

3100-6206-2

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

Kenneth E. Phernetton,

Petitioner,

OF FACT,
V.
OF LAW,

FINDINGS

CONCLUSIONS

AND

RECOMMENSATION

Independent School District No. 200,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson at 9:30 a.m. on Friday, March 6, 1992, at the Office of Administrative Hearings, Minneapolis, Minnesota. Petitioner Kenneth E. Phernetton, 901 East Second Street, Hastings, MN 55033, appeared on his own behalf. Kenneth LaCroix, Superintendent, John A. Lightbourn, Director of Grounds, and Shirley Meier, Personnel Office Manager, appeared on behalf of Respondent Independent School District No. 200, 190 - 9th Street, Hastings, Minnesota 55033. The record in this matter remained open until March 27, 1992, for the submission of post-hearing evidence and arguments.

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. sec. 14.61 (1990), the final decision of the Commissioner of Veterans Affairs shall not be made until this Report has been made available to the parties 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, Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155-2079, to ascertain

the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issue to be determined in this matter is whether the selection procedure utilized by the School District with respect to two full-time custodial positions filled in September, 1991, or the School District's failure to hire Petitioner for one of the full-time positions violated the Petitioner's rights under the Minnesota veterans preference statutes and, if so, what relief, if any, is appropriate.

Based upon all the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner received an honorable discharge from the United States Air Force on December 20, 1957. Petitioner is not disabled. The parties have stipulated that Petitioner is a veteran within the meaning of the Minnesota veterans preference statutes. Minn. Stat. 43A.11, 197.455 and 197.46 (1990 & 1991 Supp.).

2. Petitioner worked as a substitute custodian for the School District from 1986 to September of 1991 and as a part-time custodian for the School District from September of 1991 to the present. Substitute custodians fill in for full-time custodians on an intermittent basis and work less than forty hours per week. Part-time custodians also work less than forty hours per week but have a regular schedule.

3. Prior to working as a substitute and part-time custodian for the School District, Petitioner worked 12 years as a part-time custodian for the Minneapolis Veterans Administration Hospital, operated a carpet cleaning service for 22 years, and ran his own cleaning service from 1968-1978. Petitioner received superior and average performance ratings during his employment at the VA Hospital.

April 1989 Hiring

4. On April 4, 1989, the School District interviewed candidates to fill five full-time custodial positions. One position was available at the Senior High School, two at the Middle School, and two at Kennedy Elementary School. Eighty-six individuals applied for the positions, and nineteen were granted an interview. (Ex. 1.)

5. A selection committee made up of eight School District employees who were experienced in custodial matters was involved in the hiring process. Each committee member first went through the applications and divided the applications into two groups, one of applicants who should be interviewed and one of applicants who should not be interviewed. Applicants who were recommended for interview by all of the committee members were placed on a list of those to be interviewed.

6. The parties disputed whether Petitioner had submitted a formal application for the positions filled in April, 1989. After the interview list was compiled, however, the School District added to the list of those to be interviewed the names of all substitute custodians employed by the School District, regardless of whether the substitute custodians had submitted a formal application. The School District placed Petitioner's name on the list of applicants, and Petitioner was interviewed. (Ex. 1.)

7. During the individual interviews, one member of the selection committee asked each of the applicants the same fifteen questions in the same order. The answers were scored by each of the seven other committee members, and the scores for each applicant were totalled and later used to rank each

applicant.

8. Following the completion of the interviews, each committee member completed a ranking form identifying the top seven applicants. Each member of the committee assigned the number "1" to the applicant that he or she felt was

the best candidate for the job by virtue of the applicant's score on the fifteen Interview questions, the number "2" to the second-best applicant, and so on up to "7." (Ex. 1.) These rankings were later compared to arrive at the final selections.

9. During the selection process, the applicants were evaluated on the basis of their answers to the interview questions, work experience, physical well-being, references, and any personal knowledge the committee members may have had of the applicant. The selection committee took into consideration evaluations of the substitute custodians which had been provided by lead custodians at the request of the Director of Grounds for the School District. The comments of lead custodians regarding Petitioner were summarized as follows in a document provided to the selection committee:

[N]o, on a scale of 1 - 10 I'd give him a 3; slow, talkative; I'm not impressed with his work. Likes to stand around and talk. Does what he feels like [sic] to do; Ken is a little slow, takes longer than an average person to do his work, doesn't have time to do any extras; on a scale of 1 - 8 I'd give him a 3; very talkative [sic], gets on the entire staff's nerves; from my one day of observance he was on time and did what he was asked to do.

(Ex. 5.)

10. Petitioner was not ranked among the top seven candidates on any of the committee members' ranking forms, and he was not selected for any of the available five positions. (Ex. 1.) The School District did not provide Petitioner with any written explanation for why he was not chosen.

11. The selection process for the April 1989 hiring did not utilize a 100-point rating system.

12. Applicants were not asked whether or not they were veterans at any point during the selection process. The job application form utilized by the School District does not inquire into veteran status. (see Ex. 6.)

13. None of the committee members were aware of Petitioner's veterans status at the time of the selection process. Petitioner was not awarded any veterans preference points when the committee considered Petitioner as a candidate for the April 1989 positions.

September 1989 Positions

14. On September 12, 1989, the School District sought to fill one full-time custodial position available at the Senior High School.

15. The selection process for the September 1989 hiring was similar to that utilized for the April 1989 hiring. The selection committee in this instance was composed of three School District employees. Applicants were chosen for interview in the same fashion, and substitute custodians were added to the list of those to be interviewed pursuant to the School District's practice of considering substitute custodians regardless of whether they submitted a formal application. All four applicants (including Petitioner) were granted interviews. (Ex. 2.)

16. Responses to interview questions were scored by the members of the selection committee, and each committee member used a ranking form to rank the applicants, with the number "1" assigned to the applicant the committee member felt best qualified for the job, the number "2" assigned to the second-best applicant, and so on down to the number "4." (Ex. 2.)

17. Petitioner ranked fourth, or last, on each of the committee members' ranking forms, and was not selected for the job. (Ex. 2.)

18. The School District did not utilize a 100-point rating system during the September 1989 hiring process.

19. At no time in the hiring process were any of the applicants asked about their veterans status. The committee members were not aware of Petitioner's status as a veteran. Petitioner was not awarded any veterans preference points.

November 1989 Hiring

20. On November 2, 1989, the School District sought to fill one full-time custodial position available at Tilden Elementary School.

21. The selection process for the November 1989 hiring was similar to that utilized in the prior hirings described above. The selection committee in this instance was composed of three School District employees, one of whom was involved in the process only after the field of candidates was reduced to three. Twelve of the fifteen applicants were granted an interview. Again, Petitioner was included among the applicants granted an interview pursuant to the School District's practice of considering substitute custodians regardless of whether they submitted a formal application. (Ex. 3.)

22. Responses to interview questions were scored by the members of the selection committee, and the committee members used ranking forms to rank those they felt were the top five applicants. (Ex. 3.)

23. Petitioner did not rank in the top five on either of the committee members' ranking forms, and was not selected for the position. (Ex. 3.)

24. The School District did not utilize a 100-point rating system during the November 1989 hiring process.

25. At no time in the hiring process were any of the applicants asked about their veterans status. The members of the selection committee were not aware of Petitioner's veteran status. Petitioner was not awarded any veterans preference points.

September-1991 Hiring

26. In late August of 1991, the School District sought to fill two full-time custodial positions and one part-time custodial position. The full-time positions were available at the Senior High School and Pinecrest

Elementary School. The part-time position was available at McAuliffe
Elementary School.

27 . A Notice of Vacancy dated July 23, 1991, was prepared and posted with respect to the full-time position available at Pinecrest Elementary School. A Notice of Vacancy dated August 12, 1991, was prepared and posted with respect to the full-time position available at Hastings Senior High School.

28. The Notices of Vacancy set forth the following "required qualifications" for the two full-time custodial positions:

- Must be in good general health and pass a physical exam prior to employment.
- Must be able to lift eighty pounds to chest height.
- Must be able to adjust his/her hours to accomplish the daily workload and also to provide for emergency situations.
- Must be willing to work overtime as requested.
- Shall have the ability to deal with faculty, students and the public in a friendly, cooperative manner.

ate Notices of Vacancy dated July 23, 1991, and August 12, 1991.

29. By the time of the September 1991 hiring, the School District had become aware that it had the responsibility to provide veterans with a preference in hiring. Shirley Meier, Personnel Office Manager for the School District, recommended to the four-member selection committee that veterans (including Petitioner) be considered for interviews during the selection process.

30. In order to decide which candidates should be interviewed, the selection committee went through the applications and divided them into two groups, as described above. No numerical system was applied in assessing who should be interviewed.

31. The selection committee decided that it would interview an applicant if the selection committee happened to know that the applicant was a veteran and the applicant was a "borderline case" for an interview. John Lightbourn, the Director of Grounds for the School District and a member of the selection committee, knew of no instance in which the selection committee made such a determination.

32. Seven of the seventy-two applicants for the positions were selected for interviews. Petitioner was not interviewed for either of the full-time positions or the part-time position. The parties dispute whether or not Petitioner filed a formal application for this position. Petitioner was, however, considered by the selection committee in any event pursuant to its customary practice with respect to substitute custodians. The selection committee unanimously decided that Petitioner would not be interviewed because everyone on the committee was "familiar" with Petitioner and wanted to

interview other candidates to "see what else was out there."

33. During the interviews, the applicants were asked ten questions. One point was allocated to each question. The members of the selection committee

decided based upon the applicant's response to each question whether or not the applicant should receive the point. Fractions of a point were not awarded.

34. The record is unclear regarding the manner in which the selection committee identified the successful candidates for the available positions.

35. The selection process did not utilize a 100-point rating system.

36. Petitioner was not selected for either of the full-time positions. The School District did not provide Petitioner with any written explanation for its decision not to hire him for the full-time positions.

37. Petitioner was selected for the part-time position at McAuliffe Elementary School. He is currently employed in that position on a September to June basis. The position is evaluated each year by the School District to determine if it is still needed. Under the collective bargaining agreement which is currently in effect, Petitioner is retained in the position so long as the position is retained.

38. The School District did not submit a copy of the posting for the part-time custodial position awarded Petitioner or otherwise provide sufficient evidence that the minimum qualifications for part-time custodial positions varied from those for full-time positions. By virtue of this lack of evidence and the fact that Petitioner was in fact hired as a part-time custodian, the Judge finds that Petitioner met the minimum qualifications for the full-time positions that were filled by the School District in September 1991.

39. Administrative Law Judge Steve M. Mihalchick issued Findings of Fact, Conclusions of Law and a Recommendation in *Gordon R. Nilson v. independent School District No. 200*, OAH Docket No. 69-3100-5884-2, on November 20, 1991. In his report, Judge Mihalchick concluded that the School District's removal of Gordon Wilson from a custodial position and its subsequent failure to recall Mr. Wilson for one of the full-time custodial positions filled in September of 1991 violated Mr. Wilson's veterans preference rights, and recommended that Mr. Wilson be immediately employed as a full-time custodian. The Commissioner of Veterans Affairs apparently has not yet rendered a determination in the Wilson matter.

40. Petitioner frequently asked lead custodians for whom he worked as a substitute whether they had any complaints regarding his work. They always told him that they had no complaints. No one has ever complained to Petitioner about his ability to get along with people.

41. Petitioner has been orally reprimanded on two occasions for talking to on-duty custodians while he is off-duty.

42. Petitioner filed a petition on January 14, 1992, with the Minnesota Department of Veterans Affairs in which he alleged that the School District denied his veterans preference rights during the selection process for the full-time positions filled in September 1991.

43. A Notice of Petition and Order for Hearing was issued by the

Commissioner of Veterans Affairs with respect to this matter on January 29, 1992.

44. Petitioner only challenges the validity of the selection process for the full-time custodial positions filled in September 1991. He does not challenge the selection process used by the School District in 1989.

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

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction over this matter pursuant to Minn. Stat. 14.50 (1990) and 197.481 (1991 Supp.). The Notice of Hearing issued by the Commissioner of Veterans Affairs was proper and all substantive and procedural requirements of law have been met.

2. The Petitioner, Kenneth E. Phernetton, is a nondisabled veteran within the meaning of Minn. Stat. 197.447 (1991 Supp.) and 43A.11 (1990), and is entitled to all of the rights set forth in the veterans preference statutes.

3. Independent School District No. 200 is a political subdivision within the meaning of Minn. Stat. 197.455 (1991 Supp.).

4. The burden is on the Petitioner in this proceeding to prove by a preponderance of the evidence that he was denied his rights under the veterans preference statutes.

5. Minn. Stat. 43A.11, subd. 3 (1990), grants to honorably discharged, nondisabled veterans a preference in governmental employment through the addition of five points to the individual's competitive open examination rating.

6. All of the Minnesota veterans preference statutes were in effect at the time Petitioner sought permanent employment with the School District.

7. Petitioner has satisfied his burden of establishing by a preponderance of the evidence that he was denied his rights under Minn. Stat.

43A.11 and 197.455 (1990 and 1991 Supp.), when the School District failed to award him veterans preference points at any time during the hiring process for the full-time custodial positions filled in September, 1991.

8. The Memorandum below is incorporated by reference in these Conclusions of Law.

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 requiring Independent School District No. 200 to vacate its September 1991 hiring with respect to the two full-time custodial positions, reopen these positions, and conduct a new selection process based upon proper identification of the veterans status of applicants, appropriate application

of a 100-point rating system, and allocation of five additional points for nondisabled veterans and ten additional points for disabled veterans; provided, however, that if Gordon R. Wilson is reinstated to one of the two full-time positions, only the remaining full-time position should be reopened.

Dated this 28th day of April, 1992.

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1 (1988), the Commissioner of Veterans Affairs is required to serve its final decision upon each party and the Administrative law Judge by first class mail.

Reported: Tape recorded (no transcript prepared.)

MEMORANDUM

The Minnesota Legislature has recognized 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" and accordingly has required that public employers award veterans an employment preference. Minn. Stat. 43A.11, subd. I and 3 (1990). Public employers are required to add five points to the competitive open examination rating of a nondisabled veteran, and ten points to the rating of a disabled veteran. This preference is made applicable to school districts by Minn. Stat. 197.455 (1991 Supp.). That section states:

The provisions of Minnesota Statutes, 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 . . . school district . . . except that a notice of rejection stating the reasons for rejection of a qualified veteran shall be filed with the appropriate local personnel officer. Any provision in a law, charter, ordinance, rule or regulation contrary to the applicable provisions of section 43A.11 is void to the extent of such inconsistency.

Minn. Stat. 197.455 (1991 Supp.)(emphasis added). I/

Minn. Stat. 197.455 directs school districts to follow the provisions of Minn. Stat. 43A.11 except to the extent that the employer's explanation for its failure to hire the veteran is to be filed with the school district personnel officer rather than being provided directly to the veteran. Because school districts thus are not required to provide the veteran with a notice of

rejection (as required by Minn. Stat. 43A.11), the School District in the present case did not violate the statute when it failed to provide Petitioner with a written explanation of the reasons underlying his rejection. The record does not reveal whether the School District in fact filed a notice of rejection with the local personnel officer.

In Hall v. city of Champlin 463 N.W. 2d 502 (Minn. 1990) , the Supreme Court affirmed the Court of Appeal's holding [450 N.W.2d 613 (Minn.App. 1990)]

that a rating system based upon 100-points is implicit in the veterans preference law. The Supreme Court reasoned that a 100-point system "is necessary to the uniform application and intended effect of that law." Hall,

463 N.W.2d at 505. The Court further held that "political subdivisions of the

state Must adapt their hiring systems to a 100-point rating system to enable

the allocation of veterans preference points." Id. at 505-506 (emphasis added). The Court further noted:

Our decision today does not unduly restrict the discretion granted by the legislature to cities that choose to operate under a personnel ordinance. It does not require political subdivisions to adopt any particular form of hiring system. They need not adopt civil service systems nor need they extensively revise hiring processes and administer formal written examinations for all positions subject to veterans preference. 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.

at 506.

Evidence presented at the hearing focused upon four recent occasions on which the School District has hired custodians. With respect to the three

occasions that occurred in 1989, the School District has candidly admitted that it was unaware of veterans preference requirements and that an applicant's status as a veteran played no role in the selection process. These selection processes obviously were not in conformity with Minnesota veterans preference statutes. Petitioner in this case, however, does not complain about the 1989 selections. His complaint is limited to an allegation

that the procedures followed by the School District when it filled two full-time custodial positions in September of 1991 violated his veterans preference rights.

Neither party in this proceeding was represented by an attorney, and the record is unclear concerning certain aspects of the September 1991 selection

process. It appears, however, that the School District advertised two full-time and one part-time custodial openings, received formal applications

from a number of persons interested in the position, and appointed a selection

committee composed of four individuals. Each member of the selection committee then reviewed the formal applications and identified the candidates that he or she would like to see interviewed. A list of individuals to be interviewed was compiled by comparing the interview choices of each committee

member. Pursuant to general School District practice, the committee members also considered the substitute custodians currently employed by the School District to be applicants for the positions, and decided whether they should be added to the interview list. No numerical system was utilized by the committee members in evaluating the applicants prior to the interview.

The selection committee, having recently learned of the applicability of veterans preference statutes, decided that, in "borderline" cases, it would interview an applicant who was a veteran. John Lightbourn, the Director of Grounds, testified that it was the committee's understanding that "veterans had be be at least interviewed," and that veterans "received preferential ranking to be at least interviewed." The application form utilized by the School District, however, did not inquire into veterans status, and the witnesses at the hearing were reduced largely to speculation regarding whether particular applicants or the successful candidates were veterans. In addition, Mr. Lightbourn testified that he knew of no instance in which veterans who were "borderline" cases were in fact interviewed by virtue of this policy.

During the interviews, the selection committee asked each candidate ten questions. The responses to each question were scored by each member of the committee by awarding either one point or zero points. After the interviews were completed, the committee identified the successful candidates. Because the process which the committee followed in doing so was not fully explained, it is unclear whether the points awarded each candidate during the interviews were tallied and the highest-scoring individuals were selected, or whether the committee members ranked their candidate choices, these choices were compared, and the individuals who were ranked highly by the majority of the committee members were selected. Where rankings are performed, the impact of any statutorily-mandated veterans preference points that have been included in a candidate's score will be impermissibly diluted.

The selection committee was aware that Petitioner was a veteran. It decided, however, that it would not interview Petitioner because it was "familiar" with him and wanted to "see what else was out there." Although Petitioner was not interviewed during this selection process, 2/ he was in fact hired for the part-time custodial position. The basis for Petitioner's selection is unclear, since it is evident that no interview points could have been awarded to him. The School District was given an opportunity following the hearing to provide documentation with respect to the minimum qualifications for the openings involved in the September 1991 hiring. It provided copies of the postings with respect to the full-time positions, but did not provide a copy of the posting with respect to the part-time positions or any other

2/ Evidence presented at the hearing by both the School District and the Petitioner indicated that, although Petitioner was selected for the part-time position, he was not interviewed during the hiring process. Such a conclusion is also consistent with Exhibit 4, which does not list Petitioner among those interviewed, and the finding of Judge Milhalchick in *Wilson v.*, independent School District No. 200 (discussed in Finding of Fact No. 39 above) that the School District hired a third person for the part-time position who was not on the list of applicants or among those persons interviewed. See Finding of

Fact No. 18 in Wilson. It thus appears that the statement in the petition filed by Petitioner with the Department of Veterans Affairs indicating that Petitioner was interviewed for the part-time position is erroneous.

evidence that the minimum qualifications for the part-time position differed from those associated with the full-time positions. 3/ Because Petitioner was chosen to fill the part-time position, it thus appears that he satisfied the minimal qualifications for the full-time positions. If Petitioner's status as a veteran were taken into account, he should have received an interview and appropriate consideration for the full-time positions.

It is clear that the selection procedures for the full-time positions filled in September 1991 violated Petitioner's right to veterans preference in public employment. The School District, even though aware of Petitioner's status as a veteran, did not award Petitioner extra points in rating him for the full-time positions and did not utilize a 100-point rating system or a system that was clearly capable of being reduced to a 100-point rating system. 4/ Due to the School District's failure to interview Petitioner during the selection process and its failure to otherwise employ a numerical system in evaluating candidates, the record is devoid of any evidence permitting a comparison of Petitioner's "rating" with those of the other candidates for the positions. Therefore, the evidence is insufficient to determine whether Petitioner would have been selected for either of the full-time positions if the School District had awarded him five additional points. The Administrative Law Judge thus has recommended that the hiring for the two full-time positions be vacated and a new selection process be conducted based upon proper identification by applicants of veterans status, appropriate application of a 100-point rating system, and allocation of five additional points for nondisabled veterans and ten additional points for disabled veterans. Since only the hiring practices regarding the full-time positions are at issue in this case, it has been determined that it is not necessary to reopen the part-time position.

As noted in Finding No. 39 above, Administrative Law Judge Steve M. Mihalchick has determined in a separate veterans preference case against the School District that a veteran terminated by the School District should have

3/ The School District's witnesses did testify that the responsibilities of full-time custodians differed from those of part-time custodians because full-time custodians received less supervision and had to work more on their own. These differences in level of responsibility, however, do not justify a conclusion that the minimum qualifications for the full-time and part-time jobs are different. Moreover, the postings for the full-time positions do not mention any attributes relating to the ability to work without supervision among the "required qualifications" for the job.

4/ Because insufficient evidence was provided concerning the method followed by the selection committee in identifying the candidates who were ultimately successful, it is unclear if the School District evaluated candidates based entirely upon a ten-point interview process or a "ranking"

process. Assuming a ten-point process is utilized and no adjustments are made to rank the applicants, conversion to a 100-point rating system may easily be accomplished. Proper adherence to veterans preference requirements would be achieved under such a ten-point system by awarding nondisabled veterans .5 additional points and disabled veterans one additional point.

been laid off and reinstated when the full-time positions became available in September 1991. Judge Mihalchick recommended that the Commissioner of Veterans Affairs order the School District to immediately employ Gordon Wilson, the veteran involved in that case, as a full-time custodian. The Commissioner of Veterans Affairs apparently has not yet rendered a final decision in the Wilson case, and it is unclear whether Mr. Wilson has been reinstated in one of the two full-time custodial positions at issue in the present proceeding. If Mr. Wilson is in fact reinstated to one of the two full-time positions, the Judge has recommended that only the remaining full-time position should be reopened. The Commissioner of Veterans Affairs is urged to take his decision in the Wilson matter into consideration when granting any appropriate relief in the present case.

Based upon the evidence submitted at the hearing, it appears that the School District has unintentionally acted in derogation of Its obligations under the veterans preference laws. It may be helpful for the School District to seek legal counsel in order to ensure that it is fully aware of these obligations in future hiring situations.

B.L.N.