

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

<p>David B. Bentzen, Petitioner, vs. Hennepin County, Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION</p>
---	--

Administrative Law Judge Bruce H. Johnson (ALJ) conducted a hearing in the above entitled consolidated contested proceedings at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota on December 20, 2010, pursuant to two Notices of and Orders for Hearing issued on November 1, 2010.¹ The hearing record closed on January 27, 2011, when all of the post-hearing submissions were received.

Trevor S. Oliver, Attorney at Law, appeared on behalf of David B. Bentzen (Petitioner). Cheri Sudit, Assistant Hennepin County Attorney, appeared on behalf of Hennepin County (Respondent or County).

STATEMENT OF ISSUES

1. Did the County violate the Petitioner's rights under the Veterans Preference Act, Minn. Stat. § 197.46 (VPA)² in connection with his applications for employment as a Sheriff's Evidence Specialist on April 11, 2008, or on September 28, 2009.
2. If so, what remedy, if any, is appropriate.

¹ When the hearing began, the parties agreed that the two contested case proceedings could be consolidated for hearing and adjudication.

² Unless otherwise indicated, all references to Minnesota Statutes are to the 2010 edition.

SUMMARY

The County violated the Petitioner's veteran's preference rights in connection with his application for the position of Sheriff's Evidence Specialist in April 2008 but did not violate his veteran's preference rights in connection with his application for an identical position in September 2009. Because the County gave the Petitioner a guaranteed interview in a second posting for an identical position in 2009, the County provided him with appropriate relief for the violation that occurred in April 2008. The ALJ therefore recommends that the Commissioner grant the Petitioner no further relief.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Jurisdictional and Procedural Findings

1. The Petitioner is an honorably discharged veteran, having served on active duty in the U. S. Navy from July 25, 1972, until July 24, 1978.³

2. The County is a political subdivision of the State of Minnesota.

3. On October 25, 2010, the Petitioner submitted a Petition for Relief Under the Minnesota Veterans Preference Act (Petition for Relief) to the Commissioner of the Department of Veterans' Affairs (Commissioner) alleging a violation of his VPA rights on or about April 11, 2008. On the following day,⁴ he submitted another Petition for Relief alleging another violation of his VPA on or about September 28, 2009.

4. On November 1, 2010, the Commissioner issued Notices of Petition and Orders for Hearing in both matters, and this consolidated contested case proceeding ensued.

The Petitioner's Military Service, Education, and County Employment

5. During his service with the U. S. Navy, the Petitioner was trained and served as an electronics technician.⁵

6. After being discharged from the Navy, the Petitioner attended the University of Wisconsin-LaCrosse between September 1978 and May 1980, but he did not complete a bachelor's degree. While enrolled at that institution, he also worked as a

³ Notice of Petition and Order for Hearing (Jan. 29, 2009), Certificate of Release or Discharge from Active Duty (DD Form 214N).

⁴ Ex. 6B

⁵ *Id.*

police officer in the Onalaska, Wisconsin, Police Department and also as a jail deputy in the LaCrosse County, Wisconsin, Sheriff's Office.⁶

7. From September 1980 to December 1987, the Petitioner worked as a Signal Construction Crewman for the Burlington Northern Railroad. From February 1987 to April 1991, he worked as an automotive service technician, and from February 1991 to December 1992, he worked as a security officer for American Security Corporation's Armored Car Division.⁷

8. In January 1993, the Petitioner became employed as a patrol deputy for the Dodge County Sheriff's Office, a position that he held until he received a medical retirement in January 2001.⁸

9. Between September 1990 and May 2008, the Petitioner received three Associate in Applied Science degrees from Dakota County Technical College—specifically, in Computer Network Administration, Biomedical Equipment Technician, and Automotive Technology.⁹

10. The Petitioner has also attended the University of Minnesota-Duluth where he pursued courses of study in criminology and biology.¹⁰

County Personnel Practices

11. The County's human resource management systems are governed by Minn. Stat. §§ 383B.26—383B.42. Specifically, Minn. Stat. § 383B.39 provides:

In all examinations veteran's preference shall be granted to every person who is a veteran as defined in section 197.447.

12. County personnel rules require that veterans be given interviews whenever they apply and meet the qualifications for open competitive positions. As a matter of policy, current County employees are also be given interviews whenever they apply for open positions.¹¹

13. In August 2002, the County established job class specifications for the position of Sheriff's Evidence Specialist. Those job class specifications contained the following "Employment Standards":

Education and Experience:

Two years of college or vocational-technical course work in a law enforcement or criminal justice program; **OR** completion of twenty (20) college quarter credits in anatomy, biology, chemistry, physiology, or a

⁶ Ex. 5.

⁷ *Id.*

⁸ Ex. 5; Ex. 6B.

⁹ Ex. 5.

¹⁰ Ex. 8A.

¹¹ Testimony (Test.) of Kari Boe-Schmidt.

closely related field; **OR** current or prior licensure as a peace officer; **OR** two years of experience inventorying or accounting for inmate property or police evidence; **OR** an approved equivalent combination of education and experience.

Licenses:

Possession of valid drivers license with no more than two (2) moving violations in the last three (3) years.

Knowledge, Skills and Abilities:

Knowledge of: current crime laboratory methods; Sheriff's Office and forensic laboratory policies, procedures and guidelines; best practices for packaging and storing criminal evidence to maintain evidence integrity and chain of custody; safe handling of biohazardous materials and weapons; statues (sic) and regulations governing disposition of evidence.

Skill in: accurately inventorying and accounting for evidence in computerized data bases; safely performing safety checks on weapons; communicate orally and in writing.

Ability to: handle and secure criminal evidence with complete honesty; develop and conduct classroom and on-the-job training for law enforcement personnel; research evidence handling issues to identify best practices.

14. The job class specifications did not specify any, more rigorous ideal qualifications of applicants.

15. When an open position was posted for appointment, it was the practice of the County's Department of Human Resources (HR Department) to first screen applications to rule out applicants who did not meet the position's minimum qualifications. If there were a large number of minimally qualified applicants, the HR Department would conduct a second screening to develop a smaller list of ideally qualified applicants. The HR Department would then submit the list of ideally qualified applicants to the hiring County department.¹²

The Petitioner's Initial Employment with the County

16. In October 2000, the Petitioner applied to the U. S. Department of Veterans Affairs (VA) for a disability rating based on injuries or conditions that occurred during his active duty service in the U. S. Navy.¹³

17. On or about March 26, 2001, the Petitioner applied to the County for a position as a Detention Specialist at the County Jail.¹⁴ As part of that application process, the Petitioner submitted a claim for veteran's preference. Although that

¹² Test. of K. Boe-Schmidt.

¹³ Test. of David Bentzen.

¹⁴ *Id.*; Ex. 1.

application indicated that the Petitioner had a service connected disability, he did not provide the County evidence of that disability and its extent at that time.¹⁵

18. In June 2001, the VA gave the Petitioner a disability rating of 30% or greater.¹⁶ By letter dated June 23, 2003, the Minnesota Department of Veterans Affairs (DVA) provided him with evidence certifying that he was receiving disability compensation rated at 30% or greater.¹⁷ On or about February 26, 2010, the VA increased the percentage of his service connected disability to 50%.¹⁸

19. The Petitioner did not provide the County with written evidence of any service connected disability until April 27, 2010, when he submitted documentation to the County from the VA regarding an increase of his disability rating for attachment to his application master record.¹⁹

Petitioner's Application for the April 11, 2008, Posting

20. On or about April 11, 2008, the County published an invitation (posting) for applications for open competitive appointment to the position of Sheriff's Evidence Specialist. Among other things, that Posting stated that:

The Ideal Candidates must have:

- Bachelor's degree or higher in criminal justice, forensic science or a closely related field
- Two or more years of previous experience with chain of custody and evidence integrity preservation in a law enforcement setting
- An understanding of judicial system processes pertaining to evidence in criminal court proceedings
- Ability to manage multiple evidence storage locations, to organize a wide variety of tasks and adapt to frequently changing priorities
- Ability to recognize and respond positively and respectfully to the needs of diverse customers including law enforcement professionals, other laboratory personnel, Sheriff's Office personnel, court personnel, and the general public
- Ability to work independently with minimal direction
- Ability to make presentations in a formal court setting regarding evidence integrity
- Ability to bend, climb, stretch, and lift up to 50 pounds
- Previous experience using personal computers including a working knowledge of Microsoft Word, Excel, PowerPoint, and Access
- Previous work experience in a crime lab

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Ex. D.

¹⁸ Test. of D. Bentzen.

¹⁹ Ex. 10; see *also* discussion in Part I of the Memorandum that follows.

- A willingness to handle evidence packaging containing drugs, narcotics, weapons, graphic crime scene photographs as well as biological and other hazardous materials
- An approved driver's license and satisfactory driving record including no more than two moving violations within the last three years
- No felony convictions.²⁰

21. On or about April 11, 2008, the Petitioner applied for a County open competitive appointment for the position of Sheriff's Evidence Specialist.²¹

22. There were 138 other applicants for that position. The Petitioner met the minimum qualifications for the position as set forth in the class specifications, but nine other candidates did not meet the minimum qualifications.²²

23. Of the remaining 130 applicants, the HR Department determined that 94 applicants, including the Petitioner, did not have the ideal qualifications described in the April 11, 2008, posting. The HR Department determined that the Petitioner did not meet the ideal qualifications because he lacked a Bachelor's degree or higher in criminal justice, forensic science or a closely related field.

24. The County interviewed 22 applicants with ideal qualifications for the Sheriff's Evidence Specialist position described in the April 11, 2008, Posting.²³ Because the County had concluded that the Petitioner did not meet the ideal qualifications described in the posting, it did not give him an interview.²⁴

25. On April 11, 2008, the County notified the Petitioner by email that he had not been selected for the Sheriff's Evidence Specialist position posted.²⁵

Petitioner's Application for the September 28, 2009, Posting

26. On or about September 28, 2009, the County published another Posting for an open competitive appointment for the position of Sheriff's Evidence Specialist. That second posting described the characteristics of "ideal candidates" somewhat differently from the characteristics described in the April 11, 2008, Posting:

The Ideal Candidates must have:

- Two or more years of previous experience in evidence management in a law enforcement setting
- The ability to manage multiple evidence storage locations and adapt to frequently changing priorities

²⁰ Ex. B.

²¹ Ex. 10; test. of K. Boe-Schmidt and D. Bentzen.

²² test. of K. Boe-Schmidt

²³ Ex. A; test. of K. Boe-Schmidt.

²⁴ Test. of K. Boe-Schmitz.

²⁵ Ex. 10; test. of K. Boe-Schmidt.

- The ability to recognize and respond positively and respectfully to the needs of diverse customers including law enforcement professionals, other laboratory personnel, court personnel, and the general public
- The ability to work independently with minimal direction
- The ability to bend, climb, stretch, and lift up to 50 pounds
- A willingness to handle evidence packaging including narcotics, weapons, biological materials, and other hazardous items
- Previous experience using personal computers and computer software such as Microsoft Office, a Laboratory Information Management System (LIMS), a Records Management System (RMS), and specialized evidence management and inventory programs
- An understanding of judicial system processes pertaining to evidence in criminal court
- The ability to make presentations in a formal court setting regarding evidence handling procedures
- An approved driver's license and satisfactory driving record including no more than two moving violations within the last three years
- No felony convictions
- Ability to demonstrate the employee competencies²⁶

27. On or about September 29, 2009, the Petitioner submitted an application in response to the County's second posting for a position of Sheriff's Evidence Specialist.²⁷

28. The County received 273 other applications for that position. The Petitioner met both the minimum qualifications for the position as set forth in the class specifications and the ideal qualifications set forth in the September 28, 2009, posting.²⁸

29. The County interviewed 25 applicants, including the Petitioner and three other veterans, for the Sheriff's Evidence Specialist position described in the September 28, 2009, posting.²⁹

30. Prior to the interviews, the HR Department ranked the applicants. All four of the veterans were given 5 veterans preference points and tied for the Number 1 ranking. The non-veteran applicants tied for the Number 2 ranking.³⁰

31. The Interviews were conducted by a panel of three members of the Sheriff's Office staff—Kristen Tomlinson, Steve Henning, and Shane Magnuson. The interviewers asked the same twelve questions of each applicant, took notes of the

²⁶ Ex. 2.

²⁷ Ex. 10; test. of K. Boe-Schmidt and D. Bentzen.

²⁸ test. of K. Boe-Schmidt

²⁹ Ex. C; test. of Kristen Tomlinson.

³⁰ Ex. C; test. of K. Boe-Schmidt.

applicants' responses, and then scored the applicants' answers using the following scale:

- 0 = Unacceptable Answer
- 1 = Marginal answer or didn't fully answer the question
- 2 = Acceptable Answer
- 3 = Good Answer
- 4 = Excellent Answer

32. The three interviewers gave the Petitioner scores of 26, 29, and 26, for a total score of 81 out of a possible 144.³¹ However, the interviewers gave another applicant, L.E., scores of 38, 40, and 40, for a total score of 118 out of a possible 144.³² Based on the scoring of the interviews, L.E. was selected for the position.

33. By letter dated December 15, 2009, the County notified the Petitioner that he had not been selected for the Sheriff's Evidence Specialist position posted on September 28, 2009.³³

Other Findings

34. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

35. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

36. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

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

CONCLUSIONS

1. The Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction to consider this matter.³⁴

2. The Notices of Petition and Orders for Hearing were proper in all respects, and the Department of Veterans Affairs (DVA) has complied with all of the law's substantive and procedural requirements.

3. The DVA gave the Petitioner and the County proper and timely notice of the hearing in this matter.

³¹ Ex. 6A, 6B, and 6C.

³² Ex. 6A, 6B, and 6C.

³³ Ex. 10; test. of K. Tomlinson.

³⁴ Minn. Stat. §§ 14.50 and 197.481.

4. The Petitioner is an honorably discharged, disabled “veteran” within the meaning of the VPA,³⁵ and he is entitled to all of the protections and benefits of that Act.

5. The VPA provides, in part, that:

The 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 . . . [Emphasis supplied.]

6. Minn. Sta. § 43A.11, subd. 1, in turn, provides that:

Recognizing that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit which cannot be readily assessed by examination, a veteran's preference shall be available pursuant to this section to a veteran as defined in section 197.447.³⁶

7. Minn. Sta. § 43A.11, subd. 5, defines “disabled veteran”:

For the purpose of the preference to be used in securing appointment from an applicant pool, "disabled veteran" means 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.³⁷

8. Minn. Stat. § 197.455, subds. 4 and 5, provide:

Subd. 4. **Nondisabled veteran's credit.** 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.

Subd. 5. **Disabled veteran's credit.** 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. There shall be added to the competitive promotional examination rating of a disabled veteran, who so elects, a credit of five points provided that (1) the veteran obtained a passing rating on the examination without the addition of the credit points; and (2) the veteran is applying for a first promotion after securing public employment.

³⁵ Minn. Stat. §§ 197.447 and 197.455.

³⁶ See also Minn. Stat. § 197.455, subd. 2.

³⁷ Prior to 2004, a 50% or greater service connected disability was required in order for a veteran to be “disabled.” In that year the statute was amended to give disabled status to veterans with any percentage of service connected disability. See Act of May 18, 2004, 2004 Minn. Laws, ch. 207, § 13.

9. Minn. Stat. § 43A.11, subd. 7, provides:

Subd. 7. **Ranking of veterans.** Applicants who meet the minimum qualifications for a vacant position and claim disabled veteran's preference shall be listed in the applicant pool ahead of all other applicants. Applicants who meet the minimum qualifications for a vacant position and claim nondisabled veteran's preference shall be listed in the applicant pool after those claiming disabled veteran's preference and ahead of nonveterans. 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 separated veterans must be granted an interview for the position by the hiring authority.

10. The Sheriff's Office is a department of the County, and its employees are employees of the County. By law the County must therefore credit applicants for positions with any of the VPA's hiring preferences for which they may be eligible.³⁸

11. County personnel rules require that veterans be given interviews whenever they apply and meet the qualifications for open competitive positions. As a matter of policy, current County employees are also be given interviews whenever they apply for open positions.³⁹

12. The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.⁴⁰ Because VPA does not address burden of proof in contested case proceedings initiated under that Act, the Petitioner has the burden of proof to establish by a preponderance of the evidence that the County denied him rights to which he was entitled under the VPA.

13. The Petitioner failed to establish by a preponderance of the evidence that he provided the County with evidence documenting his service connected disability prior to April 27, 2010.⁴¹

14. By law competitive open hiring examinations given by the County may consist of written examinations or reviewing applicant's qualifications and informally ranking applicants after oral interviews.⁴²

15. The tests that the County administered to applicants in connection with its April 11, 2008, and September 28, 2009, postings for the position of Sheriff's Evidence

³⁸ Minn. Stat. § 197.46. Also, in Minn. Stat. § 383B.39 the legislature specifically provided that eligible applicants for Hennepin County positions would be entitled to the veterans preference hiring credits.

³⁹ Finding 13.

⁴⁰ Minn. R. 1400.7300, subp. 5.

⁴¹ See discussion in Part I of the Memorandum that follows.

⁴² *Hall v. City of Champlin*, 463 N.W.2d 502, 505 (Minn. 1990) (*Hall*); *McAfee v. Department of Revenue*, 514 N.W.2d 301, 303 (Minn.App. 1994) (*McAfee*). See also Part II-A of the Memorandum that follows.

Specialist were based on evaluation of applicants' past training and experience through oral interviews.

16. When a political subdivision employs an evaluative interview in a hiring process in which veterans are involved, it must use a 100-point rating system in determining which applicants will receive an interview.⁴³

17. Receiving a veteran's preference credit does not provide absolute preference for veterans; veteran's preference credit may increase the chance that a veteran will receive an interview, but the hiring authority may hire any certified applicant.⁴⁴

18. The County's failure to use a 100-point rating system to determine who would be interviewed and its failure to give the Petitioner an interview in connection with the April 11, 2008, Posting for the position of Sheriff's Evidence Specialist violated both the VPA and County personnel rules.⁴⁵

19. By giving the Petitioner a Number 1 ranking on the interview list for the September 28, 2009, posting for the position of Sheriff's Evidence Specialist and by giving him an interview, the County gave the Petitioner the veteran's preference rights to which he was entitled under Minn. Stat. § 197.455. The County did not violate the Petitioner's veteran's preference rights by failing to hire him for that position.⁴⁶

20. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

21. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATIONS

The Administrative Law Judge respectfully recommends that the Commissioner:

(1) DISMISS David B. Bentzen's Petition for Relief in OAH 4-3100-21664-2; and

(2) GRANT David B. Bentzen's Petition for Relief in OAH 4-3100-21648-2, but grant no further relief for the reasons set forth in the Memorandum that follows.

⁴³ See Part II-B of the Memorandum that follows.

⁴⁴ *McAfee, supra*, 514 N. W. 2d at 304.

⁴⁵ See discussion in Part II-C of the Memorandum that follows

⁴⁶ See discussion in Part II-D of the Memorandum that follows.

Dated: February 28, 2011.

s/Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Digitally Recorded

NOTICES

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make a 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 Larry Shellito, Commissioner of Veterans Affairs, State Veterans Service Building, 20 West 12th Street, Room 206C, St. Paul, Minnesota 55155-2006, 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 decision of that agency 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 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 Commissioner is required to serve his final decision upon each party and the ALJ by first class mail or as otherwise provided by law.

MEMORANDUM

I. The Petitioner was not entitled to the credit available to disable veterans allowed by Minn. Stat. § 197.455, subd. 5.

In October 2000, the Petitioner applied to the VA for a disability rating based on injuries or conditions that occurred during his active duty service in the U. S. Navy.⁴⁷ The Petitioner applied for his current position with the County on or about March 26, 2001.⁴⁸ In order to receive a preference as a disabled veteran, applicants were required to attach a letter from the VA verifying their disabled status to their Claim for Veteran's Preference form.⁴⁹ In response to the question "Do you have a service connected disability? Percentage of service connected disability, the Petitioner merely typed "???" He did not provide the County with any evidence of that disability and its extent at that time.⁵⁰ In fact, the VA did not actually give the Petitioner a disability rating until June 2001, three months after he began his employment with the County..⁵¹

The Petitioner testified that he subsequently gave a copy of that first disability rating to the County's HR Department for inclusion in his Application Master Record as an attachment. The Petitioner's testimony was not explicit about when he provided that first VA disability determination to the County, although he intimates that the document was provided to the County before his first application for a Sheriff's Evidence Specialist position in April 2008.⁵² On the other hand, the Petitioner's Application Master Record indicates that it is an applicant's responsibility to create a VA disability certification as an attachment.⁵³ The only record of a VA disability certification being attached to the Petitioner's Application Master Record is a April 10, 2010, entry indicating that the Petitioner had uploaded a February 26, 2010, letter from the VA increasing the percentage of his service connected disability by an unspecified amount.⁵⁴ The Petitioner made no assertion nor introduced any evidence that the information recorded on his Petitioner's Application Master Record was erroneous. The Petitioner's testimony about when he first provided evidence of a VA disability determination to the County was vague, at best, and any assertion that he gave the County such evidence before applying for either of the Sheriff's Evidence Specialist positions is contradicted by documentary evidence, the accuracy of which was not challenged. The ALJ therefore concludes that the Petitioner failed to establish by a preponderance of the evidence that he was entitled to the credit available to disable veterans allowed by Minn. Stat. § 197.455, subd. 5.

II. The Petitioner was denied his veteran's preference rights in April 2008, but not in September 2009.

⁴⁷ Finding 16.

⁴⁸ Finding 17.

⁴⁹ Ex. 1.

⁵⁰ *Id.*

⁵¹ Finding 18.

⁵² See Petitioner's Post-Hearing Brief at pp. 2-3.

⁵³ Ex. 10.

⁵⁴ Finding 18.

The parties agree that the VPA in its current form does not guarantee that a public employer will hire an eligible veteran in preference over eligible non-veterans.⁵⁵ What, then, is the nature of the advantage or preference that the VPA does give to veterans who apply for governmental positions? The Petitioner argues that a public employer must use a 100-point rating system or other objective rating system to select candidates to certify for interviews in order to give “tangible meaning” to military service as a factor to be given “similar weight to other forms of education, experience, or training.” The evidence established that the County did not use a 100-point rating system when it filled the two Sheriff’s Evidence Specialist positions in April 2008 and September 2009. The question, then, is whether the County violated the Petitioner’s veteran’s preference rights in connection with either or both postings.

A. The County properly used an evaluative interview process in lieu of a written competitive in selecting an incumbent for the Sheriff’s Evidence Specialist position that was posted in September 2009.

Citing Minn. Stat. §43A.11 and its predecessor statutes, the Minnesota Supreme Court in *Hall*, observed that the legislature had not defined the term “examination,” and concluded that interviews were “an appropriate form of examination.”⁵⁶ Citing *Hall*, in turn, the Minnesota Court of Appeals confirmed that general proposition in *McAfee*:

The court in *Hall v. City of Champlin* addressed the application of veteran’s preference points to political subdivisions when a civil service system is not used. As part of that analysis, the court determined that an examination and an interview could be equated for purposes of a competitive open examination. [Citation omitted.] We agree an interview may serve as the equivalent of an exam ...⁵⁷

Accordingly, the County did not err in this case in substituting an evaluative interview process for a written examination in its hiring process to fill the Sheriff’s Evidence Specialist positions. However, that still leaves open the question of whether an evaluative interview process must also incorporate a 100-point rating system at some stage of that process.

B. When a political subdivision employs an evaluative interview in a hiring process in which veterans are involved, it must use a 100-point rating system in determining which applicants will receive an interview.

In *Hall*, the Minnesota Supreme Court unequivocally stated:

⁵⁵ Petitioner’s Post-Hearing Brief at pp. 7-9; Hennepin County’s Post-Hearing Brief at p. 3; *Hall, supra*, 463 N.W.2d at 504; *McAfee, supra*, 514 N.W.2d at 305 .

⁵⁶ *Hall, supra*, 463 N.W.2d at 504-05.

⁵⁷ 514 N.W.2d at 304. However, the court went on to note that in the state civil service system, a written exam may be required when specifically mandated by a statute or rule

A local appointing authority may administer any type of evaluation as long as it is based on criteria capable of being reduced to 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. § 197.46.⁵⁸

The court has never reversed or modified that holding in the *Hall* decision. Although *McAfee* involved somewhat similar issues, the Court of Appeals never addressed the necessity of a 100-point rating system because it concluded that the position at issue was an unclassified position that was not covered by the VPA.

What remains to be considered is *when* a political subdivision must administer the 100-point rating system in an evaluative interview hiring process. The Minnesota Supreme Court did not directly address that question in *Hall*. However, the legislature has addressed that question in Minn. Stat. § 43A.11, subd. 7:

Subd. 7. **Ranking of veterans.** Applicants who meet the minimum qualifications for a vacant position and claim disabled veteran's preference shall be listed in the applicant pool ahead of all other applicants. Applicants who meet the minimum qualifications for a vacant position and claim nondisabled veteran's preference shall be listed in the applicant pool after those claiming disabled veteran's preference and ahead of nonveterans. 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 separated veterans must be granted an interview for the position by the hiring authority.

In short, the legislature clearly contemplated that veteran's preference points were to be applied at the stage of a hiring process when a public employer determines which applicants will receive an interview. The court of appeals in *McAfee* confirmed that interpretation:

Finally, even if *McAfee* had received a veteran's preference credit, he still would not be entitled to the relief he seeks, that is, appointment to the Attorney I position. Section 43A.11 does not provide absolute preference for veterans; veteran's preference credit may *increase the chance that the veteran will receive an interview*, but the appointing authority may hire any certified applicant.⁵⁹ [Emphasis supplied.]

Nevertheless, the Petitioner argues that nothing in Minn. Stat. § 43A.11 provides guidance in this case because that section "governs veterans' preference for state employees." However, there is nothing in the language of that section that restricts its application to state employees, and the fact that Chapter 43A is coded "State Personnel Management" does not of itself limit the scope of Minn. Stat. § 43A.11. "The head notes

⁵⁸ *Hall, supra*, 463 N.W.2d at 505.

⁵⁹ *McAfee, supra*, 514 N.W.2d at 305.

printed in boldface type before sections and subdivisions in any edition of the Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and are not part of the statute.⁶⁰ Moreover, in *Hall*, the Minnesota Supreme Court explicitly indicated that Minn. Stat. §§ 43A.11 and 197.445 must be read in *pari materia*:

The plain words of section 197.455 provide that section 43A.11 shall govern preference of a veteran under charter provisions, ordinances, and rules or regulations, as well as civil service laws, of the political subdivisions of this state.⁶¹

C. The County violated the VPA in connection with the Petitioner’s April 2008 application for a Sheriff’s Evidence Specialist position.

The Petitioner’s primary argument is that the County improperly failed to use a 100-point rating system in evaluating applications for both the April 2008 and September 2009 Sheriff’s Evidence Specialist postings. However, it is unnecessary to address the propriety of the County’s rating process in determining whether the Petitioner’s veterans’ preference rights were violated in April 2008. Although the VPA does not guarantee that a public employer will hire a veteran in preference over non-veterans, it minimally requires that the veteran receive an interview when the veteran meets the minimum qualifications for the position and examination is an experiential examination based on interviews of the applicants.⁶² Here, Mr. Bentzen met the minimum qualifications for the position of Sheriff’s Evidence Specialist when that position was posted on April 11, 2008. However, the County denied him an interview because he did not meet the somewhat more rigorous qualifications of an “ideal candidate.” There is nothing in law that allows a public employer to deny an interview to a veteran who meets the position’s minimum qualification but who may not be an “ideal candidate” when the examination for the position is a purely experiential examination. The County therefore violated the Petitioner’s veterans’ preference rights in connection with the April 2008 posting by failing to use a 100-point rating system to select the applicants who would be interviewed. It also violated its own personnel rules by failing to give him an interview.

D. The County granted the Petitioner greater preference rights in determining whether he would be interviewed for the September 2009 Posting than use of a 100-point rating system would have afforded him.

A preponderance of the evidence established that the County also did not use a 100-point rating system in determining which applicants would be interviewed for the September 2009 Posting for a Sheriff’s Evidence Specialist. The Petitioner argues that the 100-point rating system must be administered in a way that gives a veteran a

⁶⁰ Minn. Stat. § 645.49.

⁶¹ *Hall*, *supra*, 463 N.W. 2d at 504.

⁶² *McAfee*, *supra*, 514 N.W.2d at 305.

practical advantage over other eligible applicants.⁶³ Under Minn. Stat. § 43A.11, subd. 7, that practical advantage is an increased “chance that the veteran will receive an interview.” During the September 2009 hiring process, the Petitioner actually received greater rights than he would have received through application of his veteran’s preference in a 100-point rating system. County personnel rules *guaranteed* veterans an interview, and unlike what occurred in April 2008, the County made good on that guarantee by making him a finalist and giving him an interview in the September 2009 hiring process. The final result was the same as the final result in *McAfee*:

Because the Department of Revenue granted McAfee an interview, he was accorded the same rights he would have received had section 43A.11 applied to this position.⁶⁴

In summary, even though the County failed to use a 100-point rating system in determining which applicants would be interviewed for the September 2009 Posting, it gave the Petitioner greater rights than he would have received if the County had relied solely on a 100-point rating system to select finalists for interviews.

III. What relief is appropriate?

The VPA does not guarantee that a public employer will hire a veteran in preference over non-veterans; it does not even require that a veteran receive an interview. Rather, it only requires that the veteran receive an increased opportunity for an interview when the veteran meets the minimum qualifications for the position and examination is an experiential examination based on interviews of the applicants.⁶⁵ Here, Mr. Bentzen met the minimum qualifications for the position of Sheriff’s Evidence Specialist when that position was posted on April 11, 2008. However, in that first posting the County neither used a 100-point rating system to determine who would be interviewed nor gave him an interview in violation of both the VPA and County personnel rules. One must next consider what relief may be appropriate. Minn. Stat. § 197.481, subd. 1, empowers the Commissioner “to grant the veteran such relief the commissioner finds justified by said statutes.” In the Petition under consideration in OAH 4-3100-21664-2, the Petitioner requested the Commissioner to direct the County to promote him “to the permanent fulltime Sheriff’s Evidence Specialist 00948V/Z job.” However, Minnesota’s appellate courts have ruled that such relief is not available to the Petitioner. What he was entitled to by law was simply an increased chance for an interview.

If the Petitioner had filed that Petition near the time when the violation occurred rather than over two and one-half years later, it may have been appropriate, for example, for the Commissioner to require the County to re-post the position and give the Petitioner the interview to which he was entitled. However, doing that now will interfere with the legal rights of the successful applicant without any assurance that the Petitioner would become the successful applicant after interviews were conducted.

⁶³ Petitioner’s Post-Hearing Brief at pp. 7-9.

⁶⁴ *McAfee*, *supra*, 514 N.W.2d at 305.

⁶⁵ *Id.*

Moreover, the County has, in effect, already provided the Petitioner with relief that is comparable to the relief to which he would have been entitled in 2008. On September 28, 2009, the County posted an identical position. The Petitioner applied for that position and was subsequently given an interview. He therefore, in effect, received during the second hiring process the remedy to which he would have been entitled as a result of the County's violation of his VPA right in connection with April 2008 posting.⁶⁶

IV. Conclusion

The VPA requires political subdivisions to fill positions in the classified service by open competitive examinations. Those examinations may consist of written examinations or reviewing applicants' qualifications and informally ranking them after oral interviews. However, when the examination consists of oral interviews, the political subdivision must use criteria capable of being reduced to a 100-point rating system in selecting the applicants who will be interviewed. The VPA requires that disabled and nondisabled veterans be given additional preference points in that 100-point rating system in order to increase their chances for an interview. The County's personnel rules give veterans even a greater preference than the VPA by guaranteeing that veterans will receive an interview in connection with all open competitive appointments.

The County violated the Petitioner's veteran's preference rights in April 2008 by failing to use a 100-point rating system to determine which applicants would be interviewed, thereby depriving him of an increased chance of an interview in connection with that first posting. The County also violated its own personnel rules by failing to actually give him an interview. On the other hand, the County gave the Petitioner a guaranteed interview in connection with its September 2009 posting for an identical position, thereby giving him even greater rights than the VPA provided to him. The County therefore did not violate the VPA or its own rules in connection with the second Posting. The County's guarantee of an interview in a second posting for an identical posting, in effect, provided him with the relief to which he would have been entitled for the County's violation in the first posting. The ALJ therefore recommends that the Commissioner give the Petitioner no further relief.

B.H.J.

⁶⁶ As noted above, Hall does not require a 100-point rating system; it requires "criteria capable of being reduced to 100-point rating system." Even if *Hall* were interpreted as requiring use of a 100-point in selecting the successful applicant, the scoring of the interviews involved in the September 2009 Posting was done on a 144-point scale, which could be easily scaled to a 100-point scale. If such a scaling were done, the Petitioner would have scored well below the successful applicant even if 5, or even 10, veteran's preference points were added to his score.