

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

In the Matter of Chris A. Stroner v. City of  
Hopkins

**RECOMMENDATION ON MOTION  
FOR SUMMARY DISPOSITION**

The above matter is pending before Administrative Law Judge M. Kevin Snell (ALJ) pursuant to a Notice of Petition and Order for Hearing (Notice) issued on December 19, 2012, filed on December 21, 2012, for a hearing scheduled for February 6, 2013.

Joseph A. Kelly, Kelly & Lemmons, P.A., St. Paul, Minnesota, appeared on behalf of Chris A. Stroner (Petitioner). Marylee Abrams, Abrams & Schmidt, appeared on behalf of the City of Hopkins (City).

On January 18, 2013, the City filed a Motion for Summary Disposition (Motion). On February 1, 2013, Petitioner filed his Memorandum of Law in Opposition to the City's Motion. Thereafter, the parties and the ALJ agreed to continue the hearing and utilize the February 6, 2013, hearing date for oral argument on the Motion.

At the February 6, 2013 prehearing conference, the ALJ requested additional briefs on legislative history and statutory interpretation of the veterans preference statutes (VPA) and the Minnesota civil service statutory provisions that are relevant to this proceeding.<sup>1</sup>

The parties and the ALJ agreed that the hearing, if needed, would occur on March 29, 2013.

On February 22, 2013, the City submitted its Memorandum of Law Requested to Clarify Legislative Intent. Also, on February 22, 2013, Petitioner submitted his Post-Hearing Memorandum regarding the Motion.

On March 22, 2013, after inquiry by the parties, the ALJ advised the parties that a hearing would not be necessary because the ALJ would be resolving the matter by Summary Disposition upon the record as it stands.

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<sup>1</sup> Minn. Stat. §§ 43A and 197.455. References to Minnesota Statutes refer to the 2010 edition unless otherwise noted.

Pursuant to the authority conferred by Minn. R. 1400.5500 and 1400.6600, for the reasons stated in the attached Memorandum, and based upon all the files and records herein, the Administrative Law Judge makes the following:

### RECOMMENDATIONS

The Administrative Law Judge respectfully recommends that the Commissioner of Veterans Affairs:

1. **Order** the City to notify Petitioner in writing of the reasons he was not hired for the position of Captain; and
2. Otherwise, **DISMISS** Petitioner's Petition for Relief.

Dated: June 3, 2013

/s/ M. Kevin Snell

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M. KEVIN SNELL  
Administrative Law Judge

### NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Larry W. Shellito, Commissioner, MN Department of Veterans Affairs, 206c Veterans Service Building, 20 West 12th Street, St. Paul, MN 55155-2079, (651) 757-1555, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under 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 or as otherwise provided by law.

## MEMORANDUM

### I. Standards for Summary Disposition

An Administrative Law Judge may recommend or grant summary disposition of a case where there is no genuine issue as to any material fact.<sup>2</sup> Summary disposition is the administrative equivalent of summary judgment in district court because summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>3</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts when considering motions for summary disposition in contested cases.<sup>4</sup>

To defeat a motion for summary judgment, the nonmoving party must show that specific facts are in dispute that have a bearing on the outcome of the case.<sup>5</sup> The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden.<sup>6</sup> Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery.<sup>7</sup> To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden.<sup>8</sup>

### II. Undisputed Material Facts

Petitioner is a veteran as defined in Minn. Stat. § 197.447. Petitioner has served active duty U. S. Army deployments in Kosovo, Kuwait, Saudi Arabia, and Iraq – where he was the Platoon Sergeant in charge of an Infantry Platoon of 64 men during 18 months of combat operations. Currently, Petitioner holds the position of First Sergeant, the senior enlisted advisor to the commanding officer of his unit.<sup>9</sup>

Petitioner is not a Disabled Veteran as defined in Minn. Stat. § 197.455, subd. 5.<sup>10</sup>

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<sup>2</sup> Minn. R. 1400.5500 K.

<sup>3</sup> *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); Minn. R. Civ.P. 56.03.

<sup>4</sup> See Minn. R. 1400.6600

<sup>5</sup> *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>6</sup> *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1988).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Petitioner's Response to Request for Admissions (Admissions), Response 4; Petitioner's Summary Disposition Post-Hearing Memorandum (Petitioner's Memo.) at 1 and Exhibit. B.

<sup>10</sup> Admissions, Resp. 14.

On or about January 11, 1993, Petitioner was hired as a patrol officer by the City through an open competitive examination process. He was credited with the requisite points during the 1993 hiring process for the position of patrol officer.<sup>11</sup>

In January 1999, Petitioner was promoted to the position of police sergeant for the City.<sup>12</sup> During his employment with the City, Petitioner has served in the positions of firearms instructor, OIC academy instructor, SWAT team member, SWAT team leader, detective sergeant, patrol sergeant, investigator, drug task force member, and K-9 officer.<sup>13</sup>

On August 30, 2011 the City's Chief of Police posted an internal opening for the position of police captain to all members of the City's police force.<sup>14</sup> The process for filling the vacancy for the position of police Captain was limited to police officers currently employed by the City.<sup>15</sup> In addition to other information about the position and the hiring process, the posting stated:

All candidates who meet these qualifications will be interviewed by the chief sometime during the week of September 26<sup>th</sup>. The new captain will be named by September 30, 2011, but will not assume the position of captain until sometime during the month of December.<sup>16</sup>

On September 12, 2011, while deployed as First Sergeant at the U.S. Army's Headquarters of the 2<sup>nd</sup> Battalion 135<sup>th</sup> Infantry Regiment at Camp Buehring, Kuwait, Petitioner submitted his letter of interest for the police captain position.<sup>17</sup>

Four candidates met the qualifications for the police Captain position. Each of the four candidates, including Petitioner, were interviewed for the position. Petitioner was interviewed by the Chief, by telephone from Kuwait, during the week of September 26, 2011.<sup>18</sup>

On October 3, 2011, Petitioner was notified by the Chief, by e-mail, that another one of the four qualified candidates had been offered and accepted the position of captain. The Chief expressed his thanks to Petitioner for applying and regret that Petitioner was not chosen by stating:

Honestly, I could have picked any of you four and would have been happy with the pick, but unfortunately, there is only one position available.<sup>19</sup>

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<sup>11</sup> Admissions, Resp. 1; Motion at 1; See, Minn. Stat. § 43.18 (1992).

<sup>12</sup> Petitioner's Memo. at 1; Admissions Resp. 2.

<sup>13</sup> Admissions, Resp. 3.

<sup>14</sup> Respondent's Memorandum of Law in Support of Motion for Summary Disposition (Motion), Ex. A.

<sup>15</sup> *Id.*; Admissions, Resp. 5.

<sup>16</sup> Motion, Ex. A; Admissions, Resp. 7.

<sup>17</sup> Motion, Ex. B; Admissions, Resps. 8-10.

<sup>18</sup> Motion, Exs. B and C; Admissions, Resp. 11.

<sup>19</sup> Memo., Ex. C; Admissions, Resps. 12, 13.

The City neither notified Petitioner that he could utilize veterans preference with regard to the captain position, nor did it assign Petitioner preference points in ranking the four candidates.

Neither party has argued or shown that there exist essential factual elements that would require an evidentiary hearing. Therefore, the ALJ has concluded that this matter may be determined by interpreting and applying the applicable law to the undisputed facts necessary to resolve Petitioner's claims.

### III. Arguments of the Parties

Petitioner argues that the City was obligated to use a 100-point rating system when it filled the Captain position and that it failed to do so, thereby violating the VPA. Petitioner further argues that:

- he was entitled to receive 10 points to be allocated to his "score" as the candidates were ranked;
- the process utilized was not a "promotional" process because the word "promotion" did not appear in the posting or other documents;
- the City's process for the position of police captain was a "competitive open examination" and not a "competitive promotional examination" process; and
- the City failed to advise him of the reason he was not selected for the police captain position.<sup>20</sup>

The City argues that:

- because the posting was limited to currently employed police officers of the City, the process for selection of candidates was a "competitive promotional examination" process;
- a veterans' rights in an internal promotional process are explicitly restricted to disabled veterans, and then only for the first promotion while in public employment;
- the e-mail adequately advised Petitioner of the reason he was not selected for the police captain position.<sup>21</sup>

Minn. Stat. § 197.455, subd 5, provides:

**Disabled veteran's credit.** There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of 15 points provided that the veteran obtained a passing rating on the examination without the addition of the credit points. There shall be added to the **competitive promotional examination** rating of a disabled veteran, who so elects, a credit of five points provided that (1) the veteran

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<sup>20</sup> Petitioner's Memorandum of Law In Opposition to the Motion, at 6-9.

<sup>21</sup> Motion at 4.

obtained a passing rating on the examination without the addition of the credit points; and (2) **the veteran is applying for a first promotion after securing public employment.** (Emphasis added.)

For the reasons discussed in the following sections, the ALJ concludes that the City's position is correct, with one exception. Even if the City had erred in its understanding of the VPA and its use of its 100 point system, there would be no further remedy to give the Petitioner because it gave the Petitioner all rights to which he would be entitled by having received an interview, except for the notice of the reason he was not selected.

#### **IV. Legislative History of the Veterans Preference Act**

The VPA dates back to 1887, at the close of the Civil War, giving preference in employment and appointment to honorably discharged Union soldiers and sailors.<sup>22</sup> Since that time, veterans preference rights have been modified and altered. In 1907, it was the policy of the State to grant absolute preference in hiring to soldiers, sailors and marines of the Civil War. This applied to all governmental units in the State.<sup>23</sup>

This changed in 1939 when the Legislature modified preference for the state civil service. Under the modified veterans preference law, veterans applying for state employment received preference points added to their examination rating.<sup>24</sup> This modified veterans preference was applicable for state jobs until the Minnesota legislature amended Minn. Stat. § 43.30, repealed section 197.45 and adopted section 197.455, making the modified point-based preference applicable to political subdivisions, as well as the state civil service system.<sup>25</sup>

In 2004, the veterans preference statutes were amended, resulting in the deletion of some specific terms, the modification of the state's hiring process, with changes to both Minn. Stat. §§ 43A and 197.455. The legislative history of the changes is relevant to fully understand the intent of the 2004 statutory changes.

In 1975, the Legislature amended the veterans preference statute, in relevant part, to read as follows:

#### **43.30 VETERANS PREFERENCE.**

...

Recognizing that training and experience in the services of the government and loyalty and sacrifice for the government are qualifications of merit which cannot be readily discovered by examination; there shall be

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<sup>22</sup> In *State ex. Rel. Cowden v. Miller*, 66 Minn. 90, 68 N.W. 732 (1896), Justice William Mitchell wrote the opinion upholding the constitutionality of Laws of Minn. 1887, Chapter 149, which was entitled "An Act giving preference in appointment and employment to honorably discharged Union soldiers and sailors."

<sup>23</sup> Revised Laws of Minn., Supp. 1907, ch. 24, § 1849-1.

<sup>24</sup> See, *Hall v. City of Champlin*, 463 N.W. 2d 502, 504 (Minn. 1990).

<sup>25</sup> 1974 Minn. Laws ch. 45, repealing Minn. Stat. § 197.45 (1974).

added to the examination rating of a disabled veteran, if he so elects, a credit of ten points if the veteran obtained a passing grade without the addition of the credit points; and if the disabled veteran is able to perform the duties of the position sought with reasonable efficiency, his name shall be placed on the list of eligible with the names of other eligible persons. The name of a veteran with such augmented rating shall be entered ahead of a nonveteran when their ratings are the same.

There shall be added to the examination rating of a nondisabled veteran, if he so elects, a credit of five points if the veteran obtained a passing grade without the additions of the credit points. The name of a veteran with such augmented rating shall be entered ahead on a non-veteran when their ratings are the same.

A governmental agency, when notifying an applicant that he has passed an examination, shall notify the veteran of his specific score and shall also notify the applicant that he may elect to use a veteran's preference to augment his passing rating.

A veteran's preference under this section may only be used in the state civil service and political subdivisions of the state in the securing of positions to be filled by open competitive examinations and may not be used for the filling of promotional positions. **An open competitive examination is an examination open to current employees and nonemployees of the state or political subdivision.** A veteran's preference under this section may not be used by any veteran who is eligible to receive a monthly veteran's pension benefit based exclusively on length of military service.

Notwithstanding the foregoing restrictions on use, **in any governmental agency giving an examination, where an applicant for a promotional position is a disabled veteran who has passed the promotional examination for his first promotion after entering that position, he may elect to have a credit of five points added to that examination rating.** The decision to make such election may be made either before or after the examination. **This promotional preference may only be successfully used one time and only in the securing of the first promotional position after securing public employment. . . .** (Emphasis added)<sup>26</sup>

In 1981 Chapter 43 of Minnesota Statutes was repealed and replaced with Chapter 43A. Minn. Stat. § 43.30 was replaced with Minn. Stat §§ 43A.02, subds. 15 and 16, and 43A.10 and 11.<sup>27</sup>

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<sup>26</sup> 1975 Laws of Minn., ch. 45, § 2.

<sup>27</sup> 1981 Laws of Minn., ch. 210, §§ 10, 11.

In 1989, Minn. Stat. § 43A included specific definitions for competitive open and competitive promotional examinations.<sup>28</sup> At that time, Minn. Stat § 43A.02, subd. 15 defined a competitive open examination as:

‘Competitive open’ means eligibility to compete in an examination for state employment is extended to all interested persons.<sup>29</sup>

Also at that time, Minn. Stat § 43A.02, subd. 16 defined a competitive promotional examination as:

‘Competitive promotional’ means eligibility to compete in an examination for state employment is limited to persons currently occupying, or on leave from civil service positions.<sup>30</sup>

These definitions were central to the decision in *Stevens v. Hastings*, OAH 69-3100-4115-2 (December 26, 1989), where the ALJ concluded that while the assistant fire chief position was deemed exempt from the requirements of veterans preference as a department head, the filling of the position in early 1988 would have been considered a competitive promotional examination,

because eligibility for the position was limited to current employees of the Fire Department, . . . as such the only veterans who would have been entitled to any credits on the examination would have been any veterans with a permanent service-connected disability rated at 50% or greater.<sup>31</sup>

In *Stevens*, the ALJ determined that veterans preference points were only available in a promotional process to disabled veterans, and since *Stevens* was not disabled, he was not entitled to any veterans preference points.<sup>32</sup>

## **V. The 2004 Amendments to the Veterans Preference Statutes.**

At the prehearing conference, the ALJ expressed concern regarding an apparent inconsistency between former Minn. Stat. §§ 43A, subds. 15 and 16, and the new 197.455, subds. 4-6 regarding the use of the terms “open competitive examination” and “competitive promotional examination.” Accordingly, the ALJ requested that the parties prepare briefs regarding statutory interpretation of those provisions.

In 2004, the legislature overhauled both Minn. Stat. §§ 43A and 197.455. Among other changes, the legislature moved the language that is the subject of this proceeding in Minn. Stat. § 43A.02 into Minn. Stat. § 197.455. In doing so, references to Minn. Stat. § 43A in section 197.455 were deleted, and the definitional language for “competitive

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<sup>28</sup> Minn. Stat. § 43A.02, subds. 15 and 16 (1988).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Stevens, supra.* at 8.

<sup>32</sup> *Id.*; *Accord, Frank v. Otter Tail County*, OAH 8-3100-9121-2 (January 20, 1995).

open” and “competitive promotional” formerly contained in Minn. Stat. § 43A.02, subs. 15 and 16 was removed. In addition, the terms “competitive open” and “competitive promotional” were transferred to Minn. Stat. § 197.455 in new subdivisions 4 and 5.<sup>33</sup> The legislature also changed the title of Minn. Stat. § 197.455 from “State Law Applicable” to “Veteran’s Preference Applied,” together with additional changes separating Minn. Stat. § 43A from section 197.455. These changes make it clear that only Minn. Stat. § 197.455 applies to counties, cities, towns, school districts and all other municipalities and political subdivisions.<sup>34</sup>

At the time of the passage of the bills, Senate Counsel explained:

[Veteran’s Preference Applied] eliminates reference to section § 43A.11, which is repealed in part and extensively modified in part elsewhere in the bill and replaces this with new language that requires the local government use of veteran’s preference that is closely patterned after the existing process.<sup>35</sup>

As the City correctly argues, this confirms that the manner of addressing open competitive and competitive promotional examinations, that formerly applied to both the state and local units of government, now applies only to local units of government. The fact that the specific definitions of “competitive open” and “competitive promotional,” formerly contained in Minn. Stat. § 43A.02, subs. 15 and 16, were not inserted into Minn. Stat. § 197.455, does not mean that the definitions of those terms have been changed now that those terms are contained in Minn. Stat. § 197.455. The ALJ concludes that they have not.

## **VI. Additional Relevant Case Law**

The undisputed facts establish that the City did not use a 100-point rating system when it filled the Captain position in September of 2011. The question, then, is whether the City violated the Petitioner’s veteran’s preference rights in connection with that posting and hiring process for that position. The law, in its current form, does not guarantee that a public employer will hire an eligible veteran in preference over eligible non-veterans.<sup>36</sup>

In *McAfee v Dept. of Revenue*, 514 N.W.2d 301 (Minn. Ct. App. 1994), the Court of Appeals confirmed the general proposition established in *Hall v. City of Champlin*, 463 N.W.2d 502, 504 (Minn. 1990), that:

Finally, even if McAfee had received a veteran’s preference credit, he still would not be entitled to the relief he seeks, that is, appointment to the Attorney I position. Section 43A.11 does not provide absolute preference

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<sup>33</sup> 2004 Minn. Laws 207, §§ 9, 10, 12, 13, 29, and 31.

<sup>34</sup> *Id.*, at sec. 29.

<sup>35</sup> Exhibit C, page 1.

<sup>36</sup> *McAfee v. Dept. of Revenue*, 514 N.W.2d 301, 305 (Minn. App. 1994).

for veterans; veteran's preference credit may increase the chance that the veteran will receive an interview, but the appointing authority may hire any certified applicant.<sup>37</sup>

As the City correctly argues, the legislature contemplated that veteran's preference points are to be applied at the stage of a hiring process when a public employer determines which applicants will receive an interview.<sup>38</sup> In *Bentzen v. Hennepin County*, OAH 4-3100-21648-2, 4-3100-21444-2 (February 28, 2011), the ALJ held: citing *McAfee*:

The Veterans Preference Act does not guarantee a public employer will hire a Veteran in preference over non-veterans; it does not even require that a veteran receive an interview. Rather it only requires that the veteran receive an increased opportunity for an interview when the veteran meets the minimum qualifications for the position, and examination is an experiential examination based on interviews of the applicants.<sup>39</sup>

The final result for Petitioner is the same as the final result in *McAfee*:

Because the Department of Revenue granted McAfee an interview, he was accorded the same rights he would have received had section 43A.11 applied to this position.<sup>40</sup>

In summary, even if the City had erred in relying on in not utilizing a 100-point rating system in determining which applicants would be interviewed for the September 2011, posting for the position of police Captain, it gave the Petitioner all rights to which he was entitled by being selected to be among the four finalists for interviews.

## **VII. What, if any, relief is appropriate?**

The law does not guarantee that a public employer will hire a veteran in preference over non-veterans. It does not even require that a veteran receive an interview. Rather, it only requires that the veteran receive an increased opportunity for an interview when the veteran meets the minimum qualifications for the position and examination is an experiential examination based on interviews of the applicants.<sup>41</sup> Here, Petitioner met the minimum qualifications for the position of Captain when that position was posted on August 30, 2011. In that posting, the City clearly limited the posting to currently-employed City police officers. The fact that the City used the words "appointment" rather than "promotion" is irrelevant in this case. Whether the City utilized a 100-point system and allocated 10 points to Petitioner is also irrelevant to the result here because the process utilized was a competitive promotional examination

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<sup>37</sup> *McAfee, supra*, 514 N.W.2d at 305.

<sup>38</sup> *Hall, supra*. at ; *McAfee, supra*, at 305.

<sup>39</sup> *Bentzen, supra*. at 15.

<sup>40</sup> *McAfee, supra*, 514 N.W.2d at 305.

<sup>41</sup> *Id.*

process. Such a process permits only Disabled Veterans to receive veterans preference points.

Petitioner was denied his right to receive written notice of the “reasons” he was not hired for the position of Captain as required by law. Accordingly, the ALJ respectfully recommends that the Commissioner order the City to comply with Minn. Stat. § 197.455, subd. 10, by sending Petitioner a written notice that contains the reasons that he was not selected. Such a remedy is adequate to remedy this violation of the VPA.

### **VIII. Conclusion**

Minn. Stat. § 197.455 permits political subdivisions to fill positions in the classified service by open competitive examinations or competitive promotional examinations. Those examinations may consist of written examinations or reviewing applicants’ qualifications and informally ranking them after oral interviews.

Petitioner contends that the City’s selection process of the four final candidates was an open competitive examination process. It was not. The process utilized was a competitive promotional examination process that was limited to currently employed City police officers. Petitioner’s arguments overstate the City’s legal obligation. As long as the City has correctly applied Minn. Stat. § 197.455, it is legally entitled to make a hiring decision based on its subjective determination as to which of the candidates interviewed is the best fit for the job.

There is nothing in the law that required the City to promote Petitioner instead of another qualified City police officer.

The City gave the Petitioner an interview in connection with its August 2011 posting for the position. The City, therefore, did not violate Minn. Stat. § 197.455 in connection with the evaluation of the qualified candidates and award of the position. The ALJ recommends that the Commissioner give the Petitioner no further relief beyond ordering the City to provide Petitioner, in writing, the reason[s] he was not selected.

**M. K. S.**