

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

James E. Martensen,
Petitioner,
v.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

Minneapolis Board of Education,
Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Sara D. Jay at 9:30 a.m. on March 2, 1994 at the offices of the Minneapolis Board of Education, 801 Broadway Northeast, Minneapolis, Minnesota. The record closed on March 30, 1994, upon receipt of the parties' post-hearing briefs.

James E. Martensen, the Employee, appeared and was not represented by counsel. He was accompanied by Darrell E. Ray, Business Representative, Minnesota Statewide District Council of Carpenters. Tim Pawlenty, Esq., Rider, Bennett, Egan & Arundel, 2000 Lincoln Center, 333. South 7th St., Minneapolis, MN. 55402, appeared on behalf of the Minneapolis Board of Education ("District").

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision in this matter. Pursuant to Minn. Stat. Sec. 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, 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 12th Street, St. Paul, MN. 55155-2079.

STATEMENT OF ISSUE

The issues to be determined in this proceeding are:

1. What remedy is available for the District's failure to give timely notice to Petitioner of his veteran's preference rights, if any.
2. Whether the removal of Petitioner from his job as a carpenter violated the Minnesota Veterans Preference Act.

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

FINDINGS OF FACT

1. Petitioner James E. Martensen is a veteran honorably discharged from the United States Navy on May 15, 1967. On May 18, 1972, Mr. Martensen was initiated in the United Brotherhood of Carpenters and Joiners. (Ex. B.) Mr. Martensen is and has been for some considerable time a journeyman carpenter and a union member.

2. Mr. Martensen began his position with the Minneapolis Public Schools, Special School District No. 1 ("District"), on December 2, 1991. He did not compete for the position through civil service examination, but was hired through his union's hiring hall. During and prior to that period of time, the District had filled its temporary positions by contacting the union hiring hall, which maintains a list of union members seeking work.

3. Mr. Martensen was one of a number of Building Trades employees hired on a temporary basis to work as carpenters, electricians, painters, plasterers and in other classifications, through their respective union hiring halls. Mr. Martensen and several other carpenters continued to work under successive temporary permits for periods exceeding one year.

4. Temporary employees are not covered by civil service rules. Temporary employees of the District have no seniority, and are released when the work for which they are hired is finished. Tr. 18.

5. The District has a long-term collective bargaining relationship with the Minneapolis Building and Construction Trades Council ("Building Trades" or "Trades"), which includes the Minnesota Statewide District Council of Carpenters ("Carpenters"). At the time Mr. Martensen was hired, the District and Trades were functioning under a contract due to expire April 30, 1992.

6. Negotiations for that contract began in 1992, and continued after expiration of the contract. Kayleen Bonczek, contract administrator, represented the District in negotiations with the Building Trades. The Building Trades expressed concern about a large number of temporaries who had been working in excess of one year, in particular regarding their rate of pay. Negotiations were protracted, and did not conclude until approximately November of 1992. At that time, the negotiators were in agreement, and presented the new collective bargaining agreement to their respective parties for ratification.

7. Shortly after negotiations were concluded, the District laid off four long term temporary electricians. The Building Trades and International Brotherhood of Electrical Workers, Local 292 ("IBEW") protested and formally grieved the layoffs. (Dist. 1, 2.) The District, preferring not to de-rail the negotiated Collective Bargaining Agreement, separately negotiated a settlement with the Building Trades.

8. The Collective Bargaining Agreement ("Agreement") was ratified by the Building Trades unions and by the District and School Board. The Agreement was duly executed on January 26, 1993.

9. The negotiations regarding temporary employees resulted in

creation of a Memorandum of Agreement ("MOA") executed by the Building Trades, the IBEW, and the District on February 3, 1993. (Dist. 3.) The MOA acknowledges that a number of temporary employees of the District represented by the Building Trades and IBEW Local 292 had been working under permit for "a period of consecutive days beyond one (1) year," and provides, in pertinent part:

THAT, the district shall request of the Civil Service Commission that employees currently on payroll who have been on permit and working consecutive days beyond one (1) year, be certified with the date of certification of the initial date of the permit which started their consecutive days of employment; and,

THAT, this memorandum includes the following permit employees with the certification date as indicated:

Adkins, Russell	Electrician	05-06-91
Ahrens, Robert	Electrician	05-09-90
*	*	*
Larson, Dave	Carpenter	05-21-90
*	*	*
Martensen, James	Carpenter	12-02-91
*	*	*
Swanson, David	Electrician	05-06-91
Timsans, Valdis	Carpenter	01-06-92
Westberry, Ronald	Electrician	05-30-90

THAT, employees who are under permit of one (1) year or less shall be governed by the Civil Service Rules and Regulations pertaining to temporary permit employees

Mr. Martensen and Mr. Larson are the only Carpenters covered in the MOA.

10. The "certification" dates given on the MOA accurately reflect the first date each of the covered employees worked for the District on temporary permit, after being hired through union hiring halls. "Certification" date is normally the first day of full-time, permanent work, and is used by the Minneapolis Civil Service Commission as the seniority date.

11. Each classification covered under the Agreement, including "carpenters" and "electricians," has a separate seniority list. Although seniority is not covered in the Agreement, it has been the practice of the parties, for at least ten years, to maintain seniority lists by classification, and to employ seniority in the customary fashion, e. g., as a determinative factor in making layoffs.

12. Mr. Martensen, along with all others covered by the MOA and other temporary employees, was laid off prior to the signing of the MOA. Mr. Martensen was laid off on January 15, 1993. Prior to his layoff, Mr. Martensen had been cutting cabinets with various power machines in the mill. He performed carpentry work after a cabinetmaker had done the layout and set up work.

13. Mr. Martensen was recalled by the District on July 16, 1993. At that time, he performed repair work, such as repairing ceiling tiles, gymnasium floors, doors, windows, and other carpentry maintenance work.

This work was also being performed by others.

14. In approximately May 1993, Ms. Bonczek again discussed temporary employees' status with the Building Trades unions. The problem as expressed by Ms. Bonczek was that the MOA had included only temporaries on payroll as of a specified date, but "several long time permit workers were not included" in the MOA. That discussion resulted in Ms. Bonczek writing to the Building Trades compiling the names to be added to the MOA, including those of Carpenters J. Buszta, start date 4/1/91, Mark Kamke, start date 4/1/91, and Fernando Rosas, start date 5/21/90. All three would be senior to Mr. Martensen; none have been recalled. The list of additions had been provided to the Minneapolis Civil Service Commission, but the lists from the May 1993 letter from Ms. Bonczek had not been merged with the MOA list at the time Mr. Martensen was recalled.

15. In approximately the summer of 1993, internal auditor Diane Downs began planning the budget for academic year 1993-1994 for the facilities department, which is the department employing Building Trades in the performance of its work. Ms. Downs performed broad calculations regarding numbers of employees on staff, average salaries, and other expenses. As a result of those calculations, she concluded that the facilities department was going significantly over budget. She concluded that the facilities department did not have enough money to sustain the employees it was using, and was using restricted funds pay for the previous fiscal year's expenses. The funds being so used were trusts set up for major construction projects. The facilities department also had a history of going over budget by as much as 33% per year. Ms. Downs concluded that, if the facilities department continued to employ its current number of employees, it would have insufficient funds left to purchase supplies.

16. Following her review, Ms. Downs talked to then-associate superintendent for finance Gerald Manafee and acting director of facilities Allen Johnson. She informed them that they could not support the number of people they had on staff.

17. As a result of those discussions, in approximately October 1993, Mr. Johnson instructed department heads to lay-off all employees who did not hold positions which had been budgeted. Those employees are called "temporary" by the District, which signifies internally that the position was not in the budget. The facilities department does not budget for specific classifications, but does budget for a number of salaries overall, and had at least ten percent more employees than had been included in the budget.

18. As the work allowed, the various areas in the facilities department laid off all employees in non-budgeted positions. That included all of the employees listed on the MOA, included Mr. Martensen and Mr. Larson. Mr. Martensen was laid off effective October 22, 1993.

19. Since that time, Mr. Larson was recalled, and is working in a temporary position assigned by the carpentry department to the mill, similar to the work done by Mr. Martensen during his first period of service with the District. A position in that area opened as a result of internal promotions, retirement and leave of absence. The District does not regard that position as permanent, since what it needs in the mill is a cabinetmaker, with full capability to layout and set up cabinetry, skills not

expected of carpenters. The District was working on details of such a posting at the time of the hearing, but no position posting had been finalized.

20. Mr. Martensen has not been recalled since his layoff on October 22, 1993. The notice of layoff provided to Mr. Martensen on October 19, 1993, makes no reference to Mr. Martensen's veteran's status, nor to the Veteran's Preference Act and rights thereunder. The letter does advise that "The School District has reached an agreement with the Building Trades Council and the Civil Service Commission that allows those temporary/permit employees who have worked with the District for a year or more consecutively" to be considered "as first choice when the District required additional temporary help in the Carpenter Shop."

21. On November 30, 1993, Mr. Martensen filed a petition with the Department of Veterans Affairs protesting his layoff.

22. Notice of Petition and Order for Hearing were served on the District by the Commissioner on December 21, 1993, setting the hearing for January 27, 1994. Two continuances were granted at the request of the District, the first to allow for productive discussion and the second to allow production of a witness.

23. On February 24, 1994, the District served Mr. Martensen with a letter again notifying him of his layoff, and of his right to petition the District Court for a writ of mandamus compelling reinstatement, and noting that, "You are also apparently aware of your rights pursuant to Minnesota Statute 197.481 You are hereby notified, however, that you may have other rights to challenge your layoff pursuant to that statute." (Dist. Ex. 10.)

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. Sec. 14.50, and Minn. Stat. 197.481. The Department gave proper notice of hearing on this matter and has complied with all substantive and procedural requirements of law and rule.

2. The Petitioner, James Martensen, is an honorably-discharged veteran within the meaning of Minn. Stat. Sec. 197.46 and 197.447, and is entitled to all the protections and benefits of the Minnesota Veterans Preference Act.

3. The Minneapolis Board of Education and Special School District No. 1 are a "school district" within the meaning of Minn. Stat. Sec. 197.46.

4. Minn. Stat. Sec. 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. The District has shown by a preponderance of the evidence that it acted in good faith in abolishing Petitioner's position, for the reasons set forth in the Memorandum below.

6. An employer is required to give proper notice of rights under the Veteran's Preference Act to the veteran. The requirement of notice is not nullified by the veteran's becoming aware of his rights independent of proper notice by the employer. *Young*, supra.

7. The District stipulated that it did not give Petitioner notice when advising of his layoff on October 22, 1993. The District did not give him such notice until February 24, 1994.

8. A veteran is entitled to a continuation of pay until properly discharged in accordance with the Veterans Preference Act. *Pawelk v. Camden Township*, 415 N.W.2d 47, 51 (Minn. Ct. App. 1987). Until notice of veterans preference rights is given, a veteran has not been properly discharged in accordance with the Act. Therefore, the Petitioner is entitled to back pay from the time of his layoff until the time proper notice was given, subject to mitigation of damages.

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 awarding James Martensen back pay with pre-judgment interest pursuant to Minn. Stat. 334.01, for the period of time between October 22, 1993 and February 24, 1994, but not reinstating him to a position as a carpenter within the District.

Dated: April 13, 1994

Sara D. Jay
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. Sec. 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: Transcribed.
Susan L. Hecker, Court Reporter.

MEMORANDUM

The Veterans Preference Act specifically allows termination of a veteran from public employment on only two bases: incompetency or misconduct. A third basis for termination has been developed through case law.

[I]t 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 may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so called veteran's preference act.

State ex rel. Boyd v. Matson, 155 Minn. 137, 141-42, 193 N.W. 30, 32 (1923)(citations omitted).

A threshold issue in this case is whether the Commissioner and administrative law judge (ALJ) have jurisdiction to decide whether abolition

of a position is in good faith. A ruling was made on this issue at hearing. However, as the argument is also raised by the District in its posthearing brief, further discussion is included herein.

Jurisdiction

Where the issue is misconduct or incompetence, a veteran is entitled to a hearing before a local veterans preference board. Where the issue is good faith of a reduction in force, the District argues that the only proper forum for Mr. Martensen to bring his complaint is the district court, through petition for a writ of mandamus pursuant to Minn. Stat. 197.46.

A similar argument was made by the City of St. Paul, in *Jasper v. City of St. Paul*, DVA-87-001-BC, OAH Docket No. 2-3100-842-2 (1986), based on the language in Justice Simonett's concurring opinion in *Young* also cited by the District herein. In *Jasper*, Administrative Law Judge Bruce Campbell noted the portion of the Young majority's statement regarding Minn. Stat. 197.481, allowing a veteran to "petition the Commissioner of Veterans Affairs for an order directing the agency to grant the veteran such relief the commissioner finds justified by said statutes":

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.
Young, 386 N.W.2d 732, 736-37 (Minn. 1986).

Based on that language, Judge Campbell stated,

While there is language in a concurring opinion of Justice Simonett which asserts that a lay tribunal is not competent to judge an issue of good faith, the holding of the majority reaffirms the jurisdiction of the Commissioner in cases of this type [abolition of a position]. . . .the Court equates the breadth of the veterans rights to a writ of mandamus to those available from the Commissioner.

Jasper, op. at 4 (aff'd by Commissioner, June 27, 1987)(dismissing case because petitioner had pursued mandamus remedy to conclusion in district court, ruling petitioner required to elect between petition for mandamus and commissioner).

As well as the language of *Young*, the District here bases its argument in part on the following language from *Myers v. City of Oakdale*, 409 N.W.2d 848 (Minn. 1987):

Where the reason for removal is incompetency or misconduct, the veteran is entitled to a hearing before a Veterans Preference Board. 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 Court determines whether the employer's action was taken in good faith.

Id. at 851.

The issue in *Myers* was whether placing an employee on medical leave

constituted a "removal" for "incompetency" within the meaning of the Act, thus entitling the employee to a veteran's preference hearing. Abolition of a position was not claimed; rather, Oakdale argued that removal for physical disability was either not a "removal" at all, or that the decision was akin to a layoff and reviewable only for good faith.

As noted at hearing (Tr. 10), the cited statement in Myers is dictum. As such, it does not appear to reflect a considered determination limiting the Commissioner's or administrative law judges' jurisdiction. See also *Bolden v. Hennepin County Bd. of Commissioners*, 504 N.W.2d 276, 278, fn. 1 (Minn. Ct. of App., 1993)(veteran could not pursue mandamus remedy for back pay while veteran's preference board hearing was pending before ALJ; rejecting limitation placed on veteran's preference board authority over back pay placed in Myers).

Since Myers was decided, Administrative Law Judge Steven Mihalchick has concluded that the Commissioner, and by delegation, the administrative law judges, who have jurisdiction to interpret, apply, and find violations of the Act, also have jurisdiction to determine whether a position has been abolished in good faith. *Muhvic v. City of Duluth*, Order on Motion to Restrict Scope of Hearing, OAH Docket 69-3100-4617-2, (June 6, 1990).

That conclusion is supported by the fact that the Minnesota Court of Appeals, after Myers, has had the opportunity to review numerous cases in which administrative law judges determined issues of law, including good faith in the abolition of a position, and has never once indicated that the consideration was improper. *Grehl v. Minneapolis Public Schools*, 484 N.W.2d 815 (Minn. Ct. App. 1992)(effect of Act on seniority ranking); *Anderson v. City of Minneapolis*, 503 N.W.2d 780 (Minn. 1992)(signing of voluntary demotion form prior to return to work after disability as removal; ALJ determination affirmed); *Obedoza v. Metropolitan Transit Commission*, C3-92-1200, December 1, 1992, review denied, January 28, 1993 (affirming Commissioner, who had adopted ALJ determination that position was not abolished in good faith, and reinstating petitioner). It seems highly unlikely that the Court would review such decisions in detail without mentioning that the administrative law judges lacked subject matter jurisdiction, if such was the case.

The administrative law judge ruled at the hearing in this matter that the administrative law judge does have jurisdiction to decide issues of good faith relating to abolition of a position. Tr. 11. Upon review of applicable case law, that ruling will not be disturbed.

Good Faith of Termination

Cases deciding the good faith of abolition of a position have centered on three factors. One is whether the employer's articulated reason for the layoff has a legitimate factual basis. Another is whether a less senior nonveteran employee continues to perform the veteran's former duties for the employer. *Young*, 386 N.W.2d at 739 ("veterans have a preference over nonveteran 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.") The third factor is whether the process by which the veteran was selected for layoff was fair and free from manipulation; in other words, an inquiry into subjective ill will.

Here, Mr. Martensen argues that his layoff was subjectively and objectively in bad faith. Despite considerable confusion surrounding the amendment of the seniority list, there is little evidence to support a finding of actual bad faith.

Examining the first factor, it appears that the employer's articulated reason for the layoff is legitimate. There is no question that the District has been having significant financial problems, particularly in its Buildings division. The District's need to reduce expenses and employees was amply proven, and no contradicting evidence was introduced. Thus, it is concluded that the employer had a legitimate factual basis for a reduction in force.

For the second and third factors of bad faith, Mr. Martensen argues that both his seniority ranking and his selection for layoff were not fair and objective. He argues that the District and the Unions did not have the authority to enter into the MOA, nor to establish seniority outside the standards of the Civil Service rules. If the administrative law judge understands the argument correctly, Mr. Martensen in his post-hearing brief argues that the District and the Unions, if they choose to recognize seniority, are restricted under the Civil Service Rules to recognizing seniority by "certification" date. He then posits that he, Mr. Larson and Mr. Timsans all have the same "certification date," because they were granted seniority (in the sense of permanent positions) at the same time, i. e., at the time the MOA was signed. He thus concludes that he should be considered the most senior of the three, due to his veteran's status.

There is a fundamental flaw in Mr. Martensen's argument, however. The District and the Unions are not limited by the civil service rules. In fact, the Rules specifically provide:

1.03 Coexistence with the Minnesota Public Employees Labor Relations Act (PELRA)

Agreements reached under PELRA between the City of Minneapolis and exclusive employee representatives will supersede Civil Service Commission Rules whenever overlap exists. Employees in the classified service and not covered by labor agreements are subject to these rules.

Mr. Martensen is undoubtedly an employee "covered by labor agreements" within the meaning of the rules. His employment and pay rate were subject to, and established by, the collective bargaining agreement between the District and the Union. The fact that he has any seniority at all is also because of a bargained agreement, the MOA, reached between the District and the Union granting permanent status to certain temporary employees.

The civil service rules are clear that Union-Employer agreements supersede civil service rules, including those covering seniority. The rule does not limit that supersession to collective bargaining agreements, but covers any agreement reached by union and employer. This is in accord with the parties' continuing obligation to bargain in good faith over new issues concerning terms and conditions of employment arising during the term of the agreement. *Conley v. Gibson*, 355 U.S. 41 (1957). The MOA as executed by both parties is an agreement superseding overlapping civil service rules.

Mr. Martensen's arguments that the Union and Employer were not entitled to enter into an agreement establishing seniority do not have a sound basis.

Mr. Martensen's argument regarding the effect of his veteran's status on his seniority assignment also must fail. First, "seniority ... is not governed by the Veterans Preference Act." *Grehl v. Minneapolis Public Schools*, 484 N.W.2d 815, 816 (Minn. App. 1992) (finding assignment of a veteran ranked fourth on civil service tests to a seniority/bidding rank of 44th, based on training date, did not violate veteran's preference act). Second, and perhaps more important herein, creating a ranking according to Mr. Martensen's theory would result in ignoring the significantly longer service of Mr. Larson.

Mr. Larson began work as a carpenter for the district almost seven months earlier than Mr. Martensen. Mr. Martensen did not dispute this. Mr. Larson has qualifications similar or equal to those of Mr. Martensen (the latter's questions on that issue having been satisfied by production of documents). Both were hired through the Union's hiring hall as temporaries. It would be patently unfair under the circumstances to require the district to ignore the longer service of Mr. Larson, even if *Grehl* permitted consideration of the issue in a veteran's preference context.

As additional evidence of bad faith, or manipulation of the process, Mr. Martensen introduced evidence regarding amendment of the MOA, which lead to several carpenters coming ahead of him on the seniority/recall list, as well as evidence regarding a position he felt had been re-formulated so as to eliminate him.

The testimony reflects considerable confusion about the amendment to the MOA. One person proposed on the amendment has since been removed, to be placed at the bottom of the list, because that person was proposed "in error." The amendment was not executed by the Union; it adds new individuals who were not qualified under the original MOA by virtue of not being on the payroll on the date employed, but without stating the new qualifying dates. It was still unclear at the close of hearing what the standards were for inclusion on the amended list.

Nonetheless, the confusion appears to be solely the result of a good faith effort on the part of the District to accommodate the Union's request for fairness in the inclusion of long-term temporaries, despite staggered layoff dates. Confusion, or even important errors, do not provide evidence that the process was manipulated specifically to oust Mr. Martensen. Moreover, Mr. Martensen's layoff was not affected by the additions to the seniority list under the amendment. At the time he was recalled, the amended list should have been in effect, and Mr. Martensen should not have been recalled. Even after this was realized, he was not laid off in favor of the more senior carpenter on the amended list. Thus, the amendment does not provide evidence of bad faith.

The same is true of Mr. Martensen's contention regarding reformulation of the mill position. Mr. Martensen suggested that he had been working in a mill position during his first tenure with the District, and that the carpentry position which should be available there was redrawn to avoid bringing him into it.

From the District's evidence, it is clear that the mill shop has been much affected by layoffs and attrition, and is in need of a second skilled "cabinetmaker," a different job classification from "carpenter." A job description had not been finalized and the position had not been posted at the time of hearing. The District did explain that it needs a skilled cabinetmaker to do layout and set up when its only cabinetmaker is unavailable. To date, the facts show no subjective ill will in the District's plan to consider hiring a skilled cabinetmaker, rather than employing a journeyman carpenter such as Mr. Martensen.

The evidence is clear that Mr. Martensen's position was abolished in good faith, based on legitimate economic reasons, and without manipulation or personal ill will.

Lack of Notice

Even though Mr. Martensen was laid off in good faith, he was not given notice of his Veteran's Preference rights. The District has admitted the lack of notice, but argues that Mr. Martensen is not entitled to reinstatement or back pay as a result.

Certainly, where the position is abolished in good faith, a veteran is not entitled to be reinstated. Requiring reinstatement would require the employer to discharge a more senior employee to make room for the veteran, a result never intended by the legislature. Op. A.G. No. 85-a (8/26/47).

However, the question of back pay in this case is more problematic. The precise issue does not seem to have been considered by the courts or in any administrative hearing, in the context of a good faith abolition of position without proper notice.

The District argues that Mr. Martensen is not entitled to any remedy for the lack of notice, because he knew of his rights as shown by his petition to the Commissioner of Veterans Affairs. However, that argument was flatly rejected in Young, 386 N.W.2d at 738. An employer is required to notify the veteran of his rights under the Veteran's Preference Act, whether or not the veteran may be aware of them.

Under the Act, if no notice is given to the veteran, no time limitation for the commencement of a hearing or writ of mandamus begins to run. It is immaterial whether a veteran is aware of his or her preference rights under the Act.
Id.

Arguably, the Court intended the tolling of the time limitation to be the sole remedy for failure to notify in instances of good faith abolition. Once the position is abolished, arguably there is no position from which to determine continuing pay until proper notice, and therefore the back pay award would necessarily be zero.

However, language used by the Court of Appeals in other cases indicates that a remedy should be provided for the failure to give proper notice.

Minnesota courts have interpreted the statute to mean that 'a veteran is entitled to compensation until he is formally

discharged in accordance' with the statute. Pawelk v. Camden Township, 415 N.W.2d 47, 51 (Minn. App. 1987).
Bolden, 504 N.W.2d at 277.

In cases involving discharge for misconduct or incompetency under Minn. Stat. 197.46, the veteran is entitled to pay continuation until the veteran has been accorded a hearing and a veterans preference board has found that the discharge was properly based on incompetency or misconduct. That is the point at which the veteran discharged for cause is considered properly discharged in accordance with the statute.

In the instance of abolition of position, "in accordance with the statute" appears to mean both that the abolition must be in good faith, as defined by case law, and that the veteran must be given proper notice of veteran's preference rights. Until both of those requirements are fulfilled, the veteran has not been formally discharged "in accordance with the statute." If the veteran does not receive the required notice, the abolition may ultimately be upheld, as is true of a discharge for misconduct or incompetency, but the statutory requirements have not been fulfilled and the veteran is therefore entitled to pay continuation.

Mr. Martensen was not properly discharged "in accordance with the statute" until February 24, 1994, when he was given written notice of his veterans preference rights. Therefore, he is entitled to back pay at his average weekly rate during the time of his rehire under the seniority agreement from October 22, 1993 through February 24, 1994. His back pay is subject to principles of mitigation of damages, and any pay or other compensation (including unemployment benefits, if any) should be deducted. See Henry v. Metropolitan Waste Control Commission, 401 N.W.2d 401, 406 (Minn. 1986); Robertson v. Special School District No. 1, 347 N.W.2d 265 (Minn. 1984).

S.D.J.