

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

-

Walter D. Mercer,

Petitioner,

v

**FACT,**

**AND**

Independent

School

District

**RECOMMENDATION**

No. 227, Chatfield,

Respondent.

**FINDINGS OF**

**CONCLUSIONS**

-

The above entitled matter came on for hearing before Administrative Law Judge (ALJ) Phyllis A. Reha on April 24, 1996, and was continued to and concluded on May 14, 1996 at the Chosen Valley High School, 205 Union Street, Chatfield, Minnesota.

Daniel M. Myshin, Attorney at Law, 300 Broadstreet on the Park, 300 First Avenue NW, Rochester, Minnesota 55901 appeared on behalf of the Petitioner, Walter D. Mercer. Patricia A. Maloney, Attorney at Law, 730 Second Avenue South, Suite 300, Minneapolis, Minnesota 55402, appeared on behalf of Independent School District No. 227. The record closed on June 5, 1995 upon receipt of the last reply brief submitted by counsel.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under 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 Melter, Commissioner, Minnesota Department of Veterans Affairs, 2xx Veterans Services, 20 West 12th Street, St. Paul, Minnesota 55155 to ascertain the procedure for filing exceptions or presenting argument.

**STATEMENT OF ISSUE**

The issue to be determined in this proceeding is whether the School District abolished Petitioner's Elementary School Head Engineer position in good faith within the meaning of Minn. Stat. §197.46.

### **FINDINGS OF FACT**

1. Walter D. Mercer (Petitioner) is an honorably discharged veteran within the meaning of the Veterans Preference Act, Minn. Stat. § 197.46 (1996). Petitioner has a Chief Engineers License, Grade C, that authorizes him to operate steam boilers of unlimited horsepower. Exhibit No. 5.

2. Petitioner was hired by Respondent Independent School District No. 227, Chatfield, Minnesota (School District) as a Head Engineer on June 10, 1991. Petitioner's contract was approved by the School Board on June 21, 1994. Until July 1, 1994, Petitioner held the working title of "Elementary School Head Engineer". On July 1, 1994, Petitioner was demoted to "Lead Custodian" The position of Lead Custodian receives a lower rate of pay than a Head Engineer.

3. Steve Irish was hired by the School District as a Custodian on June 14, 1983. Exhibit No. 8. On April 23, 1991, the School Board promoted Irish to "High School Head Engineer." Exhibit No. 9. This promotion occurred approximately six weeks before Petitioner became employed by the School District. On July 1, 1994, the School District eliminated the Elementary School Head Engineer position held by Petitioner, and Irish became the School District's "Head Engineer" responsible for both the high school and the elementary School. Steve Irish is not a veteran. Irish maintains a First Class Engineer's License (Grade C-Limited to 300 Horsepower).

4. According to the Minnesota State Boiler Inspector, a person with a First Class C boiler license may be in charge of the boilers at both the high school and elementary school. Exhibit No. 7. A First Class Engineer's License does not require a high school diploma or a GED.

5. Due to inadequate state funding, the School District was involved in major budget reductions for five consecutive school years commencing at the 1989-90 school year. The School Board had to trim \$80,000 to \$90,000 from the School District's general fund budget each of those school years. Transcript 23.

6. At a School Board meeting held on January 31, 1994, the School Board reviewed the budget for school year 1993-94. The budget showed a projected deficit of \$95,038 from the general fund for the 1993-94 school year, with a projected fund balance on June 30, 1994 of \$252,742. See Exhibit No. 1, 2nd page of the January 31, 1994 Board Minutes.

7. The School District needs a positive fund balance in its general fund in order to meet cash flow needs and have reserves for an emergency (i.e., an unusually cold winter resulting in higher heating costs; equipment failure; uninsured legal expenses; etc.). The School District's accounting firm recommended that the School

District maintain a fund balance equal to 10% to 12% of annual general fund expenditures in order to provide an adequate cash flow and reserve. For the 1993-94 school year, that would mean a general fund balance of \$372,000 to \$447,000. However, dwindling state resources had forced the School District to reduce its general fund balance to approximately 6% to 7% of expenditures. Transcript 24.

8. At the School Board meeting held on January 31, 1994, after some debate, the School Board unanimously decided to maintain the general fund's balance at \$250,000, or 6% to 7% reserve to cover cash flow needs and emergencies. Because of the Board's policy decision to maintain the general fund balance at \$250,000, or 6% to 7% of expenditures, and the existence of a \$95,000 deficit in the 1993-94 general fund budget and no increase in state aid for the 1994-95 school year, the School Board determined that the financial condition of the School District dictated that the School District must reduce expenditures immediately. A resolution was passed directing the administration to make recommendations for reductions in programs and positions. Exhibit No. 1, Minutes of the January 31, 1994 Board meeting, pp. 2-3.

9. The School Board held a special working session on February 23, 1994, to review possible budget reductions for the 1994-95 school year. The meeting lasted one hour and forty-five minutes. See Exhibit No. 1, Minutes of February 23, 1994, working session.

10. At a regular meeting held on March 28, 1994, a discussion was held on the administrative recommendations for reductions/additions in programs and positions and reasonings therefore. Budget reductions approved by the School Board at that meeting included:

- a. Zero increase in supplies for the 1994-95 school year;
- b. Reassign Athletic Director position from a teacher (who receives additional compensation) to the Principal (who received no additional compensation);
- c. Eliminate summary custodial help;
- d. Reduce attorneys fees by \$8,000 according to Superintendent Miller's testimony on April 24, 1996, reduction in attorneys fees was to be accomplished by eliminating hiring an attorney to negotiate the School District's union contracts;
- e. Discontinue District financed summer band lessons;
- f. Reduce one telephone line in each building;
- g. Reduce athletic transportation;
- h. Reduce summer painting projects;

- i. Reduce tax anticipated interest by \$10,000;
- j. Eliminate bowling and physical education;
- k. Reduce staff development expenditures;
- l. Reduce cost of the year book;
- m. Reduce Chapter 1 funds;
- n. Use a District vehicle for Drivers Education;
- o. Transfer the summer open gym program to Community Education, at a cost savings to the District;
- p. Eliminate the touring show;
- q. Reduce the District's auditing costs by \$2,000; and
- r. Reduce number of paid coaches for seventh and eighth grade sports.

Exhibit No. 1, Minutes of the March 28, 1994 meeting;

11. The meeting on March 28, 1994, there were several motions regarding reducing clerical and custodial time as part of the budget reductions. None of these motions passed. However, in addition to all of the budget reductions enumerated above, the School Board passed a resolution eliminating one of the four sections of sixth grade and a part-time general music position. Exhibit No. 1, Minutes of the Meeting on March 28, 1994, p. 3.

12. The probationary teachers occupying those positions were terminated. However, a vacancy subsequently occurred in a kindergarten position and the probationary sixth grade teacher who was terminated, Lori Quam, was hired for that position. Although Lori Quam was reemployed by the School District, the School District did have a budget saving by reducing the number of sixth grade classes from four to three sections.

13. At a meeting held on April 25, 1994, the School Board continued its discussion of possible budget reductions. Exhibit No. 1, Minutes of April 25, 1994 meeting, p. 2.

14. Prior to the meeting, School District officials had prepared a memo for the Board's consideration regarding the cost savings for eliminating one Head Engineer position and replacing that position with a Lead Custodian. Exhibit No. 11. The Board

analyzed the cost savings which would be realized by replacing the Head Engineer position with a Lead Custodian position. The Board unanimously voted to eliminate one Head Engineer position. For possible savings between \$6,000 and \$8,000. Exhibit No. 1, Minutes of April 25, 1994 meeting, p. 2.

15. Superintendent Jeff Miller used seniority as a basis for determining which of the two Head Engineers employed by the School District would be demoted to the Lead Custodian position as a result of the Board's action. Since Steve Irish was senior, Superintendent Miller determined that Petitioner should be the individual demoted as a result of the budget reductions. The demotion resulted in a reduction in wages to Petitioner of approximately 21%.

16. Superintendent Miller met with Petitioner on at two occasions after the Board's action to eliminate one Head Engineer position to discuss the budget reductions and staff reorganization with him. On May 9, 1994 at 9:30 a.m. Superintendent Miller met with Petitioner and talked about the elimination of the Elementary School Head Engineer position. Superintendent Miller discussed with Petitioner the fact that he would not be responsible for the heating and ventilation system in the elementary school after July 1, 1994, and that those responsibilities would go to the remaining Head Engineer, Steve Irish.

17. At that meeting, Petitioner questioned whether Irish was properly licensed to run the boilers in the elementary school. Superintendent Miller checked with the Minnesota State Boiler Inspector, Department of Labor and Industry, to see if Irish was properly licensed to operate the boilers.

18. The Superintendent called the Department of Labor and Industry in the spring and later again in August, 1994. On both occasions he was advised that Irish was properly licensed on all the boilers in both buildings. Subsequently, Superintendent Miller received written confirmation of Irish's qualifications to be Head Engineer from the State Boiler Inspector. Exhibit No. 7.

19. After receiving the first confirmation that Irish was properly licensed to serve as Head Engineer, the Superintendent sent Petitioner a letter advising him of the elimination of his Head Engineer position effective July 1, 1994. Exhibit No. 12

Thereafter custodial job descriptions were revised to reflect the new organizational structure of one Head Engineer position for the School District and Lead Custodian for the elementary school. See Exhibit Nos. 2 and 3.

20. Superintendent Miller held another meeting with Petitioner on October 4, 1994 to review job descriptions. The meeting was attended by Petitioner, Steve Irish, and Elementary Principal Bill Van Lowe. The Superintendent again reviewed the changes of duties for the custodial staff at the meeting. He explained that Irish was responsible for overall supervision of both school buildings, while Petitioner would continue to oversee the day-to-day operation of the elementary building and was to notify Irish of any problems.

21. Since Irish became Head Engineer for the entire School District, effective July 1, 1994, he has been responsible for special situations in the elementary school, including:

- a. In August, 1994, Irish was called when there was flooding in the elementary auditorium.
- b. In October, 1995, Irish was contacted by the Police Department with a request to use the elementary building to observe possible criminal activity in the neighborhood.
- c. In December, 1995, School Board member Maureen Ruskel, called Irish when she noted that there was an open window in the elementary school

22. On June 2, 1994, Petitioner filed a petition with the Department of Veterans Affairs alleging that the position of Elementary School Head Engineer was not eliminated in good faith.

23. On July 15, 1994, a Notice of Petition and Order for Hearing was issued by Bernie Melter, Commissioner, Department of Veterans Affairs, setting a contested case hearing concerning the Petition for August 23, 1994 in Rochester, Minnesota, before ALJ Thomas W. Healy. Thomas Healy was a contract ALJ with the Office of Administrative Hearings (OAH) pursuant to Minn. Stat. § 14.49.

24. This matter was heard on August 23, 1994 by Judge Healy. By letter dated October 25, 1995, the parties were informed that the file was returned to the Office of Administrative Hearings due to Judge Healy's failure to timely prepare findings and make a recommendation. Thomas Healy is no longer an Administrative Law Judge with the OAH. The parties were advised that they could have a hearing *de novo* before another ALJ, or another ALJ from the OAH could prepare a decision based upon the record created in the August hearing. The parties could not agree on either option, so the matter was reassigned to ALJ Phyllis A. Reha to schedule a *de novo* hearing.

25. The *de novo* hearing was held in Chatfield, Minnesota on April 24, 1995 and May 14, 1995. The parties stipulated to the admissibility of the transcript of the hearing held on August 23, 1994 before Judge Healy. Exhibit No. 18.

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. The Notice of Hearing was proper and the Department has complied with all relevant procedural and substantive provisions of law and rule.

3. The Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of law.

4. Petitioner is an honorably discharged veteran within the meaning of Minn. Stat. §§197.46 and 197.44 of the Veterans Preference Act.

5. 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. For purposes of Minn. Stat., § 197.46, a demotion is considered a removal. Gorecki v. Ramsey County 437 N.W. 2d 646, 649 (Minn. 1989).

6. Public employers may abolish positions 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, 738 (Minn. 1986).

7. The burden of proof is upon Petitioner to prove by a preponderance of the evidence that he was removed from a job in violation of Minn. Stat. § 197.46. Once a removal is established, the burden of proof is upon Respondent to prove by a preponderance of the evidence that the position was abolished in good faith.

8. Petitioner's demotion from Elementary School Head Engineer to Elementary School Head Custodian is a removal within the meaning of Minn. Stat. §197.46.

9. Petitioner's removal was not for reasons of incompetency or misconduct as those terms are defined by Minn. Stat. §197.46.

10. Petitioner's removal from his position as Elementary School Head Engineer was a result of the School District's good faith decision to abolish his position.

11. Petitioner's veterans preference rights were not violated by the Respondent because Petitioner's demotion was a result of the School District's good faith decision to abolish his position as Elementary School Head Engineer. within the meaning of Minn. Stat. § 197.46. Thus, the School District has provided Petitioner with the procedural and substantive rights to which he is entitled.

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 Walter C. Mercer be DENIED.

Dated: July 2, 1996

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PHYLLIS A. REHA  
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: Tape Recorded

## **MEMORANDUM**

Pursuant to Minn. Stat. § 197.46, a political subdivision may only discharge a veteran for incompetency or misconduct. However, our Supreme Court has recognized that the Veteran's Preference Act (VPA) is not intended to prevent 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 Veteran's 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 appointees by abolishing the office or position for 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.

Boyd v. Mattson at 141 through 142, 193 N.W. at 32 (citations omitted).

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

(1) The School District did not require other employees within the School District to carry a fair share of the decreased funding because at the same time Petitioner's position was eliminated, the School District gave raises to other employees;

(2) The School District selected an unqualified candidate for the remaining Head Engineer position because Steven Irish did not have a high school diploma or a GED;

(3) Other reductions in expenditures adopted by the School Board were not permanently implemented; and

(4) Petitioner continued to perform many of the same duties, at a lesser rate of pay.

The Administrative Law Judge has considered the arguments of Petitioner and must respectfully disagree and conclude that the evidence is insufficient to sustain a finding of bad faith..

The cases in this area (lay off 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 reasons for the lay off 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 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, 43 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 evidence introduced at the hearings demonstrate that the School District had legitimate financial constraints and made good faith efforts to reduce expenditures by eliminating the Elementary School Head Engineer position and retaining the most senior Head Engineer. The Petitioner does not dispute that the School District had legitimate financial reasons to reduce expenditures. Petitioner also does not dispute that the elimination of one Head Engineer position and replacing it with a Lead Custodian position would save the School District between \$6000 to \$8,000 per year. In an effort to reduce expenditures, the School District implemented a wide variety of budget cuts for the school year 1994-1995. The evidence in the record indicates that these cuts were in response to serious financial circumstances the School District found itself in due to limited state funding. The initial budget cuts encompassed everything from auditing costs to summer painting projects. One of those reductions came in the area of maintenance personnel. In an effort to cut costs, the School District reorganized maintenance positions such that one of two Head Engineer positions was eliminated and replaced with a Lead Custodian position. The School District's intent was to have

the remaining Head Engineer become responsible for supervision over the entire School District rather than just the high school.

In determining which Head Engineer position to eliminate, the School District proceeded on the basis of seniority. Since Irish was hired by the School District eight years prior to Petitioner, and Irish held the position of Head Engineer for six weeks longer than did Petitioner, Irish was selected to remain in the position of Head Engineer.

The Minnesota Supreme Court has addressed the issue of seniority and veteran lay off in 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 non-veteran, 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, his position is not abolished in good faith, and he is entitled to reinstatement with back pay. The Veteran's Preference Act is applicable to 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.

Seniority has been held to be an objective standard which gives a veteran preference in a lay off situation, or requires his lay off if the least senior. In this case, because there was no question as to Petitioner's competency to perform the job, seniority was the appropriate standard to determine who should be assigned the new responsibilities of the reclassified position. This result is supported by Justice Simonett's concurring opinion, which is joined by Justice Kelly and Justice Coyne in Young v. City of Duluth, supra which states:

First of all, a veteran is given preference to certain government positions over non-veterans. 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 the veteran; only that if the job is continued, the veteran is entitled to keep it. (Citations omitted).

The Administrative Law Judge has concluded that the use of a seniority standard to lay off a veteran, who is otherwise competent to fulfill the job, when the job still exists and other non-veteran, more senior employees are assigned to perform the veteran's job duties, is not a violation of the VPA.

The Petitioner's contention that the School Board did not abolish the position in good faith because the School District did not require other employees to carry a fair share of the load or fairly distribute the wage decrease among other School District employees; or that the decision to eliminate one position for legitimate financial reasons was not part of a comprehensive plan, does not form a legal basis under the VPA to overturn the School District's decision as long as the School District had legitimate financial reasons to reduce expenditures. The Administrative Law Judge could find no case law that says the School District's decision to eliminate one position for legitimate financial reasons has to be part of a comprehensive plan. Nor is there any case law to support Petitioner's contention that wages for remaining positions cannot be increased while a position held by a veteran has been eliminated and the veteran has been demoted to a lower paying position.

The School Board minutes which were introduced into the hearing indicate that the School Board made proposals in good faith to reduce expenditures. While most of the proposed reductions were not permanently implemented, there is no indication that the failure to permanently implement all of the proposals were done in bad faith to place the financial burden on the back of the Petitioner. The School District had legitimate, good faith reasons for giving other employees raises, adding staff as needed in other areas, and purchasing new equipment.

The Petitioner's argument that the School District selected an unqualified candidate for the remaining Head Engineer position is not supported by the facts of this case. As the Findings of this report reflect, Steve Irish was properly licensed to serve as Head Engineer. His qualifications for the job were reaffirmed by written confirmation from the Minnesota State Boiler Inspector at the Department of Labor and Industry. (See Exhibit #7). The fact that Irish did not have a high school diploma or a GED could not make him unqualified for the position for which he held for a period of over three years.

The most difficult issue to decide in this case, is Petitioner's argument that he continued to perform most of the same duties, but at a lesser rate of pay, and therefore the School District did not eliminate his position in good faith within the meaning of the VPA. The testimony and evidence at the hearing indicates that the Petitioner continued to routinely perform most of the same duties he had when he was the Elementary School Head Engineer. He continued to regulate heating and ventilating systems, and was responsible for most routine repairs not specifically included in the Lead Custodian job description.

The Administrative Law Judge credits the testimony of Petitioner that he continued to perform most of these functions. Steve Irish's testimony that he made daily

inspections of the boiler at the elementary school after 6:00 p.m. was incredible. However, despite the lack of credibility in Steve Irish's testimony, the Administrative Law Judge must conclude that the position of Elementary School Head Engineer was eliminated to the extent that supervisory responsibility for the Lead Custodian's job duties was now placed in the hands of the remaining Head Engineer. As the Findings of this report reflect, after Irish became Head Engineer for the School District, he has been recognized and been responsible for special situations in the elementary school for which the Lead Custodian had no responsibility for. For example, in August of 1994, Irish was called when there was flooding in the elementary auditorium. Petitioner was not called to tend to that emergency. In October of 1995, Irish was contacted by the police department with a request to use the elementary building to observe criminal activity in the neighborhood. Petitioner was not called for that responsibility. In December of 1995, a School Board member called Irish when she noted there was an open window in the elementary school. Petitioner was not summoned for that call. Petitioner's new job description required that he report to the Head Engineer. Irish's job description required Irish to report to the School Principal. Certainly, the Petitioner could continue to perform many of the same routine, day-to-day duties but under the direct supervision of the Head Engineer. The Head Engineer certainly could delegate to the Lead Custodian responsibilities such as regulating heating and ventilating systems in the elementary school. Petitioner was well qualified and experienced to handle these functions. The fact that the Petitioner continued to perform most of the same duties that he held while Elementary School Head Engineer is not evidence of bad faith in this case.

In this case, Petitioner was not terminated; rather, he was assigned to the newly created position of Lead Custodian. No allegations have been made that this reassignment, which was a demotion due to a reduction in pay, was for personal or political reasons. There is no new employee fulfilling these duties. Effective July 1, 1994, Steven Irish as the School District's Head Engineer now has ultimate performance responsibility for many of the duties which were previously the responsibility of the Elementary School Head Engineer.

Whether or not the School District discontinued Petitioner's Elementary School Head Engineer position in good faith is a fact question to be determined by the Administrative Law Judge. The Administrative Law Judge concludes that the School District has established by a preponderance of the evidence that the Petitioner's position of Elementary School Head Engineer was abolished in good faith within the meaning of the Veteran's Preference Act. Thus, Petitioner's request that the Commissioner reinstate him to his former Head Engineer position with back pay and interest should be denied.

PAR