

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Emmett T. McKeever,

Employee,

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-  
ORDER DISMISSING APPEAL FOR  
LACK OF JURISDICTION

vs.

Minnesota Department of Human  
Services,

Employer.

The above-entitled matter came on for a motion hearing on December 1, 1995, in Minneapolis, before Allan W. Klein, Administrative Law Judge.

Emmett T. McKeever, 2341 Sherwood Road, Mounds View, Minnesota 55112, appeared on his own behalf, without benefit of counsel.

Steven M. Gunn, Assistant Attorney General, 445 Minnesota Street, Suite 1100, St. Paul, Minnesota 55101-2128, appeared on behalf of the Department of Human Services.

The record in this matter closed on December 1, 1995, at the close of the motion hearing.

NOTICE

Pursuant to Minn. Stat. § 43A.33, subd. 4 (1994), this Order is the final decision in this case. Under that statute, however, any party aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 to 14.68 (1994).

Based upon all of the pleadings and documents filed herein, the Administrative Law Judge makes the following:

## ORDER

That the appeal filed by Emmett T. McKeever with the Office of Administrative Hearings be DISMISSED for lack of jurisdiction, as set forth more fully in the attached Memorandum which is incorporated herein.

Dated this 6th of December, 1995.

ALLAN W. KLEIN  
Administrative Law Judge

## MEMORANDUM

The gist of this decision is that the Department's actions toward McKeever did not constitute a "suspension, reduction in rate of pay, demotion, or discharge" within the meaning of the managerial plan promulgated by the Minnesota Department of Employee Relations, and therefore, the Office of Administrative Hearings has no jurisdiction to resolve the dispute. The jurisdiction of the Office is limited to only the most severe disciplinary actions, which are enumerated in statute or the managerial plan. Disciplinary actions which are not within those enumerated may not be appealed to the Office of Administrative Hearings.

The Department has requested that the Administrative Law Judge dispose of McKeever's claim without a hearing on the merits. This request is analogous to a motion for judgment on the pleadings under Rule 12.03 of the Minnesota Rules of Civil Procedure. It is also analogous to a motion for summary disposition in that the same standards apply. Minn. Rule part 1400.5500 K (1991). Summary disposition of a claim is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law. Minnesota Rule of Civil Procedure, Rule 56.03. A material fact is one which is substantial and will affect the result or outcome of the proceeding, depending on the determination of that fact. Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804 (Minn. App. 1984), rev. den., Feb. 6, 1985. In considering a Motion for Summary Disposition, the evidence must be viewed in the light most favorable to the non-moving party. Grondahl v. Bulluck, 318 N.W.2d 240 (Minn. 1982); Nord v. Herreid, 305 N.W.2d 337 (Minn. 1981); American Druggists Ins. v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. App. 1989). With a motion for summary disposition, the initial burden is on the moving party to show facts establishing a prima facie case for the absence of material facts at issue. Theile v. Stick, 425 N.W.2d 580, 583 (Minn. 1988). Here the Department has met its burden. Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota

Mutual Fire and Casualty Company v. Retrum, 456 N.W.2d 719, 723. (Minn. App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). Although there are numerous facts in dispute, they are not material to the outcome. No matter how “poorly” McKeever was treated, the outcome of the motion is determined by the limits on the jurisdiction of this Office.

In this procedural posture, the Administrative Law Judge must view the evidence in the light most favorable to McKeever. Even when viewed in that light, the Administrative Law Judge concludes that the actions taken against McKeever did not constitute any of the jurisdictional acts. This conclusion is based on the following assumed facts, which are assumed solely for purposes of this motion.

McKeever was a long-time city, then state, employee. He had been an employee of the Department for some time. Policy differences arose between him and a newly appointed assistant commissioner, Helen Yates. McKeever's supervisor was Larry Woods. For the calendar year 1992, Woods rated McKeever well, indicating his performance was above expectations. On July 26, 1994, the Department's Human Resources Director announced that there would be a four percent salary increase, for all managers whose performance had been satisfactory, with slightly higher increases for a few exceptional performers. The announcement said there would be no increases for managers whose performance had been less than satisfactory. The performance increases would be retroactive to July 1, 1994.

McKeever's eligibility for this increase was problematic, because there was no performance review for calendar year 1993 done on McKeever. Larry Woods recommended to the assistant commissioner, Helen Yates, that McKeever receive the “satisfactory” pay increase. No action was taken on that request. It was submitted on August 2, 1994. Then, on September 6, McKeever requested a written performance evaluation. He made this request directly to Assistant Commissioner Yates, because McKeever was aware that Woods and Yates disagreed on how he should be evaluated. Yates had told Woods to rate McKeever as unsatisfactory. Woods refused to do so. Upon prodding from McKeever, Yates herself prepared a performance evaluation dated October 14, 1994, which essentially rated McKeever as unsatisfactory. McKeever appealed that evaluation to the Commissioner of Human Services, who delegated the review to her Director of Human Resources. As a result of that appeal, Yates' unsatisfactory performance review of October 14, 1994 was removed from McKeever's personnel file. No other performance review was inserted. Instead, the personnel file reflected no appraisal for 1994.<sup>[1]</sup>

The appeal was decided by the Director of Human Resources on October 9, 1995, and on October 19, 1995, McKeever filed an appeal with the Office of Administrative Hearings pursuant to Minn. Stat. § 43A.33. At the same time, he filed a similar appeal with the Commissioner of Employee Relations.

Following communications with both parties regarding an acceptable date, a Notice of and Order for Hearing was issued on November 1, 1995, setting a prehearing conference for December 1. On November 8, the Department filed a Motion for Summary Disposition, and on November 17, McKeever filed a Reply. At the December 1 hearing, both sides were given an opportunity to present oral comments on the motion. At the close of those comments, the Administrative Law Judge orally ruled that the motion would be granted, and that the appeal would be dismissed for lack of jurisdiction.

McKeever claims that the failure to give him a performance-based increase in August of 1994, when increases were given to those managers who had been rated satisfactory or better, constitutes a “reduction in pay”, entitling him to a hearing at the Office of Administrative Hearings. The Administrative Law Judge concludes that the failure to grant a pay increase is not the same as a reduction in pay. The granting of any performance-based pay increase is discretionary, and the acts of the Department in this particular case illustrate that discretion. Some managers received a four percent increase, a few received a higher increase, and some received no increase. McKeever had no “entitlement” to any increase. The failure to grant him an increase is not a reduction in pay. A reduction in pay would occur if, for example, McKeever had been compensated at a base rate of \$30,000, but then, for some reason, his base salary was reduced to \$28,000. Such a decrease is qualitatively different from a decision to keep his salary at \$30,000, which is effectively what happened to McKeever.

The failure to grant a discretionary increase is not within the list of actions which the Legislature or the managerial plan have deemed to be so severe that they trigger the right to a contested case hearing at the Office of Administrative Hearings. Therefore, the Office is without jurisdiction to entertain the appeal, and it must be dismissed.

AWK

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<sup>[1]</sup> Although the 1992 performance appraisal was for calendar year 1992, it appears that there was a change in appraisal periods sometime during 1993, as McKeever was expecting a performance appraisal for 1994, which must have been based on a fiscal year 1994 deadline.