

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

G. Richard Pierce,

Petitioner,

vs.

Independent School District No. 535,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATIONS**

The above-entitled matter came on for hearing before Administrative Law Judge Bruce H. Johnson at 9:30 a.m. on July 17, 1997, in Room 104, Government Center, 201 4th Street, S.E., Rochester, Minnesota.

Patrick J. Kelly, Attorney at Law, 1750 North Central Life Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Petitioner, G. Richard Pierce (hereinafter "Mr. Pierce"). Douglas A. Boese, Attorney at Law, 206 South Broadway, 505 Marquette Bank Building, P. O. Box 549, Rochester, Minnesota 55903-0549, appeared on behalf of Independent School District 535 (hereinafter the "School District" or "District"). The record of the proceeding closed on July 29, 1997, upon receipt of the parties' post-hearing briefs.

This Report is a recommendation and not a final decision. After a review of the record, the Commissioner of the Minnesota Department of Veterans Affairs will make the final decision, in which he may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61 (1996), 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, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota

55155-2079, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are:

1. Whether the School District denied rights afforded to Mr. Pierce under the Veterans Preference Act by failing to notify him of his right to request a hearing before the position he held as a roofing technician for the School District was abolished; and
2. Whether Mr. Pierce's position as a roofing technician for the School District was abolished in good faith.

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

FINDINGS OF FACT

1. Mr. Pierce resides at Box 94, Dover, Minnesota. He served on active duty in the United States Navy from January, 1957, until March 12, 1965, after which he was honorably discharged. Following his military service, Mr. Pierce was employed for several years as a civilian data processing technician for the U. S. Department of Defense. (Testimony of Mr. Pierce; Exhibit 9)
2. Mr. Pierce was first hired by the School District in 1985 to repair blisters that had formed on roofs of the District's school buildings. Subsequently, he was placed into the position of roofing technician, a position which he continued to hold until that position was eliminated on June 30, 1997. (Testimony of Messrs. Pierce and Bourgeois)
3. From 1986 through the summer of 1995, Mr. Pierce's primary duty during the summer months was to renovate and repair the roofs of the District's school buildings by applying foam roofing materials on them. In this regard, Mr. Pierce normally supervised a crew of temporarily employed college students. They were generally able to apply this treatment to the entire roof of one small school building or to part of the roof of a larger school building during the course of a summer. In the summer of 1996, he began to become involved in applying rubber roofing materials to one or more school buildings. (Testimony of Messrs. Pierce, Horn, and Bourgeois)
4. During the period from 1985 through 1996, the School District also contracted with independent contractors from time to time for the replacement of roofs on some of its school buildings. Whenever a school's roof was replaced by

a contractor, Mr. Pierce would not be involved with the work. Contract work was normally supervised and monitored by an architect engaged by the School District. After the work was completed, however, Mr. Pierce's supervisor, might later request him to contact independent contractors from time to time regarding such matters as repairs and warranties. (Testimony of Messrs. Pierce and Horn)

5. During the period from 1985 until about November of 1996, Mr. Pierce's immediate supervisor was Roy Horn, the District's Supervisor of Building Maintenance. Mr. Horn supervised approximately 117 maintenance personnel, assigned to both the District's central maintenance unit and to its 29 school buildings. During the period from 1985 through 1996, when Mr. Pierce was not otherwise engaged in resurfacing and repairing roofs during the summer months, he acted as a supernumerary for the School District's other maintenance positions. Mr. Horn assigned him to perform a number of other kinds of duties, such as serving as a substitute truck driver, serving as a substitute for vacationing or ill maintenance personnel at the District's elementary school buildings, assisting the District's carpenters, helping out in the warehouse, etc. (Testimony of Messrs. Pierce, Horn, and Bourgeois) Beginning on February 22, 1991, Mr. Pierce was temporarily assigned for an extended period of time as manager of the central maintenance unit's warehouse while the incumbent was on military leave of absence. (Exhibit 3)

6. All of the evaluations of Mr. Pierce's performance that were made during his employment with the School District indicated that his performance was above average, and there was no suggestion by the School District that Mr. Pierce has ever been incompetent in the performance of his duties or that he had been guilty of any kind of misconduct. (Testimony of Mr. Bourgeois; Exhibits 1 and 2)

7. In the summer of 1996, the School District determined that reductions in state funding would result in about an \$7.4 million deficit in its general fund budget for the 1997-1998 school year. In July of 1996 the Board of Education of Independent School District No. 535 (hereinafter the "School Board") appointed a 27-member committee (hereinafter "Budget Advisory Committee") to investigate and make recommendations about which general fund budget items should be cut in order to bring the District's budget into balance. The Budget Advisory Committee was composed of the Superintendent and his eight senior managers, nine representatives of the unions representing school district employees, and nine citizens from the broader Rochester community. (Testimony of Mr. Bourgeois)

8. One of the twenty-seven members of the Budget Advisory Committee was Paul Bourgeois, the Director of Business Services for the School District. Mr. Bourgeois is ultimately responsible for all maintenance activities in the School District, a function which he exercises through a Facilities Coordinator. (Testimony of Mr. Bourgeois)

8. After preliminary investigations, the Budget Advisory Committee met on August 13, 1996, and engaged in a group process that resulted in thirty-one specific proposals for budget cuts designed to bring the School District's 1997-1998 general fund budget into balance. Several of those thirty-one budget cut proposals involved elimination of positions and the laying off of a number of different School District employees. Each committee member was asked to rank each proposed cut in order of priority, and an average ranking, representing the collective judgment of committee members, was assigned to each. (Testimony of Mr. Bourgeois; Exhibit E)

9. One of the reasons why the District's 1997-1998 budget was out of balance was that the District would be opening a new high school in that school year, and there was insufficient general fund revenue in the budget to pay for all of the staff positions that would be required at that new facility. One of the cuts considered by the Budget Advisory Committee on August 13, 1996, was the elimination of three carpenter positions in the District's central maintenance unit. It was the Committee's thinking that the estimated \$81,900 in savings from the elimination of those three positions could be used to fund some of the staff maintenance positions that would be needed for the new high school in the 1997-1998 school year. The Committee members assigned this proposal their fifth highest priority out of thirty-one recommendations. (Testimony of Mr. Bourgeois; Exhibit B)

10. The preliminary recommendations developed by the Budget Advisory Committee on August 13, 1996, were subsequently circulated widely within the Rochester community for public review and comment, including public meetings. Those recommendations were also shared district-wide with all School District staff. (Testimony of Mr. Bourgeois)

11. In August of 1996, about the time the Budget Advisory Committee was making its preliminary budget recommendations, Mr. Thomas Bravo was hired as a new Director of Maintenance for the District. His immediate superior was Mr. Bourgeois. (Testimony of Mr. Bravo) In early September of 1996, Mr. Bourgeois advised Mr. Bravo that the Budget Advisory Committee had proposed to cut the 1997-1998 budget for the central maintenance unit by \$81,900 by eliminating three carpenter positions. Mr. Bravo indicated to Mr. Bourgeois that the elimination of three carpenter positions might result in serious problems for the District. He stated that the State Fire Marshal had recently cited the School District for a large number of outstanding Fire Code violations for which no further extensions of the time for correction would be given. It was Mr. Bravo's opinion that the carpenters were needed to correct the outstanding fire code violations. If the violations were not corrected, the District could be subject to substantial fines and penalties. (Testimony of Mr. Bravo)

12. Mr. Bravo then asked Mr. Bourgeois to request the Budget Advisory Committee to modify that particular recommendation by giving administrative staff the discretion to determine which positions to cut in the central maintenance unit in order to achieve \$81,900 in savings. Besides a carpenter crew and a roofing technician, the District's central maintenance unit also included truckers to deliver mail, supplies, and food to school buildings, two high-voltage electricians and one low-voltage electrician to care for building electrical needs, a grounds crew, and heating and ventilation technicians. A central warehouse, along with any associated full or part time positions, was in the process of being eliminated in favor of a contractual "just-in-time delivery system." (Testimony of Messrs. Bourgeois and Bravo)

13. It was Mr. Bourgeois' and Mr. Bravo's intention to make the required \$81,900 budget cut through natural attrition insofar as possible. If sufficient savings could not be produced through normal retirements, resignations and the like, then Messrs. Bourgeois and Bravo would recommend eliminating the position or positions in the central maintenance unit whose loss, in their judgment, would be least disruptive to the District's operations. (Testimony of Messrs. Bourgeois and Bravo; Exhibits B and C)

14. Ken Kavitz, the foreman of the trucking and grounds crew in the District's central maintenance unit, was scheduled to retire in the near future. Mr. Bravo proposed, and Mr. Bourgeois agreed, that they would not fill that position when it became vacant – in other words, they would reduce the size of the trucking and grounds crews by one supervisory position – at a savings of about \$50,000 per year. (Testimony of Messrs. Bourgeois and Bravo)

15. After beginning his employment as the District's Facilities Coordinator in early August of 1996, Mr. Bravo had recommended that the District contract with a number of independent consultants for some studies aimed at investigating and addressing the District's most significant facilities problems. One such problem was the apparent need to replace the roofs of several of the school buildings within the District. In this regard, the District contracted with Ambe Ltd. (hereinafter "Ambe"), an independent roofing consultant, to conduct an inspection and study of the roofs of each of the buildings owned by District and to help develop a systematic plan for repairing and replacing those roofs. (Testimony of Mr. Bravo) Neither Mr. Pierce nor his supervisor, Mr. Horn, was invited to participate in, or provide input into, the roof study which Ambe conducted. (Testimony of Messrs. Pierce and Horn)

16. Ambe concluded that on a scale of 1 to 10 (with a score of 10 indicating roofs in the worst condition) thirteen of the District's twenty-nine school buildings had roofs whose condition was evaluated as being a "10" and which therefore required immediate removal and replacement. Ambe also assisted the District in developing a long-range roof repair and replacement plan and budget. (Exhibit D)

17. Given the apparent magnitude of the District's roof problem, Mr. Bravo recommended to Mr. Bourgeois that the District implement its roof repair and replacement plan using independent roofing contractors, and that it discontinue replacing and repairing roofs using its own personnel. The existing position of roofing technician could therefore be eliminated, at an annual saving of \$27,000. These steps would enable the District to complete meeting its goal of reducing the 1997-1998 central maintenance unit by \$81,900, as proposed by the Budget Advisory Committee. (Testimony of Mr. Bravo) In short, it was Mr. Bravo's conclusion – a conclusion with which Mr. Bourgeois agreed – that the roofing technician position represented less of a core maintenance need to the District than the other positions that made up the central maintenance unit. Mr. Bourgeois accepted Mr. Bravo's recommendation and forwarded it to the Budget Advisory Committee, which incorporated the \$81,900 reduction of the central maintenance unit budget, as modified, into the Committee's final recommendations to the School Board. (Testimony of Mr. Bourgeois; Exhibit C)

18. Mr. Bourgeois forwarded the modified budget reduction proposal for the central maintenance unit to the Budget Advisory Committee in about November, 1996. Shortly thereafter, Mr. Bravo informed Mr. Pierce that he would no longer be assigned to work on the repair or replacement of the roofs of the District's buildings. Rather that work would thereafter be performed by independent roofing contractors engaged by the School District. Mr. Pierce was instructed to receive future work assignments from Mr. Bravo. Those work assignments included inspecting the doors throughout the District's buildings to determine the repairs that needed to be made, working with the grounds crew, and other central maintenance unit assignments. (Testimony of Messrs. Pierce and Bravo)

19. During the period from November, 1996, through June 30, 1997, the School District contracted with independent contractors for emergency repairs to the roofs of several school buildings at a cost of several thousand dollars. (Exhibits 6 and 7) It is uncertain how much of the amounts paid to those independent contractors represented the cost of labor and how much represented the cost of materials and other charges.

20. On or about March 26, 1997, the School District advised Mr. Pierce that the position of roofing technician would be eliminated on June 30, 1997, as part of the School District's overall budget reduction plan for the 1997-1998 school year and gave him a lay-off notice in accordance with the pertinent collective bargaining agreement. (Testimony of Messrs. Pierce and Bourgeois)

21. All non-managerial employees of the School District's Central Maintenance Unit, including Mr. Pierce, are covered by a collective bargaining agreement between the School District and Minnesota Teamsters Public and Law Enforcement Employees Union, Local 320, excerpts from which are

contained in Exhibit A. After being notified that his position of roofing technician was being eliminated, Mr. Pierce made application under § 13.4 of that collective bargaining agreement to bump into an operating engineer position. The incumbent in that position apparently had less seniority than Mr. Pierce had. (Testimony of Mr. Pierce)

22. Holding a first class boiler license was one of the qualifications for the position of operating engineer. (Testimony of Mr. Pierce) When Mr. Pierce made application to bump into the operating engineer position, the School District questioned whether he held a valid first class boiler license and asked for a determination of that issue from the appropriate licensing authority. (Testimony of Mr. Pierce) It is uncertain whether Mr. Pierce actually does currently hold a valid first class boiler license. It is also uncertain whether or not his application to bump into an operating engineer position has ever been granted.

23. On July 15, 1997, the School Board formally adopted a plan to balance its 1997-1998 budget. Because of legislation enacted by the legislature in special session, the District's prospective budget deficit was finally estimated to be about \$2.5 million, rather than the \$7.4 million previously estimated. The School Board's budget plan therefore only included about ten of the thirty-two proposed cuts which the Budget Advisory Committee had recommended. Among them, however, was the recommendation to reduce the central maintenance unit's personnel budget by \$89,900. The budget plan which the School Board finally adopted also provided for, or required, the elimination of several other positions throughout the School District. (Testimony of Mr. Bourgeois; Exhibit F)

24. Whether Mr. Pierce's employment has been or will be terminated as the result of elimination of the position of roofing technician depends on his seniority rights and right to bump or transfer into other positions within the School District. Because of possible bumping rights under his collective bargaining agreement, it is still uncertain whether or not Mr. Pierce's employment with the School District has been, or will be, terminated.

25. Having emergency roof repairs done by an independent roofing contractor, rather than by a single in-house roofing technician, enables the School District to perform repairs on multiple roofs simultaneously and decreases the time during which the roofs are in a state of disrepair.

26. It is uncertain how long it might have taken Mr. Pierce to perform all of the repairs to school building roofs that were made by independent contractors during the period from November, 1996, through June 30, 1997.

27. Any Finding more properly termed a Conclusion is hereby adopted as such.

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

CONCLUSIONS

1. Under Minn. Stat. § 14.50 and § 197.481 (1996), the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised in this case under the Veterans Preference Act, Minn. Stat. § 197.46 (1996). The Commissioner of Veterans Affairs and the Administrative Law Judge, however, lack jurisdiction to determine whether the School District has been, or is now, in violation of its collective bargaining agreement with the Minnesota Teamsters Public and Law Enforcement Employees Union, Local 320.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant, substantive and procedural requirements of statute and rule.

3. The School District received timely and proper notice of the hearing herein.

4. Mr. Pierce is an honorably discharged “veteran” within the meaning of Minn. Stat. § 197.447 (1996) and § 197.46 (1996) and is entitled to all of the protections and benefits of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 et seq. (1996).

5. The School District is a political subdivision of the state within the meaning of Minn. Stat. § 197.46 (1996), and its personnel practices are therefore subject to the provisions of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 et seq. (1996).

6. The requirement of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 (1996), that a veteran is entitled to a hearing prior to termination of his or her employment, normally does not apply when a public body eliminates a position in good faith for some legitimate purpose, such as when it is part of a good faith reduction in force. State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (Minn. 1923), Young v. City of Duluth, 386 N.W.2d 732, 737 (Minn. 1986).

7. Whether a veteran’s position has been eliminated in good faith for a legitimate purpose is an affirmative defense for which a public employer of the veteran has the burden of proof. State ex rel. Caffrey v. Metropolitan Airport Commission, 246 N.W.2d 637 (Minn. 1976); cf. Southern Minnesota Municipal Power Agency v. Schrader, 394 N.W.2d 796, 802 (Minn. 1986).

8. The decision of the School Board's budget advisory committee, and later of the School Board itself, to reduce the 1997-1998 personnel budget of the District's central maintenance unit by \$81,900.00 was made in good faith for a legitimate purpose.

9. The decision of the District to reduce its central maintenance unit's 1997-1998 personnel budget by \$81,900.00, in part, by eliminating its roofing technician position was also made in good faith and for a legitimate purpose.

10. The School District has not denied Mr. Pierce rights provided to him by Minn. Stat. § 197.46 (1996).

11. These Conclusions are made for the reasons set out in the Memorandum which is attached to and incorporated by reference in these Conclusions.

12. Any Conclusion more properly termed a Finding is hereby adopted as such.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS THE RECOMMENDATION of the Administrative Law Judge that the Petition of G. Richard Pierce be DISMISSED.

Dated this _____ day of August 1997.

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape Recorded (three tapes); No Transcript Prepared.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1 (1996), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

This proceeding was initiated by a Notice of and Order for Hearing dated June 12, 1997, issued by the Commissioner of Veterans Affairs pursuant to his authority under Minn. Stat. § 197.481 (1996). The Notice scheduled the hearing in this matter for 9:30 a.m. on July 16, 1997, at the Government Center in Rochester, Minnesota. The purpose of the hearing was to hear Mr. Pierce's petition for relief under the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 et seq. Specifically, Mr. Pierce alleged that his employment as a roofing technician with the School District was terminated without first notifying him of his right to request a hearing under Minn. Stat. § 197.46 (1996). There was very little conflict in the evidence presented by both the parties and relatively little dispute about the underlying facts. The issues in this case relate primarily to the sufficiency of the evidence and to application of the law to the facts.

Mr. Pierce's Prima Facie Case

Minn. Stat. § 197.46 (1996) provides in pertinent part:

No person holding a position by appointment or employment 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. [Emphasis supplied.]

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge.

The parties both agree that Mr. Pierce is an honorably discharged veteran who is entitled to the protection of Minn. Stat. § 197.46 (1996). There is also no dispute about the facts that the School District abolished Mr. Pierce's position as a roofing technician as of June 30, 1997, and that the School District issued a lay-off notice removing him from that position as of the same date.¹ Finally, the parties agree that the School District did not inform Mr. Pierce pursuant to Minn. Stat. § 197.46 (1996) that he had a right to a hearing at which the School District was required to show incompetency or misconduct on his part before terminating his employment as a roofing technician. In short, Mr. Pierce established a prima facie case that the School District violated rights afforded him under the Minnesota Veteran's Preference Act.

Good Faith Elimination of Mr. Pierce's Position

The School District, however, raised as a defense the fact that it had terminated Mr. Pierce's employment as a roofing technician as the result of eliminating his position in the course of a good-faith, District-wide reduction in force. The District therefore argues that under existing law, it was not required to notify him of, or provide him with, a hearing at which it was required to show incompetency or misconduct on his part.

On its face Minn. Stat. § 197.46, supra, appears to apply to any action by a public body to terminate the public employment of an honorably discharged veteran, regardless of whether or not the termination is part of a bona fide reduction in force. However, beginning with State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (Minn. 1923), the Minnesota Supreme Court has established a line of authority indicating that the Veterans Preference Act does not prevent public employers from eliminating positions, and incidentally the employment of veterans who may occupy them, so long as those positions are being eliminated in good faith for legitimate purposes:

¹ Although Mr. Pierce is clearly no longer employed as a roofing technician, it was unclear from the evidence whether his employment with the School District has been terminated. He may have the right under his collective bargaining agreement to "bump" into some other position. It appears that the appellate courts of Minnesota have not yet directly addressed the issue of whether a veteran who has been laid off but who has bumped into another position has been "removed" for purposes of the Veterans Preference Act. No evidence was produced at the hearing to establish clearly what Mr. Pierce's employment status with the district is. Since, however, this matter can be decided on other grounds, the Administrative Law Judge has not directly addressed those issues.

The purpose of this section [the Veterans Preference Act] is 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. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position. [Citations omitted.] The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veteran's preference act. *Id.* at 32.²

An assertion by the public body that a veteran's position has been eliminated as the result of a good faith reduction in force is an affirmative defense for which the public body has the burden of proof. See, e.g., State ex rel. Caffrey v. Metropolitan Airport Commission, 246 N.W.2d 637 (Minn. 1976); cf. Southern Minnesota Municipal Power Agency v. Schrader, 394 N.W.2d 796, 802 (Minn. 1986). Moreover, in determining whether a position has been eliminated in good faith, a reviewing tribunal is obliged to examine the substance of the action and not just the form. Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987). Whether action to eliminate the position has been taken in good faith or whether the reasons given by the public body are merely a subterfuge to oust the veteran from his position is a question of fact to be determined by the trier of fact by a preponderance of the evidence. Caffrey, supra, 246 N.W.2d at 641; State ex rel. Niemi v. Thomas, 27 N.W.2d 155, 157, 223 Minn. 435, 438 (Minn. 1947).

The School District's Evidence of Good Faith

The evidence presented by the School District established the following:
In July of 1996 the Rochester Public Schools found itself facing a \$7.4 million

² See also, Young v. City of Duluth, 386 N.W.2d 732, 737 (Minn. 1986).

budget shortfall for the 1997-1998 school year. Cuts would have to be made somewhere. The School Board established a very open and inclusive process for determining where the cuts should be made. A 27-member budget advisory committee, with equal representation from School District administration, employee collective bargaining representatives, and the public at large, was convened to make specific recommendations on where the cuts should occur. (Testimony of Mr. Bourgeois) In August of 1996 the budget advisory committee reached consensus on thirty-two individual budget cutting measures that together would yield the required \$7.5 million in cuts. One of those measures, which the group ranked fifth in priority, was cutting \$81,900 from the central maintenance unit personnel budget by eliminating three carpenter positions. Other proposals involved eliminating many other positions throughout the School District. (Exhibit B) In the context of the budget problem District-wide and in view of the committee's desire to avoid cutting instructional services to students as much as possible, the committee's decision to cut \$81,900 from the central maintenance unit budget was legitimate, reasonable and made in good faith.

Between August 13 and November 11, 1996, the budget advisory committee openly solicited comments and concerns about its proposed cuts from persons within the school district and from the public at large. As part of this process, Mr. Bourgeois discussed the proposed cut in the central maintenance unit's personnel budget with the manager of that unit, Mr. Bravo, who raised concerns about the committee's thinking about which positions in that unit should be cut. It was Mr. Bravo's judgment that the School District needed the three carpenter positions to ensure that a number of outstanding fire code violations would be corrected in a timely manner. (Testimony of Mr. Bravo) That represented a legitimate concern. As an alternative, Messrs. Bravo and Bourgeois proposed to the committee that they be given the discretion to determine what cuts to make in order to achieve the targeted \$81,900 reduction in central maintenance unit personnel costs. The committee accepted this recommendation and incorporated it into its final proposals to the School Board. (Exhibit C)

The District's central maintenance unit was comprised of a number of skilled trade positions. Besides a roofing technician, it included carpenters, truckers, warehousemen, groundskeepers, electricians, and heating and ventilation technicians. A policy decision had been made in the course of an open and inclusive process that some jobs in that unit would have to be cut.³ The School District presented evidence showing that the cuts that were actually

³ Mr. Pierce also argued that his \$27,000 annual salary was de minimis in the District's total budget of \$96,500,000 and suggested that the District was obligated to cut something else to avoid laying off a veteran. But cutting elsewhere could have compromised legitimate policies (e.g., attempting to hold instructional services harmless) or compelled the District to lay off some other employee. The Veterans Preference Act does not require preserving the jobs of veterans during a good faith reduction in force at the expense of non-veterans. See State ex rel. Boyd v. Matson, supra, 193 N.W. at 32.

made represented the good faith judgment of Messrs. Bravo and Bourgeois about which of those central maintenance jobs were least important for the School District to maintain.

After conducting a review of central maintenance positions, Messrs. Bourgeois and Bravo concluded first that the School District could get along without a supervisory position for the trucking and grounds crews. Elimination of that position would result in \$50,000 in annual savings, and it could be accomplished by not filling an impending vacancy due to retirement. (Testimony of Messrs. Bourgeois and Bravo) They next concluded that eliminating the roofing technician position at a \$27,000 per year savings would be less problematical for the District than losing some other central maintenance position. This conclusion was based, in part, on the fact that the District had already found it necessary to contract out some of its roofing work. Evidence also showed that almost one-half of the School District's roofs required more or less immediate replacement – more work than Mr. Pierce himself could accomplish in the course of several years. In fact, the District had already begun contracting out much of its roof replacement work to independent contractors. Evidence also showed that having roof repairs done by an independent contractor enabled the District to perform repairs on multiple roofs simultaneously and therefore decreased the time required to repair roofs.⁴ (Testimony of Messrs. Bourgeois and Bravo)

Mr. Pierce's Evidence of Bad Faith

Mr. Pierce presented no evidence that cast a doubt on the good faith of the budget advisory committee's budget reduction process or the substantive decisions that the committee made – including its decision to require \$81,900 in cuts in the central maintenance unit's personnel costs. Neither does he challenge the good faith of the decision to reduce the size of the trucking and grounds crew by one supervisory position by declining to fill an upcoming vacancy through retirement. What Mr. Pierce claims was made in bad faith was the decision to absorb the remainder of the required cut in central maintenance costs by eliminating his position rather than the position of one of his coworkers. Under existing law, that decision may be considered as having been made in bad faith only if a preponderance of the evidence establishes that its purpose was to get rid of Mr. Pierce as an individual and not simply to eliminate the position he occupied.

Mr. Pierce first argues that Caffrey, supra, establishes a special test under which a showing by a veteran that eliminating his or her position (1) effects no

⁴ There was also evidence that the School District might obtain the benefit of some warranties when its roofs were replaced or repaired by independent contractors. But there were questions over whether or not such warranties would extend to workmanship as well as to materials and whether they would extend to repairs at all.

significant economic savings and (2) effects no substantial change in the departmental operations establishes bad faith per se on the part of the public body. In such circumstances, Mr. Pierce argues, no specific evidence of an improper primary motive to get rid of the veteran rather than the position is required. In Caffrey, however, the Supreme Court neither held nor implied that such evidence alone would be sufficient to sustain a finding of bad faith, much less sufficient to establish bad faith per se.⁵ Caffrey and Taylor merely stand for the proposition that a trier of fact may consider evidence that eliminating a position failed to effect savings or a substantial change of operations as some evidence of bad faith, to be considered together with other evidence. In short, there is nothing in Caffrey and Taylor to suggest a change in the test that was fashioned in Boyd – that is, whether the public body's real motive was terminating the employment of a particular incumbent in a position rather than simply eliminating the position itself.

Moreover, Mr. Pierce's claim of lack of savings was only supported by evidence that the School District had paid independent contractors several thousand dollars – more than Mr. Pierce's annual salary – for roof repairs between November of 1996 through June of 1997. (Exhibits 6 and 7) On the other hand, Mr. Bravo testified that those charges included the cost of both labor and materials. There was no evidence enabling a direct comparison of the cost of Mr. Pierce's labor and the labor charges of the School District's contractors. More important, there was no evidence of whether Mr. Pierce alone could have completed the roof repairs that were contracted for in the same period of time, or even within a year's or two years' time. In short, the evidence offered by Mr. Pierce to establish an absence of savings through elimination of his position was, at best, inconclusive and had very little probative value in establishing a bad faith motive on the District's part for eliminating his position.

Mr. Pierce also testified that Mr. Bravo had once called him a "good old boy," an assertion which Mr. Bravo vigorously denied. Even if taken as true, the meaning and significance of such a remark is ambiguous and not clearly probative of an animus on the part of School District management to get rid of him rather than his position. Further, as evidence that the School District was

⁵ The precise issue before the Court in Caffrey, supra, was whether the district court's finding that the public body had not acted in good faith in abolishing the veteran's position was "clearly erroneous." The Supreme Court merely cited the absence of significant savings and absence of any substantial changes in departmental operations as two of several factors that contributed to its holding that "while a finding of lack of good faith is certainly not compelled, neither is such a finding manifestly contrary to the evidence." 246 N.W.2d at 641. In Caffrey, in addition to lack of significant savings and absence of a change of operations, the district court had also found that elimination of the public body's public affairs officer position was not accompanied by "any specific alternative for meeting public affairs needs." Id. at 638. More important, perhaps, the district court had found that management had, in fact, been dissatisfied with the veteran's performance but the veteran "was never informed that his competence was being questioned." Id. at 641. The Supreme Court, in effect, held that all of this evidence taken together was sufficient to support a finding that the public body merely used elimination of the position as a pretext for its real motive of attempting to terminate the employment of the veteran incumbent.

trying to get rid of him rather than his position, Mr. Pierce also points to the fact that he was excluded from participation in Ambe's study of School District roofs and to the fact that repair of those roofs was turned over to independent contractors in November of 1996. The preponderance of the evidence establishes, however, that these latter two actions were the result of business judgments by Mr. Bravo on how best to manage the School District's roof problems, and there was no evidence those decisions were motivated by some personal dislike of Mr. Pierce.

Finally, Mr. Pierce contends that the School District demonstrated bad faith by violating certain provisions of the collective bargaining agreement in effect between the District and Mr. Pierce's exclusive bargaining representative. Mr. Pierce alleges that under 13.4 of that agreement (Exhibit A), he had the right upon elimination of his position to bump a less senior employee in an operating engineer position – a position for which he claims to have been qualified. Qualifications for that position apparently included a first class boiler license.⁶ Mr. Pierce testified that when he applied to bump into that position, the School District raised questions with the licensing authority about whether his first class boiler license was valid.⁷ There was no evidence in the record to establish whether or not there may have been some legitimate basis for questioning the validity of his license. Nor was there any evidence to establish whether the alleged challenge to his qualifications was successful or even whether he was ultimately successful in his attempt to bump into the other position.

An administrative law judge lacks jurisdiction to determine whether a violation of a collective bargaining agreement, under which a veteran may have other rights, has occurred. That kind of determination must be made by a court of general jurisdiction or by some other tribunal specified by the contract itself, such as an arbitrator. What an administrative law judge can consider is whether conduct which some other tribunal might find to be violative of a collective bargaining agreement also represents evidence relevant to the issue of whether the public body was seeking to eliminate the veteran's position or the veteran himself. Here, a bad faith motive for questioning Mr. Pierce's qualifications for another position cannot be inferred from the mere fact that the questioning occurred. The inference runs the other way. One can infer a legitimate interest on the part of the School District to verify that its employees are fully qualified for the positions they hold. There was simply no evidence presented of a bad faith reason for challenging his qualifications for the other job.

⁶ No evidence was introduced to establish what all of the qualifications for the position of operating engineer might have been. It is only from inferences drawn from Mr. Pierce's testimony that it could be established that those qualifications included a first class boiler license.

⁷ The evidence on all of these points consisted almost exclusively of Mr. Pierce's own testimony and was sketchy at best.

Finally, Mr. Pierce alleges that the School District violated § 18.8 of the collective bargaining agreement covering Mr. Pierce by laying him off and the contracting out the work he had been performing. As noted above, the Administrative Law Judge lacks jurisdiction to determine whether or not the School District violated the collective bargaining agreement in question.⁸ This tribunal can only determine whether action by the School District to contract out its roofing work is probative of a specific intent on its part to get rid of Mr. Pierce as an individual rather than simply to eliminate his job. The mere fact of contracting out roofing work does not necessarily raise an inference of such a motive.⁹ The Administrative Law Judge therefore found that an alleged violation of § 18.8 was not probative of any issue material to this proceeding and is therefore irrelevant.

In conclusion, the evidence cited by Mr. Pierce that the real motive for eliminating his position was to get rid of him as a disfavored employee was tenuous and unpersuasive. On the other hand, the School District met its burden of proving by a preponderance of the evidence that Mr. Pierce's roofing technician position was eliminated in good faith as part of a District-wide reduction in force that was necessitated by a budget shortfall, and that it was not a subterfuge or pretext designed to conceal the more specific and personal objective of ending Mr. Pierce's employment with the School District.

B. H. J.

⁸ Even if the Administrative Law Judge did have jurisdiction, §18.8 was not one of the provisions of the collective bargaining agreement that was placed into evidence (see Exhibit A), so there would have been a failure of proof.

⁹ A finding that the School District violated the collective bargaining agreement by contracting work might raise an inference of bad faith in the District's dealings with Mr. Pierce's union without inferring that the District acted in bad faith against him personally.