

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Chester M. James,

Petitioner,

FINDINGS OF FACT.
CONCLUSIONS OF LAW
AND RECOMMENDATION

vs

City of Marshall,

Respondent.

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, on July 23, 1993, in the conference room of the Lyon County Courthouse, Marshall, Minnesota, pursuant to a Notice of Petition and Order for Hearing issued by the Commissioner of Veterans Affairs on May 21, 1993. Robert L. Gjorvad, Runchey, Louwagie & Wellman, 533 West Main Street, P.O. Box 1043, Marshall, Minnesota 56258-0843, appeared on behalf of Petitioner Chester M. James. Julie Fleming-Wolfe, Greene Espel, 1700 Lincoln Centre, 333 South Seventh Street, Minneapolis, Minnesota 55402, appeared on behalf of Respondent City of Marshall (City). The record was closed upon adjournment of the hearing that day.

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 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 was a department head so as to be excluded from the

veterans preference protections of Minn. Stat. 197.46.

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

FINDINGS OF-FACT

1. As stipulated by the parties, Petitioner is a veteran for purposes of Minn. Stat. 197.46, having served on active duty in the United States Navy from April 7, 1964 to December 7, 1967, and having received an honorable discharge.

2. As stipulated by the parties, Petitioner was demoted effective May 1, 1993, from his position as Electrical Superintendent of the City's Marshall Municipal Utilities (MMU) to the position of Plant/Maintenance Operator. The City did not provide him with notice of his rights as a veteran under Minn. Stat. 197.46 in connection with his demotion.

3. Chapter 13 of the City Charter of the City creates the Municipal Water, Light and Power Commission (Commission) and grants it exclusive jurisdiction, control and management of all water, light and power operations and facilities of the City. Ex. 4. Under section 13.02 of the City Charter, the Commission consists of five commissioners appointed by the mayor to five-year terms. The City Charter requires the Commission to have regular monthly meetings and to hold special meetings as required.

4. Section 13.03 of the Charter divides the functions of the Commission into separate divisions for the electric and water operations. It also provides that there shall be a General Manager in charge of the overall management of the Municipal Water, Light and Power System, which is generally referred to as Marshall Municipal Utilities. Under the Charter, the General Manager is to have such authority as is delegated by the Commission, determines the number of employees necessary for the operation of the system and fixes their duties and compensation, subject to approval of the Commission. The General Manager is also given control of all construction and repairs, the immediate management and operation of the electric and water systems, enforcement and execution of all rules, regulations, programs, plans and decisions made by the Commission and is empowered to prepare plans and specifications and takes bids and let contracts subject to the approval of the Commission. The General Manager is given the power to appoint and remove other officers and employees of the Commission subject to the approval of the Commission.

5. The administration of MMU is divided into four functions which are sometimes referred to as departments and sometimes as divisions. The two major functions are the Water Department and the Electrical Department. They are under the control, respectively, of the Water Superintendent and the Electrical Superintendent. Office functions are under the management of a person designated as Secretary of the Commission or Office Manager and the buildings and property maintenance function is under the management of a Plant/Property Superintendent. Exs. 2 and 3.

6. MMU buys electrical power which is then distributed to the residents of the City over power lines erected and maintained by the Electrical Department. The function of the Electrical Superintendent is described in policies adopted by the Commission effective October 10, 1989, as follows:

The ELECTRICAL SUPERINTENDENT is, as directed by the General Manager, in charge of the operation, maintenance and extension of the electric system, including transmission, distribution, substations, metering and the operation and maintenance of all equipment related to the electrical department. He is also responsible for advising the General Manager on the hiring, promotion, discipline and retention of electrical department personnel and other duties as may be directed by the General Manager. Electrical department personnel are responsible, during their duty hours, for the operation and maintenance of the electrical system as directed by the Electrical Superintendent.

Ex . 2 The Water Superintendent is described in very similar terms by the polici es except that, of course, the Water Superintendent has responsibility for the operation and maintenance of the water system of the City.

Ex. 2. The current Water Superintendent, Maurice Chaplin, has also acted as the Assistant General Manager of MMU for the past six years.

7. The Electrical Superintendent is not involved in negotiating the contracts for purchase of electrical power by MMU. That is handled by the General Manager.

8. In 1986, MMU placed an advertisement in the newsletter of the Minnesota Municipal Utilities Association seeking a "Electrical Line Superintendent" to replace the retiring superintendent. The ad stated, in relevant part:

Responsible for supervising 5 lineworkers and 2 person meter/load management. System distribution at 13.8 KV and 2.4 KV with 5,500 meters. Duties include distribution layout and materials purchase. Responsible to the general manager.

Prefer applicants with 15 plus years experience with increasing supervisory responsibilities to line superintendent-foreman. Applicable education may substitute for comparable years of experience. Salary range from \$29,000 to \$33,500 depending on experience and education.

Ex. 1. Petitioner applied for the position of Electrical Line Superintendent. Ex. 9.

9. After leaving the Navy in 1967, Petitioner had become an apprentice lineman in 1968 in a four-year apprenticeship program. He then worked as a journeyman lineman and line crew foreman for various electrical contractors until 1983 when he became the Electrical Utilities Superintendent for the City

of Gilbert, Minnesota. In his letter of application to the City, he described his duties there as follows:

My duties with the City of Gilbert are: Department head position responsible for the planning, Construction, maintenance, and operation of the electric distribution system in the City of Gilbert and for the overall operation of the Electrical Distribution Department. In the time that I have been with the City of Gilbert I have been directly responsible for the development and supervision of development and design of the Gilbert Substation and Distribution System upgrade. I am also responsible for installation and maintenance of residential metering and for installation and maintenance of commercial three phase, self-contained, demand, and CT metering. I am responsible for preparing equipment specifications and evaluating bids, including making recommendations for bid awards. I am responsible for joint pole use contract negotiations with Bell Telephone and Cable Television. I also give direction and interpretation of all electrical department functions to the City Council bimonthly. I am also available for emergency call out 24 hours a day.

Petitioner was hired for the job in 1986.

10. Gregory Sherman has been General Manager of MMU for just over one year. It has been Sherman's practice to delegate more responsibility and authority to the superintendents than the prior General Manager had. He expects the superintendents to "take charge and run their departments."

11. In April 1993, there were eight employees working in the Electrical Department under the Electrical Superintendent, a line foreman and seven linemen. Seven of them were journeyman linemen and one was an apprentice lineman.

12. Marshall has been enjoying substantial growth and expansion recently. As a consequence, there has been a considerable amount of building which has required MMU to provide new transmission lines, a new substation and other new components of the electrical system in Marshall.

13. The Electrical Superintendent is responsible for scheduling the work done in the Electrical Department. For those tasks that the employees in the Electrical Department are unable to do themselves, the Electrical Superintendent must arrange for the work to be contracted out. That process is usually accomplished with the assistance of a consulting engineer to design the project, develop specifications and solicit and evaluate bids. On routine items such as trucks and transformers, the Electrical Superintendent determines the needs of the Electrical Department and makes recommendations to the Commission as to purchasing by quote or bid, as appropriate.

14. The consulting engineering firm used by the City in the design of

electric system projects was hired by the Commission and directs all of its reports to the General Manager with copies to the Electrical Superintendent. Petitioner worked quite closely with the contractors and their employees in supervising the projects.

15. The Electrical Superintendent is an important position and the ability of the Electrical Superintendent to perform his job well significantly affects the success of the Department. In constructing electrical systems, even when designed by engineers, there may be several different methods to accomplish the desired end and the Electrical Superintendent must make such decisions. The Electrical Superintendent has the power to override the Electrical Engineer's design if he believes an objective can be accomplished a better way. This is because electrical engineers understand the technical aspects of a project, but don't necessarily comprehend the needs or operations of particular customers or other similar local factors. The Electrical Superintendent acts as a project manager for the MMU on construction projects and the success of individual projects depends on the Electrical Superintendent's abilities to deal with the consultants, contractors and customers and make the day-to-day decisions on changes and problems that arise in such projects.

16. Petitioner has no professional training and the position does not require it. It does require technical knowledge and training regarding electrical distribution systems, which Petitioner acquired through the apprenticeship program and on-the-job experience as a lineman. After Petitioner was terminated effective May 1, 1993, he was replaced by the person who had been line foreman, who is reported to be doing the job very well.

17. In his day-to-day routine, Petitioner performed different duties from the rest of the employees in the Electrical Department who were generally setting poles and running lines. He was involved in purchasing equipment, working with the consulting engineers and contractors, meeting with customers regarding their needs, negotiating easements, consulting with the General Manager and making presentations to the Commission.

18. Under Sherman as General Manager, the Water and Electrical Superintendents present reports and make recommendations to the Commission at its monthly meetings. For example, at the April 14, 1992 meeting, Petitioner reported on the four bids that had been received for a one-ton truck chassis and recommended the low bidder. He reported on the four bids received for 15 electrical transformers and again recommended that the bid be awarded to the low bidder. The Commission awarded the bids as recommended by Petitioner. Petitioner also requested that the Commission call for bids for a transformer to be used at a substation, and reported that he had been informed of a construction company's plans to construct six new apartment buildings and

requested that the Commission call for four quotes for transformers for that project, which they did. At the same meeting, the General Manager suggested to the Commission that two persons be hired in the Electrical Department for the summer to do cleanup and dirt work at \$6.00 per hour. The Commission voted to do so. Ex. 6.

19. At the March 18, 1993 regular meeting of the Commission, Petitioner reported that he, the City Engineer and the Mayor had met with representatives of Southwest State University to discuss a utility easement across the University property to a motel. The parties were to meet again to discuss the various options and the Commission authorized Petitioner to negotiate an agreement that would satisfy the needs of the University at the least possible cost to MMU subject to approval of the Commission at its next meeting.

Petitioner also reported on a \$14,000 change order required on the new substation project, which was approved by the Board, and on discussions that had been held with Schwan's Sales Enterprises regarding the cost of an extension of a fiber optics cable. He reported that he had received approval from MMU's consulting engineers to make final payment to two contractors on construction projects, which the Commission approved. He reported on bids that had been received for the "115 kv loop completion and dead-end towers", giving the recommendation of the consulting engineers and himself. He also reported on bids for transformers to be used in 1993 and underground wire to be used during 1993, which the Commission awarded to the low bidders. Ex. 8.

20. At the Board's April 13, 1993 meeting, Petitioner reviewed a proposed change in an Electrical Department policy regarding charges for underground electric service. The proposal was adopted by the Commission. Ex . 7.

21. Under Sherman, Petitioner was given more input into the hiring of employees and Sherman relied more upon Petitioner's advice in making employee decisions. However, Sherman made the decisions regarding the staffing of the Electrical Department and once promoted an employee out of the Electrical Department without any consultation with or notice to Petitioner. Petitioner did discipline employees within the Electrical Department, including sending four employees home for the remainder of a day for certain activities.

22. The General Manager has final authority over all of the Electrical Superintendent's decisions. Most of the Electrical Superintendent's decisions are routine and are those necessary to keep the work progressing by directing the work of the Electrical Department employees and supervising the work of the contractors to make sure the work was being done correctly. However, some of those projects have been very substantial, with projects costing in the millions of dollars.

23. The General Manager was not satisfied with Petitioner's performance as Electrical Superintendent and on April 30, 1993, informed Petitioner that he was being demoted to the position of Plant/Maintenance Operator. That action was confirmed in a letter to Petitioner from the General Manager dated May 7, 1993, which stated as follows:

Chester:

In reponse (sic) to the inquiries in your letter of May 3, 1993, I take sole responsibility as General Manager of MMU for the decision to remove you from the position of Electrical Superintendent. The decision was based on my personal observations of how your fellow management team and employees were treated by you. All employees of MMU are "at will" employees and the promotion, discipline and

retention of employees is at the discretion of the
General Manager.

Your job title, effective May 1, 1993, will be Plant/Maintenance Operator and your duties will be the same as those of other Plant/Maintenance Operators as directed by Steve Swanson, Plant/Properties Superintendent. Your salary will be adjusted to the responsibilities of your new duties.

Any vacation time accrued prior to May 1, 1993 will be paid at your former salary level.

24. On May 10, 1993, Petitioner filed a petition with the Commissioner of Veterans Affairs requesting relief from the City's action. On May 24, 1993, the Notice of Petition and Order for Hearing was served by mail upon the City and Petitioner setting the hearing in this matter.

25. As stipulated by the parties, the difference between Petitioner's pay as Electrical Superintendent and as Plant/Maintenance Operator from May 1, 1993, through July 23, 1993, was \$2,328.32. As Electrical Superintendent, he had been paid a salary equivalent to \$23.08 an hour. He is now paid \$16.47 per hour plus a shift differential of 30cents per hour.

26. Petitioner took three days of vacation around Memorial Day, namely Friday, Saturday and Sunday, May 28-30, 1993. He was paid for that at his old Electrical Superintendent's rate of \$23.08 per hour. Had Petitioner still been Electrical Superintendent at that time, he would have had three days off that weekend without taking any vacation.

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

CQNCCLUSIONS

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. The Notice of Hearing issued by the Department of Veterans Affairs was proper and all substantive and procedural requirements of law and rule have been fulfilled.

2. Petitioner is a veteran within the meaning of Minn. Stat. 197.447, and for the purposes of Minn. Stat. 197.46.

3. During his employment with the City since 1986, Petitioner was the Electrical Superintendent, having control and responsibility over the Electrical Department of MMU.

4. During his employment with the City, and specifically at the time of his demotion on May 1, 1993, petitioner was not a department head for the purposes of Minn. Stat. 197.46.

5. Petitioner was demoted from his position as Electrical Superintendent for alleged incompetency.

6. Petitioner's demotion to Plant/Maintenance Operator constitutes a removal under Minn. Stat. 197.46.

7. The City did not notify Petitioner of his right to request a hearing within sixty days of the receipt of a notice of removal as required by Minn. Stat. 197.46.

8. Petitioner's veterans preference rights provided by Minn. Stat. 197.46 were denied by the City when it removed him without an opportunity for a hearing prior to the demotion as required by Minn. Stat. 197.46.

9. Petitioner is entitled to reinstatement to his position of Electrical Superintendent until he has been afforded all of his rights under Minn. Stat. 197.46.

10. Petitioner is entitled to back pay of \$2,328.32 for the period of May 1, 1993 through July 23, 1993, \$533.92 for vacation pay he was required to use on May 28-30, 1993, and the difference between his pay as a Plant/Maintenance Operator and his salary as Electrical Superintendent from July 24, 1993 to the date he is reinstated by the City, together with interest at the rate of six percent per year from the date such payments should have been made to the date of payment. Pawelk v. Camden Township, 415 N.W.2d 47 (Minn. App. 1987).

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 City reinstate Petitioner as Electrical Superintendent immediately with all pay, status and benefits he would have received had he not been demoted effective May 1, 1993.

2. The City pay Petitioner back pay of \$2,328.32 for the period of May 1, 1993 through July 23, 1993, \$533.92 for vacation pay he was required to use on May 28-30, 1993, and the difference between his pay as a Plant/Maintenance Operator and his salary as Electrical Superintendent from July 24, 1993 to the date he is reinstated by the City, together with interest at the rate of six percent per year from the date such payments should have been made to the date of payment.

3. The City comply with the requirements of Minn. Stat. 197.46 if it intends to demote Petitioner.

Dated this 23rd day of August, 1993.

STEVE M. MIHALCHICK

Administrative Law Judge

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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

The Veterans Preference Act provides that honorably discharged veterans may not be removed from employment with a political subdivision without first having the benefit of a hearing. Minn. Stat. 197.46. The statute is expressly inapplicable to the chief deputy of an elected official or a department head. This exemption has been construed to include the head of a department as well as the chief deputy. The burden to establish that a veteran is the head of a department is on the political subdivision.

Holmes

v. Wabasha County_y, 402 N.W.2d 643 (Minn. App. 1987).

The "head of a department" means the head of some government division "which was important enough to have a deputy," and "only such departments [can] be excluded as a separate department." State es rel. Sprague v. Heise, 243 Minn. 367, 373, 67 N.W.2d 907, 912 (1954). Holmes v. Wabasha County, 402 N.W.2d 643 (Minn. App. 1987).

The Minnesota Supreme Court has itemized the various factors used in several cases to determine whether certain veterans were department heads:

1. Does the alleged department head have charge of the work done by the department?
2. Does the person's work require technical, professional training?
3. Is the person the highest authority at that level of government as to the person's official duties?
4. Does the person supervise all of the work in the department?
5. Does the success of the department depend on the person's techniques?
6. Are the employees in the department under the person's direction?
7. Are the person's duties more than merely different from other employees?
8. Does the person have the power to hire and fire subordinates?

State Ex Rel McGinnis--v. Police Civil Service Commission of Golden
Valley 253
Minn. 62, 75, 91 N.W.2d 154, 163 (1958).

Petitioner was the Electrical Superintendent of MMU's Electrical
Department. But that department was not "important enough to have a deputy."
Petitioner supervised eight linemen. One of those linemen was a line
foreman,

but performed no chief deputy functions. Thus, under the Sprague standard, the Electrical Department cannot be considered a separate department for purposes of Minn. Stat. 197.46.

Examination of the McGinnis factors supports that conclusion. Petitioner was responsible for the work done in the Electrical Department and had day-to-day control over the work that was done by the linemen and the contractors, but everything he did was subject to the control of the General Manager. He worked with the consulting engineers on projects, but they reported directly to the General Manager and the Commission as well. He was not involved in the purchase of electricity by the City, that was done by the General Manager and the Commission.

Petitioner's work did require some technical training and, as a superintendent, some supervisory or management training and skill. But there is no indication that the position required any more training than that that Petitioner himself received on the job.

Petitioner was not the highest authority as to his official duties. The General Manager both had full control and authority over him and the Electrical Department.

Petitioner did supervise all the work done in the Electrical Department. The employees there were under his direction.

The success of the Electrical Department did depend upon Petitioner's technique because he was in charge of the operation. However, there was nothing unusual or innovative about the techniques required in the position. The job requires the experience of a line foreman who knows the process of constructing municipal power lines and systems and the equipment and supplies required to do so.

Petitioner's duties were significantly different from other employees in the Electrical Department. The other employees were linemen putting up poles and power lines. Petitioner was not involved in the actual construction, but coordinated the activities of the linemen and performed other duties required to arrange for the construction and maintenance of the power system.

Petitioner did not have the power to hire or fire employees. That power was held by the General Manager. The General Manager did provide Petitioner

and the Water Superintendent with more and more authority with regard to hiring of employees, but Petitioner's role remained advisory and the General Manager made the actual hiring decisions.

Finally, Petitioner did not occupy a confidential position of trust that makes at-will discharge appropriate and of the type intended to be exempt from the Veterans Preference Act requirement that cause be proved for removal. *Gorecki v. Ramsey-County*, 437 N.W.2d 646 (Minn. 1989).

The City cites *State ex rel. Michie v. Walleen*, 185 Minn. 329, 421 N.W. 318 (1932), in support of its position that Petitioner was a department head. In that case, Michie was the county engineer of Chippewa County and was discharged without a hearing which he alleged to be a violation of the Veterans Preference Act. The Supreme Court affirmed the holding of the trial

court that he was not entitled to the protections of the act because he was a department head. The court noted that he was in charge of the highway work of the county, that he was paid the same as "other county officers", that he had to provide a bond in the same manner as other county officers, that his work required technical, professional training, that he was the highest authority in the county as to his official duties, that all road work in the county must be done under his supervision, that the success of his department depended on his engineering technique, that the employees in his department worked under his directions and road builders and contractors must meet his requirements and that he was an official whose duties were fixed by law. While there are some similarities, the Electrical Superintendent position here did not have that same degree of authority, responsibility, independence of action and degree of critical decision making authority. The City also argued that this case was similar to that in Holmes v. Wabasha County, 402 N.W.2d 642 (Minn. App. 1987), in that the Electrical Department was very important and important enough to have a department head. In fact, Holmes restated the Sprague standard that the department must be one which is important enough to have a deputy and that only such departments can be excluded as a separate department.

The department head exception to the Veterans Preference Act is quite narrow. As noted in Sprague, the department head exclusion is not mentioned in Minn. Stat. 197.46. The statute only excludes the chief deputy of an elected official or department head. That has been construed to mean that a department head can also be excluded. But, that department head must be very high level, it must be a position essentially equivalent to an elected official. The Electrical Superintendent position of the Marshall Municipal Utilities is not such a position.

SMM