

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

Gordon R. Wilson,
Petitioner,

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND RECOMMENDATION

vs.

Independent School District No. 200,
Respondent.

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, on October 28, 1991, at the Office of Administrative Hearings in Minneapolis, Minnesota. Petitioner Gordon R. Wilson, 115 West 17th Street, Hastings, Minnesota 55033, appeared pro se. Joseph E. Flynn of Knutson, Flynn, Hetland, Deans & Olsen, Suite 950, Minnesota World Trade Center, 30 East Seventh Street, St. Paul, Minnesota 55101, appeared on behalf of Respondent Independent School District No. 200. The record was closed upon adjournment of the hearing on October 28, 1991.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, 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 R. Melter, Commissioner of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether Petitioner's removal from his position of employment with Respondent was as the result of a good-faith abolition of his position by Respondent.
2. Whether Respondent's subsequent failure to hire Petitioner denied Petitioner any rights under the Veterans Preference Act.

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner is a veteran who was honorably discharged from the U.S. Navy on February 24, 1969, after having served four years on active duty.

2. On August 30, 1990, Petitioner began full-time employment as a beginning custodian with Respondent. His employment was approved by the School Board on September 5, 1990. Ex. 5. He had previously been employed as a part-time, temporary custodian by Respondent.

3. A labor agreement between Respondent and Teamsters Local 320 (the Labor Agreement) governs the terms and conditions of employment for Respondent's custodial employees. Ex. 4. Pursuant to Article XIII, Section 1, of the Labor Agreement, custodial employees serve a probationary period of nine months. During the probationary period Respondent has the unqualified right to suspend, discharge or otherwise discipline an employee and the employee has no recourse to the grievance procedure regarding such action. However, probationary employees have the right to bring grievances under any other provision of the Labor Agreement.

4. Petitioner was assigned to work at Respondent's Kennedy Elementary School. He performed his job there satisfactorily. Ex. 5.

5. In early 1991, the financial condition of Respondent required it to reduce expenditures. At a meeting of February 6, 1991, Respondent's School Board approved a resolution finding that its financial condition dictated that it reduce expenditures through the discontinuance of positions and programs and directing the Administration to consider such reductions. The resolution recommended that the 1991-92 general fund expenditures be reduced by \$300,000.00 and listed several positions recommended for reduction, including two custodial positions. Ex. 6.

6. The two most recently hired custodians in the district were Petitioner and Kenneth Martin. Martin was hired shortly after Petitioner. Both were still on probation and were recommended for termination by the Administration. It was recommended that Petitioner be terminated May 29, 1991, which was one day before his probationary period expired. It was recommended that Martin be terminated June 7, 1991, the last day of the school year. The Administration recommended several teachers for termination as of the end of the school year. Ex. 6.

7. On March 6, 1991, the School Board passed several resolutions regarding the termination and non-renewal of long-term substitute teachers, probationary teachers, and certain other positions including Petitioner and Martin; all as recommended by the Administration. Ex. 6.

8. Petitioner had been notified by the Director of Buildings and Grounds in a

memo of February 25, 1991, that, due to recent staff cuts, his employment would end at the conclusion of his shift on May 29, 1991. In a letter of March 12, 1991, from the Clerk of the School Board, Petitioner was notified that the Board had formally terminated his position as a probationary custodian at its meeting of March 6, 1991. Ex. 5. Neither notice of termination notified Respondent of any rights under Minn. Stat. § 197.46 to challenge the termination.

9. Article XVI of the Labor Agreement provides that in the event Respondent reduces the work force, such reduction shall be made in order of seniority and the last employee hired shall be the first to be laid off within classification. It also provides that employees on layoff shall have the right to recall for a period of twenty-four months and shall be recalled from layoff in order of seniority.

10. Respondent terminated Petitioner, rather than place him on layoff, based upon Respondent's understanding and standard practice that probationary employees are not covered by the layoff and recall provisions of the Labor Agreement.

11. After Petitioner was terminated on May 29, 1991, Martin, a person in the same classification less senior than Petitioner and still on probation, continued working through June 7, 1991.

12. At some point after Petitioner was terminated, his duties were taken over by a more senior custodian who transferred from Respondent's middle school to Kennedy Elementary School.

13. Petitioner was not terminated by Respondent for incompetency or misconduct.

14. During the summer of 1991, two custodians resigned, thereby creating two vacant custodian positions within the School District. One was a full-time custodian position at the high school and the other was a full-time custodian position at Pinecrest Elementary School. In addition, a half-time nine-month position of custodian at McAuliffe Elementary School also became vacant. In July and August of 1991, Respondent posted notices of those vacancies as required by the Labor Agreement. Ex. 7.

15. Had there been anyone on the layoff list for the custodian position, they would have been recalled to fill the vacant positions pursuant to the Labor Agreement.

16. In late August, Petitioner applied for the vacant custodian positions, along with almost ninety other people. At that time, Respondent did not have a system in place that would allow veterans to receive the preference credits required by Minn. Stat. §§ 197.455 and 43A. 11. Respondent has never had such a system in place, but is now in the process of implementing one.

17. Respondent selected seven of the applicants for interviews. Petitioner was selected for interview specifically because he was a veteran, of which Respondent was

aware, and also because he had previously worked for Respondent as a custodian. The interviews were conducted by a four-person interview committee on August 29, 1991. Ex. 8. The four members of the committee ranked the applicants as follows:

Applicant	INTERVIEWER			
	#1	#2	#3	#4
A	1	2	1	1
B	2	3	2	2
C	3	1	4	4
Petitioner	4	4	3	3
D	5	5	6	5
E	7	6	5	6
F	6	7	7	7

Exs. 9, 10, 11 and 12. Applicants A and B were hired for the full-time custodian positions at the High School and Pinecrest Elementary effective September 3, 1991. A third person, not on the list of applicants or among those those persons interviewed, was hired for the half-time nine-month position. Ex. 8.

19. Petitioner was notified by a phone call that he had not been hired. He was not provided with the reasons for his rejection in writing as required by Minn. Stat. § 43A.11, subd. 9.

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.
2. Petitioner is an honorably-discharged veteran entitled to the protections of Minn. Stat. §§ 197.46, 197.455 and 43A.11, collectively referred to as the Veterans Preference Act.
3. 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 notwithstanding the Veterans Preference Act if the abolition of the position is in good faith. State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923); Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986).
4. The burden of proof is upon Petitioner to prove by a preponderance of the evidence that he was terminated in violation of Minn. Stat. § 197.46 and not provided with a hiring preference as required by Minn. Stat. § 197.455 and 43A.11. Respondent's claim that Petitioner's position was abolished in good faith is an affirmative defense for

which Respondent has the burden of proof. Minn. Rule 1400.7300, subp. 5.

5. Petitioner was not terminated for incompetency or misconduct.

6. Respondent's removal of Petitioner was not done pursuant to a good faith abolition of position in that Petitioner was not the most junior person in his classification when he was removed. It was a violation of Minn. Stat. § 197.46 to remove him prior to June 7, 1991, when the most junior custodian was removed.

7. Respondent has denied Petitioner rights provided to him by the Veterans Preference Act in that it removed Petitioner in violation of Minn. Stat. § 197.46, and failed to provide him with the notice required by that statute.

8. Had Petitioner been removed on June 7, 1991, he would have been a permanent employee, would have been placed on the layoff list and would have been recalled on September 3, 1991.

9. Petitioner is entitled to be reinstated as of May 29, 1991, made a permanent employee as of May 30, 1991, placed on layoff as of June 7, 1991, and appointed as a full-time custodian effective September 3, 1991, as if he had been recalled from layoff that date and to receive all status, back pay and benefits he would have received consistent with such employment.

10. Ignoring for the moment that Petitioner's termination was in violation of the Veterans Preference Act, Respondent's hiring procedures for the vacant custodial position did provide Petitioner with substantially all of his rights under Minn. Stat. §§ 197.455 and 43A. 11. While Respondent did not have a system in place to allow for the awarding of veterans preference credits, Respondent did make Petitioner a finalist for the position specifically because he was a veteran. A more typical system that complies with the Veterans Preference Act adds five points to the test or experience rating score of veterans, thereby increasing their chances of being among the finalists selected for final interviews. A system that makes all veterans finalists, absent other circumstances, also satisfies the requirements of the Veterans Preference Act. Respondent did not provide Petitioner with the reasons for his rejection as required by the Veterans Preference Act, but that is a technical requirement with no real remedy. Moreover, the evidence at the hearing established how the ratings were made, that they were reasonably done, and that the interview committee rated other people higher than Petitioner.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order:

1. That the petition of Gordon R. Wilson be GRANTED.

2. That Respondent Independent School District No. 200 immediately employ Petitioner as a full-time custodian with full pay, status and benefits as if he had continued to work through June 7, 1991, had achieved permanent status, had been placed on layoff and had been recalled September 3, 1991.

3. That Respondent reimburse Petitioner the amount of pay he would have received had he been employed through June 7, 1991, then placed on layoff, then recalled September 3, 1991, plus the value of any benefits Petitioner would have received, together with interest thereon at the statutory rate from the date such payments should have been made.

Dated this 20th day of November, 1991.

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
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, not transcribed, Tape No. 11007.

MEMORANDUM

Under Minn. Stat. § 197.46, a political subdivision may only discharge a veteran for incompetency or misconduct. However, our Supreme Court has recognized that the Veterans Preference Act is not intended to prevent public employers from abolishing positions in good faith. State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923). A lack of good faith may be proved when it is established, after a hearing, that the public employer, under the pretext of abolishing a veteran's position, actually continued it under some other name or reassigned the veteran's duties to a less senior employee. Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986); Gorecki v. Ramsey County, 437 N.W.2d 646 (Minn. 1989). In Young, the Court stated:

If the city merely reassigned Young's duties to non-veteran employees less senior than he, 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.

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 738-739.

The standard of a good faith set forth in Young was developed more fully in Gorecki as follows:

In examining the conduct of this public employer, we are guided by two separate principles. The first is that the Veterans Preference Act itself was designed 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." Young v. City of Duluth, 386 N.W.2d 732, 737 (Minn. 1986) (quoting State ex rel. Boyd v. Matson, 155 Minn. 137, 151-42, 193 N.W. 30, 32 (1923)). See also Johnson v. Village of Cohasset, 263 Minn. 425, 435, 116 N.W.2d 692, 699 (1962) (VPA protects honorably discharged veterans from the ravages of a political spoils system). While the impact of political decisions upon a veteran's employment are minimized, the act cannot be viewed as fully restricting the government's exercise or control over its administrative affairs. See State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923). A ministerial or perfunctory act of coordinating an actual position with its appropriate classification will withstand scrutiny if based upon a reasonable exercise of administrative discretion. The second principle is one requiring this court to examine the substance of the administrative decision rather than its mere form. See Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987).

The School Board and School Administration legitimately made a determination that there was a need to reduce the budget for the 1991-92 fiscal year by \$300,000.00, and that it was necessary to do so through the reduction of several positions, including two custodial positions. So far as the evidence here shows, all of that was done in accordance with the law and the Labor Agreement. However, when it terminated Petitioner prior to Martin, and did so for reasons not necessary to the abolition of the positions, Respondent violated the Veterans Preference Act.

It is clear that Martin had been hired after Petitioner. Respondent's Personnel Office Manager testified that Martin was hired shortly after Petitioner. The exhibits show that Martin was still on probation when he was terminated as of the end of the school year on June 7, 1991. Thus, Petitioner was terminated while a less senior employee continued to work in the same classification. That does not constitute the good faith abolition of a position and is not permitted under the Veterans Preference Act. Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986).

Respondent presented no evidence that Petitioner's earlier removal was required as part of the reduction in force or otherwise justified. The need to reduce expenditures was for the fiscal year starting July 1, 1991, so that did not require it. All the other positions were terminated as of the end of the school year on June 7 or 8, 1991. Only Petitioner was removed on May 29, 1991. The obvious purpose of this action was to prevent Petitioner from achieving permanent status. That would make Petitioner's removal somewhat easier for Respondent, would avoid the necessity of maintaining a recall list, would allow Respondent to hire whomever it chose when a vacancy occurred and would allow Respondent to pay a new custodian at the starting rate rather than the possibly higher rate of a recalled custodian. Whatever Respondent's reason for the early termination of Petitioner, it was not a necessary part of the abolition of Petitioner's position, it was an act directed toward Petitioner personally. Thus, Petitioner's termination does not fall within the good faith abolition of position exception.

There is an additional reason that Respondent's actions here violated the Veterans Preference Act and that is that the Act requires probationary veterans to be treated as permanent employees. Under Minn. Stat. § 197.46, veterans cannot be removed except for incompetence or misconduct shown after a hearing. That is equivalent to requiring a showing of "just cause," Leininger v. City of Bloomington, 299 N.W.2d 723 (Minn. 1980), and takes away the power to remove employee at will. Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986). A traditional probation provision allows the employer to remove probationary employees at will. But, no exception exists in the Veterans Preference Act for probationary veterans. Thus, just cause must be shown for the removal of even probationary veterans, State ex rel. Sprague v. Heise, 243 Minn. 367, 67 N.W.2d 907 (1954), and they are essentially equivalent to permanent employees. If permanent employees are entitled to be laid off and recalled in the order of hire, then veterans who would otherwise be considered to be on probation are entitled to the same treatment. This is particularly so under the Labor Agreement in this case which expressly grants probationary employees all the rights of permanent employees except for disciplinary removal only for cause. To hold otherwise would defeat the preference granted by the Act and uphold the action of Respondent, who totally ignored the Veterans Preference Act when it terminated Petitioner and now claims to have acted in good faith.

S.M.M.