69-3100-5513-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

David R. Possin,

Petitioner,

vs.

St. Paul Public Schools,

Respondent.

FINDINGS_OF_FACT,
CONCLUSIONS_OF_LAW
AND_RECOMMENDATION

The above-entitled matter is before Steve M. Mihalchick, Administrative Law Judge, on Cross-Motions for Summary Disposition and Respondent's Motions for Dismissal. Petitioner David R. Possin, 1642 Burns Avenue, St. Paul, Minnesota 55106, appeared on his own behalf. Jeffrey G. Lalla, General Counsel, St. Paul Public Schools, 360 Colburne Street, St. Paul, Minnesota 55102, appeared on behalf of Respondent. The record closed upon receipt of the final brief on August 1, 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. Þ 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 Melter, Commissioner of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 W. 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether Respondent used a hiring system fully in compliance with Minn. Stat. ÞÞ 197.455 and 43A.11.

2. Whether the position in question is a "strictly confidential" position exempt from the requirements of Minn. Stat. Þ 197.455.

3. Whether Petitioner's claim is moot because Respondent has not yet hired anyone for the position and is about to readvertise it.

4. Whether Petitioner's petition is defective in that it alleged that

Respondent does not have a system in place as required by law "to fill positions not protected by Minnesota Statute 197.46."

5. Whether the propriety of the rating score given Petitioner by Respondent is an issue within the jurisdiction of this proceeding.

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

FINDINGS OF FACT

For the purpose of these motions, the facts appear as follows.

1. Petitioner is an honorably discharged veteran entitled to the benefits provided by the Veterans Preference Act and, in particular, Minn. Stat. ÞÞ 197.455 and 43A.11. Respondent is a school district to which those statutes apply.

2. Petitioner has over eight years of personnel experience in the Army.

3. On December 3, 1990, Respondent posted and advertised a job announcement that applications were being accepted for the position of Human Resource Specialist and that applications would be received through January 18, 1991. What used to be known as the Personnel function is now often referred to as the Human Resource function; for example, Respondent's Human Resource Department used to be known as its Personnel Department. The job announcement stated that the position was open due to the transfer of job classification functions from the City of St. Paul to Respondent. It described the qualifications for the position as follows:

> A baccalaureate degree in personnel administration, labor relations, psychology or a related field; and, four years of progressively respon

Desirable knowledge, skills and abilities were also listed. The job announcement described the responsibilities of the position as follows:

> General Statement of Duties: Perform skilled professional work in one or more programs of the Board of Education's Human Resource Department; and perform related duties as required.
>
> Supervision Received: Work under general supervision of an assistant human resource director.
>
> Supervision Exercised: May provide technical guidance and direction to technical or clerical employees.
>
> 1. Perform position allocation reviews, and classification or compensation studies; prepare, present and defend recommendations based upon results or studies.

2. Prepare job descriptions and class specifications to accurately describe the duties performed in positions within the school district.

3. Assist in the development of career ladders and lattices to aid in recruiting, training and retaining District employees.

4. Conduct job analysis studies; utilize results to develop job-related selection instruments, including written, practical or physical examinations and training and experience standards.

5. Assist in the recruitment of applicants for school district positions.

6. Evaluate training and experience of applicants, may participate in oral interview committees, and monitor and summarize interview results as required.

7. Respond, as directed, to routine questions from employees regarding personnel practices and procedures and labor agreement provisions.

8. Assist in the orientation of new paraprofessional and classified service employees.

9. Facilitate the exchange of information between the District and the City of St. Paul, and other appropriate agencies.

10. Perform other related duties as assigned.

The position was a year-round full-time position with a minimum starting salary of $1,309.38 biweekly and benefits "consistent with those provided for other similar professional positions."

4. Information gained from the compensation studies to be performed by the person in the Human Resource Specialist position will include information used by Respondent in negotiating collective bargaining agreements with its employees.

5. Petitioner applied for the Human Resource Specialist position.

6. After the application deadline, the several applications received by Respondent were reviewed. Those not meeting the minimum qualifications set forth in the job announcement were rejected and the remaining applicants were sent a supplemental application questionnaire. Petitioner was initially rejected as not having the minimum qualifications of one year of "job analysis and job evaluation" experience. Upon being notified of his rejection, Petitioner called Eileen Cardwell, the Assistant Human Resource Director who would be supervisor of the new position, to complain. She agreed to rescind the initial rejection and sent Petitioner a supplemental application questionnaire, which he returned.

7. Fifteen supplemental application questionnaires were returned, including Petitioner's. Respondent rated the questionnaires on a 100 point system consisting of a maximum of 60 points for relevant experience, a maximum of 20 points for education, a maximum of 10 points for relevance of education to the position and a maximum of 10 points for a writing sample. The scores of the fifteen applicants ranked by total score were as follows:

	Experience	Education	Relevance Education	Sample	Total
Applicant No. 1	60	10	0	4	74
Applicant No. 2	56	3	5	5	69
Applicant No. 3	42	10	0	8	60
Applicant No. 4	42	10	0	5	57
Applicant No. 5	14	20	10	7	51
Applicant No. 6	26	10	5	6	47
Applicant No. 7	30	10	0	7	47
Applicant No. 8	19.5	15	0	6	40.5
Applicant No. 9	9	20	5	4	38
Applicant No. 10	12	5	5	10	32
Applicant No. 11	10	5	5	5	25
Applicant No. 12	0	15	0	5	20
Possin, D. (Petitioner)	0	5	5	6	16
Applicant No. 14	0	10	0	5	15
Applicant No. 15	2	10	0	1	13

No credit was given for veteran's preference.

8. Respondent then interviewed the seven applicants scoring highest on the supplemental application questionnaire. From among those seven, Respondent selected three as finalists, those being Applicants No. 3, 4 and 5. The job was offered to Applicants No. 3 and 4, who each refused the job offer.

9. Respondent did not offer the position to Applicant No. 5 or anyone else and has decided instead to change the minimum qualifications and re-post the position. It intends to change the minimum qualification to three years rather than four years experience for applicants with a baccalaureate degree and to one year rather than two years experience for applicants with a masters degree. In addition, Respondent will make the minimum qualification of at least one year of job analysis and job evaluation a "highly desirable" experience criteria rather than a minimum requirement. Respondent is reducing the minimum qualifications because the finalists for the original position indicated they were more interested in a management position rather than the line position described and that the minimum qualifications as originally set required too much experience for such a position.

10. Petitioner also applied for a position of Personnel Representative with the State of Minnesota that was announced November 30, 1990, and closed December 31, 1990. That position had qualifications and responsibilities very comparable to Respondent's Human Resource Specialist position. Like

Respondent's system, the examination for the state position consisted of a past/fail experience and training rating and a scored questionnaire rating for applicants who passed the experience and training rating. The questionnaire was to be scored as 100 for best qualified, 85 for well qualified, 70 for qualified or 50 for not qualified. By notice of February 14, 1991, the Minnesota Department of Employee Relations notified Petitioner that his final score was 100.

11. Petitioner also applied for a Personnel Coordinator I position with the City of Minneapolis that was open from January 14, 1991 to January 23, 1991. That position also has duties and requirements similar to Respondent's open position. Qualifying persons were given an oral examination with a maximum score of 100 percent and a minimum passing score of 70 percent. Petitioner qualified and took the oral examination. With the addition of five extra points for veteran's preference, his final score was 85.17.

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. ÞÞ 14.50 and 197.481.

2. Petitioner

3. Minn. Stat. Þ 197.455 states that the provisions of Minn. Stat. Þ 43A.11 granting preference to veterans in the state civil service shall also govern preference of a veteran in the school districts and other political subdivisions of this state. Minn. Stat. Þ 43A.11 provides, in relevant part:

> 43A.11 VETERAN'S PREFERENCE
>
> 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. 7. Ranking of veterans. An eligible with a rating augmented by veteran's preference shall be entered on an eligible list ahead of a nonveteran with the same rating.

Subd. 8. Notification. A governmental agency when notifying eligibles that they have passed examinations shall show the final examination ratings preference credits and shall notify eligibles that they may elect to use veteran's preference to augment passing ratings.

Subd. 9. Rejection; explanation. If the appointing authority rejects a certified eligible who has received veteran's preference, the appointing authority shall notify the eligible in writing of the reasons for the rejection.

4. Minn. Stat. Þ 197.46 provides, in relevant part:

Nothing in section 197.455 or this section shall be construed to apply to the position of private secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding a strictly confidential relation to the appointing officer. The burden of establishing such relationship shall be upon the appointing officer in all proceedings and actions relating thereto.

5. The position of Human Resource Specialist with Respondent is not a strictly confidential position within the meaning of Minn. Stat. Þ 197.46.

6. Respondent's method of filling the vacancy for Human Service Specialist failed to comply with the requirements of Minn. Stat. Þ 43A.11, in that no credits were added to the scores of veterans who passed the examination, no system existed to rank eligible veterans with a rating augmented by veteran's preference ahead of nonveterans with the same rating, no notice was given to veterans that they may elect to use veteran's preference to augment passing ratings and no system was in place to provide the required notice of the reasons for rejection to veterans who were not hired.

7. In that Respondent did not hire anyone for the position and is about to readvertise it, Petitioner has not yet been injured by Respondent's failure to comply with the Veterans Preference Act.

8. Given Respondent's previous failure to properly grant veteran's preference, it is appropriate to specifically order Respondent to comply with Minn. Stat. Þ Þ 197.455 and 43A.11 in all future hirings including, in particular, the reopening of the Human Resource Specialist position.

9. Petitioner's reference in his petition to "positions not protected by Minnesota Statute 197.46," does not render the petition defective. Despite the

incor

10. The issue of whether it is within the jurisdiction of the Commissioner and the Administrative Law Judge to determine whether the appointing authority has failed to apply veteran's preference by acting with manifest arbitrariness in determining the ratings given to a veteran has been rendered moot and need not be decided.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that Respondent rescind the previous process for hiring a Human Resource
Specialist, that it revise the requirements for the position as it deems appropriate and that it fully comply with the requirements of Minn. Stat. ÞÞ«197.455 and 43A.11 in filling the revised position and all future hirings not otherwise exempted from those statutes.

Dated this 29th day of August, 1991.

_____/s/_____
STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. Þ 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: No hearing.

MEMORANDUM

In discussions with the parties in this matter, it was determined that there were few factual disputes and that the decision in this matter would probably depend upon application of the law to the undisputed facts. Since Respondent had access to most of the facts, Respondent was asked to file a Motion for Summary Disposition along with other motions it intended to raise and Petitioner was allowed an opportunity to respond.

Summary disposition under the rules of the Office of Administrative Hearings, Minn. Rule 1400.5500K, is equivalent to summary judgment under Rule 56 of the Rules of Civil Procedure and is appropriate where there is no genuine

issue as to any material fact and the moving party is entitled to judgment as a matter of law. The non-moving party has the benefit of that view of the evidence which is most favorable and all doubts and inferences must be resolved against the moving party. Thiele_v._Stich, 425 N.W.2d 580 (Minn. 1988).

Hall_v._City_of_Champlin, 463 N.W.2d 502 (Minn. 1990) requires that political subdivisions of the state adapt their hiring systems to a 100 point rating system to enable the allocation of the veteran's preference points required by Minn. Stat. Þ 43A.11. Respondent argues that it used a 100 point system in the hiring procedure for the Human Resource Specialist and was thus fully in accord with the statute as construed in Hall_v._City_of_Champlin. While the affidavit and documents submitted by Respondent show that Respondent used a 100 point system for scoring and ranking the qualified applicants for the position, there is nothing whatsoever in the affidavit of the Assistant Human Resource Director or the documents to indicate that any points were given to anyone for veteran's preference, that anyone was notified of the right to have their score augmented by the veteran's preference credit, that any veteran was notified of the reasons for rejection or that any consideration whatsoever was given to any of the requirements of Minn. Stat. Þ«43A.11. Based on the record here, the requirements of the statute were not followed by Respondent.

Respondent argues that the Human Resource Specialist position is a strictly confidential position and therefore exempt from the Veterans Preference Act under the provisions of Minn. Stat. Þ 197.46. Respondent relies on the fact that under the Public Employment Labor Relations Act (PELRA) which applies to Respondent, a "confidential" employee is defined as any employee who works in the Personnel offices of a public employer or who has

Pursuant to Minn. Stat. Þ 197A.03, subd. 1, the definitions in that section apply only to PELRA and thus have no particular application here. Moreover, Minn. Stat. Þ 197.46 does not exempt "confidential" employees, it exempts persons holding a "strictly confidential relation" to the appointing officer. The statutory exception must be read in context. The statute provides an exception for a person who is a private secretary, teacher, superintendent of schools, the one chief deputy of any elected official or head of a department or any person holding a strictly confidential relation to the appointing officer. The strictly confidential relation exception applies to only those positions that work so closely with the appointing official that allowing the appointing official to employ and discharge the person at will is appropriate. General_Drivers_Local_#346_v._Aitkin_County_Board, 320 N.W.2d 695 (Minn. 1982). (The scope of the exception contained in Minn. Stat. Þ 197.46 is quite clear. The use of the tern "one chief deputy" excludes any interpretation that deputies fall within the confidential employee exception.)

State_ex_rel._Sawyer_v._Mangni, 231 Minn. 457, 43 N.W.2d 775 (1950). (The first assistant city attorney is not a deputy and does not hold a strictly confidential relation to the city attorney because his work is no different from that of the other assistants.) In this case, the appointing authority is the Respondent's school board. Clearly, the Human Resource Specialist position does not have a strictly confidential relation to the Board. The Human Resource Specialist position works under the general supervision of an Assistant Human Resource Director and has no supervisory, managerial or confidential advisory responsibilities. Thus, the position does not have a strictly confidential relation to the Human Resource Director or the supervising Assistant Human Resource Director if either of those positions were considered to be the appointing official. Therefore, the position is not exempt from the provisions of the Veterans Preference Act.

Respondent has moved for dismissal of the matter on the grounds that the matter is moot because it has not hired anyone for the Human Resource Specialist position and is revising the job requirements and will be reposting the job announcement. Petitioner has suffered no harm, especially because he will have the opportunity to apply for the revised position. Redoing the application process will allow Respondent to correct any errors in its process that violate the Veterans Preference Act and will allow Petitioner to receive his veteran's preference credit, if appropriate. Nonetheless, Respondent violated the Act last time and requiring that the position be reopened and proper procedures followed this time will help assure compliance with the Act.

Petitioner suggests that the fact that he was awarded zero out of a possible 60 points for experience despite eight years of personnel experience in the Army indicates that Respondent effectively discriminates against veterans. He states that by not granting veterans any points for relevant military experience, Respondent can keep a veteran from attaining a score high enough to qualify for the preference points. Respondent argues that this issue is outside the scope of the petition and not within the scope of the Veterans Preference Act. This issue is addressed by State_ex_rel._Meehan_v._Empie, 164 Minn. 14, 204 N.W. 572 (1925). At that time, the veteran's preference law stated that honorably discharged soldiers were entitled to preference in public employment and that when a vacancy occurred and a veteran applied, the appointing body was required to "make an investigation as to the qualifications of said soldier, . . . and if he is a man of good moral character, and can perform the duties of said position," appoint him to the position. As to the matter of determining whether the soldier was qualified, the court stated:

> 2. It is t
>
> fitness. Evidence of it may be competent in determining whether the appointing body applied the

> law at all, or, applying it, proceeded with manifest arbitrariness. It is to be assumed that the appointing body will proceed with the investigation, and will be fair. If it chooses otherwise, there is difficulty of enforcement arising from the inherent nature of the subject. It cannot be remedied by the court through an assumption of authority to appoint. Its power is confined within the limits which we have stated.
>
> 3. The evidence was taken upon the theory, largely at least, that the issue was whether the relator was qualified for the appointment. The real question was whether the council applied the law at all, making the required investigation, or with manifest arbitrariness determined that the relator was not fit. The finding of the trial court is that the relator is possessed of the requisite fitness. That does not determine that he is entitled to the employment. The trial court, or this court, may think him fit, and yet concede that a contrary belief of the council is sustained, or at least not so arbitrary as to vitiate its finding.

At the time of that case, a veteran's exclusive remedy for violations of the Veterans Preference Act was to seek a writ of mandamus in district court. Since that time, the jurisdiction of the Commissioner of Veterans Affairs to consider petitions alleging denials of rights under the Veterans Preference Act has been added to the Act. However, since the original hiring process in this matter has been abandoned and a new process will be commenced, it is not necessary to determine at this time whether the Commissioner and Administrative Law Judge also have jurisdiction to determine whether an appointing authority acted with manifest arbitrariness in evaluating and rating veterans applying for employment.

SMM