

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Steven Shannon,
Petitioner,

vs.

City of Minneapolis,
Respondent.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above entitled matter initially came on for hearing before Administrative Law Judge Barbara L. Neilson on July 22, 2009, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota, on the threshold question of the applicability of the Veterans Preference Act to the employment position held by the Petitioner. On July 30, 2009, the Administrative Law Judge issued an order concluding that the Petitioner is entitled to the rights and protections of the Veterans Preference Act.

On August 20, 2009, a further hearing was held at the Office of Administrative Hearings to consider the merits of whether the Petitioner was removed for incompetency or misconduct. The OAH record closed at the end of the hearing on August 20, 2009.

Gayle Gaumer, Attorney at Law, appeared on behalf of the Petitioner, Steven Shannon. Mike Bloom, Assistant City Attorney, appeared on behalf of the City of Minneapolis.¹

STATEMENT OF ISSUE

The issue presented at this stage of the hearing is whether or not the Petitioner was removed from his position with the City for incompetency or misconduct and what, if any, relief should be awarded under the Veterans Preference Act.

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

¹ Stipulation of Parties; Exhibit 7.

FINDINGS OF FACT

Procedural Findings

1. The Petitioner, Steven R. Shannon, is an honorably discharged veteran within the meaning of the Veterans Preference Act (VPA).²

2. The City of Minneapolis is a public employer within the meaning of the VPA.

3. The Petitioner was hired by the City of Minneapolis out of the union hiring hall list maintained by International Brotherhood of Electrical Workers, Local 292. Although he was classified by the City as a “temporary” employee, the Petitioner was continuously re-employed by the City from September 18, 2000, until January 16, 2009.

4. On January 16, 2009, the Local 292 Hiring Hall provided the Petitioner with a “Separation Notice” that indicated that the City had “discontinued his employment due to limitations not allowing him to perform all of the essential functions required by the Traffic Division.”³

5. The City did not notify the Petitioner of its intent to discharge him or of his right to request a hearing under the VPA within 60 days of receipt of the notice of intent to discharge.

6. On March 30, 2009, the Petitioner signed a Petition for Relief for submission to the Department of Veterans Affairs. The Petition was notarized by his attorney in this matter. The Petition was not filed with the Department of Veterans Affairs until sometime in May of 2009.⁴ In the Petition for Relief, the Petitioner asserted that the City had terminated him without prior notice and without allowing him a hearing under the VPA. He requested reinstatement and lost wages and benefits from the date of termination, plus interest.

7. The Commissioner of Veterans Affairs issued a Notice of Petition and Order for Hearing on June 2, 2009, and ordered that a contested case hearing be held on July 22, 2009. In the Order for Hearing, the Commissioner stated that the purpose of the hearing would be “to determine whether Petitioner’s veterans preference rights, as granted under MN Stat. 197.46 have been denied.” If the Administrative Law Judge found that the Petitioner’s veterans preference rights were not violated or denied, the Commissioner’s Order for Hearing indicated that the Judge “may provide a RECOMMENDATION that the Commissioner DISMISS the Petition and Order.” On the other hand, if the Judge determined that the Petitioner’s veterans preference rights were violated or denied, the Order for Hearing directed the Administrative Law Judge “to

² See Minn. Stat. § 197.447. Unless otherwise noted, all references are to the 2008 edition of the Minnesota Statutes.

³ Ex. 6.

⁴ The exact day in May on which it was received is not clear on the copy of the Petition for Relief that was attached to the Notice of Petition and Order for Hearing.

continue and complete the Veterans Preference Hearing, and provide the Commissioner a RECOMMENDATION whether the Petitioner's requests, stated or related to his Petition, should be DENIED or GRANTED, with each Denied or Granted Item so specified."⁵

8. The Administrative Law Judge held a telephone conference call with counsel for the parties on July 7, 2009. After a lengthy discussion with counsel, the Administrative Law Judge ruled that, "consistent with the Commissioner's Order for Hearing, this proceeding will involve a determination of whether the City was required to provide a veterans preference hearing and, if so, completion of that hearing culminating in a recommendation to the Commissioner regarding whether Mr. Shannon's requests for relief should be denied or granted." The Administrative Law Judge further ordered that the July 22, 2009, hearing would focus on the threshold question of whether or not the Petitioner's position was protected by the VPA and that, if it was determined that the Petitioner was entitled to the protection of the VPA, a further hearing would be held on August 20, 2009, to consider whether or not the Petitioner was removed for cause or for incompetence and what, if any, relief should be awarded.⁶

9. At the initial hearing held on July 22, 2009, the parties entered into a Stipulation of Facts, stipulated to the receipt of various exhibits, filed pre-hearing memoranda and provided legal argument.

10. On July 30, 2009, the Administrative Law Judge issued an Order Regarding Applicability of Veterans Preference Act to Petitioner's Position concluding that the temporary employment exception to the VPA did not apply to the Petitioner's position and that the Petitioner is entitled to the rights and protections of the VPA.⁷

11. A further hearing was held on August 20, 2009, as previously scheduled, to consider the substantive issue of whether the Petitioner was removed for incompetency or misconduct and whether he was entitled to relief under the VPA.

Nature of Petitioner's Employment

12. The Petitioner is a licensed Journeyman Electrician who worked in the City's Public Works Traffic Division between 2001 and January 2008.⁸

13. A 2008 job posting by the City states that typical duties and responsibilities of electricians working for the City include, among other things, "[i]nstall[ing], repair[ing] and maintain[ing] electrical equipment and appliances" such as "generators, motors, control boards, receptacles, conduits, meters, lighting systems, traffic systems, etc.;" "[p]erform[ing] overhead and underground electrical work;"

⁵ Notice of Petition and Order for Hearing at 1-2 (emphasis in original).

⁶ These rulings were summarized in a July 14, 2009, letter from the Administrative Law Judge to counsel for the parties.

⁷ See Order of the Administrative Law Judge Regarding Applicability of Veterans Preference Act to Petitioner's Position (July 30, 2009).

⁸ Testimony of Petitioner.

“[i]nstall[ing] interior and exterior wiring;” and “[p]erform[ing] other related duties as assigned.” The posting requires that candidates “[m]ust be able to perform all essential job functions of an electrician.” The specific duties of electricians working in the Traffic Division identified in the posting include the following:

- Assemble, install and maintain traffic signal and street lighting hardware.
- Install and maintain above and below ground wiring and conduit systems.
- Install and maintain mechanical and solid state traffic signal control and communication equipment.
- Install and maintain outdoor and indoor electrical facilities as required.
- Install and maintain navigation lighting systems on Mississippi River bridges.
- Performs other related duties as assigned.⁹

The posting states that City electricians must work under the following working conditions:

Exposure to high voltage. Frequently works out of a bucket lift truck and will be required to work above ground, in some instances, over 100 feet. Works in all kinds of weather conditions and with exposure to dust, dirt, fumes, loud noises and traffic; ability to walk on rough, uneven or slippery surfaces; ability to work in confined spaces; must be able to push, pull, lift and carry tools and equipment; must be able to bend, twist, reach crouch, stoop, kneel and climb. Must be able to perform all essential job functions of an electrician.¹⁰

The Petitioner agreed that the description in this job posting accurately describes the general duties and working conditions for electricians working for the City.¹¹

14. The 2008 posting did not mention any weight requirements that applied to candidates for the job or specify the maximum load capacities of the equipment used by electricians.

15. Electricians working for the City report to a foreman, and the foremen report to Thomas Piersak, who is the General Foreman for the City’s electricians. Mr. Piersak and the foremen decide the work and crew assignments without consulting with the union. Employees are assigned specific job duties each morning, and on-going

⁹ Ex. 10, Job Duties.

¹⁰ Ex. 10, Working Conditions.

¹¹ Testimony of Petitioner.

duties are reevaluated every morning. The City's Collective Bargaining Agreement with Local 292 includes a management rights clause which is interpreted to vest City management with the right to assign work duties. That clause specifies:

The Union recognizes the right of the Employer to operate and manage its affairs in all respects in accordance with applicable laws and regulations of appropriate authorities. All rights and authority which the Employer has not officially abridged, delegated or modified by the express terms and provisions of this Agreement are retained by the Employer.¹²

16. During the time the Petitioner worked for the City, both temporary electricians hired through the union hiring hall and permanent electricians hired directly by the City had similar responsibilities.¹³

17. Electricians working for the City can be assigned anywhere, to do any work within the City, and must be able to perform both above ground and below ground work. Their job duties can include many different overhead and underground tasks, such as wiring lights in a building or a semaphore or installing or repairing street lighting and underground wiring. If the job they are asked to perform involves overhead work, they may need to work out of a bucket truck or, less frequently, use a ladder. On occasion, a scissors lift or scaffolding is used to perform such work. Electricians who are assigned to work on lighting systems that are located inside a building may need to use a ladder. The City has just one classification for electricians, regardless of whether they work outside or in the City's shop.¹⁴

18. The City has approximately eight or nine bucket trucks (also called tower trucks) that are used almost daily. Two of the bucket trucks have a maximum load capacity of 400 pounds, and the others have a maximum load capacity of 350 pounds. The 400-pound bucket trucks are generally assigned to bigger and heavier projects, such as larger overhead projects or those involving installation of lighting or signal cabinets.¹⁵

19. The City has only one scissors lift and it is not always available for every job.¹⁶

20. The ladders used by electricians in the City's Traffic Division have maximum load limits of either 300 or 350 pounds. Bucket trucks are used more frequently than ladders.¹⁷

21. The maximum load capacity reflects the maximum working load that the bucket or ladder can safely hold, and takes into account the weight of the electrician as

¹² Exhibit 2; Testimony of Thomas Piersak.

¹³ Testimony of Petitioner, T. Piersak.

¹⁴ Testimony of Petitioner, T. Piersak.

¹⁵ Testimony of T. Piersak.

¹⁶ Testimony of Petitioner.

¹⁷ Testimony of Petitioner, T. Piersak.

well as the weight of his or her tool belt, work boots, hard hat, jacket, harness, and the equipment being used that day. The City did not offer precise weights for each piece of equipment. Mr. Piersak estimated that the safety harness worn by electricians weighs approximately 7 pounds; a “come-along” (used to pull items tighter) and hand tools that an electrician might carry into the bucket weighs approximately 10-12 pounds; a reel of wire weighs approximately 8-10 pounds; and a fixture weighs approximately 40-45 pounds. Although several of the trucks have material handling capability that allows workers to lift equipment with a hoist, at some point the worker in the bucket must take hold of the item. If the worker is pulling cable, a significant amount of pressure and additional weight may be involved.¹⁸

22. City workers are trained not to exceed the maximum load capacity of the equipment. If the maximum load capacity is exceeded, it is possible the equipment could fail, resulting in injury to the worker and/or others.¹⁹

23. The City’s electricians usually work in two-person crews. Two electricians may be paired on the same crew for as long as two or three years. A foreman oversees several crews and sometimes is present at the work site. When the electricians are using a bucket truck, one person remains on the ground to observe or do work on the surface, while the other person goes up in the bucket. Frequently the worker in the bucket doing the overhead work must work harder than the worker on the ground. The City lets workers decide who will go up in the bucket at any given time. The crews generally take turns or flip a coin to decide who will be in the bucket.²⁰ If there is a dispute between the crew members, the foreman decides and typically tells the crew members to rotate.²¹

24. The Petitioner weighed approximately 320 pounds at the time he was hired by the City. His weight has gone up during the last few years. He has diabetes and attributes at least some of his weight gain to a medication that he previously took. That medication was found to be conducive to weight gain and is now off the market. He weighed approximately 380 pounds in January 2009, and approximately 370 pounds at the time of the hearing in August 2009. The Petitioner’s doctor has recommended that he undergo bariatric surgery to assist him in losing weight. The Petitioner has petitioned his insurance carrier for approval of the surgery but has not yet received approval. The Petitioner’s physician expects that he would lose approximately one-half his body weight if he had the surgery.²²

25. From approximately 2003 to late 2008, the Petitioner was assigned to the City’s shop, where he uncrated, pre-wired, and set up traffic signal heads for use in intersections. The Petitioner was given that job because Mr. Piersak “needed him there at the time.” Before the Petitioner began working in the shop, that job had traditionally been held by a “permanent” City employee rather than a “temporary” employee hired

¹⁸ Testimony of T. Piersak.

¹⁹ Testimony of Petitioner.

²⁰ Testimony of Petitioner, T. Piersak.

²¹ Testimony of T. Piersak.

²² Testimony of Petitioner.

through Local 292. In the latter part of 2008, the City hired two permanent electricians, and Mr. Piersak decided to move the Petitioner out of the shop and replace him with Keith Anderson, a permanent electrician.²³ Mr. Piersak told Mr. Anderson that a lot of temporary employees may be laid off and he wanted someone who was a permanent employee to work in the shop. Mr. Anderson thereafter began to do much of the work that the Petitioner previously performed in the shop.²⁴

26. In the latter part of 2008, after being moved out of the shop, the Petitioner began receiving assignments in the field. During December 2008, the Petitioner performed a variety of tasks for the City. His work in the field included adjusting cabinets to provide power for the City's wi-fi system; trouble-shooting problems with lighting systems (i.e., trying to locate a break in wiring, a bad fuse, or a bad contact causing an outage); installing under-bridge wiring using a scissors lift (a mobile platform with a greater load capacity than the City's ladders and bucket trucks); and pulling in street light wire (which involved laying conduit in the ground for street lights, setting foundations for the lights, and thereafter pulling the wire in for operation of street lights). In performing this work, he was not required to work in the bucket. In fact, during late 2008, the Petitioner did a minimal amount of work using ladders and buckets. He did a lot of underground wiring work in which he remained on the surface of the street.²⁵

Events Leading To Termination

27. On or about December 1, 2008, four Electrical Foremen in the City's Traffic Division submitted a memorandum to Mr. Piersak. In the memorandum, the foremen indicated that they had "concerns regarding the safety of Steve Shannon while he performs certain duties that are required of him as an electrician." They went on to note that "[t]he tower trucks that we operate on a daily basis, as well as any of the ladders we use, all have certain weight restrictions" and stated that none of them felt comfortable assigning the Petitioner to such duties because they believed it would create an unsafe condition for him.²⁶ When Mr. Piersak spoke with one or more of the foremen about the memorandum, he was told that they were not assigning the Petitioner these duties due to this safety concern but instead were giving him other duties.²⁷

28. Mr. Piersak discussed the memorandum he received from the foremen with the City's Human Resources office, which recommended that the Petitioner undergo a fitness-for-duty physical examination. The City arranged for the Petitioner to see Thomas C. Jetzer, M.D., of Occupational Medicine Consultants in Edina, Minnesota.²⁸

²³ Because Mr. Anderson testified that he became a permanent employee of the City during 2005, it does not appear that he was one of the two new hires.

²⁴ Testimony of Petitioner, T. Piersak, Keith Anderson.

²⁵ Testimony of Petitioner.

²⁶ Testimony of T. Piersak; Exhibit 11.

²⁷ Testimony of T. Piersak.

²⁸ Testimony of Petitioner, T. Piersak.

29. Dr. Jetzer issued a Report of Work Ability relating to the Petitioner on or about December 23, 2008. In the Report, Dr. Jetzer checked the box indicating that the Petitioner could “return to work with limitations on 12/23/08 through indefinitely,” and stated that the Petitioner “may work without restrictions within equipment specifications.”²⁹

30. After the City received the Report of Work Ability, the Human Resources Office advised Mr. Piersak to meet with the Petitioner to find out what the notation on the Report meant. In late December, 2008, a meeting was held with the Petitioner, two union representatives, Mr. Piersak, and Steve Mosing, Engineer III, to discuss the Report. During the meeting, Mr. Piersak brought up the Petitioner’s ability to go up in the bucket trucks and told him that all electricians were expected to be able to perform the essential functions of the job. One of the union representatives urged the City to assign the Petitioner to other duties. Mr. Piersak did not agree with that suggestion. During the meeting, the Petitioner told Mr. Piersak that the Report of Work Ability meant that he could not work in the bucket because of his weight, and expressed doubt that he could lose enough weight to meet the specifications. Mr. Piersak told the Petitioner that he would have to stay home until he could perform the essential functions of the position and pass the physical.³⁰ The Petitioner did not work at the City during January 2009.³¹

31. Mr. Piersak reported back to the City’s human resources office after the meeting and was told that, because the Petitioner was a temporary employee and could not perform the essential functions of the position, the City had to let the Petitioner go.³²

32. On January 16, 2009, the Local 292 Hiring Hall provided the Petitioner with a “Separation Notice” that indicated that the City had “discontinued his employment due to limitations not allowing him to perform all of the essential functions required by the Traffic Division.”³³

33. There is no indication in the record that the City had previously questioned the Petitioner’s qualifications for the electrician job or had previously taken disciplinary action against him. The City never warned the Petitioner prior to December 2008 or January 2009 that he needed to lose weight to avoid the termination of his employment. The Petitioner was not aware until the hearing that the foremen had raised a concern

²⁹ Exhibit 12.

³⁰ Testimony of T. Piersak.

³¹ Testimony of Petitioner.

³² Testimony of T. Piersak.

³³ Testimony of Petitioner; Exhibit 6. The City offered testimony underscoring that the union did not file a grievance when the Petitioner was discharged. However, the Letter of Agreement regarding employment of temporary employees (attached as Attachment “B” to the collective bargaining agreement between the City and the Union) specifies that temporary employees “shall be at will employees, i.e., they shall serve at the pleasure of the Employer” and “may be released from employment within the sole discretion of the Employer without regard to seniority or to just cause.” The Letter of Agreement goes on to specify that “the release of a temporary employee from employment shall not be subject to review under the grievance or arbitration provisions of the [collective bargaining agreement] or the rules and regulations of the Minneapolis Civil Service Commission.”

about his safety, nor was he aware that they had not been assigning him to certain work because of that concern.³⁴

34. As set forth in the Procedural Findings above, the Petitioner subsequently filed a Petition for Relief under the VPA, the Commissioner of Veterans Affairs issued a Notice of Petition and Order for Hearing, and hearings were held on July 22, 2009, and August 20, 2009.

Additional Findings

35. At the time of his termination, the Petitioner was paid at a rate of \$38.55 per hour.³⁵ Under the Letter of Agreement between the City and the Union, temporary employees who worked in excess of regular hours on regular work days (Monday through Friday) were to be paid 1½ times the regular rate of straight time up to midnight; and those who worked in excess of ten hours in a workday or worked on Saturdays, Sundays, holidays, or emergency call-back bases were to be paid a double the rate of single time.³⁶ It is not clear from the record how much overtime the Petitioner worked.

36. At the time of his termination, the City paid \$17.75 per hour worked by the Petitioner to the electrician fringe benefit fund.³⁷

37. The Petitioner has not been employed since January 16, 2009. As a member of Local 292, he cannot directly seek work on his own behalf but must go through the union hiring hall. The Petitioner has put his name “on the book” at the union hall but several hundred people are ahead of him on the list.³⁸

38. The Petitioner had received approximately \$14,000 (\$565 per week) in unemployment compensation as of the date of the hearing. He continues to be a union officer and receives a stipend for attending union meetings, as he did prior to his termination. There has been no change in the frequency of union meetings since his termination.³⁹

39. The Petitioner was never unable to perform an assigned job duty while he was working for the City. Apart from the issue of equipment specifications, the Petitioner agrees that he is physically able to do the job of electrician and there is no medical reason why he cannot do the job.⁴⁰

40. Keith Anderson (the permanent electrician who took the Petitioner’s place in the City’s shop) does not spend all of his working time in the shop. He works there most mornings but, in the afternoon, he goes out in the field on the signal truck to cover

³⁴ Testimony of Petitioner.

³⁵ Exhibit 9.

³⁶ Letter of Agreement, ¶ 5 (Ex. 2, Attachment B).

³⁷ Exhibit 9.

³⁸ Testimony of Petitioner.

³⁹ Testimony of Petitioner.

⁴⁰ Testimony of Petitioner.

the gap between the morning and afternoon signal truck shifts. Mr. Anderson also works weekends on bucket trucks and fills in on various crews as needed.⁴¹

41. Mr. Anderson would not object if the Petitioner worked in the shop and Mr. Anderson worked outside.⁴²

42. There would be sufficient work for electricians in the Traffic Division to assign the Petitioner to full-time work not involving the use of a bucket truck or ladder.⁴³

43. The facts set forth in the July 30, 2009, Order of the Administrative Law Judge Regarding Applicability of Veterans Preference Act to Petitioner's Position are incorporated into these Findings to the extent that they are not inconsistent with these Findings.

44. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

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

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 has the right to a hearing under the VPA prior to discharge from employment and, if so, whether there was a proper basis for the City to terminate the Petitioner's employment and what, if any, relief is appropriate under the VPA.

2. When issuing the Notice of Petition and Order for Hearing, the Department substantially complied with all substantive and procedural requirements of statute and rule, and this matter is properly before the Administrative Law Judge. The Petitioner's Petition for Relief was received by the Department in May, 2009.⁴⁴ At the request of counsel for the Petitioner, the Department scheduled the hearing on the petition for July 22, 2009. While Minn. Stat. § 197.481, subd. 4, generally directs the Commissioner to hold the hearing within 20 days of being served with the petition, it also specifies that a party who fails to demand the hearing within 20 days may be heard by permission of the Commissioner.

⁴¹ Testimony of Petitioner, T. Piersak, K. Anderson.

⁴² Testimony of K. Anderson.

⁴³ Testimony of T. Piersak, K. Anderson.

⁴⁴ The exact date in May is not clearly identified on the Petition for Relief attached to the Notice of Petition and Order for Hearing.

3. The Petitioner is an honorably discharged veteran within the meaning of the VPA.⁴⁵

4. The City of Minneapolis is a political subdivision of the State of Minnesota within the meaning of the VPA.⁴⁶

5. The parties have complied with all relevant substantive and procedural requirements of statute and rule and this matter is properly before the Administrative Law Judge.

6. The conclusions and legal discussion set forth in the July 30, 2009, Order of the Administrative Law Judge Regarding Applicability of Veterans Preference Act to Petitioner's Position are incorporated into these Conclusions to the extent that they are not inconsistent with the Conclusions in this Report.

7. Minn. Stat. § 197.46 provides in 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.

8. Under Minn. R 1400.7300, subp. 5, the Petitioner has the burden of proof to establish by a preponderance of the evidence that he was removed from his employment with the City and denied his rights under the Veterans Preference Act, Minn. Stat. § 197.46.

9. The Petitioner has demonstrated by a preponderance of the evidence that he was removed from his employment with the City on January 16, 2009.

10. Minn. Stat. § 197.46 further provides:

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge. The failure of a veteran to request a hearing within the provided

⁴⁵ Minn. Stat. § 197.447 defines "veteran" for purposes of the VPA to mean "a citizen of the United States or a resident alien who has been separated under honorable conditions from any branch of the armed forces of the United States after having served on active duty for 181 consecutive days or by reason of disability incurred while serving on active duty, or who has met the minimum active duty requirement as defined by Code of Federal Regulations, title 38, section 3.12a, or who has active military service certified under section 401, Public Law 95-202. The active military service must be certified by the United States secretary of defense as active military service and a discharge under honorable conditions must be issued by the secretary."

⁴⁶ See Minn. Stat. § 197.46.

60-day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available legal remedies for reinstatement.

11. As discussed in the July 30, 2009, Order of the Administrative Law Judge Regarding Applicability of Veterans Preference Act to Petitioner's Position, the Petitioner's position does not fall within the temporary employment exception to the VPA. The Petitioner has demonstrated that he was not given written notice of the City's intent to terminate him for incompetency or of his right to request a hearing under the VPA within 60 days of receipt of the notice of intent to discharge, in violation of Minn. Stat. § 197.46.

12. Under the VPA, a veteran may be dismissed from employment for misconduct or incompetency.⁴⁷ The Minnesota courts have held that physical inability to perform job requirements constitutes "incompetence" within the meaning of the VPA.⁴⁸ Minnesota courts have also concluded that "[t]he cause or reason for dismissal must relate to the manner in which the employee performs his duties, and the evidence showing the existence of reasons for dismissal must be substantial."⁴⁹

13. The discipline imposed on the veteran may be modified if the employer acted unreasonably⁵⁰ or there are extenuating circumstances that demonstrate that the discharge was unwarranted.⁵¹

14. The City bears the burden to show by a preponderance of the evidence that its conduct was reasonable.⁵² Factors that may be considered in this regard include "the veteran's conduct, the effect upon the workplace and work environment, and the effect upon the veteran's competency and fitness for the job."⁵³

15. A back pay award made under the VPA is subject to customary mitigation of damages principles.⁵⁴ A veteran is required to "reduce his claim for wages by the amount which, by the exercise of due diligence, he could have earned in employment of a like kind or grade."⁵⁵ The employer must bear the burden of showing that the employee could have obtained other employment.⁵⁶

⁴⁷ Minn. Stat. § 197.46.

⁴⁸ See, e.g., *Myers v. City of Oakdale*, 465 N.W.2d 702 (Minn. App. 1991); see also *Myers v. City of Oakdale*, 409 N.W.2d 848, 853 (Minn. 1987) (the term "incompetency" as used in the VPA should be construed according to its common and approved usage, which includes "want of physical fitness").

⁴⁹ *Leininger v. City of Bloomington*, 299 N.W.2d 158, 161 (Minn. App. 1995).

⁵⁰ *State ex rel Laux v. Gallagher*, 527 N.W.2d 158, 161 (Minn. App. 1995); *Myers*, 409 N.W.2d at 853; *In re Schrader*, 394 N.W.2d 796, 802 (Minn. 1986), *rehearing denied* (Nov. 21, 1986).

⁵¹ *Schrader*, 394 N.W.2d at 802.

⁵² *Schrader*, 394 N.W.2d at 802; *Lewis v. Minneapolis Bd. of Educ.*, 408 N.W.2d 905, 907 (Minn. App. 1987), *review denied* (Minn. Sept. 23, 1987).

⁵³ *Schrader*, 394 N.W.2d at 802.

⁵⁴ *Kurtz v. City of Apple Valley*, 290 N.W.2d 171, 174 (Minn. 1980).

⁵⁵ *Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401, 406 (Minn. App. 1987), *quoting Spurck v. Civil Service Board*, 42 N.W.2d 720, 727 (Minn. 1950).

⁵⁶ *Hembre v. City of Edina*, 1994 W.L. 455644 (Minn. App. 1994).

16. The Petitioner's approximate two-month delay in filing his Petition for Relief and proceeding with the hearing in this matter amounted to a failure to mitigate his damages. The City did not demonstrate that the Petitioner could have obtained other employment.

17. Unemployment compensation received by the veteran must be deducted from a veteran's back pay award.⁵⁷

18. The City has not demonstrated that its decision to discharge the Petitioner under these circumstances was reasonable. In addition, the Petitioner has demonstrated that extenuating circumstances exist that render termination unwarranted at this time.

19. The Petitioner is entitled to reinstatement to his position with the City, and is entitled to his wages and benefits as if he had held the position consistently through the date of the Commissioner's Order, minus (1) two months' wages attributable to the Petitioner's delay in filing his Petition for Relief and proceeding with the hearing in this matter; and (2) the amount of unemployment compensation received by the Petitioner between January 16, 2009, and the date of the Commissioner's Order.

20. The Petitioner is entitled to receive interest on his back wages at the rate of 6 percent per year, calculated from the time each paycheck was due, as set forth in Minn. Stat. § 334.01, subd. 1.⁵⁸

21. The City is entitled to take adverse action against the Petitioner, up to and including discharge, if his weight is not reduced within six months of his reinstatement to a sufficient level to enable him to meet equipment specifications.

22. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

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

RECOMMENDATION

IT IS RECOMMENDED THAT:

1. The Commissioner of the Minnesota Department of Veterans Affairs GRANT the Petition for Relief.

2. The City reinstate the Petitioner to his electrician position with the City.

⁵⁷ See, e.g., *Robertson v. Special School District No. 1*, 347 N.W.2d 265 (Minn. 1984); *Johnson v. City of Apple Valley*, 536 N.W.2d 336 (Minn. App. 1995); *Pawelk v. Camden Township*, 415 N.W.2d 47, 52 (Minn. App. 1987); *Kurtz*, 290 N.W.2d at 174; Findings of Fact, Conclusions of Law, and Recommendation in *Perttu v. City of Keewatin*, OAH Docket No. 4-3100-14123-2 (2001).

⁵⁸ *Henry*, 401 N.W.2d at 407.

3. The City compensate the Petitioner for such back pay and benefits to which the Petitioner may have become entitled between January 16, 2009, and the date of the Commissioner's Order, with interest, minus the amount of unemployment compensation received by the Petitioner, and minus two months' wages to reflect the Petitioner's delay in filing the petition with the Department and promptly proceeding with the hearing.

4. The City be permitted to take adverse action against the Petitioner, up to and including discharge, if his weight is not reduced within six months of his reinstatement to a sufficient level to enable him to meet equipment specifications.

Dated: September 23, 2009

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Digitally Recorded; No Transcript Prepared

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 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 Clark Dyrud, Commissioner of Veterans Affairs, State Veterans Service Building, 20 West 12th Street, Room 206C, St. 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 Commissioner, or upon 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 Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Under the Veterans Preference Act, no qualified veteran holding a position in public employment “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.”⁵⁹ The terms “misconduct” and “incompetence” have been equated with “just cause,” meaning any cause “touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office.”⁶⁰ The Minnesota courts have held that physical inability to perform job requirements constitutes “incompetence” within the meaning of the VPA.⁶¹ It is also well established that “[t]he cause or reason for dismissal must relate to the manner in which the employee performs his duties, and the evidence showing the existence of reasons for dismissal must be substantial.”⁶²

Under applicable case law, the discipline that the employer imposed on the veteran may be modified if the employer acted unreasonably⁶³ or there are extenuating circumstances that demonstrate that the discharge was unwarranted.⁶⁴ The purpose of a veterans preference hearing is not merely to review findings and approve or disapprove the recommended sanction, but to determine, based on the evidence, what penalty, if any, is justified. The authority to modify the discipline proposed by the employer is consistent with granting the veteran a meaningful hearing and ensuring that the employer does not arbitrarily abuse its power.⁶⁵ The employer bears the burden to show by a preponderance of the evidence that its conduct was reasonable.⁶⁶ To determine whether the City acted reasonably, one must consider “the veteran’s conduct, the effect upon the workplace and work environment, and the effect upon the veteran’s competency and fitness for the job.”⁶⁷ The veteran is given the opportunity to show whether there are any extenuating circumstances that should have weighed into the employer’s decision to terminate the veteran’s employment.⁶⁸ Accordingly, the City must show that it reasonably exercised its discretion in the selection of discipline.⁶⁹

⁵⁹ Minn. Stat. § 197.46.

⁶⁰ *Ekstedt v. Village of New Hope*, 292 Minn. 152, 162-63, 193 N.W.2d 821, 827-28 (1972); *Bendickson v. County of Kandiyohi*, No. C9-00-1149 (Minn. App. Dec. 19, 2000) (citing *In re County of Cass*, 353 N.W.2d 627, 630 (Minn. App. 1984)).

⁶¹ See, e.g., *Myers v. City of Oakdale*, 465 N.W.2d 702 (Minn. App. 1991); see also *Myers v. City of Oakdale*, 409 N.W.2d 848, 853 (Minn. 1987) (the term “incompetency” as used in the VPA should be construed according to its common and approved usage, which includes “want of physical fitness”).

⁶² *Leininger v. City of Bloomington*, 299 N.W.2d 158, 161 (Minn. App. 1995).

⁶³ *State ex rel Laux v. Gallagher*, 527 N.W.2d 158, 161 (Minn. App. 1995); *Myers*, 409 N.W.2d at 853; *Schrader*, 394 N.W.2d at 802.

⁶⁴ *Schrader*, 394 N.W.2d at 802.

⁶⁵ *Id.* at 800-01 (Minn. 1986); *AFSCME Council 96 v. Arrowhead Regional Corrections Board*, 356 N.W.2d 295, 298 (Minn. 1984).

⁶⁶ *Lewis v. Minneapolis Bd. of Educ.*, 408 N.W.2d 905, 907 (Minn. App. 1987), *review denied* (Minn. Sept. 23, 1987); *In re Schrader*, 394 N.W.2d at 802.

⁶⁷ *Schrader*, 394 N.W.2d at 801-02; *Pawelk v. Camden Township*, 415 N.W.2d 47, 50 (Minn. App. 1987).

⁶⁸ *Garavalia v. City of Stillwater*, 283 Minn. 335, 346, 168 N.W.2d 336, 344 (1969).

⁶⁹ *Schrader*, 394 N.W.2d at 802-03 (Simonett, concurring).

In this case, the City acknowledges that the Petitioner has the requisite knowledge and licensure to serve as an electrician for the City, and that he has no claimed disability or medical restrictions that affect his ability to perform his job. The City contends that the Petitioner is “incompetent” to remain in his position solely because of his weight and his resulting inability to work on the City’s existing ladders or bucket trucks within the maximum load capacities for that equipment. The City has demonstrated that its electricians must be able to perform the essential functions of the job, and that those essential functions generally include being able to go up in bucket trucks and climb ladders. It is evident that, in January 2009, the Petitioner exceeded the 350-pound maximum load capacity of the majority of the City’s bucket trucks and its strongest ladders. It is also likely that the Petitioner would have exceeded the capacity of the two 400-pound bucket trucks if he had to carry a significant amount of equipment with him.

However, the Administrative Law Judge concludes that, under the particular circumstances of this case, the City has not shown that its decision to discharge the Petitioner from his position in January of 2009 due to his inability to work within the maximum load capacities for this equipment was reasonable and that the Petitioner has demonstrated that termination at that time was unwarranted due to extenuating circumstances. The Judge reaches this conclusion for the reasons discussed below.

First, the City did not provide the Petitioner with adequate notice that his job would be in jeopardy if he did not lose weight. It is undisputed that the Petitioner worked as an electrician for the City for more than eight years. He testified that he was within 50 pounds or less of his current weight at the time he was originally hired by the City. Despite the fact that the Petitioner weighed approximately 320 – 380 pounds during the eight years of his employment, there is no evidence in the record that the Petitioner was informed at any time prior to late December 2008 or early January 2009 that his weight was an issue and substantial weight loss would be required to maintain his position. During the time that the Petitioner worked in the shop, the City did not question his weight or whether he could use a ladder or bucket truck. In fact, the City admitted that the Petitioner’s weight simply wasn’t an issue during the prior five years of his employment, due to the nature of the duties he performed in the shop. There is no suggestion in the record that the Petitioner was assigned to the shop because the City felt compelled to avoid sending him out in the field; to the contrary, Thomas Piersak, the General Foreman for the City’s electricians, simply said that the Petitioner was given that job because Mr. Piersak “needed him there at the time.” Only when the Petitioner was moved out of the shop in late 2008 and began receiving field assignments did his weight become a matter of concern. Even then, the Petitioner was not informed that the foremen were not giving him certain job assignments because of his weight, nor was he told of the memorandum Mr. Piersak had received from the foremen regarding their safety concerns about him.

Second, once the issue was finally discussed with the Petitioner in late December 2008, the City did not give him an adequate opportunity to bring his weight down to come within equipment specifications, but simply terminated his employment in a matter of weeks. It appears that the City’s human resources office believed that such

a severe sanction was justified at least in part because, in its view, the Petitioner was merely a “temporary” employee who could be “released from employment within the sole discretion of the Employer without regard to seniority or to just cause” under the Letter of Agreement that applied to such employees. Regardless of how the Petitioner is classified by the City, however, the Administrative Law Judge ruled in her July 30, 2009, Order that the Petitioner is not properly considered a temporary employee under the VPA, and instead is entitled to the protections of that Act, including termination only for the reasons permitted under the Act.

Third, the Petitioner had no history of discipline or performance problems. His term of employment was continuously extended on a regular six-month basis for over eight years. The City admitted in closing argument that the Petitioner had performed good work as an electrician. There is no evidence of any refusal to perform a job assignment or any misconduct on his part. Moreover, there is no indication that the Petitioner’s foremen or managers had any dissatisfaction whatsoever with the Petitioner’s ability to perform his job duties prior to the time they raised the safety concern in late 2008.⁷⁰

Based upon all of the evidence, the City’s decision to terminate the Petitioner’s employment on January 16, 2009, was too harsh of a penalty. The situation did not warrant the imposition of any sanction on the Petitioner at that time. Accordingly, the Administrative Law Judge finds that the City has not shown that termination is reasonable under the circumstances of this case, and the City did not properly consider the extenuating circumstances discussed above. While the City may in the future require the Petitioner to reach a weight that will allow him to work within equipment specifications, and may terminate his employment if he fails to do so, it is only reasonable for the City to first provide proper notice to the Petitioner that his weight is a matter of concern and could lead to his discharge and an adequate opportunity for him to achieve that weight loss goal.

The Administrative Law Judge recommends that the Petitioner be reinstated to his position with the City and be compensated for his lost wages and benefits as if he had held the position consistently through the date of the Commissioner’s Order, minus (1) two months’ wages attributable to the Petitioner’s delay in filing his Petition for Relief and proceeding with the hearing in this matter; and (2) the amount of unemployment compensation received by the Petitioner between January 16, 2009, and the date of the Commissioner’s Order. The Petitioner is entitled to receive interest on his back wages at the rate of 6 percent per year calculated from the time each paycheck was due, as set forth in Minn. Stat. § 334.01, subd. 1.

To determine the amount of wages owing the Petitioner, the City shall calculate the average number of regular and overtime hours worked by the Petitioner during the time period of January 1, 2007 – January 1, 2009; assume that the Petitioner worked

⁷⁰ The Petitioner’s testimony that his weight gain during the past few years was attributable at least in part to a medication that he previously took provides some additional evidence of an extenuating circumstance.

that amount of regular and overtime hours during the period of January 16, 2009, through the date of the Commissioner's Order; and multiply the average regular and overtime hours by the regular and overtime hourly rate of pay in effect during that time period.

During the six-month period following his reinstatement, the Petitioner should be given work that he is able to perform while he attempts to bring his weight down. This should not present a difficulty for the City, since the General Foreman acknowledged at the hearing that there would be sufficient work for electricians in the Traffic Division to assign the Petitioner to work that does not involve the use of a bucket truck or ladder. In addition, Mr. Anderson testified that he would not have any objection if the Petitioner was assigned to work in the shop and Mr. Anderson worked outside. If the Petitioner's weight is not reduced within six months of his reinstatement to a sufficient level to enable him to meet equipment specifications, the City will be entitled to take adverse action against the Petitioner, up to and including discharge. It appears from the evidence presented at the hearing that a goal weight in the range of 300 - 320 pounds would be adequate⁷¹ but, because the evidence presented at the hearing only included approximations of the weights of equipment and tools, the Administrative Law Judge lacks a sufficient basis to set an exact weight to be achieved. The City should ascertain the actual weight of equipment and tools and notify the Petitioner of the goal at the time he is reinstated.

B. L. N.

⁷¹ Although some of the City's ladders have a capacity of only 300 pounds, it is reasonable to assume that the Petitioner could choose to use one of the 350-pound ladders. There is no evidence that workers climbing ladders typically carry heavy equipment. In addition, the Petitioner and the City agreed that ladders are used less frequently than bucket trucks. The Administrative Law Judge agrees with the City that it does not have an obligation to reserve one of the two 400-pound bucket trucks for the Petitioner's use or buy a new truck with a greater capacity.