

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF VETERANS AFFAIRS

In the Matter of:

David C. Easter,
Petitioner,

vs.

Dakota County,
Respondent.

**AMENDED RECOMMENDED
ORDER ON MOTION
FOR SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Kathleen D. Sheehy on Dakota County's motion for summary disposition. The County filed its motion April 30, 2008; the Petitioner filed his response by email on May 13, 2008. The Petitioner also filed a motion to compel discovery on May 21, 2008, to which the County responded on May 22, 2008. The motion record closed on May 23, 2008.

Kathryn M. Keena, Assistant County Attorney, 1560 Highway 55, Hastings, MN 55033, appeared for the Dakota County (the County). David C. Easter (Petitioner) appeared for himself without counsel.

Based upon all the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT:

1. The County's motion for summary disposition be **GRANTED**;
2. The Petitioner's motion to compel discovery be **DENIED**;
3. The Department of Veterans Affairs dismiss the Petition of David Easter for relief under the Veterans Preference Act; and
4. The hearing scheduled to take place on June 4, 2008, is hereby canceled.

Dated: May 29, 2008.

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

The Petitioner is a disabled veteran who was honorably discharged from service in the U.S. Marine Corps on April 11, 1986, after four years of service. His primary specialty area while in service was as a microwave equipment repairman.^[1] The Petitioner has applied for several positions with Dakota County and has not been hired for any of them to date. On March 6, 2008, the Petitioner filed a petition for relief with the Department of Veterans Affairs, alleging that the County failed to give him an interview for a position as a Building Services Technician and singled him out because he had asserted his rights under the Veterans Preference Act. On March 10, 2008, he filed a second petition, in which he alleged that the County did not consider him for a Senior Office Specialist position in retaliation for his previous exercise of his Veterans Preference Rights and had failed to demonstrate that the County's reasons for rejecting him were job-related or consistent with business necessity. The County seeks summary disposition of these claims, contending it fully complied with the Veterans Preference Act and was not obligated to interview or hire the Respondent for either position. In addition, the County maintains it provided the required notice to the Petitioner of the reasons why his applications were rejected.

Factual Background

In support of its motion, the County offered evidence in the form of an Affidavit of Sara Knoll, a staffing consultant in the County's Employee Relations Department. According to the affidavit, since November 2007 the Respondent has applied for 17 different positions with Dakota County, ranging from administrative assistant, case aide in Community Corrections, campground operator, Veterans Service Officer, park ranger, human resources, and public health epidemiologist/senior information specialist. The Petitioner met the minimum qualifications for 14 of the positions. For each of these 14 positions, the Petitioner's application was forwarded to the specific hiring department within the County for review and consideration. The Petitioner was interviewed for a position as a Public Assistance Program Eligibility Specialist, but was not offered a second interview. He did not receive an interview for any of the other positions for which he met the minimum qualifications.^[2]

With regard to the two positions at issue in this case, the County offered evidence that the Building Services Technician position was posted in January 2008, and the Senior Office Specialist Position was posted in December 2007. The Petitioner completed an on-line application for both positions. As part of the application process, the Petitioner completed an agency-wide questionnaire that asks applicants whether they are qualified for Veterans Preference points. The Petitioner completed the questionnaire for both positions, indicating he was a disabled honorably discharged veteran entitled to ten Veterans Preference points if he met the minimum job requirements.^[3]

The Building Services Technician position was with the Facilities Management Department. The position description called for basic knowledge of the practices and procedures of building maintenance and repair; basic knowledge of various mechanical, electrical, plumbing, pneumatic and HVAC controls and systems; knowledge of the care and supervision in the use of strong chemicals; knowledge of maintenance and repair of

custodial equipment; basic understanding of blueprints and specifications; personal computer skills and electronic mail experience; and ability to communicate effectively both orally and in writing.^[4] The County received 31 applications for the Building Services Technician position. All applicants met the minimum job requirements. The County notified the Petitioner that he met the minimum requirements of the position and that, with the addition of Veterans Preference points, his final rating score was 90 out of 100 points. His rating score placed the Petitioner third on the list of eligible candidates. The Employee Relations Department forwarded the applications of the 22 top-scoring applicants to the Facilities Management Department for review. The hiring manager reviewed the applications and offered three persons interviews for the position. The Petitioner did not receive an interview because he lacked direct experience in this area. One of the finalists who did receive an interview, and was ultimately hired for the position, was a veteran who had been working as a temporary employee in the Facilities Management Department. On March 5, 2008, the County notified the Petitioner that the hiring department had selected a candidate whose skills and/or experience most closely matched the needs for this position.^[5]

The Senior Office Specialist position was available within the Dakota County Library System. The position description required considerable knowledge of general office procedures, practices, and equipment; knowledge of departmental programs, policies, and procedures; knowledge of English, grammar, and punctuation; knowledge of math and bookkeeping principles; ability to operate mainframe computer terminals and personal computer equipment, and software with Microsoft Office Products; ability to effectively organize and prioritize departmental workload; ability to work effectively with the public, department and County associates in a professional manner; and ability to communicate effectively with both internal and external customers.^[6] The County received 168 applications for the Senior Office Specialist position, and 164 of them met the minimum job requirements. The County notified the Petitioner that he met the minimum requirements and that, with the addition of Veterans Preference Points, his final rating score was 104 out of 100 points. His rating score placed the Petitioner first on the list of eligible candidates. The Employee Relations Department forwarded the applications of the 21 top-scoring applicants to the hiring manager of the Dakota County Library for review. Eight persons were interviewed. The Petitioner did not receive an interview because the hiring manager did not believe his application addressed the needs of the department. On March 7, 2008, the County notified the Petitioner that the hiring department had selected a candidate whose skills and/or experience most closely matched the needs of the position.^[7]

The Petitioner submitted his personal employment profile in connection with both applications at issue in this case. According to his profile, he received a Bachelor's degree in Public Administration from Metropolitan State University in 1992. He provided an employment history reflecting his work as a microwave radio repairman with the U.S. Marine Corps in 1982-86; one year as a student worker for the Veterans Administration in River Falls, Wisconsin, in 1987-88; one year as a student worker providing mail-related services for the Minnesota Pollution Control Agency from 1988-89; fifteen years as an operations supervisor for United Parcel Service in Minneapolis from 1988-2003; six months as a car salesman at Monticello Ford in 2004; three months as a manager trainee for Super America in Ramsey, Minnesota, in 2005; nine months as a sales

coordinator for United Rentals in St. Michael, Minnesota, in 2005-06; and six months as a driver for Magnum Transportation in Blaine, Minnesota in 2006-07.^[8]

Motions for Partial Summary Disposition

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.^[9] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.^[10] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.^[11]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.^[12] 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 under Minn. R. Civ. P. 56.05.^[13] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.^[14]

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.^[15] All doubts and factual inferences must be resolved against the moving party.^[16] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.^[17]

Legal Analysis

The law is well settled in Minnesota that political subdivisions, including Dakota County, must afford a hiring preference to veterans.^[18] The issue in this case is what the preference consists of: the Petitioner maintains the County violated his rights by failing to interview and/or hire him for the two positions at issue, and by failing to adequately notify him of the reasons why he was rejected; the County maintains it gave the Petitioner the preference to which he was entitled and that it had no obligation to interview or hire him. The County also contends it gave adequate notice to the Petitioner of the reasons why he was not selected for the positions.

The Veterans Preference Act, Minn. Stat. § 197.455, subd. 5 (2006), provides in relevant part:

There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of ten points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.

The Act further provides 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.^[19] In addition, a governmental agency, when notifying eligibles that they have passed examinations, shall show the final examination ratings and preference credits and shall notify all eligible persons that they may elect to use veteran's preference to augment passing ratings.^[20] 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.^[21]

The plain language of the Veterans Preference Act makes clear that the preference consists of augmenting a veteran's rating with preference points and ranking an eligible veteran ahead of a nonveteran with the same rating. The Act contains no guarantees of an interview or employment by a veteran, whatever the ranking. By requiring the appointing authority to provide written notice of the reasons for rejecting a veteran who has elected to use the statutory preference, the Act expressly contemplates that an eligible veteran may be rejected.

In *McAfee v. Department of Revenue*, the Minnesota Court of Appeals held that the hiring preference does not apply to temporary unclassified positions in the Department of Revenue.^[22] With regard to Minn. Stat. § 43A.11 (the veteran's preference provision applicable at the time the case was decided), the court noted that 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.^[23] Once a veteran is given his or her preference points and ranked correctly on the eligibility list, the veteran is afforded all of the preference entitled to the veteran by law.^[24]

The County presented evidence that it gave the Petitioner the preference points to which he was entitled and correctly ranked him on the list of eligible persons provided to the hiring departments. The County maintains it was not required to do more, and that it accordingly is entitled to summary disposition and dismissal of the Petitioner's claims. In opposing the motion for summary disposition, the Petitioner argued that the Veterans Preference Act was violated when the County failed to give him the opportunity, despite being rated as number 1, to interview and compete for a position. He further argued:

Dakota County (Respondent) did indeed cause harm to not only Petitioner but to all Disabled Veterans and those who are eligible under the VPA. Respondent's Statement of Fact obstinately fails and neglects to bring forth the true facts. Respondent intentionally violated Minnesota Statutes Chapter 13 data practice laws in order to cover up its violations of the VPA.^[25]

The Petitioner has failed to articulate what the "true facts" are and what information, if any, the County has failed to bring forth. To successfully resist a motion for summary disposition, the non-moving party must show by substantial evidence that there are specific facts in dispute which have a bearing on the outcome of the case, and general averments like the one made above are not enough. The County has established that it is entitled to summary disposition on the Petitioner's claim that the County violated the VPA in failing to interview or hire him for the two positions at issue.

The Petitioner also argues that the County's written explanation to him of the reasons for rejection were insufficient. He argues that the written notice should not be a form letter but should point out specifically what the veteran's shortcomings were so that the veteran would then be able to obtain some type of remedial service from the Veterans Service Office to overcome the stated reason. The statute requires the appointing authority to notify the eligible veteran in writing of the reasons for the rejection.^[26] Here, the County informed the Petitioner that it had selected a candidate whose skills and/or experience most closely match the needs for the positions in

question. The Petitioner's employment profile includes no previous work experience in building maintenance or repair, mechanical or electrical controls or systems, or repair of custodial equipment. Nor does he have any apparent experience working in a library. It is not clear from the record that the letters sent to him were "form" letters; but assuming they were, it appears they were an appropriate response given the requirements of the positions as compared to the Petitioner's work experience. The Administrative Law Judge has concluded that the written notices provided to the Petitioner were legally sufficient and in compliance with the requirements of the Veterans Preference Act, and the County's motion for summary disposition on this claim is granted.

The Petitioner has repeatedly asserted that the County has violated the Data Practices Act and that these alleged violations should preclude granting of the County's motion and entitled him to sanctions. His motion to compel discovery seeks "the existence, status, and disposition of Formal Complaints made under Minnesota Statutes Chapter 13." He attached as an example email requests dated January 16, 2008, in which he asked the County to provide the reasons for rejection with regard to a case aide position, along with a list of eligible names for all positions for which he had applied as of that date. He also requested all applications on the list of eligible persons for all the positions he had applied for in the County. The County has made repeated efforts to determine what the Petitioner is asking for, and it has produced a number of documents to him, including the applications of all the finalists for the positions for which he had applied through the time of his request in January 2008.^[27] In addition, the Petitioner maintains that he met a woman who worked for Dakota County on-line at a dating website, and this woman told him specifically "the practice and procedure of Dakota County in regards to Veterans Preference." He has requested "all records of Dakota County employees using work computers to view on-line dating sites in 2007." The County responded to this request, indicating that its firewall would prevent County employees from accessing the website in question (match.com) from work, and the County thus would have no record of visits there.

The Petitioner has failed to articulate why a list of all eligible names or the applications for all the positions for which the Petitioner has applied would provide information material to resolving this motion, or why he needs more than the names and applications of the finalists. That information might be relevant if there were a dispute about his ranking on the list of eligible persons, but here the evidence is undisputed that the Petitioner was included in the list of persons eligible for an interview. He has further failed to establish the materiality of records pertaining to County employees who have visited on-line dating sites in 2007. It appears the Petitioner believes there must be other documents containing additional reasons why he was not interviewed or offered these positions.^[28] The County has responded that there are no additional documents.

The Administrative Law Judge has explained to the Petitioner that he must specify what documentation he is seeking from the County, why he believes the County has failed to produce documents that exist, and why those documents would be relevant to his claim.^[29] The Petitioner has failed to do so, and his motion to compel discovery and to impose sanctions is accordingly denied. Because the Petitioner has not raised a genuine issue of material fact regarding the County's evidence that he was ranked highly on the list of eligible candidates for both positions at issue here, that he received the preference points to which he was entitled, that his applications were forwarded to the hiring departments for review, and that the hiring managers concluded

that other people had more relevant work experience, the County's motion should be granted and this matter dismissed.

K.D.S.

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. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Clark Dyrud, Commissioner, Department of Veterans Affairs, 206C Veterans Service Building, 20 West 12th Street, St. Paul, MN 55155, to learn the procedure for filing exceptions or 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.

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.

^[1] Form DD 214, attached to Petition for Relief under the Veterans Preference Act. The Petitioner has not disclosed the nature of his service-connected disability.

^[2] Knoll Affidavit ¶¶ 1-4.

^[3] Knoll Aff. ¶ 6-8, 17-19.

^[4] Knoll Aff. Ex. 1.

^[5] Knoll Aff. ¶¶ 9-15; Exs. 4-6.

^[6] Knoll Aff. Ex. 8.

^[7] Knoll Aff. ¶¶ 20-24; Exs. 11-13.

^[8] Knoll Aff. Exs. 2 & 9. The Petitioner also indicated he had some type of recent criminal conviction for violation of a no-contact order. *Id.* Exs. 3 & 10.

^[9] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

^[10] See Minn. R. 1400.6600.

^[11] *Illinois Farmers Insurance 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. App. 1984).

^[12] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

^[13] *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

- [14] *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).
- [15] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).
- [16] See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).
- [17] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).
- [18] Minn. Stat. § 197.455 (2006).
- [19] *Id.* § 197.455, subd. 8.
- [20] *Id.* § 197.455, subd. 9.
- [21] *Id.* § 197.455, subd. 10.
- [22] 514 N.W.2d 301, 302 (Minn. App. 1994), *rev. denied* (Apr. 19, 1994).
- [23] *Id.* at 305.
- [24] *Grehl v. Minneapolis Pub. Schools*, 484 N.W.2d 815, 817 (Minn. App. 1992).
- [25] Petitioner's Response to Motion for Summary Disposition at 1-2.
- [26] Minn. Stat. § 197.455, subd. 10.
- [27] See email from the Assistant County Attorney to the Petitioner dated May 21, 1008 (with attachments dated February 7, 2008; April 16, 2008; April 16, 2008; April 9, 2008). The documents demonstrate that both of the finalists for the Senior Office Specialist position were current employees of the County with several years of experience at the Dakota County Library. When the County responded to this request for data, no finalist list had been created for the Building Services Technician position.
- [28] Email from Petitioner to County and ALJ dated April 23, 2008 (with attachment dated Jan. 16, 2008).
- [29] See email correspondence dated May 21, 2008, from the ALJ to the Petitioner.