

# Legal Watch



## General Counsel

### North Dakota Veteran's Preference Law

#### General Rule

Supervisors with hiring responsibility at NDSU must be aware of North Dakota's Veterans' Preference Law, NDCC § 37-19.1. Lack of familiarity with the law may cause major hiring problems.

A "veteran" means a North Dakota resident who is a "war time" veteran, which is an individual who served in the active military forces during a period of armed conflict or who received the armed forces expeditionary or other campaign service medal during an emergency condition and who was discharged or released under other than dishonorable conditions. "Wartime veteran" also includes an individual who died in the line of duty in the active military forces, as determined by the armed forces. For a list of wars, campaigns, and expeditions of the Armed Forces since World War II which qualify for veterans preference see: <http://www.opm.gov/staffingportal/vgmedal2.asp>

The law states that North Dakota resident veterans who meet the required qualifications for a position have an absolute preference right to be appointed to the position, unless the agency has a "competitive personnel system". NDCC § 37-19.1-02(2). Disabled veterans are entitled to preference over nondisabled veterans.

A "competitive personnel system," such as the one used by NDSU, is defined as a system that rates applicants for a position using an objective set of skills, knowledge, abilities, behaviors, or other characteristics required for the position.

Where the government agency has a "competitive personnel system", 5 points are added to the "exam" grade for a veteran and 10 points for a disabled veteran out of a total possible 100 points (if based on a scale other than 100 points, add 5% and

10% for veterans and disabled veterans, respectively). Upon evaluating all the applicants, the employing authority shall designate a number of individuals to be considered from for the position, and fill the position from this group of eligible individuals.

In certain limited cases, spouses of deceased or disabled veterans may claim the preference right. NDCC § 37-19.1-03. The unremarried spouse of a veteran who died in service, or later died of a service-connected cause, is entitled to the employment preference normally given to the veteran, if the spouse is otherwise qualified. Similarly, the spouse of a disabled veteran having a one hundred percent service-connected disability is entitled to the employment preference given to a veteran.

#### Exceptions or Exclusions

Not all positions at NDSU are subject to the preference. The law excludes "teachers" and "instructors of board institutions," which arguably means all faculty, lecturers and GTA's and any other employees whose primary responsibility is to teach. The law also excludes the president, executive deans, vice presidents, assistants to the president, provosts, and athletic team coaches (NDCC § 37-19.1-02(4)). If a position falls into one of these exemptions, the advertisement for the position must state that the veterans' preference does not apply.

The law also does not apply to promotions. In *In re James Meyers*, a 1985 North Dakota District Court case, the Court relied on the legislative history to hold that the preference did not apply to a promotion from a counselor III position to counselor IV position.

and therefore internal transfers are treated like promotions and thus not eligible for the preference. The University System Office takes the position that internal transfers can mean between campuses in the system. This issue has not been decided by the courts.

## Appeals Process

If the veteran is not appointed, the veteran has 15 calendar days "after notification by certified mail that employment has been refused" to request a hearing from the North Dakota Commissioner of Veterans' Affairs. The veteran's request for hearing must be in writing and include a copy of the employer's notification that employment has been refused. NDCC § 37-19.1-04(1). NOTE: IF THE NOTIFICATION IS NOT DONE IN WRITING BY CERTIFIED MAIL, THE FIFTEEN DAY TIME LIMIT WON'T START TO RUN. THEREFORE, PROPER NOTIFICATION IS VERY IMPORTANT!

The ND Commissioner of Veterans' Affairs has fifteen calendar days to request the Director of the ND Office of Administrative Hearing designate a hearing officer to hear the grievance. The hearing officer then has thirty calendar days to hold a hearing. After all matters are closed the hearing office has fifteen calendar days to render a decision. The decision is binding on both parties, subject to appeal.

If the decision goes against the employer, "the applicant is entitled to immediate employment in the position. . . or an equivalent position." NDCC § 37-19.1-04(1). This result could require the employer to create a new position or to terminate the employee that filled the original advertised position.

To avoid such an outcome, make sure that the veteran is notified at the earliest opportunity by certified mail that they will not be hired, and do not fill the position until the appeal time has expired. If you are unsure on how to proceed, seek legal advice from the General Counsel's Office.

## Problem Areas

- Notice of veteran status.

NDSU has forms that clearly put the veteran on notice that the preference is either requested or it is waived. Some positions in the past where the standard application form is not filled out have caused difficulties where the veteran's status may have been "hidden" in the resume and the preference not clearly claimed. Do not assume the preference has been waived in this situation. Hiring officials need to work with the Human Resources Office (broadbanded positions) or the Equity and Diversity Office (non-banded positions) to make sure a potential preference application has not been overlooked.

- Minimum/preferred qualifications.

Perhaps no area has caused more problems than the "art" of putting together the required qualifications. In drafting minimum or required qualifications versus preferred ones, supervisors need to keep in mind that fewer minimum qualifications will result in high numbers of qualified applicants. Whereas, a large amount of minimum qualifications will result in fewer qualified applicants. It is important to keep this balance in mind when drafting qualifications for advertised positions so you can anticipate the number of qualified applicants you will receive to the advertisement.

When looking at experience, be specific when identifying the amount and type required of the position. For example, if the position requires a year of experience or experience in higher education, it is important to state that in the advertisement.

The courts will give the employer some leeway on whether the employee was "qualified." *Schmitt v NDSU Experiment Station*, held that whether the applicant was "qualified" is a question of fact for the employer which will not be overturned if there is sufficient evidence to support that determination. The employer also gets considerable deference on how merit and qualifications are to be evaluated.

- Make sure the veteran meets all the initial requirements for the preference.

There are a number of baseline qualifications a veteran must meet to be entitled to claim the preference. The Human Resources or Equity and Diversity Office will help determine eligibility.

The applicant must:

1. Be a United States citizen;
2. Be a North Dakota resident;
3. Be a "war time veteran";
4. Furnish a DD214;
5. Furnish other documentation as needed per N.D. Administrative Code 4-07-05-07 such as a marriage certificate from spouse claiming preference or letter from V.A. indicating veteran's disability status;
6. Not have received a dishonorable discharge;
7. Be physically and mentally capable of doing the job; and
8. Request the preference, or at least not have waived the preference.

- Interviews.

The advantage of having a "competitive personnel system" is that, in order to hire the best applicants, preferred qualifications plus interview results can be added to the score (sometimes point values are only awarded to preferreds after an interview). A veteran will not have an absolute right to the position simply by meeting the minimums when there is a "competitive personnel system."

- Notification.

Eligible veterans who are not hired or interviewed must be notified by certified mail that they are not being hired or the appeal time period will not start. (See Appeals section above).

*"The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive the Veterans of earlier wars were treated and appreciated by their country."*

- George Washington



## General Information on Veteran's Preference

Since the time of the Civil War, veterans of the Armed Forces have been given some degree of preference in appointments to Federal jobs. Recognizing that sacrifices are made by those serving in the Armed Forces, Congress enacted laws to prevent veterans seeking Federal employment from being penalized because of the time spent in military service.

By law, veterans who are disabled or who served on active duty in the Armed Forces during certain specified time periods or in military campaigns are entitled to preference over non-veterans in hiring from competitive lists of eligible (or basically qualified) job candidates. Veterans' preference recognizes the economic loss suffered by citizens who have served their country in uniform in times of strife, restores veterans to a favorable competitive position for government employment, and acknowledges the larger obligation owed to disabled veterans. Preference applies in hiring for most federal civil service jobs, including when agencies make temporary appointments.

*(U.S. Department of Veterans Affairs,  
Office of Business Oversight)*

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Entitlement to veterans' preference does not guarantee a job. There are other ways an agency can fill a vacancy other than appointment from a list of eligibles through the competitive examining process. Also, granting of extra points to those with preference does not necessarily make a qualified veteran a top ranked candidate. However, it does provide additional consideration for otherwise qualified candidates.

*(U.S. Department of Veterans Affairs,  
Office of Business Oversight)*

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## Resources for information on Veterans' Preference:

Veterans' Preference  
NDCC § 37-19.1

<http://www.legis.nd.gov/cencode/t37c19-1.pdf>

Veterans' Preference  
North Dakota Office of Management and Budget

<http://www.nd.gov/hrms/managers/guide/vetspref.html>

Veterans' Preference Advisor  
U.S. Department of Labor

<http://www.dol.gov/elaws/vetspref.htm>

Veterans' Preference & VRA Programs  
Federal Jobs Net

<http://federaljobs.net/veterans.htm>

Veterans' Preference  
USAJobs

<http://www.usajobs.gov/veterans.asp>

VetGuide

U.S. Office of Personnel Management

<http://www.opm.gov/veterans/html/vetguide.asp>

**For questions about the Veterans' Preference Law, contact the NDSU Human Resources Office.**