

# 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.

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 an "established personnel system". NDCC § 37-19.1-02(2). Disabled veterans are entitled to preference over nondisabled veterans.

An "established personnel system" has been held to be one based on merit principles and therefore competitive in nature so as to find the best candidate. City of Bismarck v. Santineau, 509 N.W.2d 56 (N.D. 1993). NDSU has an "established personnel system".

Where the government agency has an "established 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.

The person with the highest score, whether a veteran or not, is entitled to the position unless there is "justifiable cause" for not appointing that person. "Justifiable cause" is not defined in the law. However, the N.D. Supreme Court has defined it to mean a reason based on rational, defensible grounds in order to prevent arbitrary decisions. Dyer v. N.D. Dept. Of Human Services, 498 N.W.2d 160 (N.D. 1993).

A qualified disabled veteran is entitled to an absolute preference regardless of score unless the employer can show "justifiable cause" in writing, why the disabled veteran wasn't employed. NDCC § 37-19.1.02(4)(f).

The fact that other candidates are better or more qualified is not considered justifiable cause. The lack of relevant experience or communication skills necessary for the position may constitute justifiable cause not to hire the otherwise eligible veteran or spouse.

In certain limited cases, spouses of deceased or disabled veterans may claim the preference right. NDCC § 37-19.1-03. The unmarried spouse of a veteran who died in service or because of a service-connected cause is entitled to the employment preference normally given to the veteran if the spouse is otherwise qualified. Similarly, if the veteran is disabled due to a service connected cause and unable to exercise the veteran's right to the employment preference, the spouse is entitled to the employment preference if otherwise qualified.

A "veteran" means a North Dakota resident who is a "war time" veteran which is a veteran who served on active duty during a war or received an expeditionary medal or campaign service medal during an emergency condition and who was discharged under other than dishonorable conditions. A "war time" veteran also includes those who died in the line of duty in the active military 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/veterans/html/vgmedal2.asp>

#### Exceptions or Exclusions

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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.

Previously, the North Dakota Attorney General held that the preference does apply where there is an application for a different position or job within the same agency. (Attorney General's Opinion, July 9, 1975).

However, recent interpretations of the law by the Attorney General and the Office of Administrative Hearings have held that the preference applies in the initial hire only and therefore internal transfers are treated like promotions and thus not eligible for the preference. The University System Office also takes the position that internal transfers can mean between campuses in the system, as well. This issue has not been decided by the courts.

## Appeals Process

If the veteran is not appointed, the veteran has 15 days "after notification by certified mail that employment has been refused" to request a hearing. The veteran's request for hearing must be in writing. NDCC § 37-19.1-04(1). The request is made to the North Dakota Commissioner of Veterans' Affairs by certified mail. A copy of the request must be mailed to the employing agency as well. These hearings are conducted by the North Dakota Office of Administrative Hearings. 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 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 days to hold a hearing. After all matters are closed the hearing office has fifteen 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).

Thus, if an employer has already appointed someone else to the position over a veteran who should have been appointed, look out! This situation is a real catch-22.

Make sure the veteran is given notice they won't be hired at the earliest opportunity by certified mail and don't permanently fill the position until the appeal time is past or you may have two people in the same job! Needless to say, this can get expensive! The alternative is to make the final offer to the successful applicant and take the risk. Legal advice should be sought in these situations.

## 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 the fewer minimum qualifications you have, the more apt you may be required to hire someone who may not possess all of the qualifications you would like. However, more qualifications put into the minimums means fewer applicants. Thus, drafting qualifications is an art and a balance.

### Problem Areas:

- Notice of veteran status.
- Minimum/preferred qualifications.
- Make sure the veteran meets all the initial requirements for the preference.
- Interviews.
- Notification.

Consider, when looking at experience, specifying the type and minimum amount. Experience could be one day. If the experience must be in higher education, say so! Time spent determining exact qualifications prior to recruitment is a wise strategy.

The courts will give the employer some leeway on whether the employee was "qualified." In Schmitt v NDSU Experiment Station, a 1988 case from Stark County District Court, the judge 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. City of Bismarck v. Santineau, supra.

- 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 an "established 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 an "established personnel system." However, a qualified, disabled veteran is entitled to the position, without regard to the total score, unless there is justifiable cause not to appoint the disabled veteran.

What this means in practice is that a disabled veteran who is minimally qualified should always be interviewed. In cases where nondisabled veterans are minimally qualified, whether they are interviewed or not depends on where the veteran falls on the point scale cutoff for interviews, like the rest of the candidates.

- 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).

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



*"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