

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

In the Matter of Jeffrey Allen LaVigne

**RECOMMENDATION FOR AN ORDER
OF SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Eric L. Lipman for an oral argument on May 17, 2016.

Ian M. Welsh, Assistant Attorney General, appeared on behalf of the Minnesota State Lottery (the Lottery). Jeffrey Allen LaVigne, the Employee-Veteran, appeared on his own behalf and without counsel.

STATEMENT OF THE ISSUES

1. Was Mr. LaVigne legally entitled to interview for a senior information management position with the Lottery?
2. If not, is the Lottery entitled to judgment as a matter of law?

SUMMARY OF CONCLUSIONS

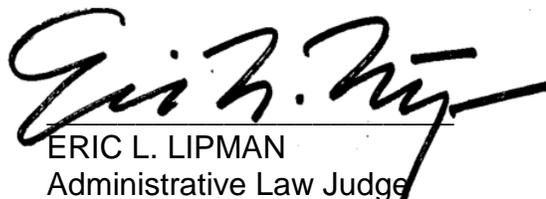
The Administrative Law Judge concludes that Mr. LaVigne did not meet the minimum qualifications for the Lottery's information services manager position. As a result, Mr. LaVigne was not legally entitled, under Minn. Stat. § 43A.11, subd. 7 (2014), to interview for the position.

Based upon the hearing record and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

1. The Lottery's Motion for Summary Disposition should be **GRANTED**.
2. Mr. LaVigne's appeal should be **DISMISSED**.

Dated: June 14, 2016


ERIC L. LIPMAN
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 (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

Factual Background

Minnesota is one of 43 states that operates a lottery. Like most of those states, the Minnesota State Lottery offers a combination of “instant” games (where purchasers can scratch off the coating on a ticket to reveal whether or not they win a prize) and “online” games (where tickets contain several numbers and a drawing is held at a scheduled time to determine the winning numbers).¹

In Fiscal Year 2012, the Lottery made \$165 million in sales of “online” lottery tickets, a figure that represented 32 percent of its revenue.² The Lottery makes these sales through an integrated network of computer terminals in retail locations across Minnesota.³

State law provides that the Director of the Minnesota State Lottery may employ personnel as are needed to operate the lottery; enter into contracts with vendors, lottery

¹ See *Minnesota State Lottery Overview*, at 9 (Minnesota State Lottery, 2013); *Minnesota State Lottery, Evaluation Report 04-01*, at 3 (Office of Legislative Auditor, 2004).

² *Minnesota State Lottery Overview, supra*, at 19.

³ *Evaluation Report 04-01, supra*, at 10-11.

related-organizations and governmental units for lottery operations; and “take all necessary steps to ensure the integrity of, and public confidence in, the State Lottery.”⁴

On November 3, 2015, the Lottery advertised a job opening for an Information Services Manager (I/S Manager).⁵

The advertisement described the particular duties, reporting relationships and minimum qualifications for the position. It read:

Job Duties:

Manage and administer the Lottery's systems activities, software development projects, computer resources, voice and data communication networks, office automation, local area networks, and the Information System staff. Serves as the Assistant to the Director of Operations in the Director of Operations absence. The position exists to coordinate the planning, development and implementation of Lottery-wide information systems policies and to represent the agency on any systems related interagency committees or task forces.

Applicants who are offered employment will be subject to passing a background check, including fingerprinting, as a condition of their employment.

Minimum qualifications:

Bachelor of Science in IT or closely related field and two years advanced professional experience in Information Technology; or 3 years of additional advanced professional experience may substitute for degree requirements.

Interpersonal skills sufficient to effectively deliver and explain information to manager, supervisors and department employees.

Analytical ability/critical-thinking skills and problem-solving ability sufficient to analyze and evaluate complex information/problems, identify, research and evaluate alternatives/issues/different points of view, independently make sound decisions, resolve conflicts and provide guidance to agency manager and supervisors on a variety of IT issues.

Written and oral communication skills sufficient to prepare effective documents, presentations and reports.

Ability to plan and manage a large complex budget for hardware acquisition and operation.

⁴ Minn. Stat. § 349A.02, subd. 3 (3), (5), (7) (2014).

⁵ Affidavit (Aff.) of Loretta Nichols.

Ability to identify Lottery-wide short and long term information systems needs and hardware needs.

Ability to manage and direct highly skilled and technical personnel engaged in programming, systems analysis and computer operations.⁶

On November 4, 2015, Mr. LaVigne, who was then the Lottery's Lead Worker for Quality Assurance, applied for the I/S Manager position. As part of the application process, Mr. LaVigne submitted his resume, which detailed both his education and prior work experience.⁷

As detailed in his resume, Mr. LaVigne was an honorably-discharged veteran of the United States Army.⁸ He holds an Associate's Degree in Information Technology Management from Rasmussen College, but does not possess a Bachelor's Degree.⁹ Moreover, at the time of his application, Mr. LaVigne had a total of four years and eight months of work experience in information technology.¹⁰

Because Mr. LaVigne does not hold a Bachelor's Degree, he could be considered for the I/S Manager position by substituting three additional years of "additional advanced professional experience," beyond the two years of such experience that were required alongside such a degree, for a total of five years of "advanced professional experience."¹¹

On November 20, 2015, Wesley R. Harms, the Assistant Director of the Lottery, wrote an electronic mail message to Mr. LaVigne to inform him that he was not selected for an interview for the I/S Manager position. Mr. Harms wrote:

We received your resume and it's very impressive. You have excellent technical abilities, but I think we need someone in that position that is both technically gifted as well as having many years of managerial experience or three years of additional advanced professional experience. The Lottery has made tremendous strides in iGaming and we wouldn't have gotten there without your efforts. I want to thank you for your interest in the position and thank you for always giving your best.¹²

On January 13, 2016, the Lottery hired another applicant for the position.¹³

⁶ Aff. of L. Nichols, Ex. 1.

⁷ Aff. of L. Nichols, Ex. 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Aff. of L. Nichols, Ex. 1.

¹² Petitioner's Ex. A.

¹³ Aff. of L. Nichols, ¶ 6.

On February 27, 2016, Mr. LaVigne filed a Petition for Relief under Minnesota's Veteran's Preference Act. He alleged that the Lottery violated Minn. Stat. § 43A.11, subd. 7, by denying him an opportunity to interview for the I/S Manager position.

Summary Disposition

Summary disposition is the administrative equivalent of summary judgment.¹⁴ Summary disposition is appropriate where there is no genuine issue about any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the outcome of the case.¹⁵

The Lottery, as the moving party, has the burden of showing the absence of genuine issues of material fact. In order to resist the motion, Mr. LaVigne must show that there are facts in dispute which, if resolved in his favor, will affect the outcome of the case.¹⁶ The existence of a genuine issue of material fact must be established by substantial evidence; general averments are not enough to meet the nonmoving party's burden.¹⁷ With that said, the evidence needed to defeat a summary disposition motion does not need to be in a form that would be admissible at trial.¹⁸

Lastly, the nonmoving party is given the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the party seeking summary disposition.¹⁹ If reasonable minds could differ as to the meaning of the evidence, judgment as a matter of law should not be granted.²⁰

Veterans Preference in Hiring

Minn. Stat. § 43A.11, subd. 7, guarantees veterans who are recently-separated from the armed services opportunities to present their qualifications for state employment. The statute provides in part:

Each recently separated veteran who meets minimum qualifications for a vacant position and has claimed a veterans or disabled veterans preference must be considered for the position. The top five recently

¹⁴ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chem. Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); Minn. R. Civ. P. 56.03.

¹⁵ *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N. W. 2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N. W. 2d 804, 808 (Minn. Ct. App. 1984).

¹⁶ *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N. W. 2d 853, 855 (Minn. 1986).

¹⁷ *Id.*; *Murphy v. Country House, Inc.*, 240 N. W. 2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N. W. 2d 712, 715 (Minn. Ct. App. 1988).

¹⁸ *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

¹⁹ See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Thiele v. Stich*, 425 N. W. 2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N. W. 2d 876, 878 (Minn. 1971); *Dollander v. Rochester State Hosp.*, 362 N. W. 2d 386, 389 (Minn. Ct. App. 1985).

²⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

separated veterans must be granted an interview for the position by the hiring authority.²¹

The Lottery does not dispute that Mr. LaVigne was “a recently separated veteran” as those terms are used in Chapter 43A (2014). Instead, it maintains that the Mr. LaVigne did not meet the minimum qualifications for the I/S Manager position. It requests summary disposition and a recommendation for dismissal of Mr. LaVigne’s petition.²²

For his part, Mr. LaVigne makes two key claims in opposition to the Lottery’s motion. He asserts that the reason proffered by the Lottery for denying him an interview was improper; because the denial was based upon factors that were not related to the job’s minimum qualifications. Secondly, Mr. LaVigne asserts that his coursework in information management at Rasmussen College qualifies as “additional advanced professional experience,” as those terms are used in the job announcement.²³ Each of these claims is discussed below.

Analysis

Mr. LaVigne points to Mr. Harms’ electronic mail message of November 20, 2015, and Harms’ statement that the Lottery was looking for a candidate that had “many years of managerial experience,” as proof of the Lottery’s misconduct. Mr. LaVigne asserts that significant managerial experience was not a minimum qualification of the I/S Manager post, and that he was judged by a different, and unstated, set of standards.

The Administrative Law Judge disagrees. The minimum qualifications for the I/S Manager position requires an “[a]bility to manage and direct highly skilled and technical personnel engaged in programming, systems analysis and computer operations.”²⁴ Further it required an ability to “manage a large complex budget for hardware acquisition and operation.”²⁵ Given that Mr. LaVigne’s resume does not detail much experience in directing and managing technical personnel, or managing budgets for the acquisition and operation of hardware, the Lottery properly declined to interview him for this vacancy.²⁶

Additionally, Mr. LaVigne maintains that because the term “additional advanced professional experience,” is not defined in the job announcement, or elsewhere, he should be permitted the opportunity to establish that his coursework at Rasmussen College qualifies as “advanced professional experience.”

²¹ Minn. Stat. § 43A.11, subd. 7.

²² RESPONDENT’S MOTION FOR SUMMARY DISPOSITION, at 1.

²³ PETITIONER’S RESPONSE TO THE MOTION FOR SUMMARY DISPOSITION, at 1, ¶ 8.

²⁴ Aff. of L. Nichols, Ex. 1.

²⁵ *Id.*

²⁶ See Aff. of L. Nichols, Ex. 2.

The Administrative Law Judge disagrees. The meaning of “advanced professional experience,” is plain when it is read in the context of the job announcement: The Lottery wanted to hire an information services professional that was experienced in managing complicated budgets, work teams and acquisition plans. The position sought demonstrated ability to “plan and manage a large complex budget for hardware acquisition and operation,” “identify Lottery-wide short and long term information system needs,” and “independently make sound decisions, resolve conflicts and provide guidance to agency managers and supervisors on a variety of [information technology] issues.”²⁷

To this end, the Lottery was entitled to state its needs for a manager with either: a Bachelor’s Degree and two years of such work experience; or, a candidate with five years of significant management experience. Mr. LaVigne had neither.

The Lottery did credit some academic work that it thought was useful - namely, work obtaining a four-year degree - but even for these applicants, a year’s worth of study did not supplant a required year’s worth of advanced managerial experience. The tabulation that Mr. LaVigne proposes fundamentally changes the terms of the announcement - crediting academic work that was not credited in the announcement and more generously awarding credit for that work than the announcement allows other applicants. This he cannot do.

The Lottery does have a need for a manager with significant experience managing complex projects and work teams. This is apparent when one considers the broader statutory environment in which the Lottery operates. The legislature has accorded the Lottery with greater autonomy than other state agencies when acquiring information technology,²⁸ and, it regards the effective and honest performance of Minnesota lotteries as a “particularly sensitive” and important matter.²⁹ Because of the heightened authority and accountability of such a role, the Lottery acted properly in limiting the range of candidates it invited to interview for the I/S Manager position.

The Lottery is entitled to summary disposition.

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²⁷ Aff. of L. Nichols, Ex. 1.

²⁸ See Minn. Stat. § 16E.06 (d) (2014).

²⁹ See Minn. Stat. § 349A.07, subd. 1 (2014) (“In entering into a lottery procurement contract, the director shall utilize an open bid process and shall take into account the particularly sensitive nature of the state lottery and shall consider the competence, quality of product, experience, and timely performance of each potential vendor in order to promote and ensure security, honesty, fairness, and integrity in the operation and administration of the lottery”).