

VETERAN'S PREFERENCE ISSUES IN HIRING AND FIRING PUBLIC EMPLOYEES

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Overview

The Minnesota Veterans' Preference Act (Minn. Stat. § 197.46 et seq.) provides veterans of military services with certain rights and protections in public employment.

- In the hiring process, qualified veterans who meet the minimum qualifications for a job are awarded preference points from the public employer which increases the likelihood that they will receive an interview.
- In the termination process, the law provides that a veteran cannot be removed from a position except for incompetence or misconduct and only after due notice and a hearing is provided by the employer.

Veteran Defined

A "veteran", for purposes of offering a preference, is a citizen of the United States or a resident alien separated under in honorable conditions from any branch of the U.S. armed forces:

- after having served on active duty for 181 consecutive days; or
- by reason of disability incurred while serving on active duty; or
- who has met the minimum active duty requirement as defined by Code of Federal Regulations, title 38, section 3.12a; or
- who has active military service certified under section 38 U.S.C. Section 106, Part I, Chapter 1.

The United State Secretary of Defense must certify the active service and discharge under honorable conditions of the veteran.

A. Veteran's Preference in Hiring

What is Veterans' Preference

The preference consists of a credit of points available to applicant veterans to recognize the experience and training they received in the military service. Under a 100-point scale established by the public employer, applicant veterans meeting the minimum qualifications for a job are awarded five (5) extra points and disabled veterans are awarded ten (10) extra points. The spouse of a deceased veteran or a disabled veteran who is unable to use the preference because of the disability, is entitled to the same preference.

Veterans' preference applies to all public employers that recruit or employ veterans, including counties, cities, towns, school districts or other municipalities or political subdivisions of the State of Minnesota.

Exception for Department Head Positions: The law does not require public employers to give preference points for department head positions. The following factors are determinative of whether a position constitutes a department head:

1. Does the alleged department head have charge of the work done by his/her department?
2. Does the work require technical, professional training?
3. Is he/she the highest authority at that level of government as to his/her official duties?
4. Does he/her supervise all of the work in his/her department?
5. Does the success of the department depend on his/her technique?
6. Are the employees in the department under his/her direction?
7. Are the duties more than merely different from other employees?
8. Does he/she have power to hire and fire subordinates?

PRACTICE POINTER: Very few positions will qualify for the department head exception because the ultimate authority for personnel administration (such as hiring and/or firing of employees) is often limited to the board or council of the governing unit.

B. Notification of Preference Availability

The public employer must notify all applicants of the availability of veterans' preference points. Notification of the preference points is generally provided to the applicants in the application materials. In order to qualify for the preference points, a veteran applicant must specifically identify the type

of preference requested (i.e. veteran, disabled veteran, spouse of deceased veteran or spouse of disabled veteran) and provide documentation supporting entitlement to the preference within a reasonable time. Generally, a Form DD214 or a Form FL-802 for disabled veterans will substantiate the veteran's preference status.

PRACTICE POINTER: Preference points will not be awarded unless specifically requested by the veteran applicant and substantiated by the necessary documentation.

C. Training and Experience Ratings

The 100-point scale established by a public employer for a position is generally referred to as a Training and Experience Rating (T&E Rating). A sample T&E Rating is attached hereto. Based on the job description, the T&E Rating should list the qualifications necessary for the position and be prepared prior to advertising for the position or reviewing the applications in order to ensure objectivity.

The T&E Rating has three sections: minimum qualifications based on the essential functions of the job; additional desirable qualifications for the job (i.e. additional education, training, experience, licensures etc.); and statutorily mandated veterans' preference points. Each of the job qualifications should be assigned a point value such that the total points available under the T&E Rating equal 100.

A T&E Rating must be completed for each application received for the vacant position only if a qualified veteran in the applicant pool has requested a preference. Relying on the applications and/or documentation requested from all of the applicants, points on the T&E Rating sheet should be awarded as follows:

1. Award points to candidates that satisfy the minimum qualifications for the job;
2. If a candidate meets the minimum qualifications for the job, add additional points for each desirable qualification that are met;
3. Award preference points to qualified veterans (or veteran's spouses) who meet the minimum qualifications for the job;
4. Select the top candidates for interviews and include any veterans who tie with the lowest score of any applicant chosen for an interview.

Preference points are not awarded to a veteran unless he or she meets the minimum qualifications for the job.

PRACTICE POINTER: Preference points are only awarded at the time of the application review and the public employer is not required to hire a veteran from the interview pool.

D. Notice to Veteran Applicants

The law also requires the public employer to send written notice to veteran applicants who were not interviewed or hired. The notice must either state the reason the veteran was not contacted for an interview or the reason the veteran was not hired following an interview.

Veteran's Preference in Firing

A. Removal from Position

The law also provides certain protections to veterans in connection with the loss of their employment by a public employer. According to Minn. Stat. § 197.46, no veteran employed by a political subdivision “shall be removed from such position or employment except for incompetence or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.” For purposes of this statute, the courts have interpreted “removal” from a position to include discharge, suspension and demotion. The courts have also concluded the “incompetence or misconduct” standard outlined in the law is comparable to the “just cause” standard incorporated in most collective bargaining agreements.

B. Notice and Hearing

Public employers intending to remove a veteran from their position or employment are required to provide the veteran with written notice of the intent to discharge. The notice must identify the grounds and factual basis for the discharge. The notice must also notify the employee of his or her right to request a hearing before a neutral panel under the Veterans' Preference Act within sixty (60) days of receipt of the notice. The employee should also be notified that the failure to request a hearing will be deemed a waiver of their right to a hearing and any possibility of reinstatement as a remedy under the Veterans' Preference Act. If the public employer fails to provide the foregoing notice, the 60-day limitation period for requesting a hearing is indefinitely extended until notice is provided pursuant to the law.

PRACTICE POINTER: The public employer is obligated to pay the veteran throughout the 60-day period, or if a hearing is requested, until final disposition of the appeal.

The law provides a procedure for selecting a neutral panel to hear the veteran's challenge. Generally, each party appoints a person to the panel and the two panel members selected by the parties jointly select the third member on the panel. Limited discovery is allowed in preparation for the hearing. The three-person panel considers evidence offered by the parties at the hearing and issues a written decision. The hearing panel has the discretion to fashion a remedy other than the action proposed by the employer if there is substantial evidence of extenuating circumstances that justifies a lesser penalty.

C. Judicial Review of Panel Decision

The law allows the veteran to appeal the findings of the hearing panel to the district court. The appeal must be in writing and served on the public employer within 15 days of the decision and filed with the court administrator within 10 days thereafter. The issue before the reviewing court will be whether the hearing panel abused its discretion in reviewing the matter.

Non-Disciplinary Discharge

A veteran may be discharged without having to show incompetence or misconduct if it is part of a layoff or reduction in force by the public employer. The action must be made in good faith and the responsibilities of the abolished position cannot be re-assigned to less senior employees as a subterfuge to avoid the veteran's right to a hearing.

The discharged veteran must be notified in writing of his or her right to petition the district court within 60 days for a writ of mandamus to challenge the employer's actions. In the alternative, the notice should advise the veteran of his right to petition the Commissioner of Veterans Affairs for a hearing on the matter. Reinstatement of the veteran is only appropriate if it is established that the abolition of the veteran's position was not made in good faith.