

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

Kathleen S. Griesel,

Petitioner,

vs.

Winona Housing and Redevelopment
Authority,

Respondent.

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

The above-entitled matter came on for hearing before Kathleen D. Sheehy, Administrative Law Judge, on November 23, 2004, at the Winona County Government Center, 177 Main Street, Winona, MN 55987. The OAH record closed on receipt of post-hearing briefs on December 15, 2004.

James R. Forsythe, Esq., Streater & Murphy, P.A., 64 East Fourth Street, P.O. Box 310, Winona, MN 55987-0310, appeared for Kathleen S. Griesel (petitioner).

Eric P. Johnsrud, Esq., Pflughoeft, Pederson & Johnsrud, LLP, 160 Lafayette Street, P.O. Box 436, Winona, MN 55987-0436, appeared for the Winona Housing and Redevelopment Authority (HRA or respondent).

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after review of the record and may adopt, reject, or modify the Recommendations contained herein. Pursuant to 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. An opportunity must be afforded each party adversely affected to file exceptions and to present argument to the Commissioner. The parties should contact the Commissioner of Veterans Affairs to ascertain the procedure for filing exceptions and presenting argument. 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. 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 the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

Did the Winona HRA fill a leasing agent position in violation of petitioner's rights under the Veterans Preference Act (VPA), Minn. Stat. § 197.455?

The Administrative Law Judge concludes that the Winona HRA filled the position in violation of the petitioner's rights under the VPA. The hiring decision should be vacated and reopened using a selection process that is consistent with the VPA.

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The petitioner, Kathleen S. Griesel, is a veteran honorably discharged from the United States Army in February 1984, after four years of service.^[1]
2. The Winona HRA is a city housing and redevelopment authority organized pursuant to Minn. Stat. § 469.003. The authority consists of a board of commissioners, appointed by the mayor with the approval of the city council. The Winona HRA has seven employees, including an executive director, William Doerer, and an administrative supervisor, Linda Bedtka.
3. From May 1996 through December 2000, Griesel worked for the Winona HRA as an occupancy specialist. In this position she was responsible for leasing apartments, monitoring waiting lists, interviewing/screening applicants, monitoring lease compliance, conducting annual recertifications of tenant eligibility, and assisting with rent collections. Shortly after being hired she passed certification examinations required by the U.S. Department of Housing and Urban Development on public housing eligibility and rent calculation.^[2]
4. Griesel resigned voluntarily from the HRA in August 2000. At the request of the executive director she agreed to stay until a replacement was hired and trained in December 2000.^[3]
5. In or about January 2001 Griesel moved to Maryland, but shortly thereafter she returned to Winona. She obtained a position as deputy court administrator at the Winona County Courthouse, where she worked from May to October 2001. Since October 2001 she has worked as an apartment manager for Horizon Management Group. In that position she is responsible for leasing apartments based on eligibility for federal tax credit, verifying tenant incomes, conducting annual recertifications, supervising maintenance, coordinating unit turnovers, and hiring outside contractors.^[4]
6. On July 29, 2004, the Winona HRA advertised an open position for a leasing agent. The advertisement indicated that the HRA would accept applications for one week, until August 6, 2004.^[5] The leasing agent position was defined to include less responsibility than the occupancy specialist position

Griesel had previously filled, and it also paid less than Griesel had earned when she left the HRA in 2000.^[6] The HRA intended to hire someone who could, within three years, grow into an occupancy specialist position.^[7]

7. Griesel saw the advertisement and applied for the job. The HRA received and considered a total of 11 applications for the position. One application, received after the period for submission of applications had closed, was disregarded.

8. The administrative supervisor and executive director took the applications to a meeting of the HRA board of commissioners in early August. The chair of the board indicated that the board's personnel committee would contact them to review the applications before a hiring decision was made. He had previously expressed concerns regarding the hiring process to other board members and wanted to ensure that the HRA hired qualified applicants.^[8]

9. While waiting for the personnel committee to contact them, Bedtka and Doerer reviewed the applications and interviewed five people. They did not select Griesel for an interview. Doerer believed she was overqualified for the job because the position had been scaled down from the one she had held in the past. Although he did not view her as being ineligible for the position, he made the judgment that she should not be interviewed because she had not seemed happy in the job before and he did not know why she would want it now.^[9]

10. After interviewing the five applicants, Bedtka recommended and Doerer agreed that they should offer the job to one of the applicants, and they obtained approval from the chair to do so. The person to whom they offered the job declined it, as he had already taken a different position at Ashland Furniture. Doerer then indicated to the chair that he wanted to offer the position to another of the five applicants, a young man who had not graduated from high school but had obtained his GED and attended some community college classes.

11. At that point, the chair contacted two board members comprising the personnel committee, John Ferden and Steven Zolondek, and asked them to review the applications. Ferden has taught at Winona State University for 28 years and has been on the HRA board for two years. Zolondek owns a plumbing business and has been on the HRA board for more than five years. They both obtained copies of seven applications from Bedtka, including the petitioner's application.

12. Ferden knew that he did not have all of the applications and that some had been cut ahead of time. He understood that the seven applications he reviewed were from people who were qualified for the job. He developed a 22-point rating system based on six different factors, including diploma or equivalent, ability to operate the computer program, math skills, willingness to attend out-of-area training, previous work-related experience, and criminal record. Griesel received the highest score (18.5) based on his ranking.^[10]

13. Zolondek agreed with Ferden's ranking of the applicants, although he did not score them using Ferden's ranking system; specifically, he agreed that Griesel was the top-ranked applicant. When he discussed his rankings with Doerer, Doerer told Zolondek that he wanted to hire the man he had previously interviewed, Rick Prospichal, because Prospichal was "a nice guy" and Doerer "wanted to give him a break." Doerer informed Zolondek that there had been problems with Griesel's performance in the past. Zolondek then reviewed Griesel's personnel file. In Zolondek's opinion, the performance issues noted there did not disqualify Griesel for the job.^[11]

14. Doerer, Bedtka, and another employee did a second round of three interviews. They did not interview Griesel. Doerer then did a final interview of the two finalists. He offered the job to Prospichal, who accepted it.

15. At no point during the hiring process—reviewing the resumes, interviewing the candidates, or in discussions with the HRA board—did the HRA staff take veterans status into consideration or attempt to comply with the Veterans Preference Act.^[12] Neither Doerer nor Bedtka were aware that the VPA applied to the HRA's hiring decisions.^[13]

16. On September 3, 2004, Doerer sent Griesel a letter informing her that the position had been filled. He also said the HRA would keep her application on file for future openings.^[14]

17. On September 5, 2004, Griesel wrote to the Doerer asking him to notify her of the number of points she was given based on her experience and whether any veterans preference points were applied.^[15] The HRA did not respond to her letter.

Procedural Background

18. On October 6, 2004, the petitioner filed a petition for relief with the Department of Veterans Affairs alleging that the HRA had failed to consider her for the position in violation of the Veterans Preference Act. She asked to be appointed to the position and asked that the HRA be required to use a point system and "due process" for hiring decisions.^[16]

19. The Department of Veterans Affairs issued a Notice of Petition and Order for Hearing in this matter on October 14, 2004. The hearing was scheduled for November 18, 2004.

20. At the request of counsel for the HRA, and with the agreement of the petitioner, the hearing was rescheduled for November 23, 2004.

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

CONCLUSIONS OF LAW

1. Pursuant to Minn. Stat. §§ 14.50 and 197.481, subd. 4, the Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter.
2. The Department of Veterans Affairs has complied with all procedural and substantive requirements of law or rule.
3. The petitioner is an honorably discharged veteran within the meaning of Minn. Stat. § 197.447 who is entitled to the benefits and protections of the Veterans Preference Act.
4. A veteran has the burden of proving a violation of the Veterans Preference Act.^[17]
5. The Winona HRA is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. § 197.455.^[18]
6. 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.^[19]
7. The Act further provides that there shall be added to the “competitive open examination rating of a nondisabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.”^[20]
8. An eligible with a rating augmented by veteran’s preference shall be entered on an eligible list ahead of a nonveteran with the same rating.^[21]
9. A governmental agency, when notifying eligibles that they have passed examinations, shall show the final examination ratings and preference credits and shall notify eligibles that they may elect to use veteran’s preference to augment passing ratings.^[22]
10. If the appointing authority rejects a certified eligible who has received veteran’s preference, the appointing authority shall notify the eligible in writing of the reasons for the rejection and file the notice with the appropriate local personnel officer.^[23]
11. Political subdivisions of the State must adapt their hiring systems to a 100-point rating system in order to effectuate the intent of the Veterans Preference Act and to allow for uniform application of veterans preference points.^[24]
12. The Winona HRA violated the petitioner’s veteran’s preference rights in filling the position of leasing agent without compiling a list of eligibles through use of a

100-point rating system and without allocating her an extra five points to which she was entitled as a veteran.

13. The remedy available under the statute is to require the City to vacate the hiring decision, reopen the position, and conduct a new selection process based upon the appropriate application of a 100-point rating system and allocation of additional points to the petitioner in recognition of her status as a veteran.

14. The Memorandum attached hereto is incorporated by reference.

Based on the above Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATIONS

IT IS RESPECTFULLY RECOMMENDED THAT the Commissioner of Veterans Affairs issue an Order determining that:

1. The Winona HRA filled the position of leasing agent in violation of the Veterans Preference Act;
2. The Winona HRA shall conform its hiring procedures to the requirements of the Veterans Preference Act; and
3. The Winona HRA shall vacate the hiring decision, reopen the position, and conduct a new selection process based upon the application of a 100-point rating system and proper allocation of additional points in recognition of veterans status.

Dated this 5th day of January, 2005.

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Tape recorded (four tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

Effective Date of 2004 Amendments to the VPA

Until recently, the VPA contained no hiring preference of its own but rather referred to the preference to be granted a veteran under state civil service laws. The VPA provided in relevant part that “[t]he provisions of section 43A.11 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.”^[25]

Section 43A.11 contained provisions requiring the addition to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.^[26] Disabled veterans were entitled to ten points.^[27] It also provided that an eligible with a rating augmented by veteran’s preference shall be entered on an eligible list ahead of a nonveteran with the same rating; that a governmental agency was obligated to notify eligibles of their right to use veteran’s preference to augment passing ratings on final examinations; and that if an appointing authority rejects a certified eligible who has received veteran’s preference, the appointing authority shall notify the eligible in writing of the reasons for the rejection.^[28]

In 2004, these provisions of section 43A.11 were enacted, verbatim, within the VPA itself.^[29] The VPA now provides that “[t]his section shall 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.”^[30] At the same time, section 43A.11 was amended to provide a stronger preference for veterans seeking employment with the state civil service. The requirement to add five or ten points, depending on disability status, was eliminated. Disabled veterans who meet minimum qualifications for state civil service positions are now to be listed in the applicant pool ahead of all other applicants; nondisabled veterans who meet minimum qualifications are to be listed in the applicant pool ahead of nonveterans, but behind disabled veterans.^[31] The intent of these simultaneous amendments appears to be to preserve the former requirements of section 43A.11 and to make them applicable to political subdivisions other than the state, while at the same time enhancing the preference for veterans seeking employment in the state civil service.

At the hearing, the Winona HRA contended that the amendments to the VPA did not apply to this hiring decision because the process was started before the effective date. The amendments do not specify an effective date, so pursuant to Minn. Stat. §645.02, the amendments to both the VPA and chapter 43A became effective August 1, 2004. Except for publication of the advertisement on July 29, 2004, the entire hiring process was conducted after August 1, 2004. Applications were open until August 6, and the process of reviewing the applications, interviewing candidates, and making the

hiring decision was begun after that time. The HRA now appears to accept, in its letter brief, that the amendments are applicable. The record is clear that the amendment to the VPA is applicable to this case.

Substantive Effect of 2004 Amendments to the VPA

Both parties argue that Minn. Stat. § 43A.11, as amended, controls the disposition of this case. The petitioner argues that she is entitled to the position as a matter of law because, as a veteran, she should have been placed ahead of all other applicants. The Winona HRA contends first that there is no absolute guarantee of employment for veterans, even under the amendments, and second that because the petitioner does not meet the minimum qualifications for the position she is not entitled to be ranked in an applicant pool at all.

The petitioner's argument that the enhanced preference contained in Minn. Stat. § 43A.11 applies to this case is unfounded. By its terms, Minn. Stat. § 197.455, subd. 1, is the controlling provision. The VPA retains the language requiring the addition of five or ten points, depending on a veteran's disability status, to the score of a competitive open examination. The case law developed with regard to section 43A.11 (prior to the amendments) is still applicable in defining how such a system is to be implemented by an appointing authority that does not use a civil service employment system.^[32]

In *Hall v. City of Champlin*, the Minnesota Supreme Court held that political subdivisions of the state must adapt their hiring systems to a 100-point rating system to enable the allocation of veterans preference points.^[33] The Court provided further direction as follows:

Our decision today does not unduly restrict the discretion granted by the legislature to cities that choose to operate under a personnel ordinance. It does not require political subdivisions to adopt any particular form of hiring system. They need not adopt civil service systems nor need they extensively revise hiring processes and administer formal written examinations for all positions subject to veterans preference. A local appointing authority may administer any type of evaluation as long as it is based on criteria capable of being reduced to [a] 100-point rating system. The 100-point rating system will apply to all positions except those specifically exempted from the veterans preference act by Minn. Stat. §197.46.^[34]

Furthermore, contrary to petitioner's arguments, veterans are not entitled to an absolute hiring preference under the VPA, nor were they under section 43A.11, subsds. 3 and 4. The plain language of the statute addresses only the issue of a veteran's ranking on an eligibility list; it contains no guarantees of employment to a veteran, whatever his or her ranking, but rather expressly contemplates that a veteran who is placed on the list of certified eligibles may be rejected by the appointing authority.^[35]

The Minnesota Court of Appeals has interpreted the statute in this manner on two occasions. In *McAfee v. Dept. of Revenue*,^[36] the court held that the hiring preference does not apply to temporary unclassified positions in the Department of Revenue. The court noted, however, that the statute does not provide an absolute preference for veterans; a veteran's preference credit may increase the chance that a veteran will receive an interview, but the appointing authority may hire any certified applicant.^[37] Earlier, in *Grehl v. Minneapolis Public Schools*, the court held that once a veteran has received the appropriate number of preference points and has been ranked correctly on an eligible list, the veteran has been "afforded all of the preference entitled to him by law."^[38]

Finally, the parties disagree as to the import of certain statements contained in an otherwise satisfactory performance review the petitioner received before she voluntarily left the Winona HRA in December 2000.^[39] Between her hiring in 1996 and her departure in 2000, the petitioner had one performance review that occurred in March 1999.^[40] There is considerable conflict in the evidence regarding the significance of this evaluation and its impact on Griesel's eligibility for the position. Linda Bedtka's testimony that Griesel should not be considered eligible was not consistent with that of board commissioners John Ferden and Steven Zolondek, who both said the applications they reviewed were from people who were qualified for the job and that, of them all, Griesel was most highly qualified. William Doerer, who made the final hiring decision, testified that in his opinion Griesel was overqualified for the job, that he did not deem her ineligible for the position, and that he remained willing to listen if someone disagreed with his judgment that she should not be interviewed. He was aware of but had no independent knowledge of the issues raised by Bedtka. Bedtka's testimony on some of these issues is also inconsistent with other statements she made in the performance evaluation^[41] and with written statements she made to Griesel after the performance evaluation.^[42]

The Winona HRA contends that based on this evaluation Griesel cannot be said to meet the minimum qualifications for the position and she is not entitled to be ranked against any other applicants seeking the position.^[43] Griesel contends that the HRA is not permitted to rely on such evidence to exclude her from the pool of applicants. She also argues that the policy behind a related amendment to section 43A.10 should preclude the HRA from making such a unilateral decision here. That amendment provides that the commissioner of employee relations may remove from consideration any applicant for a state civil service position who has been dismissed for cause from public service; has directly or indirectly given or promised to give anything of value to any person in connection with the selection process, appointment, or proposed appointment; has committed fraud or intentional misrepresentation in the application or selection process; or has been convicted of a crime directly related to the vacant position.^[44]

As noted above, the governing statute in this case is Minn. Stat. § 197.455. It does not contain the "minimal qualification" language of section 43A.11, or any reference to the factors listed in Minn. Stat. § 43A.10, subd. 6b. Political subdivisions,

including the Winona HRA, are still required to make hiring decisions in conformance with *Hall v. City of Champlin*. The HRA must develop a system that ranks all applicants based on a 100-point scale, and it must select those eligible for an interview after appropriate application of veterans preference points. Consideration of any past performance issues must take place after completion of this process.

K.D.S.

^[1] See Petition for Relief Under the Veterans Preference Act, October 6, 2004 (Certificate of Release or Discharge from Active Duty); Testimony of Kathleen Giesel.

^[2] Ex. 1.

^[3] Testimony of Kathleen Giesel.

^[4] Ex. 1.

^[5] Ex. 8.

^[6] Ex. 2.

^[7] Testimony of Linda Bedtka.

^[8] Testimony of Steven Zolondek, John Ferden.

^[9] Testimony of William Doerer.

^[10] Testimony of John Ferden; Ex. 5.

^[11] Testimony of Steven Zolondek.

^[12] Testimony of Linda Bedtka.

^[13] Testimony of William Doerer, Linda Bedtka.

^[14] Ex. 3.

^[15] Ex. 4.

^[16] Petition for Relief under the Veteran's Preference Act, October 6, 2004.

^[17] Minn. R. 1400.7300, subp. 5.

^[18] See *Stockwell v. Winona HRA*, OAH Docket No. 3-3100-16087-2 (October 21, 2004); Commissioner's Decision and Order dated November 10, 2004.

^[19] Minn. Stat. § 197.455, subd. 2.

^[20] *Id.*, subd. 4.

^[21] *Id.*, subd. 8.

^[22] *Id.*, subd. 9.

^[23] *Id.*, subd. 10.

^[24] *Hall v. City of Champlin*, 463 N.W.2d 502 (Minn. 1990).

^[25] Minn. Stat. § 197.455 (2002).

^[26] Minn. Stat. § 43A.11, subd. 3 (2002).

^[27] *Id.*, subd. 4 (2002).

^[28] *Id.*, subds. 7-9 (2002).

^[29] Minn. Laws 2004, Chapter 207, § 29.

^[30] Minn. Stat. § 197.455, subd. 1.

^[31] Minn. Stat. § 43A.11, subd. 7.

^[32] When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed on such language. Minn. Stat. §645.17(4).

^[33] *Hall*, 463 N.W.2d at 505.

^[34] *Id.*, 463 N.W.2d at 506.

^[35] See Minn. Stat. § 197.455, subd. 10 (notice of reasons for rejection).

^[36] 514 N.W.2d 301 (Minn. App. 1994).

^[37] *McAfee*, 514 N.W.2d at 305.

^[38] *Grehl*, 484 N.W.2d 815, 817 (Minn. App. 1992).

^[39] By agreement of the parties, Griesel's entire personnel file was received in evidence as Ex. 9, subject to a protective order. It contains private data on individuals and is considered not public information under the Minnesota Data Practices Act, Minn. Stat. § 13.43, subd. 4.

^[40] Ex. 9 at 25-28; see also Ex. 9 at 19-21 (supervisor's follow-up notes).

^[41] See Ex. 9 at 25, Item D.

^[42] See Ex. 10 (holiday card dated December 1999 on which Bedtka wrote to Griesel "I want you to know how much I appreciate you being there for me. You are a joy to have around, you know.").

^[43] See Minn. Stat. § 43A.11, subd. 7 (applicants who meet the "minimum qualifications" shall be listed in the pool).

^[44] Minn. Stat. § 43A.10, subd. 6b; Minn. Laws 2004, Chapter 207, § 12.