

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Deane L. Johnson,
Petitioner

vs.

Pipestone County,
Respondent

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

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on August 2, 2001, at the Pipestone County Courthouse, Pipestone, Minnesota.

Howard L. Bolter, of the firm of Borkon, Ramstead, Mariani, Fishman & Carp, 608 Second Avenue South, Suite 485, Minneapolis, MN 55402-1940 appeared on behalf of Deane L. Johnson ("Petitioner" or "Johnson").

Richard A. Beens, of the firm of Felhaber, Larson, Fenlon & Vogt, 601 Second Avenue South, Suite 4200, Minneapolis, MN 55402-4302, appeared on behalf of Pipestone County (hereinafter "Respondent" or "County").

The hearing concluded in less than half a day, and the record closed on August 13, 2001, upon receipt of Memoranda from both sides.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after 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 Jeffrey L. Olson, Commissioner of the Minnesota Department of Veterans Affairs, 208C Veterans Service Building, 20 West 12th Street, St. Paul, MN 55155-2079 to ascertain the procedure.

STATEMENT OF ISSUE

Whether Deane Johnson was a department head, and therefore exempt from the provisions of the Veterans Preference Act, at the time that he was discharged from the position of Director of Family Services for Pipestone County, on or about March 27, 2001.

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

FINDINGS OF FACT

1. Deane L. Johnson is approximately 52 years of age.
2. He served in the United States Army during the Vietnam War, received the Purple Heart, and was honorably discharged in 1970. He received a Bachelor Degree in Sociology, and then began working for the South Dakota Department of Social Services in 1975. He held various positions in South Dakota in the social work field between 1975 and 1992.
3. On February 19, 1992, Johnson was hired by Pipestone County as the Director of Pipestone County Family Services Agency, a post he held for just over nine years, until March 27, 2001, when he was discharged.
4. At the time of his discharge, Johnson was not offered a Veterans Preference hearing. On May 7, 2001, Johnson filed a Petition for Relief under the Veterans Preference Act with the Minnesota Department of Veterans Affairs. On May 22, 2001, Commissioner Jeffrey L. Olson issued a Notice of Petition and Order for Hearing, setting the hearing in this matter for August 2, 2001 in Pipestone. Both parties agree that there were no missed deadlines or other procedural defects that might deprive the Administrative Law Judge and Commissioner of jurisdiction.^[1]
5. County government in Pipestone County is under the control of the Pipestone County Board of Commissioners. There are approximately 15 departments headed up by a department head. These include the highway department, the auditor, the treasurer, the assessor, the sheriff, the family services agency (informally known as the welfare department), and a variety of others.^[2]
6. Located organizationally between the County Board of Commissioners and the Family Services Agency is the County Family Services Board (informally known as the Welfare board). This Board is made up of all five county commissioners plus two public members appointed by the county commissioners. This Board has its own set of committees and procedures. It meets once a month, in contrast to the County Board which meets three times per month. The Family Services Board resolves many of the

issues for the Family Services Agency which the County Board resolves for the other county agencies.^[3]

7. Within the Family Services Agency, there is one Director (Deane Johnson) and there are three supervisors who serve under the Director. These are the social services supervisor, the financial assistance supervisor, and the collections and accounting supervisor. Each of these supervises roughly five employees.^[4] The three supervisors report to Johnson.

8. Throughout the time that Johnson served as director of the agency, his title was "Director". He received an annual salary (as opposed to an hourly wage) and was exempt from the Fair Labor Standards Act requirements. His job description^[5] specified the following items:

Nature of Work: Position involves administering social services programs for Pipestone County. Duties include fiscal management, staff supervision, program analysis and reporting requirements. Work is performed under the administrative supervision of the local Welfare board and the technical supervision of the State Department of Human Services, and is reviewed and evaluated through observation of results.

Relationships: Reports to County Welfare board and County Board of Commissioners as necessary or required. Reports to State and Federal governments as requested/mandated.

Specific duties/responsibilities: Includes, but not limited to the following:

Oversees the administration, interpretation and integration of all social services programs as mandated by state/federal laws and county policies. Formulates and implements agency policies to meet legislated/mandated services and client and staff needs. Analyzes and evaluates the effectiveness of policies through consultations and meetings.

Develops annual budget and projects future program costs for presentation to Board of Commissioners. Implements policies consistent with approved budget. Ensures agency representation in negotiations with service providers to obtain services within budget guidelines.

Provides technical leadership for the County Welfare board.
Supervises the preparation of monthly meeting agendas.

Oversees the supervision of department personnel. Evaluates staff needs and recommends personnel changes. Oversees the recruitment, hiring, training and evaluation of staff in accordance with MN Merit System rules.

Confers with County Attorney's staff regarding legal issues of concern to the agency.

Oversees the preparation of statistical, financial, and activity reports for county, state, and federal authorities.

Serves as community resources person for the agency to explain programs and services, to attend public and professional meetings related to social services programs.

Observes prescribed health and safety precautions in the performance of all tasks.

Performs other related work as required.

McGinnis Factors

9. In 1958, the Minnesota Supreme Court had occasion to summarize the reasoning in a number of previous cases into a list of eight factors to be considered in determining whether or not an individual is, in fact, a “department head” within the meaning of the Veterans Preference Act.^[6] Those factors, sometimes referred to as the “McGinnis Factors”, provide as follows:

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

These factors have been used in several cases since their presentation in 1958, the most recent reported case being in 1989.^[7] They are the definitive test for determining whether or not a person serves as a “department head” for purposes of the Veterans Preference Act. For that reason, the practices of Pipestone County in relation to Deane Johnson will be examined using those considerations.

- a. Did Deane Johnson have charge of the work done by the Family Service Agency?

10. Johnson made the day-to-day decisions about what work got priority and who handled what work.^[8] Johnson had authority to approve routine requests for vacation and sick leave, but he had to get welfare board approval for major personnel changes, such as reallocating a person from one function in the agency to another.^[9]

- b. Did Deane Johnson’s work require technical, professional training?

11. When Johnson was hired, the basic qualifications for his job included a high school diploma/GED. They also included a bachelor’s degree in social work, business administration or a related field. They also required a minimum of five years experience in the public/private social services field involving income maintenance, social services, or physical operations with increasing levels of responsibility. There was a preference for candidates with administrative experience, including budgeting, personnel supervision, and program management, with preference being given to persons with social services administration experience. Finally, the county preferred

that applicants have knowledge of methods, principles, and fiscal management of public welfare administration.^[10]

12. Much of the Agency's work was governed by rules promulgated by the federal and state governments. An important part of the job was making sure the agency was in compliance with those rules, and to the extent there was discretion, interpreting them.^[11] Johnson performed these tasks.

c. Was Deane Johnson the highest authority at that level of government as to his official duties?

13. Johnson made day-to-day decisions what work was to be done and who was to do it. He interpreted the state and federal regulations. However, the welfare board set policy.^[12]

14. Johnson appeared at all Welfare board meetings, as well as those County Board meetings that affected the agency. He was the only staff person who regularly attending these meetings, except for an agency staff person who was there to take minutes of the meetings.^[13] Johnson was the spokesperson for the agency at the Welfare board meetings, and often (but not always) presented the agency's position to the board.

d. Did Johnson supervise all of the work in his department?

15. Johnson was the only person who could be said to supervise all of the work in the department, but he did this through three supervisors, who were responsible for three subject-matter areas of the agency. The actual "line workers" reported to the three supervisors, but the three supervisors reported to Johnson.^[14]

e. Did the success of the agency depend on Johnson's technique?

16. The mission of the agency was:

... to help citizens in a cost effective manner consistent with the laws and rules that apply to [the agency].^[15]

Although he was restricted by the limitations imposed by federal and state rules, as well as welfare board policies, within those restrictions Johnson did deploy the personnel of the agency and give them direction. To the extent that his choices, deployment or direction were wrong or inaccurate, the success of the agency was affected.^[16]

f. Were the employees in the agency under Johnson's direction?

17. Johnson was clearly the day-to-day "boss" of the department. He issued a memorandum which was given to new employees which set forth his view of the agency

and how new employees should behave in order to be successful there.^[17] That memorandum included the following information:

#13. This agency functions because of rules – mostly mine. Learn them. Do them and you will be fine. When you have questions ask your immediate supervisor for clarification and follow their hard-earned advice.

#15. You will find that I approach problems from a military perspective. The agency objective is to achieve the mission. The mission is to help citizens in a cost-effective manner consistent with the laws and rules that apply to us. The highest compliment from me is that “you have done the good soldier (thing) for the good of the agency.”

18. Johnson took pride in maintaining a military-style command system in his department.^[18] On several occasions, however, this military-style approach caused staff grumbling, and some employees went to County Commissioners with complaints about Johnson.^[19] Except as noted below, the County Board and the Welfare board both abstained from taking official action on these complaints, but some individual board members listened to the staff complaints, encouraged staff members to tell them what was happening in the agency, and questioned Johnson about them.

19. There were two incidents where a board acted officially on these staff complaints. The first had to do with a performance evaluation, and the second had to do with Johnson’s termination. In the case of the performance evaluation, in January of 1999, Johnson completed a performance evaluation on one of his supervisors, named Linda Halbur. Johnson recommended to the Welfare board that she not receive any merit step increase. One of the commissioners, who had been receptive to staff criticisms of Johnson, objected to the performance evaluation, and insisted that Johnson strike a reference to “insubordination” in her review and that he give Halbur a merit increase. The board, at that time, had only six members. The vote was three to three, and the motion was tabled until the next board meeting, when Johnson’s recommendation was upheld with a four to three vote.^[20] The second official action that came as a result of the staff criticisms was Johnson’s termination in March of 2001. Other than those two instances, neither board took any official action that would negate the idea that the employees were under Johnson’s control.

20. Johnson believed that two of the county commissioners were attempting to “micro manage” the agency by listening to staff complaints and then questioning Johnson about them.^[21] He was also concerned that at least one of these county commissioners was attempting to monitor the hours he devoted to his work.^[22] While the record does contain some evidence to support his concern about “micro management” it does not contain sufficient evidence to validate his belief this “micro management” had so undermined his authority that he was no longer directing the agency’s employees. Johnson’s military training and belief in the military-style of management caused him to be sensitive and offended by “his” employees going around

his back, and causing commissioners to questioning him about matters. To him, these actions were more serious than the record shows them to be.

g. Were Johnson's duties more than merely different from other employees?

21. Like all other department heads, Johnson was charged with preparing a budget for his agency. He would present his proposed budget to the county board, and they would ultimately determine how much could be spent. It was common for the county board to cut his proposed budget, but there is no evidence to suggest his budget was cut any more than other agency's budgets were cut.

22. Despite the fact that the county board had approved his budget, Johnson was not free to spend money however he chose. A major restriction on his ability to spend money was a limitation on any capital purchases over a small amount (which began at \$100 but went up informally over the years). This restriction on capital spending meant, for example, that if Johnson wanted to lease a new copying machine, he had to get board approval.^[23] One time he went ahead and bought five new computers without prior approval, and this engendered a "spirited discussion" at a board meeting over his spending authority. Ultimately, his purchase of the computers was allowed to stand, but the debate reminded him that he was not free to make capital purchases without board approval.^[24]

23. Johnson also was not allowed to enter into contracts without board approval. The agency had a number of contracts with outside providers for detox services, home based health care services, etc. Johnson would negotiate the terms of the contract, and then bring it to the welfare board for the board's approval.

24. Johnson did not carry a traditional "case load" himself. Instead, he administered the agency. He worked on budgets, fielded complaints from the public, interpreted rules and policies handed down by the state and federal governments, and dealt with personnel matters. Almost all of these were done by him alone, although some were done by his three supervisors. There was no one else in the agency who dealt with these matters. As noted earlier, he attended all Welfare board meetings and some county board meetings.

h. Did Johnson have the power to hire and fire subordinates?

25. There have been no firings from the agency during Johnson's tenure as director. If there were to be a firing, however, Johnson would make a recommendation to the welfare board, which would make the ultimate decision of whether to fire the individual. The only exception to this would be if the particular situation required immediate suspension or termination, in which case Johnson would be authorized to take the action, and then immediately report it to the welfare board and seeks its ratification of his action.^[25]

26. With regard to hiring, there have been approximately 25 hires made during Johnson's tenure, and they have all followed the same pattern. Johnson (or the appropriate supervisor) and the county personnel coordinator would review the job description to be sure it was still current, the personnel coordinator would then advertise the position, screen the applicants, and deliver the applications to Johnson. The supervisor, and sometimes Johnson as well, would then interview candidates, and decide on a list of two or three "finalists". Johnson would then make a recommendation to the Welfare board and, after they had approved his choice, he would hire the person.^[26] Johnson had the effective power to hire people because the Welfare board never rejected one of his recommendations. There is no question, however, that the welfare board had the authority to reject a recommendation if it chose to.^[27]

27. Johnson has asked for additional staff on several occasions, but the Board has only allowed to increase the total complement of his department by one person during his tenure.

28. All performance evaluations and pay increases (other than automatic pay increases) are subject to the approval of the Welfare board. As noted earlier in connection with the case of Linda Halbur, the county board had the ultimate authority to grant or deny a pay raise. However, that was the only case cited where Johnson's recommendation was questioned.^[28]

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

CONCLUSIONS

1. Under Minn. Stat. §14.50 and 197.481, 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.

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. The County received timely and proper of the notice herein, and has consented to the Department's jurisdiction.

3. Deane Johnson is an honorably discharged veteran within the meaning of Minn. Stat. §197.447 and §197.46, and is therefore entitled to all the protections and benefits afforded by the Veterans Preference Act, Minn. Stat. §§197.46 *et.sic*.

4. Pipestone County is a political subdivision of the State within the meaning of Minn. Stat. §197.46 and its personnel practices are therefore subject to the provisions of the Minnesota Veterans Preference Act.

5. The Minnesota Preference Act 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 County has the burden of establishing that Mr. Johnson was a department head who is exempt from those requirements of the Act. *Holmes v. Wabasha County*, 402 N.W.2d. 643 (Minn. App. 1987).

6. During his tenure as the county’s Family Services Agency Director, Mr. Johnson was a “department head” for purposes of Minn. Stat. §197.46, and the County was therefore exempt from the requirement from that statute to provide him with notice of a right to a hearing to establish incompetency or misconduct prior to termination of his employment.

7. These conclusions are made for the reasons set out in the Findings and Memorandum which is attached to and incorporated by reference in these conclusions. Any conclusion more properly deemed 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 Deane L. Johnson be DISMISSED.

Dated this __21st__ day of September, 2001.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Debra M. Boe, Benchmark Reporting Agency.

NOTICE

Under 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

The Administrative Law Judge has determined that Deane Johnson was a “department head” because of the *McGinnis* factors. It should be noted, however, that the way that the *McGinnis* court laid out those factors does not lead to an easy grouping of facts under each factor. Instead, it is necessary to grasp all of the facts, and then apply the *McGinnis* factors to them. This is because many of the facts overlap from one *McGinnis* factor to another. The Administrative Law Judge decided that it would be unduly repetitive to list all of the facts that need to be considered for any one *McGinnis* factor. Therefore, readers should consider all of the facts when looking at an individual *McGinnis* factor, not just the ones that are set forth in the Findings under that particular factor.

The fact that some of Johnson's employees went behind his back and complained to county commissioners about his management style, and the fact that some of those commissioners encouraged that kind of communication and acted upon it, does not mean that Deane Johnson was not a “department head”. There is no question but that Johnson was offended by that kind of behavior and there is no question that he did not have the “thick skin” needed to deal with it. But that fact is that only once did this conflict come to a vote before the Welfare board (when Johnson’s performance review of Linda Halbur was questioned) and, on that occasion, the Board voted to uphold Johnson’s recommendation. That does not support Johnson’s belief that his authority had been so undermined that he could no longer be considered a department head.

The County Board, and the Welfare board, did keep a tight leash on Johnson in connection with personnel practices and budgetary expenditures, but there is little factual support for the proposition that their control was so great that Johnson was not able to function as a department head. Applying the *McGinnis* factors to the facts of this case leads to the conclusion that Johnson was, in fact, a department head.

A.W.K.

^[1] Opening Statement of Howard Bolten, Tr. 8.

^[2] Tr. 16-17.

^[3] *Id.* at 36-38.

^[4] *Id.* at 17-18.

^[5] Exhibit 1. This is a revised job description, drafted in 1996 by the County Personnel Coordinator with input from Johnson. It is substantially similar to the version in force at the time of his hiring in 1992. TR. 15-16 and 62.

^[6] *State ex rel. McGinnis v. Police Civil Service Commission of Golden Valley*, 253 Minn. 62, 75, 91 N.W.2d 154, 163 (1958).

^[7] *Schleck v. State*, 442 N.W.2d 359 (Minn. App. 1989).

^[8] Tr. 25, 40, and 45.

^[9] Tr. 45 and 94.

^[10] Ex. 1.

^[11] Tr. 22 and 47-48.

^[12] Tr. 52.

^[13] Tr. 39-40.

- [\[14\]](#) Tr. 22 and 25.
- [\[15\]](#) Ex. 3.
- [\[16\]](#) Tr. 88.
- [\[17\]](#) Ex. 3.
- [\[18\]](#) Tr. 84.
- [\[19\]](#) Tr. 63 and 65.
- [\[20\]](#) Tr. 64-65.
- [\[21\]](#) Tr. 63-64.
- [\[22\]](#) Tinklenberg Depo. at 14.
- [\[23\]](#) Tr. 58; Tinklenberg Depo. at 12.
- [\[24\]](#) Tr. 71.
- [\[25\]](#) Tr. 64-65; Pribyl Depo. at 27-28.
- [\[26\]](#) Tr. 66-67.
- [\[27\]](#) Tr. 29 and 42-43.
- [\[28\]](#) Baden Depo. at 22-23.