STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

M.S.,[1] Appellant,

vs.

President, UNIVERSITY OF WISCONSIN SYSTEM, and
Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case 49
No. 69216
PA(sel)-65

Decision No. 33128

Appearances:

Pat Wilbur with **M. S.,** appearing on behalf of the Appellant.

Joely Urdan, Associate Director & Senior University Legal Counsel, University of Wisconsin-Milwaukee, P. O. Box 413, Milwaukee, Wisconsin 53201-0413, appearing on behalf of the Respondents.

INTERIM DECISION AND ORDER

This matter is before the Wisconsin Employment Relations Commission as an appeal of a decision not to award veterans preference points to the Appellant. The parties stipulated to the following statement of the issue for hearing:

> Whether Respondents' decision that the Appellant was ineligible for the position of Purchasing Agent-Objective was contrary to the civil service code [with jurisdiction pursuant to Sec. 230.44(1)(a), Stats.] and/or illegal or an abuse of discretion [with jurisdiction pursuant to Sec. 230.44(1)(d), Stats.]

A hearing was conducted on April 26, 2010, before Kurt M. Stege, a member of the Commission's staff serving as the designated Hearing Examiner. The parties filed post-hearing briefs, the last of which was received on June 28, 2010. The examiner issued a proposed decision on September 27, 2010, concluding that the Respondents' decision was not contrary to

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[1] The Commission has chosen to use initials, rather than the Appellant's entire name, in order to maintain the confidentiality of Appellant's service record. See Sec. VA 1.10, Wis. Adm. Code.

the state civil service code, illegal, or an abuse of discretion. Appellant filed objections and the Commission received the Respondents' response on November 8, 2010.

For the reasons that are explained below, the Commission disagrees with the conclusions reached in the proposed decision and concludes instead that the Appellant was entitled to veterans preference points. The Memorandum has been substantially modified to reflect the Commission's altered analysis and conclusions. Material changes to the Findings of Fact in the proposed decision are identified in footnotes.

Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Appellant took the state civil service examination for a Purchasing Agent position on May 9, 2009. Appellant passed the exam with a score of 79.64.

2. Appellant claimed eligibility for 10 veterans preference points as provided in Sec. 230.16(7)(a), Stats.:

> A preference shall be given to those veterans . . . who gain eligibility on any competitive employment register and who do not currently hold a permanent appointment or have mandatory restoration rights to a permanent appointment to any position. A preference means the following:
>
> 1. For a veteran, that 10 points shall be added to his or her grade.

Appellant did not "hold a permanent appointment or have mandatory restoration rights" during the relevant time period.

3. As a consequence of Appellant's assertion of veteran status and the ten points that were added to his score, Respondent University of Wisconsin-Milwaukee (UWM) interviewed him in June, July, and August, 2009, for a vacant Purchasing Agent position.[2]

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[2] The Appellant objected to this finding and contended there was "absolutely no fact or evidence" that, absent the preference points, his name would not have been on the list of certified candidates. The Memorandum portion of this Decision quotes Sec. 230.25(1m), Stats., which provides that "additional" names are placed on the certification list for persons whose "combination of veterans preference points . . . and examination score earn a total score equal to or higher than the lowest score of those certified on the basis of examination only." According to Sec. 244.040(3), Wisconsin Human Resources Handbook, "[o]nly those veterans certified under ss. 230.25(1m) . . . require verification" of their status as someone who qualifies for veterans preference points. In other words, the prospective employer would have no reason to check the qualifications of a veteran who was certified solely on the basis of examination score. The University of Wisconsin – Milwaukee went through the verification procedure for Appellant, which is convincing evidence that the Appellant's name was added to the certification list because of the addition of veterans preference points. As UWM would not have interviewed Appellant if his name were not on the certification list, we remain convinced that but for the additional 10 points, the Appellant would not have been considered for the vacancy. However, we have removed the word "solely" from the beginning of this finding because the presence of Appellant's name on the certification list was also a function of his base score on the exam.

4. Respondents did not seek to confirm eligibility to receive veterans points before or at the time of the interviews.[3]

5. By letter dated August 31, 2009, UWM informed Appellant that he was "a final candidate" for a Purchasing Agent position and that a "final hiring decision" would be made upon "completion of a criminal records review." Appellant promptly submitted the requested "Applicant Consent and Disclosure Form."

6. On or about September 9, 2009, Appellant was also asked to submit a copy of his "Certificate of Release or Discharge from Active Duty" form, which is commonly referred to as the "DD214," for the purpose of confirming his eligibility for receiving the ten veterans points. The form has several sections and is sometimes provided in a short version that includes such information as dates of service, decorations, and military education. The form is also sometimes provided in a somewhat longer version that includes all the information in the shorter version and adds, among other things, the type of separation, character of service, separation code and a narrative explanation for the separation. The form itself contemplates a release or discharge from only one period of military service. For example, as detailed in finding 14, below, Section 12 of the form, labeled "Record of Service," includes, among other things, a space for entering the "Date Entered [Active Duty] *this Period,"* and a space for entering the "Separation Date *this Period.*" (Emphasis added). An exception is that the form lists decorations awarded during "all periods of service."[4]

7. During a telephone conversation with a human resources manager at UWM on September 10, 2009, Appellant said that he had received an "other than honorable" discharge from the military. Appellant submitted a copy of the short form of his DD214 but did not submit the longer version.

8. By letter to the Appellant dated September 16, 2009, Respondent UWM informed him that he was ineligible to be a candidate for the Purchasing Agent-Objective position because he did not meet the definition of "veteran" in Sec. 230.03(14), Stats.

9. Appellant promptly appealed the action to the WERC. After Appellant filed his appeal, Respondents informed the Appellant that their decision was still being reviewed. The Appellant's veterans service officer supplied the Respondents with additional information regarding the Appellant's service record, including electronic records maintained by the U.S. Department of Veterans Affairs. Respondents never changed the eligibility conclusion reflected in the September 16 letter.[5]

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[3] The Commission has modified this finding in the proposed decision to eliminate ambiguity.

[4] The Commission has modified the third from last sentence in this finding and has added the last two sentences in this finding.

[5] The Commission has added the last two sentences in this finding to describe events that occurred after Appellant filed his appeal.

Appellant's military service and records

10. Appellant enlisted in the U.S. Navy on May 20, 1981 for a four-year period.

11. Appellant received a good conduct award for the four-year period ending May 19, 1985.

12. Appellant's enlistment was extended "at the request and for the convenience of the government" on May 20, 1985 for 24 months.

13. Appellant was discharged on September 29, 1987.[6]

14. Appellant's DD214 identifies the period of service covered by that form as running from May 20, 1981 until September 29, 1987. It lists the character of service as "bad conduct" and explains the reason for the separation as "conviction by special court martial." The form includes information in the following format:[7]

12. RECORD OF SERVICE	YEAR	MON	DAY
a. Date Entered [Active Duty] This Period	81	MAY	20
b. Separation Date This Period	87	SEP	29
c. Net Active Service This Period	06	01	05
d. Total Prior Active Service	00	00	00
e. Total Prior Inactive Service	00	00	20
f. Foreign Service	00	00	00
g. Sea Service	03	03	29

15. "Bad conduct" is not service that is honorable in character.

16. The U.S. Department of Veterans Affairs maintains computerized records that indicate the Appellant had two duty periods, with the first from May 20, 1981 (identified in the records as "entered on duty" date or EOD) until May 19, 1985 (identified as "released from active duty" or RAD). Those records show the character of his service during that period as HVA ("honorable for VA purposes"). The records show that the Appellant's second period of

[6] Appellant's DD214 directs the reader to "see continuation sheet" where it lists "dates of time lost during this period." While the continuation sheet is not of record, we construe the reference to account for the more than four-month difference between 24 months after his enlistment was extended on May 20, 1985 and his September 29, 1987 discharge date.

[7] The Commission has added the table to the proposed decision in order to more clearly set forth the information found on the DD214.

service ran from May 20, 1985 until September 29, 1987, and that the character of service during this period was DVA ("dishonorable for VA purposes").[8]

17. The U.S. DVA has determined that the Appellant is eligible for at least certain federal benefits for veterans.[9]

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Commission has the authority to review this matter pursuant to Sec. 230.44(1)(a), Stats., as a decision attributable to the Administrator of the Division of Merit Recruitment and Selection, and pursuant to Sec. 230.44(1)(d), Stats., as a decision relating to the selection process in the state civil service after the candidates were certified for the vacant position.

2. The Appellant has the burden to establish that the Respondents' decision to deem the Appellant as ineligible for veterans preference points when being considered as an applicant/candidate for the position of Purchasing Agent-Objective was contrary to the state civil service code, illegal, and/or an abuse of discretion.

3. The Appellant has sustained that burden.

4. Respondents' action of denying veterans preference points to the Appellant was contrary to the civil service code and illegal.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondents' action is rejected and the Respondents are directed to cease and desist from denying veterans preference points to the Appellant. If the position in question or a

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[8] The Commission has modified this paragraph to more accurately reflect the terminology used by the U.S. DVA and to delete the final sentence, the substance of which is now found in Finding 9.

[9] The Appellant objected to this finding because a letter of record from Wisconsin's DVA stated that the "US DVA (VA) has determined that the Appellant is entitled to VA benefits." Appellant is correct that the letter was not phrased in terms of "at least some" VA benefits. However, the letter does not specify whether the Appellant is entitled to some or all federal VA benefits and the finding, as written, is accurate under either circumstance. The record includes testimony that a determination of eligibility for one veterans benefit does not mean that the same individual is eligible for all other veterans benefits.

comparable position is vacant, Respondent UWM shall appoint the Appellant to the vacancy. If the position or a comparable position is not vacant, UWM shall appoint the Appellant, if still qualified, upon the next vacancy. The Appellant will be provided an opportunity to submit a request for costs pursuant to Sec. 227.485, Stats. The Commission retains jurisdiction for purposes of determining whether an award of costs and fees is warranted and to resolve issues that might arise relating to remedy. A representative of the Commission will contact the parties to schedule a telephone conference.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

University of Wisconsin System & Division of Merit Recruitment and Selection (M. S.)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

The focus of this case is on the standard for receiving veterans preference points when seeking employment in the state civil service.

Veterans preference points are a statutory method for adding qualifying veterans to the list of certified candidates from which a state civil service appointment is made. As provided in Sec. 230.25(1m):

> After certifying names under sub. (1) [from the head of the examination register], additional names shall be certified in rank order of those who with the combination of veterans preference points awarded under s. 230.16(7) and examination score earn a total score equal to or higher than the lowest score of those certified on the basis of examination only.

It is clear that absent the ten veterans points added to the Appellant's base exam score of 79.64, the Appellant would not have been certified as a candidate for the Purchasing Agent-Objective vacancy in question and would not have been considered for the position.[10] After interviewing him on several occasions, the University of Wisconsin was prepared to offer Appellant the position once he passed the criminal background check and provided evidence that he was a qualifying "veteran."[11]

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[10] The Commission has replaced "undisputed" with "clear" in the foregoing sentence to reflect the Appellant's contention in his objections to the proposed decision.

[11] Based upon the materials presented at hearing, the Commission understands it is typically not cost effective for the prospective employer to confirm veteran status at the time application materials are received. The University of Wisconsin chose to wait until later in the hiring process to determine the Appellant's eligibility. In his objections to the proposed decision, and, in particular, in connection with his argument that it was an abuse of discretion for UWM to wait until Appellant had undergone three interviews before seeking to verify his eligibility for veterans preference points, the Appellant argued that the foregoing statements in the instant footnote were "groundless." Appellant suggested that Respondents would have been required to submit a "cost effectiveness analysis" to provide adequate factual support for the footnote, that the University expended significant additional time by delaying the verification until after three interviews, reference checks and a criminal background check, and that the Appellant's own expenditures of time must be considered in any analysis of the relevant costs. Our comment in the first sentence of this footnote relates to the cost to the prospective employer (either the University or the State) and is a generalization not limited to the circumstances of the hiring process in the instant case. The Wisconsin Human Resources Handbook "strongly encourages" agencies to verify eligibility before conducting interviews but does not require it or provide a rationale for the encouragement. In contrast, the same Handbook, in Sec. 244.010, provides:

> It is most cost effective to complete the verification process between certification and hiring rather than at the time of application. This prevents devoting a lot of resources toward verification when only a small percentage of the applicant pool will actually be hired.

Appellant claimed eligibility for the preference points pursuant to Sec. 230.16(7)(a), Stats.:

> A preference shall be given to those veterans . . . who gain eligibility on any competitive employment register and who do not currently hold a permanent appointment or have mandatory restoration rights to a permanent appointment to any position. A preference means the following:
>
> 1. For a veteran, that 10 points shall be added to his or her grade.

The definition of veteran, for the purpose of the case before us, is found in Sec. 230.03(14), Stats:

> [V]eteran means any of the following:
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> . . .
>
> (d) A person who *served on active duty under honorable conditions in the U.S. armed forces for 2 continuous years or more or the full period of the person's initial service obligation, whichever is less*. A person discharged from the U.S. armed forces for reasons of hardship or a service-connected disability or a person released due to a reduction in the U.S. armed forces prior to the completion of the required period of service shall also be considered a "veteran", regardless of the actual time served. [Emphasis added.]

The Appellant contends that he qualifies as a veteran under Sec. 230.03(14), Stats., even though he does not have a DD214 indicating a period of service characterized as honorable. According to Appellant, he met the statutory longevity requirements in one or both of the following ways: first, he served "under honorable conditions" for "2 continuous years or more"; second, he served under honorable conditions for his "full period of initial service obligation" from 1981 to 1985. Somewhat less directly, the Appellant alternatively argues that his service comprised two distinct periods, the first of which was honorable in character, and the second of which ended in a bad conduct discharge. The Appellant bases the latter contention principally upon evidence that his service is treated as two separate periods pursuant to federal law governing VA benefits, which in turn makes him eligible for state VA benefits. The Appellant argues that Wisconsin's veterans preference statute must be construed liberally in favor of eligibility and urges the Commission to follow the federal lead regarding VA benefits and view him as having two periods of service, one of which was honorable in character.

The Respondents, to the contrary, contend that, because the Appellant has only one DD214, and it treats his service as a single period, he has had only one period of service. Since that single period ended in a bad conduct discharge, his service was not honorable in character and does not qualify the Appellant for preference points. The Respondents distinguish the Appellant's possible eligibility under Chapter 45, Wis. Stats. (state veterans

benefits), on the ground that said chapter contains an express provision aligning state eligibility

to federal eligibility, viz., Sec. 45.02(1), Stats.[12] In contrast, Chapter 230's preference points provisions contain no parallel language aligning state benefits to federal benefits. The Respondents believe that this shows that "'a different [legislative] intention existed,'" citing STATE V. DEBORAH J.Z., 228 WIS. 2D 468, 476-76 (CT. APP. 1999), 475-76, which in turn quotes KIMBERLY-CLARK CORP. V. PSC, 110 WIS.2D 455, 463 (1983).

As discussed more fully below, this case presents a close question of statutory construction. Ultimately, largely driven by the statutory imperative of liberal construction, we conclude that, while the Appellant's DD214 established a presumption against his eligibility for preference points, the presumption was rebutted by other evidence demonstrating that the Appellant's service covered two distinct periods, one of which was honorable in character. Hence he is eligible for veterans preference points.

Construing Sec. 230.03(14), Stats.

The general rules for interpreting a statute were recently set forth in BANK MUT. V. S.J. BOYER CONST., INC., 2010 WI 74, ¶ 23-25:

> When interpreting a statute, we begin with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. We give words their common and ordinary meaning unless those words are technical or specifically defined. *Id.* . . .
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> We do not read the text of a statute in isolation, but look at the overall context in which it is used. *Kalal,* 271 Wis.2d 633, ¶ 46, 681 N.W.2d 110. When looking at the context, we read the text "as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* Thus, the scope, context, and purpose of a statute are relevant to a plain-meaning interpretation "as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself." *Id.,* ¶ 48. If the language is clear and unambiguous, we apply the plain words of the statute and ordinarily proceed no further. *Id.,* ¶ 46.
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> The inquiry does not stop if a statute is ambiguous, meaning that "it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.,* ¶ 47. If a statute is ambiguous, we may turn to extrinsic sources. *Id.,* ¶ 51. Extrinsic sources are sources outside the statute itself, including the legislative history of the statute. *Id.* We sometimes use legislative history to confirm the plain meaning of an unambiguous statute, but we will not

[12] Section 45.02(1), Stats., provides: "Any person whose service on active duty with the U. S. armed forces or in forces incorporated as part of the U.S. armed forces makes that person eligible for general U.S. department of veterans affairs benefits shall be considered to have served under honorable conditions for purposes of this chapter."

use legislative history to create ambiguity where none exists. *Id.*

In terms of the present case, Sec. 230.02, Stats., states that "Statutes applicable to [the Office of State Employment Relations] shall be construed liberally in aid of the purposes declared in s. 230.01." Section 230.01, Stats., in turns states, *inter alia*, "It is the policy of this state to take affirmative action which is not in conflict with other provisions of this chapter." The veterans preference provision in Sec. 230.16(7)(a), Stats., is quite clearly an effort at affirmative action with respect to hiring veterans. Therefore that provision must be liberally construed. If the policies for and against Appellant's eligibility are in equipoise, the impasse must be resolved in favor of the Appellant.

What the statute requires in terms of period of service

As noted earlier, the statutory provision being construed in the matter pending before the Commission reads:

> [V]eteran means any of the following:
> . . .
> (d) A person who *served on active duty under honorable conditions in the U.S. armed forces for 2 continuous years or more or the full period of the person's initial service obligation, whichever is less*. A person discharged from the U.S. armed forces for reasons of hardship or a service-connected disability or a person released due to a reduction in the U.S. armed forces prior to the completion of the required period of service shall also be considered a "veteran", regardless of the actual time served. [Emphasis added.]

We find the statutory language ambiguous as to what criteria the Appellant would have to satisfy in order to be eligible for preference points. At first blush, the provision could be read to confer eligibility upon any individual who has served honorably on active duty for at least two years. Under that interpretation, the Appellant would be eligible for preference points so long as he had served for at least two continuous years without being subject to a less than honorable separation and regardless of whether he had *completed* any cognizable period of service. This interpretation, however, does not bear scrutiny in light of the language of paragraph (14)(d) or the definitions as a whole, nor with the way in which military service is traditionally organized and credited.

As to the language of the statute, we first note that, though awkwardly constructed, the language appears designed to create a longevity requirement ("two years *or more*) but also to create an exception to that requirement for someone whose initial enlistment is shorter than two years but who is released honorably at the conclusion of that initial enlistment. The Appellant's construction, as applied to a peacetime service member, focuses on the shorter of: 1) the "full period of the person's initial service obligation"; or 2) two years. This interpretation would remove two words ("or more") from the definition, because there would

never be a reason to look at a period longer than two years.[13] Where possible, statutory constructions should give effect to every word in the provision. Any construction resulting in "surplusage" is disfavored. STATE V. JENSEN, 324 WIS. 2D 586, 782 N.W.2D. 415 (2010).

Moreover, the phrase "served on active duty under honorable conditions" is used elsewhere in Sec. 230.03(14), Stats., to indicate a status that is assessed over a definable period – delimited by some kind of release or separation – rather than on a day-to-day basis. The entire subsection reads:

> (14) Except as provided in s. 230.16(7m), veteran means any of the following:
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> (a) A person who *served on active duty under honorable conditions* in the U.S. armed forces and who was entitled to receive any of the following:
>
> 1. The armed forces expeditionary medal . . . .
>
> 2. The Vietnam service medal . . . .
>
> 3. The navy expeditionary medal.
>
> 4. The marine corps expeditionary medal.
>
> (b) A person who *served on active duty under honorable conditions* in the U.S. armed forces in a crisis zone as defined in s. 45.01(11).
>
> (c) A person who *served on active duty under honorable conditions* in the U.S. armed forces for at least one day during a war period, as defined in s. 45.01(13) or under section 1 of executive order 10957 dated August 10, 1961.
>
> (d) A person who *served on active duty under honorable conditions* in the U.S. armed forces for 2 continuous years or more or the full period of the person's initial service obligation, whichever is less. A person discharged from the U.S. armed forces for reasons of hardship or a service-connected disability or a person released due to reduction in the U.S. armed forces prior to the completion of the required period of service shall also be considered a "veteran", regardless of the actual time served. [Emphasis added.]

All four paragraphs limit "veteran" to someone who has "served on active duty under honorable conditions." The use of the phrase in all four locations indicates that the phrase must be interpreted consistently throughout the subsection. COUTTS V. WISCONSIN RETIREMENT BD., 209 WIS. 2D 655, 562 N.W.2D 917 (1997) (When the same term is used repeatedly in a single statutory section, it is a reasonable deduction that the legislature intended that the term have an identical meaning each time it appears.)

The words in the definition indicate that the interval of military service encompassed by the word "served" can be performed "under honorable conditions" or under some other

[13] In addition, as noted below, the Appellant's interpretation could require Respondents to review every two-year interval between May 20, 1981 and September 29, 1987.

characterizing an interval "served" logically implies a cognizable period of service. That is to say, the period of time being characterized as honorable or less than honorable must have a beginning and an end.

For example, paragraph (14)(c) defines "veteran" to include someone whose service was "for at least one day during a war period." Under the Appellant's interpretation, an individual who served his/her first day in a war period without incident, but engaged in misconduct on the second day and was dishonorably discharged, would still have served "under honorable conditions" and be eligible for preference points. This reading, for all practical purposes, would eliminate the "served under honorable conditions" language from paragraph (c): only those service members who acted dishonorably during their one and only day of service during a war period would be excluded from the definition. The Commission believes this would be an unreasonable or absurd result, and as such, is to be avoided. MAXEY V. REDEVELOPMENT AUTHORITY OF CITY OF RACINE, 120 WIS. 2D 13, 353 N.W.2D 812 (CT. APP. 1984).

A similar unreasonable result would be generated under paragraph (14)(d) definition if "honorable" were not applied to a cognizable "period" of service. If two continuous years of service qualifies for preference points, then individuals who commit dischargeable misconduct on the first day of their third year of service during their initial period of enlistment would still be eligible for preference points. Yet there is no evidence that the military reaches a determination about the character of an enlistee's service at any time prior to the end of that period of service. To interpret the two continuous years as a "period of service" would effectively require the military to change its practices and render a determination at the end of every two-year period.

Therefore, looking at Sec. 230.03(14), Stats., as a whole, the Commission concludes that the phrase "served on active duty under honorable conditions" refers to a defined period of service, with a specific beginning point and an end point (i.e., a release or separation), for which the character, either honorable or otherwise, has been determined in an official manner.

We conclude, therefore, that duration of service must satisfy one of two requirements: 1) a delineated period of service, with an objectively verifiable beginning and end, covering two consecutive years *or more*; or 2) if the service was for less than two consecutive years, the service period was the person's entire initial service obligation.[14]

The Appellant's period of service for purposes of Sec. 230.03(14)(d), Stats.

There is no dispute that the Appellant enlisted in the U.S. Navy on May 20, 1981 for four years and received a good conduct award for the period ending May 19, 1985, the time at

[14] As set forth in paragraph (14)(d), if the applicant's period of service ended as a result of a) discharge due to hardship; b) discharge due to a service-connected disability; or c) the person was released due to a reduction in force, the duration of the period of service is irrelevant.

which his enlistment was extended for 24 months for the "convenience" of the government. At the time it was awarded to the Appellant, the Navy Good Conduct Medal required: 1) four

years of continuous active service; within which the individual had 2) "a clear record (no convictions by courts-martial, no non-judicial punishments (NJP), no lost time by reason of sickness-misconduct, no civil convictions for offenses involving moral turpitude)"; and 3) certain "performance marks". The conduct that served as the basis for the "Bad Conduct" entry for Appellant's "character of service" line of his DD214 occurred after Appellant's enlistment was extended. Respondents take the position that the reference to bad conduct on the DD214 infects all of the Appellant's period of military service described in the form so that he does not qualify as a veteran under the first clause of Sec. 230.03(14)(d), Stats.

The Appellant contends that the information on the DD214 should not be definitive in his situation, given the terms used in Sec. 230.03(14), Stats., and the manner in which similar periods of service are treated under federal veterans benefits law. He provided a record of his military service from a computer system maintained by the U.S. Department of Veterans Affairs. The record indicates that he had been released from active duty on May 19, 1985, before he began the extension of his enlistment that resulted in a court-martial conviction. The computer screen image shows that the character of service during this four-year period was "honorable for VA purposes," and that a dishonorable character of service applied to the 28-month period ending September 1987. Consonant with that record, the U.S. Department of Veterans Affairs deemed the Appellant eligible for federal veterans benefits. The latter fact is reflected in correspondence from the Wisconsin DVA in 1989 as well as testimony by the Appellant and by his veterans service officer.

There is nothing in the statute that expressly defines a "period of service" or explicitly notes that the determination of whether a duty period was served "under honorable conditions" must be made by the U.S. military in the form of a DD214 rather than by the U.S. Department of Veterans Affairs. However, because the DD214 constitutes the official record of service issued by the Department of Defense, it is routinely relied upon as the sole or at least primary vehicle for determining eligibility for various veterans benefits, including preference points pursuant to Sec. 230.25(1m), Stats. The record indicates that a person with multiple and distinct periods of military service usually will have a DD214 for each such distinct period. There appears to be no dispute that someone can qualify for veterans preference based on a DD214 demonstrating preference-eligible separation, even if one or more of the person's other DD214(s) would not qualify for preference points.[15]

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[15] Respondent Division of Merit Recruitment and Selection has adopted Chapter 244 of the Wisconsin Human Resources Handbook, entitled "Verifying Applicant Information." The Handbook serves to guide human resources staff throughout state government in the administration of the various laws and rules that apply to employees (and prospective employees) of the State of Wisconsin. The chapter includes Sec. 244.040 relating to veterans preference, which includes the directive: "To verify eligibility of all veterans certified through preference points, review, at a minimum, the veteran's *Certificate of Release or Discharge from Active Duty* (DD214)."

In the Appellant's case, he had only one DD214 but he also produced a different federal record, from the U.S. DVA, reflecting two separate periods of service. The federal DVA conclusion presumably also would lead to the state conferring VA benefits upon the Appellant

pursuant to Sec. 45.02(1), Stats., set forth above in footnote 12. The proposed decision dismissed the relevance of the federal DVA record by noting that, unlike Chapter 45's veterans benefits statute, Sec. 230.03(14), Stats., does not expressly require the state to follow the federal lead regarding honorable service for purposes of eligibility. As the proposed decision and the Respondents accurately note, the absence of similar language in two statutes covering similar territory, under the "expressio unius est exclusio alterius" principle, could be viewed as reflecting a legislative intent to exclude federal standards when construing Chapter 230.

We agree with the proposed decision that since Chapter 230 contains no similarly required alignment of eligibility, Respondents are not *bound* to apply the federal determination of "honorable service" for veterans benefits when determining eligibility for preference points, as is true regarding Chapter 45 benefits. We also agree with Respondents that the absence of similar language in Chapter 230 reflects a legislative judgment that the determinations as to preference points may not necessarily parallel those for federal benefits.

However, the fact that Chapter 230 eligibility standards *may* differ from federal VA eligibility does not mean that they *must* differ. In this case, the two statutes (Chapter 45 and Chapter 230) do not cover such identical territories as to require strict application of the "expressio unius" principle. It is not surprising that eligibility for state veterans benefits under Chapter 45 should align with federal veterans benefits, because the benefits themselves under corresponding state and federal law are quite similar, with health care being the prime example. In contrast, the federal veterans preference points program is significantly more narrow than the state preference points system established under Chapter 230. In a nutshell and subject to a multitude of qualifications, federal preference points are limited to disabled veterans (who receive 10 points) and veterans who served during highly specific time periods and/or military campaigns (who receive 5 points). See generally, Title 5 U.S.C., Section 2108. Thus, the Appellant would not be eligible for federal preference points, not for reasons relating to his character of service, separate periods of service, or length of service, but because (as far as this record reflects) he is not disabled nor did he serve during the highly specific wartime periods set forth in Title 5. The federal preference law in Title 5 contains no provision analogous to paragraph (14)(c), because Wisconsin deliberately chose to award preference points to a broader group of veterans, a group that would include the Appellant if he has a cognizable period of honorable service.

Given the lack of alignment between federal and state preference points, it is not remarkable that Chapter 230 lacks language incorporating federal eligibility standards the way Chapter 45 does in Sec. 45.02(1), Stats. By the same token, since Sec. 230.03(14), Stats., concerns an entirely different program (affirmative action for veterans in state employment) than Chapter 45 (health and other welfare benefits for veterans), we do not view the Legislature's failure to specifically align federal health and welfare benefits with state

preference points as an indication that preference points eligibility *cannot* be guided by federal standards if it otherwise makes sense to do so.

Thus we conclude that we may look to federal determinations for guidance in deciding whether the Appellant served honorably during a cognizable period of service for purposes of paragraph (14)(c). Nonetheless, we still must determine whether it is appropriate to do so for the purposes at issue here.

The Respondents posit that the DD214 should be the exclusive method of establishing whether a veteran has served a qualifying period of service. This position has considerable legal and practical merit and was the foundation of the proposed decision in this case. The DD214 is the principal basis for assessing eligibility for veterans benefits of all types. It is readily available, and clearly the Respondents are justified in demanding it from applicants claiming veterans preference points. The Appellant's DD214 on its face depicts him as having a single period of service that was not honorable in character.

However, another official record exists that depicts the Appellant's service as two separate periods, one of which was honorable in character. The second record reflects the basis of the Appellant's eligibility for federal and (perhaps but not necessarily derivatively) state VA benefits. The legal basis for the second record is a federal law passed in 1977, with retroactive effect, that amended Title 38 (the federal law applicable to VA benefits) to provide a constructive release at the conclusion of an individual's period of initial service obligation if the individual was not actually separated owing to reenlistment.[16] As a result, an individual such as Appellant, who has completed a period of obligation honorably, is eligible for VA benefits even though a subsequent period of service may have ended less than honorably. 38 U.S.C. Sec. 101(18)(B). This provision is amplified in DVA regulations at 38 C.F.R. Sec. 3.13(c):

> **Sec. 3.13 Discharge to change status**
>
> . . .
>
> (c) Despite the fact that no unconditional discharge may have been issued, a person shall be considered to have been unconditionally discharged or released from active military, naval or air service when the following conditions are met:
>
> (1) The person served in the active military, naval or air service for the period of time the person was obligated to serve at the time of entry into service;

[16] We draw an inference from U.S. DVA's action to grant eligibility to Appellant that the federal agency finds no meaningful distinction between "reenlistment" (as that term is used in 38 U.S.C. Sec. 101(18)(B) and 38 C.F.R. Sec. 3.13(c), the latter of which is set forth elsewhere on this page) and extending an enlistment.

(2) The person was not discharged or released from such service at the time of completing that period of obligation due to an intervening enlistment or reenlistment; and

(3) The person would have been eligible for a discharge or release under conditions other than dishonorable at that time except for the intervening enlistment or reenlistment.

The question is whether "period of service" in paragraph (14)(c) should be interpreted in a parallel fashion, i.e., should Appellant be deemed to have completed a period of service honorably because he received the Good Conduct Award at the conclusion of his original four-year enlistment and because his enlistment was extended "for the convenience of the government." As noted earlier in this Memorandum, "period of service" is not defined by statute or regulation for either Chapter 45 or Chapter 230 purposes, and we do not feel constrained by the absence of language analogous to Sec. 45.02(1), Stats., to avoid looking to federal standards for guidance in interpreting paragraph (14)(c) if it makes sense to do so. We are left, then, to interpret the legislative intent underlying the statute based upon policy considerations, including the "liberal construction" imperative that applies to Chapter 230 as a whole.[17]

To weigh against this specific statutory instruction favoring eligibility, the Respondents and the proposed decision advance what is essentially a practical consideration, i.e., that the DD214 should be conclusive as to "periods of service" in order to avoid the possibility of having to mine the labyrinth of military terms and documentation. Without denigrating the possibility that such concerns could exist in another situation (though none has been suggested), they do not seem compelling here. The Respondents had only to examine a single official record other than the DD214 to conclude that the Appellant had completed a cognizable period of service honorably. No one disputes that one period of honorable service is sufficient to qualify for preference points even if an individual has a second non-qualifying period of service. Under the current circumstances, efficiency concerns carry considerably less weight than the statutory imperative of liberal construction.

For future application of the veterans preference provision, efficiency and practicality can be served by treating the DD214 as creating a presumption of eligibility or non-eligibility, while at the same time allowing an individual such as the Appellant to overcome that presumption with other reliable records such as the U.S. DVA record supplied here.

Accordingly, we conclude that the Appellant has satisfied his burden to establish that he served a period of service honorably and is eligible for the veterans preference points provided in Sec. 230.03(14)(c), Stats. Having reached that conclusion, it is unnecessary to reach the

[17] Despite our conclusion that the language of the statute is ambiguous, the relevant legislative history, some of which was outlined in the proposed decision, is not helpful in resolving the ambiguity.

Appellant's other arguments regarding alleged flaws in the Respondents' hiring procedures.

The Respondents' decision to find the Appellant ineligible for veterans preference points was contrary to the civil service code and therefore illegal.

Remedy

The Commission understands there is no dispute that but for the decision that Appellant was ineligible for veterans preference points, he would have been hired by UWM to fill a vacant Purchasing Agent position. However, he was never appointed to the position so he was never removed from the position so as to be eligible for the remedies set forth in Sec. 230.43(4), Stats. SEEP V. PERSONNEL COMMISSION, 140 WIS. 2D 32-41-42 (CT APP, 1987).

The Commission also understands that once the Appellant had filed his appeal, UWM initially did not take further steps to fill the vacancy. It is possible that the position, or a comparable position, is vacant. If so, the Appellant is entitled to be appointed to the vacancy, assuming he remains qualified. PAUL V. DHSS & DMRS, CASE NOS. 82-156-PC & 82-PC-ER 69 (PERS. COMM. 6/19/1986). If neither the particular position nor a comparable position is currently vacant, then the Appellant is entitled to be appointed to the next vacancy, again assuming he remains qualified. ID. Under the circumstances, the Commission may not remove the incumbent if the position is now filled[18] and the Commission lacks the authority to award the Appellant back pay or front pay. PEARSON V. UW & WIS. PERS. COMM., DANE COUNTY CIRCUIT COURT, 85-CV-5312, 6/25/1986, AFF'D BY COURT OF APPEALS, 86-1449, 3/5/1987.

The Appellant will be provided an opportunity to submit a request for fees and costs pursuant to Sec. 227.485, Stats.

Dated at Madison, Wisconsin, this 11th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/

[18] ZANCK & SCHULER V. DP, CASE NOS. 80-380-PC & 81-12-PC (PERS. COMM. 12/3/1981).

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Susan J. M. Bauman, Commissioner