

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

William M. Obedoza,

Petitioner,

FINDINGS\_OF\_FACT,  
CONCLUSIONS\_AND  
RECOMMENDATION

vs.

Metropolitan Transit Commission,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on December 9 and 10, 1991 at the Office of Administrative Hearings, Minneapolis, Minnesota. The record on this matter closed on February 12, 1992, the date of receipt of the last post-hearing brief.

Karla«R. Wahl, Attorney at Law, 1950 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, Minnesota 55402, appeared on behalf of the Petitioner, William M. Obedoza. Andrew D. Parker, from the firm of Popham, Haik, Attorneys at Law, 3300 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent, Metropolitan Transit Commission (MTC).

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 this 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 of Veterans Affairs, Second Floor Veterans Service Building, 20«West Twelfth Street, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the removal of Petitioner from his job as a safety supervisor with the MTC violated the Minnesota Veterans Preference Act.

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

FINDINGS OF FACT

1. The Petitioner, William M. Obedoza, served in the United States Navy from 1959 through 1962 and was honorably discharged in 1965. In 1979, Mr.

Obedoza rejoined the Navy and is currently an active member of the Naval Reserves. He is of Filipino descent, although Respondents' employee records list his nationality as hispanic, and is 49 years old (DOB - 3/27/42).

2. William Obedoza began his employment with the MTC in 1967 as a bus driver. He held that position through 1969 when he left his employment with the MTC. On August 28, 1970, Mr. Obedoza was reemployed by the MTC as a bus driver and he served in that capacity through 1974 when he was appointed to a clerk/dispatcher position. He held the dispatcher job for a period of ten months, at which time he was promoted to the management position of safety supervisor. This promotion occurred in September of 1975. While in the position of a driver and dispatcher, Mr. Obedoza was represented by Local 1005 of the Amalgamated Transit Union (ATU). However, the position of safety supervisor is a nonunion, salaried position.

3. At the time Mr. Obedoza elected to transfer to the position of safety supervisor, the contract between the MTC and the ATU required that union employees transferring to nonunion positions would continue to accumulate seniority for purposes of returning to their union position. However, in 1978, the contract was changed and the accumulation of seniority was discontinued for employees who had transferred to nonunion positions. As part of this change in the contract, all nonunion employees who had transferred from union positions under the old contract were permitted to transfer back to their union position with full seniority. Mr. Obedoza remained in his nonunion supervisory p

4. Mr. Obedoza continued in his position as a safety supervisor from September 1975 to April 1, 1991, at which time his position was abolished by MTC. Prior to April 1, MTC employed five safety supervisors. Of those five, Mr. Obedoza had the second most seniority. Only Mr. Obedoza's position was abolished, leaving four safety supervisors to do the work that five had previously performed. Mr. Obedoza's job responsibilities were split between two of the remaining safety supervisors.

5. When Mr. Obedoza was informed that his position was to be abolished, he was given the option under the existing union contract to transfer back to a union position according to his seniority ranking. Mr. Obedoza elected to accept a transfer rather than leave his employment with the MTC. Petitioner's seniority allowed him to transfer to a bus driver position which he presently holds.

6. The MTC is a special purpose political subdivision of the State of Minnesota reporting directly to the Regional Transit Board (RTB). The RTB receives funds for metro transit from property taxes and general revenue funds from the State. The RTB sets transit policy for the metro region and is the pass-through agency for MTC funding received from the State. The MTC also relies heavily on revenues from rider fares for its funding. In addition, MTC receives limited funding from the federal government.

7. The MTC operates approximately 900 buses during the peak rush hour and provides service on 127 different bus routes. The MTC employs approximately 2,300 individuals and has an operating budget of \$117 million.

8. In 1990, MTC revenues began to decline and expenses increased so that, in March of that year, a \$3.5 million shortfall was forecast for the

-2-

year. Ridership had unexpectedly fallen and diesel fuel costs were greatly increased due to the Mideast conflict. At that time, the MTC took the following measures to curb the estimated shortfall: a freeze on hiring and travel; an across-the-board reduction in expenses for each division; a reduction in purchases; the elimination of consultant assistants and vacant positions; and a reduction in service to a level commensurate with reduced ridership. The MTC attempted to balance its budget without reducing personnel.

These attempts succeeded and sufficient reductions were made to nearly meet the 1990 budget guidelines.

9. In December of 1990, the MTC was informed that there would be no additional funding from the federal government. This funding amounted to seven percent of MTC revenues. On January 4, 1991, the MTC adopted its proposed 1991 budget. This proposed budget was balanced based on projections the MTC had made at that time.

10. On January 29, 1991, the MTC first learned that the RTB had received reduced revenues from the State amounting to \$3.5 million and that the MTC would have to absorb an estimated \$1.576 million of the reduction. Nonpersonnel-related reduction measures were immediately taken which included zeroing out virtually all nonessential line items in the budget. The MTC met with the RTB concerning methods to ameliorate the effect of the revenue reduction. RTB approval was necessary for changes in operation proposed by the MTC.

11. During the February 5, 1991 regular meeting of the MTC, the subject of staff reduction was first addressed. The assistant chief administrator for administration, Beverly Auld, stated that as many as 35 staff members could be

laid off resulting in a \$1 million budget reduction. The MTC solicited suggestions from staff concerning ways to reduce expenses and avoid personnel layoffs. By mid-March 1991, the MTC was forced to reduce expenses by \$2.139 million in order to balance its budget. After making all of the nonpersonnel-related cuts it could and adjusting fuel consumption projections, personnel reductions totaling \$732,000 were required. On March 19, 1991, the Commiss

12. The MTC eliminated 30 fulltime positions plus one intern in March of 1991. Of the 30 fulltime positions, 13 were vacant and were abolished, nine employs were given transfer rights to open union positions, and eight fulltime employees were laid off. Twenty-seven of the 30 fulltime positions which were eliminated were administrative or clerical positions. Petitioner's job, one of five safety supervisors, was one of the administrative positions cut.

13. Prior to the layoffs, the assistant chief administrator of operations, Jerrold Olson, instructed the division directors within operations to assess which positions could be cut without directly impacting service on the street. The MTC specifically wanted to avoid the layoff of drivers, mechanics, transit information operators and customer service representatives if at all possible. Operations includes the divisions of transportation, risk management, equipment maintenance and engineering and facilities.

-3-

14. The risk management division consists of three departments: liability and claims; workers compensation; and safety. Ed Williams, the director of risk management, reviewed each of the positions within the departments he supervised in March 1991, to assess if and where a layoff could occur. Mr. Williams had been the manager of safety before assuming the position of director of risk management in late 1990. In his position as director, Mr. Williams has continued to be the direct supervisor for the five safety supervisors because the manager of safety position was eliminated when Williams was promoted.

15. One safety supervisor was assigned to each of the five MTC garages. The safety supervisors worked in conjunction with the transportation manager and assistant transportation managers assigned to the garage to administer the MTC safety program. The job responsibilities of the safety supervisor included:

- . Conduct inspections of MTC properties, buses, buildings, shops and equipment to ensure a safe working environment and compliance with OSHA and MTC

safety standards.

- . Conduct ride checks and/or retraining with drivers/mechanics when they are on probation, complaints or accident involvement indicate poor or reckless driving habits, employee has been absent from work for any reason longer than thirty (30) days, and/or ability to drive has been impaired by injury or illness.
- . Conduct road test and turn-ins for all driver trainees at garage.
- . Serve as chairperson of the garage Accident Review Committee (determine chargeableness of accidents) and review accident reports to ensure consistent application of driver safety standards.
- . Provide high visibility of and promote the safety department to drivers and mechanics to ensure that employee safety concerns are addressed by management.
- . Monitor driver's pre-check of equipment, pull out and street operations to provide employee awareness of safety responsibilities.
- . Conduct work safety programs for the mechanical area (fire drills, safety films, programs required by OSHA regulations or requested by employees) to ensure a safety working environment in mechanical/shop areas.
- . Provide assistance and cooperation to managers and supervisors to develop and maintain safety awareness program.

-4-

- . Analyze safety data, determine causes of safety problems and take corrective measures to eliminate safety violations and hazards.
- . Assist manager of safety and planning in conducting the annual rodeo to provide competitive spirited and increased morale for drivers and mechanics.
- . Other duties as assigned.

16. In carrying out the duties set forth above, safety supervisors had responsibility for the drivers at the particular garage they were assigned to.

The goal was to improve driving safety and thus reduce accidents. Each of the five garages had a different number of drivers. In early 1991, the Snelling garage had 359 drivers; the Heywood garage had 336 drivers; the South garage had 234 drivers; the Nicollet garage had 249 drivers; and the Shingle Creek garage had 197 drivers. William Obedoza had been assigned to the Shingle Creek garage since approximately 1977. Due to his Naval Reserve commitment, Petitioner worked 3-4 weeks less per year than the other four safety supervisors.

17. Ed Williams determined that the drivers at the three smaller garages (South, Nicollet and Shingle Creek) could be combined into two groups without increasing the supervisor-to-driver ratio above that which currently existed at the Snelling or Heywood garages. He felt that four safety supervisors could then cover the five garages and the work load would be more evenly balanced.

18. Mr. Williams met again with Mr. Olson and recommended to him that the number of safety supervisors be reduced from five to four. Mr. Olson agreed with this recommendation and instructed Mr. Williams to determine which of the five safety supervisor positions should be abolished pursuant to the MTC personnel code. At that time, however, Mr. Williams was aware that Mr. Obedoza would most likely be the individual laid off and so informed Jerrold Olson.

19. The MTC Personnel Code provides as follows:

Part 6. SEPARATION\_AND\_DEMOTION.

\* \* \*

Subp. 2. Layoff. (e) The chief administrator may lay off an employee by reason of abolition of position, shortage of work or funds, or other reason outside the employee's control which do not reflect discredit on the services of the employee.

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-5-

Part 7. SENIORITY.

Employment, promotion, layoff, demotion, and termination must be on the basis of merit and efficiency. Where these factors are considered by the chief administrator as equal between employees, the action must be on the basis of seniority.

20. Ed Williams reviewed the previous year's performance evaluations concerning each of the five safety supervisors in order to determine which supervisor ranked the lowest on "merit and efficiency". Performance evaluations were done annually on each safety supervisor. Mr. Williams had been responsible for preparing the evaluations from 1981 to the present.

Each supervisor was numerically evaluated based on their performance regarding the responsibilities listed in the job description for the position of safety supervisor. The rankings range from 1 (unsatisfactory) to 3 (good) to 5 (excellent). Each responsibility evaluated takes into account a number of specific factors, including the relative importance of that responsibility on that job site. The performance evaluations were reviewed with each supervisor evaluated on an annual basis. The supervisor was given the opportunity to object and appeal any ranking he/she did not feel was fair. Mr. Obedoza had appealed a ranking on at least one previous occasion. He was aware that the MTC personnel code considered merit and efficiency for compensation, promotions and layoffs.

21. Ed Williams again met with Jerrold Olson for the purpose of reviewing the comparative rankings of five supervisors. Mr. Williams informed Olson that the Petitioner's job performance over the ten-year pe

22. A major problem area with Petitioner's job performance was the lack of detail in activity reports which were submitted to Ed Williams. Mr. Williams counseled Mr. Obedoza concerning deficiencies in the activity reports throughout his employment and even provided Petitioner with an example of an adequately detailed report submitted by another safety supervisor. Mr. Obedoza was aware that the completeness of his reports was an ongoing problem.

23. The performance evaluation rankings of the five supervisors during the years when they were all in the same position were as follows:

Name	1987	1988	1989	1990	Average
Strom	-	4.25	4.20	3.75	4.07
Gingerich	3.80	3.60	3.80	3.95	3.79
Sunsdahl	3.45	3.65	3.75	3.55	3.60
Uzpen	-	3.35	3.75	3.75	3.62
Obedoza	3.40	3.40	3.55	3.10	3.36

-6-

24. Throughout Petitioner's employment with the MTC, he was rated "good" or "very good" on performance evaluations. Mr. Obedoza's competency to do the job of safety supervisor was not at issue. Annual performance evaluations

determined, in part, the salary increases which were given to the safety supervisors. Because Mr. Obedoza had the second highest seniority as a safety supervisor and there was a disparity between his salary and that of the three less-senior safety supervisors, similar percentage wage increases only exacerbated the disparity. Consequently, Petitioner was sometimes ranked lower in comparison to other supervisors so that the gap between the disparate income levels would be reduced. All of the five safety supervisors were required to perform the same job tasks and had the same job description.

25. Based on the information he received from Mr. Williams, Jerrold Olson recommended to the Chief Administrator that Petitioner's position be abolished thus reducing the number of safety supervisors to four. This reduction resulted in a savings to the MTC in the amount of Mr. Obedoza's annual salary and benefits, approximately \$45,000.00. This recommendation was approved and on March 21, 1991, Mr. Obedoza was informed that he was being laid off from his position as a safety supervisor. Mr. Obedoza was given written notification of the layoff and his rights under the Veterans Preference Act. The layoff became effective on April 1, 1991, after which time Petitioner's duties as a safety supervisor were split between non-veteran employees, three of whom had less seniority than Mr. Obedoza. Petitioner's salary as a bus driver was approximately \$5,000 less than his salary as a safety supervisor.

26. On an infrequent basis, fellow employees at the MTC would make derogatory comments regarding other employees who were actively involved in the military reserve. Reserve training was jokingly referred to as "military vacation". Military reservists were referred to as "part-time employees" and as being on the "sausage patrol". These remarks were not tolerated by Petitioner's supervisors when they were overheard, however.

27. On April 15, 1991, Mr. Obedoza filed a Petition for Relief with the Minnesota Department of Veterans Affairs. On May 22, 1991, the Department issued its Notice of Petition and Order for Hearing.

Based upon 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 in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481. The Department gave proper notice of the hearing on this matter and has complied with all substantive and procedural requirements of law and rule.

2. The Petitioner, William Obedoza, is an honorably-discharged veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447,

3. The Metropolitan Transit Commission is a political subdivision of the state of Minnesota within the meaning of Minn. Stat. § 197.46.

-7-

4. Minn. Stat. § 197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing. However, public employers may abolish positions held by veterans notwithstanding the Veterans Preference Act if the abolition of the position is in good faith. *Young v. City of Duluth*, 386 N.W.2d 732 (Minn. 1986); *State ex rel. Boyd v. Matson*, 155 Minn. 137, 193 N.W. 30 (1923). The employer has the burden of proving that it acted in good faith when a veteran's position is abolished and a layoff occurs.

5. For the reasons set forth in the Memorandum below, the Judge concludes that the removal of William Obedoza from his job as a safety supervisor with the MTC violated the Minnesota Veterans Preference Act. Mr. Obedoza is entitled to reinstatement to his position as a safety supervisor with the MTC without loss of seniority and to be compensated for the reduction in pay and other benefits he has received while employed in the position of a bus driver. He is also entitled to pre-judgment interest in accord with Minn. Stat. § 334.01 calculated from the time each paycheck was due. See, *Young v. City of Duluth*, 410 N.W.2d 27 (Minn. App. 1987); *Henry v. MWCC*, 401 N.W.2d 401 (Minn. App. 1987).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs issue an Order reinstating William Obedoza to his position as a safety supervisor with the MTC and awarding him compensatory salary and benefits during his period of employment as a bus driver. In addition, Mr. Obedoza is entitled to an award of pre-judgment interest pursuant to Minn. Stat. § 334.01.

Dated this 4th day of March, 1992.

/s/ Peter C. Erickson

PETER C. ERICKSON  
Administrative Law Judge

NOTICE

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

Reported: Taped, Transcript Prepared by Allen J. Thiry, Court Reporter.

MEMORANDUM

Pursuant to Minn. Stat. § 197.46, a political subdivision may only discharge a veteran for incompetency or misconduct. However, our Supreme

-8-

Court has recognized that the Veterans Preference Act (VPA) is not intended to prevent public employers from abolishing positions in good faith. This principle was first stated in *State ex rel. Boyd v. Mattson*, 155 Minn. 137, 193 N.W. 30 (1923), as follows:

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. The municipal authorities

*Id.* at 141-42, 193 N.W. at 32 (citations omitted).

The Petitioner argues that bad faith must be assumed in this case because:

(1) Mr. Obedoza worked three to four weeks less per year than the other safety supervisors due to his Naval Reserve commitment; (2) other employees made derogatory comments about Mr. Obedoza's "time off" for the Reserve; and (3) Mr. Obedoza was ranked lower on performance evaluations than comparable employees in order to eliminate the income disparity. The Judge disagrees and concludes that this evidence is insufficient to sustain a finding of bad faith.

Petitioner's supervisors testified that they supported Mr. Obedoza's commitment

to the Naval Reserve and instructed other employees that derogatory comments regarding Petitioner's naval commitment were not appropriate. The Judge does not believe that this was a factor in the layoff herein. Although there is evidence that Mr. Obedoza's performance rankings were slightly lower than comparable, less senior employees, the record is also clear that several aspects of Petitioner's work performance (activity reports specifically) were deficient and not corrected. The Judge has concluded that there is no direct evidence of bad faith herein. Consequently, the issue really is whether implementation of the "merit and efficiency" standard by MTC which resulted in

less senior, nonveteran employees taking over Petitioner's job duties, constitutes bad faith and a violation of the VPA.

The Judge is convinced that at the time the reduction in employees occurred herein, those reductions were necessitated by budgetary constraints. There is no question but that Petitioner was competent to perform his job as a

safety supervisor; but his performance evaluations were the lowest of the group

of five supervisors. When Mr. Obedoza was laid off, his job duties were split

up between other nonveteran safety supervisors, three of whom were less senior

than Mr. Obedoza. This layoff was done in accordance with the MTC's personnel

code using the "merit and efficiency" standard set forth above.

The most recent case which discusses the issues of seniority and veteran layoff is Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986). In Young, a veteran employee governed by a city civil service system was laid off due to job restructuring based on budgetary reductions. Mr. Young had been employed by the City of Duluth longer than most other employees performing similar job functions so his salary was higher. After Mr. Young was laid off, most of his

job duties were reassigned to nonveteran, less senior employees. In Young, the

Supreme Court stated:

If the city merely reassigned Young's duties to non-veteran employees less senior than he,<sup>3</sup> his position is not abolished in good faith, and he is entitled to reinstatement with back pay. The Veterans Preference Act is applicable in cases in which public employers reassign duties in times of revenue shortfalls and budget cuts. No exception in the act exists for such situations. Thus, veterans have a preference over non-veteran employees less senior than they to continue to perform duties for which they are qualified if the public employer continues to

need such duties performed.

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3 As we stated in Boyd, "[t]he [veterans preference] act does not authorize, nor purport to authorize, the removal of a prior appointee to make a place for a soldier; and cannot reasonably be construed as abrogating the civil service rules governing tenure of office." 155 Minn. at 141, 193 N.W. at 31-32.

386 N.W.2d at 738-39.

There are three reported Appellate Court decisions on Young v. City of Duluth, two Court of Appeals decisions and the Supreme Court decision referenced above. See also, Young v. City of

The Respondent herein argues that because it followed its personnel code which uses "merit and efficiency" as the methodology for layoff, there cannot be a finding of bad faith or a violation of the VPA. The Judge does not agree.

The cases in this area (layoff of a veteran for a legitimate purpose) seem to focus on three specific issues to determine whether the VPA has been violated.

First, whether the reason for the layoff as articulated by the employer has a legitimate, factual basis; second, whether the job duties previously performed by the veteran remain to be performed or are being

-10-

performed by others; and third, was the methodology used to lay off the veteran objective and free from manipulation. See also, Gorecki v. Ramsey County, 437 N.W.2d 646 (Minn. 1989); Ochocki v. Dakota County Sheriff's Department, 464 N.W.2d 496 (Minn. 1991); State ex rel. Evans v. City of Duluth, 195 Minn. 563, 262 N.W.2d 681 (1935). The Judge has concluded that the use of a "merit and efficiency" standard to lay off a veteran, who is otherwise competent to perform the job, when the job still exists and other nonveteran, less senior employees are assigned to perform the veteran's job duties, is a violation of the VPA.

Seniority has been held to be an objective standard which gives a veteran preference in a layoff situation (Young and Boyd) or requires his layoff if he is the least senior (Evans). The "merit and efficiency" standard is a competency standard and is inappropriate in a situation such as this when the action taken is to remove a veteran from an existing job. In this case, because there was no question as to Petitioner's competency to perform the job,

seniority should have been the determining factor. This result is buttressed by Justice Simonett's concurring opinion, which is joined by Justice Kelly and Justice Coyne in Young\_v.\_City\_of\_Duluth, 386 N.W.2d 732, 739 (Minn. 1986), in which he states:

First of all, a veteran is given preference to certain government positions over nonveterans. Minn. Stat. §197.455 (1984), incorporating by reference Minn. Stat. § 43A.11 (1984). Secondly a veteran, once appointed, may not be discharged from his or her government position "except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing." Minn. Stat. § 197.46 (1984). Because these are the only stated grounds for removal, this court has construed the statute to mean that an incumbent veteran is entitled to hold his job, absent a showing of incompetency or misconduct, so long as the job exists. A public employer is not required to continue a job in existence simply to benefit a veteran; only that if the job is continued, the veteran is entitled to keep it. (Citations omitted.)

P.C.E.