

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF VETERANS AFFAIRS

In the Matter of:

Donald H. Varenhorst,

Petitioner,

vs.

Otter Tail County,

Respondent.

**RECOMMENDED ORDER
ON MOTION FOR
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Steve M. Mihalchick on Otter Tail County's motion for summary disposition. The County filed its motion May 7, 2009; the Petitioner filed his response on June 12, 2009; the County filed a reply on June 17, 2009; and the Petitioner filed a reply on July 7, 2009. On July 16, 2009, the County requested that the reply be stricken as not allowed. The motion record closed on July 16, 2009.

Scott Lepak, Esq., Barna, Guzy & Steffen, Ltd., 400 Northtown Financial Plaza, 200 Coon Rapids Boulevard, Minneapolis, MN 55433, appeared for Otter Tail County (the County). Donald H. Varenhorst (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**; and
2. The Department of Veterans Affairs dismiss the Petition of Donald H. Varenhorst for relief under the Veterans Preference Act.

Dated: July 20, 2009.

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The Petitioner is a disabled veteran who served in the U.S. Army from 1967 through 1970, when he was given a temporary disability retirement based on combat wounds, for which he received a Purple Heart.¹ He worked for the U.S. Postal service as a labor relations manager in various locations from 1973 through 2003, when he retired.² In October 2008 the Petitioner applied for a position as a Veterans Service Officer in New York Mills, Otter Tail County, Minnesota. He was given an interview but was not selected for the job.

On December 18, 2008, the Petitioner filed a petition for relief with the Department of Veterans Affairs, alleging that the County had violated his rights under the Veterans Preference Act. He requested relief in the form of immediate placement in the Veterans Service Officer (VSO) position, front pay, back pay, seniority, and interest on lost wages, benefits, and entitlements. On January 6, 2009, the Department issued a Notice and Order for Hearing to determine whether the Petitioner's rights were violated or denied. The County now seeks summary disposition, contending it fully complied with the Veterans Preference Act and was not obligated to hire the Respondent for the position.

Factual Background

In support of its motion, the County offered evidence in the form of an Affidavit of Stephanie Morris, a human resources specialist for Otter Tail County who provided administrative and support services to the Veterans Service Office during the application and selection process for the VSO position. The VSO job description provides that the minimum training and experience requirements were a bachelor's degree in public administration or sociology with one year experience in government administration, or three to five years of progressively responsible Veterans Service experience, or any combination of education and experience that provides equivalent knowledge, skills, and abilities. In addition, all applicants were required to be honorably discharged veterans of the United States Armed Forces.³

The Petitioner applied for the position on October 9, 2008. On the application, he indicated that he was a disabled veteran and wished to claim five additional Veteran's Preference Points based on his disability status.⁴ The Petitioner also submitted a copy of his DD Form 214, which provides that his discharge was a retirement because of placement on a temporary disability retired list.⁵

Otter Tail County used a 100-point scoring system to rate applications for this position. Applicants could score up to 25 points based on meeting the minimum job requirements, completeness and grammatical correctness of the application, and the qualities reflected in the personal statement on the application form. In addition, 75

¹ Affidavit of Stephanie Morris, Ex. B. DD Form 214, attached to Petition for Relief under the Veterans Preference Act. The Petitioner has not disclosed the nature of his service-connected disability.

² Morris Aff. Ex. A.

³ Petitioner's Reply Memorandum (July 7, 2009), Ex. 5. See also Minn. Stat. § 197.601 (any person appointed a Veterans Service Officer by a county must be a veteran as defined in Minn. Stat. § 197.447).

⁴ Morris Aff. Ex. A.

⁵ *Id.* Ex. B.

additional points were possible based on a supplemental rating tool pertaining to the applicant's employment background, communication skills, counseling experience, computer and office administration skills, and affiliation with veteran's organizations.⁶ This system permitted applicants to score up to 100 points prior to the application of the five or ten veterans preference points, whichever was applicable, in order to determine the total points used to establish a cut-off for interviews.⁷

Morris prepared an initial scoring sheet for all applicants. In her initial scoring, she allowed the Petitioner five veterans preference points in addition to those points scored on the application and supplemental rating tool. Because the Petitioner's DD Form 214 referenced a "temporary" disability at the time of his discharge in 1970, she did not believe the Petitioner had established his entitlement to ten veterans preference points based on his disability status.⁸ Based on his score as initially calculated, the Petitioner and seven other applicants were deemed eligible for an interview. The Petitioner was notified of and participated in the interview process. At the conclusion of the interview process, the highest-scoring applicant had 166.4 points, and the lowest-scoring applicant had 92 points. The Petitioner received a score of 112.2 points and was ranked seventh out of the eight candidates.⁹ The County offered the position to the person with the highest score.¹⁰

On November 26, 2008, the Petitioner called Ms. Morris to inquire about the position, and she advised him that another applicant had been selected. During this conversation, the Petitioner advised her that he should have received ten veterans preference points because of his disability status. On that same date, Ms. Morris notified the Petitioner in writing that another candidate with a higher overall score had been selected. She invited him to apply for other positions within the county.¹¹

Ms. Morris later had the Veterans Service Officer review the Petitioner's DD Form 214, after which five additional points were added to the Petitioner's score, bringing it to 117.2.¹² This revision, made on or about December 1, 2008, did not change the Petitioner's ranking, which remained seventh out of the eight candidates.¹³

The Petitioner requested more information about the selection process from Ms. Morris. On December 1, 2008, Morris sent him the application form of the person selected for the position and the final scores of the top eight candidates.¹⁴ During

⁶ *Id.* Ex. G.

⁷ Morris Aff. ¶ 16.

⁸ The Veterans Preference Act defines a disabled veteran, for the purpose of securing appointment from a competitive open examination, as a person who has "a compensable service-connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces, which disability is existing at the time preference is claimed." See Minn. Stat. § 197.455, subd. 6.

⁹ *Id.* ¶¶ 5-10; Morris Aff. Ex. D.

¹⁰ Morris Aff. ¶ 12.

¹¹ Morris Aff. Ex. F.

¹² Morris Aff. ¶ 10; Affidavit of Scott Lepak Ex. B (Petitioner's Response to Interrogatory No. 6).

¹³ Morris Aff. ¶ 11 & Ex. D.

¹⁴ Morris Aff. ¶ 13 & Ex. E.

discovery in this matter, the County provided additional information about the hiring process and other candidates interviewed for the position.¹⁵

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.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ 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. 56.05.²⁰ The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.²¹

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.²² All doubts and factual inferences must be resolved against the moving party.²³ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.²⁴

Legal Analysis

The law is well settled in Minnesota that political subdivisions, including Otter Tail County, must afford a hiring preference to veterans.²⁵ The issue in this case is what the preference consists of: the Petitioner maintains the County violated his rights by failing to hire him for the position; the County maintains that it gave the Petitioner the preference to which he was entitled and that it had no obligation to hire him.

¹⁵ Lepak Aff. Ex. A; Protective Order and correspondence from ALJ (Mar. 13, 2009).

¹⁶ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

¹⁷ See Minn. R. 1400.6600.

¹⁸ *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).

¹⁹ *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).

²⁰ *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).

²¹ *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

²² *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

²³ 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).

²⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

²⁵ Minn. Stat. § 197.455 (2008). Before 2004, veterans rights in hiring were the same as existed in the statute governing employment by the State, namely, Minn. Stat. § 43A.11 and its predecessors. See Minn. Laws 2004, ch. 207, § 29.

The Veterans Preference Act, Minn. Stat. § 197.455, subd. 5 (2008), 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.²⁶ 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.²⁷ 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.²⁸

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 as provided in the statute.²⁹ 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. § 197.46.³⁰

The plain language of the Veterans Preference Act makes clear that the hiring preference consists of use of a 100-point rating system, augmenting a veteran's rating with preference points, and ranking an eligible veteran ahead of a nonveteran with the same rating. In this case, all of the eligible candidates were veterans, because that was a minimum job requirement for the position. Beyond this, 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.

²⁶ *Id.* § 197.455, subd. 8.

²⁷ *Id.* § 197.455, subd. 9.

²⁸ *Id.* § 197.455, subd. 10.

²⁹ *Hall v. City of Champlin*, 463 N.W.2d 502, 505 (Minn. 1990).

³⁰ 463 N.W.2d at 506.

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.³¹ 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.³² 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.³³

The County presented evidence that it used a 100-point system to rank the eligible candidates, and it gave the Petitioner five preference points and included him in the group of applicants who received an interview. After the interview, the Petitioner ranked seventh of eight applicants. Even after his preference points were augmented to reflect his disability, the Petitioner remained seventh of the eight applicants. An applicant with a higher score was selected. The County maintains it was not required to do more for the Petitioner 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 County violated his rights because the "10 point Veteran Preference credits were not awarded until December 1, 2008, [after] [t]he selection was made on November 26, 2008."³⁴ The Petitioner's argument as to the date on which the extra five points were awarded is immaterial; even if the additional five points had been awarded before the interview and selection of another candidate, the correction in the number of preference points had no effect on the Petitioner's ranking within the group or his eligibility for an interview. He remained seventh out of the eight candidates. He was ranked correctly. He got an interview. There is nothing in the Veterans Preference Act that required the County to hire him instead of another veteran in the group.

The Petitioner also argues that the County's motion is premature and that he was deprived of the opportunity to present material on the validity of the 100-point system used by the County. On the contrary, the County provided the Petitioner with copies of the applications for all of the candidates, as well as their scores based on the application, the supplemental rating tool, and the interview.³⁵ The County appears to have used a 100-point system that complies with the requirements of the Act. If the County did not use this system, the Petitioner has had the opportunity to demonstrate it, and he has not done so. In addition, the Petitioner contends that during the interview, one of the interviewers made notes about him that were unfair, subjective, and inaccurate. He argues that the County's motion should be denied so that he can further develop the record on the awarding of points and the objectivity of the selection process. This argument overstates the County's legal obligation. As long as the County has implemented a 100-point system, appropriately ranked candidates, and awarded veterans preference points, the County is legally entitled to make a hiring decision based on its subjective determination as to which of the candidates interviewed will be best for the job.

³¹ 514 N.W.2d 301, 302 (Minn. App. 1994), *rev. denied* (Apr. 19, 1994).

³² *Id.* at 305.

³³ *Grehl v. Minneapolis Pub. Schools*, 484 N.W.2d 815, 817 (Minn. App. 1992).

³⁴ Lepak Aff. Ex. B (Petitioner's Response to Interrogatory No. 7).

³⁵ Lepak Aff. Ex. A; Morris Aff. Ex. E.

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. 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, he received an interview, and he received the preference points to which he was entitled, the County's motion should be granted and this matter should be dismissed.³⁶

S.M.M.

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 this Recommendation. 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.

³⁶ The Administrative Law Judge has also considered the Petitioner's July 9, 2009, submission, despite the fact that it was not allowed under the June 3, 2009, Order on Motion for Extension. The Petitioner raised no new relevant facts or arguments in that submission.