

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

In the Matter of Alan D. Frank,

Petitioner,  
v.

Otter Tail County,

Respondent.

RECOMMENDED ORDER  
GRANTING MOTION FOR  
SUMMARY DISPOSITION  
AND ORDER FOR  
CERTIFICATION

By written motion dated December 23, 1994, Otter Tail County seeks an Order dismissing the request of Alan D. Frank for a veteran's preference hearing on the issue of his ceasing to occupy the position of sergeant with the Otter Tail County Sheriff's Department. The County also filed a Statement of Facts and supporting Memorandum of Law with their Motion. By written motion dated December 23, 1994, Alan D. Frank (Mr. Frank or Employee), seeks an Order of the Administrative Law Judge granting summary disposition in his favor on the issue of whether he is entitled to a hearing as to whether just cause existed for his cessation of employment as a sergeant with the Otter Tail County Sheriff's Department and his return to employment as a regular deputy sheriff. On January 12, 1995, the Employee filed a response to the Respondent's Motion in Support of Summary Disposition in favor of the County. The County, by letter received on January 12, 1995, declined to file a memorandum in response to the Employee's Motion.

The record on the Joint Motions for Summary Disposition closed on January 12, 1995, with the receipt by the Administrative Law Judge of the responsive memorandum of the Employee.

Appearances: Thomas Bennett Wilson III, Wilson Law Firm, Suite 220, 4933 France Avenue South, Edina, Minnesota 55410, filed an appearance on behalf of Alan D. Frank (the Employee or Mr. Frank); and Michael T. Rengel, Pemberton, Sorlie, Sefkow, Rufer & Kershner, Attorneys at Law, Law Office Building, 110 North Mill Street, P.O. Box 866, Fergus Falls, Minnesota 56538-0866, appeared on behalf of Otter Tail County (Employer, Respondent or County).

Because the recommendation of the Administrative Law Judge on the Joint Motions for Summary Judgment is in favor of summary judgment for the County, the Administrative Law Judge advises the parties of their right to file exceptions to this Report as follows:

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 and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 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, Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota 55155-2079, telephone (612) 296-2783, to ascertain the procedure for filing exceptions or presenting argument.

Based upon all of the records and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY RECOMMENDED:

1. There are no genuine issues of material fact regarding the circumstances under which Alan D. Frank ceased serving as a sergeant for the Otter Tail County Sheriff's Department and, therefore, a hearing to develop factual issues is unnecessary.

2. The County is entitled to summary disposition, as a matter of law, dismissing the veteran's preference appeal of Alan D. Frank regarding his cessation of service as a sergeant in the Otter Tail County Sheriff's Department and his return to employment as a regular deputy sheriff with the County.

3. Pursuant to Minn. Rules, pt. 1400.7600 (1993), this recommended Order for Summary Disposition, along with the official record of this proceeding, are hereby certified to the Commissioner of the Department of Veterans Affairs.

Dated this 20 day of January, 1995.

s/s Jon L. Lunde  
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JON L. LUNDE  
Administrative Law Judge

MEMORANDUM

After a review of the memoranda and accompanying affidavits submitted by the Employee and the County, the Administrative Law Judge believes that no hearing to develop a factual record in the above-captioned matter is appropriate. There are no material facts at issue in this proceeding which are open to dispute. Both parties, based on their supporting documentation, have moved for summary disposition. For the reasons hereinafter discussed, the Administrative Law Judge believes that summary disposition against the Employee, Alan D. Frank, is appropriately granted to the County.

A request for summary disposition should be granted when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law. Minnesota Rule of Civil Procedure, Rule 56.03; Minn. Rules, pt. 1400.5500 K (1991). A material fact is one which is substantial and will affect the result or outcome of the proceeding, depending on the determination of that fact. Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804 (Minn. App. 1984), rev. den., February 6, 1985. In considering a motion for summary disposition, the evidence must be viewed in the light most favorable to the nonmoving party. Grondahl v. Bulluck, 318 N.W.2d 240 (Minn. 1981); Nord v. Herried, 305 N.W.2d 337 (Minn. 1981); American Druggists Institute v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. App. 1989).

With a motion for summary disposition, the initial burden is on the moving party to show facts establishing a prima facie case for the absence of material facts at issue. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the nonmoving party. Minnesota Mutual Fire & Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To resist a motion for summary disposition, the nonmoving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid-America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). The nonmoving party may not rely on general assertions; significant probative evidence must be offered. Minnesota Rules of Civil Procedure, Rule 56.05; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989); Celotex Corp. v. Catrett, 477 N.W. 317, 322-23 (1986); Bob Useldinger & Sons, Inc. v. Hangsleben, 505 N.W.2d 323 (Minn. 1993); Lundgren v. Eustermann, 370 N.W.2d 877 (Minn. 1985); Lamont v. Minnesota Department of Employee Relations, 495 N.W.2d 11 (Minn. App. 1993). General Casualty Co. of Wisconsin v. Mid-Continent Agencies, Inc., 485 N.W.2d 147, rev. den.; Johnson v. Van Blaricon, 480 N.W.2d 138 (Minn. App. 1992); Phillips-Klein Companies, Inc. v. Tiffany Partnership, 474 N.W.2d 370 (Minn. App. 1991); Kletschka v. Abbott-Northwestern Hospital, Inc., 417 N.W.2d 752, rev. den.; Bush v. City of Lakefield, 399 N.W.2d 169 (Minn. App. 1987), rev. den.; National Farmers Union Property & Casualty Co. v. Henderson, 372 N.W.2d 71 (Minn. App. 1985); and Alexander Construction Co., Inc. v. C & H Contracting, Inc., 354 N.W.2d 535 (Minn. App. 1984). A mere statement of conclusions unsupported by allegations of fact or mere conclusory denials are not sufficient to oppose successfully a motion for summary disposition. Johnson v. Van Blaricon, 480 N.W.2d 138, 140 (Minn. App. 1992); Gutwein v. Edwards, 419 N.W.2d 809 (Minn. App. 1988); Nowicki v. Benson Properties, 402

N.W.2d 205 (Minn. App. 1987); Grand Northern, Inc. v. West Mall Partnership, 359 N.W.2d 41 (Minn. App. 1984); Alexander Construction Co., Inc. v. C & H Contracting, Inc., 354 N.W.2d 535 (Minn. App. 1984). The evidence introduced to defeat a summary disposition motion need not be admissible at trial, however, Carlisle, 437 N.W.2d at 715, citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

The Administrative Law Judge believes that the memoranda of the parties and supporting affidavits amply demonstrate that there are no material facts at issue in this proceeding. The parties agree, in all material respects, to the circumstances under which Mr. Alan D. Frank received a promotion to the position of sergeant with the Otter Tail County Sheriff's Department and the action of the County in ceasing to allow him to occupy that position.

The undisputed facts underlying this case are as follows: See, Statement of Facts, submitted by Respondent, dated December 23, 1994 with attached Exhibits and Memorandum of Law in Support of Motion, submitted by Employee, dated December 23, 1994, pp. 1-2. In May of 1994, the Otter Tail County Sheriff's Department posted notice of an internal opening for a sergeant position with the Otter Tail County Sheriff's position. This was a competitive promotional hire limited to persons currently occupying positions in the Otter Tail County Sheriff's Department. It was not an open examination. On June 3, 1994, Petitioner and other employees of the Otter Tail County Sheriff's Department applied for the position on a form supplied by the Respondent. This form had been used for new applications and for promotions since June 23, 1993. Petitioner was invited to appear for an oral interview to be held on June 21, 1994. The filling of the sergeant's position was being accomplished by Chief Deputy Mark Morris of the Otter Tail County Sheriff's Department. When Chief Deputy Morris received and reviewed the applications for the internal opening, he saw that two applicants had requested veteran's preference points. One of the applicants who had requested veteran's preference points for the competitive examination failed to have the necessary length of service and, therefore, there was no issue as to how his request for veteran's preference points should be handled.

Chief Deputy Mark Morris was not fully aware of how to process the Petitioner's request for veteran's preference points on the closed promotional examination. He attempted to contact the Otter Tail County coordinator, Larry Krohn, who was on vacation and would not return for several weeks. Chief Deputy Morris then contacted Detective Sergeant Gary Waskosky, a union steward who represented the employees union. Sergeant Waskosky was also unaware of how to handle the Employee's request for veteran's preference points. Robert Weisenburger, a representative of Minnesota Teamster's Public & Law Enforcement Employees Union Local 320, was contacted. Mr. Weisenburger, who himself did not know the answer to the question, contacted representatives from Dakota County who told Mr. Weisenburger that the Employer was required to give five veteran's preference points to the Petitioner. The information provided by Mr. Weisenburger's contact in Dakota County was based on the erroneous interpretation of Minn. Stat. § 43A.11 (1992), that a non-disabled veteran was also entitled, as a matter of law, to preference points in a competitive examination. Mr.

Weisenburger told Chief Deputy Mark Morris and Sergeant Gary Waskosky the information he had received from his source in Dakota County.

At the conclusion of the interviews, the candidates were ranked by points. The Petitioner finished second, 1.66 points behind the number one applicant, Deputy Sheriff Mark Englund. Pursuant to the erroneous information that Chief Deputy Mark Morris had received, five veteran's preference points were added to the score of Deputy Sheriff Alan D. Frank, causing him to be the number one candidate, after the veteran's points had been added.

By memorandum dated June 22, 1994, the administration of the Sheriff's Department announced that Deputy Sheriff Frank was the highest ranked candidate. On June 22, 1994, Gary Nelson, the Sheriff of Otter Tail County, wrote a letter to Deputy Sheriff Alan Frank offering him the position of sergeant with the Otter Tail County Sheriff's Department, based on the score he had received, which included the addition of five veteran's preference points.

On an unspecified date prior to June 27, 1994, the County Coordinator, Larry Krohn, returned from vacation and was informed that Deputy Frank had received promotion to sergeant, after he was credited with five veteran's preference points. Mr. Krohn told Chief Deputy Morris and Sheriff Nelson that a mistake had been made and that only a disabled veteran was entitled, under Minn. Stat. § 43A.11 (1992), to five veteran's points in a closed promotional examination. Chief Deputy Morris rechecked the source of his information on the addition of veteran's preference points and he was informed that the initial advice given to Chief Deputy Morris by Mr. Weisenburger was erroneous and that Minn. Stat. § 43A.11 (1992) did not require that Mr. Frank receive the five veteran's preference points in the closed promotional examination. Minn. Stat. § 43A.11 (1992) does not authorize or prohibit adding veteran's points to the score of a nondisabled veteran in a closed promotional examination. It does not speak to that subject matter.

By letter dated June 27, 1994, both Deputy Sheriff Mark Englund and Deputy Sheriff Alan D. Frank were informed of the possibility that the addition of five points to the score of Deputy Sheriff Alan D. Frank had been an error by the County, based on erroneous advice about the application of Minn. Stat. § 43A.11 (1992).

On July 5, 1994, Alan D. Frank was notified by Sheriff Nelson and Chief Deputy Mark Morris that the addition of five points for veteran's preference to his score on the closed promotional examination was a mistake and that Deputy Mark Englund would be promoted to the position of sergeant. Deputy Frank had, in the interim, purchased uniforms required for his service as sergeant with the Otter Tail County Police Department. He was, however, reimbursed by the County for his expenditures when he was informed that he would reassume his old position as deputy sheriff.

Otter Tail County has not adopted any provision in its code of personnel regulations which deals with veteran's preference in any circumstance.

Petitioner's Reply to Respondent's Memorandum, January 10, 1995, Exhibit A. The Employee concedes that the County has not adopted a policy specifically granting or denying veteran's preference as a part of its code of regulations regarding personnel policy. Petitioner's Reply to Respondent's Memorandum, January 10, 1995, p. 4. The application form used by the County, Petitioner's Memorandum of Law in Support of Motion, December 23, 1994, Exhibit 2, p. 3, states, in relevant part:

Preference points are awarded to qualified veterans and spouses of deceased or disabled veterans to add to their exam results. Points are awarded subject to the provisions of Minnesota Statutes 43A.11. To be eligible for veteran's preference points, you must: . . . .

A veteran does not have any constitutional right to veteran's preference in public employment. Veteran's preference is a creation of the Legislature and the Legislature can remove such rights or limit the rights available to veterans as it sees fit. State, ex rel. Stubben v. Board of County Commissioners of Hennepin County, 273 Minn. 361, 141 N.W.2d 499 (1966); Mahoney v. Minnesota Department of Highways, 281 Minn. 199, 161 N.W.2d 45 (1968). The purpose of the veteran's preference law is to provide a measure of equity to veterans who have served their country and demonstrated both character and service. The right does not, however, arise apart from legislative action or, conceivably, the action of a personnel authority entitled to grant such a preference.

Minn. Stat. § 197.455 (1992), in relevant part, provides:

The provision of sections 43A.11 granting preference to veterans in the state civil service applies under the civil service laws, charter provisions, ordinances, rules or regulations of a county, city, town, school district, or other municipality or political subdivision of this state, . . . .

Minn. Stat. § 43A.11, subd. 3 (1992), in relevant part, provides:

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.

Minn. Stat. § 43A.11, subd. 4 (1992), which relates to a disabled veteran's credit, in relevant part, provides:

There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of ten points provided that the veteran obtained a passing rating on the examination without the addition of the credit points. There shall be added to the competitive

promotional examination rating of a disabled veteran, who so elects,  
a credit of five points . . . .

Minn. Stat. § 43A.11 (1992), therefore, only requires the addition of five points to the score of a nondisabled veteran when the examination involved is a "competitive open examination". Only a disabled veteran receives by virtue of the statute a credit of five points in a "competitive promotional" examination. A clear reading of the statute, therefore, does not mandate that Deputy Alan D. Frank, a nondisabled veteran, receive veteran's preference points in an competitive promotional examination, as was involved in this case.

It could be argued that either the County or the appointing authority, the Sheriff's Department, would have discretion to exceed the requirements of Minn. Stat. § 43A.11, subd. 3 and 4 (1992), and purposefully award veteran's credits to Deputy Alan D. Frank, a nondisabled veteran in the competitive promotional examination involved in this case. Initially, it should be stated that Minn. Stat. § 197.455 (1992), previously quoted, makes Minn. Stat. § 43A.11 (1992) exclusive in its governance of the subject matter and the County could not exceed the points and circumstances under which veterans preference would be allowed by Minn. Stat. § 43A.11 (1992). While there is support for this construction of Minn. Stat. § 197.455 (1992), the Administrative Law Judge need not formally decide that issue. It is clear, as the Employee recognizes, the County has not adopted a provision in its personnel policy granting veteran's rights under the circumstances involved in this case. See, Petitioner's Reply to Respondent's Memorandum, January 10, 1995, at Exhibit A. The personnel form previously quoted does not provide an independent right to any stated veteran's points. It incorporates by reference Minn. Stat. § 43A.11 (1992), under the requirement of Minn. Stat. § 197.455 (1992).

It could be argued that the addition of points to Deputy Frank's score by Chief Deputy Morris was a sufficient and intentional addition of points to give the Employee the benefits of Minn. Stat. § 197.46 (1992). The simple response to that contention was stated by the Minnesota Supreme Court in State, ex rel. Archambo v. Thorfinnson, 61 N.W.2d 231, 235 (Minn. 1953), as follows:

Appellant also contends that he acquired civil service status when he was placed on the civil service register by the new commission, which register was based on information furnished the commission by the superintendent of police. There is no merit to this contention for at least two reasons. In the first place, he could not acquire a status he did not have simply by the superintendent's including his name on the list of those eligible by mistake.

As the court recognized in Thorfinnson, supra, an appointing authority may correct a mistake without offending the requirements of Minn. Stat. § 197.46 (1992). See also, Ochocki v. Dakota County Sheriff's Department, 464 N.W.2d 496 (Minn. 1991); State ex rel. Cruse v. Webster, 231 Minn. 309, 43 N.W.2d 116 (1950).

The Employee in this case attempts to take inappropriate advantage of a simple mistake when the mistake has not caused him prejudice by a resort to a mechanistic and metaphysical interpretation of Minn. Stat. § 197.46 (1992). He asserts that once a thing has been done, even if in error, the law prohibits its undoing. No such mechanistic and formal interpretation of the veteran's preference law is appropriate. A court looks to the substance of the circumstances, not the formal label. Myers v. City of Oakdale, 409 N.W.2d 848, 850-51 (Minn. 1987); Ammend v. County of Isanti, 486 N.W.2d 3, 6 (Minn. App. 1992). The purpose of the veteran's preference act is to accommodate within the framework of fairness to nonveterans, a reward to veterans for service to the country in its armed forces. In no way does the result argued for by the Employee support that purpose. Rather, he asks that he be allowed to retain something to which he was not entitled and he only received by mistake to the detriment of another applicant who is entitled to fair treatment by the system. The correction of a clear and obvious mistake in a timely fashion by the appointing authority without prejudice is "not the type of removal to which the Veteran's Preference Act applies; therefore, the County's actions did not violate the Veteran's Preference Act". Ochocki v. Dakota County Sheriff's Department, 464 N.W.2d 496, 498 (Minn. 1991). Summary disposition of the Employee's appeal is appropriate.

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