

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

Peter A. Torgeson,

Petitioner,

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

Vs

City of West St. Paul,

Respondent.

The above-entitled matter is before the Administrative Law Judge on Stipulated Facts and Exhibits and the briefs of the parties. The record closed on February 6, 1992, upon receipt of the final Reply Memorandum.

David

R. Forro, Caldecott, Forro & Taber, 607 Marquette Avenue, Suite 300, Minneapolis, Minnesota 55402, appeared on behalf of Petitioner Peter A. Torgeson. Arnold Kempe, City Attorney, City of West St. Paul, 1616 Humboldt Avenue, West St. Paul, Minnesota 55118, appeared on behalf of Respondent City of West St. Paul.

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 the Administrative Law Judge and the Commissioner have jurisdiction to determine the issues presented.

2. Whether reduction in rank from Captain to Firefighter in the West St. Paul Fire Department is to be done on the basis of seniority in overall time in the Department or time in grade as Captain.

3. Whether Petitioner's reduction in grade by Respondent denied Petitioner any rights under the Veterans Preference Act.

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

FINDINGS OF FACT

The parties have stipulated to the following facts and it is found that:

1. Petitioner is a veteran entitled to the protections of Minn. Stat. 197.46 of the Veterans Preference Act.

2. Prior to January 1, 1992, Respondent's Fire Department operated on a two-shift basis with two Captains on each shift. Respondent then decided to go to a three-shift system effective January 1, 1992, with one Captain per shift. Thus, the fourth Captain position became unnecessary and it was appropriate to demote one of the four Captains back to Firefighter. The reorganization to a three-shift system was done in good faith to promote operational efficiency.

3. Petitioner was hired as a Firefighter by Respondent's Fire Department on May 15, 1977. He was promoted to Captain on August 21, 1986. Jeffrey Davis, not a veteran, was hired as a Firefighter on February 25, 1974. He was promoted to Captain on June 26, 1989. The other two Captains are both veterans and are senior to both Petitioner and Davis in length of service with the Fire Department and time in grade as Captain.

4. Respondent selected Petitioner for reduction from Captain to Firefighter based upon its belief that he had the least seniority.

5. Petitioner was notified of the reduction orally and subsequently in a written notice of December 13, 1991. Ex. 1. The written notice complied with the requirements of Minn. Stat. 197.46. It notified Petitioner that he was being laid off his position as Captain effective December 31, 1991, was being reassigned as a Firefighter effective January 1, 1992, advised him that his position was being abolished in good faith, advised him that he was entitled to a veterans hearing or other relief and notified him that he had sixty days from the date of the notice in which to petition District Court or the Commissioner of Veterans Affairs.

6. Exhibit 2 is a copy of Respondent's Personnel Policy Code codified as Section 311 of the West St. Paul City Code of 1980 and adopted by the City Council on August 14, 1989. Exhibit 3 is a copy of the Collective Bargaining Agreement between Respondent and the International Association of Firefighters

Local 1059. Both were in effect at all times relevant here.

7. Petitioner filed a grievance with the Fire Chief challenging his demotion. The Chief denied the grievance. The Grievance Committee of Local 1059 reviewed the matter and decided, based upon advice of its legal counsel, not to pursue the grievance on behalf of Petitioner. Exhibit 4 is a copy of the letter and memorandum from the Local 1059's legal counsel regarding the matter.

8. Promotion to the position of Captain within Respondent's fire department is based upon testing and qualification and not on seniority.

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 of 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. c 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 removed from the position of Captain for incompetency or misconduct.

6. For purposes of the reduction of Captain positions in the West St. Paul Fire Department, seniority must be determined on the basis of Department seniority and the person with the least Department seniority removed.

7. Respondent's removal of Petitioner was done pursuant to a good faith abolition of position in that Petitioner was the least senior person when he was removed. Therefore, Respondent's action did not violate Minn. Stat. 197.46.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that the petition of Peter A. Torgeson be DENIED.

Dated this 26th day of February, 1992.

STEVE M. MIHALCHICK
Administrative Law Judge

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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. 11453.

MEMORANDUM

Despite having notified Petitioner that he could petition either the District Court or the Commissioner of Veterans Affairs and despite having stipulated to the jurisdiction of the Commissioner of Veterans Affairs in this matter, Respondent argues that the proper jurisdiction for a "good faith" issue is in the District Court and not in a veterans preference hearing in the Department of Veterans Affairs. Because jurisdiction may not be stipulated, the issue will be addressed.

Respondent's argument is based on a statement in Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987). There the court was summarizing the law and stated that when a veteran is removed for incompetency or misconduct, the veteran is entitled to a hearing before a veterans preference hearing board. The Court went on to state:

When the reason for removal is the abolishment of the position, the veteran is not entitled to a veterans preference hearing but to a hearing before the district court where the district court determines whether the employer's action was taken in good faith. See Young v. City of Duluth, 386 N.W.2d 732, 739 (Minn. 1986).

409 N.W.2d at 851. The "veterans preference hearing" referred to in Myers is the discharge hearing to be held before the local Veterans Preference Hearing Board, it is not the hearing held by an Administrative Law Judge for the Commissioner of Veterans Affairs under Minn. Stat. 197.481 to determine if veterans preference rights have been denied. In Young, the Supreme Court had discussed the effect of the adoption of Minn. Stat. 197.481 in 1973. The section allows a veteran who has been denied rights under the Veterans Preference Act to petition the Commissioner of Veterans Affairs for relief. The City of Duluth argued that by enacting that provision, the Legislature removed the right of veterans to seek mandamus that existed under Minn. Stat.

197.46. The Court held:

It is evident from the language of the Act that the Legislature intended to allow veterans to enforce their rights by either petitioning for a writ of mandamus under section 197.46 or by requesting an order from the commissioner under section 197.481.

386 N.W.2d at 737. In Independent School District No. 709 v. State of Minnesota Commissioner of Veterans Affairs and Habert, Court File No.

C2-90-2265, unpublished opinion (Minn. App. April 9, 1991), the court stated:

The school district contends the Commissioner lacks jurisdiction to determine whether Habert's position was abolished in good faith. The school district argues Habert can only challenge his dismissal by seeking a writ of mandamus. He disagrees. The supreme court has construed the Veterans Preference Act (VPA) to permit veterans to enforce their rights by either petitioning for a writ of mandamus or by requesting an order from the Commissioner under Minn. Stat. 197.481 (1988). *Young v, City of Duluth*, 386 N.W.2d 732, 737 (Minn. 1986). Habert requested an order under the statute and therefore the Commissioner properly exercised jurisdiction.

The Commissioner has jurisdiction in this matter under Minn. Stat. 197.481 and the Administrative Law Judge's jurisdiction arises under Minn. Stat. 14.50.

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 discussed 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.'" *Yovng v. City of Duluth*, 386 N.W.2d 732, 737 (Minn. 1986) (quoting *State ex rel. Boyd v. Marson*, 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).

437 N.W.2d at 650. The *Gorecki* court determined that a reorganization plan that reclassified certain veterans was an authorized and appropriate consequence of the implementation of a broad administrative plan, not a consequence directed specifically at the Petitioners and that, therefore, no "removal" had occurred. In *Ochocki v. Dakota County Sheriff's Department*, 464 N.W.2d 496 (Minn. 1991), a veteran was hired to one of five newly-created positions at the County jail. Several unsuccessful applicants filed an appeal with the County's Personnel Board of Appeals which determined that the hiring process had been flawed. The Board recommended that the appointments be set aside and the positions reopened. The veteran was not among the top five after the second round of testing and was removed from his new position. He then brought a petition before the Commissioner of Veterans Affairs. The Commissioner, upon recommendation of an Administrative Law Judge, held the removal to be improper and ordered reinstatement. The Court of Appeals reversed the Commissioner's Order holding that the veteran had never acquired preference rights under the Veterans Preference Act because of the flaw in the original hiring process. *Ochocki v. Dakota County Sheriff's Department*, 454 N.W.2d 476 (Minn. App. 1990). Upon review, the Supreme Court affirmed, holding that this was a fact situation, like that in *Gorecki*, that fell outside the reach of Minn. Stat. 197.46. The court stated:

We hold that the public employer county's revocation of a veteran's promotion made by a hiring process that violated the county's personnel administrative rules and procedures, and was seriously detrimental to all candidates for that position, is not the type of removal

to which the Veterans Preference Act applies; therefore,

the county's action did not violate the Veterans Preference Act.

The question of whether the county acted in good faith to comply with its civil service rules, *lee Young v. City of Duluth*, 386 N.W.2d 732, 737-38 (Minn. 1986), is not an issue in this case. The ALJ found no evidence of any bad faith or impropriety on the part of Dakota County, nor does appellant make any such allegation on appeal.

464 N.W.2d at 498. Minn. Stat. 197.46 of the Veterans Preference Act does not provide any preference for veterans over non-veterans regarding removal, layoff or demotion. It does not impose any seniority requirements. It does require that veterans only be removed for cause and provides them with a right to a hearing on that issue. The seniority question arises only in those cases where the public employer alleges that a veteran has been removed or demoted because the veteran's position was abolished. In such cases, failure of the employer to abide with express or normal seniority rules is evidence that the employer was acting out of an attempt to remove the particular veteran rather than abolish the position.

In the general sense of the term, this is not a "good faith" case. Respondent has attempted to comply with the Veterans Preference Act and to treat Petitioner in accordance with the law. Respondent's Personnel Code expressly incorporates the Veterans Preference Act. Respondent demoted Petitioner believing him to have the least seniority and provided Petitioner with a notice that fully complied with the requirements of the Veterans Preference Act. Respondent's actions were not a mere subterfuge for ousting Petitioner from his position. Nonetheless, Young states that good faith does not exist where a veteran is removed while a less senior employee is retained to perform the same duties. Because Petitioner alleges that a less senior employee was retained in this case, the issue must be addressed.

Petitioner argues that all the veterans preference cases dealing with the seniority question have required that the first person appointed to a particular position be the last person removed from that position. Even if that were true, it does not lead to a conclusion that the Veterans Preference Act imposes a classification seniority system. Seniority rights of employees arise only out of contract or statute. *Edelstein v. Duluth Missabe & Iron Range Railway Company*, 225 Minn. 508, 31 N.W.2d 465 (1948); *Trailmobile Co. v,*

Whirls, 331 U.S.40 (1947). Seniority rights are tied to a specific group or unit, including among other possible units: plant, division, employer, or job category. Seniority is generally one factor, and may be the controlling factor, for determining promotions, work assignments and transfers, vacations, layoffs, bumping rights and hiring after layoff. Many contracts, especially those covering large numbers of employees, establish seniority units for different purposes. Thus, plant-wide seniority may govern layoffs but departmental seniority may help determine promotions. BNA Labor Relations Reporter, Labor Relations Expeditior, Seniority, at 710:101-102.

In Boyd, the City of St. Paul was reducing the number of police and fire alarm telegraph operators from sixteen to four. There was a civil service rule in St. Paul at that time that stated that if it was necessary to reduce the force in any employment, persons serving in such employment shall

be laid off in the inverse order of their certification and appointment." Nonetheless, the City laid off a non-veteran who had been hired in 1918 while retaining five veterans who had not been hired until 1921. The non-veteran sued and the court held that Section 2 of the Veterans Preference Act in existence at that time, which is virtually identical to Minn. Stat. 197.46, did not prevail over the seniority rights established by the civil service system. The court did not define seniority rights, but applied the City's civil service rule which provided layoff rights by seniority in each "employment." In *Stat, x rel _Evens, v. City of Duluth*, 195 Minn. 563, 262 N.H. 681 (1935), the court again addressed the application of the Veterans Preference Act in a seniority situation. In that case, a non-veteran had been a member of the Duluth Fire Department for several years. He was then injured on the job and unable to work for about a year. On January 17, 1924, he returned to work and was appointed as one of the two Assistant Fire Wardens in the fire department. On January 1, 1930, a veteran was appointed as the other Assistant Fire Warden. On October 1, 1933, budget requirements required that one of the Assistant Fire Wardens be laid off and the veteran was selected on the basis of seniority. The City of Duluth had no formal civil service rules governing seniority but its action was upheld in *Evens* because the concept of seniority was a well-recognized principle of economic and industrial action and a long and well-established sound policy. Again, however, the court did not define seniority but held that the non-veteran was senior to the veteran to a very substantial extent stating, "If his earlier service be ignored, he was still senior to relator by more than five years." Finally, in *Young*, the court did not provide a specific definition of seniority under the Veterans Preference Act and remanded the matter to the district court for a finding of fact on the issue.

Petitioner has pointed out two opinions of the Attorney General that interpret *Boyd* and *Evens*. Opin. Atty. Gen. 308-A March 3, 1945, and Opin. Atty. Gen. 85-B December 21, 1959. The 1945 opinion concluded that when one of two officers of equal grade must be demoted for lack of funds or other valid reason, the non-veteran must be senior to the veteran in service in offices of equal rank and held by them as regular incumbents. The 1959 opinion interpreted *Boyd*, to hold that the civil service rules governing tenure in office applied and thus, that employees who have the same job classification must be laid off in inverse order of their certification and appointment regardless of veterans status. Again, neither of these opinions attempt to define seniority except to the extent that seniority rights are

defined by any civil service rules that apply.

Respondent argues that it properly determined that Davis had seniority over Petitioner under the Labor Agreement with Local 1059 which takes precedence over the provisions of the Personnel Code pursuant to provisions of that code. Section 311.02, subd. 2, of the Labor Agreement provides that any employee included in a collective bargaining agreement is exempt from any provision of the Personnel Code that is inconsistent with such agreement. The Labor Agreement covers the job classes of Fire Captain, Firefighter and Fire Inspector and contains the following relevant provisions:

ARTICLE II DEFINITIONS

- 2.7 SENIORITY: An EMPLOYEE's length of continuous employment in the EMPLOYER's Fire Department.
- 2.8 DEPARTMENT: The Fire Department of the City of West St. Paul as established and amended from time to time pursuant to Chapter 22.16 of the City Municipal Code.

ARTICLE IX SENIORITY

- 9.1 DEPARTMENT SENIORITY. For the purposes of this AGREEMENT, department seniority shall be defined as the length of continuous and uninterrupted employment in the fire department.
- 9.2 SENIORITY LISTS. The department shall maintain at all times during this AGREEMENT seniority lists by department.
- 9.3 LOSS OF DEPARTMENT SENIORITY. An EMPLOYEE will lose acquired department seniority in the following instances:
- (a) Resignation
 - (b) Discharge
 - (c) Retirement
- 9.4 WORK FORCE REDUCTION. In the event of a reduction in the department work force, such reduction shall occur on the basis of seniority in the department.

The Labor Agreement contains no provisions regarding promotion or reduction in grade.

Respondent argues that the demotion of one of the Captains to Firefighter was a work force reduction subject to Section 9.4 of the Labor Agreement and, thus, the reduction was required by that section to be done on the basis of seniority in the Department. Local 1059 agreed with that interpretation based upon advice from its counsel and Central District Vice President who were of the opinion that, "As to the Fire Captains on the Department, therefore, the change to a three-shift system will result in a reduction-in-force under the Collective Bargaining Agreement," and that the Department seniority provision must be applied. That is a reasonable interpretation. The contrary interpretation is also possible because there was not a reduction in the Department work force. It could be argued that Section 9.4 does not apply and that if there is a reduction in force "as to the Fire Captains," then seniority also ought to be determined "as to the Fire Captains." Nonetheless, the parties to a contract may agree to its meaning and where a union and an

employer agree as to the meaning of a collective bargaining agreement, that interpretation is binding upon the individual employees. Edelstein v. Duluth.

Mesabe and Iron Range Railway Company, 225 Minn. 508, 31 N.W.2d 465 (1948). Here, the parties to the Labor Agreement have agreed that Section 9.4 applies to the reduction of a Captain to Firefighter and that the reduction must be made on the basis of Department seniority. Since that was done in this case, Respondent's action was in good faith and there has been no violation of Minn.

Stat. 197.46.

SMM