5-3100-5626-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Keith R. Franklin,

Petitioner

vs.

Metropolitan Airports Commission,

Respondent.

FINDINGS_OF_FACT, CONCLUSIONS_AND RECOMMENDATION

The above-entitled matter was heard by Administrative Law Judge Howard L. Kaibel, Jr., on July 16, 1991, in Minneapolis. The record closed on July 29, 1991.

Keith R. Franklin (Petitioner), 6533 - 17th Avenue South, Minneapolis, Minnesota 55423, appeared on his own behalf without benefit of counsel. Jim Kosta, Respondent's Personnel Manager, P.O. Box 1700, Twin City Airport Station, St. Paul, Minnesota 55111, appeared on behalf of the Metropolitan Airports Commission (Respondent), without benefit of counsel.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department 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 R. Melter, Commissioner, Minnesota Department of Veterans Affairs, Veterans Services Building, Second Floor, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Was Petitioner deprived of his veterans preference rights by the Respondent in hiring five firefighters?

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

## FINDINGS OF FACT

1. Petitioner is an honorably discharged veteran.

2. Respondent is a public unit of government which concedes that it is subject to the Veterans Preference Act.

3. Respondent advertised for job applicants in the spring of 1991 to fill five firefighter vacancies at the Minneapolis-St. Paul airport.

4. Petitioner applied for the job on March 13, 1991.

5. Respondent's personnel office reviewed the 200 applications for the vacancies and determined that 67 of the applicants, including Petitioner, met the minimum advertised qualifications for the position.

6. Respondent's fire chief then reviewed the 67 applications and selected 21 or more final candidates for an oral interview process. Petitioner was not one of the applicants selected to be interviewed.

7. The 21 or more final candidates were then interviewed and ranked by a panel selected by Respondent's personnel department.

8. Five of the top ranked candidates were hired to fill the vacancies.

9. The remaining 16 candidates were placed on an "eligible list" of persons to be hired over the next year to fill any new firefighter openings.

10. Respondent's personnel policies provide for adding the five percent veterans preference points (ten percent for disabled veterans) after the oral interviews are completed in ranking the candidates. Because Petitioner was not selected for an oral interview, he was not able to utilize his preference points.

11. The fire chief who made the decision not to interview Petitioner, did not testify or attend the hearing. He told Respondent's personnel officer that he did not include Petitioner in the final

12. It is clear in retrospect that Petitioner's training and experience was more than adequately focused on the job requirements. If the fire chief had looked more closely at the attachments to Petitioner's application, this would have been apparent to him.

13. Petitioner has specialized training in crash and salvage skills beyond the firefighting training required of all naval personnel. He has also successfully completed a Hennepin Vocational-Technical College firefighter program and a special training course conducted by Respondent's fire chief and the Minnesota Department of Transportation. He is a Minnesota licensed

Emergency Medical Technician (EMT) and has successfully completed training at the National Fire Training Center in the handling of hazardous materials. He is a full-time firefighter at Fort Snelling stationed across the fence from the airport. His employer has a mutual aid pact with Respondent to handle the same kind of responsibilities in emergencies as he would be handling if he were hired to fill one of the advertised positions. He has 18 years experience handling aircraft crashes and fighting the same kinds of fires as he would be responding to if he were hired to fill one of the advertised positions.

14. There are two other veteran applicants with similar qualifications and experience that also were not called to interview, who also consequently were deprived of an opportunity to utilize their veterans preference points in competing for the job openings.

15. Non-veterans with considerably less qualifications and experience were interviewed, ranked and hired to fill the positions sought by Petitioner and the other veterans; including a non-veteran with only three years of firefighting experience who was not a licensed EMT.

16. Respondent contends that its personnel policies comply with the Veterans Preference Act and that it fears unspecified legal ramifications if it were to vacate the "eligible list" and the hiring process at this time.

17. Respondent is considering establishing a new hiring process for hiring "up to three" additional firefighters to fill a new classification of "on-the-job training" employees which Petitioner might be interviewed for. If that process is instituted, the new positions would be tailored to recruit recent Vo-Tech graduates. Petitioner would have to compete with such graduates plus the 16 candidates on the present eligible list, if such a process is instituted, for an unspecified number of vacancies at a yet-to-be-determined salary.

18. Petitioner filed a Petition with the Commissioner of Veterans Affairs alleging a violation of his veterans preference rights on April 18, 1991.

19. The Commissioner of Veterans Affairs reviewed the factual allegations in the Petition and issued the notice and order for this hearing which concluded that it appeared "that the Respondent has denied Petitioner the rights afforded him by the Veterans Preference Act" on May 23, 1991.

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

## CONCLUSIONS

1. That the Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction over this proceeding pursuant to Minn. Stat. ÞÞ 14.50 and 197.481.

2. That the notice of hearing issued by the Department of Veterans Affairs was in all respects proper with regard to form, content, execution and filing. All other substantive and procedural requirements of law and rule have been properly complied with.

3. That the Petitioner, Keith R. Franklin, is a veteran within the meaning of Minn. Stat. ÞÞ 197.46 and 197.447, and is entitled to all the protections of the Veterans Preference Act.

4. That the Metropolitan Airports Commission is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. Þ 197.46.

5. That the Petitioner's veterans pr

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of Veterans Affairs order the Metropolitan Airports Commission to vacate the hiring of the five firefighters and to recompile its eligible list after allowing Keith R. Franklin and any other similarly situated veterans to complete the interview process for those firefighter positions.

Dated this __6th__ day of September, 1991.

__s/Howard_L._Kaibel,_Jr._____

HOWARD L. KAIBEL, JR.
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: Taped. Transcript Prepared, Karen Toughill.

MEMORANDUM

Background

Every State in the Union has some form of veterans preference law to accord veterans some degree of advantage in hiring for public employment. Koelfgren_v._Jackson, 355 F.Supp. 243 (D.C. Minn. 1972), affirmed 93 S.Ct. 1502 (1973). Minnesota has had such a law in one form or another since the Civil War. They are a legislative judgment that veterans are "likely to possess courage, constancy, habits of obedience, and fidelity, which are valuable qualifications for any public office or employment." Kangas_v._McDonald, 188 Minn. 157 at 161, 246 N.W. 900 at 901 (Minn. Sup. Ct. 1933). It is thought that these qualifications are difficult to measure objectively, but deserving of consideration in hiring. As the court in Kangas noted, they are also a reward for the sacrifices of these veterans:

> It has been the laudable purpose of the Minnesota lawmakers, declared on numerous ocassions, to give a well-earned preference in appointments in the public service to those who have served the nation in its time of peril.

These laws also recognize that service in the Armed Forces in times of war disrupts the lives of those who serve, endeavoring to remedy this disruption by giving them some advantage in public employment when they return. Feinerman_v. Jones, 356 F.Supp. 252 (D.C. Pa. 1973). Veterans preference laws are thus generally held to be remedial legislation which is to be liberally construed to accomplish the legislative purpose. Krohn_v._Judicial_Magistrate_Appointing Commission, 239 N.W.2d 562 (Iowa 1976); Abt_v._Wilcox, 106 Mich. 183, 249 N.W. 483 (Mich. 1933); and Chester_v._Department_of_Civil_Service, 216 A.2d 611 (N.J. Supr. A.D. 1966).

Until 1975, Minnesota Veterans Preference laws gave qualified veterans an "absolute" preference in public employment. Under that law the Petitioner here and any of the other veterans who were among the 67 applicants who met the minimum qualifications for the job would have automatically been hired to fill the five vacancies, over any qualified non-veterans, without any interview and ranking process of any kind. When the Legislature switched from "absolute" veterans preference to the five- or ten-point advantage, it perforce required the utmost attention by public employers and appellate reviewers to ensuring that this legislatively granted preference is not diluted or eliminated in the ranking of qualified applicants for public employment. It is well settled that the purpose of the legislative veterans preference is to prevail over local agency discretion in hiring when there is any conflict. Butts_v._Aurora, 246 N.E.2d 853 (Ill. App. 1969).

The Legislature in Minn. Stat. Þ 43A.11 has made it clear that the courts and particularly the Commissioner must ensure that public hiring is done solely

on merit, which is essential to implementing legislatively established v

That court has repeatedly made it clear for more than a century that this legislative mandate must be vigorously complied with. In a case like this one, where the City of Rochester did not allow qualifying candidates to proceed to oral interviews, the court, in a strongly worded decision voided the appointment of the Rochester Chief of Police for failure to strictly comply with the statute. It held that substantial compliance with the law is insufficient and that there must be complete compliance.

> Some candidates were ruled out, as the examiners said, without even giving them the entire oral examination. However fair and honest the examiners here may have been, such a practice should not be tolerated, . . .. State_ex rel._Kos_v._Adamson, 226 Minn. 177, 32 N.W.2d 281 (1948).

The_Violation

Although Respondent's personnel manager stressed that the final interview was "our examination process", there was really a two-part examination process here. The first part of that process was the review of the applications by the fire chief to determine which of the qualified candidates would be allowed to complete the final interview. The veteran here was excluded during the first part of this two-part examination process. Eliminating the veteran without allowing him to complete the second part of the process, so that he could not apply his 10 percent veterans preference points to the final score, was clearly and unequivocally a violation of his veterans preference rights.

This has unambiguously been the law in Minnesota since at least the Supreme Court decision in Kangas, supra, in 1933. In that case the Hibbing Fire Department conducted a similar two-part examination. Petitioner was one of 33 qualified applicants, but was not one of the ten candidates allowed to interview for 8 vacancies. The court overturned the hiring and ordered the appointment of the petitioner.

Nonetheless, as recently as 2-1/2 years ago, St. Louis County was still employing a multi-part process to deprive veterans of their preference rights. In the case of Frank_P._Lehto,_Petitioner_v._St._Louis_County_Civil_Service Commission,_Respondent, (1988) OAH Docket No. 4-3100-2703-2, the county asserted in its defense that the State of Minnesota and Hennepin County both continued to follow the procedure of limiting the number of applicants allowed to complete the examination, preventing veterans from applying their points to their final score. The Judge in that case recommended an order allowing the qualified veteran to complete the entire examination process so that he could utilize his preference points in the final ranking:

> It is only then that decisions to hire or not hire the veteran may be made. The intent of the Veterans Preference Act is quite clear; it is to afford an honorably discharged veteran a "preference" in securing a public job. The practice followed by St. Louis County and for that matter the State of Minnesota and Hennepin County, is contrary to that intent.

That report and its recommendation were adopted by the Commissioner in a decision dated January 20, 1989, which has not been subsequently appealed.

The Minnesota Court of Appeals dealt most recently with the issue last year in the case of Hall_v._City_of_Champlin, 450 N.W.2d 613, which was recently affirmed unanimously by the Supreme Court. The petitioner was one of 107 candidates for two full-time laborer positions. He was among the top 15 qualified applicants, but was not among the top eight who were chosen for oral interviews. The Commissioner and the courts affirmed the Administrative Law Judge's report finding this to be a violation of the Veterans Preference Act, ordering the city to immediately hire the petitioner.

Citations to these authorities were provided to the parties prior to the hearing. Respondent did not point Metropolitan Airports Commission violated Petitioner's veterans preference rights here and that he must be allowed to complete the interview process, which is what he is requesting.

Remedy

As the Minnesota Supreme Court held in another recent veterans preference case, Allen_R._Ochocki_v._Dakota_County_Sheriff's_Department, 464 N.W.2d 496 (Minn. 1991) this January, erroneous hiring processes must be voided and the hiring must be redone in compliance with the Veterans Preference Act.

> We cannot see that prejudice will result to anyone if a legal and proper examination be held now in order that applicants for the position involved may be duly and legally certified.

C.F. Maddey_v._City_of_Ottumwa, 226 Iowa 941, 285 N.W. 208 (Iowa 1939).

A good discussion of the issue of what relief should be extended is found in Jenson_v._State_Department_of_Labor_and_Industry, 689 P.2d 1231, appeal after remand 718 P.2d 1335 (Mont. 1984). The majority in that decision takes the same position as the Minnesota courts, applying proper legal procedures to all original applicants. Two dissenting judges objected to reopening the process for all of the original applicants, because it might mean that the job would ultimately go to one of the other six veterans who had not appealed the illegal procedures. That is not a problem here, as Petitioner indicated on the record that he would have no objection to the other veterans being allowed to

be interviewed. Another dissenting judge in that case wanted to completely reopen the position for new applicants, arguing that there were perhaps additional veterans who did not apply, because they did not know they would receive absolute veterans preference at the time the job was originally listed.
Again, that is obviously not a problem here.

In this case, keeping the reopening of the process to applicants responding to the original job listing would be in accord with Respondent's established practice of creating and maintaining a list of eligibles for a year. Judicial economy would not be served by forcing the other veterans who were deprived of their rights to file separate petitions with the Commissioner.

It would appear based on this record that there is a good chance Petitioner will be one of the five firefighters ultimately hired, once he is allowed to interview. At least one considerably less qualified candidate ranked in the top five in the previous flawed process. All that Mr. Franklin petitions for is the opportunity to participate fully and fairly in the selection process. The law will not countenance anything less.

H.L.K., Jr.