

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS**

Wayne R. Higbee,

Petitioner,

vs.

St. Louis County,

Respondent.

**ORDER
ON MOTION TO COMPEL
DISCOVERY**

This contested case proceeding is before the undersigned Administrative Law Judge for rulings on objections to a request by Wayne R. Higbee to compel St. Louis County to make certain documents available to him.

Sarah Lewerenz, Attorney at Law, 211 West Second Street, Duluth, Minnesota 55802, represents the Petitioner Wayne R. Higbee, and Shaun R. Floerke, Assistant County Attorney, 100 North Fifth Avenue West, #501, Duluth, Minnesota 55802-1298, represents the Respondent St. Louis County.

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

ORDER

The Administrative Law Judge HEREBY ORDERS that Mr. Higbee's request to compel the County to produce documents is GRANTED, in part, and DENIED, in part, to the extent described in the attached Memorandum, which the Administrative Law Judge hereby incorporates into this Order.

Dated this 1st day of February, 2000.

BRUCE H. JOHNSON

MEMORANDUM

Prior Proceedings

This contested case proceeding began on November 18, 1999, when the Commissioner of the Department of Veterans Affairs filed a Notice of Petition and Order for Hearing on behalf of Mr. Higbee and served it on the County. Subsequently, by letter dated January 14, 2000, Mr. Higbee's counsel forwarded a discovery request to St. Louis County. Specifically, Mr. Higbee asked the County to produce copies of twelve separately described sets of documents. By letter dated January 19, 2000, the County's counsel objected to Item Nos. 2, 4, 5, 7, 8, 11, and 12 of the request on the ground that none of the information being sought in those requests is relevant to the issues in this proceeding. By letter dated January 21, 2000, Mr. Higbee's counsel responded to the County's objections, arguing in essence that all of the requested documents pertained to material issues in this case. On January 26, 2000, the County submitted a reply to that response. And on January 27, 2000, counsel for Mr. Higbee raised objections to the County's reply.

In his most recent rebuttal letter, Mr. Higbee argues that the County did not have leave to submit a reply. The ALJ did, however, give the County leave to submit a reply and, by the same token, will also consider Mr. Higbee's January 27th rebuttal to that reply.^[1] Second, in that rebuttal Mr. Higbee objects to the County's discussion of the merits at this stage of this proceeding. But the ALJ notes that all of the submissions made by both counsel necessarily contain arguments directed at the merits, since some consideration of the merits is necessary to determine whether the information that Mr. Higbee is seeking bears on material issues. Finally, Mr. Higbee objects to the County making statements of fact in its reply. But at this stage of the proceeding, the ALJ is accepting neither party's version of the facts. Rather, as this Memorandum indicates, the ALJ is taking the allegations of fact made by both parties at face value in determining whether Mr. Higbee's document requests are directed at discoverable information.

Allegations of the Parties

Neither party has established a factual record to support its position in this discovery dispute, nor would it be appropriate for them to do so at this stage. What matters in addressing a discovery dispute is what the parties' allegations and claims are. And there appears to be a sufficient record of allegations and claims to enable the ALJ to address Mr. Higbee's discovery requests and the County's objections. This

contested case proceeding involves a claim by Mr. Higbee that the County violated rights under Minnesota's Veterans Preference Act^[2] in a number of different ways. It appears that in 1993 Mr. Higbee was employed in a boiler operator and maintenance position at the County's laundry.^[3] It also appears that on December 9, 1993, the County notified him that it would be laying him off as a full time stationary engineer on December 21, 1993, and that it cited budget reductions as the reason for the layoff. At this point the County apparently alleges that because of Mr. Higbee's seniority, his collective bargaining agreement required the County to transfer him to a similar position elsewhere as an unscheduled hourly employee. Meanwhile, it appears that his layoff date was extended to December 31, 1993. The County then claims that on December 20, 1993, Mr. Higbee gave the County a letter of resignation in which he indicated that he was terminating his employment as an unscheduled hourly employee effective January 5, 1994. Mr. Higbee then claims that he was placed on a County re-employment list on that same day. And he further claims that on November 14, 1994, a position for which he was eligible for re-employment came open, but that the County failed to notify him of the opening and hired a non-veteran for that position.

Applicable Discovery Rules

In a contested case proceeding, OAH rules allow parties to conduct discovery according to the Minnesota Rules of Civil Procedure.^[4] Those rules provide, among other things, that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party"^[5] The Civil Rules also provide that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information appears reasonably calculated to lead to the discovery of admissible evidence."^[6] Relevancy, as it is defined in a discovery context, has been broadly construed to include any matter "that bears on or that reasonably could lead to other matter that could bear on any issue that is or may be in the case."^[7] But OAH's discovery rule goes on to place some additional requirements on the party seeking discovery. If the party from which discovery is being sought objects to the request, the OAH discovery rule^[8] requires:

[T]he party seeking discovery shall have the burden of showing that the discovery is needed for proper presentation of the party's case, is not for the purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery. [Emphasis supplied.]

The Material Issues in This Proceeding

Mr. Higbee's first claimed violation of the Veterans Preference Act is relatively straightforward. On its face Minn. Stat. § 197.46 flatly prohibits any action by a public body to terminate the public employment of an honorably discharged veteran without cause and without a hearing. However, beginning with *State ex rel. Boyd v. Matson*,^[9]

the Minnesota Supreme Court has indicated 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:

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.^[10]

An assertion by the public body that a veteran's position has been eliminated as the result of a good faith reorganization is an affirmative defense for which the public body has the burden of proof.^[11] 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.^[12] So, the underlying question that the reviewing tribunal must answer is whether the public employer's action in laying the veteran off was to eliminate the position for a legitimate reason or whether the reasons it gave for the layoff were merely a subterfuge to oust the particular veteran from his job.^[13] Here, Mr. Higbee claims that his December 1993 layoff was not done in good faith for legitimate reasons. On the other hand, the County claims that the layoff was done in good faith for budgetary purposes. So discovery relating to those particular issues is entirely appropriate for both parties. Moreover, *Boyd* also stands for the proposition that evidence that the veteran's job duties were subsequently performed by one or more less senior employees is evidence of the public body's lack of good faith. So it is entirely appropriate for Mr. Higbee to request the County to provide him with information about who, if anyone, may have subsequently performed duties that he had previously performed at any work location. Finally, evidence tending to show that the County failed to comply with the seniority provisions of its civil service rules and practices or its collective bargaining agreement in laying Mr. Higbee off might also be some evidence that the layoff was not done in good faith.

Additionally, Mr. Higbee also appears to be alleging that upon being notified of his impending layoff, he had certain rights under his collective bargaining agreement and County civil service rules to transfer to some other positions, presumably in lieu of being laid off. He appears to be alleging that the County's failure to effect such a transfer was another violation of the Veterans Preference Act. If the County had a self-

executing obligation to transfer Mr. Higbee to another position rather than laying him off, then the County's failure to do so might possibly amount to a violation of the Veterans Preference Act. On the other hand, if any right to a transfer arose only upon Mr. Higbee's request, then to state a claim for relief, Mr. Higbee must also plead and prove that he requested such a transfer but that the County failed to honor his request. But in either event, information about other employees whom Mr. Higbee may have had a right to displace by exercising a right to transfer would be immaterial to the issue of whether the County deprived him of a right to transfer.

Finally, Mr. Higbee appears to be contending that the County wrongfully failed to honor some re-employment rights that he claims to have had in November of 1994. As previously noted, Minn. Stat. § 197.46 only applies on its face to *removals* of veterans from public positions. While there is authority that the term removal also embraces demotions, it does not necessarily include all of the other kinds of personnel actions that a veteran might consider to be adverse. In effect, Mr. Higbee seems to be arguing that the County's failure to rehire him at a later date also amounts to a "removal" under the Veterans Preference Act. Mr. Higbee has not yet cited any legal authority for that interpretation of Minn. Stat. § 197.46. In rebuttal, the County argues that Mr. Higbee's layoff in December of 1993 was done in good faith and for legitimate reasons, and that although Mr. Higbee may have other remedies under County civil service rules and his collective bargaining agreement, the Veterans Preference Act does not provide him with a remedy for any subsequent failure by the County to honor any re-employment rights that he may have acquired.

Disposition of the County's Objections

The County concedes that Mr. Higbee is entitled to the information being sought in Item Nos. 1, 3, 6, 9, and 10 of his request, and it must therefore provide him with that information.

With regard to Item No. 2, the County must provide Mr. Higbee with copies of boiler logs at any facilities where he was actually working when he was laid off, but it is not required to provide him with boiler logs at any facilities where he was not performing job duties at that time. Who may have been working at other County facilities is immaterial to the issues in this proceeding.

With regard to Item No. 4, again the County must provide Mr. Higbee with information concerning the employment applications of any persons subsequently hired by the County who performed duties that Mr. Higbee was performing at any County facility at the time he was laid off, but the County is not required to provide him with that information for any facilities where he was not actually working at that time.

Yet again, with regard to Item No. 5, the County must provide Mr. Higbee with the time records of anyone performing the duties of stationary engineer at any facility where Mr. Higbee was working when he was laid off, but the County is not required to

provide him with boiler logs at any facilities where he was not actually working at that time.

In Item No. 7 Mr. Higbee is seeking copies of the “[r]e-employment lists on which Wayne Higbee’s name appears.”^[14] Minn. R. pt. 1400.6700, subp. 2, requires the party seeking discovery to make an affirmative showing that “the discovery is needed for the proper presentation of the party’s case.” The proposition that Mr. Higbee is advancing to support this particular request is that the Veterans Preference Act provides him with a remedy for a failure by the County to honor his re-employment rights. In essence, the County is objecting to Item No. 7 on the ground that, as a matter of law, the underlying contention fails to state a claim upon which relief can be granted.^[15] Given the novelty and potential importance of this legal issue, the ALJ is unprepared to address it even on a provisional basis without some kind of record^[16] and an opportunity for both parties to brief their respective legal positions. So even though the legal basis for Mr. Higbee’s re-employment rights claim is still debatable, the precise request is relatively narrow, and the information sought appears to be readily obtainable by the County. So the ALJ is requiring the County to provide Mr. Higbee with any of its re-employment lists on which his name appears.

Although the context of the request expressed in Item No. 8 is not entirely clear, documents relating to any position that Mr. Higbee may have held with the County either immediately before or immediately after being laid off may serve to identify the position from which he claims to have been removed. They may also serve to establish whether or not he subsequently resigned from a position, as the County claims. The County must therefore provide him with any “[r]e-employment or hiring documents when Wayne Higbee went to work at the St. Louis County Jail,” as specified in Item No. 8 of his request.

And with regard to Item No. 11, since the County claims that Mr. Higbee resigned from his position, it must provide him with any documents in its possession relating to his unemployment claim. Although whether or not any unemployment claim was allowed may not necessarily be dispositive of whether or not he resigned, those documents may contain statements by the parties that could bear on whether or not there was a resignation.^[17]

Finally, Item No. 12 requests documents relating to whether maintenance was subsequently performed at a particular facility where Mr. Higbee apparently was working immediately before he was laid off. Since Mr. Higbee alleges that his duties included performing maintenance, that information might tend to shed light on whether the County reassigned some of his duties to a less senior employee. But the ALJ notes that Mr. Higbee’s request is not limited in time. It appears to the ALJ that production of any maintenance records for that facility during the period January 1, 1994, through December 31, 1995, will be sufficient for Mr. Higbee’s purpose. So, the County must therefore comply with Item No. 12 subject to that time limitation.

B.H.J.

^[1] This discovery dispute involves some unique and important issues, and the ALJ has therefore concluded that both parties should have every opportunity to articulate their positions.

^[2] Minn. Stat. §§ 197.46, *et seq.*

^[3] This is an assumption by the ALJ, since there is no record to indicate whether he may have performed his work at other locations. But it is unnecessary for the ALJ to know precisely where he performed his duties in order to rule on the County's objections.

^[4] Minn. R. 1400.6700, subp. 2 (1997). (Unless otherwise specified, all references to Minnesota Rules refer to the 1997 edition.)

^[5] Minn. R. Civ. P. 26.02 (a).

^[6] *Id.*

^[7] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

^[8] Minn. R. pt. 1400.6700, subp. 2.

^[9] 193 N.W. 30 (Minn. 1923).

^[10] *Id.* at 32. See also, *Young v. City of Duluth*, 386 N.W.2d 732, 737 (Minn. 1986).

^[11] 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).

^[12] *Myers v. City of Oakdale*, 409 N.W.2d 848, 850 (Minn. 1987).

^[13] *Caffrey*, *supra*, 246 N.W.2d at 641; *State ex rel. Niemi v. Thomas*, 27 N.W.2d 155, 157, (Minn. 1947).

^[14] Letter from Mr. Higbee's counsel to the County's counsel dated January 14, 2000.

^[15] Since there is no precise administrative analog to a motion under Minn. R. Civ. P. 12.02 to dismiss for failure to state a claim upon which relief can be granted, the underlying legal issue will ultimately have to be addressed either upon a motion for summary disposition under Minn. R. pt. 1400.5500, subp. K, or at the hearing on the merits.

^[16] For example, even if Mr. Higbee did possess some kind of re-employment rights, either under County civil service rules or under his collective bargaining agreement, there is simply no record yet of the nature and extent of those rights.

^[17] As noted above, to be discoverable, the information being sought need only be such that it "reasonably could lead to other matter that could bear on any issue that is or may be in the case." Minn. R. Civ. P. 26.02 (a).