

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

Gary G. Johnson,

Petitioner,

v.

City of Battle Lake,

Respondent.

FINDINGS OF FACT,

CONCLUSIONS AND RECOMMENDATION

The above-captioned matter came on for hearing before Administrative Law Judge Jon L. Lunde, commencing at 8:30 a.m. on Monday, May 8, 1995 at the courthouse in Fergus Falls, Minnesota. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated March 10, 1995. The record closed on May 23, 1995 when the Respondent's request to reopen the record to receive additional evidence was denied.

Patricia Y. Beety, Attorney at Law, 3490 Lexington Avenue North, St. Paul, Minnesota 55126-8044, appeared on behalf of the City of Battle Lake (City or Respondent). The Petitioner, Gary G. Johnson, P.O. Box 425 Battle Lake, Minnesota 56515, was present at the hearing. He appeared on his own behalf.

NOTICE

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 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, Minnesota Department of Veterans Affairs, 2nd Floor Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, telephone 612/296-2783, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this case is whether the Respondent failed to use a 100-point system in selecting a new public works laborer, failed to give Petitioner any veterans credit points when he applied, and failed to notify Petitioner of the reasons for the City's failure to hire him in violation of Minn. Stat. § 197.481, subd. 4; and if any violations occurred, whether the Petitioner is entitled to compensatory, punitive, or nominal damages or any other relief.

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

FINDINGS OF FACT

1. Petitioner is an honorably discharged veteran of the United States Marine Corps. He was on active duty between August 31, 1965 and June 30, 1969, during which time he fought in Vietnam.

2. In the fall of 1994, the City's public works superintendent was retiring. At that time, the city council decided to assign the public works superintendent's duties to the water and sewer superintendent and change the water and sewer superintendent's title to "city coordinator." It also decided to create a new public works employee position which would be supervised by the city coordinator.

3. The city council's personnel committee was responsible for preparing a job description for the public works employee, publishing notice of a vacancy, reviewing applications, interviewing finalists, and recommending its selection for hire to the full council. The personnel committee consisted of the city coordinator, Burton Olson, and two city council members: Les Estes and Dean Nordstrom.

4. On September 28 and October 5, 1994, the City published notice that it was seeking applications for the public works employee position. Ex. A. The notice stated that application forms and job descriptions were available from the city clerk's office and that all applications had to be submitted by October 20, 1994. Id. It went on to state that finalists would be interviewed sometime after October 20.

5. Petitioner obtained an application for the public works employee position. At that time, he did not request and wasn't offered a copy of the job description, and he received no instructions for completing the application. He subsequently completed the application and filed it in a timely manner.

6. The job description prepared by the personnel committee described the functions of the public works position as follows:

FUNCTION: Assist in the performance of a wide variety of duties relating to the maintenance and repair of city buildings, streets, parks, airport and water and sewer facilities; check lift stations and sewer plant on alternating weekends, and perform the City Coordinator duties when the City Coordinator is absent.

7. The general job duties of the public works employee involve maintenance of the City's lift stations and sewer facilities. The public works employee is required to

gather water and sewer samples, maintain water and sewer facilities; read, replace, and repair water meters; and inspect and clean sewer lines. Also, the public works employee is required to maintain city streets and parks; remove snow; mow lawns; rake leaves; and perform other, related duties. Ex. B.

8. The only mandatory requirement for the public works position is that the applicant hold a Class C driver's license. However, within two years after being hired, the incumbent would be required to obtain a Class D Waste Water Facility Operator Certificate and a Class D Water Supply System Operator's Certificate. When Petitioner applied, he had a Class D driver's license. It authorized him to drive all types of vehicles, including those covered by a Class C license.^[1] Petitioner noted that he held a Class D driver's license on his application. Ex. D.

9. On October 10, 1994, the personnel committee members met to review the 23 applications which had been filed. The applications were separated into five groups (A-E). Five applications were included in each group except Group E, which had only three applications. Each application was identified by group and by number. For example, D-1 represented the first application in Group D.

10. The applications were graded on a scale from 1 to 3 by each of the committee members. The highest score that could be assigned by each member was 1. The lowest score an applicant received was rejected. The applicant's final score was the sum of the other two scores. Hence, the top score an applicant could receive was 2. Six persons had a score of 2; eight had a score of 3; seven had a score of 4; and two had a score of 5. The Petitioner's score (A-1) was 4.

11. The applicants' scores were based exclusively on information set forth in their applications. Three primary criteria were considered in calculating the applicants' scores: education, job experience, and skills.

12. Petitioner's application contained virtually no information regarding his job experience or his skills. The only employment noted on his application was his current employment as a groundskeeper and his military service. Although Petitioner indicated that he was currently working as a groundskeeper, he did not describe the duties and responsibilities of that position and the only skill he identified was "machinery."

13. Once the applications were reviewed, the personnel committee interviewed the six applicants who received a score of 2. The finalists were graded on a 60-point scale containing five categories: job-related skills, information analysis/decision-making, work orientation, interpersonal relations, and communications. An applicant could get a score of up to 12 points under each category. Veterans points would have been added to the final score, but no veterans were interviewed by the personnel committee and no veterans points, were, therefore allocated to any of the six finalists or the other applicants.

14. Following the personnel committee's interviews, it recommended that the City hire S.S. S.S. obtained a score of 50 from each of the three personnel committee members. They all gave him identical total scores in each of the five scoring categories. The city council adopted the personnel committee's recommendation and

hired S.S. He began working full time on or about December 1, 1994 at an hourly wage of approximately \$8.

15. Petitioner met the minimum qualifications of a public works employee but would not have been interviewed or hired if a different, 100-point scoring system had been used.

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

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Veterans Affairs are authorized to determine if the City failed to use a 100-point system, failed to give Petitioner veterans preference points and failed to properly notify him of the reasons for his rejection and to order appropriate relief for those failures, if any, under Minn. Stat. §§ 43A.11, subd. 3, 197.455, 197.481, and 14.50 (1992).

2. Petitioner and Respondent received timely and proper notice of the hearing and the issues in controversy.

3. The Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of statute and rule.

4. Petitioner is a veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447 (1992).

5. Under Minn. Rules pt. 1400.6700, subp. 5 (1993), the Petitioner has the burden of proof to establish by a preponderance of the evidence that the City violated his rights as a veteran when it hired a new public works employee.

6. The City's vacancy for a public works employee was filled by open competitive examination as defined in Minn. Stat. § 43A.02, subd. 15 (1994).

7. Under Minn. Stat. §§ 197.455 and 43A.11, subds. 3 and 4 (1990), veterans are entitled to receive preference points when applying for a competitive open examination rating from a city.

8. Under Minn. Stat. § 43A.11, subd. 3 (1992), a city must add five points to the competitive open examination score of a nondisabled veteran who requests the credit and who obtained a passing score on the examination.

9. In filling positions by competitive open examination, cities must use a 100-point scoring system to assure that veterans preference laws are uniformly implemented. Hall v. City of Champlin, 463 N.W.2d 502, 506-07 (Minn. 1990).

10. Respondent violated Minn. Stat. § 43A.11 when hiring a new public works employee because it didn't use a 100-point rating system and failed to give Petitioner an opportunity to elect the five veteran points he was entitled to receive.

11. Respondent violated Minn. Stat. § 43A.11, subd. 9 by failing to notify Petitioner of the reasons why his application was rejected.

12. The Respondent did not violate Minn. Stat. § 43A.11 by deciding not to interview all applicants for employment.

13. As a result of the Respondent's statutory violations, Respondent should be ordered to pay Petitioner nominal damages in the sum of \$300.

14. Assuming that punitive damages can be awarded in proceedings arising under Minn. Stat. § 197.481, they should not be awarded in this proceeding because the City acted in good faith.

15. The Commissioner should not invalidate the hiring decision made in this proceeding and require the City to retest the Petitioner or the other applicants using a 100-point scoring system because the Petitioner's job application contains insufficient data for scoring purposes, and if it was scored, the Petitioner's score would not be high enough to merit an interview.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

1. That the Commissioner issue an order requiring the Respondent to use a 100-point scoring system when filling future vacancies by competitive open examination.
2. That the Respondent pay the Petitioner nominal damages in the sum of \$300.

Dated this 25th day of May, 1995

JON L. LUNDE
Administrative Law Judge

Reported: Taped: 2 tapes

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

This case involves the hiring of a new public works employee by the City. Petitioner, a veteran, has challenged the hiring process followed by the City. Petitioner alleged that the City failed to use a proper scoring methodology when filling the position, failed to provide him with the veterans preference points he is entitled to receive under governing statutes, and failed to notify him of the reasons for his rejection.

Minn. Stat. § 43A.11, subd. 3 governs the credits a nondisabled veteran is entitled to receive. It states:

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. § 197.455 (1992) makes the provisions of § 43A.11 applicable to all political subdivisions of the state. It states, in part:

The provision of 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 county, city, town, school district, or other municipality or political subdivision of this state, 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. . . .

The City argued that Petitioner was not entitled to any veterans preference points under the statute because Petitioner did not obtain a passing score on the examination made by the personnel committee. That argument lacks merit.

The only mandatory qualification for the job was possession of a valid Class “C” drivers license. No other minimum qualifications were established. In fact, Olson testified that Petitioner met the minimum qualifications for the job. Because Petitioner met the minimum qualifications, he should have been given a score based on a 100-point scale and an opportunity to elect veterans preference points. The City gave him no such score and no opportunity to elect preference points. It cannot be argued that Petitioner didn’t have a passing score when the scoring method used violated statutory requirements and his veterans preference points were not recognized. There simply is no way to extrapolate a passing score from the scoring system Respondent used.

The personnel committee members didn’t score applicants using a 100-point system based on specified criteria. Instead, each member reviewed the applications and gave the highest scores to applicants who appeared to be the best candidates for the job. Olson admitted that this scoring system was not governed by any formula but by the subjective conclusions of each personnel committee member based on information in the job applications.

The criteria used for the initial review included the applicant’s education, job experience and skills. Olson testified, however, that the important skills included the use of all types of tools and equipment, experience with water and sewer and an ability to work with the public.

The methodology used by the City in conducting the initial review and scoring of job applications did not comport with the directives of the court in Hall v. City of Champlin, 463 N.W.2d 502 (Minn. 1990), because a 100-point system of grading applications wasn’t used and the one to three point system cannot be converted to a

100-point system in any rational manner. The system, by failing to establish minimal qualifications and by failing to use a 100-point system on which veterans points could be awarded violated the statute. The 100-point scoring system must be applied at the point where the relative ranking of applicants is made to determine which of them has passed. In this case, the 100-point system should have been used when the applications were initially scored for purposes of determining who had passed and who would be interviewed.

Respondent suggested that the Petitioner failed to establish minimum qualifications for the job because his job application contains no specifics regarding his employment experience, education, and skills. There is some merit to that argument. Petitioner's job application lists only his current employer and indicates only that Petitioner can operate "machinery." Petitioner should have itemized the types of machinery and equipment he has experience operating and should have listed all his employers and the duties of those employments. Furthermore, instead of reporting merely that he had some training in the Marines, he should have indicated what that training was, rather than merely inserting the word "general."

Petitioner argued that the City should have interviewed all applicants and that it should have provided him with a copy of the job description or instructions on how to complete the application form. Both arguments are unpersuasive. The job announcement, which Petitioner had an opportunity to read, stated that a copy of the job description was available from the city clerk. However, he never requested a copy of the job description. Furthermore, the job announcement stated that only "finalists" would be interviewed. No law requires the City to interview all applicants. Under these circumstances, it was the Petitioner's responsibility, as an applicant for employment, to list his education and training, job experience, and skills on the employment application. He elected not to report detailed information and is responsible for any adverse consequences of that decision. It is probably preferable for employers like Respondent to attach a copy of the relevant job description to an employment application and attach a notice stating the minimum qualifications of the job, the necessity for providing detailed information, and the scoring system that will be used. However, cities aren't required to do that and the Respondent's failure to do so did not violate any veterans preference provisions. All applicants—veterans and nonveterans alike—were treated in the same manner.

When employers fail to use an appropriate scoring methodology, as the City did in this case, it is sometimes appropriate to invalidate the hiring decision that was made and order that the hiring process be repeated following statutory procedures. In this case, however, such an order should not be issued because the Respondent's application was so deficient in detail that it would be virtually impossible to assign a score to his the application. If it was scored, the Administrative Law Judge is persuaded that Petitioner would not pass any reasonable cutoff. The system used by the City placed the Petitioner in the lower half of all applicants. If a new scoring system were developed, it is extremely unlikely that Petitioner's relative position among the applicants would improve even with five veterans preference points. Therefore, the Administrative Law Judge is persuaded that Respondent should not be ordered to redo the hiring process.

The Petitioner should, however, be awarded nominal damages for the statutory violations which occurred to compensate him for the time and expense of this proceeding. In the past, the Commissioner has awarded nominal damages of up to \$300 or more. See Terry L. Seguin, Petitioner, v. City of Duluth, Respondent, Commissioner's Decision and Order dated October 23, 1991; OAH Docket No. 4-3100-5786-2. It is concluded, therefore, that the Respondent should be ordered to pay Petitioner nominal damages in the amount of \$300. Petitioner suggested that the City should be ordered to pay punitive damages to him. The Veterans Preference Act does not specifically authorize the payment of punitive damages. Assuming that punitive damages may be awarded in a particular case, the Administrative Law Judge is persuaded that they should not be awarded here. City officials, including the members of the personnel committee, acted in good faith, and a punitive damage award is not justified.

JLL

^[1] See, Minn. Stat. § 171.02, subd. 2(d).