

STATE OF MINNESOTA
OFFICE OF HEARING EXAINERS

FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
William L. Wilson, Commissioner,
Department of Human Rights,

Complainant,

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

VS.

City of Rochester, Minnesota,
and Rochester Police Civil
Service Commission,

Respondents.

The above-entitled matter came an for hearing before Hearing Examiner Peter C. Erickson of the State Office of Hearing Examiners at 9:00 a.m. on Friday, September 16, 1977 in the Olmsted County Courthouse, Rochester, Minnesota. The record remained open through November 7, 1977 for the submission of posthearing briefs.

Norman B. Coleman, Jr., Special Assistant Attorney General and Richard L. Varco, Jr., Special Assistant Attorney General, 240 Bremer Building, St. Paul 55101 appeared as counsel for the Complainant. Gerald H. Swanson, Rochester City Attorney, Room 1, City Hall, Rochester 55901, appeared as counsel for the Respondent.

Notice is hereby give that pursuant to Minn. Stat. sec. 363.071, subd. 2, this is the final decision of the Department of Human Rights, and under Minn, Stat, A 363.072, any person aggrieved hereby may seek judicial review pursuant to Minn. Stat. 15.0424 and 15.0425,

Based upon all of the files, records and proceedings herein,

the Hearing Examiner makes the following:

FINDINGS OF FACT

1. On August 23, 1977, a prehearing conference was held in Cannon Falls, Minnesota. At that time, Respondent moved to dismiss the instant action as a matter of law. Because the relief prayed for was contingent upon actions soon to be taken by Respondent, an evidentiary hearing was scheduled and held on September 16 prior to resolution of the motion to dismiss. The record on this matter is now complete should there be any further proceedings as a result of this order,

2. In the fall of 1974, Joy Fogarty, a 34 year old female, made inquiries of Rochester city officials regarding a job on the city police force. Ms. Fogarty was told that her age would prohibit her from applying for a position as a police officer. Fogarty subsequently spoke to the Chief of Police, the Mayor, the City Personnel Director, the City Attorney and a member of the Police Civil Service Commission concerning the age requirement. Ms. Fogarty hired an attorney, Robert G. Suk, to represent her in attempts to apply for a position on the police force.

3. On September 9, 1975, Joy Fogarty submitted an application to take the patrol officer's examination the next time it was given. The application was rejected by the Civil Service Commission in April, 1976 on the ground that Ms. Fogarty could not meet the maximum age requirement of 32. Fogarty was given a hearing on the rejection by the Commission on April 29, 1976. A patrol officer examination was not given in 1976, however,

4. In early, 1977, applications to take the examination were again being accepted by the city, Ms. Fogarty applied and was rejected because of her age.

5. At the time of the April, 1976 rejection, the Commission stated that they would allow William Noser, a male over 32 years of age, to take the examination if he met the other qualifications. The age exception in this instance was based on the mandate of the Veteran's Preference Law.

6. On May 3, 1976, Joy Fogarty filed a charge of discrimination against Respondent with the Minnesota Department of Human Rights. In February, 1977 the Commissioner of Human Rights found probable cause to believe that an unfair discriminatory practice had been committed. A complaint was issued to Respondent on June 23, 1977 charging Respondent with sex discrimination in violation of Minn. Stat. sec. 363.01, et seq. (1976)

7. The Rochester Police Force has in its employ several patrol officers who are 45 years old or older and are assigned regular line duty.

8. There are approximately 553,000 veterans in the State of Minnesota of whom approximately 11,000 are female. Therefore, males comprise 98 percent and females 2 percent of the veterans in this state.

9. The recruiting area for the position of patrol officer for the Rochester Police Force is and has been since 1968 the State of Minnesota.

10. The Rochester Police Civil Service Commission was created by resolution of the Common Council on March 2, 1931. At its first meeting on April 8, 1931, the Commission adopted a rule establishing age limits for patrolmen. The Commission has continued in existence since then and at all times has had an age rule governing applicants for the entrance examination of patrol officers. The Commission age rule was last amended on September 20, 1961 to provide that applicants must be under 33 years of age at the time set as the final date for receiving applications for an examination.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following;

CONCLUSIONS

1. The Hearing Examiner has jurisdiction over this matter pursuant to Minn. Stat. sec. sec. 363.071 (1976) and 15.052 (1976).

2. Complainant gave proper notice of the hearing in this matter, and all relevant, substantive and procedural requirements of law and rule have been complied with.

3. The operation of the Veterans Preference Law, in conjunction with the maximum age requirement set by Rochester pursuant to statute, has a disparate impact upon women over age 32. Complainant argues that this disparate impact constitutes sex discrimination in violation of Minn. Stat, sec. 363.03, subd. 1 (2) which reads:

363.03 UNFAIR DISCRIMINATORY PRACTICES. Subdivision 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance or disability,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment;

4. Minn. Stat. sec. 419.06 mandates that local Civil Service Commissions promulgate rules to promote efficiency and carry out the purposes of chapter 419, including rules providing for the rejection

of applicants for patrol officer positions based on age requirements.

The pertinent language reads as follows:

419.06 RULES FOR POLICE DEPARTMENT. The commission shall, immediately after its appointment and from time to time thereafter, make, amend, alter, and change rules to promote efficiency in the police department service and to carry out the purposes of this chapter. The rules shall provide among other things for:

(6) The rejection of candidates or eligibles who, after the entry of their names, shall fail to comply with the reasonable rules and requirements of the commission in respect to age, residence, physical condition, or otherwise, or who have been guilty of criminal, infamous, or disgraceful conduct, or of any wilful misrepresentation, deception, or fraud in connection with their applications for employment;

This regulatory authority was first enacted in 1929 and has been in continuous effect since then.

5. The applicable statutory language regarding veterans' preference reads as follows:

43.30 VETERANS PREFERENCE. The provisions of this section shall govern the granting of veterans' preference for the state civil service.

A veterans' preference shall be available pursuant to this section to every person who has been separated under honorable conditions from any branch of the armed forces of the United States; (a) after having served on active duty for 181 consecutive days or (b) by reason of disability incurred while serving on active duty, and who is a citizen of the United States. A veteran thus preferred shall not be disqualified from holding any position in the classified service on account of his age or by reason of any physical disability provided such age or physical disability does not render him incompetent to perform the duties of the position.

197.45 STATE LAW APPLICABLE. The provisions of section 43.30 granting preference to veterans in the state civil service shall also govern preference of a veteran under the civil service laws, charter provisions, ordinances, rules or regulations of a county, city, town, school district, or other municipality or political subdivision of this state, except that a notice of rejection of a qualified veteran shall be filed with the appropriate personnel officer. Any provisions in a law, charter, ordinance, rule or regulation contrary to the applicable provisions of section 43.30 is void to the extent of such inconsistency. Section 197.46 to 197.48 shall not apply to state civil service.

Respondent argues that the disparate impact is the result of compliance

with statutory mandate (sec. sec. 419.06 and 43.30) and, as such, there can be no sex discrimination.

6. For the Examiner to find sex discrimination in the instant case, he would have to conclude that either the Veterans Preference Law or the age setting authority in sec. 419.06 is invalid. As long as there is the authority to set an age requirement, any age, even 45 or 50, will result in a disparate impact when veterans preference is applied.

Complainant argues that it is not contesting the validity of the

Veterans' Preference Law, but rather, the age limitation. That Respondent must demonstrate the necessity of the age limitation that is set. The instant proceeding, however, is grounded upon sex discrimination, not age discrimination. To discriminate because of age was not even a violation of Minnesota Human Rights Law until 1977 (see Chapter 351, 1977 Laws) and then a specific exemption was provided for peace officers and firefighters.

To find either 419.06 or sec. 43.30 invalid, a determination must be made that the section (s) are: (1) unconstitutional; (2) in violation of federal law; or (3) in conflict with other statutory language. Complainant did not raise constitutional issues purposely in this proceeding. Much of the basis for Complainant's argument centers on federal Title VII cases which have invalidated state laws and private industry practices because the statute or practice was in violation of federal law. The instant matter, however, is grounded upon state Human Rights law. Minn. Stat. sec. 645.26 states that if statutes are in conflict, the special provision shall be construed as an exception to the general provision unless the general provision was enacted later and it was the manifest intention of the Legislature that the general provision shall prevail. There is no indication, however, that the Legislature intended that Chapter 363 supercede sec. 419.06 and sec. 43.30.

The Examiner concludes that although a disparate impact was shown by Complainant, it was the result of the joint operation of 419.06 and 43.30 and not in violation of sec. 363.03, subd. 1 (2).

7. The Examiner has carefully reviewed the record in this matter and has made the Findings of Facts necessary to support the decision herein. Due to the disposition herein, the Findings do not, however, represent all of the issues considered at hearing nor all of the evidence taken.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

ORDER

That the Complaint in this matter is dismissed and the relief prayed for is denied.

Dated this 11 day of November, 1977

Peter C. Erickson, Hearing Examiner

OFFICE OF HEARING EXAMINERS