8/13/79

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ALLAN NETTLETON,

Petitioner,

vs.

STATE PERSONNEL BOARD,

Respondent.

JUDGMENT

Case No. 159-201

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

The above entitled review proceeding having been heard by the Court on the 30th day of July, 1979, at the City-County Building in the city of Madison; and the petitioner having appeared pro se after Attorney Michael J. Briggs, withdrew as petitioner's counsel with the consent of petitioner and the approval of the Court; and Assistant Attorney General Robert J. Vergeront having appeared for the respondent Board and for Donald E. Percy, Secretary, Department of Health and Social Services; and the Court having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Order of respondent State Personnel Board dated August 26, 1977, entered in the matter of Allen Nettleton, Appellant, v. Manuel Carballo, Secretary, Department of Health and Social Services, and Vernè Knoll, Deputy Director, State Bureau of Personnel, Respondents, Case No. 76-110-I, be, and the same hereby is, affirmed.

Dated this 13th day of August, 1979.

BY THE COURT:

George R. Currie
Reserve Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ALLAN NETTLETON,

Petitioner, MEMORANDUM DECISION

vs.

STATE PERSONNEL BOARD, Case No. 159-201

Respondent.

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding by petitioner Nettleton instituted under Ch. 227, Stats., to review an order of the respondent Board dated August 26, 1977, which ordered closed an investigation under sec. 16.05(4), Stats., into the practice of the state according veterans preference points in the hiring of persons through competitive examinations in the classified civil service.

STATEMENT OF FACTS

On June 14, 1976, petitioner filed with the Board his written request in letter form dated June 13, 1976, for an investigation and hearing pursuant to sec. 16.05(4) Stats., 1975. In this letter he stated:

> "This is a request for an investigation and hearing pursuant to Section 16.05(4) of Wisconsin Statutes.
>
> On June 3, 1976, I participated in an oral examination for the position of Social Services Supervisor 3 - Chief, State Plans and Statutes, Division of Family Services, Department of Health and Social Services. On June 14, 1976, I received a notification that my rank in the certified list for the position was fourth. I inquired of the Division of Family Services' Personnel Office, which had conducted the examination (file number 00978) and was informed that my rank had been reduced to fourth, after having been in the top three, once veterans preference points had been added to the examination scores of certain other applicants.
>
> On August 21, 1962, I was classified by Selective Service System Local Board No. 10 in Salem, Oregon, as 4F on the basis of an artificial left eye. This classification as unfit for military service due to a

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handicap exempted me from military service, therefore I am not eligible for veterans preference points.

I claim, therefore, that I and others similarly situated have been discriminated against on the basis of my handicap and have not been rightfully interviewed for the above position on the basis of my rank on the job related oral examination."

On November 12, 1976, a prehearing conference in the matter was held before Anthony J. Theodore, legal counsel of the Board. This conference was attended by petitioner and by Attorney David Whitcomb appearing for the Department of Health and Social Services (hereafter the Department).

A conference report of this conference dated November 15, 1976, signed by Theodore is in the record returned to the court. The report stated that the parties stipulated the facts were not in dispute and that the facts alleged in petitioner's letter of June 13, 1976, were correct. It also stated:

"RELIEF REQUESTED:

Mr. Nettleton seeks relief alternatively and in the following order:

1. An order directing all agencies to discontinue the use of veterans' points;

2. If this is not granted, an order directing all agencies to discontinue the use of veterans' points as to handicapped persons;

3. If this is not granted, an order directing the agencies to discontinue the use of veterans' points in situations involving Mr. Nettleton;

4. If this is not granted, a declaration of rights with regard to the legality of veterans' points and more specifically, S. 16.12(7), stats.

Mr. Whitcomb took the position that an administrative agency such as the Board does not have the power to grant this relief, and that the application of veterans' points is not unlawfully discriminatory although in certain cases it may cause inequitable results.

MISCELLANEOUS:

1. Mr. Nettleton cited the federal vocational and rehabilitation act of 1973 in support of his position. Mr. Whitcomb took the position that this was not within the Board's jurisdiction.

2. This case will be submitted to the Board for preliminary consideration of whether it will exercise its discretion pursuant to S. 16.05(4) on the basis of the record to date."

The Board thereafter entered an order dated December 21, 1976, in the matter, the crucial provision of which stated

> "In light of Respondent's position and because we perceive the use of veterans' points to have a significant impact on broad policy questions concerning the enforcement and effect of Subchapter II of Chapter 16 of the statutes, we will assume jurisdiction over this matter pursuant to S. 16.05(4), statutes."

The order further stated:

> "In order that we may determine what kind of further proceedings, if any, are desirable, the parties are directed to file written arguments or statements of position that will be responsive to the issues identified at the prehearing conference pursuant to the following schedule . . . ."

The record returned does not include any briefs or statements of position which the parties filed pursuant to this order of December 21, 1976. No hearing was ever scheduled by the Board.

On August 26, 1977, the Board entered its "Opinion and Order", the order being that which is the subject of this review. The opinion contained findings of fact which set forth the facts as stipulated to at the prehearing conference. The conclusion of law stated in part:

> "Section 16.12(7) Wisconsin Statutes which confers preference points on veterans does not on its face appear to discriminate against handicapped individuals. All individuals whether handicapped or not are entitled to the preference points if they serve in this country's armed services. The policy of the Statute is to encourage military service by all citizens by ensuring that sacrifices incurred while in the armed services are compensated. Thus, the training or job advancement lost because of military service is rewarded by preference points when seeking state employment. More severe sacrifices such as disabilities are rewarded by additional preference points. On its face, therefore, Section 16.12(7) Wisconsin Statutes has the policy of rewarding individuals, especially individuals who thereby become disabled, who make sacrifices for this country. As such the principle of state and federal preferences accorded to veterans has consistently been upheld against charges of discrimination based on equal protection grounds. White v. Gates, 253 F 2d 868 (D.C. Cir.), cert denied, 356 U.S. 973 (1958). Branch v. DeBois, 418 F. Supp. 1128 (N.D. 111 1976). Rios v. Dillman, 499 F 2d 329 (5th Cir. 1974).
>
> In the present case, since Wisconsin's Statute does not draw a handicapped-based classification, we conclude that the appellant suffered no discrimination becuase of handicap in employment.
>
> The appellant has pointed out both that congress has banned discrimination against the handicapped

in any program receiving federal financial assistance (29 USC Section 794) and that the Department of Health, Education and Welfare has adopted a regulation pursuant thereto which bans the use of any test or criterion which has a 'disproportionate, adverse effect on the employment opportunities of handicapped persons or any class of handicapped persons . . .' 45 CFR Section 84.13. While as a state agency we have no jurisdiction over these provisions as such, we believe that in the exercise of our investigative and advisory roles, Section 16.05(4) and (6), Stats., it is appropriate in this case to examine these provisions.

If applied, the disproportionate, adverse impact test would probably strike down veterans preference points even though no handicapped-based classification was intended. We are unconvinced that the test is intended to be applied to statutes involving veterans preference points. The test is not required to meet constitutional requirements. Washington v. Davis, 426 US 229 (1976). Moreover, it can be inferred that congress did not intend the prohibition against handicapped discrimination to apply to veterans preference points since it retained the mandatory use of such a preference contained in 5 USC Section 2108 and 3309. In any case, the use of HEW's disproportionate, adverse impact test must yield to the will of congress as expressed by the veterans preference statutes.

Given the long standing nature of states veterans preferences, their constitutional acceptance, and congress retention of federal veterans preference points, we believe 29 USC Section 794 and the HEW regulation were not intended to apply to such preferences at the state level."

The Board's order provided:

"It is ordered that this investigation be closed."

THE ISSUES

The petitioner's brief advances these contentions:

(1) Section 16.12(7), Stats., 1975, granting veterans preference points violated sec. 504 of the Vocational Rehabilitation Act of 1973 (29 U.S.C. sec. 794, Publ. L. 93-112, Title V. sec. 504.)

(2) This state statute granting veterans preference points also violates sec. 111.32(5)(f) of the Wisconsin Fair Employment Act.

Counsel for the Board contends among other things:

(1) It lay entirely within the discretion of the Board whether or not to continue the investigation,

and, therefore, the court is without power to reverse the exercise of this discretion embodied in the Board's order.

(2) Petitioner's brief asks for personal relief for himself by being placed in the position in the Division of Family Services of the Department for which he took the civil service examination. This relief cannot be granted because petitioner did not appeal under the provisions of sec. 16.05(1)(f), Stats., 1975, which is a prerequisite to the granting of such relief.

Because the court has determined that the granting of veterans preference points by sec. 16.12(7), Stats., 1975, does not violate either sec. 504 of the federal Vocational Rehabilitation Act of 1973 nor sec. 111.32(f) of the Wisconsin Fair Employment Act, it finds it unnecessary to pass on the above additional issues raised by counsel for the Board.

THE VETERANS PREFERENCE POINTS STATUTE

Section 16.12(7), Stats., 1975, provides:

> "A preference shall be given to any qualifying veteran. A preference means that whenever a veteran gains eligibility on any competitive employment register 5 points shall be added to his grade; and if such veteran has a disability which is directly traceable to war service, he shall be accorded another 5 points. 'Veteran' as used in this subsection means any person who served on active duty under honorable conditions in the U.S. armed forces who was entitled to receive either the armed forces expeditionary medal, established by executive order 10977 on December 4, 1961, or the Viet Nam service medal established by executive order 11231 on July 8, 1965, or for at least one day during a war period, as defined in s. 45.35 (5)(a) to (g) or under section 1 of executive order 10957 dated August 10, 1961." (Emphasis added.)

This statute provides that preference points be added only after the applicant has established that he or she is eligible and qualified for the position. In Beghin v. State Personnel Board, 28 Wis. 2d 422, 430, 137 N.W. 2d 29 (1965), it was held that "veterans' preference points are to be added to the composite or final grade of the applicant."

THE COURT'S DECISION

A. Whether Granting of Veterans Preference Points Pursuant to Sec. 16.12(7), Stats. Violates Vocational Rehabilitation Act of 1973.

Section 504 of the Vocational Rehabilitation Act of 1973 (29 USC sec. 704) provides:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7 (6) shall by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Petitioner's brief points out that the HEW regulations implementing this act (45 CFR 84) contain this provision relating to the prohibition of above quoted sec. 504:

> "The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession."

It is conceded that petitioner because of his artificial eye is a handicapped person within the meaning of this federal act.

The court is of the opinion that the answer to petitioner's contention that the granting of veterans preference points by sec. 16.12(7), Stats. violates sec. 504 of the Vocational Rehabilitation Act of 1973 is to be found in a reading of the majority and dissenting opinions of the United States Supreme Court in Personnel Administrator of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979). The issue in that case was whether a state statute granting veterans preference ~~points~~ violated the equal protection of the laws clause of the Fourteenth Amendment because it allegedly discriminated against women, while here the question is whether such a state statute violates a federal statute prohibiting discrimination against handicapped persons by employers. However, the court believes that the proof [illegible] to establish that the state statute does so discriminate is the same in both situations. This is the issue with respect to

which the Feeney case opinions, both majority and dissenting, speak.

At issue in the Feeney case a Massachusetts statute granting an absolute life time preference to veterans with respect to civil service examination position was challenged as violating the equal protection of the laws clause of the Fourteenth Amendment on the ground it discriminated against women. Both the majority and dissenting opinions agreed that in order to strike down the state statute on that ground it was necessary to prove intent on the part of the legislature in enacting it to discriminate against women. The dissenting opinion held that this could be inferred from the disparate impact the statute had on women seeking civil service jobs. The statistics disclosed that less than 2 percent of Massachusetts veterans were women, and it was stated in the dissent that the absolute preference formula had rendered desirable state civil service employment an almost exclusively male prerogative. Because of this disparate impact the dissenting opinion inferred a legislative intent to discriminate against women.

The majority opinion in Feeney stated:

> "The veterans' hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and welldisciplined people to civil service occupations. See, e.g., Hutcheson v. Director of Civil Service, 361 Mass. 480, 281 N.E. 2d 53 (1973)."

The majority ~~of~~ opinion further held the statute was gender neutral on its face, and that when the totality of legislative actions establishing and extending the Massachusetts veterans' preference was considered, the statute remained what it purported to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.

Applying the holding in Feeney to the instant case, in order for the court to hold that the extending of veterans preference points, statute, sec. 16.12(7) violates sec. 504 of the federal Vocational Rehabilitation Act of 1973, on the ground that it

discriminated against handicapped persons, the court would be required to find an intent by the legislature in enacting the statute to so discriminate. There of course is no direct proof of such an intent, and the issue is questionable whether it may be inferred under the disparate impact theory. The record is barren of any statistics tending to show that extending veterans preference points has had any disparate impact on handicapped persons, nor has the petitioner requested the court to take judicial notice of such statistics, if there be any. Unlike in Feeney, there is no evidence that handicapped persons by reason of the veterans preference points are virtually excluded from all choice civil service jobs. The fact that petitioner may have lost the opportunity to be certified as one of the three applicants having the highest examination grades is not material. Disparate impact cannot be grounded on what occurred to one individual. Thus, petitioner has not even made out a case entitling him to prevail under the holding of the dissenting opinion in Feeney.

Petitioner's brief contends that sec. 16.12(7) frustrates the operation of sec. 504 of the Vocational Rehabilitation Act of 1973 and states:

> "The federal act pre-empts the operation of the state statute where the state statute frustrates the purpose of the federal act, Perez v. Campbell (1971) 402 U.S. 637, 652, 91 S. Ct. 19704, 29 L. Ed. 2d 233. This is so even though the state legislature in passing its law had some purpose in mind other than one of frustration, Id. at 651. The question is whether under the circumstances of this case the state's law stands as an obstacle to the 'accomplishment and execution of the full purposes and objectives of Congress,' Jones v. Rath Packing Co. (1977), ---U.S.---, 97 S. Ct. 1305, 1309, ---L. Ed. 2d ---, quoting Hines v. Davidowitz (1940), 312 U.S. 52, 67, 71 S. Ct. 399, 85 L. Ed. 581. Such a result is compelled whether the command of Congress is explicitly stated in the statute's language or implicite contained in its structure and purpose, City of Burbank v. Lockheed Air Terminal, Inc. (1973), 411 U.S. 624, 633, 93 S. Ct. 1854, 36 L. Ed. 2d 547."

This is a federal preemption argument. Veterans as well as nonveterans taking state civil service examinations may be handicapped persons, and there is no evidence that the overall effect

of granting veterans preference points has had a substantial impact on nonveteran handicapped persons as compared to handicapped veterans securing state civil service jobs. Thus evidence is lacking which would support a determination of federal preemption on the ground that sec. 16.12(7) in operation has had the effect of frustrating the purposes of sec. 504 of the Vocation Rehabilitation Act of 1973.

The court concludes that the granting of federal preference points provision of sec. 16.12(7) does not violate sec. 504 of the Vocational Rehabilitation Act of 1973.

B. Whether Sec. 16.12(7), Stats. Violates Sec. 111.32(5)(f) of the Wisconsin Fair Employment Act.

Section 111.32(5)(f), Stats., 1975 provides in relevant part:

> "It is discrimination because of handicap:
>
> 1. For an employer . . . to refuse to hire . . . any individual, or to discriminate against any individual in promotion . . . unless such handicap is reasonably related to the individual's ability adequately to undertake the job related responsibilities of that individual's employment . . . ."

Section 111.325, Stats., 1975, provides in relevant part:

> "It is unlawful for any employer . . . to discriminate against any employe or any applicant for employment . . . ."

The word "discrimination" is defined for purposes of the Wisconsin Fair Employment Act by sec. 111.32(5) as meaning "discrimination because of age, race, color, handicap, sex, creed, national origin or ancestry."

On their face there is no conflict or inconsistency between the provisions of sec. 16.12(7) and sec. 111.32(5)(f). Furthermore it cannot be assumed by the court that the legislature intended any conflict in their application. It is the duty of the court to so construe those two statutes as to avoid any conflict if this can reasonably be done without indulging in any strained interpretation of their express language. The court, therefore, holds that the words "because of handicap" in sec. 111.32(5)(f) do not extend to the granting of veterans preference

under sec. 16.12(7). The determination could result from the granting of such veterans preference points, is not between handicapped and nonhandicapped persons but between veterans and nonveterans.

Let judgment be entered affirming the Board's order which is the subject of this review.

Dated this 13th day of August, 1979.

BY THE COURT:

George B. Currie
Reserve Circuit Judge

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