

INFORMATION MEMO

Veterans Preference in Discipline, Discharge or Job Elimination

Learn about the legal protections cities must provide to employees who are qualified veterans in the event of discipline, such as suspension or layoff, discharge from employment, or job elimination.

RELEVANT LINKS:

[Minn. Stat. § 197.46.](#)

[Minn. Stat. § 197.447.](#)

[38 C.F.R. § 3.12a.](#)

[38 U.S.C. § 106.](#)
[Section 401, Public Law 95-202.](#)

[Minn. Stat. § 197.46.](#)
[Minn. Stat. § 43A.16.](#)

[Smith v. Hennepin County,](#)
OAH Docket No. 80-3100-35990 (Sept. 18, 2019).

I. Minnesota Veterans Preference Act

State law provides that after any initial hiring probationary period expires, no veteran employed by a city shall be removed from employment except for incompetence, misconduct or abolition of the position the veteran holds.

A. Veterans

For purposes of the law, a veteran is a citizen of the United States or a resident alien separated under honorable conditions from any branch of the U.S. armed forces:

- After having served on active duty for 181 consecutive days; or
- By reason of disability incurred while serving on active duty; or
- Who has met the minimum active duty required by federal rule. (Minimum active duty is defined as the shorter of the following periods: 24-months of continuous active duty or the full period for which a person was called or ordered to active duty.); or
- Who has certain active military service certified under federal law (world war service by particular groups such as women air force service pilots, merchant marine).

1. Probationary period

Qualified veterans have many protections under the law and as such must be afforded certain benefits from the date of hire. As of 2016, a city may require employees, including veterans, to complete an initial probationary period as defined under Minn. Stat. § 43A.16 (defined to be no less than 30 days but not exceed two years of full-time equivalent service). The ALJ and the Commissioner have concluded in the decision to the left that “initial hiring probationary period” has meant the time frame when the veteran first joined the public employer. Thus, after serving an initial probationary period for a city, a veteran would not be subject to additional probationary periods such as for a promotion or new assignment. In other words, once the initial probationary period expires, a veteran may not be removed unless incompetency or misconduct is shown through a removal hearing.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

RELEVANT LINKS:

See LMC information memo, [*Veterans' Preference in Hiring*](#), for definitions of department head. [*State ex rel. McGinnis v. Police Civil Service Commission of Golden Valley*](#), 253 Minn. 62, 75, 91 N.W.2d 154, 163 (1958).

LMC information memo: [*Veterans' Preference in Hiring*](#).
[*Dryden v. City of Rochester*](#), No. A12-2310 (Oct. 7, 2013) (unpublished decision).

With the change in law, some cities who previously did not require probationary periods for employees have chosen to consider doing so after July 2016. In those situations, it is important to work with your city attorney to include strong disclaimer language stating no contractual relationship is created by the probationary period to avoid weakening the at will status of many city employees.

2. Exception for department head positions

The statute excludes department heads from Veterans' Preference Act removal rights and procedures, so cities are not required to give notice, a hearing, or continue the pay of department heads. An individual is considered a department head when:

- The individual has charge of the work done by the department.
- The work requires technical/professional training.
- The individual is the highest authority at that level of government as to his or her official duties.
- The employee supervises all the work in the department.
- The success of the department depends upon his or her technique.
- The employees of the department are under his or her direction.
- The employee's duties are more than merely different from other employees.
- The employee has the power to hire and fire subordinates.

Cities should use caution in applying this exemption and consult an attorney before assuming that an employee will be considered a department head. In general, the definition of department head will be narrowly construed by the courts and any doubt will be resolved in favor of the veteran's entitlement to rights under the statute. Many cities will find that their definition of department head does not necessarily meet the definition for purposes of veterans' preference.

3. Exceptions for temporary positions

The "Veterans Preference in Hiring" Memo states cities are not required to provide preference points to temporary employment positions. This same discussion of temporary employees applies to termination decisions as well. Pursuant to a 2013 unpublished Minnesota Court of Appeals decision, the Court found a veteran who was a temporary city employee was not entitled to reinstatement under the Veterans Preference Act. Please note, cities must use caution when defining temporary appointments, especially for temporary employees the city rehires annually.

RELEVANT LINKS:

Ekstedt v. Village of New Hope, 292 Minn. 152, 193 N.W.2d 821 (1972).

Ekstedt v. Village of New Hope, 292 Minn. 152, 193 N.W.2d 821 (1972).

Kurtz v. City of Apple Valley, 290 N.W. 2d 171 (Minn. 1980).

Kurtz v. City of Apple Valley, 290 N.W. 2d 171 (Minn. 1980).

In *Lund v. Bemidji*, 209 Minn. 91, 295 N.W. 514 (1940), the court treated a sewer worker who had been continuously employed for five years as a regular status employee even though he reapplied and was reappointed annually for a position classified as a one year only job. Also, in *Castel v. Village of Chislm*, 173 Minn. 485, 217 N.W. 681 (1928), a firefighter was entitled to Veterans protections even though his one-year fixed term position expired, since the veteran firefighter had been continuously reappointed to the position annually for five years.

B. Incompetence, misconduct and just cause

The Minnesota Supreme Court held there is no significant difference between the “incompetence or misconduct” standard in regard to veterans and the “just cause” standard in other public employment statutes and found in most collective bargaining agreements.

The courts have held the city is required to establish the veteran’s actions alleged to constitute misconduct or incompetence:

- Relate to and affect the administration of the position.
- Are of a substantial nature directly affecting the rights and interests of the public.
- Touch the qualifications of the position and the performance of the veteran’s duties.
- Establish the veteran is not fit and proper to hold the position.

1. Requirement to continue pay/suspensions

a. Related to potential termination

A veteran cannot be suspended without pay while the city determines whether or not to terminate his/her employment. However, the city may suspend a veteran with pay in this situation.

b. Unrelated to termination

The law permits unpaid disciplinary suspension in cases where the suspension is NOT connected to immediate termination. This action would not be considered “removal” under the Act and thus, no Veterans Preference hearing rights exist. In other words, generally, disciplinary suspensions not leading to discharge will not invoke the notice and hearing provisions of the Veterans Preference Act.

RELEVANT LINKS:

[Young v. City of Duluth](#), 386 N.W.2d 732 (Minn. 1986).
[Taylor v. City of New London](#), 536 N.W.2d 901 (Minn. App. 1995).

[Young v. City of Duluth](#), 410 N.W.2d 27, 29 (Minn. App. 1987).

[Minn. Stat. § 197.46](#).
[Young v. City of Duluth](#), 372 N.W.2d 57 (Minn. App. 1985).

[Layoff Notice Letter](#), LMC Model Form.

2. Layoff

a. Abolishment of position

Veterans are not given the same rights in a layoff situation as they are in a termination decision. In general, a city may layoff (or demote) a veteran in situations where the veteran is the least senior employee and the veteran's position is abolished. The job duties of the veteran cannot be assigned to other less senior positions as this implies that the position was abolished in order to avoid the veteran's right to a hearing. To determine if the position is being eliminated in good faith the city needs to ask:

- Are the job duties actually eliminated or being reassigned?
- If duties are reassigned, are they assigned to another nonveteran employee with less seniority than the veteran?
- Is the position being abolished in good faith for a legitimate purpose or as a strategy to terminate the veteran?

Unlike other types of terminations of veterans, the city does not need to pay the veteran his or her regular wages during the 30-day period after the notice of layoff (recall as of July 1, 2016, the amount of time a veteran has to request a hearing was reduced from 60 days to 30 days). If the veteran successfully challenges the layoff as not being a good faith abolition of a position, however, the city runs the risk of an award of back pay.

b. Layoff notice

Even in the case of a lay-off or position elimination, the city is required to give notice to the veteran employee who will be out of a position. The notice entitles the veteran to a hearing on whether the city acted in good faith. A layoff notice should state that a veteran has 30 days to petition the district court for a writ of mandamus compelling reinstatement and back pay if they believe the layoff is being used to prevent them from accessing veterans' rights per the law. The notice should also include the veteran has the alternative right to petition the Commissioner of Veterans Affairs for a hearing on the matter. The following language should be included in the layoff notice provided to any qualified veteran: "If you are a veteran as defined by Minn. Stat. § 197.447, you may have certain rights relating to your layoff under the Veterans' Preference Act (Minn. Stat. §§ 197.46 and 197.481). Pursuant to the Act, you have the right to either petition the District court for a writ of mandamus or the Commissioner of Veterans Affairs to determine whether the action taken was in good faith. If you wish to pursue either of these remedies, you must do so within 30 days of receipt of this notice. Your failure to do so within 30 days shall constitute a waiver of your right to contest your layoff under the Veterans' Preference Act."

RELEVANT LINKS:

[Minn. Stat. § 197.46.](#)

[Termination of Veteran
Employment Letter](#), LMC
Model Form.

[Minn. Stat. § 197.46.](#)

[Minn. Stat. § 197.46.](#)

[Minn. Stat. § 197.46.](#)

[Minn. Stat. § 197.46 \(b\).](#)

[Minn. Stat. § 197.46\(c\).](#)

3. Demotion

It is important to note that according to Minnesota law, a city wanting to remove a veteran from a position may need to follow specific procedures, even if the intent is to continue the veteran's employment but in a lesser position like that in a demotion. This may include providing the veteran with written notification of the intention to demote and the opportunity to challenge the decision and/or request a hearing within 30 days. Because these situations can be legally complicated, a city is strongly encouraged to consult with its legal counsel.

4. Termination Notice

According to law, a city wanting to remove a veteran from employment must notify the veteran of the intent to dismiss. The termination notice must state:

- The statutory grounds (e.g., misconduct or incompetence) for the proposed termination/demotion.
- The factual basis for the proposed termination/demotion.
- That, pursuant to the Veterans' Preference Act, the employee may have the right to request a hearing within 30 days of receipt of the notice.
- That, if the employee fails to request a hearing within the 30-day period, the employee's right to a hearing and other legal remedies for reinstatement will be waived; and
- That any hearing requested will be before an arbitrator, or the city's civil service board or commission, or a merit authority. If the veteran requests a hearing, the written request must include the veteran's election to be heard by the civil service board or commission, a merit authority, or an arbitrator. If the veteran fails to identify the veteran's election, the city may select the hearing body.

The city's failure to provide a discharge veteran of this notice indefinitely extends the 30-day limitation period for requesting the hearing. The city is required to pay the veteran during this 30-day period. If the veteran chooses to appeal, compensation continues until a final determination is made.

The city must continue to pay wages until one of the following occurs:

- The veteran fails to respond by the end of the 30 days after having received written notice of his/her right to appeal. (The failure of a veteran to request a hearing within the provided 30-day period shall constitute a waiver of the right to a hearing and waives all other available legal remedies for reinstatement.)
- The veteran responds to the notice stating he/she does not want a hearing.

RELEVANT LINKS:

[Minn. Stat. § 268.085, subd. 6.](#)

[Minn. Stat. § 13.43.](#)
LMC information memo,
Data Practices: Analyze, Classify, Respond.

HR Reference Manual,
[Chapter 3](#) see appendix A
flowchart for “Public vs.
Private Disciplinary Data.”

[Minn. Stat. § 197.46.](#)

[Minn. Stat. § 197.46 \(e\).](#)

- A settlement agreement is worked out between the city and the veteran in which the veteran waives his/her right to a hearing.
- The hearing is held, and a decision is rendered upholding the termination

Again, pay continuation is required during the 30 days in which a veteran may request a removal hearing, even if such a hearing is ultimately not requested. If a discharged veteran receives unemployment compensation, the city may offset that amount against the back pay the employee is entitled to receive. The city is also entitled to a reduction in the amount of recoverable wage loss by the amount of earnings received through other employment by the discharged employee.

Occasionally, a city will have a veteran inquiring about the extent of public disclosure of information if he/she resigns after receiving the Notice of Intent to Terminate. Generally speaking, under the Data Practices Act and assuming the termination is upheld, the Notice of Intent to Terminate letter will likely be classified as a public document. Thus, in the event a veteran wishes to avoid the facts supporting the termination from becoming public, that employee may want to consider resigning prior to receiving the city’s Notice of Intent to Terminate. However, with that said, a city must be mindful of the classification of disciplinary data under Data Practices Act in situations where the resignation is by a higher-level employee while complaints or charges are pending. In this event, some or all of the information relating to the discipline and discharge may be classified as public. It is always best to consult with the city attorney before determining what information is defined as public or nonpublic in these situations.

II. Hearings

The law provides a veteran has the right to a hearing before an arbitrator, a civil service board or commission, or a merit authority to challenge removal from employment. If no such civil service board or commission or merit system is in place the appeal will be heard by an arbitrator.

A city should attempt to schedule the hearing as soon as possible after notice of the veteran’s request. The city is responsible for paying for all costs of the hearing, with the exception of the veteran’s attorney’s fees, as well as continued wages of the veteran during this 30-day period and hearing process, if one is requested.

Since the veteran is on the city’s payroll, employer insurance contributions and leave accruals typically continue during this 30-day period, as a city would do for any other type of paid leave. If the veteran chooses to appeal, compensation continues until a final determination is made. Therefore, due to the expense involved, and because no formal discovery is required under the statute, avoid any agreements that will delay the hearing.

RELEVANT LINKS:

[Harr v. City of Edina](#), 541 N.W.2d 603 (Minn. App. 1996).

[2016 Minn. Laws ch. 189](#).

[Minn. Stat. § 197.46\(e\)](#).

[Minn. Stat. § 197.46](#).

If the veteran prevails and the hearing reverses the level of the alleged incompetency or misconduct requiring discharge, the governmental subdivision shall pay the veteran's reasonable attorney fees.

Occasionally, we hear about situations where a hearing is repeatedly delayed by the veteran and/or the veteran's attorney. While each situation is unique and must be reviewed with the City Attorney, some cities have asserted unreasonable delay tactics prejudice the employer because of continuing pay obligations under the statute. A laches argument may preclude the veteran in these circumstances from receiving continued wages and/or back pay.

A. Civil service

In cities having an established civil service board or commission or merit system authority, as of July 1, 2016, the veteran may elect to have the removal hearing before the civil service board or commission or merit system authority or before an arbitrator.

Thus, in these situations, the city will want to offer the veteran the option of choosing either option for his/her hearing. If the veteran chooses the hearing before an arbitrator, the city will request a list of seven arbitrator names from the Bureau of Mediation Services (BMS). Following receipt of the list from BMS, the city will then strike the first name from the list and the parties shall alternately strike names from the list until the name of one arbitrator remains. The veteran has 48 hours after receiving each of the city's elections to strike a person from the list.

Under state law, it is the responsibility of the city to pay for all costs associated with the hearing by the civil service board or commission, or merit system authority, with the exception of the attorney's fees for the attorneys representing the veteran. If the veteran prevails in a dispute heard by a civil service board and the hearing reverses the level of the alleged incompetency or misconduct requiring discharge, the city is responsible for paying the veteran's reasonable attorney fees.

B. Arbitrator

If there is no civil service commission, or other panel authorized by statute, the appeal will be heard by an arbitrator.

For a hearing before an arbitrator, the city will request a list of seven arbitrator names from the Bureau of Mediation Services (BMS). Following receipt of the list from BMS, the city will then strike the first name from the list and the parties shall alternately strike names from the list until the name of one arbitrator remains. The veteran has 48 hours after receiving each of the city's elections to strike a person from the list.

RELEVANT LINKS:

[*Matter of Schrader*, 394 N.W.2d 796 \(Minn. 1986\).](#)

[*Matter of Schrader*, 394 N.W.2d 796 \(Minn. 1986\).](#)

[Minn. Stat. § 197.46 \(e\).](#)

[Minn. Stat. § 197.46.](#)

[*Wagner v. Minneapolis Public Schools*, 581 N.W. 2d 49 \(Minn. App. 1998\).](#)

Upon the selection of the arbitrator, the city shall notify the designated arbitrator and request available dates to conduct the hearing

After hearing testimony and examining evidence, the hearing board or arbitrator may provide a remedy other than the action proposed by the city. Minnesota courts have found, in interpreting the law, the hearing official is authorized to shape a remedy other than that of the employer's disciplinary action (e.g., termination or demotion) if the evidence presents extenuating circumstances. Extenuating circumstances could be such things as family problems, illness, or disability.

The decision of the hearing board or arbitrator must be made in writing and must include findings of fact and conclusions of law.

Under state law, the city is responsible for all costs associated with the hearing, with the exception of the attorney's fees for the attorneys representing the veteran. If the veterans prevails at the hearing, and the decision reverses the level of the alleged incompetency or misconduct requiring discharge, then the city will be responsible for paying the veteran's reasonable attorneys fees.

C. Appeal

Either party may appeal the hearing's findings to the district court. The initial results, however, are likely to be upheld unless the appealing party can show the hearing board or arbitrator abused its discretion in some way. The city should seek the advice of an attorney to decide whether and how to appeal.

The appeal must be in writing and state the grounds of the appeal. The notice to appeal must be served upon the opposing party within 15 days of the decision and it must be filed with the district court administrator within 10 days after such service. Work with the city attorney to follow short court deadlines for filing a notice of appeal with the district court. A veteran who appeals a decision of the hearing board or arbitrator is not entitled to pay while the appeal is pending. In the event the veteran's termination is overturned once all appeals have been exhausted, then the veteran may be entitled to receive back pay.

1. Judicial review

The question before the district court is whether the hearing board or arbitrator abused its discretion. On appeal, the factual findings are typically upheld if they are supported by substantial evidence on the record, however, the court is free to exercise its independent judgment.

RELEVANT LINKS:

[Minn. Ct. R. 115.04, subd. 3.](#)

[Thorson v. Civil Serv. Comm'n of St. Paul](#), 308 Minn. 357, 242 N.W.2d 603 (1976).

[Minn. Stat. § 197.455, subd. 1\(b\).](#)

2. Appellate procedures

Either party may appeal the district court's decision on the removal hearing to the Minnesota Court of Appeals. By deciding to appeal a decision, a party generally undertakes the responsibility of providing a written record of the proceedings to the Court of Appeals.

In the case of an appeal of a district court's mandamus order or from an order of the commissioner of the Department of Veterans Affairs, this must be done by a petition for writ of certiorari to the Court of Appeals filed with the court and served on the Department of Veterans Affairs within 30 days after receipt of the final decision. In this circumstance, the district court or state agency (DVA) will provide the appellate court with the record for review.

III. Right to multiple remedies

The law explicitly provides that a veteran who is otherwise covered by a collective bargaining agreement must irrevocably choose between using the union grievance procedure to challenge a termination (removal) decision or the statutory process outlined for veterans. For a qualified veteran electing to use the procedures of sections 197.46 to 197.481, the matters governed by those sections must not be considered grievances under a collective bargaining agreement, and if a veteran elects to appeal the dispute through those sections, the veteran is precluded from making an appeal under the grievance procedure of the collective bargaining agreement.

IV. Settlements/waiving rights

Because of the specific hearing and pay continuation rights that veterans have, a city may want to consider proposing a separation agreement to a veteran in lieu of having a hearing. A city should seek specific legal advice before making a settlement offer to any employee.

V. Penalties

The willful disregard of Veterans Preference laws may constitute a misdemeanor by the city. An aggrieved veteran can also petition the Commissioner of Veterans Affairs for relief. Under the law, a wrongfully discharged veteran is entitled to compensation.

Even if the discharge is upheld the veteran is entitled to compensation through the hearing process until a decision is made. If reinstated, the veteran may be entitled to back pay and benefits.

RELEVANT LINKS:

[Mn Dept. of Veterans' Affairs.](#)
651.296.2562
[Veterans Employment and Training Service, U.S. Dept. of Labor.](#)
651.296.3665

[HR Reference Manual, Chapter 3.](#)
800.925.1122
651.281.1200
HRbenefits@lmc.org

VI. Further assistance

The Minnesota Department of Veterans' Affairs and the Veterans' Employment and Training Service of the U.S. Department of Labor offer information and assistance.

The League's HR Reference Manual has a complete discussion of employee discipline and termination. The Human Resources and Benefits Department staff is also available to discuss your questions.