

**IN THE MATTER OF REMOVAL OF A VETERAN UNDER THE
VETERANS PREFERENCE ACT**

**INDEPENDENT SCHOOL DISTRICT 885,
ST. MICHAEL-ALBERTVILLE,
EMPLOYER**

and

BMS Case No. 10-VP-1553

**TERRANCE BUKOSKY,
VETERAN**

NAME OF ARBITRATOR:	George Latimer Assistant Faith Latimer
DATE AND PLACE OF HEARING:	August 24, 2010 Albertville, Minnesota
BRIEFS RECEIVED:	None
DATE OF AWARD:	September 10, 2010

APPEARANCES

FOR THE EMPLOYER:
Joseph E. Flynn, Attorney
Dr. Marcia Ziegler, Superintendent
Brian Benson, District Activities Director
Terry Zerwas, Director of Building & Grounds

FOR THE VETERAN:
John Fabian, Attorney
Terrance Bukosky, Veteran
Nancy Bukosky, spouse of Veteran

STATEMENT OF THE ISSUE

Is the discharge of Veteran in accordance with the provisions of Minnesota Veterans Preference Act, MS 197.46?

INTRODUCTION

This is a hearing requested by Terrance Bukosky, an honorably discharged Veteran. It was held under the provisions of Minnesota Statutes 197.46, relevant portions as follows:

197.46 VETERANS PREFERENCE ACT; REMOVAL FORBIDDEN; RIGHT OF MANDAMUS.

Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section, shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge....

Request for a hearing concerning such a discharge shall be made in writing and submitted by mail or personal service to the employment office of the concerned employer or other appropriate office or person.

In all governmental subdivisions...Where no such civil service board or commission or merit system authority exists, such hearing shall be held by a board of three persons appointed as follows: one by the governmental subdivision, one by the veteran, and the third by the two so selected...

Mr. Bukosky (Veteran) has been employed by Independent School District 885, St. Michael Albertville (Employer or District) as a custodian since 2003. The events leading to his discharge occurred in January and February 2010. On February 7, 2010, unaware that Mr. Bukosky was a veteran, the Employer served him a notice of discharge. Mr. Bukosky requested a Veterans Preference hearing by letter of February 18, 2010. Following the submission of documentation of his veteran status and correspondence between counsel for the District and the Veteran, the District issued a new notice of discharge on April 7, 2010. The Veteran again requested a Veterans Preference hearing on June 1, 2010. (SD Exs 1 & 6-11, see addendum)

In lieu of a three member panel, the parties agreed to have this matter decided by a single Arbitrator, selected by striking names. This Arbitrator was notified of his selection on July 9, 2010. The hearing was heard in the school district offices in Albertville, Minnesota on August 24, 2010. There were no jurisdictional disputes. Both parties had full opportunity to examine and cross-examine witnesses and to submit documentary evidence. The parties chose to make oral closing arguments, and the record was closed on August 24.

BACKGROUND

In January 2010, middle school students enrolled in the District's Alternative Learning program housed at the Community Education building were working on a physics project which involved using objects in the classroom to create a 'Rube Goldberg' device. The project took a large amount of space and made use of objects including the blackboard, tubes, weights, and a box of dominoes. On the morning of January 26, the students arrived in the classroom and found that part of the project had been damaged, and the dominoes were missing. School personnel did a thorough but unsuccessful search for the dominoes. After some effort the students improvised a solution for the missing pieces of the project. (Testimony of District Activities Director Brian Benson)

In the days following, District personnel including Director of Building and Grounds Terry Zerwas and Director of Community Education Maryellen Barthel conducted an investigation to determine what had happened to the dominoes. On January 28 Mr. Zerwas asked Mr. Bukosky if he had seen the missing dominoes, and searched the room with him. Mr. Bukosky said he had not seen them. Mr. Zerwas and Ms. Barthel examined many hours of videotape taken by security cameras in the building, and questioned other staff who used that classroom for another program (Kidsplay). On February 1, Mr. Bukosky brought the dominoes to Mr. Zerwas, saying he had found them in the classroom. On February 10, 2010 Mr. Zerwas interviewed the Veteran about the missing dominoes. Attending the interview were Mr. Bukosky's Union steward, and Ms. Barthel. The Veteran was asked twice during the course of the interview if he had anything he wanted to tell Mr. Zerwas. He declined. Finally after being shown a still photo of himself carrying the box of dominoes in to the building the morning of January 29th, Mr. Bukosky admitted that he had taken the dominoes. (Test of Mr. Zerwas, Mr. Bukosky, SD Ex 13, 14, 15)

EMPLOYER POSITION

The Employer argues the Veteran's actions represent a serious betrayal of trust. Custodians employed by the District have complete access to school buildings, holding all keys. They are generally the first persons to enter a building and the last to leave. Part of their responsibility is to lock rooms and insure that facilities are secure before leaving. In addition to this, all District employees are role models for the students, and it is very important they be worthy of students' trust. In this incident, the people most affected were struggling students. Staff work particularly hard to build trust with this student population, and to help them achieve a sense of success. Therefore the damage to a project these students worked hard on which was ready to be graded was hurtful to these students.

The Employer argues the Veteran's misconduct is more serious because he lied to District officials when questioned about the incident. Mr. Zerwas emphasized he had made a point to give the Veteran more than one opportunity to confess to the theft. Mr. Bukosky admitted his action only when caught 'red handed'. Superintendent Marcia Ziegler testified the District would likely have imposed some lesser discipline on Mr. Bukosky, had he been honest with them during the investigation and showed remorse. The Employer argues it is not tolerable for the District to have employees it cannot trust, therefore it was reasonable in these circumstances to discharge the Veteran.

VETERAN'S POSITION

The Veteran admits to the facts alleged by the Employer, and testified that he deeply regrets his actions. On the day in question he had accidentally damaged the students' project, and felt terrible about it. He stated he knows taking the dominoes was a dumb thing to do. He stated he had been working a great number of extra hours, and this may have contributed to why he was not thinking clearly that day. Mr. Bukosky's wife also testified she had been undergoing cancer treatment during this period of time. Counsel for the Veteran points out that Mr. Bukosky did return the dominoes of his own volition. His embarrassment about damaging the student project led him to lie when first questioned about the dominoes. He argues these circumstances should be considered when evaluating the Employer's decision to discharge the Veteran. Under these circumstances, the Veteran argues a lesser discipline would be a more appropriate penalty.

ARBITRATOR'S ANALYSIS

As a preliminary matter, the Arbitrator has examined the record relating to the notice of discharge given to the Veteran. It is true that the first notice of discharge did not cite the Veteran's rights under the Act. However the record is clear that the Veteran immediately availed himself of those rights by requesting a hearing in writing. The Employer immediately and appropriately responded to that request. The Veteran was represented by counsel in the process of arranging this proceeding, and at hearing. The Veteran has continued to be paid during the pendency of this matter as provided by the Act. Therefore the Arbitrator concludes the Veteran's rights have not been compromised by the notice error.

The essential facts of this case are undisputed and painful. The substance of the matter is not about dominoes. It is about trust; trust between school staff and administration, faculty, students, and parents. In this case, the Veteran breached that trust when he surreptitiously removed from the classroom materials essential to a class project. The breach was exacerbated by his failure to reveal the facts to his supervisor when it was clear that an intensive search had been undertaken. Mr. Zerwas's testimony was convincing and unrebutted, that his initial assumption was that the dominoes had been taken by a student. While inspecting the classroom with Mr. Zerwas, the Veteran denied knowledge of the dominoes whereabouts. Two weeks elapsed between the discovery of the missing dominoes and the investigatory interview of February 10, when Mr. Bukosky was twice invited to speak 'Is there anything you need to tell us before we start?' and 'is there anything you want to say', which he declined. Superintendent Ziegler testified that had Mr. Bukosky been honest earlier in this process, a lesser sanction might have been possible. So it is clear that trust was broken in this case.

The Veterans Preference Act provides a Veteran employed by a county, city, town, school district or any other political subdivision of the state may be removed from his position only for incompetency or misconduct. The Courts have held that the first task of the hearing board (in this case, Arbitrator) is to determine whether in its decision to discharge the Veteran, the Employer has acted reasonably.

"In determining whether the employer has acted reasonably, the board is to be guided by such considerations as a veteran's conduct, the effect upon the workplace and work environment, and the effect upon the veteran's competency and fitness for the job."
(Southern Minnesota Municipal Power Agency v. Philip W Schrader, 394 N.W.2d 796

(1986) “The cause must be one which specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office.” (Ekstedt v. Village of New Hope, 292 Minn. at 162, 193 N.W.2d at 828 (1972))

In this case, the Employer has articulated why an individual’s honesty, and the District’s confidence that he can be trusted, are integral to the school custodian’s job. The position of trust occupied by staff who work directly with children, and the responsibility for access to virtually all school buildings and property, justify a higher standard of integrity for these employees. Therefore the Arbitrator finds the Employer’s judgment does meet the standards of reasonableness set forth above.

Although the District does not rely on prior discipline to justify its decision, the Arbitrator notes that in connection with earlier, minor infractions, the Veteran was given specific notice of the importance of the security issue:

“It was brought to my attention that on Sunday April 18, 2004, while you were working for the church group, you left the front doors to the Middle unlocked. The biggest part of your job is security to our buildings. If anyone had entered the building, we could have had major damage. We need to take pride in our schools and remember to always double check to make sure that our buildings are secure and safe...This can not happen again.”(SD Ex 2)

The record shows the Employer conducted a very thorough investigation of the incident at issue here. With respect to issues of impartiality and due process, the evidence shows the Employer began with a presumption that a student, not the Veteran was the guilty party, and that he was given more than adequate opportunity to ‘come clean’ or state his side of the story. The proof that he committed the act is not in question. In addition, unrebutted testimony was that on the only other occasions involving employee theft, the custodians in question were discharged from employment with the District.

The Courts have found that when a hearing board finds the Employer’s decision to remove the Veteran is reasonable, it has authority to reduce the sanction to a lesser discipline only when there are ‘extenuating circumstances supported by substantial evidence on the whole record’, further :

“The power of the hearing board to modify the disciplinary sanction is not dependent upon a determination that the employer acted unreasonably; it is dependent upon a finding of extenuating circumstances supported by substantial evidence in the record. Recognition that the hearing board has the power to modify the disciplinary sanction, regardless of the reasonableness of the employer’s action, is consistent with the notion that a veteran be granted a meaningful hearing.” (Schrader)

The remorse expressed by the Veteran at the hearing was palpably genuine and his entire testimony was open and truthful. Regrettably this does not constitute an extenuating circumstance, since it was expressed long after the conduct which led to his discharge. The circumstances extant at the time of the incident were that the Veteran’s wife was being treated for cancer, and that he was working a lot of overtime. These circumstances, though difficult, do not reasonably explain the long and repeated denial of his wrongdoing. Therefore the Arbitrator finds that extenuating circumstances are not supported by substantial evidence in the record.

The duty of the Arbitrator in this case is not to judge whether he, or another Employer might have come to a conclusion different than the Employer did in this case. The proper standard for review is whether, given all the facts and circumstances, there was a reasonable basis for discharge. Accordingly the action is affirmed.

FINDINGS

- 1) Mr. Bukosky is an honorable discharged veteran of the United States armed forces as defined in M.S. 197 and as such is entitled to the protections set forth in M.S. 197.46.
- 2) The Employer, Independent School District 885 sought to remove the Veteran from his position as custodian for misconduct.
- 3) The evidence shows that the Veteran violated the trust of his Employer in removing property from the school which did not belong to him, and by repeatedly lying about his actions. This violation of trust constitutes misconduct under the meaning of the Act.
- 4) The Arbitrator finds the Employer’s decision to discharge the Veteran for misconduct, to be reasonable.
- 5) The record does not contain substantial evidence of extenuating circumstances which would allow the termination decision to be modified.

AWARD

The discharge is upheld.

Arbitrator George Latimer

Dated: September 10, 2010

ADDENDUM--LIST OF EXHIBITS

- Joint 1) M.S. 197.46 Veterans Preference Act; Removal Forbidden: Right of Mandamus
- School District 1) Notice of Discharge 4-7-2010
- SD 2) Documentation of Oral Reprimand 4-20-04
- SD 3) Documentation of Oral Reprimand 4-29-04
- SD 4) Status Change Documentation-Temporary full-time night lead 10-7-04
- SD 5) Disciplinary Notice 3-8-06
- SD 6) Notice of Discharge 2-17-2010
- SD 7) Letter Requesting Veterans Preference Hearing 2-18-2010
- SD 8) Letter from District Counsel re. Veterans Preference Hearing 2-22-2010
- SD 9) Letter from District Counsel re. Veterans Preference Hearing and communication with Veteran's Union 3-26-2010
- SD 10) Letter from Veteran's Counsel re.letter of discharge and Veterans Preference rights 3-29-2010
- SD 11) Letter from Veteran's Counsel re. Veterans Preference Hearing 6-1-2010
- SD 12) Box of Dominoes
- SD 13) Terry Zerwas Notes re Investigation of Dominoes and related documents
- SD 14 & 15) Photos taken by school security camera 1-29-2010
- Veteran A) Veteran's Military Honorable Discharge papers March/April 1974
- Vereran B) Veteran's Personnel File