

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Maurice F. Williams,

Petitioner,

v.

Itasca County,

Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on August 28 and 29, 1997, in the County Board Room, Itasca County Courthouse, Grand Rapids, Minnesota.

Elizabeth A. Storaasli, Bye Boyd Agnew, Ltd., 200 Sellwood Building, 202 West Superior Street, Duluth, Minnesota 55802-1960, appeared on behalf of Petitioner Maurice F. Williams. Steven C. Fecker, Law Office of Steven C. Fecker, P.O. Box 206, Grand Rapids, Minnesota 55744, appeared on behalf of Respondent Itasca County. The record was closed on October 22, 1997, upon receipt of the correspondence from Petitioner that he would not be filing a reply brief.

**NOTICE**

This Report is a recommendation, **not** a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bernie Melter, Commissioner, Department of Veterans Affairs, 200 Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

## STATEMENT OF ISSUES

1. Whether Petitioner was removed from his position as a transfer station attendant as a result of a good-faith abolition of the position.
2. Whether the termination of Petitioner from his position as a temporary truck driver constituted a removal under Minn. Stat. § 197.46.
3. Whether the scoring system used by Respondent in filling the floater position Petitioner applied for denied Petitioner veterans preference rights under Minn. Stat. §§ 43A.11 and 197.455.

Based upon the record herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

Petitioner was honorably discharged from the United States Army on March 25, 1971, after having served more than one year on active duty. He was born May 20, 1948. Ex. 1, DD Form 214.

After his discharge, Petitioner took police officer training and worked four years as a police officer. He then worked at the National Steel mine as a mechanic, welder, truck driver, and equipment operator. He was laid off from that position. He then went to school to become an electrician and worked as an electrician.

In 1991, Petitioner began working for the County as a sign painter. The evidence on how he came to be hired for that position is somewhat confusing and not complete. It appears that he worked for the County through something called Northstar Personnel in 1991 and 1992. Ex. 18. In October 1992, the County posted the position of landfill operator on a promotional basis. Petitioner applied for that position, but his application was rejected in a letter of November 6, 1992, from Robert R. Olson, Coordinator/Human Resources Director. The rejection was based on the County's nepotism policy because Petitioner is the nephew of a person who was at that time a County Commissioner. Ex. 16. At about the same time, the County decided to terminate Petitioner at the end of his probationary period. Both issues went to mediation, then arbitration.<sup>1</sup> The Arbitrator awarded Petitioner the landfill attendant position and back pay and benefits back to December 2, 1992, the date the grievance was filed. Ex. 17; Testimony of Olson.

When Petitioner began working at the Itasca County landfill, he was known as a landfill operator or attendant. At some point in time, the position was renamed transfer station attendant. That change in title apparently was reflective of the change in function of the landfill to a transfer station used more for the collection, sorting, and shipping of waste and recyclables, rather than simply landfilling them. Petitioner's job duties at the landfill evolved over time, but generally consisted of greeting people who drove in with their refuse, determining the amount of the charge and charging them by punching their tickets or preparing bills, weighing contractor garbage trucks in and out, directing disposal of waste, operating a pickup truck, and operating a "hook" truck that was used for moving canisters. Testimony of Olson, Testimony of Williams; Ex. 5.

There was one other transfer station attendant employed at the landfill, Kathy Leeseberg. In addition, two equipment operators worked there. The transfer station attendant positions were members of AFSME Local 1626, the "Courthouse Unit", which included the clerical staff at the courthouse, maintenance staff at the courthouse, and the transfer station attendants at the landfill. The equipment operator positions were in AFSME Local 1452, the "Road and Bridge Unit", which generally included the equipment operators in the Road and Bridge Department. Testimony of Olson, Exs. 26 and 27.

On June 13, 1994, Petitioner requested that a job evaluation be done of the transfer

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<sup>1</sup> Petitioner was not notified of his veterans preference rights under Minn. Stat. § 197.46 to a hearing on his removal. Minn. Stat. § 197.46 applies even to removal from probationary positions.

***State ex rel. Sprague v. Heise***, 243 Minn. 367, 67 N.W.2d 907 (1954).

station attendant position. He did so because a number of changes had taken place in the job. They had a new building and scale to maintain and the operation had been computerized so they now had to do computer entry. Because Leeseberg was on light duty, Petitioner had to do more of the heavy work and the maintenance work around the landfill site. Testimony of Williams, Ex. 20. Leeseberg told Petitioner that she did not want the job re-evaluated because she did not feel they were entitled to a raise. Testimony of Leeseberg. The job evaluation resulted in a change in the job from grade 4 to grade 2, a reduction in pay. That resulted in Petitioner's and Leeseberg's pay being frozen until the new pay grades and step increases exceeded their current salary. Ex. 21. On October 12, 1994, Petitioner appealed the re-evaluation to Robert Olson, the Coordinator/Human Resources Director. On October 17, 1994, Olson notified Petitioner that the re-evaluation would stand until changes in the job merited a new request for job re-evaluation. Ex. 23.

In late 1995, the County Board began considering contracting out the landfill operation, believing there was a potential for significant savings. The unions asked to be able to bid on the proposal. That was done by the County's own Road and Bridge Department proposing to operate the landfill under a contract with the Solid Waste Department. The County Board accepted that proposal. The proposal was worked out among the County and Locals 1626 and 1452. Its terms were incorporated in a Letter of Understanding between the County and AFSME Council 65 and Locals 1626 and 1452. Ex. 6.

Under the Letter of Understanding, the transfer station attendants came under the supervision of the Road and Bridge Department. Under the Letter of Understanding, the transfer station attendants would continue to be covered by the Local 1626 contract, but could be assigned to work as operators, attendants, or road and bridge maintenance workers by the highway foreman and, likewise, Local 1452 employees who were restricted to limited duty could be assigned to work in the transfer station attendant positions. Ex. 6, ¶ 2. The Letter of Understanding provided that any transfer station attendant assigned to work as a road and bridge maintenance worker would be paid at the applicable rate in the Local 1452 contract, but would not accrue any Local 1452 seniority. It also provided that the transfer station attendants would continue to be covered by the Local 1626 contract and would accrue seniority under the Local 1626 contract only. Ex. 6, ¶¶ 1 and 3. This arrangement allowed the County to save money because the County could assign Road and Bridge employees on light duty to work at the landfill as transfer station attendants and because it could assign one of the transfer station attendants to other duties in the Road and Bridge Department. That saved the money that was previously used in keeping two employees 40 hours per week at the landfill when only one was required to be present at a time. The landfill was open 62 or 63 hours per week. Testimony of Olson, Testimony of Engstrom.

Under the agreement, the general plan was to have Leeseberg work 40 hours per week at the transfer station and for Petitioner to work 22 hours there, and the remainder of his time at the Arbo garage. Ex. 31.

Gary Barrett was the District 2 Road and Bridge foreman in charge of the Arbo garage. Under the terms of the Letter of Understanding, the transfer station attendants assigned to Arbo came under his supervision and he was in charge of making work assignments. Beginning in March, 1996, just prior to the signing of the Letter of Understanding, Barrett began assigning Petitioner Road and Bridge work out of the Arbo garage. He always made sure that the transfer station attendant position was filled, usually with Leeseberg, or sometimes a Road and Bridge employee on light duty, and then by Petitioner. He would assign Petitioner to Road and Bridge duties for the remainder of his regular time. Testimony of Barrett, Engstrom and Petitioner. From March through December 1996, Petitioner worked about half-time on Road and Bridge duties. Testimony of Barrett, Engstrom and Petitioner.

While working out of the Arbo garage, Petitioner performed various maintenance and operator duties. He operated a chain saw cutting brush, fed brush into a chipper, ran a loader, drove a pickup truck, drove a tandem dump truck, and operated mowers, loaders, and sanders. He plowed snow with trucks and with graders, steamed culverts, sealed cracks in blacktop,

patched blacktop, pulled beaver dams out of culverts, and did welding, clean-up and miscellaneous jobs around the garage. His duties were equivalent to those of a position called "floater" in the Road and Bridge Department. Petitioner performed well in the position and Barrett and Engstrom considered him qualified to be a floater.

In mid 1996, the County Board again sought bids to contract out the landfill operation. It received proposals and voted to accept the proposal of Solid Waste Integrated Systems, L.P. (SWIS). The County then entered into negotiations to finalize the agreement with SWIS. It was estimated that the agreement would produce savings of about \$400,000 per year over the County operating the landfill. Under the agreement, SWIS would not be employing the County's employees who worked at the landfill. Testimony of Olson.

By letter of October 22, 1996, the County Board formally notified AFSME Council 6 of its decision to enter into an agreement with SWIS, stating that it would result in the elimination of the positions currently assigned to the transfer station and possible layoff of the employees. It offered to meet with the unions to discuss the matter. Ex. 8. By letter of November 1, 1996, the Assistant Director of Council 65 notified the Chairman of the County Board that it considered the decision to contract out the transfer station operation to be a violation of the collective bargaining agreements. The letter enclosed two grievances, one filed by Local 1626 and one filed by Local 1452, grieving the action by the County. Ex. 9.

By letter of November 6, 1996, Petitioner was notified that the County intended to lay him off because the contracting out of the landfill operation to SWIS would result in the elimination of the Local 1626 positions at the transfer station. The notice advised Petitioner of his right under the Local 1626 collective bargaining agreement to bump any less senior person in Local 1626 from position for which he was qualified. It also contained the following notice regarding veterans preference rights:

The Minnesota Veterans Preference Act, Minn. Stat. Sec. 197.66, [sic] provides that if you are a veteran, separated from military service under honorable conditions, you have the right to request a hearing regarding your layoff. In order to request a hearing you must submit a written request, either by mail or personal service, within sixty (60) days of receipt of this notice, addressed as follows:

Mr. Robert Olson  
Itasca County Coordinator/  
Human Resources Director  
Itasca County Courthouse  
123 4th St NE  
Grand Rapids, MN 55744-2600

The failure to request a hearing within the 60 day period shall constitute a waiver of the right to a hearing. Your layoff will be effective upon expiration of the 60 day period for requesting a hearing or upon conclusion of a hearing upholding the layoff, whichever occurs first. You will be continued in paid status until your layoff is effective.

Ex. 4. Petitioner requested information about his bumping rights and was provided with a copy of the Local 1626 seniority list, job descriptions of those persons with less seniority, and a blank job application. He was asked to submit the job application for the job he wanted to bump into. Ex. 7.

During November 1996, Engstrom developed a proposal in an effort to resolve the union grievances in a manner that would also allow the four employees then working at the transfer station to remain employed by the County. The proposal called for the creation of two grade 7 equipment operators in Local 1452, a grade 3 floater position in Local 1452, and a solid waste site manager/administrative assistant position in Local 1626. The idea was that the displaced equipment operators could bump into the two new grade 7 operator positions, Petitioner would be placed in the grade 3 floater position in Local 1452, and Leeseberg would be placed in the new light duty solid waste site manager/administrative assistant position in Local 1626. The matter

was discussed at the November 18, 1996, meeting of the Public Works Committee of the County Board and again at the November 26, 1996, meeting of the full County Board. The matter was tabled at that meeting and referred back to the Public Works Committee. Ex. 10.

On November 27, 1996, the County Board met with the unions for a step 3 grievance meeting regarding the contracting out grievances. The Council 65 Assistant Director reiterated the union's position that the contracting out prior to negotiating with the unions had been a contract violation and that not only would the unions force a grievance, but they would also sue the County. The County's negotiator suggested that the parties attempt to resolve the matter by dealing with the employee issues. Ultimately, the parties reached a tentative resolution of the grievance, which was described in the minutes of the meeting as follows:

In an attempt to settle this grievance, the Board proposed to create two (2) grade 7 operator positions, one (1) grade 3 floater position, and one (1) light duty maintenance position. The grade 7 positions would replace the two operator positions at the landfill currently held by 1452 employees. The floater position would be filled by Maurice Williams assuming he qualified for the position. Mr. Williams would be allowed to transfer from Local 1626 to Local 1452 and carry service credit (not seniority) for the purposes of benefits. The light duty maintenance position would be created for Kathy Leeseburg. The County Engineer budgeted for the three positions in Road & Bridge; however, if this proposal is approved, a transfer of funds from Solid Waste to maintenance would be required!

The union tentatively agreed to the County proposal provided that the County accept the last offer (negotiations) submitted by Locals 1626 and 580.

The Board then directed their negotiator to draft the settlement offer and submit it to the unions. Ex. 11. Although Engstrom had been willing simply to place Petitioner as a floater without testing because he was satisfied with his ability to perform the job, Local 1452 had raised the issue of testing. Engstrom then recommended to the Board that they go along with a testing requirement and do a pass/fail test in November or December. Testimony of Engstrom.

On December 6, 1996, the negotiator submitted offer letters for each of the locals to the Council 65 Assistant Director. Ex. 12. Regarding Petitioner, the proposal was that the County would create an additional grade 3 floater position within Local 1452 that would be filled by the normal posting and bumping procedures and that after that process was completed, the remaining unfilled floater position would be offered to Petitioner provided he demonstrated to the County's satisfaction, based on testing, that he was qualified for the position.

The matter came back before the County Board on December 30, 1996. At that time, Engstrom brought a recommendation to the Board that included creating the two grade 7 positions for the two Local 1452 employees and the light duty building maintenance position in the courthouse for Leeseberg. Instead of creating the grade 3 floater position in 1452 for Petitioner, the recommendation was for a truck/trailer operator position in the Juvenile Probation Department in Local 1626. Ex. 15. However, at the time he made the presentation to the Board, Engstrom stated that there was no funding for the position in the Juvenile Probation Department and therefore staff had to withdraw that recommendation. Instead, he recommended the creation of either a survey crew chief position in Local 1626 or a low-boy tractor/trailer operator position in Local 1452. Either option would allow Petitioner ultimately to be placed in a vacant floater position in Local 1452. Ex. 30 at 2-4. Either arrangement would have fulfilled the tentative agreement and would have required Petitioner to pass a pass/fail test for the floater position.

The Board adopted the recommendations for the two Local 1452 employees and for Leeseberg. As they began to act on the recommendation regarding the position for Petitioner, David Mortenson, president of Local 1452, spoke up and stated that his local wanted Petitioner to be tested under the regular testing procedures and not be allowed to have a separate pass/fail test. The following discussion ensued:

COMMISSIONER HUJU: That's the position of the bargaining unit?

MR. MORTENSON: That's the position of the bargaining unit is that they be tested under regular -- in regular testing procedures, not setting up special tests for individual testing. The way and reason you do that is you go and run 20 people through the test or however many applicants you got and you get your best applicant and you grade them according to one, two, three, and they get hired off that list in that order. When I originally come up with that number one -- that number one decision of the truck and trailer operator is because the wood crew could use the extra help right now and stuff and are behind, and I figured that he would just naturally go in and apply and test out in the spring when we hold the testing anyway 'cause we got to make an eligibility list.

COMMISSIONER BRAFORD: I think that's a fair way to do it.

MR. ENGSTROM: One of our reasons for recommending against waiting until normal testing would be let's just say that the individual comes in fifth, what do we do with that individual between now and the time that he reaches the place on the eligibility list to be hired as an equipment operator? Do you have any recommendations for that?

MR. MORTENSON: I don't have a recommendation for that, but that's tied into issues with our group is that that you get qualified applicants into that job, the position itself. It's nothing against the person but we wholeheartedly take the position for our group and everything else, it's just we've had a few threats from outside -- outside the group that with these special tests you've got people left on your list below ten right now. I think some of the commissioners may have heard the same concerns from some people out there, and I don't want it to be our group who's got to oppose it for the fact that we don't want to be drugged into some kind of lawsuit from somebody who didn't get a job. All of a sudden you set up a different testing procedure for this one person, just to pull him in, it looks really bad. We've researched it through an attorney and everything else that we need to be as distant from that, the testing part of that, as possible for that reason.

MR. OLSON: Mr. Chairman, and I spoke with Mr. Fecker this morning on this very issue and Mr. Fecker recommends strongly that you live up to the agreement that you proposed the day that we had the Step Two grievance, and it was agreeable at that time that the individual would be tested. If the union does not wish to be part of the testing process, which I hear them say, then they should let us proceed with our testing the way that Mr. Engstrom was going to set it up and we proceed on that basis, and that's what Mr. Fecker is strongly recommending that you do.

Ex. 30 at 7-10. Olson and Engstrom continued to recommend that the Board adopt the tentative agreement that would allow Petitioner to be placed into the floater position on the basis of a pass/fail test. However, the Board ultimately decided that it would adopt the union position that it was most fair to the other applicants for the floater position that Petitioner be required to, in effect, simply apply for the job like everyone else, going through the normal testing procedure and having no preference on the hiring list. For the interim, the Board was able to allocate funding for the temporary position in the Juvenile Probation Department driving a truck, making wood deliveries. Olson then suggested that Petitioner's agreement to the arrangement was necessary because, as the Board recognized, it could mean that Petitioner would eventually be laid off. Ex. 30 at 21. That was acceptable to the Board because they felt that Petitioner still had bumping rights when the temporary job ended. Ex. 30 at 22. Petitioner was not present at the Board meeting, but the presidents of both locals were and agreed that this solution would resolve the grievances. The Board then adopted a resolution, creating the truck/trailer operator position in Local 1626 in the Juvenile Probation Department for Petitioner on a temporary basis until the spring testing for a grade 3 floater position was given. A revised grievance settlement agreement with Local 1626 was drafted by the negotiator in a letter dated January 15, 1997, to the Council

65 Assistant Director. Ex. 14. With regard to Petitioner, the agreement stated:

Maurice Williams: Maurice Williams will be placed into a temporary position as a truck driver in the firewood program of the Probation/Parole Department. This temporary position is within Local 1626 and, based on agreement with the Union, may be filled by Maurice Williams without going through the contractual posting procedure.

During the time of Spring breakup, the County Road and Bridge Department will be taking applications and testing in order to establish a Grade 3 floater eligibility list. Maurice Williams may, if he so elects, apply and be tested for the position. If as a result of the testing, Maurice Williams is first on the eligibility register, the County will at that time offer Maurice Williams a Grade 3 floater position, subject to the usual preplacement screening and satisfactory reference check responses. If Maurice Williams is not first on the eligibility list (or high enough on the eligibility list to be offered a position if there is more than one vacancy in a Grade 3 floater position), then his name shall remain on the eligibility list but the County shall not be obligated to create a Grade 3 floater position to offer to him. If Maurice Williams is not placed in a Grade 3 floater position as a result of this procedure and the temporary truck driver position in Probation/Parole is eliminated, Maurice Williams will be entitled to exercise his seniority/bumping rights within Local 1626 under the Local 1626 contract.

The agreement was signed by the Local 1626 president, the Council 65 Assistant Director, Leeseberg and Petitioner.

18. On December 31, 1996, Petitioner and Leeseberg met with Peggy Clayton, the County human resources officer, to go over the paperwork for their new positions. At that time, Clayton spoke to Petitioner about an application he had dropped off the previous day to bump into the position of court services crew foreman. She told him that they would need a letter stating his intent to bump into the position. He wanted to know how the pay compared to his temporary job, but she was not yet able to tell him because the temporary position had not yet been evaluated.

19. On January 2, 1997, Petitioner began working as a truck driver for the Probation Department. The Probation Department had a work program for juvenile offenders that was based on making up firewood bundles from scrap lumber and selling it. Petitioner's duties were primarily driving a truck to pick up and deliver the firewood. He also assisted with cutting and bundling the firewood and had some clerical duties. Ex. 33.

20. On January 9, 1997, Clayton contacted Petitioner because she had not received a letter from him stating whether he wanted to bump into the court services crew foreman position. She informed him, however, that because he had received his lay off notice November 6, 1996, any application for bumping would have had to have been 30 days from that date and, since his application for the crew foreman had been received on December 30, 1996, it was not timely. Ex. 39.

21. The County hires two or three floaters each year. It opened the floater position for applications from February 10 to February 24, 1997. Ex. 37. Petitioner submitted an application. Ex. 35.

22. The applications were graded by Clayton using an experience and training rating form that had been used for a number of years. Testimony of Clayton; Ex. 34. The rating form sets forth three minimum requirements of (1) high school graduation equivalent, (2) experience in operation and maintenance of highway construction equipment or graduation from an appropriate vocational-technical school, and (3) possession of a Class B license. For each of the minimum requirements, 23.34 points is awarded, yielding a total minimum point score of 70. Additional "bonus" points are awarded for the following items:

- \* 12 points for a Class A commercial license
- \* Up to 10 additional points for additional years of experience beyond the minimum
- \* Up to 7 points for previous experience working on listed types of heavy equipment
- \* Up to 5 points for experience as a truck driver in a government street agency or highway department.

The possible 34 bonus points are adjusted by a multiplier of 30/34 that scales the bonus points to an actual maximum of 30. (Actually, the County uses a cumbersome formula that produces the same result.) Thus, the total possible is 100 points. To that may be added the five or ten veterans preference points to reach the total experience and training rating. Testimony of Clayton.

18. Using Petitioner's application, Clayton awarded Petitioner the 70 points for the minimum qualifications, 12 bonus points for a Class A commercial license, 10 points for additional years of experience in operation and maintenance of highway construction equipment and 5 points for operating five of the seven types of heavy equipment listed. Thus, he received 27 bonus points. His total raw score of 97 was then adjusted to a total of 93.82. To that, 5 points for veterans preference was added, giving him a final score of 98.82.

19. Clayton did not award Petitioner any bonus points for work experience as a truck driver within a government street agency or highway department. She did so despite the fact that he had listed on his application that he worked as a truck driver for Probation Department because he had listed his starting date as May 1992, which she considered to be obviously a wrong date, despite the fact that that was his seniority date with the County and she knew exactly the date that he had started working as a truck driver making wood deliveries. She also didn't provide him any credit for the time he had been driving a truck while employed by the County as a transfer station attendant, nor for the nine months of 1996 he worked at the Arbo garage. During the time at Arbo, Petitioner gained several months of experience as a truck driver within a government street agency or highway department and would have been entitled to two points. Petitioner properly marked his experience at truck driving in the spaces indicated on the form. Ex. 35, pg. 3.

20. After scoring all the applications for the floater position, a list was produced of the applicants ranked by score. The high score was 109.00, the second score was 100.59, the third score was 99.71, and then eight applicants, including Petitioner, were tied at 98.82. The top 13 applicants were all veterans. Ex. 37. (The score of 109.00 is impossible under the formula used by the County, even if five or ten veterans preference points are included.)

21. The second step of the hiring process for the floater position was the road test. The top 31 applicants on the experience and training rating were certified to take the road test. Petitioner was one of those. Testimony of Clayton. The applicants taking that portion of the test drove four pieces of equipment and were graded on their performance. The possible score on each was 60, for a total possible of 240. Petitioner scored 159 points on the road test. His score on operating the "cat" was a relatively low 29. Respondent's Memo, Ex. 1. The highest score was 209 points and Petitioner's score on the road test ranked him 23rd out of the 30 scores reported. The lowest reported score was 121. The person who ranked the highest on the experience and training rating with the score of 109 did not appear for the road test. Ex. 37.

22. The score from the experience and training rating was added to the road test score and the applicants were then ranked. Petitioner's combined score was 257.71, which ranked him 22nd on the list. The top score was 307.82. Ex. 37. The top 12 finalists were then interviewed for the position. Of those, five were veterans. There is no requirement that the first person on the list be hired. Petitioner was not interviewed, but remains on the eligibility roster for one year. Testimony of Olson, Ex. 37.

23. By letter of May 6, 1997, from Olson, Petitioner was notified of the County's

intention to lay him off from employment effective June 10, 1997. The notice recited the fact that he had been placed in a temporary position as a truck driver until the eligibility list for equipment operator was established and that he would be offered a position as a Grade 3 floater if he placed first on the list and that on April 29, 1997, the eligibility list was established and he was not first on the list nor high enough on the list to be offered a position. The letter provided Petitioner notice that under the Local 1626 collective bargaining agreement, he had a right to bump less senior persons from positions in Local 1626 for which he was qualified and had five days to exercise that right. It also provided him the following notice of his veterans preference rights as follows:

If you are a veteran as defined by Minn. Stat. Sec 197.447, you may have certain rights relating to your layoff under the Veterans Preference Act (Minn. Stat. 197.46 and .481). Pursuant to the Act, you have the right to either petition the District Court for a writ of mandamus or the Commissioner of Veterans Affairs to determine whether the action taken was in good faith.

If you wish to pursue either of these remedies, you must do so within 60 days of receipt of this notice. Your failure to do so within 60 days shall constitute a waiver of your rights to contest your layoff under the Veterans Preference Act. In order to request a hearing you must submit a written request, addressed as follows:

Mr. Robert Olson  
Itasca County Coordinator  
Itasca County Courthouse  
123 4th St NE  
Grand Rapids, MN 55744-2600

The failure to request a hearing within the 60 day period shall constitute a waiver of the right to a hearing. As a veteran, your layoff will be effective upon expiration of the 60 day period for requesting a hearing or upon conclusion of a hearing upholding the layoff, whichever occurs first.

Ex. 3. While the notice mentioned the writ of mandamus and the Commissioner of Veterans Affairs, it incorrectly stated that such appeals must be made to the County.

24. Petitioner submitted a few requests for bumping, but was ultimately determined not to be qualified for any of the positions occupied by less senior persons in Local 1626. Testimony of Petitioner, Olson, Clayton; Ex. 32.

25. On June 16, 1997, Petitioner filed a letter with Olson requesting a hearing under the Veterans Preference Act to contest his lay off. Ex. 2. On July 10, 1997, Petitioner filed a Petition for Relief with the Commissioner of Veterans Affairs. Ex. 1.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481.

2. Petitioner is an honorably discharged veteran as defined by Minn. Stat. § 197.447 and entitled to the protections of the Veterans Preference Act at Minn. Stat. §§ 43A.11, 197.455 and 197.46.

3. At the end of 1996, Petitioner was working in the position of transfer station attendant at the landfill with temporary assignments to the Road and Bridge Department. His position was within Local 1626. Pursuant to the terms of the Letter of Understanding between the County and Locals 1626 and 1452, Petitioner's temporary assignments to work for the Road and Bridge Department did not qualify him as a floater in that department or as a member of Local 1452 in any way.

4. When the County Board abolished the four positions at the landfill, including Petitioner's, and contracted out the operation of the landfill to a private party, the abolition of positions was done for legitimate reasons and in good faith. Therefore, the abolition of Petitioner's position did not violate Petitioner's rights under Minn. Stat. § 197.46.

5. The November 6, 1996, Notice of Layoff/Veterans Preference Rights provided to Petitioner in connection with the abolition of his position was inadequate in two aspects. It mistakenly referred to Minn. Stat. § 197.66 rather than Minn. Stat. § 197.46 and it failed to advise him of his right to appeal the abolition of his position by a *writ of mandamus* to the District Court or a petition to the Commissioner of Veterans Affairs. Those defects are inconsequential at this point, however, because Petitioner has filed a petition with the Commissioner of Veterans Affairs, which is the subject of this proceeding.

6. The County had no legal obligation under the Veterans Preference Act to provide Petitioner with any replacement employment beyond the bumping rights he had under the Local 1626 collective bargaining agreement. Therefore, there was no violation of Petitioner's veterans preference rights under Minn. Stat. § 197.46 with regard to the County's offer to place him in a temporary truck driver position while creating permanent positions for the other three landfill employees.

7. The temporary truck driver position created for Petitioner pending the testing for the equipment operator floater position was specifically created to end upon the testing being completed. Therefore, the termination of that position at that time was not a removal of Petitioner within the meaning of Minn. Stat. § 197.46, and did not violate his rights thereunder.

8. The County's two-tier scoring system for the floater position is not a "100-point" system that allows the proper application of veterans preference points as required by Minn. Stat. § 43A.11 and **Hall v. City of Champlin**, 463 N.W.2d 502 (Minn. 1990).

9. The appropriate remedy for the violation of Petitioner's veterans preference rights is to require that the County appoint Petitioner as Grade 3 equipment operator in a floater position and provide him back pay, benefits, and seniority as if he had been appointed to that position effective June 10, 1997.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that:

1. The Petition of Maurice F. Williams be GRANTED as follows.
2. Respondent Itasca County shall appoint Petitioner to a Grade 3 equipment operator floater position in its Road and Bridge Department.
3. Respondent Itasca County shall pay Petitioner back pay and provide him with all benefits and seniority as if appointed to that position June 10, 1997. Any income or re-employment benefits received by Petitioner for the period of June 10, 1997, to appointment shall be deducted. Interest at the rate of 6 percent per annum shall be paid on all back pay and cash benefits from the date due to the date of payment.
4. Respondent Itasca County shall comply with the requirements of Minn. Stat. §§ 43A.11, 197.455 and 197.46 in the future.

Dated this 18th day of November 1997.

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STEVE M. MIHALCHICK  
Administrative Law Judge

Reported: Tape recorded, 8 tapes  
Not transcribed

### NOTICE

Under to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

### Statutory Background

Many assertions regarding veterans rights have been made by the parties in this matter. In Minnesota, the Veterans Preference Act has existed since the time of the Civil War. ***State ex rel. Cowden v. Miller***, 66 Minn. 90, 68 N.W. 732 (1896) (holding Laws 1887, c. 149, Gen.St. 1894, § 8041, giving preference in appointment and employment of public officers to honorably discharged Union soldiers and sailors, to be constitutional). Veterans preference rights in hiring have been modified over the years. Until 1975, veterans had an "absolute" preference over nonveterans in employment in political subdivisions. Any qualified veteran was required to be appointed or promoted before any nonveteran. Minn. Stat. § 197.45 (1974). That was changed by Laws of Minn. 1975, ch. 45, which repealed Minn. Stat. § 197.45 (1974) and made the point system of the state's civil service system applicable to political subdivisions. The statute now provides, in relevant part:

#### **43A.11 Veteran's preference.**

Subdivision 1. **Creation.** Recognizing that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit which cannot be readily assessed by examination, a veteran's preference shall be available pursuant to this section to a veteran as defined in section 197.447.

. . .

Subd. 3. **Nondisabled veteran's credit.** There shall be added to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.

Subd. 4. **Disabled veteran's credit.** There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of ten points provided that the veteran obtained a passing rating on the examination without the addition of the credit points. . . .

Subd. 6. **Preference for spouses.** A preference available pursuant to this section may be used by the surviving spouse of a deceased veteran and by the spouse of a disabled veteran who because of the disability is unable to qualify.

Subd. 7. **Ranking of veterans.** An eligible with a rating augmented by veteran's preference shall be entered on an eligible list ahead of a nonveteran with the same rating.

Subd. 8. **Notification.** A governmental agency when notifying eligibles that they have passed examinations shall show the final examination ratings preference credits and shall notify eligibles that they may elect to use veteran's preference to augment passing ratings.

Subd. 9. **Rejection; explanation.** If the appointing authority rejects a certified eligible who has received veteran's preference, the appointing authority shall notify the eligible in writing of the reasons for the rejection.

At the time that the foregoing changes were made, the state civil service law was modified to require the certification of the first 10 names on an eligibility list to the appointing authority, who then had to make the appointment from those 10 eligibles. Laws of Minn. 1975, ch. 45, § 1, subd. 3. That provision has been amended and now provides for the certification of 20 names, plus those having the same score as the 20th person certified. Minn. Stat. § 43A.13, subd. 4.

In *Hall v. City of Champlin*, 463 N.W.2d 502 (Minn. 1990), the Supreme Court held that the 1975 changes did not repeal veterans preference for those political subdivisions that did not have civil service systems as the City of Champlin and the League of Minnesota Cities had argued. Instead, it held that the statute required a uniform policy applicable to all veterans throughout the state and that a 100-point based hiring system was necessary to the uniform application and intended effect of the law. The court stated:

. . . We hold that political subdivisions of the state must adapt their hiring systems to a 100-point rating system to enable the allocation of veterans preference points. Our decision today does not unduly restrict the discretion granted by the legislature to cities that choose to operate under a personnel ordinance. It does not require political subdivisions to adopt any particular form of hiring system. They need not adopt civil service systems nor need they extensively revise hiring processes and administer formal written examinations for all positions subject to veterans preference. A local appointing authority may administer any type of evaluation as long as it is based on criteria capable of being reduced to 100-point rating system. The 100-point rating system will apply to all positions except those specifically exempted from the veterans preference act by Minn. Stat. Sec. 197.46.

With regard to removal of veterans, Minn. Stat. § 197.46 provides, in

relevant part:

Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section, shall be entitled to a writ of mandamus to remedy the wrong. 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.

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided 60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.

Request for a hearing concerning such a discharge shall be made in writing and submitted by mail or personal service to the employment office of the concerned employer or other appropriate office or person.

...

All officers, boards, commissions, and employees shall conform to, comply with, and aid in all proper ways in carrying into effect the provisions of section 197.455 and this section notwithstanding any laws, charter provisions, ordinances or rules to the contrary. Any willful violation of such sections by officers, officials, or employees is a misdemeanor.

The substantive requirements of this statute as applied to political subdivisions have remained unchanged for over 100 years. **See, Johnson v. Pugh**, 152 Minn. 437, 189 N.W. 257 (1922). Provisions regarding procedures have been added over the years.

#### **Petitioner's Removal**

Respondent argues that it abolished Petitioner's position of transfer station attendant in good faith and thus, under **State Ex Rel. Boyd v. Matson**, 155 Minn. 137, 1193 N.W.30 (1923), there is no violation of Minn. Stat. § 197.46. The Administrative Law Judge agrees. In **Boyd** it was held that the veterans preference law did not prevent municipal employee officials from abolishing an office or a position held by a veteran if the action is taken in good faith and is not a mere subterfuge to oust the veteran from his position. It also held that the absolute preference accorded to veterans in employment and promotion over other applicants also implied a right to

be retained in employment over nonveterans when equivalent positions are abolished.

The County Board made a good faith, legitimate business decision to contract out operation of the landfill to save approximately \$400,000 per year. The County took the action publicly, with notice to the effected unions and with the original intent to provide alternative employment for the four employees who would be put out of work by the action.

Petitioner argues that the layoff of Petitioner was not in good faith. For evidence of lack of good faith, Petitioner cites the fact that the County attempted to terminate his employment shortly after he was hired and rejected his application for promotion to landfill attendant, both of which actions were reversed in arbitration. He cites the fact that the County reduced the transfer station attendant classification through the evaluation he requested, resulting in a freeze in pay throughout his entire employment. He states the County used him as a temporary equipment operator in the Road and Bridge Department in order to be able to assign Local 1452 employees to work at the landfill in light duty positions. He also presented testimony that he felt Olson was unhappy with him because of the early arbitration, some complaints regarding Petitioner's performance and Olson's actions toward him regarding the proposed appointment to a floater position. The Administrative Law Judge does not see any evidence of bad faith by the County in any of those actions, even if they did occur. It is clear that the contracting out of the landfill operation had nothing to do with Petitioner. It was the cost of the operation of the landfill that the County Board was concerned with. Moreover, at the December 30, 1996 Board meeting, Olson urged the Board to adopt the terms of the tentative agreement that would have allowed Petitioner to be employed in the floater position with only a pass/fail test.

Petitioner also points to the fact that there was no discussion at the County Board meeting of December 30, 1996, or any other time, that any consideration should be given to Petitioner's veterans preference rights and that the Board was most concerned with addressing Local 1452's concerns about testing. There is some legitimacy to that argument, but the fact remains that the decision to abolish the landfill positions had already been made in good faith and the discussion on December 30, 1996, involved finding new employment for the four employees. None of the events that occurred on December 30, 1996, prove an absence of good faith in the abolition of Petitioner's position.

Petitioner also argues that the actual position he was working in at the end of 1996 was part-time transfer station attendant and part-time floater. He argues that by doing the work required of equipment operators in the Road and Bridge Department, he fell within the definition of an employee within Local 1452, the Road and Bridge unit. But, in fact, his temporary work assignments in the Road and Bridge Department were specifically the subject of the Letter of Understanding between the County and the two locals. Under that Letter of Understanding, Petitioner did not become an employee of the Road and Bridge Department and did not acquire any seniority in Local 1452. Moreover, the work he performed there was temporary. By terms of the Letter of Understanding, it only applied while the County continued to operate the landfill. Thus, Petitioner remained a transfer station attendant and his position was abolished at the end of 1996.

Petitioner was not treated very fairly by the County Board when the County Board created permanent positions for the other three nonveteran employees to bump into and created only a temporary position for employee to work in until the spring road test for floater was conducted. Nonetheless, the job was specifically created as a temporary position. The Probation Department only needed an additional driver to deliver wood for a few months during the late winter and the Board clearly stated its intent to create only a temporary position. Petitioner makes some claim that the position is still necessary and being performed, but there is no evidence to that effect. Petitioner's position was as a temporary truck driver that was to terminate upon the completion of the road test for the floater position. The provisions of Minn. Stat. § 197.46 do not apply to such positions. ***Crnkovich v. Independent School District No. 701***, 273 Minn. 518, 142 N.W.2d 284 (1966). Thus, Petitioner's removal from the temporary truck driver position at the time it terminated did not violate the provisions of Minn. Stat. § 197.46.

#### **Petitioner's Application for the Floater Position**

Petitioner argues that Respondent violated his veterans preference rights in the hiring for the floater position in the spring of 1997. He argues that the test for the position was divided into two parts, the 100-point experience and training rating and the 240-point equipment operation test. Thus, he argues, the test was actually a 340-point test on which he was accorded only five points veterans preference. Petitioner argues that a test that applies the veterans preference points only to the smaller portion of the test does not comply with the requirements of *Hall*. The Administrative Law Judge agrees.

Respondent argues that it properly applied the veterans preference credit for Petitioner because it applied the five-point credit after converting the eligibility scores to a 100-point scale. It argues that veterans preference points are to be applied for determining the list of "eligibles" under Minn. Stat. § 43A.12, subd. 4, and that was what was done in this case. That statute requires "eligibles" to be ranked according to their ratings and examinations and the veterans preference provisions of Minn. Stat. § 43A.11. Respondent also argues that, as previously stated by this Administrative Law Judge in a report adopted by the Commissioner of Veterans Affairs, the Veterans Preference Act does not guarantee the right to be among the finalists interviewed for a position and provides no preference at all toward being the person selected from among those interviewed. *Bruun v. Crow Wing County*, OAH Docket No. 69-3100-5788-2 (1991).

As administered by the County, the road test is actually part of creating the eligibility list; it is not a method used by the appointing authority for selecting among finalists certified to it by the Human Resources Department. Exhibit 37 itself shows that Clayton, the Human Resources Officer, labeled the combined score listing as the "Official Elig List". Olson, the Human Resources Director testified that normally the top 10 names on the list would be certified to the appointing authority and the appointing authority could select from any of those certified.

In this particular case, Respondent's two-part 340-point test renders the five veterans preference points almost meaningless. This, of course, is caused by the relatively enormous weight given to the road test (240 points maximum) versus the experience and training rating (30 points maximum) and the minimum requirements rating (70 points). The fact that the methodology used by the County seriously dilutes the effect of the veterans preference points is made clear by the results here. Based on the experience and training rating, including the minimum requirements, bonus points and veterans preference points, all 13 of the top 13 rated applicants were veterans or disabled veterans. After application of the road test score, only five of the top 12 ranked applicants were veterans.

In *Lehto v. St. Louis County Civil Service Commission*, OAH Docket No. 4-3100-2703-2, Report of the Administrative Law Judge, November 30, 1988, adopted by Commissioner January 20, 1989, it was held that a multi-part testing system that only allowed the highest 20 applicants to proceed to the next test violated the Veterans Preference Act. It was held that veterans must be allowed to complete all parts of a civil service examination if they obtain a passing score in each part so that veterans preference points may be added to the final score. While the fact situation is different here, the underlying basis of the decision applies. That is, the intent of the Veterans Preference Act to afford an honorably discharged veteran a preference in securing a public job cannot be circumvented by a scoring methodology that is contrary to that intent. Because it rendered veterans preference points almost meaningless, the testing and scoring system used by the County for the filling of the equipment operator floater position in the spring of 1997 violated Petitioner's veterans preference rights to a five-point credit on the examination rating as required by Minn. Stat. § 43A.11, subd. 3.

### **Remedy**

Under Minn. Stat. § 197.481, subd. 1, when veterans preference rights have been denied, the Commissioner may grant the veteran such relief the Commissioner finds justified by the statutes. Even though the Veterans Preference Act does not guarantee that a veteran will be hired, where it is shown that a political subdivision denies the rights provided by Minn. Stat. §§ 197.455 and 43A.11, it is within the authority and the discretion of the Administrative Law Judge to recommend and the Commissioner of Veterans Affairs to order that the veteran be hired. *Hall v. City of Champlin*, 463 N.W.2d 502 (Minn. 1990). The facts in this case require such a result.

The County has made minimal efforts to comply with the requirements of veterans preference. It apparently does not recognize that veterans cannot be removed without a hearing while they are still in a probationary position. Veterans preference rights were never a part of the discussion during Petitioner's removal. It was only after he was laid off from the transfer station attendant position that he was given notice of his veterans preference rights, a notice that was partially defective. There was no discussion of veterans preference when it was decided not to allow Petitioner to take a pass/fail test for floater in deference to other applicants who were not even County employees. The County apparently has no procedure for ranking veterans ahead of nonveterans with the same rating on eligibility lists contrary to the requirements of Minn. Stat. § 43A.11, subd. 7, (two people are listed in Exhibit 37 as receiving a road test score of 164.00; the nonveteran is listed first). Most importantly, the system used by the County in this particular case renders the veterans preference points almost meaningless.

Moreover, Petitioner has not been treated fairly by the County. The County created jobs for the other three employees at the landfill, but did not create one for Petitioner, the only veteran among them. Petitioner demonstrated by his previous work for the Road and Bridge Department that he was well qualified for the position and a good worker. Had the road test been reduced to a reasonable proportion of the overall eligibility score, and then veterans preference points applied, it is quite likely that Petitioner would have been among the top 12 eligibles certified to the appointing authority. The appointing authority would have had the authority to appoint Petitioner, because that is the "normal" procedure used by the County, contrary to the highest score first method referred to by the union local president. Petitioner should have been appointed on January 1, 1997, and certainly on June 10, 1997, after the spring road test. It is appropriate that that appointment be required now. It is also appropriate that he be awarded backpay, benefits and interest in accordance with ***Henry v. Metropolitan Waste Control Commission***, 401 N.W.2d 401 (Minn. 1987).

S.M.M.