

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

Chauncey L. Oleson,
FACT,
LAW
RECOMMENDATION
Vs

Petitioner,

FINDINGS OF
CONCLUSIONS OF
AND

Benton County,

Respondent.

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, on July 30, 1991, in the Benton County Courthouse, Foley, Minnesota. Petitioner Chauncey L. Oleson, 216 14th Avenue North, St. Cloud, Minnesota 56303, appeared pro se. Richard T. Jessen, Benton County Attorney, Courthouse, 531 Dewey Street, Foley, Minnesota 56329, appeared on behalf of Respondent County of Benton. The matter was primarily submitted on joint exhibits, together with supplemental testimony, exhibits and argument of the parties. The record was closed upon adjournment of the hearing on July 30, 1991.

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 which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to 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 Bernie R. Melter, Commissioner of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether Petitioner's removal from his position of employment with Respondent was as the result of a good-faith abolition of his position by Respondent.

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

FINDINGS OF FACT

1. Petitioner is an honorably-discharged veteran who worked in Respondent's Planning & Zoning Department from May 2, 1983 to June 28, 1991.

2. The Planning & Zoning Department had two full-time employees: Al Barthelemy, who was head of the Department and had the title Planning & Zoning Administrator, and Petitioner, whose job title was Land Use Technician/Agricultural Inspector. As Land Use Technician, he was assistant to Barthelemy. County Agricultural Inspectors are required to be appointed in every county by Minn. Stat. 18.231. They are also referred to as Ag Inspectors and the Weed Inspectors, The Planning & Zoning Department also included a half-time administrative secretary position held by a Vicki Fueling, who actually spent two-thirds to three-fourths of her time working in the Planning & Zoning Department. The remainder of her time was spent as secretary to the Personnel Director, Roxanne Casper. Joint Ex. 4. Fueling had been a County employee since 1974. Joint Ex. 15. In addition, the Veterans Service Officer's secretary spent about one-fourth of her time working for the Planning & Zoning Department and the switchboard operator was assigned on an as-needed basis. Joint Ex. 7.

3 As of 1985, Barthelemy performed the following functions in his position for the amount of time indicated:

Percent of Time	Job Function
20%	Serve as resource person to agencies and public concerning laws and ordinances effecting land use .
15%	Process applications for and issue land use permits and septic system permits.
10%	Issue licenses to sewer contractors and collect fees. Act as the County Sanitarian and Waste Officer.
10%	Serve as secretary of the Planning Commission and Board of Adjustment.
7%	Attend meetings and seminars regarding zoning, sanitation, solid waste, shore land and flood plain.
5%	Process applications for conditional use permits, variances, rezonings and subdivisions.
5%	Prepare background data and staff reports for Planning Commission and Board of Commissioners regarding variances, conditional use permits, rezonings and subdivisions.
5%	Service spokesman for Planning Commission and

Board of Adjustment in court proceedings.

5%	Follow-up complaints regarding ordinance enforcement.
3%	Supervise preparation of public hearing notices.
3%	Recommend amendments to ordinances.
3%	Maintain and update zoning map and ordinances.
3%	Monitor conditional use permits.
2%	Supervise preparation of agendas.
2%	Do site evaluations, inspections and sewer inspections as required.
2%	Check proposed plats for conformance to subdivision regulations.

Joint Ex. 2. These duties remained the same through 1991, except that the Solid Waste Officer and Sanitarian duties increased somewhat.

4. As of 1985, Petitioner performed the following job functions for the amount of time indicated:

Percent of Time	Job Function
30%	Issue land use permits.
8%	Develop mailing list for public hearings on conditional use and variance requests.
8%	Answer the phone regarding zoning and agricultural questions.
5%	Accept and help process applications for conditional use permits and variances.
5%	Answer complaint calls about weeds.
5%	Perform sewer inspections.
5%	Answer questions of persons in the office.
5%	Occasionally act as secretary of Planning Commission and Board of Adjustment.
5%	Serve as back-up for site inspections for variance requests.
5%	Take samples of seed, feed and fertilizer.
5%	Meet with elected officials regarding weed control.

4%	Use soil maps and develop transparencies for public meetings.
4%	Prepare reports.
3%	Attend Planning Commission meetings held at night.
2%	Make copies for the public.
2%	Perform site elevations when necessary.
2%	Process legal papers when weeds are not controlled.
2%	Attend Board of Adjustment meetings at night.
2%	Attend district and annual meeting CAI.
2%	Attend district and monthly workshop of sewer installers.

Joint Ex. 1. These duties remained about the same through 1991.

5. At the County Board meeting of February 5, 1991, Barthelemy announced his retirement and the Board accepted his resignation effective June 30, 1991- Joint Ex. 3.

6. On February 11, 1991, Casper submitted a recommendation to the County Board regarding the Barthelemy vacancy. Joint Ex. 4. Casper noted that it would be very disruptive to leave the position vacant for any length of time and suggested that they should start advertising the position state-wide in April. She then noted that the vacancy created a good opportunity to look at the structure of the Planning & Zoning Department. In her view, there were really four jobs being held by the two people in the Department:

- a. Planning & Zoning Administrator,
- b. Solid Waste Officer/Sanitarian,
- c. Land Use Technician, and
- d. Agriculture Inspector.

She went on to suggest that there were many combinations for restructuring the Department and duties, that goals and priorities should be set and that recruiting individuals with the proper skills to meet the goals could then begin

Casper noted that a recent study of the County organization had recommended that the agricultural inspection activity could be transferred to the County's Highway Department to be done as part of ditch inspections and that the savings in Planning & Zoning could be used to accelerate efforts to update the ordinances and later to offset the costs of any increased staffing

in the Assessor's office. Casper stated that solid waste and environmental

issues would continue to grow and noted that the half-time secretary shared with her own department could have her job upgraded to a technician position to help issue permits and the like. She recommended that a subcommittee be established consisting of two Commissioners, members of the Planning Commission and Board of Adjustment, someone from the Tri-County Solid Waste Commission, herself and the County Attorney. She advised against Barthelemy and Petitioner being on the Committee. Joint Ex. 4.

7. At its meeting of February 19, 1991, the County Board appointed an advisory committee (the Committee). Joint Ex. 5. By letter of February 20, 1991, Casper advised the members of the Committee that the County Board had discussed the retirement of Barthelemy and various options for restructuring the departmental duties and responsibilities as well as qualifications that would be required of potential applicants and that the Committee was to study the options and make a recommendation to the Board by March 19, 1991. She notified them that the Committee would meet March 6 and that she would serve as a ex officio member to advise the Committee and draft a final recommendation. Joint Ex. 6.

8. At its March 6, 1991 meeting, the Committee reached a consensus to restructure the Planning & Zoning Department positions which was set out in a memorandum of March 7, 1991, as follows:

- 1) Eliminate the two current positions
- 2) Create two new positions entitled Planning & Zoning Administrator and Environmental Officer;
- 3) Assign the Ag Inspector duties to an existing non-union position in the Highway Department with the County Engineer making a recommendation as to which position the duties would be added to;
- 4) Contract out the Sewer Inspection duties;
- 5) Add some of the duties currently assigned to Petitioner to the Administrative Secretary, namely accepting applications, developing mailing lists for notifications, providing information regarding zoning ordinances to the public;

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6) Restructure the salary levels by setting the pay grade for Planning & Zoning Administrator position lower than the existing one, setting the Environmental Officer at a pay higher than the Land Use Technician/Ag Inspector and the Administrative Secretary's pay grade. It was expected a new Planning & Zoning Administrator and Environmental would be able to be hired near the bottom of the pay ranges those jobs: and

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Officer.

7) Realign the support staff allocation by increasing Fueling three-quarters time in the Planning & Zoning Department and using the one-quarter time available from the Veterans Officer's secretary exclusively for the Environmental

Joint Ex. 7-

9. The Committee met again on March 12, 1991, to finalize its recommendation. In a memorandum of March 13, 1991 to the County Board, Casper set forth the Committee recommendations. The recommendations were the same as set forth in the memorandum of March 7, 1991, except that the Environmental Officer was to administer sewer inspections and perform them if the contract worker was not available. With regard to eliminating the current positions, the memorandum stated:

Eliminate the two current positions of Land Use Technician/Ag Inspector and Planning & Zoning Administrator/Solid Waste Officer. The latter will be eliminated by retirement, elimination of the former would require a layoff. If the two new positions are first advertised in-house, the person being laid off could apply for one or both. This would eliminate the need to pay unemployment compensation and hold a veteran's termination hearing (a lengthy and costly process). Any person hired to either of the new positions would serve a six month probation period.

Joint Ex. B. Casper had also made an oral statement in Petitioner's presence to the effect that allowing Petitioner to apply for one of the positions would "avoid the Veterans Preference hearing hassle."

10. At its meeting of March 19, 1991, the County Board heard from Casper who presented the recommendations of the Advisory Committee. The Board then voted to accept the recommendations of the Committee. Joint Ex. 9.

11. In a memo of March 21, 1991, to the County Board, Casper requested that the Board take action at its April 2, 1991 meeting so that they would have someone available to start upon Barthelemy's retirement. She was concerned that leaving the position vacant would have a serious impact on the services available during the busy summer season and that potential problems included the fact that Petitioner would be kept quite busy with sewer inspections, zoning work and ag inspector work and that there would often be no one in the office to respond to the needs there. She suggested two options: 1) making no changes in the job structures and replacing Barthelemy's position; or 2) enacting changes similar to the ones suggested by the Committee. The Memorandum stated that Petitioner would be eligible for promotion to one of the two new positions. Joint Ex. 10. However, the word "promotion" was not used in its normal sense in the memo to mean that the positions would be filled only by promotion from existing County employees. Instead, Casper meant that the positions would be advertised as open appointments and that Petitioner would be eligible to apply. It was never

Casper's intention that Petitioner would be appointed to the position of Planning & Zoning Administrator through promotion or have any advantage in seeking the position.

12. At its meeting of April 2, 1991, the County Board voted to adopt the second option, established the new positions of Planning & Zoning Administrator and Environmental Officer, added additional duties to the Administrative Secretary position, eliminated the existing positions of Planning & Zoning Administrator/Solid Waste Officer and Land Use Technician/Agricultural Inspector effective June 30, 1991, exempted the new

positions from the existing hiring freeze, transferred the Agricultural Inspector duties to the Highway Department effective June 30, 1991, and set the pay grades for the new positions and the Administrative Secretary.

Joint

Ex 11

13. The job description for the new Planning & Zoning Administrator listed the following areas of responsibility and work performance:

Processes applications for and issues land use permits, feedlot permits, conditional use permits, variances, rezonings and subdivisions. (No change from prior Planning & Zoning Administrator position.)

Prepares background data and staff reports for Planning Commission and County Board on requests for variances, conditional use permits, rezonings and subdivisions. (No change.)

Serves as resource person to agencies and public concerning land use- (No change.)

Prepares public hearing notices for applications. (Formerly supervised the preparation of the notices.)

Performs site inspections as required. (No change.)

Process applications for septic system installations and performs sewer inspections. (No substantial change, previously performed sewer inspections "as required.")

Prepares agendas and minutes for Board of Adjustment and Planning Commission. (No change.)

Attends seminars, meetings and hearings affecting zoning issues. (No change.)

Maintains and updates zoning map and ordinances. (No change-)

Manages the budget for Planning & Zoning Department. (New, but performed before.)

Serves as spokesman for Planning Commission and Board of Adjustment at court proceedings. (No change.)

Checks all proposed plats for conformance to subdivision regulations. (No change.)

Investigates complaints leading to ordinance enforcement. (No change.)

Monitors conditional use permits for compliance. (No change.)

Performs related duties as required. (New, but performed before.)

Joint Ex. 12. The only job functions previously performed by the Planning Zoning Administrator that were deleted were to issue licenses to sewer contractors and collect fees and to act as the County Sanitarian and Solid Waste Officer

14. The job description for the new Environmental Officer position contained the following areas of responsibility and work performance:

Processes applications for septic sewer installation, reviews and approves site plans and on-site sewage and water supply systems. (Planning & Zoning Administrator previously processed applications for septic system permits, Petitioner previously performed some or all of these duties on occasion.)

Performs sewer inspections . (Previously performed by Petitioner.)

Responds to and investigates complaints regarding faulty septic systems. (New, presumed previously performed by Petitioner.)

Processes applications for licensing solid waste management facilities. (Previously performed by Planning & Zoning Administrator.)

Reviews and approves plans and requests for landfill permits, coordinates with Tri-County Solid Waste Commission, recommends distribution of SCORE funds, investigates complaints regarding solid waste and environmental violations and public health nuisances. (New, previously performed to some degree by Administrator, Petitioner occasionally assisted with hazardous waste investigations.)

Serves as resource person concerning laws and ordinances affecting solid waste sanitation and environmental issues. (New, previously performed by the Planning & Zoning Administrator.)

Prepares and submits proposed revisions and amendments to ordinances affecting solid waste, sanitation and environmental matters. (New, previously performed by Planning & Zoning Administrator.)

Member of Hater Quality Control Committee, keeps necessary records as required, attends local and state meetings, seminars and hearings regarding these issues and performs related duties as required. (New, previously performed by Planning & Zoning Administrator.)

Joint Ex. 13.

15 On April 3, 1991. Casper sent a memo to the County Engineer asking him to provide her with the name of the individual to be assigned the Agriculture Inspector duties. The Engineer designated Elwood Anderson, who had been a County employee since June 1, 1979.

16 By letter of April 3, 1991, Casper notified Petitioner that the County Board had moved to Primate his position of Land Use Technician /Agriculture Inspector effective June 30, 1991, and that as the position had been eliminated, he would be laid off from employment with Benton County effective June 28, 1991. June 28, 1991, was a Friday. The notice also stated that pursuant to Minn. Stat. 197.46, he was advised of his right to request a hearing under that statute within sixty days, but asked that he notify Casper of his intent within fifteen days, if possible. Joint Ex. 16.

17. On April 3, 1991, Casper issued the job announcement for the new Planning & Zoning Administrator position.

18- By letter of May 29, 1991, Petitioner requested a hearing regarding his termination under the Veterans Preference Act and provided a copy of his DD Form 214 verifying his status as a veteran. On May 30, 1991, Casper advised Petitioner that contrary to the letter of April 3, 1991, he was not entitled to a hearing before a Veterans Preference Board or panel under Minn Stat. 197.46, because he was not being terminated for incompetency or misconduct, but rather that his position was being abolished and therefore his remedy was through a mandamus proceeding in district court. It went on to notify him that he had the right within sixty days of that notice to petition the district court for a Writ of Mandamus. Joint Ex. 17.

19. By petition dated May 30, 1991, Petitioner petitioned the Commissioner of Veterans Affairs for relief under the Veterans Preference Act. On June 19, 1991, the Commissioner of Veterans Affairs issued the Notice of Petition and Order for Hearing in this matter.

20. Petitioner applied for the position of Planning & Zoning Administrator, but was not hired. His last day of work for Respondent was June 28, 1991. At that time, his salary was \$23,161.00 per year. He has been unemployed since that time.

21. As of July 1, 1991, Respondent hired a new Planning & Zoning Administrator- Two weeks later, a new Environmental Officer was hired. Neither had been previously employed by Respondent.

22. As of July 1, 1991, all of the duties that had been performed by Petitioner were transferred to four different County employees. All of those functions are still being performed. Petitioner's job functions were reassigned as follows:

Job Function	Transferred_To
Issue land use permits Administrator.	New Planning & Zoning Barthelemy had also performed this function, but to a limited extent. With

Transferred to

the transfer of environmental functions to the new Environmental Officer, the Planning & Zoning Administrator has more time to spend on issuing permits.

Develop mailing list for notices

Administrative Secretary.

Answer phone for Zoning Agricultural questions.

Planning & Zoning Administrator, Administrative Secretary and new Ag Inspector.

Accept and help process applications for conditional use permits.

Planning & Zoning Administrator and Administrative Secretary.

Answer complaint calls about weeds.

New Ag Inspector.

Perform sewer inspections.

Environmental Officer.

Answer questions from persons in the office.

Planning & Zoning Administrator, Environmental Officer and Administrative Secretary.

Occasionally act as Secretary of Planning Commission and Board of Adjustment

Planning & Zoning Administrator.

Serve as backup for site inspections for variance requests.

No evidence in record.

Take samples of seed, feed and fertilizer.

New Ag Inspector.

Meet with elected officials regarding weed control.

New Ag Inspector.

Use soil maps and develop transparencies for public meetings.

No evidence in record.

Prepare reports.

Planning & Zoning Administrator , Environmental Officer and Administrative Secretary.

Attend Planning Commission meetings at night.

Planning & Zoning Administrator.

Make copies for the public.

Administrative Secretary.

Perform site elevations when necessary.

Planning & Zoning Administrator.

Job Function

Process legal papers when weeds are not controlled	Ag Inspector.
Attend Board of Adjustment meetings at night.	Administrator.
Attend district and annual meeting CAI.	No evidence in record.
Attend district and monthly workshop of sewer installers.	No evidence in record.

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

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 197.481
2. Petitioner is an honorably-discharged veteran entitled to the protections of Minn. Stat. 197.46, the Veterans Preference Act.
3. Minn. Stat. 197.46, prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing. However, public employers may abolish positions notwithstanding the Veterans Preference Act if the abolition of the position is in good faith. State ex rel. Boyd v. MATson, 155 Minn. 137, 193 N.W. 30 (1923); Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986).
4. The burden of proof is upon Petitioner to prove by a preponderance of the evidence that he was terminated in violation of Minn. Stat. 197.46 Respondent's claim that Petitioner's position was abolished in good faith is an affirmative defense for which Respondent has the burden of proof. Minn. Rule 1400.7300, subp. 5.
5. Petitioner was not terminated for incompetency or misconduct.
6. Respondent did not abolish Petitioner's position in good faith. It merely reassigned his duties to two existing employees and to two newly-hired employees.
7. Respondent has denied Petitioner rights provided to him by Minn.

Stat. 197.46, in that it removed him in violation of that statute.

8. Petitioner is entitled to be reinstated to his position and to be paid all back pay and benefits he would have received had he not been terminated.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order:

1. That the petition of Chauncey L. Oleson be GRANTED.
- 2, That Respondent Benton County immediately reinstate Petitioner as its Land Use Technician/Agricultural Inspector with full pay and benefits as if he had not been terminated. In the alternative, Respondent may appoint Petitioner permanently to the new position of Planning & Zoning Administrator or other comparable position acceptable to Petitioner.
3. That Respondent reimburse Petitioner the amount of pay he would have received had he not been terminated, plus the value of any benefits Petitioner lost because of the termination, together with interest thereon at the statutory rate from the date such payments should have been made.
4. That if parties are unable to agree as to the amount of reimbursement ordered in paragraph 3, either party may move the Commissioner of Veterans Affairs to have the Administrative Law Judge take evidence and make a recommendation thereon to the Commissioner.

Dated this 26th day of August, 1991-

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

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

Reported: Taped, not transcribed, Tape No. 10665.

MEMORANDUM

Under Minn. Stat 197.46, a political subdivision may only discharge a veteran for incompetency or misconduct. However, our Supreme Court has recognized that the Veterans Preference Act is not intended to prevent public

employers from abolishing positions in good faith. State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923). A lack of good faith is proved when it is established, after a hearing, that the public employer, under the pretext of abolishing a veteran's position, actually continued it under some other name or reassigned the veteran's duties to a less senior employee. Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986); Gorecki_v._Ramsey County, 437 N.W.2d 646 (Minn. 1989). In Young, the Court stated:

If the city merely reassigned Young's duties to non-veteran employees less senior than he,³ his position is not abolished in good faith, and he is entitled to reinstatement with back pay. The Veterans Preference Act is applicable in cases in which public employers reassign duties in times of revenue shortfalls and budget cuts. No exception in the act exists for such situations. Thus, veterans have a preference over non-veteran employees less senior than they to continue to perform duties for which they are qualified if the public employer continues to need such duties performed.

3 As we stated in Boyd, "[t]he [veterans preference] act does not authorize, nor purport to authorize, the removal of a prior appointee to make a place for a soldier; and cannot reasonably be construed as abrogating the civil service rules governing tenure of office." 155 Minn. at 141, 193 N.W. at 31-32.

386 N.W.2d at 738-739.

The standard of a good faith set forth in Young was developed more fully in Gorecki as follows:

In examining the conduct of this public employer, we are guided by two separate principles. The first is that the Veterans Preference Act itself was designed to "'take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause.'" Young v. City of Duluth, 386 N.W.2d 732, 737 (Minn. 1986) (quoting State ex rel. Boyd v., Matson, 155 Minn. 137, 151-42, 193 N.W. 30, 32 (1923)). See also Johnson v. Village of Cohasset, 263 Minn. 425, 435, 116 N.W.2d 692, 699 (1962) (VPA protects honorably discharged veterans from the ravages of a political spoils system). While the impact of political decisions upon a veteran's employment are minimized, the act cannot be viewed as fully restricting the government's exercise or control over its administrative affairs. See, State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923). A ministerial or perfunctory act of coordinating an actual position with its appropriate classification will withstand scrutiny if based upon a reasonable exercise of administrative discretion. The second principle is one requiring this court to examine the substance of the administrative decision rather than its mere form. See, Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987).

A significant portion of what Petitioner did was issuing land use permits. Barthelemy also issued land use permits and had overall responsibility for that function, but that was a small portion of his job. Similarly, Petitioner performed other job functions that Barthelemy also performed or was at least capable of performing and also assisted Barthelemy by performing some of Barthelemy's functions. Most of these duties were transferred to the new Planning & Zoning Administrator position because the new position had additional time available due to the transfer of the Solid Waste officer and Sanitarian functions formerly performed by Barthelemy to the new Environmental Officer position- The new Planning & Zoning Administrator position was filled by a new employee who had never previously worked for Respondent in any capacity. Thus, those duties were transferred to a less senior employee. Respondent argues that that is not the case, that in actuality those duties were not transferred to the Planning & Zoning Administrator position because they were always a part of the Administrator's duties and that because that position now had fewer duties in the environmental area, it could devote more time to the land use and zoning matters. Barthelemy performed land use functions, but so did Petitioner, and Petitioner's duties were transferred. Respondent's argument ignores the reality that on June 28, 1991, Petitioner was performing those land use functions, and on July 1, 1991, a brand new County employee was performing them, along with the land use duties Barthelemy used to perform. Petitioner's duties weren't assumed by the old Planning & Zoning Administrator position held by Barthelemy: that position was abolished by the Board.

Petitioner's sewer inspection duties were transferred to the new Environmental Officer position that was also filled by a brand new employee. Respondent argues that those duties were so minor that they should not control the decision in this matter. There is no legal authority for such an argument. In any event, those duties were not inconsequential. Performing sewer inspections took only about five percent of Petitioner's time. While that may have been a small part of his duties timewise, inspection of septic systems is not an insignificant function that can be ignored. Petitioner took training in the area and became certified, as all sewer inspectors must be. Protection of our groundwaters from inadequate septic systems is very important. Moreover, the Environmental Officer, by his presence in the office, will perform several of the other functions Petitioner performed; he

will fill in for the Planning & Zoning Administrator when necessary, he will answer questions of those who come into the office and will "perform related duties as required." Likewise, the new Planning & Zoning Administrator will backup the Environmental Officer. For example, the Administrator is required to do sewer inspections as required. Either way, a new employee is doing Petitioner's job.

Petitioner's Agricultural Inspector duties were transferred to an employee in the Highway Department. That employee turned out to be a person who had been an employee of the County some four years longer than Petitioner. However, that was not a matter of design but of happenstance. The County Engineer was asked to designate the Highway Department employee to whom the Ag Inspector duties were to be transferred without any requirement that it be an employee more senior than Petitioner.

Some of Petitioner's paperwork functions and public inter-action responsibilities were transferred to the Administrative Secretary, who was senior to Petitioner.

Thus, some of Petitioner's duties were transferred to more senior employees, but most were transferred to less senior, in fact, brand new employees. Respondent has actually continued Petitioner's job under other names. Under the standards of *Young v. City of Duluth*, it can only be concluded that Respondent did not abolish Petitioner's job in good faith.

It is clear that from the very beginning Respondent intended to oust Petitioner. The very first memorandum from Casper spoke of advertising both new jobs statewide. Respondent could have reorganized the Planning & Zoning Department without ousting Petitioner. It didn't have to transfer his duties to other people. It could have promoted him to Administrator had it wanted to. Promotion from within is a legitimate and common method of filling positions. Casper testified at the hearing that the Respondent has a policy of not filling positions by promotion from within but by open appointment, because that is required by "EEO law." Open hiring processes help achieve broader minority hiring, but the Administrative Law Judge is not aware of any "EEO law" that prohibits promotion from within. If so, then virtually all civil service systems in this state are illegal. Casper stated that Respondent's "policy" didn't apply under some of its union contracts. Contrary to its "policy," Respondent, in essence, promoted the Administrator Secretary, without advertising that job openly. It could have done the same with Petitioner.

It should also be noted that the cases that allow a transfer of duties to more senior employees to be considered the good faith abolition of a position all deal with political subdivisions facing budget problems and cutbacks that necessitate a reduction in staffing. In that situation, seniority prevails over veterans preference. *State ex rel. Boyd v. Matson*, 155 Minn. 137, 193 N.W. 30 (1923); *State ex rel. Evens v. City of Duluth*, 195 Minn. 262, 262 N.W. 681 (1935); *Young v., City of Duluth*. That is not the situation here. In this case, there was no staff reduction, there were two full-time employees in the Planning & Zoning Department before July 1, 1991, and there were two full-time

employees in the Department after that date. The Planning & Zoning Department was facing an increased work load to deal with emerging environmental issues and the need to revise ordinances. Even with the Ag Inspector duties being transferred to another department, it was necessary to increase the Administrative Secretary from a half-time position to a three-quarters time position while maintaining the additional secretarial support from the Veterans Service Officer's secretary and the receptionist. The Administrative Secretary's pay was increased. Respondent used the opportunity created by Barthelemy's retirement to reorganize the Planning & Zoning Department and to bring in people with additional skills, particularly in the environmental areas. Respondent may have wanted better employees in the Planning & Zoning Department, but a veteran can only be removed for incompetence or misconduct, not just because someone else might be able to do the job better. It can only be concluded that Respondent's intent was not to eliminate a job, but to replace Petitioner. That is prohibited by Minn. Stat. 1 97.46. Slat, -pi rel - Tamminen v. City of Eveleth, 189 Minn. 229, 249 N.W. 184 (1933). If Respondent wishes to remove Petitioner, it must prove him to be incompetent or guilty of misconduct. It has already stipulated that that is not the case.

SMM