

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

In the Matter of Mark C. Hansen,
Petitioner,

vs.

Grand Rapids Public Utilities
Commission,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDED DECISION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:00 a.m. on January 6, 2004 at the Office of Administrative Hearings in Minneapolis, MN. The OAH record closed upon the submission of the final written brief on February 24, 2004.

Teresa L. Joppa, Staff Attorney, Minnesota Council No. 65, American Federation of State, County and Municipal Employees, 3911 Seventh Street South, Moorhead, MN 56560, appeared representing the Petitioner, Mark C. Hansen. Steven C. Fecker, Esq., of the firm of Johnson, Killen & Seiler, P.A., 230 West Superior Street, Suite 800, Duluth, MN 55802, represented the Grand Rapids Public Utilities Commission.

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 Clint Bucher, Dept. of Veterans Affairs, 206c Veterans Service Bldg., 20 West 12th Street, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

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.

STATEMENT OF ISSUE

The issue in this case is whether or not the Grand Rapids Public Utilities Commission reduced the Petitioner's work hours in good faith and for a legitimate purpose.

The Administrative Law Judge concludes that the Petitioner's work hours were reduced in good faith and for a legitimate purpose.

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

FINDINGS OF FACT

1. The Petitioner is an honorably discharged veteran.
2. The Grand Rapids Public Utilities Commission is a political subdivision of the State of Minnesota.
3. The Petitioner was hired as a wastewater plant operator at the Wastewater Treatment Plant in Grand Rapids on September 9, 1998. The plant, along with a water facility and an electric distribution facility, is operated by the Grand Rapids PUC. Each of the three areas is supervised by a department manager. The department managers report to the PUC's general manager.
4. A wastewater plant operator is responsible for the operation of the processing equipment in the plant including the presses, the pumps and the blowers. This job duty occupies approximately 80% of the work day. The operator also maintains daily records, collects samples, interprets lab data and does some limited testing.^[1]
5. Mr. Hansen holds a two-year AAS Degree in Wastewater Treatment Technology from Vermillion Community College. He also holds a Minnesota Class C Wastewater Certificate.
6. Before being employed by the Grand Rapids PUC, Mr. Hansen worked in a similar position for the New Ulm Public Utilities Commission and for a private utility, PSG. During that employment he completed regular reports, did some lab testing and assisted on the testing of "unknowns" sent to the lab.
7. The Wastewater Treatment Plant also employs truck drivers who haul sludge from the plant and were responsible for hauling anywhere from 12 to 30 truckloads during a 12 hour shift when the treatment plant was running at full capacity.

8. Prior to September 1, 2003, the Wastewater Plant employed four operators (including Mr. Hansen) and four truck drivers. Each crew consists of an operator and a truck driver. Each crew worked 12-hour shifts with four days on followed by four days off. Two of the four shifts were day shifts (7:00 a.m. to 7:00 p.m.) and two were night shifts (7:00 p.m. to 7:00 a.m.). The operators would work four weeks of 36 hours, followed by four weeks of 48 hours. They averaged 40 hours per week.^[2]

9. Of the four operators, Mr. Hansen was the least senior. One other operator is a veteran.

10. Grand Rapids is a city of approximately eight to nine thousand people. The treatment plant handles wastewater from the City but also from the Blandin Paper Company, which accounts for approximately 80% of the wastewater that the plant treats.

11. In January of 2003 Blandin shut down two of the four paper machines at its facility. As a result the wastewater directed to the treatment plant was reduced from approximately 12 million gallons to 5 to 6 million gallons. Blandin laid off approximately 300 employees when the two machines were shut down. Blandin then contacted the PUC to find out what reduction in costs it would receive from the PUC.

12. The general manager of the PUC, Anthony T. Ward, prepared a preliminary reorganization plan dated April 8, 2003.^[3] Reorganization had been discussed by management for some time. The plan recommended, in part, that a truck driver and an operator position at the wastewater treatment plant be eliminated and that those two employees be assigned to an extra crew pool to fill in for truck drivers and operators, so that overtime for those people could be eliminated. The plan also proposed eliminating a part-time operator/lab tech position and creating a new position, lead operator/lab tech, to assist the department manager with day-to-day operations. The plan contemplated a reduction in the 2003 budget for the PUC of \$941,569 or 28% of the budget.^[4]

13. In an April 11, 2003 memo to the Commission, Mr. Ward requested consideration of the reorganization plan and stated that one issue that was imminent was the reorganization of the Wastewater Treatment Plant due to the reduction of flow and solids from Blandin.^[5]

14. The reorganization plan was presented to the Public Utilities Commission at a special meeting on May 7, 2003. Information concerning the reorganization was also provided to the local AFSCME Union President, John Aultman, and the AFSCME Field Staff Representative.

15. In a response to the union dated June 3, 2003, Mr. Ward stated that the reorganization plan related to the wastewater treatment plant would be implemented so that there would no longer be a day shift (7:00 a.m. to 3:00 p.m.) during the week for truck drivers and operators. The extra crew, including Mr. Hansen, would be scheduled for an eight-hour shift on weekends and holidays and would fill in for vacancies due to

vacations, sick leave or to her leaves of absence. The other operators and truck drivers would have an eight hour shift weekdays either from 3:00 p.m. to 11:00 p.m. or 11:00 p.m. to 7:00 a.m. The shift schedule was to be five shifts on, two off, five on, three off and rotating from afternoon to nights.^[6]

16. At its meeting on July 16 2003, the Public Utilities Commission approved the proposed reorganization plan and adopted an implementation date of September 1, 2003.^[7]

17. In a memo dated July 30, 2003, Mr. Ward informed the wastewater plant manager, James Ackerman, and the union representatives that effective September 1, 2003 the 12-hour shift schedule would be abolished and those employees working under that schedule would be assigned to an eight-hour shift.^[8]

18. As of September 1, 2003 the three least senior employees at the Wastewater Treatment Plant, in order of greater seniority, were Mark C. Hansen, Tim C. Satrang and Delbert F. Emerson. Mr. Emerson was a truck driver and Mr. Satrang was a part-time employee in the position of operator/lab tech.^[9]

19. Mr. Ward sent a letter to Mr. Hansen dated September 3, 2003 advising him that effective September 1, 2003 he was assigned to a revised work schedule, with the extra crew, which involved scheduled work time of less than 40 hours per week. The letter advised Mr. Hansen of his Veteran's Preference rights including his right to petition the Commissioner to determine whether the action resulting in his layoff was taken in good faith.^[10] Mr. Emerson, the truck driver, was also laid off and assigned to the part-time extra crew.

20. A Notice of Vacancy for the newly created lead operator/laboratory technician position was posted on August 14, 2003. The job duties of the position includes laboratory work, monitoring the operations of the plant, including giving instructions to the night shift, weekly reporting on the landfill operation (a function previously handled by the department manager) and filling in for the lab director in his absence (a duty also previously performed by the department manager).^[11] The position was created in part to help Mr. Ackerman with his duties and to have someone present at the plant to give directions at 3:00 p.m. when the shift started. Mr. Ackerman, who holds a Class A. Wastewater Treatment Certificate, works from 7:00 a.m. to 3:30 p.m., Monday through Friday.

21. The hourly rate for the lead operator/lab tech position is \$18.75 per hour. The abolished part-time operator/lab tech position was paid \$18.35 per hour. An operator receives \$18.15 per hour and a truck driver receives \$17.60 per hour.^[12]

22. The qualifications established for the new lead operator/laboratory technician position include, at a minimum, an AAS Degree in Water Resources Management, Pollution Control Technology or a BS Degree in Biology, and/or Environmental Sciences. An applicant was also required to possess, at a minimum, a Class B Wastewater Treatment Facility Operator Certificate and would be required to

obtain a Class A Certificate within one year. An applicant was also required to possess a Type 2 Waste Disposal Facility Operator's Certificate. Additionally, an applicant was required to have experience and have participated successfully in the Minnesota Department of Health Laboratory Certification Program.^[13]

23. In a memo dated August 15, 2003, Mr. Hansen notified the General Manager, Mr. Ward, that he would like to be considered for the lead operator/lab tech position.^[14]

24. Mr. Ward wrote to Mr. Hansen asking him to provide a more detailed statement of his qualifications for the lead operator/lab tech position by August 27, 2003.^[15]

25. Mr. Hansen replied to the General Manager in writing and noted that he held an AAS Degree in Wastewater Treatment Technology and a Class C Wastewater License with the ability to write a Class B license within one year. He stated that he did not hold the Waste Disposal Facility Operator's Certificate, but would not have a problem obtaining one within one year. He also stated that he had close to two and one-half years experience doing lab analysis for other utilities.^[16]

26. In a letter dated September 2, 2003, the General Manager advised Mr. Hansen that he did not meet the job description requirements of a Class B Operator's Certificate or a Type 2 Waste Disposal Facility Operator's Certificate and therefore would not be allowed to post for the position of lead operator/lab tech.^[17]

27. A Class C Certificate can be obtained with a high school diploma and three years of experience at a wastewater treatment facility. A Class B Certificate can be obtained with a high school diploma and six years experience at a treatment facility.^[18]

28. Since September 1, 2003, Mr. Hansen has usually worked 16 to 20 hours per week for the PUC. He has had a few weeks with 30 hours and some with 40 hours. He was trained in to be an operator at the water treatment plant also. He has worked mostly as an operator, but once as a truck driver.

29. Mr. Satrang, who held the abolished part-time operator/lab tech position, was selected to fill the lead operator/lab tech position. He holds a Class B Certificate as well as a Type 2 Waste Disposal Facility Operator's Certificate. He had experience working in the lab from his prior position. Mr. Satrang works from 8:30 a.m. to 5:00 p.m. and is present when the shift begins work at 3:00 p.m.

30. Mr. Satrang, who is not a veteran, was first hired for the part-time position on October 12, 1999. Neither a Class B or a Class A Certificate, nor the Waste Disposal Certificate is legally required for the position of lead operator/lab tech. However, management believed it would demonstrate competency and provide them with the best-qualified person.

31. The appointment of Mr. Satrang led to three grievances by the union related to bumping rights, the appointment of a part-time employee to a union position and the failure to post for a new position.

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

CONCLUSIONS

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

2. The Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of law and rule including providing proper notice of this hearing.

3. The Petitioner is a Veteran within the meaning of Minn. Stat. § § 197.46 and 197.447.

4. The Grand Rapids Public Utilities Commission is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. § 197.46.

5. Minn. Stat. § 197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing.

6. The prohibition against removal does not apply if the position was eliminated in good faith for some legitimate purpose.^[19]

7. Whether a Veteran's position has been eliminated in good faith for a legitimate purpose is an affirmative defense for which the public employer has the burden of proof.^[20]

8. The Grand Rapids PUC has met its burden of proving that it reduced the Petitioner's hours in good faith and for a legitimate purpose.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of Veterans Affairs DENY the Petition of Mark C. Hansen.

Dated this 27th day of February 2004.

S/ George A. Beck

GEORGE A. BECK
Administrative Law Judge

Reported: Tape-recorded,
Four Tapes, No Transcript Prepared

MEMORANDUM

The Veterans Preference Act protects honorably discharged veterans from arbitrary removal from public employment. Under the Act a veteran can be removed from public employment only for incompetency or misconduct and only after a hearing on those allegations.^[21] This record does not contain any indication of misconduct or incompetency on the part of the Petitioner. The Act does not, however, completely restrict a public employer's exercise or control over its administrative affairs.^[22] Judicial case law interpreting the Act authorizes the abolishment of a position held by a veteran if the public employer acts in good faith.^[23] If a job is abolished for no good reason other than to get rid of the veteran, the Veteran's Preference Act and all of the rights afforded by it will apply.^[24] A removal from a position also includes a demotion or a reduction in hours.^[25]

The Minnesota Supreme Court has held that an employer may terminate the employment of a veteran by abolishing the office or position which he held "if the action abolishing it be taken in good faith and for some legitimate purpose, and is not a mere subterfuge to oust him from his position."^[26] In determining whether a position has been abolished in good faith, the Minnesota courts have looked at several factors including: (1) whether the reasons articulated by the employer have a legitimate, factual basis,^[27] (2) whether the job duty previously performed by the veteran have been reassigned to others,^[28] and (3) whether the substance of the decision to abolish the veteran's position was an objective and reasonable exercise of administrative discretion.^[29] Whether a public employer abolished a position in good faith is a question of fact.^[30] The burden is on the PUC to establish this affirmative defense by a preponderance of the evidence.^[31]

In this case the reasons articulated by the PUC for the Petitioner's reduction in hours have a legitimate factual basis. The reduction in the Petitioner's work hours was a direct result of the shut down of two of the four paper machines at the Blandin Paper Company. Blandin laid off approximately 300 employees itself and the wastewater flow to the PUC's treatment plant was reduced approximately in half. A reduction in the number of employees at the wastewater treatment plant was clearly required and the PUC's reorganization plan reduced its 2003 budget by 28%. The PUC was pressed by Blandin to reduce its charges to Blandin and the plan was designed in part to address this factor. It cannot be concluded that the PUC's reorganization and reduction in employee hours was a pretext to get rid of the Petitioner and the Petitioner's written submission after the hearing acknowledges that

Nonetheless, the Petitioner points out budget cuts do not necessarily demonstrate good faith. If a veteran's job duties are assigned to a less senior employee, then the removal or reduction in hours may be found to be in bad faith.^[32] The record indicates that the operators who maintained full-time employment are senior to the Petitioner. However, Mr. Hansen contends that a substantial portion of his work hours as an operator were redistributed to a less senior employee, namely, Tim Satrang, who filled the new lead operator/laboratory technician position. He claims that his work hours were taken from him in order to create a full-time job for Mr. Satrang who has less seniority and who is not a veteran.

The record does not support the Petitioner's contention that his job duties were reassigned. There was an actual reduction in the number of operator hours at the wastewater treatment plant. Mr. Satrang's job duties, despite his job title, involves operator work only as a last resort when no one else is available. The job duties for the position include laboratory work, monitoring the operations of the plant including giving instructions to the night shift, weekly reporting on the landfill operation and filling in for the lab director in his absence. The laboratory analysis and tests are at a higher level of complexity than those performed by the operators in their daily routine. And the lead operator/laboratory technician only works during the day when the plant is not in operation and operator duties are not required. The job duties of Mr. Hansen's position have not been reassigned to a less senior employee.

The employer is also required to show that its decision to reduce the veteran's hours was an objective and reasonable exercise in administrative discretion. In his post hearing submission the Petitioner argues that his employment should be continued even if it is in a new or different job and that he should be given preference over non-veterans if his hours have been reduced. Mr. Satrang was selected over Mr. Hansen for the new lead operator/lab tech position because management believed he had higher qualifications. Mr. Hansen lacked some of the qualifications stated for the position but he believes that the job description was written to benefit Mr. Satrang. And Mr. Hansen asserts that he is ready, willing and able to obtain the certifications and licenses required for the position.

The failure of the employer to select the Petitioner for another position or to provide full-time replacement employment does not demonstrate that the PUC's action was not objective or a reasonable exercise of its administrative discretion. Mr. Hansen challenges the PUC's selection of Mr. Satrang for the new lead operator/laboratory technician position. Generally the Commissioner lacks authority to decide whether a collective bargaining agreement has been violated and in this case the appointment of Mr. Satrang led to the filing of three grievances by the union. Evidence relevant to whether a collective bargaining agreement was violated might, however, also be an indication of bad faith in the appropriate case. In this case the Petitioner did not meet the qualifications set out in the position description for the job for which Mr. Satrang was hired. The employer provided a reasonable explanation for the qualifications in order to ensure the employee's capability to fill in for the lab director and to direct plant operations. Additionally, the qualifications did not assure that Mr. Satrang would get the

job since another employee, who is a veteran with more seniority than the Petitioner, had the qualifications (a Class B license) and could have applied.

The Petitioner's argument that the PUC is required to continue his employment in a new or different job is based upon an unreported decision of the Minnesota Court of Appeals in Smith v. City of Champlain.^[33] In that case the Court held that a veteran could not challenge his demotion to another position because he was still employed by the same employer and had conceded that his prior position was eliminated in good faith due to budget cutbacks. The Court of Appeals did not hold that a bad faith removal occurs every time replacement employment is not provided. Rather, it held that because the employer had provided replacement employment, there was no "removal" within the meaning of the Act. A public employer may exercise reasonable discretion in deciding how to deal with a budget crisis and is not required to select the alternative which keeps a veteran employee.^[34] Neither is the public employer required to provide a veteran with on-the-job training which would qualify him for a position when a qualified applicant is available.

The Grand Rapids PUC has met its burden of proving that it reduced Mr. Hansen's hours in good faith and for a legitimate purpose. It has articulated a legitimate basis for the reduction in hours, demonstrated that Mr. Hansen's hours have not been reassigned to others, and that its decision was an objective and reasonable exercise of administrative discretion.

G.A.B.

^[1] Ex. A.

^[2] Ex. K.

^[3] Ex. E.

^[4] Ex. D.

^[5] Ex. C.

^[6] Ex. F.

^[7] Ex. H.

^[8] Ex. J.

^[9] Ex. L.

^[10] Ex. B.

^[11] Ex. P.

^[12] Ex. Q, Ex. R.

^[13] Ex. P.

^[14] Ex. S.

^[15] Ex. 2.

^[16] Ex. 3.

^[17] Ex. 4.

^[18] Ex. HH.

^[19] State ex. rel. Boyd v. Matson, 193 N.W. 2d 30 (Minn. 1923); Young v. City of Duluth, 386 N.W. 2d 732, 737 (Minn. 1986).

^[20] Caffrey v. Metropolitan Airports Commission, 246 N.W. 2d 637, 641 (Minn. 1976).

^[21] Minn. Stat. § 197.46.

^[22] Boyd v. Matson, supra.

- [23] Gorecki v. Ramsey County, 437 N.W. 2d 646, 650 (Minn. 1989).
- [24] Young v. City of Duluth, 386 N.W. 2d at 737.
- [25] Myers v. City of Oakdale, 409 N.W. 2d 848, 850 (Minn. 1987).
- [26] Caffrey v. Metropolitan Airports Commission, 246 N.W. 2d at 641.
- [27] Caffrey, 46 N.W. 2d at 641.
- [28] Young, 386 N.W. 2d at 738-739.
- [29] Gorecki, 437 N.W. 2d at 650.
- [30] State ex. rel. Niemi v. Thomas, 223 Minn. 435, 438, 27 N.W. 2d 155, 157 (1947).
- [31] Caffrey, 246 N.W. 2d at 641.
- [32] Young v. City of Duluth, supra.
- [33] 1998 WL 404954.
- [34] State ex. rel. Niemi v. Thomas, 27 N.W. 2d 155 (Minn. 1947).