

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Kevin Cole, Petitioner

v.

Minnesota Department of Corrections,
Respondent

**RECOMMENDATION ON THE
SUMMARY DISPOSITION MOTION
OF THE DEPARTMENT OF
CORRECTIONS**

This case arises out of the State shutdown, which began on July 1, 2011. As of that date, most State employees were laid off. The shutdown occurred because the State had not approved an operating budget for the biennium commencing July 1, 2011. The budget issue was subsequently resolved, and State employees, including the Petitioner, returned to work on July 21, 2011, once funding was approved.

The Petitioner is an employee of the Minnesota Department of Corrections (the Department) who was laid off during the shutdown. On July 26, 2011, the Petitioner filed a Petition for Relief under the Minnesota Veterans Preference Act (VPA). The Petitioner contends that his layoff resulted from the State's lack of good faith in failing to enact a biennial budget. He further asserts that his job was incorrectly determined not to be critical and that other Department employees performed a part of his job during the shutdown in spite of his job's designation as non-critical.

A prehearing conference was held on October 11, 2011, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, MN 55101. Kevin Cole (Petitioner) appeared on his own behalf. Krista Fink, Associate Legal Counsel, Minnesota Department of Corrections, appeared on behalf of the Department. At the prehearing, Counsel for the Department requested leave to file a dispositive motion.

On October 24, 2011, the Department filed a motion for summary disposition. The Petitioner responded to the motion on November 1, 2011. The ALJ received the Department's Reply Brief on November 21, 2011. On that day, the ALJ heard oral argument regarding the Department's motion.

Based on the filings and records herein, and the arguments of the Parties,

IT IS HEREBY RECOMMENDED THAT:

1. The Department of Veteran Affairs **GRANT** the Department's motion for summary disposition.
2. The Department of Veteran Affairs **DENY** Petitioner's request for relief under VPA.

Dated: December 9, 2011

s/Linda F. Close

LINDA F. CLOSE
Administrative Law Judge

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 and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Commissioner of Veterans Affairs, Veterans Service Building, Minnesota Department of Veterans Affairs, 20 West 12th Street, Second Floor, 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 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.

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

MEMORANDUM

Issues Presented

The Petitioner has requested relief under the VPA. He asserts that the State's failure to enact funding for the biennium, resulting in the shutdown, was not done in good faith. He further maintains that his particular job was erroneously treated as non-critical, in spite of which other Department employees performed his job, at least in part.

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment.¹ Summary disposition is appropriate when there is no genuine dispute as to the material facts of a contested case, and the law applied to those undisputed facts clearly favors one of the parties.² The moving party carries the burden of proof to establish that there are no genuine issues of material fact that would preclude disposition of the case as a matter of law.³ Further, when considering a motion for summary disposition, the tribunal must view the facts in the light most favorable to the nonmoving party.⁴ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.

In order to defeat an otherwise proper motion for summary disposition, the non-moving party must show the existence of material facts that are genuinely disputed.⁵ A genuine issue is one that is not either a sham or frivolous and a material fact is a fact whose resolution will affect the result or outcome of the case.⁶

Undisputed Facts

The Petitioner is an honorably discharged veteran of the military service. By a memorandum dated June 10, 2011, the Petitioner received from Minnesota Management & Budget (MMB) a notice about a potential layoff in July. Funding for the coming biennium had not been approved, and a shut down was anticipated. The MMB notice informed Petitioner he would be laid off unless the Department told him he should report to work to perform critical services.

On June 15, 2011, the Attorney General requested that the Ramsey County District Court issue an Order to permit funding of certain State core functions in the event of a shutdown. By a June 29, 2011, Order, the District Court ordered that only

¹ See *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

² See *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

³ See *Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁴ See *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. App. 1984).

⁵ See *Murphy v. Country House, Inc.*, 240 N.W. 2d 507, 511-12 (Minn. 1976); *Borom v. City of St. Paul*, 184 N.W.2d 595, 597 (Minn. 1971).

⁶ See, e.g., *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

critical core government functions be funded during the shutdown. The Court attached to its order an exhibit that designated critical functions for funding during the shutdown. As to the Department, the Court approved temporary funding for operations, support and basic security of correctional facilities, along with a few other core functions. The Petitioner's job, which entails overseeing inmate crews who perform cleaning services at the Department's Shakopee facility⁷, was not among the critical core functions designated by the Court.⁸

During the shutdown, the Department did not recall Petitioner to direct the work of inmate crews. From time to time, other Department employees who had been recalled, supervised inmate crew activities in place of the Petitioner.⁹ During the shutdown, the State continued to pay State employee health insurance premiums so that State employees' health coverage would not lapse. On July 21, 2011, the Petitioner returned to the same position he had held prior to the shutdown. His pay and benefits remained the same as before the shutdown.¹⁰

The Veterans Preference Act

Disposition of this matter necessarily begins with the VPA. Minn. Stat. § 197.46 provides:

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.¹¹

The protections of the VPA have existed in Minnesota since 1907.¹² The VPA was inspired by the Legislature's conviction that veterans have earned preference in public employment by virtue of their having served this country in times of peril.¹³ Over the years, the Supreme Court has had many occasions to consider the aims and effects of the VPA. From the cases, three key principles emerge.

First, the VPA is intended to limit the grounds on which a public employer may terminate the employment of a veteran, so that arbitrary removal of a veteran cannot occur. A termination must be "for cause"¹⁴ or, as phrased in the VPA, may

⁷ Petitioner's Response to the Department's motion.

⁸ *In re Temporary Funding of Core Functions of the Executive Branch of The State of Minnesota*, 62-CV-11-5203 (District Court, Second Judicial District, June 29, 2011).

⁹ At the November 21, 2011, hearing on the Department's motion, the Petitioner acknowledged he received the MMB memorandum notifying him of the potential layoff and its consequences.

¹⁰ The Petitioner acknowledged these facts at the November 21, 2011, hearing.

¹¹ Minn. Stat. § 197.46 (emphasis added).

¹² See Act of Apr. 19, 1907, ch. 263 §§ 1, 2, 1907 Minn. Laws 355.

¹³ See *Winberg v. University of Minnesota*, 499 N.W. 2d 799 (Minn. 1993).

¹⁴ *Gorecki v. Ramsey County*, 437 N.W. 2d 646, (1989).

occur only upon a showing either of misconduct or incompetence.¹⁵ To these two statutory bases for termination, judicial precedent has created a third basis: A public employer may abolish a veteran's position if the action is taken in good faith.¹⁶

Second, notwithstanding the VPA, public employers maintain the right to control their own administrative affairs. Thus, for example, the VPA does not restrict the right of a public employer to create temporary employment positions that are not subject to VPA.¹⁷ Similarly, a public employer may reclassify a position as an exercise of its administrative authority, as long as the decision to reclassify is one of substance and not mere form.¹⁸

Third, an employee is not considered "removed" from employment merely because the employee experiences a work stoppage. Although the statute does not define the term "removal," the Court's decisions illuminate that term. The Court regards a demotion, for example, as a removal.¹⁹ The same is true of placing a veteran on indefinite medical leave.²⁰ But a suspension is not a removal, because a suspension contemplates a return to work following the period of suspension. Suspension is thus distinguished from dismissal, in that the latter entails a complete end of employment.²¹ The Court has expressly held that "a veteran is removed from his or her position or employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job."²²

The Petitioner Was Not Removed From His Position

Applying this law to the undisputed facts of this case leaves no doubt that the Petitioner was not removed from his position. The MMB layoff notice received by the Petitioner explained that he was being placed on an unpaid leave of absence, unless his position entailed "critical services." The notice explained that some employees might be recalled to perform these critical services during the shutdown.

During the shutdown, the Petitioner was not recalled to work, but the State did continue his health insurance benefit by continuing to pay his health insurance premium. The State's continuation of this benefit speaks forcefully to the State's intention to retain the Petitioner as an employee. It was never likely or probable during this period that the Petitioner would be unable to go back to work. On July

¹⁵ Minn. Stat. § 197.46.

¹⁶ See *Young v. City of Duluth*, 386 N.W. 2d 732, 738-9 (Minn. 1986).

¹⁷ *Crnkovich v. Independent Sch. Dist. No. 701, Hibbing*, 273 Minn. 518, 141 N.W.2d 284 (1966) (seasonal employment as a carpenter is not governed by VPA); see also *McAfee v. Department of Revenue*, 514 N.W. 2d 301 (Minn. App 1994) (VPA does not apply to a temporary, unclassified attorney position).

¹⁸ *Myers v. City of Oakdale*, 409 N.W. 2d 848 (Minn. 1987); see also *Taylor v. City of New London*, 536 N.W.2d 901 (Minn. App. 1995), rev. denied Oct. 27, 1995.

¹⁹ *Leininger v. City of Bloomington*, 299 N.W. 2d 723, 726 (Minn. 1980).

²⁰ *Myers*, 409 N.W.2d at 851.

²¹ *Wilson v. City of Minneapolis*, 283 Minn. 352, 354, 168 N.W.2d 19, 22-23 (1969).

²² *Myers*, 409 N.W.2d at 850-51.

21, 2011, the Petitioner returned to the exact position he held before the shutdown. His salary and benefits remained unchanged.

Under these circumstances, the ALJ concludes that the Petitioner was not “removed” from his position with the meaning of the VPA. And removal is the trigger for relief under the VPA. Because there was no removal, there can be no relief under the VPA.

The Petitioner’s Position Was Not Abolished

The Petitioner has asserted the State’s lack of “good faith” in shutting down its operations for a three-week period. This assertion may stem from the MMB layoff notice, which advised the Petitioner that he had rights under the VPA and that the issue at any hearing he requested would be whether the layoff was “done in good faith and for a legitimate purpose.”²³

To the ALJ’s knowledge, the Court has applied the good faith grounds for dismissal only when a public employer has abolished a veteran’s position. None of the cases apply this analysis to a removal, much less a temporary layoff, especially one involving the entire State workforce. The good faith analysis comes into play when a public body eliminates an individual veteran’s position as a sham, when the real purpose is to terminate the veteran’s employment.

It cannot be seriously contended that the shutdown was a ruse to deprive the Petitioner of his employment. A relatively small number of State employees were recalled to perform critical services during the shutdown. Thus, veterans and non-veterans alike suffered the effects of the absence of State funding.

Apart from the “good faith” language in the VPA notice portion of the MMB layoff notice, nothing in the layoff notice suggests that the Petitioner’s position was being abolished and, indeed, his position was not abolished. On July 21, 2011, the Petitioner returned to the exact position he occupied prior to the layoff. For these reasons, it must be concluded that the State did not act in bad faith by shutting down State operations for three weeks.

The VPA Does Not Apply to the Creation of Temporary Positions

The Petitioner asserts that, during the shutdown, other Department employees performed duties he would normally have performed. He contends that his job should have been deemed critical, and he implicitly claims that the Department should have recalled him, not others, to perform this work during the shutdown.²⁴

²³ The Petitioner has acknowledged receiving the MMB Memorandum.

²⁴ It is undisputed that inmate work crews performed minimal services during the shutdown. Various Department employees supervised this work on a part-time basis. Petitioner’s Exhibits 1-6.

This VPA hearing is limited to consideration of whether an employee was removed from his employment for incompetence or misconduct or whether the employee's position was abolished in good faith. The issue of what jobs should have been funded during the shutdown because they were critical is not a VPA issue. The Ramsey County District Court decided the critical functions issue in its June 29, 2011 order. The ALJ has no jurisdiction to delve into that question and does not do so.

As to the Petitioner's implicit argument that the Department should have recalled him to work, the ALJ cannot agree that the VPA required that result. In recalling workers for critical tasks, the Department did not engage in the ordinary hiring process, which requires a competitive open examination and an award of points to veterans in that process.²⁵

The decision to recall certain workers to provide critical services could not, by its nature, be a hiring process under the VPA. There was no open examination or any lengthy hiring process. Critical services had to be performed, and they were performed by those recalled by the Department.

The case law, once again, does not support the Petitioners' position that the VPA provides him with relief. Under judicial precedents, the VPA does not apply to a public employer's decision to create temporary work. A public employer may, even on a regular basis, hire seasonal, hourly workers without regard to the VPA.²⁶ It follows that a public employer may, on a temporary basis, recall employees for critical work during a shutdown without utilizing a VPA process.

It is axiomatic that, to the extent others performed part of the Petitioner's job during the shutdown, that part-time work was temporary: the Petitioner, after all, returned to his exact same job on July 21, 2011. He did so at the same salary as before the shutdown. The Petitioner lost three weeks of compensation, which is not insignificant. But nothing had otherwise changed with respect to his job when he returned. That is precisely because other Department employees did that work on a temporary basis. And that work was merely part-time.²⁷

Conclusion

The VPA does not provide relief for the Petitioner under the circumstances of this case. During the State shutdown, the Petitioner was not removed from his position within the meaning of the VPA, nor was his position abolished, so as to trigger a good faith analysis under the VPA. The Department's failure to recall the Petitioner to perform some of his services did not violate the VPA because those employees performed those services on a temporary basis. For all these reasons,

²⁵ See Minn. Stat. §§ 197.455, subd. 2; 197.455, subd. 4

²⁶ See *Crnkovich*, 273 Minn. at 518, 141 N.W.2d at 284 (seasonal carpenter); *McAfee*, 514 N.W. 2d at 301 (temporary, unclassified attorney position).

²⁷ Petitioner's Ex. 2.

the ALJ recommends the Commissioner of Veteran Affairs grant the Department's motion for summary disposition.

L. F. C.