

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

Lester Curphy,

Petitioner,

FINDINGS_OF_FACT,
CONCLUSIONS_OF_LAW
AND_RECOMMENDATION

vs.

City of Virginia,

Respondent.

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, on May 16, 1991, in the St. Louis County Courthouse, Virginia, Minnesota. Scott C. Neff, Neff & Lager, 319 First Street South, Box 1144, Virginia, Minnesota 55792, appeared on behalf of Petitioner, Lester Curphy. Christopher J. Harristhal, Larkin, Hoffman, Daly & Lindgren, Ltd., 2000 Piper Jaffray Tower, 222 South 9th Street, Minneapolis, Minnesota 55402, appeared on behalf of Respondent, City of Virginia. The record was closed upon receipt of the final post-hearing submissions on June 24, 1991.

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 which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. P 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 Bernie R. Melter, Commissioner of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether claims for denial of veterans preference rights and employment arising more than two years ago are barred by the two-year statute of limitations set forth in Minn. Stat. P 541.07(5).

2. Whether the Minnesota Job Service is a necessary party in this matter because of its role in referring applicants for employment to the Respondent.

3. Whether Petitioner was denied any rights under the Veterans Preference Act as a result of the Respondent's failure to have in place a system providing veterans preference rights as required by the Act.

4. If Petitioner was denied rights under the Veterans Preference Act and injured thereby, what relief is he entitled to?

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

FINDINGS OF FACT

1. Petitioner was born in Eveleth, Minnesota, on July 9, 1932. He graduated from Eveleth High School in 1950. He went to work on a track gang for United States Steel after high school and in September 1950 began working in its geology department doing survey work.

2. Petitioner was drafted into the United States Army on January 14, 1953, and served on active duty until his release from active military service on December 23, 1954. The character of his service was honorable.

3. After being released from the Army, Petitioner returned to work at United States Steel. In September 1955, he began attending Eveleth Jr. College, which he did for two years. Respondent returned to work in the mines in 1957, working on a track gang for a year and as a "car dropper" for a period of time. In 1959, he worked for a time as a janitor and as a hockey player. He returned to college for two quarters in 1961, and attended the University of Minnesota Duluth from 1962 to 1964, ending up a few credits short of the requirements for a degree. Nonetheless, he obtained an elementary teaching job in Michigan where he

4. After being laid off in Michigan, Petitioner remained unemployed for some time but then worked for several months at a Holiday Inn as a janitor and in the laundry. In 1971, Petitioner returned to the Iron Range. He worked as a construction laborer for two months in late 1971, was laid off for the winter and remained unemployed until early 1973. From 1973 to 1975, he worked for two tire companies in the Virginia area and was laid off on December 31, 1975, when his employer lost a major contract. During 1976, he worked as a carpenter's tender and laborer for a construction company. He was unemployed for some period and then worked for the Arrowhead Economic Opportunity Agency on an

insulation crew from March 1979 until February 1980, when he was terminated for insubordination.

5. Since February 1980, Petitioner has not been able to find full-time employment. He has been able to find several part-time or temporary jobs. He has worked as a janitor for a theater, the Eveleth Hockey Rink, and for another employer in the area. He has worked summers as a caretaker at the Eveleth Lake Park and winters taking care of outdoor skating rinks in Eveleth. From 1981 until the present, he has peddled newspapers. He was also employed in temporary and part-time jobs by Respondent from 1981 to 1987.

6. In January 1981, Petitioner began working for Respondent as a part-time and fill-in janitor. Henry Pappone, a member of the Virginia City Council and Petitioner's brother's father-in-law, called him and asked him if he wanted a job with the City. He did, and Pappone told him to see the City Engineer. The job was to be the janitor at a senior citizens reading room operated by the City three days per week for three hours each day and to also work as a fill-in janitor at City Hall when either of the two regular janitors, Bert Pearson or Ken Klobuchar, was on vacation, sick or otherwise unable to work. Petitioner went to see the City Engineer immediately and began work shortly thereafter.

7. Near the end of 1981, the part-time janitor position at the reading room was eliminated, so Petitioner no longer worked for the City at that location. However, he continued to work as a call-in replacement janitor for Pearson and Klobuchar into 1988.

8. Petitioner believed that if he did his part-time job well and kept out of trouble, he might eventually have a chance for full-time employment with Respondent. He was led to believe that by Pappone and the former City Engineer who had told him that other people had moved from part-time or temporary jobs to full-time employment with Respondent.

9. In October 1982, Nicholas Dragisich became the City Engineer. At that time there was no City Administrator or Administrative Assistant to the City Council and the City Engineer was the top staff position. Subsequently, Dragisich also became the Administrative Assistant and the City Administrator. Up to that time, hiring for City positions involved the City Engineer making recommendations to the council, but there was no organized employment system and some hirings were a matter of getting enough votes on the City Council. Because unemployment on the Iron Range had been increasing and was especially bad at the time, Respondent was receiving as many as fifty or sixty applications for every opening. Therefore, Dragisich recommended to the City Council that it adopt a hiring process that would more likely result in hiring the best qualified people, not be subject to political influences and be more fair to all the applicants. In early 1983, the City Council adopted the recommendation and implemented a system where all applications for employment

in positions under the control of the City Council would be handled by the Job

Service of the Minnesota Department of Jobs and Training. (The parties have stipulated that jobs controlled by the City commissions are not at issue here.)

Since then, all hirings by Respondent relevant to this matter h

10. Under the Job Service process, no applications for employment are taken directly by Respondent; all persons desiring employment with Respondent must apply at the Job Service office in Virginia. In addition to its own normal job registration forms, the Job Service office has City of Virginia employment applications that people interested in employment with Respondent fill out. See, for example, Petitioner's Exhibits 1 and 6. Completed applications are kept on file for a period of one year. When Respondent has a job opening, it first posts that opening as available to existing union employees as required by the labor agreement with the union. If the position is not filled through that means, a job order is placed with Job Service by calling in a description of the job, the requirements, the pay and the number of applicants to be referred. See, for example, Petitioner's Exhibit 5. This process has been used by Respondent for filling both permanent positions and temporary or casual labor positions since 1983.

Upon receiving a job order from Respondent, Job Service reviews the applications in its City of Virginia application file to find persons matching the required qualifications. Under federally-mandated procedures used since the 1930s, Job Service applies its own form of veterans preference by referring the order to a veteran's representative who reviews the application file for qualified veterans first. After that screening, the applications from non-veterans are screened. In screening, Job Service contacts the individuals to see if they are interested in the position. Qualified, interested people then have their applications sent to Respondent. If there are more qualified people than the number of referrals requested, Job Service will rank the applicants, generally on the basis of amount of relevant experience. Veterans will be ranked first and then non-veterans. Then the applications of the number requested to be referred will be sent to Respondent. Thus, if Respondent requests a large number or unlimited number of referrals, all qualified applicants will be referred. On the other hand, if the number to be referred is limited, it is possible that only veterans will be referred.

In the case of casual labor positions, Respondent normally orders a specific number of laborers and Job Service directly informs that number of people to report to Respondent for work. In the case of permanent positions, until a few months ago, all people referred would be interviewed by a committee of Respondent's department heads. The person rated highest by the committee, giving particular consideration to the evaluation of the department head of the position to be filled, would then be recommended to the City Council for hiring.

11. Until late in 1990, veterans preference, as required by Minn. Stat. §§ 197.455 and 43A.11, was not considered at all in Respondent's hiring process. In late 1990, in response to bulletins from the League of Minnesota Cities advising municipalities of the Supreme Court's decision in *Hall_v._City_of_Champlin*, 463 N.W.2d 502 (Minn. 1990), Respondent implemented a 100-point rating system that allows for the addition of veterans preference points.

12. Petitioner regularly registered with Job Service throughout the 1980s. However, he did not fill out a City of Virginia application until at least 1985. He then maintained a City of Virginia application on file at Job Service until early 1990.

13. Job Service never referred Petitioner's application to Respondent for any full-time employment. It did refer Petitioner to Respondent for temporary casual labor assignments in 1987 and 1988.

14. During 1984, Respondent filled three full-time positions for which Petitioner claimed he might be qualified, two in Repair and one in Sewer Maintenance. Petitioner had no experience of the type required for the Sewer Maintenance position. Likewise, the Repair positions required the possession of

15. On April 15, 1985, Respondent filled the position of Parking Meter Monitor. Petitioner was apparently qualified for the position as it existed at the time and would have been referred by Job Service had he had a City of Virginia application on file at the time. About fifteen people were referred to Respondent by Job Service for the position. All were interviewed by a committee of department heads, which selected what they considered the best candidate and recommended her to the City Council for hiring. No veterans preference of any sort was applied by the Respondent in making the selection of the person hired.

16. In 1988 and 1990, three Repair positions were filled. Petitioner was not qualified for any of those positions because he does not hold a Class B Drivers License.

17. In approximately May 1987, Petitioner received a call from Job Service and was told to report to Respondent for work as a laborer on a street repair crew for about ten days. Petitioner took the job, but had to rearrange his fill-in janitor work to allow him to do so. While working on the labor job, Petitioner got in a shouting match with the job foreman who thought he was just standing around while everyone else was helping with some barricades and a plastic covering that had blown over in a rain storm. The foreman sent him back to the public works garage and Petitioner did not complete the ten-day assignment. He did continue working for Respondent in his fill-in janitor position.

18. On July 21, 1987, Petitioner wrote to Respondent asking how he could get a permanent job with the City. On July 22, 1987, Dragisich wrote him explaining that all hiring was done through the Job Service and describing the application and selection process in use at the time. Petitioner's Exhibit 3.

19. Near the end of 1987 or in early 1988, Klobuchar suffered a stroke and was unable to work for some period of time. Petitioner was apparently called in only one day to fill in for Klobuchar and the remainder of Klobuchar's time was replaced by temporary employees. Petitioner questioned the procedure and was informed by the Assistant City Engineer that there was a forty-day maximum on the amount of days that Petitioner could be allowed to work in his temporary fill-in status. By letter of February 4, 1988, the Assistant City Engineer notified Petitioner that he intended to continue to employ Petitioner for fill-in when the regular janitor was on vacation or called in sick, but that Klobuchar's afternoon janitor's job would be filled by temporary employees until his status was determined. Klobuchar eventually returned to work. Petitioner then wrote to the City Council President asking why he wasn't getting more janitor fill-in work. On April 21, 1988, Dragisich wrote to Petitioner stating that he had no authorization to hire him on a full-time basis, but that in view of the present situation (Klobuchar's illness), he was willing to use him for forty days during the year, but no more, and that Petitioner could work that in forty consecutive days or as a vacation fill-in as he preferred. Dragisich also advised him that if a full-time permanent position opened, Petitioner could apply for it through Job Service.

20. In 1988, Petitioner worked five or six days as a fill-in janitor near the end of June.

21. In September or October of 1988, Respondent's Assistant Street Superintendent requested four casual laborers to help with fall cleanup. Job Service referred Petitioner and three other people. Sometime during the first day of work, the repair foreman informed the Assistant Street Superintendent that Petitioner was the one that he had told to leave the job site back in the spring of 1987. At the end of the day, the Assistant Street Superintendent informed Petitioner that he was not to come back to work because of the previous shoving match he had had with one of the foreman. In early 1989, Klobuchar, the day-shift janitor, called Petitioner to

22. Pearson has retired from his employment with Respondent, but Respondent did not replace him. Rather, Respondent reduced its staff by one. Respondent has not hired a full-time janitor at any time since prior to 1981.

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

CONCLUSIONS

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 of law and rule have been fulfilled.

2. Petitioner is a veteran within the meaning of Minn. Stat. § 197.447, and for the purposes of Minn. Stat. §§ 197.455 and 43A.11.

3. The burden of proof is upon Petitioner to prove the facts at issue by a preponderance of the evidence. Minn. Rule 1400.7300, subp. 5.

4. Petitioner's claim is not barred by the two-year statute of limitations of Minn. Stat. § 518.07(5) barring actions for wages after two years. The reasons for this conclusion are set forth in the Ruling on Motion to Limit Discovery dated April 9, 1991.

5. Job Service is not an indispensable party and the hearing properly proceeded without joining Job Service as a party as requested by Respondent in its Motion of March 7, 1991. The responsibility for implementing veterans preference as required by Minn. Stat. §§ 197.455 and 43A.11 rests upon Respondent. It may chose to use Job Service to carry out certain aspects of the application process, but by doing so Respondent does not transfer any of its responsibilities to Job Service. It is entirely possible for Respondent to design a system that uses the application and referral services of Job Service and still provide the veterans preference rights required by those statutes.

6. At all times relevant here and until late 1990, Respondent used a hiring system that failed to provide veterans preference rights as required by Minn. Stat. §§ 197.455 and 43A.11. No conclusion is made here as to whether the system now used by Respondent fully complies with those statutes.

7. Respondent did not deny Petitioner any of his veterans preference rights. The only full-time position filled by Respondent during the times relevant here for which Petitioner was qualified was the Parking Meter Monitor position filled in 1985. However, Petitioner did not have a City of Virginia job application on file with Job Service until sometime after that point. Subsequent to that point, Job Service reasonably found that Petitioner was not qualified for any of the openings that occurred. Petitioner never reached a point in the hiring process where his veterans preference rights should have been applied. Therefore, they were never denied.

8. Petitioner's petition should be denied.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs issue an order denying the petition of Lester Curphy.

Dated this 24th day of July, 1991.

_____/s/_____

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to 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.

Reported: Taped, not transcribed.

MEMORANDUM

The most crucial fact issue in dispute in this matter is the date Petitioner first filled out a City of Virginia application form at Job Service.

If he did so before April 1985, when the Parking Meter Monitor position Respondent for interviews and, at that point, veterans preference points should have been applied. Petitioner testified that he began maintaining a City of Virginia job application form on file at Job Service at least by 1984, perhaps earlier. His testimony varied somewhat at first, but he eventually became certain that it was "at least by 1984." Job Service does not keep records more than two years, so it is impossible to verify the date that way. Petitioner kept no copies of his applications. However, Job Service was in the practice of referring everyone who met the qualifications set out in the job orders from Respondent, up to the number of referrals requested. In the referral for the Parking Meter Monitor position, Job Service referred all fifteen or so people they found qualified. If Petitioner's City of Virginia application had been on file at the time, it would have been referred by Job Service. It appears more likely than not that Petitioner's job application was not on file at the time.

Respondent maintained a system that did not provide for veterans preference as required by the statutes. However, Petitioner did not suffer any

denial of his veterans preference rights. Had he properly applied for a position for which he was qualified, he would not have received his veterans preference rights. But he never reached that point in the hiring process.

SMM