

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

In the Matter of Thomas K. Riddering v. City of Saint Paul	FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATIONS
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The above-entitled matter came on for a hearing before Chief Administrative Law Judge Raymond R. Krause (ALJ) on July 9, 2009 at the Office of Administrative Hearings in Saint Paul, Minnesota. The hearing continued and concluded on July 10, 2009. The record also closed on that date.

Thomas K. Riddering, Petitioner ("Petitioner"), appeared on his own behalf. Gail Langfield, Assistant Saint Paul City Attorney, appeared on behalf of the Respondent, the City of Saint Paul ("Respondent" or "City").

The parties stipulated to facts 1-15 and stipulated to the sole issue before the ALJ. The attached list of exhibits were offered and entered as evidence:

STATEMENT OF THE ISSUE

Did the City lay off Thomas K. Riddering in good faith for a legitimate reason?

FINDINGS OF FACT

I. Stipulated Facts

1. The Petitioner is an honorably discharged veteran. He was removed from his certified title as the City Building Official for the City of Saint Paul on April 24, 2009.

2. The Petitioner was employed by the City of Saint Paul from May 18, 1999 to April 24, 2009.

3. At the time of his layoff, the Petitioner was considered a good employee and received a bi-weekly salary of \$4,104.48.

4. The Petitioner was notified of his layoff in writing by a letter dated April 9, 2009. The letter stated that he was being laid off of his current position due to the financial situation of the City and it in no way reflected upon his work performed for the citizens of Saint Paul. The letter also notified him that he would be placed on a

reinstatement register for two years and he would be reinstated according to the City Civil Service Rules and his current Collective Bargaining Agreement. The letter also notified him of his right to a Veterans Preference Hearing and that he had 60 days from the date of notice in which to petition District Court or the Commissioner of Veterans Affairs to determine whether this layoff was in good faith.

5. On April 27, 2009, the Petitioner filed a petition with the Minnesota Department of Veterans Affairs alleging his layoff was not for incompetence or misconduct, but was not in good faith.

6. There was a long standing conflict between the Building Inspection, Fire Inspection, and Code Enforcement Divisions regarding the retroactive application of code requirements to existing buildings.

7. The Petitioner does not believe that the City was motivated to remove him based on his veteran status.

8. On April 30, 2009, the Commissioner of Veterans Affairs issued a Notice and Order for Hearing, scheduling a hearing to take place on July 9, 2009.

9. At all relevant times, Robert (Bob) Kessler was the Director of the Department to which the Petitioner was assigned and was also his supervisor.

10. The City's certified title of City Building Official remains vacant.

11. The Petitioner was the Division of Manager of the Building Inspections/Construction Service in the Department of Safety and Inspections for the City of Saint Paul and the City's Zoning Administrator. The majority of his duties included the supervision of approximately 50 employees as well as the responsibilities of the State Designated Building Official for the City of Saint Paul.

12. Each of the division managers within the Department of Safety and Inspection is a single incumbent within their respective certified title.

13. Throughout 2008 and 2009 there was a significant reduction in building permit revenue.

14. In April 2009, trade employees within the former DSI Building Inspections/Construction Service Division were required to reduce their full-time hours from 40 to 32 hours per week to avoid lay off of an additional 7.4 employees.

15. The City continues to enforce Chapter 34 of the City of Saint Paul's Legislative Code also known as the Property Maintenance.

II. Factual Findings Arising from Hearing

16. The City of Saint Paul describes its City Building Official position as a position which:

Performs responsible managerial work in planning and directing the operation and administration of the Construction Division of the office of License, Inspections, and Environmental Protection (LIEP) acts as the Building Official for the City with responsibilities as described in State law; performs other duties exercised... [The Building Official] [e]xercises general and/or technical supervision through lower-level supervisors, professional, technical, and administrative support employees.¹

17. Under Minn. Stat. § 326B.133, subd. 1 (2008), municipalities must “designate a building official to administer the [state building] code.” Subdivision 4 establishes the duties of the municipal building official as “be[ing] responsible for all aspects of code administration for which they are certified, including the issuance of all building permits and the inspection of all manufacture home installations.”²

18. Minn. Stat. § 326B.133, subd. 2 requires that building officials become certified and possess “experience in design, construction, and supervision which the [C]ommissioner [of Labor and Industry] deems necessary” and that no one “may be designated as a building official for a municipality unless the commissioner determines that the official is qualified as provided in subdivision 3.”³

19. The City hired the Petitioner and he first reported for duty as the City Building Official on May 18, 1999.⁴

20. The Petitioner’s work as City Building Official fell under the purview of the Department of Safety and Inspection (“DSI”). The Mayor and City Council created DSI in 2007 by consolidating LIEP and the Fire Inspection offices to foster efficiency, improve service to citizens, streamline regulations, and to achieve some cost-savings.⁵ DSI is responsible for more than 150 out of the over 320 chapters of the City’s Legislative Codes, having duties in the areas of Animal Control, Construction, Inspection, Code Enforcement, Environmental Health, Fire Inspection, Heritage Preservation, Licensing, Project Facilitation, Zoning, Support Services, TISH programs, Demolitions, Vacant Buildings, Construction Plan Review, Site Plan Review, and responding to complaints as well as providing information.⁶ The Petitioner supervised and was in charge of construction inspection, Construction Plan Review, Site Plan Review, and zoning.⁷

21. In January, 2009, DSI had 170.4 Full-Time Equivalent job positions (FTEs).⁸ The two main funding sources for DSI are the General Fund and the Special

¹ Respondent’s Ex. D.8.4, p. 1.

² Respondent’s Ex. E.4; Respondent’s Ex. E.5, Minn. R. 1300.0110 (2008), further establishes the duties and powers of the Building Official.

³ Respondent’s Ex. E.4.

⁴ Respondent’s Ex. D.8.2.

⁵ Respondent’s Ex. C.6, p.3, Respondent’s Ex. C.2, C.3, and C.4; Robert Kessler Testimony. See Respondent’s Ex. C.1 for the organization of LIEP prior to the DSI consolidation.

⁶ Respondent’s Ex. C-6, p. 5, 7-8.

⁷ Kessler Testimony.

⁸ Respondent’s C.2; Kessler Testimony.

Fund.⁹ The former derives its approximately \$6 million in funding from tax revenues, license fees, Local Government Aid (LGA) from the State of Minnesota, whereas the latter generates most of its funding from permit and license fees that channel into License and Permit Fund Number 320.¹⁰ Fund 320 made up 66% of DSI's 2009 budget at approximately \$11 million.¹¹ The Special Fund also funded the Petitioner's position.¹²

22. Although DSI generated its "highest levels of permit revenue ever" in 2006 and 2007, there were 1,600 vacant buildings in the City.¹³ Vacant buildings are an indicator of a potential downturn in permit revenue. The economic recession and housing finance crisis and the downturn in new construction in 2008 severely decreased the Special Fund 320 revenues and thus the Special Fund as a whole.¹⁴ At the beginning of 2008, the Special Fund had just under \$13 million and DSI's reserve funds totaled \$2.6 million.¹⁵ The Special Fund currently contains approximately \$10.5 million and the reserve funds are now "in the negative" because of the extent of the City budgetary crisis.¹⁶ The General Fund also incurred significant revenue loss due to cuts and unallotments in LGA funds from the State in December 2008, June 2009, and for 2010 in order to remedy the State budget deficit.¹⁷ DSI was therefore unable to draw on the LGA funds to supplement its own reserves to solve its own shortfall.¹⁸

23. In light of the present and anticipated future budget crises and a General Fund decrease of 20%, the Mayor's Office directed City departments and DSI to propose staff reductions and other structural changes.¹⁹ DSI's first proposed reduction plan featured cuts throughout the Department.²⁰ Deputy Mayor Ann Mulholland emphasized the disadvantages of having too many administrators in a department and instructed DSI to decrease the number of management positions. She specifically told Director Kessler to "reduce the number of boxes", a reference to the organization chart boxes that contained units within DSI and their corresponding managers.²¹ Director Kessler presented DSI's proposed reductions to the Mayor and other city officials during a meeting on February 17, 2009.²² The plan proposed to cut a number of positions but did not identify any managerial positions for layoffs.²³ The plan did not target the

⁹ Kessler Testimony; Respondent's Ex. A.2, A.3.

¹⁰ *Id.* Other special funds include the Charitable Gambling Special Fund Number 167. Kessler Testimony; Respondent's Ex. A.2, p. 3-4.

¹¹ Respondent's Ex. A.7, Attachment B, p. 1.

¹² Kessler Testimony.

¹³ Kessler Testimony.

¹⁴ Kessler Testimony; Cordes Testimony.

¹⁵ Cordes Testimony.

¹⁶ Cordes Testimony.

¹⁷ Kessler Testimony; Cordes Testimony; Respondent's Ex. B.2-B.7. The State cut the City's 2008 LGA appropriation by \$5.7 million, its 2009 allocation by \$5 million and its 2010 amount by \$11.6 million. Cordes Testimony; Respondent's Ex. B.2-B.7.

¹⁸ Kessler Testimony.

¹⁹ Respondent's Ex. A.2, p.1; Kessler Testimony; Cordes Testimony.

²⁰ Cordes Testimony; Respondent's Ex. A2-A3.

²¹ Lippert Testimony.

²² Kessler Testimony; Respondent's Ex. A.2-A-3.

²³ *Id.*

Petitioner's job.²⁴ The Mayor's Office indicated that the layoffs should be more fair and "equally spread across the board, including management." This was partially in response to the priority set by the union representing city employees.²⁵ The Mayor's Office also charged Kessler with consolidating the management functions in DSI.²⁶ The Mayor's Office did not specifically target the Petitioner for a layoff.²⁷

24. Director Kessler re-assessed his proposal to align with the Mayor's new request. He consulted with DSI managers and with the AFSCME Labor Management Committee as he contemplated layoffs, and consolidation of the Department.²⁸ During the process, Director Kessler assessed the duties performed by each department, whether managerial responsibilities could be shifted to other managers, and the indispensability of managers.²⁹ Director Kessler proposed consolidating the Construction Services and Code Enforcement units, for instance, because it was a "better way to meld three different cultures and a way to have a more unified approach" to carrying out DSI tasks and since both involve inspections of buildings and property.³⁰

25. Director Kessler determined that he could not run DSI without Housing & Code Enforcement Manager Richard Lippert and Deputy Director of LIEP for Licenses, Permits, and Customer Service Christine Rozek because the duo are key managers. Neither Mr. Lippert nor Ms. Rozek has "bump back" rights.³¹

26. Phillip Owens, Assistant Fire Marshal, William Gunther, Environmental Health Manager, and the Petitioner also lacked any "bump back" rights since they hold positions as "single incumbents."³² Mr. Gunther is also a veteran.³³ Director Kessler could have laid off any one of these three managers.³⁴ The layoff of any of these three managers would have induced DSI restructuring and devolution of job duties to the remaining managers.³⁵

27. Director Kessler based his layoff criteria on seniority, which he measured as the employee's length of service with the City. Director Kessler had the latitude to use different criteria, but he felt that seniority was the least subjective.³⁶ Mr. Gunther

²⁴ *Id.*; Wagner Testimony.

²⁵ Respondent's Ex. A..4, p.1; Kessler Testimony. Respondent's Ex. A..4, p. 1.

²⁶ Kessler Testimony.

²⁷ Cordes Testimony; Kessler Testimony.

²⁸ Kessler Testimony.

²⁹ *Id.*

³⁰ *Id.*; Respondent's Ex. A.6, p.2.

³¹ *Id.*; Respondent's Ex. D.4.1; D.4.2, p. 3; Respondent's Ex. D.6.1; D.6.3. "bump back," is the right in the event of a layoff to be offered a reduction to the highest of any lower titles they have previously held within a bargaining unit if the employee's title is in a promotional series. If an employee is a "single incumbent" in their position, they cannot "bump back."

³² Kessler Testimony; Respondent's Ex. D.7.1; Respondent's Ex. D.2.1; Respondent's Ex. D.8.1. All three are also veterans. Respondent's Ex. D.1.

³³ Kessler Testimony, Respondent's Ex. D.2.1.

³⁴ Kessler Testimony.

³⁵ *Id.*

³⁶ *Id.*

began his service with the City on September 7, 1971.³⁷ Mr. Owens started his employment with the City on November 28, 1988. Mr. Lippert began his service with the City on November 1, 1971. Ms. Rozek began her employment on December 27, 1985.³⁸ The Petitioner began his service as City Building Official on May 18, 1999.³⁹ Since the Petitioner was the least senior of the managers, Director Kessler selected the Petitioner for layoff, devolved some of his duties to other managers, and merged the Code Enforcement and Construction Services divisions into one.⁴⁰ Director Kessler explained to the Petitioner that his layoff was due to the City's fiscal challenges and not because of any deficiencies in his job performance, noting that the Petitioner was a "good, ethical, and skilled manager."⁴¹

28. As a result of the restructuring and reduction effort, six DSI employees, including the Petitioner were laid off, one employee took an early retirement, two employees were shifted to the Department of Planning and Economic Development (PED), and forty inspectors had their hours reduced, which is the equivalent of 7.4 FTEs.⁴² The Petitioner was the only DSI employee to actually lose his job.⁴³

29. The Mayor's Office and other senior officials received DSI's "Second Proposal for Reductions in 2009" on February 23, 2009.⁴⁴ The City Council adopted the plan on April 8, 2009.⁴⁵ Director Kessler informed the Petitioner the next day about his layoff effective April 24, 2009. Director Kessler called Petitioner at home to explain that "it all came down to seniority."⁴⁶ The plan achieved a \$500,000 net reduction in the DSI budget.⁴⁷

30. Section 22 of the Civil Service Rules for the City establishes the procedure by which the City determines the seniority of an employee in the event of a layoff.⁴⁸ If the City hired the employee before July 1, 1995, the employee's seniority is determined by the date the employee was certified and appointed to that class.⁴⁹ If the City hired the employee after July 1, 1995, the employee's seniority is determined by the date that the employee first reported for duty for the employment in such class.⁵⁰ If the layoff occurred because of a lack of work, funds, or other reasons, the appointing officer

³⁷ Respondent's Ex. D.2.2, p.1; Kessler Testimony.

³⁸ Respondent's Ex. D.7.2., p.1; Kessler Testimony. , 1971. Respondent's Ex. D.4.2, p. 1; Respondent's Ex. D.6.2, p.1;

³⁹ Respondent's Ex. D.8.2; Kessler Testimony.

⁴⁰ Kessler Testimony; Respondent's Ex. A.6, p. 9; *compare to* Respondent's Ex. C-2. Under the restructuring, the Manager of Code Enforcement manages the Construction Services Division. Respondent's Ex. A.6, p. 2.

⁴¹ Respondent's Ex. D.8.3; Kessler Testimony.

⁴² Respondent's Ex. A.7, "Attachment D;" Kessler Testimony.

⁴³ Kessler Testimony.

⁴⁴ Respondent's Ex. A.5; A.6; Kessler Testimony.

⁴⁵ Respondent's Ex. A.7; Kessler Testimony.

⁴⁶ Respondent's Ex. D.8.3.

⁴⁷ Cordes Testimony.

⁴⁸ Respondent's Ex. G.

⁴⁹ *Id.*

⁵⁰ *Id.*

designates the “class from which [the] layoff shall take place.”⁵¹ Employees in that class are laid off in the “inverse order” of their seniority. Since Petitioner was the only person in his job class, the provisions of Section 22 did not apply.⁵²

31. Since the City has not abolished the Petitioner’s class, the “class abolishment” rule within Section 22 does not apply.⁵³ The class for the City Building Official still exists but the position is vacant.⁵⁴

32. Article 6 of the collective bargaining agreement between the City and the Saint Paul Supervisors’ Organization (“SPSO), 2008-2010 defines seniority as “[t]he length of continuous, regular and probationary service with the Employer from the date an employee was first certified and appointed to a class title covered by this Agreement, it being further understood that seniority is confined to the current class assignment held by an employee.”⁵⁵ If the City must reduce the work force, “employees will be laid off by class title within each department based on inverse length of seniority” with the Office of Human Resources identifying the least senior employee in the title.⁵⁶

33. Following the Petitioner’s layoff, the City enacted an interim arrangement in which the City devolved some of the Petitioner’s different duties and responsibilities to other managers. This process was modeled after the way job duties were apportioned for the two years prior to the hire of Petitioner.⁵⁷ The City also acted to comply with Minn. Stat. 326B.133, subd. 7 (2008), which requires that “in the event that a designated building official position is vacant within a municipality, that municipality shall designate a certified building official to fill the vacancy as soon as possible”.⁵⁸ The City designated James T. Bloom, Senior Plan Examiner, who is a certified building official, as the Building Official for the City.⁵⁹ The Minnesota Department of Labor and Industry subsequently approved Mr. Bloom’s designation. The City devolved the Petitioner’s responsibilities for providing technical assistance for trade inspectors to Mr. Bloom.⁶⁰ The City civil service title “City Building Official” remains vacant, however.⁶¹

34. Housing & Code Enforcement Manager Lippert became Deputy Director and Manager of half of DSI after its initial creation.⁶² After the Petitioner’s layoff,

⁵¹ *Id.*

⁵² *Id.* Section 22 also sets out the “bump back” procedure.

⁵³ *Id.*

⁵⁴ Kessler Testimony.

⁵⁵ Respondent’s Ex. H, Article 6.1, p. 4.

⁵⁶ *Id.*, Article 6.3, p.4. Article 6.4 establishes the “bump back provisions” and Article 6.5 establishes the recall process.

⁵⁷ Kessler Testimony.

⁵⁸ Minn. Stat. § 326B.133, subd. 7 (2008) indicates that “[i]n the event that a designated building official position is vacant within a municipality, that municipality shall designate a certified building official to fill the vacancy as soon as possible. The commissioner [of labor and industry] must be notified of any vacancy or designation in writing within 15 days.”

⁵⁹ *Id.*; Respondent’s Ex. E.1; Ex. D.5.1; D.5.2; 5.3.

⁶⁰ Bloom Testimony.

⁶¹ Kessler Testimony.

⁶² Lippert Testimony; Respondent’s Ex. D.4.1.

Mr. Lippert acquired the personnel management portions of the Petitioner's former job, which was about half of the Petitioner's duties.⁶³ Mr. Lippert does not supervise the more technical aspects of the Petitioner's former job.⁶⁴

35. The supervisory and management responsibilities the Petitioner exercised over the Zoning, Licensing, and Heritage Preservation components in his division were not significant functions of his job and did not have an adverse impact on DSI operations when those responsibilities were devolved to other managers in the Department.⁶⁵

36. The City job class of "City Building Official" continues to exist but is vacant. The duties of that position have been given to other managers. The Department of Labor and Industry designation of "City Building Official" has been filled by Mr. Bloom and its duties have not changed.⁶⁶

37. Despite a letter written on behalf of the Petitioner questioning the layoff decision, the SPSO has not filed a grievance with the City regarding the layoff due to the bargaining unit's respect for management's right to re-tool organizational structure. The SPSO, however, is awaiting the results of the job studies Mr. Bloom and Mr. Lippert submitted before taking any further action.⁶⁷ The SPSO has no reason to believe the Petitioner's layoff violates the collective bargaining agreement and the seniority rules.⁶⁸

38. DSI managers and employees disagreed on the proper relationship between State and City building codes and regulations.⁶⁹ Much of the disagreement arose over the enforceability of a proposed egress window policy following the Minnesota Supreme Court decision in *City of Morris v. Sax Investments, Inc.* That decision held, in part, that a city rental licensing ordinance regulating a residential structure also governed under the State Building Code is invalid when the city ordinance has different requirements than the State Building Code.⁷⁰ The Petitioner and others had a differing view on the matter than other managers and employees in the office on the proper course of action.⁷¹ The Petitioner disagreed with the City Attorney's Office and DSI leadership's interpretation of and approach toward reconciling the conflict between State and City codes in light of *Morris v. Sax*. The disagreements were strong but, by and large, conducted professionally.⁷²

⁶³ Lippert Testimony.

⁶⁴ *Id.*

⁶⁵ Kessler Testimony.

⁶⁶ Kessler Testimony.

⁶⁷ Wagner Testimony.

⁶⁸ *Id.*

⁶⁹ Petitioner's Testimony; Kessler Testimony; Zaccard Testimony; Ehrlich Testimony.

⁷⁰ 749 N.W.2d 1, 7-13 (Minn. 2008).

⁷¹ Petitioner's Testimony; Kessler Testimony.

⁷² *Id.*; Petitioner's Ex. BB; Ex. EE; Ex. GG; Ex. MM; Ex. ZZ. See also Petitioner's Ex. AAA; Ex. CCC for instances of other code policy or process disagreements between the Petitioner and other DSI employees and managers and City employees.

39. Director Kessler did not invite the Petitioner to a March 16, 2009 meeting regarding the developing egress window policy because the layoff plans for the Petitioner were already in motion and, as a result, the Petitioner's presence at the meeting would have been difficult for both of them.⁷³ The Petitioner was, however, involved in earlier discussions and meetings regarding the egress window policy.⁷⁴

40. DSI issued a "Uniform Egress Window Policy" on April 29, 2009 to clarify egress window code provisions "so that property owners will know what the requirements are when we inspect their properties."⁷⁵ Director Kessler issued the memorandum on the new policy four days after the Petitioner's layoff and twenty days after the Petitioner received notification of his layoff.⁷⁶ Director Kessler indicated that Fire Marshal Steve Zaccard, Assistant Fire Chief Owens, Mr. Bloom, Mr. Lippert, Mr. Ehrlich, and Assistant City Attorney Rachel Tierney were involved in the development of the policy.⁷⁷

CONCLUSIONS

1. Pursuant to Minn. Stat. §14.50 and §197.481, the Administrative Law Judge and the Commissioner of Veterans Affairs have the authority to determine if the Petitioner was denied a hearing under the Veterans Preference Act ("Act").

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. This matter is therefore properly before the Commissioner and the Administrative Law Judge.

3. The Petitioner is an honorably discharged "veteran" within the meaning of Minn. Stat. §§ 197.447 and 197.46 and is therefore entitled to all of the protections and benefits afforded by the Act.

4. The City of Saint Paul is a political subdivision of the state within the meaning of Minn. Stat. § 197.46, therefore subjecting its personnel practices to the provisions of the statute.

5. Minn. Stat. § 197.46 (2008) provides, in part, that:

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

⁷³ Kessler Testimony; Petitioner's Ex. HH. Director Kessler did not recall whether meeting occurred. Kessler Testimony.

⁷⁴ Kessler Testimony.

⁷⁵ Petitioner's Ex. YY-2, p. 1.

⁷⁶ *Id.*; Respondent's Ex. D.8.3.

⁷⁷ Petitioner's Ex. YY-2, p.3.

or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.”

This provision generally does not apply to a situation when a public employer eliminates a position in good faith for a legitimate purpose such as a good faith reorganization.⁷⁸ Whether the public employer eliminated the veteran’s job in good faith for a legitimate purpose is an affirmative defense for which the employer carries the burden of proof.⁷⁹

6. Under Minn. R. 1400.7300, subp. 5, the Petitioner must establish by a preponderance of evidence that he was removed from his employment with the Respondent and denied his rights under the Act.

7. The City fulfilled its obligation to notify the Petitioner of his rights under the Act and the Petitioner requested a hearing within the time required.

8. The City laid off the Petitioner from his position as the City Building Official on April 24, 2009 as part of a good faith reduction and reorganization of the DSI workforce which was caused by a severe budget shortfall.

9. Although the DSI re-structuring and layoff plans occurred as discussions surrounding the egress window policy and code enforcement in the aftermath of the *Morris v. Sax* decision were also on-going, the Petitioner’s dissent on the latter was not a cause for his layoff.

10. DSI Director Kessler laid off the Petitioner because he was the least senior of the managers and not because of the opinions he held toward the City’s interpretation of and approach toward conflicting sections of the State and City building codes.

11. The Petitioner is therefore not entitled to the relief sought since the City did not violate his rights under the Act.

12. The Chief Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

⁷⁸ See *State ex rel. Boyd v. Matson*, 155 Minn. 137, 193 N.W. 30 (Minn. 1923); *Young v. City of Duluth*, 386 N.W.3d 732, 737 (Minn. 1986).

⁷⁹ See *State ex rel. Caffrey v. Metropolitan Airport Commission*, 246 N.W.2d 637 (Minn. 1976); cf. *Southern Minnesota Municipal Power Agency v. Schrader*, 394 N.W.2d 796, 802 (Minn. 1986).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the Chief Administrative Law Judge recommends that the Commissioner of Veterans Affairs DENY the Petition for Relief.

Dated: July 28, 2009

s/Raymond R. Krause

RAYMOND R. KRAUSE

Chief Administrative Law Judge

Reported: Digitally recorded

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make a final decision after a review of the record. The Commissioner may adopt, reject, or modify these 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 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 Clark Dyrud, Commissioner of Veterans Affairs, State Veterans Service Building, 20 West 12th Street, Room 206C, Saint Paul, Minnesota 55155-2006 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 decision of that agency 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 Commissioners, or upon expiration of the deadline for doing so. The Commissioners 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 Commissioner must serve his final decisions upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Issue and Authorities

The parties in this matter dispute whether the City laid off the Petitioner in good faith for a legitimate reason. Minn. Stat. § 197.46 (2008) provides that an honorably-discharged veteran employed by a public employer cannot be "removed from such

position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.” However, Minnesota precedent has established that the Veterans Preference Act (“Act”) does not “take away the power given such officials [of public employers] over the administrative and business affairs of the municipality, and does not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in *good faith for some legitimate purpose*, and is *not mere subterfuge to oust him* from his position.”⁸⁰ A good faith reduction in the workforce is a “legitimate purpose” for removing a veteran’s position.⁸¹ The public employer has the burden of proof as an affirmative defense to establish that it eliminated a veteran’s position as the result of a good faith reorganization.⁸² Whether the public employer eliminated the position in good faith or whether the reasons provided were a pretext to remove the veteran is a question of fact for the trier of fact by a preponderance of the evidence.⁸³ However, if the veteran alleges that the reorganization efforts were “merely a pretext for personnel actions that were actually directed toward him personally and not toward the functions of his position, the veteran is obliged to produce evidence of pretext.”⁸⁴ The ALJ must then assess whether the evidence establishes a good faith reorganization or pretext.⁸⁵

II. Application to the Present Matter

The evidence in this case showed the severity of the City’s budgetary challenges. DSI’s Special Fund contains approximately \$10.5 million and the reserve funds are now “in the negative” because of the extent of the City budgetary crisis. These totals are a substantial decrease from the beginning of 2008 when DSI’s Special Fund boasted just under \$13 million and its reserve funds totaled \$2.6 million. Likewise, DSI’s General Fund could not solve the Department’s shortfall because the State cut the City’s 2008 LGA appropriation by \$5.7 million, its 2009 allocation by \$5 million and its 2010 amount by \$11.6 million. As a result of the fiscal difficulties, the Mayor’s Office directed DSI to reorganize the Department and cut the workforce and enact other cost-saving measures to help solve the City’s budgetary crisis. Eventually, the proposed cuts included a DSI management position. The evidence established that the layoff of any of the DSI managers would have induced a re-structuring of Department units and the “devolution” of that manager’s duties and responsibilities to the remaining managers and officials. As such, DSI had a compelling reason to exercise its authority over its own operational structures.

⁸⁰ *State ex rel. Boyd v. Matson*, 155 Minn. 137, 141, 193 N.W. 30, 32 (Minn. 1923) (emphasis added).

⁸¹ *Myers v. City of Oakdale*, 409 N.W.2d 848, 851 (Minn. 1987); *Young v. City of Duluth*, 386, N.W.2d 732, 737 (Minn. 1986).

⁸² *State ex rel. Caffrey v. Metropolitan Airport Commission*, 246 N.W.2d 637 (Minn. 1976); *cf. Southern Minnesota Municipal Power Agency v. Schrader*, 394 N.W.2d 796, 802 (Minn. 1986).

⁸³ *Caffrey*, at 641; *State ex rel. Niemi v. Thomas*, 27 N.W.2d 155, 157 (Minn. 1947).

⁸⁴ *Lasley v. City of Duluth*, OAH 4-3100-20080-2, April 2, 2009, p. 17. “The question then becomes whether that layoff occurred as part of a good faith reorganization or reduction in the force or whether the layoff was merely a pretext or ruse for a personnel action that was actually directed toward him personally to oust him from his position.” *Id.* at p. 18.

⁸⁵ *Id.*

DSI Director Kessler selected the Petitioner for a layoff because he was the manager with the least amount of seniority, which Director Kessler measured by the years of service with the City of Saint Paul. Director Kessler admitted that he had a “degree of latitude” in determining which manager to layoff. He believed seniority was the best measure as it carried less subjectivity than other potential measurements such as family considerations or education and skill sets. SPSO President Wagner also indicated that the City did not violate the union’s collective bargaining agreement with the City and did not violate the seniority rules. Moreover, DSI leadership did not slate its managers for layoff initially. Director Kessler did not include any such layoffs in the Department’s first budget and personnel reduction proposal. The effort to identify a DSI manager for layoff arose only upon the direction of the Mayor’s Office in order to “equally spread [layoffs in DSI] across the board, including [within] management.” The Mayor’s Office did not specify a particular management position or individual for layoff. Director Kessler ultimately laid off the Petitioner only after considering DSI management needs and the seniority of the managers in the Department. The process by which DSI and City leadership determined to layoff reveals a process filled with difficult decisions carried out with fairness and good faith and not a course of action containing malicious pretext.

Furthermore, the Petitioner did not rebut the City’s evidence of budgetary duress and of the subsequent necessity to reduce and streamline City operations in order to remedy the budget shortfall. The Petitioner also failed to provide any evidence of pretext by the City. Petitioner admitted that there was no “smoking gun” to show that his layoff was not in good faith. The Petitioner did not establish that the City’s budgetary evidence and justifications for staffing changes were merely a pretext for his layoff.

He did attempt to admit a great deal of evidence to support his views on what DSI’s enforcement policies should be. He also attempted to show that his interpretation of *Morris v. Sax* was correct and that he is more qualified for the job than Mr. Bloom. These points are not relevant to the issue before the ALJ. The conflict over policy, once stipulated to, is only relevant if Petitioner can show a connection between the conflict and his layoff. The preponderance of the evidence fails to demonstrate such a connection and establishes that the City laid off the Petitioner in good faith for the legitimate purpose of reducing the management workforce in DSI.

III. Conclusion

The evidence establishes that the City laid off the Petitioner because of City budgetary problems and the resulting need to restructure DSI to help balance the City’s budget. The Petitioner did not rebut any of the City budgetary evidence and failed to offer any evidence supporting a pretextual rationale for his layoff. DSI based the Petitioner’s layoff on his length of service with and to the City of Saint Paul. The decision to layoff the Petitioner was not outcome-driven but was the result of objective evaluative criteria focused on preserving the Department’s mission in light of budgetary constraints.

The present matter personifies the real-life consequences of economic downturns and municipal fiscal crises. Although the Petitioner was a skilled manager devoted to serving and protecting the citizenry, his layoff derives from circumstances beyond his control, that being the City's good faith effort to reduce costs in order to preserve the continued functioning of City government services in light of the recent economic downturn and decreases in State aid to cities.

R. R. K.