69-3100-4115-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Gary P. Stevens,

Petitioner,

V.

City of Hastings,

Respondent.

EINDINGS_OF FACT,
CQNCLUSIQNS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick at 10:00 a.m. on November 29, 1989 at the Dakota County Government Center, Hastings, Minnesota. The Petitioner, Gary P. Stevens, 1326 West 17th, Hastings, Minnesota 55033, appeared and testified on his own behalf. Shawn M. Moynihan, Assistant City Attorney, 999 Westview Drive, Hastings, Minnesota 55033, appeared on behalf of the Respondent, City of Hastings. The record in this matter was closed upon the close of the hearing on November 29, 1989.

Notice is hereby given that, pursuant to Minn. Stat. 14.61, the final decision of the Commissioner of Veterans Affairs shall not be made until this report has been made available to the parties to the proceeding for at least 10 days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this report, if any, shall be filed with Commissioner William J. Gregg, Department of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155.

STATEMENT OF ISSUES

1. Whether the City of Hastings denied Petitioner's veteran's preference rights when it failed to add veteran's preference points to Petitioner's examination scores for the positions of Assistant Fire Chief and full-time firefighters

2. Whether the processes for hiring of the Assistant Fire Chief and full-time firefighter were promotional examinations.

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

following:

FINDINGS OF FACT

1. Petitioner is a veteran who served on active duty with the United States Navy for over three years and received an honorable discharge on May 28, 1974. He has a permanent, service-connected disability rated at ten percent.

2. Petitioner has been an on-call firefighter with the Hastings Fire Department (the "Fire Department") since January 1981. In January 1987, he was appointed to the rank of Captain in the Fire Department.

3. The Fire Department has approximately 30 on-call firefighters and 8 full-time firefighters, including the Fire Chief and Assistant Fire Chief. The on-call firefighters carry pagers with them and keep their turn out gear in their private vehicles. When a fire occurs, they are paged and then proceed directly to the scene of the fire. The full-time firefighters staff the fire station and, when a fire occurs, drive the fire equipment to the scene of the fire. At the fire scene, the full-time firefighters generally operate the equipment and the on-call firefighters fight the fire. The full-time firefighters (other than the Fire Chief and Assistant Fire Chief) do not supervise the on-call firefighters. The on-call firefighters are also referred to as volunteer firefighters and paid on-call firefighters.

4. On-call firefighters are paid by the hour for their "turn out time" and also for training time. They are paid quarterly and their pay is subject to the same withholding as full-time firefighters, meaning that federal and state income tax is withheld if the pay for the period is large enough and that social security is not withheld because police and firefighters are subject to a different pension law. On-call firefighters are hired and fired by the City Administrator, can work until they retire and their work is under the control of the Fire Chief, who is responsible for their actions.

5. It is traditional in the Fire Department for vacancies in full-time firefighter positions to be filled from the ranks of the Hastings on-call firefighters. There have been no exceptions to that practice in recent memory. Similarly, the Assistant Fire Chief position traditionally has been filled from the ranks of the Hastings full-time firefighters and on-call firefighters. There was one exception to that practice in 1981, when an Assistant Fire Chief from outside of the Fire Department was hired.

6. In November of 1987, the Assistant Fire Chief resigned to take a job in Owatonna as Fire Chief. On November 16, 1987, the Hastings City Council voted to advertise the vacancy and to fill the position from within the Fire Department. The opening was posted within the fire station and the notice was given to both the full-time firefighters and the on-call firefighters. Only full-time firefighters and on-call firefighters from the Fire Department were eligible to apply. No advertising or posting of this position was done outside of the Fire Department.

7. As required by the posting, Petitioner applied for the Assistant Fire Chief position by submitting a resume to the City Administrator. He did so on November 30, 1987. Six persons applied for the position, four full-time and two on-call firefighters. They were given a three part examination and it was

announced that the successful candidate would be selected from the three persons receiving the highest combined scores. The examination consisted of a written test, an oral interview and a simulator test. After the scores were

weighted and compiled, the total scores for the applicants, out of a possible 100, were:

Applicant		Score
1		70.70
2		67,55
3		66.82
4		61.97
5	(Petitioner)	56.55
6		52.07

8. After the scores had been totaled, the Fire Chief, himself a veteran, wondered if veteran's preference points should be awarded. He talked to the City Administrator who called someone to check. The City Administrator then asked the Chief to find out which of the candidates were veterans. The Chief called the top three candidates, reasoning that they were the only finalists. Applicant No. I decided to withdraw from consideration, it is not clear from the record whether Applicant No. 2 was a veteran and it was determined that Applicant no. 3 was a veteran with a 10% service connected disability. Petitioner was not contacted to determine whether he was a veteran because he had not scored among the top three. Five points were added to the score of Candidate No. 3 for veteran's preference. Thereafter, the City Administrator selected Candidate no. 3 as the new Assistant Fire Chief. By letter of March 8, 1988, the City Administrator notified Petitioner that he had selected Candidate No. 3 and that Petitioner's total score was 56.55 as compared to the top score of 71.82.

9. In January 1989, one of the full-time firefighters became disabled by a reoccurring knee injury and was unable to continue to serve as a full-time firefighters In a memo of January 24, 1989, the Interim City Administrator reported these facts to the City Council and asked that the process for hiring a new full-time firefighter be commenced. The memo went on to state:

> Under the City's Affirmative Action Plan it appears the City will only be required to post the availability of the position within all departments of the City. This would appear to be the process most likely to be employed by staff as this has been the practice used in the past to fill firefighter positions.

10. Shortly before January of 1989, the City had adopted an Affirmative Action Plan. Section IX A-6. of the Plan requires that notice of promotional positions be posted on the bulletin board in all City departments. Section IX A.5. of the Plan similarly requires that all job advertisements for full-time positions be posted on bulletin boards in all City departments. Section IX A.l. of the Plan requires that all departmental lead positions be advertised in certain designated newspapers.

11. On January 25, 1989, the City Council voted to authorize the Interim City Administrator and Fire Chief to develop a testing program and selection process, in compliance with the City's Affirmative Action Plan, and to hire a full-time firefighters

12. On February 2, 1989, the job posting for full-time firefighter was posted in all City departments. The posting required applicants to have completed basic firefighter training, to meet the minimum standards of training required for ambulance attendants and to be capable of passing a physical agility test. It went on to state that a written examination and oral interview would be conducted to determine three final candidates, from whom the City Administrator would make the final selection. It also stated that candidates eligible to exercise veteran's preference would be afforded that opportunity.

13. On February 5, 1989, the Petitioner applied for the full-time firefighter position.

14. The job posting was targeted for the on-call firefighters, but if any other City employees happened to meet the qualifications, they would have been eligible to apply. The City received ten applications, nine of which were from on-call firefighters already with the Fire Department. Another application was received from an on-call firefighter for the City of Woodbury who was not an employee of the City of Hastings. The Fire Chief returned that application with a letter stating that it could not be accepted because the City Council had directed that the opening be posted internally.

15. A memorandum was sent to all the full-time firefighter candidates in mid-February 1989. The memo stated that a written examination would be held on February 25, 1989, that candidates wishing to exercise their veteran's preference rights should submit an attached claim form, that oral interviews of only the persons receiving the top five scores on the written examination would be conducted March 10, 1989, and that the final selection would take place before March 13, 1989. A memorandum outlining essentially the same items was sent to the City Council by the Fire Chief. Petitioner completed the veteran's preference claim form and submitted it to the City.

16. The City's Finance Director, who also handles personnel matters for the City, had designed the veteran's preference claim form by copying a form she obtained from Ramsey County. In connection with the full-time firefighter position, she contacted the Department of Veterans Affairs to determine what the veteran's preference requirements were. Based on her discussions with the

Department of Veterans Affairs and a review of the statutes, she determined that the law requires that veteran's preference points be allowed for open competitive positions of five points to veterans and 10 points to veterans with a disability of 50% or more. (That determination was erroneous, see below.) She also determined that on promotional examinations, five points could be claimed by 50% disabled veterans, but that no points were to be awarded to non disabled veterans. On March 7, 1989, she composed and sent a memo to the full-time firefighter candidates describing her investigation and determinations and stating that the full-time firefighter position was considered promotional so that veteran's preference would not be allowed except for disabled veterans with a 50% or greater disability. The results of the written examinations had been determined at that time, but she had left them in a sealed envelope and had not reviewed them prior to sending out the memo.

17. On the same date, but after the Finance Director had made her determination regarding veteran's preference, the Interim City Administrator sent Petitioner a letter advising him that he had received the top score of 146 points on the written examination. Petitioner was invited for an oral interview on March 10, 1989, with the Interim City Administrator, the Finance Director and the Fire Chief. The four other persons scoring highest on the written examination were also invited for oral interviews.

18. The panel interviewed all five candidates. Each panel member scored each applicant and then the Finance Director compiled the scores. It had been determined previously that the Interim City Administrator would choose the new full-time firefighter from among the persons with the three top scores combining the written examination and oral interview.

19. In the opinion of the panel, the Petitioner did not score well on the oral interview. His raw score was 47 as compared to scores of 62, 53, 52, and 60 for the other Applicants. When his score was converted to a percentage and weighted at 30% his final score on the oral examination was 19. (Such a score would result if the maximum possible were 75 points). Combined with his written score weighted at 70%, Petitioner's combined total score was 76. Michael Eggert had the raw score of 62 on the oral examination and a raw score of 135 on the written. His weighted and combined total was 78. The other three Applicants received substantially lower combined scores.

20. The Interim City Administrator had, in his mind, narrowed down the selection at that point to Petitioner and Eggert. He was concerned, however, with Petitioner's poor showing on the oral examination and thought Petitioner deserved another chance because the poor interview might have been an anomaly. Therefore, he asked Petitioner back for another interview and, out of fairness, also asked Eggert back. Following the second interviews, the Interim City Administrator selected Eggert as the new full-time firefighters He did so because he felt Eggert was the best person for the job. Petitioner was informed of that decision by letter of March 17, 1989, from the Interim City Administrator.

21. No veteran's preference points were awarded to Petitioner or any other person in connection with the full-time firefighter position.

22. Eggert is also a veteran.

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

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 197.481. The Notice of Hearing issued by the Department of Veterans Affairs was proper and all substantive and procedural requirements have been fulfilled.

2. Petitioner is a veteran within the meaning of Minn. Stat. 197.447. Petitioner was separated under honorable conditions from the armed forces of the United States after having served on active duty for more than 181 consecutive days.

3. The position of Assistant Fire Chief is the one chief deputy to a department head, namely, the Fire Chief. Therefore, filling of the position is exempt from veteran's preference requirements pursuant to Minn. Stat. 197.46.

4. The on-call firefighters in the Hastings Fire Department are employees of the City of Hastings.

5. If the Assistant Fire Chief position was not exempt from the requirements of veteran's preference, the filling of the position in late 1987 and early 1988 would have been considered a competitive promotional examination because eligibility for the position was limited to current employees of the Fire Department, namely, the on-call firefighters and the full-time firefighters. As such, the only veterans who would have been entitled to any credits on the examination would have been any veterans with a permanent, service-connected disability rated at 50% or greater.

6. The City applied the veteran's preference requirements improperly in filling the Assistant Fire Chief position when it added five points to the examination score of the person ultimately selected, a veteran with a compensable disability of less than 50%. Such points should not have been awarded because the position is exempt from the requirements of veteran's preference, because the points were added after determination of the finalists, because no points should have been awarded to him if this was a competitive promotional examination and because 10 points should have been awarded to him (and to the Petitioner) if this had been a competitive open examination. Despite the mistakes, the ultimate result was that three finalists were chosen through a valid examination process without the additional of any veteran's preference points and that the selection was made from among the three finalists by the appointing authority. This is exactly the same result that would have occurred had veteran's preference been properly applied.

7. The Petitioner was not denied his veteran's preference rights with regard to the Assistant Fire Chief position. No one, including the Petitioner, was entitled to any veteran's preference points on the examination and the ultimate selection of the Assistant Fire Chief was made, if effect, as if no points had been awarded.

8. Filling of the position of full-time firefighter in early 1989 involved a competitive promotional examination because eligibility for the position was limited to current employees of the City, including the on-call firefighters. Therefore, only 50% disabled veterans were entitled to the award of any veteran's preference points on the examination.

9. Petitioner was not entitled to any veteran's preference points on the full-time firefighter examination because he does not have a disability rated at 50% or greater. Therefore he was not denied any veteran's preference rights

with regard to the examination for full-time firefighters

10. The Petitions of the Petitioner alleging that he has been denied veteran's preference rights should be denied.

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

RECQMMENDATIQN

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs deny the Petitions of Gary P. Stevens in this matter.

Dated this 26th day of December, 1989.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped not transcribed, Tape Nos. 8158, 8163 and 8166.

MEMORANDUM

At all times relevant here, Minn. Stat. 197.455 provided that Minn. Stat. 43A.11, which grants preference to veterans in the state's civil service, shall also govern preference for veterans for employment in all political subdivisions of the state. Under Minn. Stat. 197.46, an exception is created stating that veteran's preference does not apply to, among other positions, the one chief deputy of any elected official or head of a department.

Minn. Stat. 43A.11, in relevant part, provides:

> Subdivision 1. Creation. 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.
>
> Subd. 3. 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. 4. 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 (a) the veteran obtained a passing rating on the examination without the addition of the credit points and (b) the veteran is applying for a first promotion after securing public employment.
>
> Subd. 5. Disabled veteran; definitions. For the purpose of the preference to be used in securing appointment from a competitive open examination, "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. For purposes of the preference to be used in securing appointment from a competitive promotional examination, "disabled veteran" means a person who, at the time of election to use a promotional preference, is entitled to disability compensation under laws administered by the veterans administration for a permanent service connected disability rated at 50 percent or more.

Minn. Stat. 43A.02, subd. 15 and 16, provide:

> Subd. 15. Competitive open. "Competitive open" means eligibility to compete in an examination for state employment is extended to all interested persons.
>
> Subd. 16. Competitive promotional. "Competitive promotional" means eligibility to compete in an examination for state employment is limited to person currently occupying, or on leave or layoff from, civil service positions.

To summarize the foregoing, in a competitive open examination, five points are added to the score of a nondisabled veteran and ten points are added to a veteran having any compensable service connected disability. In this case, there is no requirement that the disability be 50% or greater. In the case of competitive promotional examinations, no points are added to the score of a nondisabled veteran or a veteran having less than a 50% service connected disability. A veteran who does have a permanent service connected disability rated at 50% or more may elect to receive a credit of ten points if it is the veteran's first promotion after securing public employment. In all cases, the veterans's preference credit is added only if the veteran obtained a passing score on the examination without the addition of the credit points.

The state civil service system under Minn. Stat. ch. 43A contemplates a system under which the Department of Employee Relations conducts and scores the

examinations, adds the appropriate veteran's preference points, ranks the candidates according to their total points and then certifies a list of eligibles to the appointing authority consisting of a certain number of the top ranked persons on the list. lie, generally, Minn. Stat. 43A.10, .12 and .13. The appointing authority then makes an appointment from the certified list based upon merit and ability to perform the duties of the position and the needs of the employing agency, including the need to meet affirmative action goals. Minn. Stat. $ 0LQQ Rule pt. 3900.7500. The appointing authority may choose anyone from the certified list without regard to rank on the list. Such appointments are normally made after oral interviews with the certified eligible candidates and whatever further investigation the appointing authority may desire to undertaken

The basic procedures followed by the City in the case of the Assistant Fire Chief Position were comparable to the state civil service procedures, except that the appointing authority, the City Administrator, did not receive a list of the top eligible candidates and then conduct further interviews or investigations before making the final selection. Instead, the Administrator chose from among the top three scorers. In the case of the full-time firefighter position, the Interim City Administrator had a part in the examination process and also made the final selection. This mechanism is appropriate given the size of the City staff and provides a means for applying veteran's preference as required by the law.

The Assistant Five Chief is the chief deputy of the Fire Chief. The person occupying the position is responsible for administrative and supervisory firefighting work, assists in directing Fire Department operations and, in the absense of the Fire Chief, is responsible for the duties of the Fire Chief. The Fire Chief is a department head as that term is used by Minn. Stat. 197.46. The Fire Chief is in charge of the work done by the Fire Department, the position requires technical and professional training, the Fire Chief is the highest authority at that level of government, the Fire Chief supervises all the work of the Fire Department, the success of the Department depends on the Fire Chief's technique, the employees of the Fire Department are under the Fire Chief's direction and the Fire Chief's duties are more than merely different from other employees in the Fire Department. Of all the factors listed in State ex. rel McGinnis v. Police Civil Service Commission of Golden Valley, 253 Minn. 62, N.W.2d 154 (1958), for determining whether the position

is that of a department head, the Fire Chief lacks only the power to hire and fire subordinates. In Hastings, the Fire Chief is deeply involved in that process, but does not have the final decision. Nonetheless, considering all the McGinnis factors, the Fire Chief is a department head. Because the Assistant Fire Chief is the chief deputy of a department head, filling of the position is not subject to the veteran's preference requirements imposed by Minn. Stat. 197.455 and 43A.11.

If the veteran's preference had applied to the Assistant Fire Chief position, it appears that the filling of the position in this case would have involved a competitive promotional examination as opposed to a competitive open examination. Under Minn. Stat. 43A.02, subds. 15 and 16, competitive open examinations are open to all interested persons, while competitive promotional

examinations are limited to persons currently occupying state civil service positions. Civil service is defined by Minn. Stat. 43A.02 as all employees in the legislative, judicial and executive branches of state government and all positions in the classified and unclassified services. In other words, "promotional" does not carry its usual meaning of raising to a higher rank; eligibility is limited to current state employees. Since Minn. Stat. 43A.11 is to be applied in the political subdivisions, a parallel definition must be applied when defining competitive open and competitive promotional examinations in political subdivisions. At the time the veteran's preference law was amended to incorporate the provisions of the state civil service law for application to political subdivisions of the state, most of what is now Minn. Stat. 43A.11 was found in Minn. Stat. 43.30. That section was amended at the same time to define open competitive examinations as examinations open to current employees and nonemployees of the state or political subdivision. Minn. Laws 1975, ch. 45, 2. By implication, promotional examinations were limited to current employees. When chapter 43 was reorganized as chapter 43A, the reference to political subdivisions disappeared. Minn. Laws 1981, ch. 210, 11. Nonetheless, its would appear that no change was intended and that promotional examination still means limited to current employees of the political subdivision.

Petitioner maintains that on-call firefighters like him are not employees of the City; the City maintains that they are. The Administrative Law Judge concludes that the on-call firefighters are employees of the City for the purposes of determining veteran's preference rights. They are part-time employees paid an hourly rate for the time they work. Nothing in Minn. Stat. 43A.02, subd. 16, limits the definition of employee to full-time employee. The work of the on-call firefighters is subject to the direct control of the Fire Chief and his assistant. They work with tools and equipment provided by the City and the City pays unemployment taxes and provides workers compensation insurance for them like all other employees. They are hired and subject to firing by the City Administrator. These are all indicators of "employee" status. Thus, the examination for Assistant Fire Chief was limited to persons who were current employees of the City, and was, in fact, limited to an even smaller group, just the full-time and on-call firefighters within the Fire Department. Therefore, the examination meets the definition of a competitive promotional examination and, pursuant to Minn. Stat. 43A.11, the only veteran's preference credits available would be to disabled veterans having service connected disabilities rated at 50% or more. Since none of the applicants had such a disability, no veterans points should have been given.

The City did make mistakes in the way it applied veteran's preference points to the Assistant Fire Chief position by granting five points of veteran's preference to the person ultimately selected. First, because it was a chief deputy to a department head, no points should have been given at all.

Second, even if veteran's preference did apply it was a competitive promotional examination, and only 50% disabled veterans should have received any points; it was a mistake to give points to the person ultimately selected. Third, if veteran's preference points are added they must be added before the finalists are selected. Nonetheless, in this case, the points, which should not have been added in the first place, were not added until the determination of the three finalists had already been made, so awarding the points actually had no effect on determining the finalists. Thus, the ultimate outcome was not improperly affected by the mistakes. More importantly here, it had no effect

upon Petitioner because he was not among the top three finalists. Since no one, including Petitioner, was entitled to any veteran's preference points in this examination, it was not a denial of his rights that he did not receive them. Therefore, his Petition regarding the Assistant Fire Chief examination must be denied.

For the reasons already discussed, the examination for full-time firefighter was also a competitive promotional examination. The examination was limited to current employees of the City, including the on-call firefighters. One person apparently capable of meeting the training and experience requirements of the position was rejected because he was not a current City employee. Therefore, only veterans having a disability rating of 50% or more were entitled to any veteran's preference credit on the examination. Again, there were no such veterans applying. Since Petitioner was not entitled to receive any points, it was not a denial of his veteran's preference rights that he did not receive any. Moreover, Petitioner did make the finals for the full-time firefighter position, he was among the final two persons being considered. The addition of any veteran's preference points could not have helped him get any further. Unfortunately for Petitioner, the Interim City Administrator felt that the other person was better suited for the job.

S.M.M.