

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Lucius Johnson,

Petitioner,

v.

County of Anoka,

Respondent.

SUPPLEMENTAL FINDINGS
OF FACT, CONCLUSIONS OF
LAW AND RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on April 5, 1994, at 9:30 a.m. at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota. By agreement of the parties, the issue of damages was reserved for later determination if necessary. On April 28, 1994, the Administrative Law Judge issued a report concluding that Respondent had violated Petitioner's rights under the Veterans Preference Act by failing to notify him of his rights thereunder when offering him the option to resign or be fired. That report was adopted by the Commissioner of Veterans Affairs as the Decision in this matter on July 19, 1994. The Commissioner ordered that this matter be remanded to Administrative Law Judge for further proceedings on the appropriate remedy.

The issue of an appropriate remedy was submitted to the Administrative Law Judge by affidavit and brief. Jesse Gant, III, Attorney at Law, 400 South Fourth Street, Suite 915, Minneapolis, Minnesota 55415 appeared on behalf of Petitioner, Lucius Johnson. Marcy S. Crain, Assistant Anoka County Attorney, 2100 Third Avenue, Anoka, Minnesota 55303-2265 appeared on behalf of Respondent, Anoka County. The record closed on this matter on December 19, 1994, upon receipt of the final brief.

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

What is the appropriate remedy for Petitioner's forced resignation from his position from Anoka County without notice of his rights 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. The Findings of Fact in the Administrative Law Judge's report of April 28, 1994, are incorporated as if set forth herein. In summary, it was found that Lucius Johnson's performance as a property tax appraiser prior to 1981 was marginal. He was too detailed and too slow. In 1981, the County transferred its appraisal records to a computerized system and Johnson's performance further deteriorated. He was suspended for five days in 1983. His performance did not improve. By March 4, 1984, the County Assessor concluded that Johnson had to be terminated. The Assessor believed it would require four to five months to gather the documentation and go through the procedures necessary to fire Johnson. On March 4, 1984, the Assessor told Johnson his performance had not improved and offered him the choice of resigning with a letter of recommendation or being terminated. Johnson chose to resign, which he did the next day. Johnson was not informed of his rights under Minn. Stat. § 197.46. His last day of work was Friday, March 9, 1984.

2. Had Johnson refused to resign, it would have taken four to five months for the Assessor to gather documentation and initiate the discharge procedures and for the Anoka County Personnel Board of Appeals acting as the Veterans Preference Hearing Board to hear and decide the matter.

3. Johnson earned a yearly salary of \$24,363.11 at the time of his removal. That is a monthly salary of \$2,030.26. Ex. 3. The County contributed 4.25% to retirement at the time, or \$86.29 per month in Johnson's case. In addition, Anoka County provided medical, dental, and life insurance without cost to the employee. In Johnson's case, the monthly costs to the County of those benefits were \$99.40, \$9.46, and \$2.70, respectively. Thus Johnson's total salary and benefits in 1984 amounted to \$2,228.11 per month. Anoka County also provided sick leave and vacation time to employees.

4. Johnson received \$1,146.00 in unemployment compensation in 1984 based upon a determination that Johnson had been involuntarily separated from employment by the County.

7. Johnson did not apply for other employment in 1984 after his removal by Anoka County. Johnson made minimal efforts to find employment in 1985.

Johnson had salary or business income in following amounts in the years since 1984:

1985	-0-
1986	\$27,130.00
1987	5,234.00
1988	20.00
1989	-0-

1990		1,325.00	
	1991		-0-
	1992		404.00
	1993		-0-

Johnson had substantial investments and earned significant interest income during this period. Of his 1986 income, \$18,000 was payments received from his brothers for care of their mother.

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. §§ 14.50 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 entitled to an award of back pay for Respondent's violation of Minn. Stat. § 197.46.

4. Had Petitioner not resigned his position as a Property Tax Appraiser effective March 9, 1984, but had asserted his rights under Minn. Stat. § 197.46, he would have been terminated by the Assessor and that termination would have been upheld by the Anoka County Personnel Board of Appeals by approximately August 9, 1984.

5. Johnson did not make reasonable attempts to mitigate the damages arising out of the loss of his position with Anoka County.

6. Johnson is entitled to receive back pay for the violation of his rights, but that award should be limited to the amount he would have received in the five months after his removal. This is so for either of two reasons: 1) Johnson failed to mitigate his damages and 2) had he been provided all his rights, he would have been terminated within five months. The back pay award should include salary and employer pension and insurance contributions. There is no basis for awarding the cost of sick leave or vacation time because that leave would most likely have been used as accrued. The back pay must be reduced by the amount of unemployment compensation received.

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 Anoka County pay Lucius Johnson back pay in the amount of \$9,994 (\$2,228.11 per month x 5 months - \$1,146.00), together with interest thereon at six percent per year simple interest from May 24, 1984, (the mid-point of the period covered) to the date paid. As of December 31, 1994, the total interest due was \$6,296.57.

Dated this 18th day of January, 1995.

/s/

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

In the more typical situation where a veteran is terminated without notice of his rights payment of back pay is required between the time the veteran is illegally removed and when the veteran is afforded the rights under the Veterans Preference Act (Minn. Stat. § 197.46). Pawelk v. Camden Township, N.W.2d 47, 51 (Minn.App. 1987). The back pay amount is calculated, with interest, "from the time each paycheck was due." Henry v. Metropolitan Washington Control Commission, 401 N.W.2d 401, 407 (Minn.App. 1987). Petitioner has relied upon this precedent in calculating alternative back pay amounts of \$560,869.50 and \$493,172.40. The former amount includes annual merit pay increases for 1986 and later and the latter amount assumes no increases for merit pay.

Mitigation of Damages

Back pay amounts must be reduced by income earned in mitigation of damages by the veteran. Henry, 401 N.W.2d at 407. Petitioner acknowledges he earned \$34,889.00 from March 9, 1984, to December 31, 1994. Respondent asserts that Petitioner failed to exercise due diligence in mitigating his damages by actively seeking employment. Johnson enrolled his name with a job service l

did not otherwise seek employment in 1984. In 1985, he made minimal job seeking efforts. There is no evidence that Johnson actually applied for any jobs after his removal.

Mitigation of damages goes further than deducting earnings from an award. The mitigation principle requires a veteran to actively seek employment. As stated in Henry v. Metropolitan Waste Control Commission:

A veteran covered by Minn. Stat. § 197.46 is entitled to compensation until he has been formally discharged as provided by statute, subject to mitigation of damage principles usually applied to breach of employment contracts. [citation omitted]. A veteran is required to "reduce his claim for wages by the amount which, by the exercise of due diligence, he could have earned in employment of a like kind or grade." Spurck v. Civil Service Board, 231 Minn. 183, 194, 42 N.W.2d 720, 727 (1950).

Henry, 401 N.W.2d at 406.

The burden to show a lack of mitigation is on the employer. Henry, at 406. In this case, the burden has been carried by the evidence of lack of diligence by Johnson in seeking further employment. The lack of mitigation requires that back pay not be awarded after five months beyond Petitioner's removal. Further reducing the five month back pay award is not reasonable, however, since the lack of due diligence does not manifest itself until late 1984 and because the award is already being reduced by the amount of unemployment compensation paid for part of that period.

Equitable Amount of Damages

Johnson's termination was effective March 9, 1984. He filed his petition with the Commissioner of Veterans Affairs on December 22, 1993. A delay of nearly ten years is significant, but does not constitute laches as a matter of law. Olson v. Otter Tail County, OAH Docket No. 6-3100-5639-3 (Summary Judgment Order dated February 28, 1992)(delay of seventeen years not sufficient to establish laches as a matter of law). Under the facts of this case, the laches argument has more substance. As the Minnesota Supreme Court has stated

The last contention of the village is that petitioner has been guilty of laches. While we cannot look with approval on the delay in taking action evidenced in this case, we believe that the trial court was justified in holding, at least inferentially, that laches should not bar recovery. While petitioner took no action from February to July, the record will support a finding that, from the beginning, he asserted his right to the position. Under these circumstances, the delay may have been occasioned as much by failure of the village to give him a hearing as by his failure to act. We must state, however, that in cases of this kind it is important that the individual claiming rights under civil service or the veteran's preference law

assert his rights promptly in order that the municipality's liability to pay twice be minimized as much as possible.

State ex rel. Sprague v. Heise, 67 N.W.2d 907, 912 (Minn. 1954).

The record is fairly clear that Respondent would have terminated Petitioner within five months of the date of his removal. Proceeding with a formal discharge termination would have notified Petitioner of his right to hearing and avoided any violation the Veterans Preference Act because Anoka County had a procedure in place to provide discharged veterans with their rights. Nonetheless, Anoka County violated the Veterans Preference Act by giving Johnson the option to resign or be fired without notice of his veterans preference rights.

Ensuring that a veteran is notified of his rights in a situation such as the one here is not difficult. For example, in Piccolo v. Benton County, OLR Docket No. 69-3100-8641-2, ALJ Report dated May 23, 1994, adopted by Commissioner of Veterans Affairs Order dated July 20, 1994, Benton County informed a veteran employee that he could resign or be discharged. He was presented with a letter of resignation drafted by the County Attorney that contained a provision stating that he expressly waived his right to a hearing as provided by the Veterans Preference Act. It was concluded that the veteran had been notified of his right to a hearing, that the County did not violate the Veterans Preference Act and that the Petitioner had waived his rights under the Veterans Preference Act by signing and delivering the resignation letter to the County.

Minn. Stat. § 197.481, subd. 1, states that when a veteran has been denied rights under Minn. Stat. § 197.46, the Commissioner shall grant such relief he finds justified by the statute. In this case, it is appropriate to grant relief that will encourage compliance with the Veterans Preference Act by municipalities and place the veteran in the position he would have been had County not violated his rights. Johnson seeks damages for ten years of pay and benefits. But he would not have remained an employee of the County for ten years. Had he been notified of his right to a hearing at the time he was offered the option to resign, he may have accepted excepted the resignation because it still allowed him to have a clean employment record. But his claim that he would have requested a hearing seems credible, particularly in light of the fact that he immediately applied for unemployment and claimed that he had been involuntarily terminated. But the County Assessor and other supervisors for which Johnson worked reasonably considered his performance to be incompetent, even after attempts at training and lesser discipline. The Assessor had started the process and Johnson would have been removed for incompetency. To place him in the position he would have been had he received all of his rights is accomplished by awarding him five months of back pay and benefits.

SMM