

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1811
A22-1812**

Bruce Wemette,
Appellant (A22-1811),

Lee A. Hanson,
Appellant (A22-1812),

vs.

County of Winona, Minnesota,
Respondent.

**Filed August 14, 2023
Affirmed
Johnson, Judge**

Winona County District Court
File No. 85-CV-22-1440

Thomas R. Braun, Restovich Braun & Associates, Rochester, Minnesota (for appellants)

Gregory J. Griffiths, John T. Giesen, Dunlap & Seeger, P.A., Rochester, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Segal, Chief Judge; and Worke, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Bruce Wemette and Lee Hanson are honorably discharged veterans. They were employed as detention deputies at the Winona County jail until the county was forced to

substantially decrease the capacity of the jail during the construction of a new facility. The county eliminated all detention deputy positions, created new temporary shift commander positions, and allowed the former detention deputies to apply for the new positions. Wemette and Hanson requested veterans-preference hearings to challenge the elimination of their detention deputy positions. A hearing panel conducted a hearing and concluded that the county did not violate Wemette's and Hanson's veterans-preference rights because the county made the decision to eliminate the detention deputy positions in good faith. Wemette and Hanson sought judicial review in the district court, which upheld the hearing panel's decision. We affirm.

FACTS

The Winona County jail, which is adjacent to the Winona County courthouse, was built in 1978. For years, the state department of corrections, which has authority to “inspect and license all correctional facilities throughout the state,” *see* Minn. Stat. § 241.021, subd. 1(a) (2022), identified numerous safety and security issues at the jail. In 2016, the state ordered the county to limit each inmate's length of confinement to 90 days. The state indicated that, if the county did not take corrective action, the state would require the county to further limit the scope of the jail's operations and eventually close it.

In December 2017, the county convened a jail advisory committee, which was tasked with determining the county's future needs and recommending options to replace the existing jail. The committee considered several factors, including the county's projected inmate population and the programming that a future facility should

accommodate. In September 2018, the state ordered the county to close the existing jail by no later than September 2021.

In February 2019, the committee issued its report. The report discussed four potential options: (1) not having a jail and transporting all inmates to a jail in another county; (2) keeping inmates in a holding facility for up to 72 hours while they are awaiting a hearing and transporting them to an out-of-county jail for longer jail stays; (3) building a new jail that would allow for 90-day stays and would meet the state's safety and security standards; and (4) building a larger new jail that would allow the county to hold inmates for as long as permitted by law.

The committee recommended that the county pursue the fourth option. The county board of commissioners adopted that recommendation. The county began building a new facility adjacent to the existing facility. As construction began, the county continued to operate the existing jail as a 90-day facility, with a capacity of 75 inmates, without a reduction in its jail staff. The jail operated with 24 full-time employees, including as many as 16 detention deputies, whose duties consisted primarily of ensuring the proper day-to-day functioning of the jail. The detention deputies reported to six shift commanders, who managed the jail's operations and ensured that the facility was following state standards.

In May 2021, the county was forced to change its construction plans because additional space was needed to allow for a new heating, ventilation, and air conditioning system. The county was forced to decrease the jail's capacity to only six inmates and to limit their confinement to a maximum stay of 72 hours. As a result of that decrease in capacity, the county decided that it needed to decrease the size of the jail's workforce. The

county determined that, after the decrease in capacity, the jail could be operated by the existing six shift commanders and six additional persons, who would occupy the position of temporary shift commander. The county decided to eliminate all detention deputy positions and offer each of the detention deputies the opportunity to apply for a temporary shift commander position.

In July 2021, the county gave Wemette and Hanson advance notice of the plan to reduce the jail's workforce. In August 2021, the county gave Wemette and Hanson formal notice that their detention deputy positions would be eliminated in September 2021 and that each of them was entitled to a veterans-preference hearing. *See* Minn. Stat. § 197.46 (2022). Wemette and Hanson requested veterans-preference hearings.

Meanwhile, the county posted the temporary shift commander openings. Wemette applied but withdrew his application before interviews were conducted. Hanson applied and was scheduled for an interview but withdrew his application on the day of the interview. After the county posted the openings for a second time, Hanson reapplied, was interviewed, and was hired. The county later terminated Hanson's employment in December 2021. Neither Hanson nor the county has argued that Hanson's hiring as a temporary shift commander or his subsequent termination is relevant to this appeal.

The Winona County Personnel Board of Appeals, sitting as a veterans-preference hearing panel, conducted a joint hearing in June 2022. *See* Minn. Stat. § 197.46(c). Wemette testified that he was surprised by the county's decision to lay off the detention deputies and allow them to reapply because, when he previously asked why detention deputies could not be promoted from within, the county responded that detention deputies

are not qualified to run the jail. Wemette also testified that he believes the termination was intended to create a break in service that would cause him to lose his seniority rights. Hanson testified that, by terminating and rehiring the detention deputies, the county “could basically pick and choose” who would receive an offer to be a temporary shift commander.

Wemette and Hanson called three other witnesses. A local resident testified that the county’s assistant jail administrator had stated, in a social setting, that the county terminated all detention deputies for the purpose of “cleaning house” in the jail. A former detention deputy testified about the county’s lay-off process. A veteran’s service officer, who is employed by the county as a resource for veteran employees, testified about seniority rights among jail staff and how he helps veterans after they are terminated from county employment.

The county called four witnesses. The county’s jail administrator testified that the county initially intended to keep all jail employees throughout construction and did not use the lay-off process to terminate any particular person. He also testified about the decision to staff the jail with temporary shift commanders instead of detention deputies, explaining that jail policy required at least one shift commander to be on duty at all times. He explained further that the county created the position of temporary shift commander to ensure that every person employed by the jail is qualified to make supervisor-level decisions.

The county’s interim administrator testified that the county needs high-ability employees to operate a 72-hour facility, which drove the decision to create the temporary shift commander position. She also testified that the county considered temporary lay-offs

of detention deputies but decided against that approach because the construction of the new jail was expected to last more than a year.

The assistant jail administrator denied saying that the county wanted to “weed out” certain jail employees. The county sheriff testified that the county initially intended to keep all jail employees during the construction period. He also testified that he made the decision to employ temporary shift commanders rather than to retain detention deputies because he wanted to ensure that every jail employee has decision-making authority and the ability to make such decisions.

In July 2022, the board issued its findings of fact, report, and recommendation. The board found that the county made the decision to eliminate the detention deputy positions in good faith. Accordingly, the board concluded that the county did not violate Wemette’s and Hanson’s veterans-preference rights.

In August 2022, Wemette and Hanson sought judicial review in the district court. At an initial hearing, the parties agreed that the matter could be decided by the district court based on the record of proceedings in the county and memoranda of law. In November 2022, the district court filed a seven-page order in which it affirmed the board’s decision. Wemette and Hanson appeal.

DECISION

Wemette and Hanson argue that the board erred by finding that the county’s decision to eliminate the detention deputy positions was made in good faith.

A.

Under the Veterans Preference Act (VPA), an honorably discharged veteran may not be terminated from his or her position of public-sector employment “except for incompetency or misconduct shown after a hearing.” Minn. Stat. § 197.46(a). Accordingly, if a public-sector employer intends to terminate the employment of an honorably discharged veteran, the employer must give the veteran an opportunity for a hearing at which the reasons for the termination may be determined. *See id.*

The VPA does not, however, “prevent public employers from abolishing positions in good faith.” *Young v. City of Duluth*, 386 N.W.2d 732, 737 (Minn. 1986). As the supreme court has explained:

The purpose of this section [the Veterans 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 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.

Id. (alteration in original) (emphasis added) (quoting *State ex rel. Boyd v. Matson*, 193 N.W. 30, 32 (Minn. 1923)). The exception allowing a public-sector employer to abolish a

veteran's position in good faith is subject to an examination of the employer's purposes and motives. As the supreme court has further explained:

Of course, the [employer] could not, under the pretext of abolishing the position, continue it under some other name. There would have to be a real, not a sham or pretended, abolishment. Where the abolishment of an office or position has been held to be a sham and pretended, it generally has appeared that there was prompt re-creation of the office or position under a different name or assignment of the work thereof to another department, followed by appointment of a new appointee to perform the work formerly done by the incumbent of the office or position claimed to have been abolished.

Id. at 737-38 (quoting *State ex rel. Niemi v. Thomas*, 27 N.W.2d 155, 158 (Minn. 1947)). Consequently, “public employers have only three grounds on which to base a termination of a veteran”: incompetency, misconduct, or the good-faith abolishment of a position. *Id.* at 738.

In an appeal from the decision of a district court reviewing a decision of a veterans-preference hearing panel, this court independently reviews the panel's decision and gives no deference to the district court. *Myers v. City of Oakdale*, 461 N.W.2d 242, 244 (Minn. App. 1990). We will sustain the panel's findings of fact if they are supported by substantial evidence. *Id.* at 244-45. We apply an abuse-of-discretion standard of review to the panel's ultimate decision. *Id.* at 244.

B.

In this case, the board found that the county made the decision to eliminate the detention deputy positions in good faith. The board found that the county encountered an “unexpected complication” during the jail's construction, which required the county to

reduce the number of jail employees and to ensure that all staff were “higher qualified employees.” The board concluded that Wemette and Hanson did not prove that the county’s decision to eliminate all detention deputy positions was made “in bad faith or as a ploy to get rid of the two veterans.”

Wemette and Hanson argue that the board erred on the ground that the county did not abolish their positions in good faith. Wemette and Hanson assert that the county “clearly intended to maintain the duties of detention deputies during the jail construction and initiated a scheme whereby those duties would be reassigned to temporary shift commanders, allowing Winona County to retain less senior, nonveteran employees under the guise of abolishing the deputy detention positions.”

Substantial evidence supports the board’s finding that the county’s decision to eliminate the detention deputy positions was made in good faith. The evidentiary record thoroughly explains that the county was forced to substantially decrease the jail’s capacity during the construction period and, accordingly, had a valid reason to reduce the number of uniformed jail employees, only two of whom would be on duty during each shift. The record also shows that the county reasonably determined that, to allow adequate flexibility in scheduling, all uniformed jail employees must be able to oversee and manage the jail’s operations. As a consequence, the former detention deputy position and the new temporary shift commander position are different positions with different duties. Detention deputies previously focused on less-complex, routine tasks associated with day-to-day operations, but temporary shift commanders are responsible for supervisor-level functions, such as assigning and directing staff, coordinating the transportation of inmates, completing end-

of-shift reports, and conducting inspections. The higher-level responsibilities of temporary shift commanders are required by county and state policies, which require that a “staff person in the facility must be designated in charge at all times” and be prepared to “assume the responsibility for the facility and its operation.” These facts demonstrate that the county’s decision to eliminate the detention deputy positions was made in good faith.

In addition, all terminated detention deputies were given an opportunity to apply for the temporary shift commander position. Indeed, all of the detention deputies who interviewed were offered a position. Furthermore, Hanson actually worked as a temporary shift commander for a few months (at a higher pay rate than the detention deputy pay rate), until he was terminated for reasons irrelevant to this appeal. This evidence shows that the county’s elimination of the detention deputy position was not based on a desire to employ a non-veteran in lieu of a veteran, which further indicates that the decision to eliminate the detention deputy positions was not made in bad faith. *See Niemi*, 27 N.W.2d at 158 (reasoning that hiring of non-veteran to perform identical duties of veteran may indicate bad faith).

Wemette and Hanson contend that the county did not act in good faith because the county did not adopt what they believe would have been a better staffing option, namely, to retain the number of detention deputies needed and lay off the excess number, basing the selection decisions on other factors, such as seniority and veterans-preference status. Wemette and Hanson do not cite any caselaw for the proposition that the existence of a better alternative, or any reasonable alternative, is sufficient to prove bad faith. In any event, Wemette and Hanson’s argument is contradicted by the testimony of the jail

administrator, who stated that not all detention deputies were qualified for the temporary shift commander position, such that selection based solely on seniority might leave the jail with inadequate supervision.

Wemette and Hanson last contend that the county's bad faith is illustrated by the fact that it did not adhere to the report of the jail advisory committee, which considered a 72-hour option with 40 full-time employees. But the committee did not recommend that option. In addition, the committee's recommendation contemplated that the jail would have a capacity of at least 30 inmates, not the far smaller number that was required by the decrease in available space during the construction of the new jail. The committee did not contemplate a scenario in which the jail could be operated with only two uniformed staff persons per shift.

In sum, substantial evidence supports the board's finding that the county's decision to eliminate the detention deputy positions was made in good faith. Thus, the board did not err by concluding the county did not violate Wemette's and Hanson's veterans-preference rights.

Affirmed.