

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

Erik P. Stever,

Petitioner,

v.

City of St. Paul,

Respondent

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Steven M. Bialick on September 8, 2015, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota.

Rachel G. Tierney, Assistant St. Paul City Attorney, appeared on behalf of the city of St. Paul (Respondent). John D. Baker, Baker Williams LLP, appeared on behalf of Eric P. Stever (Petitioner).

With the agreement of the parties, Respondent was given until September 15, 2015, to provide documentation to Petitioner and the Office of Administrative Hearings (OAH), relating to scores Petitioner received when he applied for two positions with Respondent in 2014. Respondent provided that documentation on September 15, 2015, which was received into evidence as Exhibits 15-18 pursuant to the stipulation of the parties.

The hearing record closed on October 9, 2015, upon receipt of the parties' written final arguments.

STATEMENT OF THE ISSUES

1. Did Respondent violate Petitioner's rights under provisions of the Veterans Preference Act, Minn. Stat. §§ 197.447-.481 (2014), in connection with his application for employment as a Vehicle Mechanic and as a Parking Enforcement Officer?

2. If Respondent violated Petitioner's rights under the Veterans Preference Act, what remedy, if any, is appropriate?

SUMMARY OF RECOMMENDATIONS

1. The Administrative Law Judge concludes that Respondent violated Petitioner's rights under Minn. Stat. § 197.455, subd. 4, by failing to add a credit of 10 points to his examination ratings in connection with his application for employment as a Vehicle Mechanic and as a Parking Enforcement Officer.

2. For that violation, the Administrative Law Judge recommends that the Commissioner of Veterans Affairs order Respondent to: (A) add a credit of 10 points to Petitioner's examination ratings; (B) show all eligible veterans who passed the examinations for the Vehicle Mechanic or Parking Enforcement Officer positions their final examination ratings, and notify them that they may elect to use veterans preference credits to augment passing ratings; (C) add the appropriate credit to the ratings of all eligible veterans who applied for the Vehicle Mechanic or Parking Enforcement Officer positions and elect to have the credit added and had passing ratings without the credit, as required by Minn. Stat. § 197.455, subd. 4 or 5; (D) fill the Vehicle Mechanic and Parking Enforcement Officer positions with qualified applicants, after taking into consideration the ratings of each applicant; and (E) give valid written reasons to all the veterans who receive a veterans preference but are denied the positions, as required by Minn. Stat. § 197.455, subd. 10.

Based upon the testimony, exhibits and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner is an honorably discharged nondisabled veteran.¹
2. In 2014, Petitioner applied for two positions with Respondent. One of those positions was as a Vehicle Mechanic and the other position was as a Parking Enforcement Officer. For each position, Petitioner supplied the required DD 214 forms and requested that veterans preference points be added to his scores.²
3. Both positions were open to anyone who met the requirements of the positions.³
4. Petitioner was qualified for both positions.⁴
5. Respondent used 100-point rating systems to determine which applicants for the Vehicle Mechanic position and the Parking Enforcement Officer position would be granted interviews. Examination ratings of 75 and above were passing ratings.⁵

¹ Testimony (Test.) of Petitioner; Stipulation of the parties; Exhibit (Ex.) 100.

² Petition for Relief under the Veteran's Preference Act; Test. of Petitioner; Ex. 100.

³ Exs. 1, 5.

⁴ Stipulation of the parties.

⁵ Exs. 15, 17; Test. of Angela Nalezny.

6. Petitioner received a rating of 100 for the Vehicle Mechanic position and a rating of 80 for the Parking Enforcement Officer position, both of which were passing ratings.⁶

7. Respondent sent letters to Petitioner, notifying him that he passed the examinations for both positions. However, the letters did not show Petitioner's final examination ratings or preference credits. The letters also failed to notify Petitioner that he could elect to use veterans preference to augment his passing ratings.⁷

8. Respondent did not add a credit of 10 points to Petitioner's ratings for either the Vehicle Mechanic position or the Parking Enforcement Officer position.⁸

9. It is Respondent's policy to offer interviews to all veterans who have passing ratings.⁹

10. Petitioner was given interviews for both positions.¹⁰

11. Respondent did not hire Petitioner for either the position of Vehicle Mechanic or the position of Parking Enforcement Officer. Respondent sent Petitioner written notices of his rejections, including explanations, by a letter dated October 28, 2014 and e-mails dated June 27, 2014 and July 9, 2014.¹¹

12. Respondent's October 28, 2014 letter informed Petitioner that the Vehicle Mechanic position had been offered to a candidate whose qualifications, experience, and background most closely matched the requirements of that position. The Respondent's letter also informed Petitioner that the candidate who was hired had Vocational Training/Certificate in Automotive Technology or successful completion of an Automotive Technician Trainee Program.¹²

13. Respondent's June 27, 2014 e-mail informed Petitioner that others had interviewed for the Parking Enforcement Officer position who were still in the process of completing their education and had the skills Respondent needed for their Parking Enforcement Officer program. Respondent's July 9, 2014 e-mail expanded on that explanation by informing Petitioner that the City tended to look for Parking Enforcement Officers who will be in the program a couple years before moving on to being an officer, so the Parking Enforcement Officers can be mentored while attending school. Respondent indicated that the City felt Petitioner would not stay in the program very long before moving on to being an officer. Respondent's July 9, 2014 e-mail also

⁶ Exs. 16, 18.

⁷ Exs. 104, 105.

⁸ Stipulation of the parties; Test. of A. Nalezny.

⁹ Test. of A. Nalezny.

¹⁰ Test. of A. Nalezny; Ex. 10.

¹¹ Ex. 4, 8.

¹² Ex. 4.

informed Petitioner that his interview score was just below average, and that veterans preference was applied by ensuring he received a selection interview.¹³

14. On June 19, 2015, Petitioner filed a Petition for Relief under the Veterans Preference Act with the Minnesota Department of Veterans Affairs.¹⁴

15. The Minnesota Department of Veterans Affairs issued a Notice of Petition and Order for Hearing, dated June 30, 2015.¹⁵

Based upon the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Pursuant to Minn. Stat. §§ 14.50, 197.481 (2014), the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised under the Veterans Preference Act, Minn. Stat. §§ 197.447-.481, in this proceeding.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of statute and rule.

3. Petitioner and Respondent received timely and proper notice of the hearing.

4. A veteran has the burden of proving a violation of the Veterans Preference Act by a preponderance of the evidence.¹⁶

5. Petitioner is an honorably discharged veteran within the meaning of Minn. Stat. § 197.447, .455 and is entitled to all of the protections and benefits afforded by the Veterans Preference Act.

6. Respondent is a political subdivision of this state within the meaning of Minn. Stat. § 197.455, and its personnel practices are therefore subject to the provisions of the Veterans Preference Act.

7. The Veterans Preference Act recognizes that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit that cannot be readily assessed by examination.¹⁷

¹³ Ex. 8.

¹⁴ Notice of Petition and Order for Hearing.

¹⁵ *Id.*

¹⁶ Minn. R. 1400.7300, subp. 5 (2015).

¹⁷ Minn. Stat. § 197.455, subd. 2.

8. To comply with the Veterans Preference Act, political subdivisions of this state must adapt their hiring systems to a 100-point rating system to enable the allocation of veterans preference points.¹⁸

9. As a political subdivision of this state, Respondent is obligated to adapt its hiring system to a 100-point rating system.

10. Respondent used 100-point rating systems which complied with the Veterans Preference Act to fill the two positions Petitioner applied for in 2014.

11. Minn. Stat. § 197.455, subd. 9, requires political subdivisions of this state to show the final examination ratings and preference credits when notifying eligible veterans they have passed examinations. It also requires political subdivisions to notify eligible veterans that they may elect to use veterans preference to augment passing ratings when notifying them they have passed examinations. Respondent failed to comply with these requirements when it sent Petitioner the letters notifying him that he had passed the examinations for the Vehicle Mechanic and Parking Enforcement Officer positions.

12. Pursuant to Minn. Stat. § 197.455, subd. 10, an eligible veteran who has received a veterans preference, but has been rejected for a position by a political subdivision of this state, is entitled to receive written notice from the political subdivision of the reasons for the rejection. The written rejection notices Respondent sent to Petitioner comply with the notice requirement of Minn. Stat. § 197.455, subd. 10.

13. Minn. Stat. § 197.455, subd. 4, requires a credit of 10 points to be added to the competitive open examination rating of a nondisabled veteran who applies to a political subdivision of this state for a position, provided the veteran elected to have the credit added and obtained a passing examination rating without the credit. Minn. Stat. § 197.455, subd. 5, requires a credit of 15 points to be added to the competitive open examination rating of a disabled veteran who applies to a political subdivision of this state for a position, provided the veteran elected to have the credit added and obtained a passing examination rating without the credit.

14. Pursuant to Minn. Stat. § 197.455, subd. 4, Respondent was required to add a credit of 10 points to Petitioner's passing examination ratings in connection with his application for employment as a Vehicle Mechanic and as a Parking Enforcement Officer.

15. Petitioner has proved by a preponderance of the evidence that Respondent violated Petitioner's rights under Minn. Stat. § 197.455, subd. 4, by failing to add a credit of 10 points to his passing examination ratings in connection with his applications for employment as a Vehicle Mechanic and as a Parking Enforcement Officer.

¹⁸ *Hall v. City of Champlin*, 463 N.W.2d 502 (Minn. 1990).

16. Petitioner is entitled to relief for Respondent's violation of his rights pursuant to Minn. Stat. §§ 197.455, .481.

17. The Commissioner of Veterans Affairs may grant a veteran whose rights under the Veterans Preference Act have been violated such relief as the Commissioner finds justified.¹⁹

18. Petitioner has requested reasonable attorney fees. Minn. R. 1400.8401 (2015) sets forth the procedure for seeking an award of expenses and attorney's fees. Neither party has followed that procedure.

Based upon the foregoing Findings of Fact and Conclusions of Law, and for the reasons set forth in the Memorandum below, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the Commissioner of Veterans Affairs issue an Order determining that:

1. Respondent violated Petitioner's rights under Minn. Stat. § 197.455, subd. 4, by failing to add a credit of 10 points to his examination ratings in connection with his application for employment as a Vehicle Mechanic and as a Parking Enforcement Officer.

2. Respondent is ordered to: (A) add a credit of 10 points to Petitioner's examination ratings; (B) show all eligible veterans who passed the examinations for the Vehicle Mechanic or Parking Enforcement Officer positions their final examination ratings, and notify them that they may elect to use veterans preference credits to augment passing ratings; (C) add the appropriate credit to the examination ratings of all eligible veterans who applied for the Vehicle Mechanic or Parking Enforcement Officer positions and elect to have the credit added and had passing examination ratings without the credit, as required by Minn. Stat. § 197.455, subd. 4 or 5; (D) fill the Vehicle Mechanic and Parking Enforcement Officer positions with qualified applicants, after taking into consideration the ratings of each applicant; and (E) give valid written reasons to all the veterans who receive a veterans preference but are denied the positions, as required by Minn. Stat. § 197.455, subd. 10.

Dated: October 26, 2015

s/Steven M. Bialick

STEVEN M. BIALICK
Administrative Law Judge

Reported: Digitally recorded. No transcript prepared.

¹⁹ Minn. Stat. § 197.481, subd. 1.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2014), 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, Minnesota 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 (2014).

Under Minn. Stat. § 14.62, subd. 1 (2014), 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

The Veterans Preference Act does not provide an absolute preference for hiring veterans over non-veterans.²⁰ However, Minn. Stat. § 197.455, subd. 4, requires Minnesota political subdivisions to add a 10-point credit to the competitive open examination rating of a nondisabled veteran who applies for a position, provided the veteran elected to have the credit added and obtained a passing rating on the examination without the credit. Minn. Stat. § 197.455, subd. 5, requires Minnesota political subdivisions to add a 15-point credit to the competitive open examination rating of a disabled veteran who applies for a position, provided the veteran elects to have the credit added and obtained a passing rating on the examination without the credit.

Petitioner is a nondisabled veteran who applied for two positions with Respondent, which were open to anyone who met the requirements of the positions. Petitioner elected to have veteran preference credits added to his ratings, and he received passing competitive open examination ratings for both positions without the credits. Therefore, pursuant to Minn. Stat. § 197.455, subd. 4, Respondent was required to add veterans preference credits of 10 points to Petitioner's ratings for each position. Respondent violated Minn. Stat. § 197.455, subd. 4, by failing to give Petitioner the 10-point credits he deserved.

Respondent states that the purpose of the ratings it uses is to determine which applicants are offered interviews. Respondent says that its policy is to offer interviews

²⁰ *McAffee v. Department of Revenue*, 514 N.W.2d 301 (Minn. Ct. App. 1994).

to all veterans who have passing ratings, which it argues is a veterans preference that eliminates the need to give veterans the credits mandated by Minn. Stat. § 197.455.

Respondent also argues that, by offering interviews to Petitioner, it fulfilled its obligation to him under the Veterans Preference Act.

However, Minn. Stat. § 197.455 clearly requires Respondent to add credits to the ratings of veterans who elect to receive the credits and received passing ratings without the credits. The statute does not allow Respondent to avoid this requirement by giving interviews to all veterans who have passing ratings.

If Respondent is not using veterans preference credits to determine who will be offered interviews, it must consider them in determining the best applicants to fill the positions. Otherwise Respondent is rendering the statutory provisions which require the addition of veterans preference credits meaningless.

Political subdivisions of this state are required to follow the plain language of Minn. Stat. § 197.455, and are not allowed to substitute their own alternative types of veterans preferences. As the Minnesota Supreme Court stated in *Hall v. City of Champlin*:

Both parties and the League agree that the legislature intended, in its 1975 enactment, to create a uniform system for the application of veterans preference in hiring. With a goal of uniformity, the legislature would not likely create a “patchwork” of veterans preference rights which would result, under the city’s proposed reading of the statutes, in giving veterans preference in some cities and not in others. Only a uniform policy applicable to all veterans throughout the state can effect the intent of the legislature.²¹

The Commissioner of Veterans Affairs may grant a veteran whose rights under the Veterans Preference Act have been violated such relief as the Commissioner finds justified. The Administrative Law Judge recommends that the relief provided to Petitioner should put Petitioner as close as possible to the position he would have been in if Respondent had complied with the Veterans Preference Act. The Administrative Law Judge believes the Order he is recommending accomplishes this goal.

S. M. B.

²¹ *Hall v. City of Champlin*, 463 N.W.2d 502, 505 (Minn. 1990).