

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

Jon T. Tillmann,

FINDINGS OF FACT

LAW

Petitioner,

CONCLUSIONS OF

RECOMMENDATION

AND

Vs

City of Golden Valley,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on September 17, 1992, at the Office of Administrative Hearings, Minneapolis, Minnesota. Maurice W. O'Brien, GORDON-MILLER-O'BRIEN, 1208 Plymouth Building, 12 South Sixth Street, Minneapolis, Minnesota 55402-1529, appeared on behalf of Petitioner John T. Tillmann. Cyrus F. Smythe, Consultant, Labor Relations Associates, Inc., 7501 Golden Valley Road, Golden Valley, Minnesota 55427, appeared on behalf of Respondent City of Golden Valley (the City). The record closed on October 13, 1992, upon receipt of the briefs of the parties.

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 55155-2079, (612) 296-2562, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether the reduction of a veteran's pay level by a public employer pursuant to a performance evaluation system that found the veteran's performance less than adequate constitutes a removal requiring written changes, notice and a hearing under Minn. Stat. 197.46 of the Veterans Preference Act.

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

FINDINGS OF FACT

1. Petitioner received an honorable discharge from the United States Army in 1961 after having served on active duty for over 180 days.
2. Petitioner works for the City in the job classification of Public Works Maintenance Worker, which is generally referred to as Maintenance Worker. He has worked for the City since February 28, 1975. Petitioner worked in Park Maintenance for his first eight years and has been in Utility Maintenance since October 1, 1983.
3. Prior to 1990, the City was one of twenty-three Metropolitan area cities that collectively negotiated a Master Labor Agreement with the International Union of Operating Engineers, Local No. 49, regarding the terms and conditions of the employment of employees in the job classifications of Maintenance Worker I, Maintenance Worker II, Maintenance Worker III and Utility Maintenance II. Ex. 2. Each of the job classifications had one specific wage rate assigned to it that was renegotiated every year. Subsequently, the City entered into separate contracts on its own with Local 49 regarding the employees in those job classifications.
4. During the 1990 negotiations regarding the 1991 labor agreement, Local 49 suggested that its members were seeking a method for more employees to earn more money. In the view of City Manager William Joynes, the existing system was frustrating for those employees in the lower job classifications of Maintenance Worker I and II who had the ability and desire to perform the duties of the higher job classifications of Maintenance Worker II and III but were unable to move up because there were no job vacancies in the higher job classifications. Workers at the lower levels received "out of class pay" for doing work of the higher job classifications such as operating certain pieces of heavy equipment, but that was not entirely satisfactory.
5. In response to Local No. 49's request that employees be able to earn more money, the City agreed to develop, with input from the union, a performance-based system with one job classification in which the employees would have the ability to earn higher wages based on initiative, attitude and ability to perform the duties of the job. Such a system could provide the

opportunity for every employee to earn more money, but in return the City demanded the final authority to assess the performance of employees, to assign them to wage levels and to move employees up or down the wage levels according to their performance. The City insisted that there be no appeal or grievance of performance evaluation beyond the City Manager. The City and Local No. 49 established a committee of employees and supervisors to draft a performance evaluation system. Several other cities in the Metropolitan area were also developing performance evaluation systems at the time.

6. On August 3, 1990, the Evaluation Process Committee submitted its evaluation process proposal to the City Manager. Ex. 6. The committee's proposal described seven Public Works Maintenance pay levels lettered from C. the starting level, at \$9.53 per hour, through Level A, the "top union negotiated pay" at \$13.72 per hour. In general, Level G was to be the normal

starting level, Level F would be awarded after successful completion of one year or relevant experience, E after two years, D after three years, C after five years and B after seven years. In addition to the longevity requirements, the committee report detailed performance standards required of each level. In its introduction, the committee report stated:

In setting up a Performance Evaluation System to pay our employees, it is our intent to reward our good employees to make it possible for all of the employees to have a chance to achieve (sic) their highest potential, and to make it possible for all of the employees to have the opportunity to move up within the scale set by the Union.

The Union will negotiate the starting level pay and the highest level pay. The City will set the inbetween levels. It is the intent of the performance levels

to get away from using just equipment as a basis of pay. These levels take into account attitude, efficiency, performance, initiative (sic), knowledge, and overall ability. Equipment is not removed from our criteria, it is in the area of knowing your job.

The Union employees will be evaluated on a yearly basis, on or near their anniversary date, until Level D is reached. Yearly evaluations will take place at a yet

to be determined month after Level D.

The initial evaluation will set individuals at the level they are performing at based on the standards that have been set. Level D, which is the old Maint. 11 Level,

is the level most employees are at and the level the newer employees are trying to reach. Employees performing at this level would be considered good employees and Level D should be the initial goal of all new employees. Levels set above Level D will be attainable by employees who are performing additional duties and/or meet the criteria set for these higher levels. It should be noted that individuals who do not perform up to the standards set would be subject to moving down; but only after given time to improve their performance at the level they are presently at. It is the Supervisors responsibility, to inform the employee anytime that improvement is needed.

7. The committee's report was, for the most part, accepted by the City and incorporated as Appendix C to the City's Employee Handbook as the Public Works Performance Evaluation System. Replacement Ex. 7. The Public Works Performance Evaluation System includes pay levels G through B, but does not include the Level A recommended by the committee. Level A had been

recommended for those employees who showed exceptional skills and capabilities in all operations, but the City Manager felt that that was beyond the scope of employees in the bargaining unit. Apparently in lieu of Level A, the Performance Evaluation System includes a performance award that is a one time, year-end payment that may be awarded for exceptional performance throughout the previous year.

8. The City's Public Works Division is divided into five subdivisions: Engineering, Street Maintenance, Park Maintenance, Utility Maintenance and the Shop (Vehicle Maintenance). Ex. 7, p. 37. Employees in the job classification of Public Works Maintenance Worker may work in Parks Maintenance as Park Maintenance Workers, in Street Maintenance as Street Maintenance Workers, or in Utility Maintenance as Utility Maintenance Workers. As of May 5, 1992, there were six Park Maintenance Workers, ten Street Maintenance Workers and seven Utility Maintenance Workers. Ex. 10.

9. The minimum requirements for Levels D, C and B are set forth in the Public Works Performance Evaluation System as follows:

Level D - Minimum Requirements

Successful completion of three (3) years of service, or relevant experience.

Meets or exceeds all the minimum requirements of Public Works Level E.

Maintains a positive attitude and deals effectively with peers, supervisors, and the public. Maintains a good work, tardiness, and discipline record.

Knows all departmental operations and performs these jobs proficiently. Can help others understand and develop their skills to perform assigned tasks.

Knows methods and materials used in area of job responsibility.

Can work without direct on-site supervision and makes on-site decisions related to task assignments.

Shows initiative in seeking and performing work.

Understands other Public Works operations, and is willing to train in other departments and work as needed during normal conditions and in emergencies.

Understands the importance of preventive maintenance and care for all City vehicles and equipment. This includes routine care with emphasis on early detection of potential breakdown or mechanical failure.

Level C - Minimum Requirements

Successful completion of five (5) years of relevant experience or two (2) years at Level D.

Meets or exceeds all of the minimum requirements of Public Works Level D.

Maintains Consistently good work habits, good attitude, safe work practices, and a safe driving record.

Demonstrates ability to lead a work crew and occasionally does so, as directed by the supervisor.

Responds to and resolves complaints effectively.

Shows ability to maintain all records in accordance with City policies.

Actively seeks advanced training (for example: Public Works education courses, or technical courses or training in skilled areas such as plumbing, electrical, carpentry, landscaping, welding, irrigation, water and sewer, mechanical training, etc).

Is willing to try new methods and return relative feedback.

Has cross-trained in other areas of Public Works and is considered a good candidate to fill in during normal or emergency situations (for example: snowplowing, water main breaks, floods, windstorms, etc).

Level B (top negotiated rate) - Minimum Requirements

Successful completion of seven (7) years of relevant experience.

Meets or exceeds the minimum requirements for Public Works Level C.

Maintains consistently good work habits, good attitude, safe work practices, and a safe driving record.

Demonstrates ability to help train other employees and actively does so.

has the ability to supervise groups of employees and regularly does so, as directed by the supervisor.

Shows initiative in seeking educational opportunities and license certification, and has completed, or is actively working toward, some type of degree or certificate of completion.

Has abilities and skills in specialized areas (for example: plumbing, electricity, carpentry, welding,

heating, painting, etc.) Has mechanical skills beyond what is necessary to be a good operator (for example: repairing small engines, making unsupervised mechanical repairs, and troubleshooting mechanical failures) and uses these skills as necessary or as directed by the supervisor.

Can proficiently operate all departmental technical equipment (for example, motor grader, oil distributor, 3 yard loaders, sewer televising equipment, large backhoes, etc).

Shows ability to deal with the public and handle complaints and concerns in a professional manner and complete follow-up work as necessary.

11. One of the purposes of adopting a single job classification of Public Works Maintenance Worker from the City's point of view was to have the workers as flexible as possible and able to do all the tasks performed by Maintenance Workers. Thus, the standards at the higher levels are established

to reward those employees who seek advanced training in the various skills needed for the tasks performed throughout the Public Works Department, cross-train into other areas of the Public Works Department, show an ability to fill in as the need arises and develop the ability to proficiently operate all departmental technical equipment. Nonetheless, the workers primarily do the tasks associated with the level to which they are assigned. As Jerry Woodhull, who described his job classification as "Street Maintenance - Level B," stated, a person at Level B is not going to be doing Level G work very often and a person at Level G is not going to be doing Level B work very often. The duties and tasks performed by any Maintenance Worker are assigned by that person's supervisor depending on what needs to be done and the abilities of the workers available to do it. Such needs may change from day

to day and may be affected by such things as the season and the available budget. Generally, the more complicated and difficult duties are assigned to those at higher wage levels who have the greater ability to do them, but, from

time to time, persons at lower levels can expect it to be assigned to the more complicated and difficult duties either because of a need to do so or as part of providing them with greater experience.

12. In the Public Works Performance Evaluation System adopted by the City, an appeal process similar to that recommended by the committee was adopted. Employees who disagree with the evaluation of their supervisor can appeal to an Appeals Committee consisting of two supervisors, the union Stewart and another employee. The committee makes a recommendation to the Public Works Director as to whether to deny or accept the appeal. If the committee does not reach a majority decision, the appeal goes automatically to

the Public Works Director. If the committee denies the appeal, the employee may fill out another appeal form and submit it to the Public Works Director who is to use the committee recommendation and any other available information

before making a decision. If the appeal is denied again, the employee may

request a meeting with the City Manager who will make the final decision.

It

is not clear from the Public Works Performance Evaluation System adopted by the City as to whether the Public Works Director must adopt a recommendation by the Appeals Committee in favor of the employee. Use of the term,

"recommend to the Public Works Director whether to deny or accept the appeal," indicates that it is only a recommendation. The section describing the evaluation process appeal procedure closes with the following statement:

The appeal procedure and performance evaluation system is administered solely at the City's discretion. Decisions regarding the amount of employees through the performance step system (sic) are not subject to arbitration or union negotiations.

Replacement Ex. 7, p. 40.

13. The Public Works Performance Evaluation System was incorporated into the 1991 Labor Agreement with Local No, 49. Ex. 13, Appendix A. The 1991 Labor Agreement stated that the Public Works Performance Evaluation System was "still in effect", set the following wage levels for 1991 and contained the following provisions:

Legal G	Level F	Level E	Level D	Level	Level B
Start					
\$ 9.92	\$ 11.10	\$ 12.29	\$ 13.48	\$ 13.76	\$ 14.04
(Hire)	(Year 1	(Year 2)	(Year 3)		

Employees will be eligible for review on their anniversary date of employment. At the review date, the employee may be increased, decreased or held at the existing wage levels depending on his/her performance during the past year. In the event of a reduction, the employee will have a six month period to correct deficiencies.

Performance evaluations shall be committed to writing on a standardized form. Decisions on the status of employees (sit) may be grieved by the employee to the Public Works Director and the City Manager, but are not subject to arbitration.

The grievance provision in the Labor Agreement was in addition to the appeal procedure established in the Public Works performance evaluation system itself. The Performance Evaluation System provided that union employees would be evaluated near their anniversary date until reaching Level D and that after Level D was reached, yearly evaluation would take place starting in November. Replacement Ex. 7, p. 39.

14. To implement the Public Works Performance Evaluation System in 1991, the employees were slotted into wage levels based upon their prior job classifications: Maintenance Worker III's were placed at Level C or B, Maintenance Worker II's were placed at Level D, Maintenance Worker I's were

placed at Levels G, F or E, and Utility Maintenance II's were placed at Level C. It was intended that the system would be fully implemented at the end of 1991 when evaluations would take place and placement of the employees at levels based upon the evaluations, and movement up or down, would take place effective January 1, 1992. However, as part of the implementation, all employees are given initial evaluations in early 1991.

15. Local No. 49 made its contract proposals for the 1992 contract year in a letter of October 29, 1991, to the City Manager. Among the proposals was one to allow grievances regarding performance evaluations to go to arbitration. Ex 3, paragraph 7. The City resisted that proposal throughout negotiations. In a letter of January 27, 1992, to Local No. 49, the City Manager set forth the City's latest contract proposal. Regarding the union's proposal to allow arbitration, the letter stated:

VI. The performance evaluation system established by unit members and City representatives shall remain unchanged in 1992. I would like you to understand that abandoning this system will result in a City bargaining position that unit members return to the old job classifications of Maintenance Worker I, II and III at the appropriate wage levels. Any insistence on making step determinations under the performance system arbitrable will result in the City bargaining to eliminate that option for unit members.

Ex. 4. paragraph VI. The union accepted the City's January 27, 1992, proposal on February 12, 1992. Ex . 5. The 1992 Labor Agreement incorporating the negotiated changes was signed by the union and the City March 17, 1992. Ex.

1. The changes included a three percent increase in the salary levels for Public Works Maintenance Workers, resulting in the following wages:

Level G	Level-F	Level E	Level D	Level I	Level B
\$10.22 (Hire)	\$11.43 (Year 1)	\$12.66 (year 2)	\$13.88 (Year 3)	\$14.17	\$14.46

16. Petitioner works in Utility Maintenance and, presumably, was in the job classification of Utility Maintenance 11. When the City went to the single Public Works Maintenance Worker classification in 1991 he was slotted into Wage Level C. Under the 1991 Labor Agreement, his wage was \$13.76 per hour. Ex. 13.

17. Petitioner was evaluated by Merlin Thorn on January 10, 1991 . Ex . 12, p. 3-4. Thorn is the Utility Superintendent. Petitioner's immediate supervisor is Dennis Moeller, the Assistant Utility Superintendent. The evaluation was mostly negative. It stated that Petitioner appeared to have an attitude problem, sometimes a total lack of interest, was constantly complaining and trying to change procedures, had trouble focusing on his own job and worried too much about what other employees and departments were doing, had difficulty with working with some of the crew and listening to and

following directions at times. With regard to the performance of his duties

within the Utility Division, the evaluation stated he handled citizen complaints well but sometimes had difficulty with one of the mechanical functions of the job. It stated that he seemed "good with equipment and

tools, but seems unsatisfied with what was provided to him." The evaluation

recommended that Petitioner be left at Level C with the understanding that a

vast improvement was required, that he would be reevaluated in six months and if he had not improved considerably would be moved down to Level D.

Petitioner signed the employee acknowledgement on the evaluation form stating that he did not agree with it but did not want to appeal.

18. In a memo of January 14, 1991, to Petitioner, Thorn set forth some specific desired corrections that would be considered when Petitioner was reevaluated in six months: (1) stop worrying about what other people and departments are doing, (2) pay more attention to his assigned job and let the supervisors set the priorities, (3) follow directions - listen to full instructions, (4) have more patience with the Job and others and practice some of the mechanical things he was having trouble with and (5) don't be so critical. Ex. 12, p. 5. Petitioner responded to the evaluation with a memorandum to Thorn and Moeller in which he expressed some confusion about being criticized for not having any good deas, a lack of Interest and an attitude problem and at the same time being criticized for complaining about procedures and tools which, in his view, was his way of trying to suggest improvements. Ex. 12, p. 6.

19. On July 9, 1991, Thorn completed another performance evaluation of Petitioreer. Ex. 12, p. 7-8. Regarding overall work habits and attitude, Thorn stated:

Marked improvement since first evaluation, but still leaves dotes with no meaning. He is asked questions about these notes and his time sheets on a regular basis. John still worries about things that have happened.

Regarding safety rules and procedures Thorn stated:

Knows the rules, but needs reminding to slow down and think on occasion.

Under "Additional comments and observations," Thorn stated:

John has taken the D-Class Water Certification Exam and has passed.

Under "Recommended actions," Thorn stated:

Leave at Level C and evaluate in November with the rest of the crew. *In the first evaluation I probably evaluated Jon's personality more than his ability and therefore was too negative.

20. In describing the July 9, 1991 , evaluation in a letter to the Department of Human Rights, the City Manager incorrectly stated that Petitioner was advised at the time that his performance had not improved to the degree necessary to maintain Level C. Ex. 10.

21. On December 17, 1991, Thorn completed another performance evaluation of Petitioner. The evaluation was very negative and recommended that

Petitioner be lowered to Level D and cautioned about further slippage.

The

evaluation generally stated that Petitioner had shown some improvement before the evaluation of July 9, 1991, but had since settled into a reverse pattern.

It stated that Petitioner had a good general knowledge in all required areas, but that he complained about tasks he was given, complained about things such as new meters, complained about being required to adequately complete daily time sheets and records, didn't use his time well, had a tendency to injure himself, had recently experienced some hard feelings and heated discussions with coworkers and made it difficult for his supervisors to do their jobs because he took up so much of their time. Ex. 12, p. 9-11. Petitioner disagreed with the evaluation. Ex. 12, p. 12-17.

22. The duties assigned Petitioner by Moeller changed at the beginning of 1992. For the previous four years, Petitioner had been the primary Utility Maintenance Worker taking water samples throughout the City and delivering them to be tested, answering resident complaints about their water bills and changing meters and doing meter repair in residents' homes. These duties were among his more complex and difficult because they included dealing with residents who were upset about their bills and required substantial paper work. Such duties are typically performed by the more experienced Utility Maintenance Workers and for the four years that he had performed the great majority of those duties himself, had constituted about 25 percent of Petitioner's work. Those duties were removed from Petitioner by Moeller. Petitioner continued to do meter repairs in the shop, along with the other 75 percent of the work he had always done.

23. The City was of the opinion that its reduction of Petitioner's pay level was not subject to Minn. Stat. 197.46. It gave him no notice of any rights under that statute.

24. Petitioner was notified of his right to appeal the December 17, 1991, performance evaluation to the Appeals Committee. He did so. The Appeals Committee was made up of the Streets and Park Superintendent, the Shop Superintendent, a Utility Maintenance Worker and a Park Maintenance Worker. Ex. 8 and Ex. 10. On February 14, 1992, the Appeals Committee heard statements from Thorn, Moeller and Petitioner. The Appeals Committee unanimously agreed to deny the appeal and place Petitioner at Level D. They found that that was where he fit based upon his everyday performance, that he did not consistently meet the Level C criteria, that he had communication and personnel problems with his supervisors and that Petitioner's attitude was the problem. Ex. 8. By letter of February 25, 1992, Ex. 8, Petitioner was notified of his right to appeal to the City Manager. (It is possible that the intermediate appeal to the Public Works Director was added later.)

25. Petitioner appealed the Appeals Committee decision to the City Manager. Petitioner and the City Manager met February 27, 1992, and had a lengthy discussion after which the City Manager informed Petitioner that he concurred with Petitioner's supervisors and the Appeals Committee and denied the appeal. Ex. 10.

26. Petitioner also followed the grievance procedure regarding the performance evaluation. Step I was a verbal grievance made to his supervisor Thorn on March 13, 1992, and denied on March 16, 1992. A Step 2 written grievance was filed March 20, 1992, by Local No. 49 and denied by the Director

of Public Works on March 24, 1992. The basis for the denial was not that Petitioner's evaluation was correct, instead the Director concluded that the adjustment to Petitioner's salary was the result of the "appraisal system" and

not a disciplinary action and therefore there was no violation of the contract, On March 30, 1992, the union filed a Step 3 grievance with the City Manager who denied it on April 10, 1992, for the same reasons as the Step 2 denial. On April 14, 1992, the union filed a request for grievance mediation with the Bureau of Mediation Services. Ex. 9.

27. On April 17, 1992, Local No. 49 filed a letter with the Bureau of Mediation Services requesting independent review on behalf of Petitioner. That matter is still pending. Ex. 11.

28. On April 20, 1992, Petitioner filed a Charge of Discrimination with the Minnesota Department of Human Rights alleging that the City discriminated against him on account of age in employment, particularly with regard to the December 17, 1991, performance evaluation and the lowering of his wages from Level C to Level D. Ex. 10. That matter is still pending.

29. It is unclear from the record as to exactly when Petitioner's reduction in wage level became effective. There is some indication that it occurred February 25, 1992, or perhaps February 27, 1992, when his appeal was denied by the City Manager. Under the 1991 Labor Agreement, Petitioner was making \$13.76 per hour at Level C. The 1992 contract wasn't signed until March 17, 1992, but presumably, wage adjustments were made retroactive to January 1. Under the 1992 contract, Level D employees were paid \$13.88 per hour, 29cents per hour less than Level C employees.

30. One other Public Works Maintenance Worker was given an initial negative evaluation and a period of six months to improve his performance or be reduced in pay level. That person did improve his performance in the view of the City to justify his continued placement at Level C. The City has reduced salary levels for two employees in other departments for performance reasons. They were a clerical employee in the City Manager's office and an accounting employee in the Finance Department.

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 of 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. For purposes of Minn. Stat. 197.46, a demotion is considered a removal.

4. The reduction in Petitioner's pay and duties at the beginning of 1992 was a demotion and, therefore, a removal within the meaning of Minn. Stat. 197.46.

5 . The City failed to notify Petitioner of his right to a hearing as required by Minn. Stat. 197.46, when it demoted him at the beginning of 1992.

6. Petitioner's veterans preference provided by Minn. Stat. 197.46 were denied by the City when it demoted him without giving him notice of his right to a hearing and failed to provide him with such a hearing.

7. Petitioner is entitled to reinstatement to his position of Public Works Maintenance Worker-Level C and to continue in such employment by the City until he has been afforded all of his rights under Minn. Stat. 197.46.

8. Petitioner is entitled to back pay in the amount of the difference between what he was paid and what he would have been paid at Level C, together with the interest at the rate of six percent per year from the date such payment should have been made to the date of payment.

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

RECOMMENDATION

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

1. The petition of Jon T. Tillmann be GRANTED.
2. The City reinstate Petitioner to Level C immediately.
3. The City pay Petitioner back pay in the amount of the difference between the pay he would have received at Level C and that which he actually received together with interest at the rate of six percent per year from the date such payments normally would have been made to the date of payment of the back pay.
4. The City comply with the requirements of Minn. Stat. 197.46 if it intends to reduce Petitioner's pay level.

Dated this 10th day of November, 1992.

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.

MEMORANDUM

Minn. Stat. 197.46 provides, in relevant part:

No person holding a position by appointment 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.

In *Gorecki v. Ramsey County*, 437 N.W.2d 646 (Minn. 1989), the court set forth two principles to be applied in determining whether a "removal" has occurred:

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).

437 N.W.2d at 650. In *Myers v. City of Oakdall*, the city determined that a veteran placed on indefinite medical leave had been "removed" within the meaning of Minn. Stat. 197.46. The court stated:

While we have not defined what it means to be "removed from such position or employment," we have recognized that a veteran is entitled to a hearing not only before he or she is discharged, but also before being demoted. See *Leininger v. City of Bloomington*, 299 N.W.2d 723, 726 (Minn. 1980). A veteran is not, however, entitled to a hearing prior to being suspended; a suspension does not constitute a removal. See *Wilson v. City of Minneapolis*, 288 Minn. 348, 352, 354, 168 N.W.2d 19, 22-23 (1969).

In Wilson we quoted the case of Mayor of Newton v. Civil Service Comm'n, 333 Mass. 340, 130 N.E.2d 690 (1955), wherein the Massachusetts Supreme Court stated: "The distinction between suspension and dismissal thus is one of substance and not of form. Suspension imports the possibility of likelihood of return to the work when the reason for the suspension ceases to be operative. Dismissal imports an ending of the employment.'" Mayor of Newton, 333 Mass. at 344, 130 N.E.2d at 692, quoting Commissioner of Labor & Industries v. Downey. 290 Mass. 432, 434, 195 N.E. 742, 743 (1935).

This is not a suspension versus removal case. Nevertheless, Wilson and the cases cited therein are helpful in determining the meaning of the phrase "removed from such position or employment." We agree with the premise of Mayor of Newton that whether an employer has by its action removed a veteran is a matter of substance and not of form. We hold that under the Veterans Preference Act, 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.

409 N.W.2d at 850-851. In Ochocki v. Dakota County Sheriff's Department, 464 N.W.2d 496 (Minn. 1991), it was held that the removal of a veteran from a position he had held because an invalid procedure had been used in filling the position was "not the type of removal to which the Veterans Preference Act applies because the veteran was never validly promoted to the position in the first place.

In Gorecki v. Ramsey County, 437 N.W.2d 646 (Minn. 1989), the issue was whether the reclassification of three Assistant County Attorneys constituted a demotion and therefore a "removal" under the Veterans Preference Act. The three veterans had been working in the job classification of Attorney IV which was the highest classification and defined as a supervisory position. However, none of the Attorney IV's had performed supervisory duties for several years. The County's Personnel Director, within his authority to administer the County personnel system, conducted a classification study and decided to eliminate the Attorney IV classification. The veterans were notified of their reclassification from Attorney IV to Attorney III. Their job responsibilities were not affected in any way and their salaries were not reduced as a result of the reclassification, although they were frozen at the current level until the pay range for the Attorney III classification exceeded their current salaries. The veterans contended that the reclassification was a mere subterfuge for a demotion, pointing to the fact of the salary freeze and the hostile attitude of the present County Attorney toward them which they

alleged existed in part because they had gained their prominence in the office under the former County Attorney. The court held that the reclassification was not a demotion for the following reasons:

(1) The mere change in classification title from Attorney IV to Attorney III while connoting a lesser position did not in itself require a conclusion

that a demotion had occurred;

(2) The veterans' relative ranking in the office was unchanged;

(3) Job duties and responsibilities were not affected, as indicated, in part, by the fact that the supervisory function that formerly distinguished the Attorney IV class no longer existed;

(4) The freezing of the salary was not a consequence crafted specifically for the veterans but instead was an implementation of a broad administrative plan.

The court concluded that the reclassification was not a "removal" but was, instead, the appropriate placing of the veterans job positions into their appropriate classification. The court went on to state:

We do not foreclose, by our decision, the possibility that one might successfully contend that a reclassification was in bad faith so as to constitute a "removal." Here we have chosen to limit our inquiry because, under the recorded facts and circumstances, it the appellant suffered a demotion it occurred when they lost their Supervisory duties in 1979 or 1980; their stipulation that those events had nothing to do with their claim that a removal had occurred in 1986 renders a bad-faith inquiry irrelevant (emphasis added).

437 N.W.2d at 650-651.

In *Ammend v. County of Isanti*, 486 N.W.2d 3 (Minn. App. 1992), the court adopted the Black's Law Dictionary definition of demotion as a "reduction to lower rank or grade, or to lower type of position." The court upheld a conclusion of the Commissioner of Veterans Affairs that a chief deputy sheriff had been demoted when a new sheriff took office and no longer allowed him to perform supervisory or administrative functions, assigned him to the least desirable and least important job such as process serving, transporting prisoners and road patrol and required him to remove the "Under Sheriff" sign from his office door even though the county board which has the formal authority to do so did not authorize the employee's demotion, and even though the employee continued to receive the chief deputy's salary and benefits.

Roberts' Dictionary of Industrial Relations, at 99 (1971), defines demotion as:

The process of moving an employee to a position lower in the wage scale or in rank. It may be involuntary, resulting from inefficiency or careless work in the form of a penalty, or voluntary resulting from a curtailment of production, and without prejudice to the employee.

The City argues that under the performance evaluation system, an employee's job classification is permanent while the wage level is temporary, that employees "self determine" their wage levels each year based on their

performance, that a temporary change in an employee's wage level upward from

one year to the next is not a promotion and that a temporary change in an employee's wage level downward from one year to the next based on the employee's performance is not a demotion. Petitioner argues that he was reduced in wage and rank and, thereby, demoted.

Applying the first Gorecki factor to this case, the fact that there is only one job classification is not determinative because we must examine substance over form. The question is whether Petitioner was removed, or demoted, from his "position or employment," not whether he was removed from his "Job classification." The terms are not necessarily synonymous. A job classification is a personnel system device for defining a similar group of jobs having common duties, responsibilities and qualifications and assigning a pay rate or range to the classification. In large employers, several different employees working different jobs in different departments may be assigned the same job classification. Thus, in this case there are Street Maintenance Workers, Utility Maintenance Workers and Park Maintenance Workers who have different specific duties but who all are assigned to the classification of Public Works Maintenance Worker.

Consolidating several job classifications into one broader job classification produces several desirable results, particularly from the point of view of the City. It reduces artificial barriers between jobs and allows employees to more easily perform different, job-enriching duties and makes the employees more versatile, allowing management greater flexibility in assigning job duties to meet changing needs. Moreover, it eliminates the need for employees to seek advancement in pay and status by moving up through narrowly-defined job classifications. Lewinsohn and Dieckhoff, Yesterday's solution Becomes Today's Problem: Consolidating-Clerical Classes, Public Personnel Management, Vol. 19, No. 1, at 25-30 (1990). However, creation of the Public Works Maintenance Worker job classification did not make all the maintenance workers the same. Differences exist which are primarily associated with the new wage levels. Employees are evaluated and assigned to the wage levels based upon their initiative, attitude and ability to perform the duties required. Likewise, employees are assigned duties based upon their initiative, attitude and ability to perform those duties. Despite the City's arguments that its maintenance workers are essentially fungible, it is quite clear that that is not the case. Level B employees don't often do Level G duties and Level G employees don't often do Level B duties. There is also significant status to being at the higher levels as demonstrated by Mr. Woodhull's fairly proud and insistent statement that he was a "Street-Maintenance Level B." Moreover, the minimum requirements for the wage levels described in the Performance Evaluation System demonstrate the differences between the levels. Of particular relevance here are the differences between Levels C and B; even though they are only one step apart there are significant differences. Level C maintenance workers must demonstrate the ability to lead a work crew and occasionally do so; Level D maintenance workers have no such requirement. Level C maintenance workers must respond and resolve complaints effectively; again, no such requirement exists for Level D employees. Level D employees must have cross-trained into other areas of Public Works and be able to fill in during normal or emergency situations in those other areas. Level D employees must only be willing to

train in other departments and work as needed during normal conditions and emergencies. For all these reasons, the mere fact that Petitioner suffered no change in job classification does not require a conclusion that no demotion occurred.

Turning to the second Gorecki factor, when Petitioner's wage level was reduced, his relative ranking among maintenance workers was lowered. As previously discussed, the City's maintenance workers attach significant status to the wage levels. In this particular case, Petitioner's relative pay level and level of responsibility were reduced.

Applying the third factor, Petitioner's job duties and responsibilities were reduced at the same time his pay level was reduced. The highest level duties that he had performed for several years, and which he considered most prestigious, were removed from him. Moreover, his pay was reduced from what it otherwise would have been.

Finally, applying the fourth Gorecki factor, the reduction in Petitioner's pay, duties and responsibilities, was not part of the implementation of a broad administrative plan but was instead a consequence specifically directed at him and based upon his supervisors' opinions that his performance was inadequate for the level at which he was being paid. Thus, applying the Gorecki standards, Petitioner has been demoted.

It is also noted that the performance evaluation system grants to the management officials of the City the arbitrary power to demote employees at will contrary to the basic purpose of the Veterans Preference Act. Again, there are undoubtedly benefits, particularly from a management view, in having a performance-based pay system that rewards the more able and higher achieving employees for their abilities and efforts. Such systems presumably induce better performance and local governments should be free to implement systems that increase employee performance. In designing and implementing its system, the City Manager quite naturally wanted full and final authority in making the performance evaluations. The Veterans Preference Act should be read to interfere with normal administrative functions as little as possible, but in this case, the power to arbitrarily reduce wage levels is inconsistent with the purposes of Minn. Stat. 197.46.

The fact that Petitioner had a right to appeal his performance evaluation to the Appeals Committee and grieve his pay reduction does not render the system less arbitrary. In the first place, the hearing provided by Minn. Stat. 197.46, is in addition to arbitration and other rights provided to a veteran employee. AFSME Council No. 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295 (Minn. 1984). Secondly, Petitioner's grievance was denied by the City not on the basis of his negative evaluation being correct but on the basis that the pay reduction was not a disciplinary action and therefore not in violation of the contract. In effect, the City declared it

non-grievable. Third, while the Appeals Committee procedure provides the potential for an unbiased review, it may be dominated by the City through its supervisory personnel. In this particular case, the Appeals Committee made no comment on the fact that Petitioner had corrected his performance after the January 1991 evaluation and had not been given another evaluation allowing him six months to improve his performance.

The City also argues that because wage levels are subject to annual review and redetermination, they amount to temporary positions of the type to which the Veterans Preference Act does not apply. *Crnkovich_v*, ISD No 701, 142 N.W.2d 284 (Minn. 1966); *State v. Mangni*, 42 N.W.2d 529 (Minn. 1950);

Markuson and Coudron v. City of Minnetonka Report of Administrative Law Judge dated July 20, 1992, OAH Docket No. 4-3100-6408/6409-2, adopted by Commissioner of Veterans Affairs September 18, 1992. However, in each of the cited cases, employees were assigned additional duties generally within their job classifications which were later removed due to organizational restructuring rather than as a disciplinary action. In this case, there has been no organizational restructuring. Petitioner was reduced in pay and duties because his supervisors perceived him to be "incompetent." Under these circumstances, he is entitled to the protection of Minn. Stat. 197.46, that requires such allegations to be proved at a hearing before an unbiased hearing board.

SMM