in the parties' extensive briefing of the issues has Eldredge stated that the VPA "transformed [the Commission] into something other than the Commission." *Respondent's Brief*, p. 15.⁴ The City also makes much of the rather unremarkable fact

³ On matters of procedure, the venerable VPA statute is famously short on guidance, leaving unaddressed matters such as discovery, timing, and attorney fees. To be sure, nothing in the VPA precluded the Commission from applying its authorizing statute or regulations to address this procedural void, in this matter and cases that came before. Doing so, however, made the Commission no less a Veterans Preference Board. Whether the Commission (or any other Veterans Preference Board) does so by utilizing its inherent adjudicative authority or by borrowing from preexisting law or regulations is of no moment. It is still what it is: a statutorily designated Veterans Preference Board.

⁴ To the contrary, the commissioners are still the commissioners when they adjudicate Veterans Preference hearings, just as the Vice President of the United States remains the Vice President when he fulfills his constitutional role in casting a tie-breaking vote in the Senate. In the former case the Commission is "serving as" or "acting as" a Veterans Preference Board; in the latter, the Vice President is "serving as" or "acting as" a United States Senator.

that both the VPA and civil service commissions employ the same “just cause” standard. *Id.*, p. 16. “Just cause” is the universal or nearly-universal criterion for determining fairness in employment terminations, whether by statute or in collectively bargained agreements.

In sum, no amount of argument or strained statutory interpretation by the City can change the undeniable fact that, when it issued its decision reinstating Eldredge, the Veterans Preference Board was acting as a Veterans Preference Board, and nothing else. As such, the appellate rules and procedures created solely for application in the context of decisions by a civil service commission have no applicability to this situation and cannot provide a basis for the City’s right to appeal the decision.

B. The Civil Service Commission Appeal Statute Cannot, By Its Terms, Alter or Amend the VPA, Including the VPA’s Appeal Provisions

The City asserts in its Brief that the Court cannot “engage in impermissible statutory construction by amending Section 197.46 to include ‘employer,’” so as to apply the VPA’s fifteen-day deadline to it as well as Eldredge. *Respondent’s Brief*, p. 19. Ironically, the City then proceeds to urge the Court to engage in the very same sort of “impermissible statutory construction” to reach the unsupportable conclusion that its statute of choice (Section 484.01, subd. 2) amends the VPA by adding an employer’s right to appeal where none previously existed.

The City’s position is that Section 484.01, subd. 2, “clearly provides the process by which an employer . . . may take an appeal . . . in veteran’s cases.” *Respondent’s Brief*, p. 20. Assuming that the VPA provides employers with no appellate rights, the

City's solution is to attempt to read Sections 197.46 and 484.01, subd. 2 in harmony to fill the gap. Doing so would effectively alter the VPA, of course, but the City argues that altering it in this manner is appropriate because the sections are not mutually exclusive and not inconsistent with one another. *Id.*, p. 19.

Even if the Commission served solely in its capacity as a statutory civil service commission when it sat as a Veterans Preference Board (which it did not), the City would still be incorrect. Section 484.01, subd. 2, upon which the City relies in supporting its right to appeal, unambiguously states that it “does not *alter or amend* the application of sections 197.455 and 197.46, relating to veterans preference” (emphasis added). Conscripting Section 484.01, subd. 2 to correct the VPA's silence, as the City urges the Court to do, would serve to “alter and amend” the application of Section 197.46 by providing employer appeal rights where none heretofore existed.⁵ Since, as noted above, Section 484.01, subd. 2 expressly precludes this outcome by its own terms, the City's “harmony” based argument fails as a matter of law and should be rejected by the Court.

C. Veterans Preference Board Decisions Are Only Reviewable By Employers Via Certiorari Appeal to the Minnesota Court of Appeals

Recognizing that the Commission served at all times as a Veterans Preference Board when it decided Eldredge's case reduces to one the candidates for appellate review by the City: Minnesota Statute Section 606.01. Under that statute, any public employer

⁵ As discussed below, the general certiorari statute, by contrast, contains no comparable language excepting the VPA.

may obtain certiorari review of an employment decisions by a quasi-judicial body. *Williams v. Board of Regents of University of Minnesota*, 763 N.W.2d 646, 651 (Minn. Ct. App. 2009). Decisions by Veterans Preference boards are quasi-judicial in nature, and the City does not attempt to argue otherwise.

Accordingly, assuming *arguendo* the VPA contains no employer appeal right, the City's sole avenue of appellate review of the Commission's decision *qua* Veterans Preference Board was via writ of certiorari to the Minnesota Court of Appeals within 60 days of the adverse decision. Having brought its appeal to the wrong court (the District Court) over 60 days ago, the City forfeited its right to appellate review.

III. The Court of Appeals' Framework for Employer Appeals From Adverse Veterans Preference Board Decisions is Unworkable and Contains Numerous Traps for the Unwary.

Finally, as described in Eldredge's opening brief, the City's proposal and the Court of Appeals' holding would lead to a bizarre maze of statutory outlets for various employers' VPA appeals. When determining legislative intent in a case like this, the Court should consider the consequences of a proposed statutory construction. *See* Minn. Stat. § 645.16(6).

The consequences of the City's position would be as follows:

1. A veteran would appeal under Minn. Stat. § 197.46 to the district court with a 15-day deadline;
2. A first-class city would appeal under Minn. Stat. § 484.01, subd. 2, to the district court with a 60-day deadline;
3. A non-first-class city with a merit or civil service system would appeal under Minn. Stat. § 44.09, subd. 1, to the district court with a 10-day deadline; and

4. All other cities (*i.e.* non-first-class cities without a merit or civil service system) would presumably appeal under Minn. Stat. § 606.01 to the court of appeals with a 60-day deadline, or they might have *no appeal right* at all.⁶

This patchwork scheme is surely not what the Legislature intended, with wildly differing appeal rights for cities based upon the seemingly irrelevant factors of size and civil service commission status.

More importantly, the framework conflicts with the Legislature's intent in enacting the VPA itself. The Legislature intended that all veterans be rewarded equally for their loyalty and sacrifice. *See Hall v. City of Champlin*, 463 N.W.2d 502, 505 (Minn. 1990) ("It would also be difficult to reconcile . . . a system that would reward the military service and sacrifice of some veterans and not of others."). The City's proposal would allow some veterans to enjoy greater security in their rights than others, dependent only upon which city or town in Minnesota where they happen to live.

⁶ As the City points out, a party has standing to appeal only by statute or by its status as an aggrieved party. *Respondent's Brief*, p. 12 (citing *City of St. Paul v. LaClair*, 479 N.W.2d 369, 371 (Minn. 1992)). In *LaClair*, the Court held that a city could not appeal the determinations of its own commissions as an aggrieved party. Rather the appeal right must come from a statute in such a situation. Minnesota Statutes Section 606.01 presumably does not suffice, especially considering that it existed at the time of *LaClair*, and the legislature responded specifically to *LaClair* by enacting Minn. Stat. § 484.01, subd. 2.

In order to best effectuate the Legislature's overarching goal in enacting the VPA, the Court should hold that *all* employer appeal rights under the VPA come from the same statute, whether that is Section 197.46 or Section 606.01. Under either formulation, the City's appeal of Eldredge's reinstatement order to the District Court was improper, and should be dismissed.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

MANSFIELD, TANICK & COHEN, P.A.



Date: February 23, 2011

By: _____

Charles A. Horowitz (#294767)
Brian N. Niemczyk (#386928)
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402-4511
(612) 339-4295

**ATTORNEYS FOR WILLIAM A.
ELDREDGE**