

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

**FOR THE DEPARTMENT OF VETERANS AFFAIRS**

Lee W. Williams,

Petitioner,

vs.

City of Truman,

Respondent.

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

The above-entitled matter came on for hearing before Administrative Law Judge Bruce H. Johnson at 9:30 a.m. on October 9, 1997, in the Martin County Commissioners' Room, Law Enforcement Center, 201 Lake Avenue, Fairmont, Minnesota.

Nicholas P. Granath, Attorney at Law, Firststar Bank Building, Suite 310, 8800 West Highway 7, St. Louis Park, Minnesota 55426, appeared on behalf of the Petitioner, Lee W. Williams (hereinafter "Mr. Williams"). James A. Wilson, Attorney at Law, 110 Downtown Plaza, Box 271, Fairmont, Minnesota 50631, appeared on behalf of the City of Truman (hereinafter the "City"). The record of the proceeding closed on December 2, 1997, upon receipt of all of the parties' post-hearing briefs.

This Report is a recommendation and not a final decision. After a review of the record, the Commissioner of the Minnesota Department of Veterans Affairs will make the final decision, in which he may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61 (1996), 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, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota

55155-2079, to ascertain the procedure for filing exceptions or presenting argument.

### **STATEMENT OF ISSUES**

The issues to be determined in this proceeding are:

Whether the City denied rights afforded to Mr. Williams under the Veterans Preference Act by failing to notify him, upon terminating his employment with the City on or about July 1, 1997, of his right to request a hearing on whether cause for dismissal existed.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. After graduating from high school, Mr. Williams served on active duty in the United States Army from October 3, 1985, until September 24, 1986, and also served in the U. S. Army Reserve until he was honorably discharged on November 17, 1990. (Tr. pp. 153-154; Exhibits 1 and 2)

2. After completing his active military service, Mr. Williams attended Normandale Community College, earning an Associate of Arts degree in criminal justice in 1987. (Tr. p. 152) While attending Normandale, he served as a community service officer with the police department in St. Louis Park, Minnesota. (Tr. p. 156)

3. After earning his A. A. degree, Mr. Williams became employed as a full-time police officer in Charter Oak, Iowa, for about a month. He then held a similar position with the police department in Overland, Kansas, until 1995. (Tr. pp. 157-160) While in Overland, he participated in some major narcotics investigations and received several letters of commendation and three awards for valor. (Tr. pp. 158-160)

4. The City is a statutory city of approximately 1,292 residents located in Martin County, Minnesota. It is situated in a rural agricultural area. (Tr. p. 49) The City is governed by a mayor and a four-member city council. Apart from special meetings, its city council meets twice a month. (Tr. pp. 112-113) The City has not established a municipal merit system pursuant to Minn. Stat. Ch. 44 (1996).

5. The City's government is administered through seven departments, most of which are established by the City Code. (Tr. pp. 49-50) Sections 202.01

through 202.03 of the City Code provide the following with respect to the City's police department:

#### Section 202.01. ESTABLISHMENT

A police department is hereby continued. The head of the department shall be known as the chief of police and the number of additional members of the department, together with their ranks and titles, shall be determined by the council by resolution. The compensation to be paid members of the police department shall be fixed by the council. Members of the department shall be appointed by the council.

#### Section 202.02. CHIEF OF POLICE

The chief of police shall have supervision and control of the police department and its members. He shall be responsible to the council for law enforcement and for property of the city used by the department. He shall be responsible for the proper training and discipline of the members of the department. He shall be responsible for the keeping of adequate records and he shall report to the council on the needs of the department and its work. Every member of the police department subordinate to the chief shall obey instructions of the chief and any superior officer. The council shall designate one of the police officers as acting chief, who shall have all the powers and duties of the chief during his absence or disability.

#### Section 202.03. DUTIES OF POLICE

Members of the police department shall enforce the ordinances and laws applicable to the city, bring violators before the county court, and make complaints for offenses coming to their knowledge. Members of the police department shall serve processes on behalf of the city and shall serve such notices as may be required by the council or other authority. When the city is not a party to the proceedings involved in the process or notice, the officer shall collect the same fees as provided by law for town constables. All such fees shall be paid into the city treasury.

6. The City currently employs eleven full-time, three part-time, and several seasonal employees; these numbers include employees of its police department. (Tr. p. 49) The number of full and part-time employees of the City's police department has varied from time to time. When Jeffry Cummins, who was Mr. Williams' predecessor as the City's chief of police, began his employment, he was the City's only police officer for about six months. (Tr. p. 125) Later during Mr. Cummins' tenure, the police department consisted of two full-time and two-part-time police officers. (Id.) When Mr. Williams became chief of police, the police force consisted of himself, two part-time officers, and some reserve

officers. (Exhibit E; Tr. pp. 164-165) At some point during Mr. Williams' tenure as chief of police, the City's police department consisted of two full-time, three part-time, and six reserve police officers. (Exhibits E and F; Tr. pp. 185-186) In addition to police and reserve officers, the police department has employed a clerical support person. (Exhibit E; Tr. p. 69)

7. At all times relevant to this proceeding, the City's police department did not have a deputy or assistant chief of police, except as may be provided in Section 202.02 of the City's Code.

8. In May of 1995, Mr. Cummins resigned his position as the City's chief of police in order to accept the position of chief of police in Springfield, Minnesota. (Tr. p. 124)

9. In late May of 1995, the City began soliciting applications for a chief of police to replace Mr. Cummins by placing advertisements in a local newspaper (Exhibit 13), in the Minneapolis Star Tribune (Exhibit 14), and with the Minnesota State Peace Officer Standards and Training ("POST") Board. (Tr. p. 57; Exhibit U)

10. In response to inquiries about the position, the City Clerk sent prospective applicants, including Mr. Williams, letters requesting them to apply, application forms, copies of a position description that included a statement of minimum qualifications (Exhibit A-2), copies of passive warning statements, and some information about the City. (Tr. pp. 57-59). The minimum qualifications for the position were set forth as follows:

#### DESIRED MINIMUM QUALIFICATIONS

##### Education and Experience:

- (A) Minimum two-year degree in law enforcement
- (B) Licensed as a full-time Minnesota peace officer by POST Board on or before June 1, 1995
- (C) Three years full-time experience as a police officer
- (D) Valid Class C Minnesota driver's license

##### Necessary Knowledge, Skills and Abilities:

- (A) Thorough knowledge of modern law enforcement principles, procedures, techniques, and equipment.
- (B) Considerable knowledge of applicable laws, ordinances, and department rules and regulations.
- (C) Skill in the use of the tools and equipment listed below.
- (D) Ability to train and supervise subordinate personnel.

- (E) Ability to perform work requiring good physical condition.
- (F) Ability to communicate effectively orally and in writing.
- (G) Ability to establish and maintain effective working relationships with subordinates, peers and supervisors.
- (H) Ability to exercise sound judgment in evaluating situations and in making decisions.
- (I) Ability to give verbal and written instructions.
- (J) Ability to meet the special requirements listed below.
- (K) Advance (sic) first aid, first responder, or EMT certified.
- (L) Ability to meet Department's physical standards.

11. In response to the City's advertisements soliciting applications for the position of police chief, Mr. Williams submitted an application (Exhibit B) on June 4, 1995. (Tr. pp. 60-61) At the time of his application, Mr. Williams was not licensed by the State of Minnesota as a peace officer, as required by Minn. Stat. § 626.846, subd. 1 (1996). (Tr. p. 161; Exhibit B) Mr. Williams subsequently completed the POST Board's examination requirements and was appointed a licensed peace officer of the State of Minnesota on July 17, 1995.

12. On August 21, 1995, Mr. Williams entered into an employment agreement pursuant to the terms of which he accepted employment as Police Chief for the City. (Exhibit A-1) Attached to that employment agreement as Exhibit A was a copy of the position description that had been circulated to prospective applicants. (Exhibit A-2; Tr. pp. 54-61) The police chief's major areas of direct responsibility are described in that position description as follows:

**SUPERVISION RECEIVED**

Works under the general guidance and direction of the City Council.

## SUPERVISION EXERCISED

Exercises supervision over all police department staff directly.

## ESSENTIAL DUTIES AND RESPONSIBILITIES

- (A) Plans, coordinates, supervises and evaluates police department operations.
- (B) Develops policies and procedures for the Department in order to implement directives from the City Council.
- (C) Plans and implements a law enforcement program for the City in order to better carry out the policies and goals of City Council; reviews Department performance and effectiveness, formulates programs or policies to alleviate deficiencies.
- (D) Coordinates the information gathered and work accomplished by various officers; assigns officers to special investigations as the needs arise for their specific skills.
- (E) Assures that personnel are assign (sic) to shifts or working units which provide optimum effectiveness in terms of current situations and circumstances governing employment.
- (F) Evaluates evidence, witnesses, and suspects in criminal cases to correlate all aspects and to assess for trends, similarities, or for associations with other cases.
- (G) Supervises and coordinates the preparation and presentation of an annual budget for the Department; directs the implementation of the department's budget; plans for and reviews specifications for new or replaced equipment.
- (H) Directs the development and maintenance of systems, records and legal documents that provide for the proper evaluation, control and documentation of police department operations.
- (I) Trains and develops Department personnel.
- (J) Handles grievances, maintains Departmental discipline and the conduct and general behavior of assigned personnel.
- (K) Prepares and submits periodic reports to the City Council regarding the Department's activities, and prepares a variety of other reports as appropriate.

- (L) Meets with elected or appointed officials, other law enforcement officials, community and business representatives and the public on all aspects of the Department's activities.
- (M) Attends conferences and meetings to keep abreast of current trends in the field; represents the City Police Department in a variety of local, county, state and other meetings.
- (N) Cooperates with County, State and Federal law enforcement officers as appropriate where activities of the police department are involved.
- (O) Ensures that law and ordinances are enforced and that the public peace and safety is (sic) maintained.

13. While Mr. Williams served as the City's chief of police, he maintained standing instructions from himself to other members of the department in the form of 118 separate operating procedures setting forth, often in very minute detail, how police officers were required to perform their duties and work in a variety of situations. As chief of police, Mr. William had the authority to issue, rescind, alter, modify or temporarily suspend any of those standard operating procedures. (Exhibit H) Between 20% and 30% of those standard operating procedures were prepared and issued by Mr. Williams. The remainder were prepared and issued by his predecessor, Mr. Cummins. (Tr. pp. 129-130) Approximately 28 of the 118 standard operating procedures are mandated for all police departments by the POST Board. The remaining 90 are within the authority and discretion of the chief of police. (Id.) The only involvement of the City Council in adopting and maintaining the police department's standard operating procedures was to request the city attorney to examine them for legality. (Id.) The department's standard operating procedures cover such matters as a code of conduct for police officers, specific procedures to be followed in various kinds of situations and emergencies, use of firearms, transportation of prisoners, etc. (Exhibit H)

14. While serving as the City's chief of police, Mr. Williams solicited police officer applicants; he then interviewed, tested, and examined them and presented his selections to the City Council for appointment. (Tr. pp. 203-207; Exhibits M, N, and O) On three occasions, Mr. Williams hired part-time police officers or volunteer reserve officers and had them placed on the City payroll weeks, and in once case months, before they were presented to the City Council for approval and appointment. (Exhibits Q, R, and S)

15. As the City's chief of police, Mr. Williams was responsible for preparing an annual budget for the police department and for submitting it to the City Council for approval. (Tr. p. 134; Exhibit L)

16. During his tenure as the City's chief of police, the City Council requested Mr. Williams to attend one of the two monthly Council meetings in order to report on the activities of the police department. Because of his schedule and duties, Mr. Williams' attendance at City Council meetings was somewhat irregular. (Tr. p. 113)

17. At all times relevant to this proceeding, no member of the City Council was licensed by the Minnesota State Peace Officer Standards and Training Board pursuant to Minn. Stat. § 626.846, subd. 6 (1996) and Minn. R. pt. 6700.0700 (1995).

18. While employed as the City's police chief, Mr. Williams provided other members of the police department with direction and supervision, as described in part in Finding No. 12, above.

19. While employed as the City's police chief, Mr. Williams directed the other members of the police department in the performance of their duties and supervised the work of the department by issuing standard operating procedures (Exhibit H), by issuing internal department memoranda (Exhibit I), by issuing training plans and other correspondence (Exhibit J), and by giving members of the department verbal instructions on how to perform their duties.

20. The preparation of weekly duty assignments for the department's police officers was accomplished in the following way: Mr. Williams would decide on the hours that he himself would serve on patrol duty. Mr. Williams then allowed Officer Schumacher, the other full-time police officer, to decide which of the remaining hours of patrol duty he would like to work. Finally, the department's part-time officers were allowed to decide among themselves which hours they would work. (Tr. p. 172)

21. Largely as the result of Mr. Williams' leadership and initiative, the City's police department accomplished the following during Mr. Williams' tenure as chief of police (Exhibit V):

- A. The police department building was moved and upgraded;
- B. Equipment of the police department was replaced and modernized;
- C. The police department acquired the capability to lift fingerprints from a crime scene and the capability to investigate a homicide scene;
- D. The police department acquired the use of almost \$300,000 worth of vehicles and equipment through Operation Northstar;
- E. As of June 17, 1997, there were no drugs being sold in or near the City of Truman; and



F. The department's police officers were equipped with pagers, and the pager numbers were listed in the newspaper, making police officers available to residents 24 hours a day.

22. Mr. Williams' normal 40-hour work week consisted of 10-hour patrol shifts three days a week and a fourth 10-hour day that was to be devoted to administrative duties. On occasions his fourth shift was partially spent on patrol. (Tr. p. 165)

23. Section 8 of Mr. Williams' employment agreement with the City provided in part that:

**Section 8 Hours of Work**

It is recognized that the Employee must devote a great deal of time outside the normal office hours to the business of the City, and to that end the Employee will be allowed to take compensatory time off as he shall deem appropriate during normal working hours.

(Exhibit A-2) While Mr. Williams served as the City's chief of police, he spent a considerable amount of time each month, outside of his normal 40-hour work week, on administrative and managerial duties that were not required of other members of the department. (Exhibit V)

24. Mr. Williams performed routine patrol duties, similar to those performed by the City's other police officers, for approximately 30 hours during a normal work week. During the remaining hours of his normal work week and during times outside his normal work week, Mr. Williams performed the duties of the City's police chief that are set forth in Finding No. 12, above, duties which other members of the City police department were not required to perform. (Tr. p. 165; Exhibit V)

25. On July 1, 1997, at 5:00 p.m., the City Council held an emergency special meeting during the course of which it voted to terminate the City's employment agreement with Mr. Williams immediately, subject to the four-month severance pay provision in that employment agreement. (Exhibit 17) Thereupon, Mr. Williams' employment as the City's police chief was terminated.

26. At no time before, during, or after the City Council's meeting of July 1, 1997, did the City provide Mr. Williams with notice of a right to request a hearing on cause for his dismissal pursuant to Minn. Stat. § 197.46 (1996). The City has never held a hearing on whether there was cause for terminating Mr. Williams' employment.

27. On August 5, 1997, Mr. Williams submitted a petition to the Commissioner of Veterans Affairs requesting relief from the City's actions. On

August 19, 1997, the Commissioner served a Notice of and Order for Hearing by mail upon the City and Mr. Williams, and this proceeding ensued.

28. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

29. Any Finding more properly termed a Conclusion is hereby adopted as such.

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

### CONCLUSIONS

1. Under Minn. Stat. § 14.50 and § 197.481 (1996), the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised in this proceeding under the Veterans Preference Act, Minn. Stat. § 197.46 (1996).

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant, substantive and procedural requirements of statute and rule.

3. The City received timely and proper notice of the hearing herein.

4. Mr. Williams is an honorably discharged "veteran" within the meaning of Minn. Stat. § 197.447 (1996) and § 197.46 (1996) and is entitled to all of the protections and benefits set forth in the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 et seq. (1996).

5. The City is a political subdivision of the state within the meaning of Minn. Stat. § 197.46 (1996), and its personnel practices are therefore subject to the provisions of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46, et seq. (1996).

6. The Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 (1996) exempts "department heads" from the requirement that a veteran be given notice of a right to a hearing to establish incompetency or misconduct prior to termination of his or her employment. State ex rel. McGinnis v. Police Service Commission of Golden Valley, 91 N.W.2d 154, 161 at n. 10 (Minn. 1958); State ex rel. McOsker v. City Council, 208 N.W. 1005 (Minn. 1926). The City has the burden of establishing that Mr. Williams was a department head who is exempt from the notice requirement of the Veteran's Preference Act. Holmes v. Wabasha County, 402 N.W. 643 (Minn. App. 1987).

7. Mr. Williams had charge of the work done by the City's police department.

8. State law and the minimum qualifications for the City's chief of police required that the incumbent be licensed as a peace officer in the State of Minnesota pursuant to Minn. Stat. § 626.846, subd. 6 (1996) and Minn. R. pt. 6700.0700 (1995).

9. The work of the City's chief of police required a two-year college degree in law enforcement and a minimum of three years' experience as a full-time peace officer, neither of which requirements were applicable to other members of the City police department.

10. Under both state law and City Code, the City's chief of police was the highest law enforcement authority in the City's government.

11. In his capacity as the City's chief of police, Mr. Williams supervised all of the work of the City's police department.

12. During his tenure as the City's chief of police, the success of the City's police department depended on Mr. Williams' technique.

13. In his capacity as the City's chief of police, the employees of the City's police department were under Mr. Williams' direction.

14. In his capacity as the City's chief of police, Mr. Williams' duties differed materially from the duties of the other members of the police department.

15. In his capacity as the City's chief of police, Mr. Williams lacked the power to appoint police officers and to establish their compensation, but he had the power to discharge, demote, or otherwise discipline them.

16. During his tenure as the City's chief of police, Mr. Williams was a 'department head' for purposes of Minn. Stat. § 197.46 (1996), and the City was therefore exempt from the requirement of that statute to provide him with notice of a right to a hearing to establish incompetency or misconduct prior to termination of his employment.

17. These Conclusions are made for the reasons set out in the Memorandum which is attached to and incorporated by reference in these Conclusions.

14. Any Conclusion more properly termed a Finding is hereby adopted as such.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**RECOMMENDATION**

IT IS THE RECOMMENDATION of the Administrative Law Judge that the Petition of Lee W. Williams be DISMISSED.

Dated this \_\_\_\_\_ day of December 1997.

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BRUCE H. JOHNSON  
Administrative Law Judge

Reported: Tape Recorded (three tapes); Transcript Prepared.

**NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1 (1996), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

## MEMORANDUM

This proceeding was initiated by a Notice of and Order for Hearing dated August 19, 1997, issued by the Commissioner of Veterans Affairs pursuant to his authority under Minn. Stat. § 197.481 (1996). The Notice scheduled a hearing before an administrative law judge for the purpose of considering Mr. Williams' petition for relief under the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46, et seq. Specifically, Mr. Williams alleged that the City discharged him without first notifying him of his right under the Veterans Preference Act to request a hearing on cause for his dismissal.

Minn. Stat. § 197.46 (1996) provides in pertinent part:

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. [Emphasis supplied.]

It is important at the outset to understand the purpose and the limits of this proceeding. The issue before the Administrative Law Judge is whether the City was obliged to give Mr. Williams notice of his right to request the hearing specified by Minn. Stat. § 197.46 (1996) — a hearing at which the City would be required to show incompetency or misconduct on Mr. Williams' part before discharging him. If the Administrative Law Judge should find that such notice was required, however, the hearing on whether or not there was cause for his dismissal can only be conducted later and in a separate forum.<sup>1</sup>

The parties both agree that Mr. Williams is an honorably discharged veteran who would be entitled, unless otherwise exempt, to receive notice of an intent by the City to discharge him from his employment so that he could request the hearing on cause specified by Minn. Stat. § 197.46 (1996). Furthermore, the City concedes that it did not provide Mr. Williams with the notice specified by the

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<sup>1</sup> At the hearing, Mr. Williams argued that the merits of his dismissal — i.e., whether the City can establish misconduct or incompetency on his part — are at issue in this proceeding. As noted above, that is not the case. The only issue here is whether the City was required to give Mr. Smith *notice of his right* to a hearing on the merits before it discharged.

statute. Although Minn. Stat. § 197.46 requires a public body to give notice of its intent to terminate the public employment of an honorably discharged veteran, the statute goes on to provide for the following exemptions:

Nothing in section 197.455 or this section shall be construed to apply to the position of private secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding a strictly confidential relation to the appointing officer.<sup>2</sup>

The precise question here is whether Mr. Williams, in his capacity as the chief of police of the City of Truman, was the “head of a department” within the meaning of Minn. Stat. § 197.46. The burden of establishing that an honorably discharged veteran is a department head who is exempt from the notice requirement of the Veteran’s Preference Act is on the City. Minn. Stat. § 197.46 (1996); Holmes v. Wabasha County, 402 N.W. 643 (Minn. App. 1987).

### **Existence of a Deputy or Assistant Chief**

Mr. Williams cites State ex rel. Sprague v. Heise, 67 N.W. 907 (Minn. 1954) for the proposition that only heads of departments that are important enough to have a deputy should be exempt from the requirements of the Veterans Preference Act. In 67 N.W. at 912, the Minnesota Supreme Court said:

It must have been the intention of the legislature that "head of a department" meant head of some division of city government which was important enough to have a deputy and that only such departments could be excluded as a separate department.

However, in the same paragraph, the Court went on to say:

While cases may arise where a department has only one employee, who thereupon would be the head of the department, we believe that ordinarily, before anyone could be classified as a head of a department, the department must be sufficiently important as to include more than one employee. [Emphasis Supplied.]

Id. at 912. In order to give effect to both parts of this section of the Sprague opinion, the Supreme Court’s language about an organization needing a deputy to attain the status of a 'department' should be interpreted as meaning that there

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<sup>2</sup> Although the statute only appears to cover the chief deputy of the head of a department, the Minnesota Supreme Court has held that “inasmuch as the act excluded a first deputy of the head of a department it must follow that it also excludes the head of a department.” State ex rel. McGinnis v. Police Service Commission of Golden Valley, 91 N.W.2d 154, 161 at n. 10 (Minn. 1958), citing State ex rel. McOsker v. City Council, 208 N.W. 1005 (Minn. 1926).

should normally be a second person within an organization capable of conducting its activities in order for that organization to be considered a 'department' with a 'head.'

Here, although the City's police department had no formally appointed deputy or assistant chief, there was usually at least one other full-time, licensed peace officer on staff.<sup>3</sup> The evidence further established that the police department was organized to reflect varying levels of authority that descended from the chief through its full-time officers to its part-time officers, according to their respective seniority. (Tr. p. 132) In other words, the second full-time police officer was a subordinate of the chief of police but was a superior of all the part-time and reserve police officers. Additionally, Section 202.02 of the City Code provides that "[t]he council shall designate one of the police officers as acting chief, who shall have all the powers and duties of the chief during his absence or disability." (Exhibit E) So, as a practical matter, although the City's police department may not have had a deputy or assistant chief in name, there were mechanisms in place to cover the essential duties of such a position. In short, even if one were to read the Sprague opinion narrowly – that is, as requiring an organization to have a deputy in order for its manager to be considered a 'department head' – the substance of that requirement has been met here.

### **Size of the Police Department**

In asserting that he was not a 'department head', Mr. Williams appears to place considerable emphasis on what he considers to be the small size of the City of Truman and its police department. Although the size of the City's police department appears to have varied from time to time as vacancies occurred, the evidence indicates an intent on the part of the City to maintain a police force consisting of a chief, one other full-time police officer, three part-time police officers, and about six reserve police officers. (Exhibits E and F; Tr. pp. 185-186) Except for suggestions in Sprague, supra, that a 'department' should normally comprise more than one employee, Minnesota's appellate courts have never indicated that the size of a police department, or of any other municipal department, is an important factor in determining whether the leader of the department is a 'department head' within the meaning of the Veterans Preference Act. Rather, in State ex rel. McGinnis v. Police Service Commission of Golden Valley, 91 N.W.2d 154, 163 (Minn. 1958), the Minnesota Supreme Court discussed eight factors that it did consider to be important:

- (1) Does the alleged department head have charge of the work done by his department?

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<sup>3</sup> Although there may have been occasions when the department consisted only of a chief and one or more part-time police officers, the evidence suggests that such a state of affairs existed only when the City was in the process of filling the vacancy for a second full-time officer.

- (2) Does his work require technical, professional training?
- (3) Is he the highest authority at that level of government as to his official duties?
- (4) Does he supervise all of the work in his department?
- (5) Does the success of his department depend on his technique?
- (6) Are the employees in the department under his direction?
- (7) Are his duties more than merely different from other employees?
- (8) Does he have power to hire and fire subordinates?

There are some common threads that can be found in most of these factors. Rather than the size of a municipal organization, the inquiry should be directed at the extent to which the activities of the organization represent an essential municipal function, the extent of its leader's authority to exercise discretion in managing the activities of the organization, and whence the leader draws his or her authority to exercise discretion. Here, the size of the City's police department is more than sufficient to meet the Sprague test, and the inquiry must then turn to the eight factors set forth in the McGinnis test. Nothing in McGinnis suggests that all eight factors need to be present in order for a municipal employee to be considered a department. They are merely guides for assessing an employee's importance to a municipality, the extent and scope of his or her legal authority, and his or her ability to exercise discretion in carrying out duties.

### **Power to Hire and Fire Subordinates**

Mr. Williams argues that of all the McGinnis factors, the eighth factor – the power to hire and fire subordinates – should be accorded the greatest weight in determining who is a 'department head' for purposes of the Veterans Preference Act. This, however, ignores the context in which McGinnis came to the Minnesota Supreme Court. The case involved a finding by a district court that a village police chief was not a department head or chief deputy of a department head. Although the district court had failed to make findings of fact, it appeared from the record "that the court placed great weight on the fact that the chief of police could not hire or fire subordinates . . ." 91 N.W.2d at 162. The relief granted by the Supreme Court was remanded to the district court to reconsider its conclusion that the police chief was not a department head, with instructions to consider seven more factors. In so doing, the Supreme Court noted that "[t]hus there are many criteria which may be found as fact apart from the power to hire and fire subordinates." Id. at 163. In short, rather than indicating in



McGinnis that the power to hire and fire subordinates should be accorded the greatest weight in determining who is a 'department head,' the Supreme Court was actually cautioning lower courts against giving that factor too much weight.

Here, Mr. Williams contends that he lacked any power to change the employment status of his subordinates. He suggests that he was merely a "team leader" – a sort of "first among equals." But the evidence indicates that this assertion is not entirely correct. Section 202.01 of the City Code (Exhibit E) expressly gives the Truman City Council only the powers to appoint police officers and to determine their pay:

The compensation to be paid members of the police department shall be fixed by the council. Members of the department shall be appointed by the council.

The Code says nothing about any power of the City Council to discipline, demote, or fire police officers. Before making the assumption that the Code implicitly grants those powers to the City Council, one must also consider Section 202.02, which provides in part:

The chief of police shall have supervision and control of the police department and its members. \* \* \* He shall be responsible for the proper training and discipline of the members of the department. [Emphasis supplied.]

Demotion and firing are forms of discipline. Thus, a reasonable interpretation of the Truman City Code is that it empowers the City Council to hire and set the compensation of police officers but that it empowers the police chief to fire, demote, or otherwise discipline other members of the department. Moreover, even the City Council's power to appoint is not necessarily equivalent to a power to hire. The term 'appoint' denotes the end point of the hiring process. There are other stages of the hiring process that precede appointment – stages which the evidence here indicates were conducted and controlled by Mr. Williams, presumably under the general authority granted him by the City Code. While serving as chief of police, Mr. Williams solicited police officer applicants; he then interviewed, tested, and examined them and presented his selections to the City Council for appointment.<sup>4</sup> (Tr. pp. 203-207; Exhibits M, N, and O)

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<sup>4</sup> There is also evidence in the record that Mr. Williams effectively had the power to hire police officers and that City Council appointment of officers was regarded as a technical formality. In three cases, Mr. Williams hired part-time police officers or volunteer reserve officers and had them placed on the City payroll weeks, and in once case months, before they were presented to the City Council for approval and appointment. (Exhibits Q, R, and S) The City Council subsequently reprimanded Mr. Williams for ignoring the Council's role in personnel decisions. (Exhibit 4)

## Authority Over Work Done by the Department

The first McGinnis factor is whether the person alleged to be a department head has exercised authority over the work done by his department. The City claims that Mr. Williams did exercise that authority over the department's work and that he was the highest law enforcement authority in city government. Mr. Williams argues that the City Council was actually in charge of the police department and the highest law enforcement authority. Although not specifically discussed in McGinnis, other Minnesota Supreme Court cases indicate that the source of an alleged department head's authority to exercise discretionary control of the work within his or her organization is an important consideration. Specifically, authority fixed directly by law is more indicative of a department head than authority delegated from some other legally empowered body or individual. Sprague, supra, 67 N.W.2d at 911, quoting State ex rel. Michie v. Walleen, 241 N.W. 318 (Minn. 1932). Here, the police chief's authority to participate in the hiring, firing and disciplinary processes has been discussed above. His more general authority to control the work of the police department is set forth in Section 202.02 of the City Code:

The chief of police shall have supervision and control of the police department and its members. He shall be responsible to the council for law enforcement and for property of the city used by the department. He shall be responsible for the proper training and discipline of the members of the department. He shall be responsible for the keeping of adequate records and he shall report to the council on the needs of the department and its work. Every member of the police department subordinate to the chief shall obey instructions of the chief and any superior officer. [Emphasis supplied.]

Mr. Williams therefore had the direct legal authority to take virtually complete charge of the work done by his department. The position description that was attached as an exhibit to Mr. Williams' employment agreement (Exhibit A-2) was more specific in its listing of his powers and duties.<sup>5</sup> The existence of the City Code provision indicates that Mr. Williams had the legal authority and discretion to exercise virtually plenary control over the work of his department. The position description attached to his employment agreement amounted to a statement of

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<sup>5</sup> Mr. Williams denied that a copy of that job description had been attached to his copy of his employment agreement, and he testified that he had not been represented by counsel when he entered into that agreement. Nevertheless, a preponderance of the evidence established that he had received a copy of the position description when he requested an application for the job. (Tr. pp. 57-59) Section 1. of his employment agreement stated that the City agreed to employ him "to perform the functions and duties specified in the job specifications attached hereto as Exhibit A . . ." (Exhibit A-1) He therefore clearly had implied notice that the position description was being incorporated into his employment agreement. Finally, the City Clerk, Mr. Rohman, testified that the position description had, in fact, been attached to Mr. Williams' employment agreement at the time he signed it. (Tr. pp. 53-54)

expectations by the City as to some of the ways Mr. Williams would be exercising his discretion to control the department's work. The only issue that remains to be considered is whether he met those expectations and did, in fact, exercise control over the department's work while he was chief.

Control is normally exercised through directives and instructions, whether written or verbal. Though relatively little evidence was adduced at the hearing concerning any verbal instructions either Mr. Williams or his predecessor may have given to other police officers, a great deal of evidence was elicited about the written instructions prepared by both Mr. Williams and Mr. Cummins. The department's standard operating procedures ("SOPs") were standing instructions by the chief of police to the remainder of the police force and represent a primary mechanism for the chief to exercise control over the department's work. (Exhibit H) SOP #118 reaffirms that "[i]t is the authority of the Chief of Police to rescind, alter, modify or temporarily suspend any of the listed SOPs covered in this manual (sic)." The remaining 117 standard operating procedures set forth, often in very minute detail, how the City's police officers are to perform their work in a variety of situations. Between 20% and 30% of those standard operating procedures were created and promulgated by Mr. Williams himself. (Tr. pp. 129-130) Similarly, Mr. Williams exercised his discretion to control the work of his department by issuing internal memoranda. (Exhibit I) One such memorandum (Exhibit I-20) not only authorized, but required, off-duty officers to take police vehicles home with them and to drive them when pursuing personal business in and around the City of Truman. This alone was a significant exercise of the discretion to control.

In alleging his lack of control, Mr. Williams advanced three main contentions – that he was at all times subject to the strict control of the City Council, that he was required to attend Council meetings and update the Council on police matters, and that he did not set the daily schedule of his employees. The second and third contentions lack any merit. As to the second contention, Mr. Williams was only expected to attend every other meeting of the Council, and even that expected attendance at Council meetings was irregular because of his schedule. (Tr. p. 113) The Administrative Law Judge also takes official notice of the fact that it is not uncommon even for heads of large departments in cities of the first class to be expected to attend city council meetings and report on the activities of their departments. In support of his third contention, Mr. Williams testified that he did not set the daily schedules of the City's other police officers. (Tr. p. 172) But what can be reasonably inferred from his other testimony is that he specified the hours that he himself would serve on patrol duty; he then allowed Officer Schumacher, the other full-time police officer, to decide which of the remaining hours of patrol duty he would like to work. Finally, the part-time officers were allowed to decide among themselves which hours they would work. (Id.) Delegating discretion to subordinates is as much an act of control as exercising discretion directly.

Mr. Williams' contention that the City's police department was at all times strictly controlled by the City Council is borne out neither by the City Code nor by the evidence. There was evidence that the City Council passed on to the chief some citizen requests and complaints (Exhibit 6), but this is a common practice of legislative bodies and cannot be considered to be control. There was also evidence that the City Council sought on occasions to exercise fiscal oversight over the department – for example, when the department exceeded its budget for cellular telephone calls (Exhibit 5). But as legislative bodies, city councils commonly exercise fiscal oversight over executive departments. In the two years in which Mr. Williams served as the City's police chief, there appears to have been only one occasion where the City Council challenged his policies. In a memorandum dated October 1, 1996, the City Council demanded that he eliminate the department's S.W.A.T. team and take steps to limit access to the department's M-16 automatic weapons, that the police officer on duty perform his functions in a way that was more visible to the public, and that the police department conduct regular business security checks.<sup>6</sup> (Exhibit 4) It is clear that Mr. Williams had established the policies about which the Council was complaining – just as he had established dozens of other department policies. (See Exhibits, H, I, and J) Disagreement over three policies over the course of two years falls far short of establishing that the City Council exercised effective control over police department on a continuing basis.

### **Technical and Professional Training; Highest Authority**

There is a relationship between the second and third McGinnis factors. The second factor to be considered is whether the work of the person claimed to be a department head requires technical, professional training. The third seeks to determine whether that person is the highest authority at that level of government as to his official duties. Mr. Williams claims that he did not have any technical or professional training beyond that required to be a patrol officer. On the other hand, the City correctly points out that the minimum qualifications for the chief of police (Exhibit A-2) exceed the minimum qualifications for being a patrol officer by incorporating the additional requirements of a two-year degree in law enforcement and three years of prior full-time experience as a peace officer.<sup>7</sup> Both arguments, however, miss a major point. Mr. Williams does not contend that some other member of the City's police department functioned as the

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<sup>6</sup> The other subject discussed in that memorandum pertained to matters that were properly within the scope of the City Council's authority and functions—namely, fiscal oversight of the department's budget, a demand that Mr. Williams comply with the City Code by submitting the names of prospective part-time and reserve police officers to the Council for approval and appointment, and a request that the department respond to complaints about its communications with other law enforcement agencies and officials.

<sup>7</sup> In these two respects, the City's minimum qualifications for its police chief also exceed the POST Board's minimum selection standards for licensure as a peace officer in the State of Minnesota. Minn. R. pt. 6700.0700 (1995)

'department head' but that the City Council functioned in that capacity. Minn. Stat. § 626.846, subd. 6 (1996) provides:

Subd. 6. A person seeking election to the office of sheriff must be licensed as a peace officer. A person seeking appointment to the office of sheriff, or seeking appointment to the position of chief law enforcement officer, as defined by the rules of the board, after June 30, 1987, must be licensed or eligible to be licensed as a peace officer. The person shall submit proof of peace officer licensure or eligibility as part of the application for office. A person elected or appointed to the office of sheriff or the position of chief law enforcement officer shall be licensed as a peace officer during the person's term of office or employment.

There may be cities in Minnesota that by charter or ordinance have vested law enforcement authority in the city council or some elected official. There was absolutely no evidence in the record to suggest that the City of Truman is such a city. To the contrary, Section 202.02 of the City Code clearly designates a chief of police as the City's chief law enforcement officer. Having chosen that course, Minn. Stat. § 626.846, subd. 6 (1996) compels the City to choose as its chief Law enforcement officer someone who is "licensed as a peace officer during the term of office or employment." Since there is no evidence to suggest that some other member of the City's police department functioned as chief law enforcement, the conclusion that Mr. Williams was the highest law enforcement authority in the City is inescapable. In short, the third McGinnis factor – whether the chief of police was the highest law enforcement authority in the City's government – has also been met here. 91 N.W.2d at 163. The fact that the City Council, which is a legislative body, may from time to time exercise oversight over some aspects of the Department's activities, particularly financial matters, does not alter the result. That is true of legislative bodies at all levels of government.

### **Supervision of Work and Direction of Employees**

The fourth and sixth McGinnis factors contain some common threads:

(4) Does he supervise all of the work in his department?

\* \* \*

(6) Are the employees in the department under his direction?

The latter factor is aimed primarily at determining where authority to direct employees in the performance of the duties resides; the former is aimed at determining whether that authority was, in fact, exercised in the particular case. Section 202.02 of the City Code grants the chief of police the authority to direct employees of the department:

Every member of the department subordinate to the chief shall obey the instructions of the chief and any superior officer.

The position description attached to Mr. Williams' employment agreement (Exhibit A-2) sets forth the City's expectations as to the matters with respect to which Mr. Williams would provide other members of the department with direction and supervision. The department's standard operating procedures (Exhibit H) and internal memoranda (Exhibit I) indicate that Mr. Williams did, in fact, exercise his authority to direct other members of the department in performance of their duties, often in considerable detail. And Mr. Cummins testified that when he was the City's chief of police, he did, in fact, perform all the duties and responsibilities that are listed in Mr. Williams' job description. (Tr. p. 132) It was the testimony of Obe Oren, a member of the Truman City Council, that the City had hired Mr. Williams "to head the department and to run basically the law enforcement in the community." (Tr. p. 113) He also testified that the City Council did not involve itself with supervision of the City's police officers.<sup>8</sup> (Tr. p. 114) Against all of this evidence, Mr. Williams' contention that he was a mere "team leader" and conduit for direct supervision and control of the police department by the City Council rings hollow. As noted above, the fact that Mr. Williams may not have had direct control of the daily schedules of other officers resulted from his delegation to them of discretion the City Code granted to him and not from his lack of ability to control their schedules.

### **Dependence of Success of the Department**

The fifth McGinnis factor is whether the success of the department depends on the incumbent's technique. Although Minnesota's appellate courts have not indicated what the meaning of the term "technique" is in this context, the term clearly embraces an incumbent's leadership qualities and abilities, as well as initiative. Mr. Williams argues that the department's success only marginally depended on his own efforts, but rather was dependent primarily on the actions of the City Council. Nevertheless, in a letter dated June 17, 1997, directed to the City Council (Exhibit V), Mr. Williams summarized a number of successes that he inferred were due mainly to his own efforts:

Since coming to Truman almost two years ago, I feel that together we have accomplished a great deal. The police department building was moved and upgraded. Departmental equipment was replaced and modernized. Before I became chief TPD did not have the capability to lift a single fingerprint. Now, we are capable of investigating a homicide scene. The quality of officers, in my opinion, has also improved. Now our part-time officers are better

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<sup>8</sup> To the contrary, Exhibits M, N, O, Q, R, and S all suggest strongly that the City Council was not even involved actively in the hiring process for police officers.

trained and equipped than full-time officers in larger cities. Through Operation Northstar and with your acquiescence almost \$300,000.00 worth of vehicles and equipment have been gathered for city usage. Also, at the time of this writing there are *no* drugs being sold in or near Truman. I know of no other city that can make that boast. However, I am most proud of one issue, public confidence has been restored in the police department. When a Truman resident calls for assistance he or she knows that a well trained, well equipped officer will respond, and that whatever the situation may be or whoever it may involve, the problem will be resolved in a fair and impartial manner.

You may have heard about the latest buzzword in law enforcement circles—*Community Oriented Policing (COP)*. Many jurisdictions look at this style of law enforcement as if it is a new program that they should implement. Some even have outside trainers come in to teach their officers how to employ Community Oriented Policing Strategies. What COP is all about is making the officers accessible to the public and getting the public involved in the department. To date, not only are we the only area department with pagers, but we are the only department that I am aware of that publishes these numbers in the newspaper thus making our officers available 24-hours a day to any Truman Resident.

The Administrative Law Judge accepts at face value the fact that the successes described above occurred while Mr. Williams was serving as the City's chief of police and that most, if not all of them, were the result of his initiatives. In short, by Mr. Williams' own admission, the fifth McGinnis factor is present here.

### **Differences in Duties**

The seventh McGinnis factor, and last to be considered, is whether Mr. Williams' duties were merely different from those of the department's other employees. Mr. Williams' contention that his duties were not materially different is predicated almost exclusively on his own testimony that 75% of his time was consumed with patrol duty. (Tr. p. 165) In other testimony, Mr. Williams testified that his normal 40-hour work week consisted of 10-hour patrol shifts three days a week and a fourth 10-hour day that was to be devoted to administrative duties.<sup>9</sup> (Id.) On the other hand, on June 17, 1997, Mr. Williams wrote a letter to the City Council (Exhibit V) in which he indicated that he routinely worked a large number of hours per week beyond those four 10-hour shifts:

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<sup>9</sup> Mr. Williams also testified that this fourth shift sometimes was partially spent on patrol. (Tr. p. 165) There was, however, no evidence to indicate how frequently that happened, or to what extent it was related to vacancies within the department, vacations, etc.

What must be kept in mind is that this schedule is the *patrol schedule*, or in other words a schedule of both when Mike works and when I am responsible for covering a uniformed patrol shift. I work a huge number of hours outside this schedule. My work schedule is simply not just the patrol schedule as this schedule is only when I am responsible to be uniformed and answering calls for service. The vast majority of my work entails work outside this schedule both uniformed and in regular clothes. [Emphasis in original.]

Mr. Cummins testified that he spent 40% of his time on non-patrol duties when he was the City's police chief. The department's standard operating procedures (Exhibit H), internal memoranda (Exhibit I), annual budget submission (Exhibit L), and monthly reports to the City Council of the department's activities (Exhibit K) all indicate that Mr. Williams spent a considerable amount of time each month on administrative and managerial duties that were not required of other members of the department. In short, even though Mr. Williams may have spent between 60% and 75% of his normal 40-hour work week on patrol duties that were similar to other members of the police department, he spent a large amount of other time performing necessary functions and duties that were peculiar to the chief of police.<sup>10</sup> In summary, the City established by a preponderance of the evidence that there was a material difference between Mr. Williams' duties as chief of police and the duties of the other officers in the department.

It is for the reasons set forth above that the Administrative Law Judge has concluded that while employed by the City of Truman, Mr. Williams served as a 'department head' within the meaning of Minn. Stat. § 197.46 (1996) and that the City was therefore exempt from the notice requirements of the Veterans Preference Act when it terminated Mr. Williams' employment.

B. H. J.

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<sup>10</sup> From the outset, the parties recognized and expected that Mr. Williams would be spending a great deal of time outside of normal working hours performing administrative and managerial functions associated with the office of chief of police. Section 8 of his employment agreement (Exhibit A-1) provided in part:

**Section 8      Hours of Work**

It is recognized that the Employee must devote a great deal of time outside the normal office hours to the business of the City, and to that end the Employee will be allowed to take compensatory time off as he shall deem appropriate during normal working hours.