

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Kenneth Thomsen,

Petitioner,
CONCLUSIONS OF LAW,
v. AND RECOMMENDATION

FINDINGS OF FACT,

Hennepin County,

Respondent.

This matter came on for hearing before Administrative Law Judge Barbara Neilson on September 28, 29 and 30, 1994, at 9:30 a.m. at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota.

Karla Wahl, Attorney at Law, 4840 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402 appeared on behalf of Petitioner, Kenneth Thomsen. Sara Wahl, Senior Assistant County Attorney, 2000 Hennepin County Government Center, Minneapolis, Minnesota 55487 appeared on behalf of Respondent, Hennepin County. The record closed on this matter on December 9, 1994, when the last reply brief was received.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of Veterans Affairs shall not be made until the Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bernie Melter, Commissioner, Department of Veterans Affairs, Veterans Service Building, 20 West Twelfth Street, St. Paul, Minnesota 55155-2079, telephone number (612) 297-5828.

STATEMENT OF ISSUE

Whether Petitioner's job assignment constitutes a demotion without notice or opportunity for a hearing under Minn. Stat. § 197.46 (the Veterans Preference Act).

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

FINDINGS OF FACT

1. Kenneth Thomsen served on active duty in the U.S. Marine Corps from 1953 to 1955, including an 18 month tour of duty in Korea. Thomsen was separated from the Corps with an honorable discharge.

2. In 1976, Thomsen was hired by Hennepin County as a Property Description Technician in the Property Tax and Public Records Unit. The primary responsibility of that position is to write descriptions of parcels of land being divided. After 7 years in that unit, he transferred to the Department of Public Works where Thomsen wrote property descriptions for acquiring rights of way.

3. In February, 1985, Thomsen began working in the Surveyor's Office as a Senior Engineering Technician (SET) in the Survey Analysis Unit. In that position, Thomsen coded computer information from the field notes taken in surveys, made computations to determine the location of property corners (private property markers). Thomsen did research on the location of property lines and created maps from that research and computations.

4. The lowest level of staffing in the Surveyor's Office is the Computer Graphics Technician (CGT). CGTs perform map drawing functions and data entry. The next higher level of staffing in the Surveyor's Office is that of Engineering Technician (ET). ET is an entry level position for persons performing land plat functions, field work, and map drawing. Above the ET level is the SET level. SETs perform many of the same duties as ETs. The two distinctions between SETs and ETs are the complexity of work assigned and the degree of supervision required. SETs generally are assigned more complex tasks and are supervised less.

5. ETs and SETs are directed in their functions by lead workers. These persons are usually Principal Engineering Technicians (PETs). These lead workers are responsible for accomplishing the teams' tasks, but are not supervisors of team members. ETs and SETs are supervised by either the Senior Land Surveyor or the Supervising Engineering Technician. CGTs are directed by the Computer Graphics Supervisor, and supervised by the Senior Land Surveyor.

6. A memorandum from Thomsen's supervisor was sent to the County Surveyor on April 14, 1989. The memorandum criticized Thomsen's performance and unwillingness to change and recommended Thomsen be demoted to ET. This recommendation was not acted on by the County Surveyor.

7. In 1990, the Surveyor's Office was organized into two general divisions. One division, was supervised by the Senior Land Surveyor, and was comprised of three sections, graphics, drafting, and plat checking (hereinafter "Drafting Division"). The graphics section had CGTs and no ETs or SETs. The drafting section was headed by a PET and had four ETs. No SETs

were in that section. The plat checking section was headed by a Land Surveyor and had one SET and no ETs.

8. The other division (hereinafter "Survey Division") in the Surveyor's Office was supervised by the Supervising Engineering Technician. It too was comprised of three sections, R/W, and two field groups. Each section was led by a PET. There were two ETs in each field group. R/W had two ETs and an SET (Thomsen). The Survey Division performed more complicated work than the Drafting Division.

9. On March 16, 1990, Thomsen received a letter from the County Surveyor providing notification that Thomsen was to be demoted to the classification of ET. At the same time, Thomsen was transferred from the R/W section of the Survey Division to the drafting section of the Drafting Division. The two persons Thomsen worked with after the transfer were both ETs. Another ET was assigned the responsibility to check plats. Thomsen was prohibited from checking plats by the County Surveyor.

10. Thomsen's new duties were to sell maps to customers in the survey office, log incoming plats for checking, respond to inquiries for customers and process road openings and road vacations. Logging incoming plats consisted of checking that required documents are included, counting the number of lots to be platted, and checking that the appropriate fee was included. Processing road openings or road vacations consisted of transferring the drawing of the road from a smaller sheet of paper onto a larger sheet of paper. No complex calculations were required to accomplish any of these tasks. Almost no research of public records was required in the position. None of the computers or computer programs in the Surveyor's Office were used by Thomsen to perform the tasks he was assigned.

11. Plat checking consists of a detailed review of each aspect of the legal description, boundaries, and survey markings of each lot within a plat. The title opinion is reviewed for the boundary description of the lots. The plats are reviewed to ensure compliance with State law.

12. As of June 1, 1990, the Surveyor's Office was reorganized. The two divisions remained, and the Drafting Division retained its three sections. The Survey Division retained its R/W section (renamed as "survey analysis") and added a third survey field section. Thomsen was formally transferred from the survey analysis section to the drafting section of the Drafting Division. On an organizational chart prepared at this time, Thomsen was listed as an ET in the drafting section. Exhibit 11. On that same chart, a vacancy is listed in the survey analysis section of the Survey Division for an SET. The added field section is comprised of two ETs and contains no PET or SET as a lead worker.

13. In July, 1991, Thomsen was assigned for three months to be cross-trained in the computer graphics section. This assignment rendered Thomsen familiar with tasks performed by CGTs. No other SET or ET was cross-trained in CGT duties. While Thomsen was in the computer graphics section, a CGT performed Thomsen's duties in the drafting section.

14. On July 8, 1991, the County Personnel Board reinstated Thomsen to his position as an SET and denied the effort to demote him to the ET classification. Thomsen asked the County Surveyor to adjust his position reflect the Board's Order. The County Surveyor told Thomsen that he was "reinstated" so long as he was receiving the same salary as an SET. Thomsen requested to be transferred back to the Survey Division. That request was denied.

15. By July 1, 1991, the Surveyor's Office was again reorganized. The Survey Division retained the survey analysis section and three field sections but all the field sections had a lead worker and two ETs. The survey analysis section filled the vacant SET position. The Drafting Division retained its graphic section, but the drafting and plat checking sections were merged into a section titled "land information/plat checking." The merged section was comprised of the same personnel serving in the former drafting section. The two positions in the plat checking section were eliminated and the persons holding those positions were moved into the Survey Division. The structure of the land information/plat checking section was, according to an organizational chart, altered to a PET, an SET, and two ETs. Exhibit 11. The chart shows Thomsen filled the SET position. Thomsen's actual job duties were not affected by the reorganization.

16. In February, 1992, Thomsen was assigned to the Public Land Corner Survey Project (the Project). The Project consists of researching the history of each of the 2,033 monuments in Hennepin County. The purpose of the project is to create a record linking the placement, movement, or alteration of monuments, as documented in the surveys performed since the original markers were set out. At the time Thomsen was assigned, fifty monuments were researched. Thomsen's time records show he began work on the Project on March 10, 1992. Exhibit 21. For the first few weeks, Thomsen spent about half of his work time on the Project. No significant work was performed on the Project by Thomsen from April to July, 1992. From July, 1992, onward, Thomsen worked full-time on the Project. When Thomsen was not performing work on the Project, he was performing the desk duties he had been doing since his transfer to the Drafting Division.

17. In January, 1992, Steven C. Johnson, Senior Personnel Representative for Hennepin County, conducted an audit of Thomsen's position. Johnson's report indicates that fifty percent of Thomsen's position was work on the Project. Exhibit 16. Johnson relied completely upon information from the

County Surveyor in conducting the audit. No time records were reviewed. The audit was formally issued on February 1, 1992.

18. With two exceptions, Thomsen has retained the same duties since being assigned to the Project. In May and June of 1993, Thomsen cross-trained for field assignments. From January to June of 1994, Thomsen was the acting PET on a field assignment.

19. Thomsen filed a Petition with the Commissioner of Veterans Affairs asserting that Thomsen's rights under the Veterans Preference Act had been denied by Hennepin County. The Commissioner issued a Notice of Petition and Order for Hearing on August 14, 1992.

Based on 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 over the subject matter of this hearing, pursuant Minn. Stat. §§ 14.57 and 197.481.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. Petitioner is an honorably discharged veteran and entitled to the protections of Minn. Stat. § 197.46.

4. Petitioner was de facto demoted from his position as a Senior Engineering Technician without being notified of his right to a hearing as required by Minn. Stat. § 197.46.

5. Petitioner's de facto demotion ended when he was assigned to compile information on public monuments.

6. Petitioner suffered no loss of pay or benefits during his de facto demotion.

7. Minn. Stat. § 197.46 provides no remedy for a temporary, de facto demotion not accompanied by a loss of pay or benefits.

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

RECOMMENDATION

1. That Hennepin County's de facto demotion of Petitioner be held a violation of the Veterans Preference Act.

2. That Petitioner's request for relief be denied.

Dated this _____ day of December, 1994.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Jeffrey J. Watczak
Reporters Diversified Services
Duluth, Minnesota
Three Volumes

MEMORANDUM

The Veterans Preference Act conditions demotion of a veteran on either incompetence or misconduct. Minn. Stat. § 197.46. A veteran may also be removed, without violating the Act, where the employer abolishes the veteran's position in good faith. State ex rel. Boyd v. Mattson, 193 N.W. 30, 32 (Minn. 1923). In this case, the County attempted to demote Thomsen by the procedure provided in Minn. Stat. § 197.46. The County changed Thomsen's duties, however, without waiting for the outcome of the hearing process. As a result, Thomsen spent 27 months primarily assigned to counter work and map preparation that is properly assigned to ETs. The facts that a vacancy existed in the Survey Division at Thomsen's former position and that the vacancy was soon filled by a different SET support the initial move being made in conjunction with the attempt to formally demote Thomsen.

Witnesses for Hennepin County testified that the reassignment was not for the purpose of demoting Thomsen, but merely an efficient use of his abilities. This testimony is inconsistent with the subsequent staffing decisions made regarding the two divisions. The Drafting Division did not need more staff, as was borne out by the Division's workload and the fact that one of its sections (with two positions) was eliminated within one year. The Survey Division did not need more staff and, at one point, had a field section without a lead worker. Two ETs staffed that section, contrary to the testimony by the County's witnesses that ETs required more supervision than SETs.

The County asserted that the duties performed by SETs overlap with those performed by ETs and all staff, including the County Surveyor, perform all the tasks required in the office. While that is certainly true, that fact does not change the reality that Thomsen was moved into a position which placed a ceiling on the complexity of work he was assigned to perform. That ceiling

well below the tasks performed by SETs in the Surveyor's Office. This is the essential aspect of a demotion.

As stated in Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987) "whether an employer has by its action removed a veteran is a matter of substance and not of form." The same is true for demotions. Where the job duties have radically changed to a level of staff below the veteran's classification, a demotion has occurred. Ammend v. County of Isanti, 486 N.W.2d 3, 6 (Minn.App. 1992).

The fact that Thomsen was demoted does not end the inquiry, however. Management is free to assign employees, including veterans, to appropriate work within the classifications of those employees. In February, 1992, the County Surveyor reassigned Thomsen to work on the public monuments project. This work is within the classification of an SET. The work requires a level of complexity beyond that required of an ET. The position held by Thomsen was audited by the County. The audit found that the position is properly classified for an SET based upon the significant percentage of work done on the Project. Since Thomsen was working on the Project at least half-time since July, 1992, the de facto demotion ended upon his reassignment to the Project.

Thomsen asserted that the Project is not properly within the SET classification because an ET, P. Nelson, did similar research work before Thomsen was transferred to the Drafting Division. The testimony of the lead worker for both Thomsen and Nelson indicated that Nelson was not capable of doing the work required for the project due to a lack of surveying experience. This testimony supports the County's contention that the position on the Project occupied by Thomsen is properly staffed at the SET level due to the complexity of the work.

Under the particular facts of this case, the Veteran's Preference Act affords no remedy. There is no backpay or benefits to be awarded and Thomsen has been reinstated to a position commensurate with his classification. Had Thomsen remained in the drafting section doing work properly done by ETs, the Judge would not hesitate to recommend that the Commissioner of Veterans Affairs issue an Order assigning Thomsen to an SET position in the Survey Division. The evidence is strong in this case that the motivation for reassigning Thomsen was to demote him in derogation of the Board's Order and Thomsen's rights under the Veteran's Preference Act. Managerial decisions regarding Thomsen's future assignments must be carefully taken to ensure that the Veteran's Preference Act is not violated.

B.L.N.