

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

James F. Lewis,

Petitioner,

vs.

City of Minneapolis,

Respondent.

FINDINGS OF-FACT,
CONCLUSIONS AND
RECOMMENDATION ON DAMAGES

The above-entitled matter is before the undersigned Administrative Law Judge on motion by the City of Minneapolis and a remand from the Commissioner of Veterans Affairs for a determination on the issue of damages. This matter was heard by telephone conference call on October 25, 1990, and upon the submission of written argument.

Peter W. Ginder, Assistant City Attorney, A-1700 Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota 55487-0170 appeared on behalf of the Respondent, City of Minneapolis. Gayle Gaumer, Wilson Law Firm, Suite 504, 5101 Vernon Avenue, Edina, Minnesota 55436 appeared on behalf of the Petitioner, James F. Lewis. The record was closed on November 15, 1990, upon receipt of the final submission from the parties.

STATEMENT OF ISSUE

What damages will properly compensate the Petitioner as a result of the denial of his veteran's preference rights?

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. On April 6, 1990, the Administrative Law Judge issued his report in this matter to the Commissioner of Veterans Affairs concluding that the City had denied the Petitioner his veteran's preference rights when it demoted him from Meter Reader I to Clerk II, effective December 5, 1987, without providing him with a Notice of Hearing and hearing as required by Minn. Stat. 197.46.

The relevant facts are that Petitioner had been working as a Meter Reader I when he was injured on July 27, 1987. Due to the injury, he was unable to return immediately to his former position and was put in a light-duty desk job for some period while still maintaining the job title of Meter Reader I and his regular pay. While his condition improved somewhat and he increased his hours of work, Petitioner never returned to his meter reader duties. Late in

1988, the City obtained a medical report indicating that he would be unlikely to ever do so. The City then began procedures to demote him to a Clerk II position which was done effective December 5, 1988. The Administrative Law Judge concluded that the demotion was done without providing veteran's preference rights to a notice and hearing under Minn. Stat. 197.46.

2. On July 11, 1990, the Commissioner of Veterans Affairs adopted the Administrative Law Judge's recommendations and ordered the City to reimburse Petitioner:

the amount of pay he would have received had he not been demoted effective

December 5, 1988, less amounts paid to him as a Clerk II, less amounts paid as benefits under worker's compensation including the tax benefits derived therefrom, if any, plus the value of any other benefits
Petitioner

may have lost because of the demotion, together with interest thereon at the statutory rate from the date such payments should have been made.

The Order permitted either party to move the Administrative Law Judge to make a recommendation as to the proper amount of reimbursement, should the parties be unable to agree on the proper amount of reimbursement.

3. From the time he was demoted in December 1988 until he was reinstated as a Meter Reader I, which was apparently about March 23, 1990, Petitioner worked and was paid as a Clerk II. He also received workers' compensation for a portion of the difference between his Clerk II pay and his former Meter Reader I pay. As is the practice among City employees and specifically allowed by Civil Service Commission Rule, Petitioner used sick leave and vacation leave on several occasions, such as doctor's visits, instead of claiming workers' compensation benefits for the time off.

4. Although the parties have not been able to agree on the proper amount of reimbursement, they have agreed on the underlying facts, including the following figures:

\$46,292.49	Amount Petitioner would have received as Meter Reader 1
-36,574.84	Amount Petitioner received as Clerk II
\$ 9,717.65	Gross back pay amount
- 3,819.92	Amount Petitioner received from worker's compensation
\$5,897.73	Net back pay amount

5. Amounts received as gross pay are the basis for payments into the Minneapolis Employees Retirement Fund (MERF). The City makes a contribution into each employee's account equal to 12.74 percent of the employee's gross pay amount. Employees make a contribution of 9.75 percent of the gross pay amount, which is deducted from the employee's gross pay amount and deposited into the employee's account with MERF. The pension deductions apparently are in lieu of any FICA payments. During all times relevant here, the MERF has had annual earnings on contributions of five percent.

6. With regard to the sick leave and vacation time used by Petitioner in lieu of workers' compensation benefits, the City has reinstated that time using a conversion credit formula whereby the difference in pay received for the time taken during the demotion was credited back into the employee's sick leave and vacation time banks. This process takes into account the effect of taking sick leave or vacation time in lieu of receiving worker's compensation benefits and is the normal procedure used by the City in such cases.

7. A transportation expense benefit of \$12.00 is paid biweekly to Meter Readers. The expense benefit is intended to partially compensate meter readers for expenses in using personal vehicles for performing job-related duties. (City Letter, November 2, 1990, Exhibits 5a and 5b). Petitioner had been paid that benefit while performing desk duties as a Meter Reader I even though he did not incur any vehicle expenses. After he was demoted, he did not receive the payments. Petitioner did not incur vehicle expenses during the period of demotion.

8. Petitioner was, at all times relevant here, in the 21 percent marginal bracket for federal taxes and the 7 percent bracket for state taxes.

9. Calculated at the Petitioner's combined 28 percent marginal tax bracket, Petitioner received a benefit of \$1,069.58 in taxes he did not have to pay on the \$3,819.92 in worker's compensation paid him during the period of demotion.

Based on the record herein, the Administrative Law Judge makes the following:

CONCLUSIONS

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

2. It is not appropriate to deduct the "tax benefit" of the workers' compensation from the back pay amount. As Robert Simonson of the City's Public Works Department stated in his memorandum of October 31, 1990, to the City attorney, Ex. 4 attached to the City's brief, the entire back pay award to be paid to Petitioner will now be subject to normal taxation. That is correct because the back pay award will not include unemployment benefits that are exempt from taxation and Petitioner will now have to pay taxes on the entire amount. Therefore, it is not appropriate to deduct the "tax benefit" of the unemployment payments. The provisions of the prior order requiring such a deduction should be reversed.

3. Petitioner should be awarded \$5,897.73 as back pay plus interest at six percent from the dates the payments should have been made. As of November 30, 1990, the total interest accrued was \$412.30. See Appendix A

attached hereto. Interest continues to accrue at the rate of \$0.97 per day.

4. The back pay award to Petitioner should be subject to the normal tax and pension deductions and contributions by Petitioner and the City.

5. Petitioner is entitled to interest at the rate of six percent on the amount of the employer's contribution to the MERF that should have been made by the City on the back pay amounts. The City agrees that that is 12.74 percent of the \$9,717.65 gross pay difference, or \$1,238.03. Ex. 4 attached to the City's brief. Arguably, that is only due on the net back pay amount of \$5,897.73, but the City's position will be accepted. As of November 30, 1990, the accrued interest was 90.80. See Ex. A attached hereto. Interest continues to accrue at the rate of \$0.20 per day.

6. Petitioner is not entitled to any compensation for the sick and vacation time used beyond the conversion credits for vacation and sick leave already granted by the City.

7. Petitioner is not entitled to any compensation for lost transportation pay because Petitioner is not entitled to receive that benefit without incurring vehicle expenses.

8. Petitioner's other demands and claims should be denied.

RECOMMENDATION

It is respectfully recommended that the Commissioner of the Department of Veterans Affairs order that:

1. The City pay back pay in the amount of \$ 5,897.73, together with interest thereon at the rate of six percent per year from the dates payment should have been made to the date of payment, subject to normal tax and pension deductions.

2. The City contribute \$1,238.03 to MERF, representing the City's normal contribution on the gross pay differential of \$9,717.65.

3. The City pay interest on the \$1,238.03 at the rate of six percent per year from the dates such contributions should have been made to the date of payment.

4. The City grant to Petitioner the conversion credit for vacation and sick leave accumulated while employed as a Clerk II as the City has proposed, to the extent not previously granted.

5. That all other claims by Petitioner be denied.

Dated: December 1990.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The determination of damages in veteran's preference cases was recently discussed in PAwelK v. Camden Township, 415 N.W.2d 47 (Minn. App. 1987). There, the court stated:

Under the Veterans Preference Act, a veteran is entitled to compensation until he is formally discharged in accordance with Minn. Stat. 197.46 (1982). Henry-v. Metropolitan Waste Control Commission, 401 N.W.2d 401, 406 (Minn. Ct. App. 1987) (citing Johnson [v. village of Cohasset], 263 Minn. at 437, 116 N.W.2d at 700). The veteran is also entitled to "interest calculated from the time each paycheck was due." Henry, 401 N.W.2d at 407. This sum is to be reduced by the amount that the veteran did earn, or with due diligence could have earned, in similar employment. Id. (citing Spurck v. Civil Service Board, 231 Minn. 183, 194, 42 N.W.2d 720, 727 (1950)). Pawelk's unemployment compensation must be subtracted from his back wages. See Robertson v. Special School District No. 1, 347 N.W.2d 265 (Minn. 1984) (public employer entitled to offset amount of unemployment received against back pay due to discharged employee covered by Veterans Preference Act).

This case involves a back pay award where the employee was never discharged, but received a lower amount of pay and benefits due to a demotion made without providing the procedural protections of the Veteran's Preference Laws. The Commissioner's Order in this case recognized that the proper remedy due to the employee was to establish the status quo ante, to the extent that can be accomplished at this time. To carry out the Commissioner's Order, the employee's entire benefit structure must be examined. The primary components are wages, pension contributions, sick leave, vacation time, and a transportation expense benefit. Using only the amounts not in dispute, the initial calculation is as follows:

	\$46,292.49	Amount Petitioner would have received as Meter Reader
I		
	36,574.84	Amount Petitioner received as Clerk II
	3,819.92	Amount Petitioner received from worker's
compensation		
	\$ 5,897.73	Gross income.

The calculation above shows the amount which the Petitioner would have received in gross income had the demotion not occurred.

Petitioner maintains that some monetary award is required to compensate him for sick leave and vacation time taken during the period of demotion. However, the back pay award is calculated based on 80 hour biweekly pay periods. (City Letter, November 2, 1990, Exhibit 7). Thus, the monetary adjustment for the amounts paid during sick leave and vacation time taken is already incorporated into the back pay calculation. See, J. Lambrinos,

Maximizing Economic Loss Damagesj, 89-90 (1989). To award monetary amounts for sick leave and vacation time taken would double count those benefits. More importantly, the conversion credit formula proposed by the City is adequate to correct any loss by the Petitioner.

The travel expense benefit is claimed by the Petitioner on the ground that he would have received it but for the demotion. However, the benefit is clearly intended to partially compensate employees for work-related use of their own vehicles and is not intended to provide additional income. The employee cannot compel that payment in this action when he is not entitled to it.

Likewise, Petitioner's claims for lost investment opportunity and income tax value should be denied because they have not been lost; they are compensated for by the interest granted and by the interest that will be earned in the pension fund in the future. Petitioner may invest his back pay award as he chooses to retain his investment opportunities. Shifting Petitioner's income into a later year is not particularly significant. It may cause him to pay more taxes in the later year, but then he's had the benefit of the money he didn't have to pay in earlier years. Moreover, his pension benefits may be greater because the lump sum payment may increase his "average five highest years." At any rate, these items are impossible to determine precisely and probably balance out in the long run.

S.M.M.