

STATE OF WISCONSIN

STATE PERSONNEL BOARD

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ALLAN NETTLETON,

Appellant,

v.

MANUEL CARBALLO, Secretary,
 Dept. of Health & Social Services, and
 VERNE KNOLL, Deputy Director,
 State Bureau of Personnel,

Respondents.

Case No. 76-110-I

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OFFICIAL

OPINION
AND
ORDER

Before: Wilson, Morgan, Warren and Hessert (DeWitt, dissenting), Board Members.

NATURE OF THE CASE

This is a request for an investigation of Wisconsin's statutorily imposed practice of granting veterans preference points in the selection process for state employment. Because of the importance of the issue, and in the absence of objection from respondent, the Personnel Board assumed jurisdiction pursuant to its authority under Section 16.05(4) Wisconsin Statutes.

FINDINGS OF FACT

Both parties have stipulated to the following set of facts:

"On June 3, 1976, I (the appellant) 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 & 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 4-F on the basis of an artificial left eye. This classification as unfit for military service due to a handicap exempted me from military service, therefore, I am not eligible for veterans preference points."

CONCLUSIONS OF LAW

The appellant insists that the application of veterans preference points discriminated against him solely because of his disability. His argument is that the application of veterans preference points to the examination scores of other, veteran applicants (pursuant to Section 16.12(7) Wisconsin Statutes) reduced his ranking to fourth and under Wisconsin's "rule of three" (contained in Section 16.20(1) Wisconsin Statutes) he was denied any chance to successfully compete for the supervisory position. Since the appellant's handicap renders him ineligible for military service and as a consequence for veterans preference points, his drop in rank was in effect the result of discrimination because of his handicap.

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. Ill 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 because 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.

In essence, the use of veterans points in this state is a product of the legislature and any changes in this area must come from that body. The Employment Relations Study Commission has conducted extensive hearings and research in this area and concluded in essence that the current statutory scheme is discriminatory in its effect on women and minorities, inimical to the civil service system and should be modified. The board concurs in the commission's recommendations in this area.

ORDER

It is ordered that this investigation be closed.

Dated August 26, 1977.

STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson