

Opinion No. 105.

Soldiers and Sailors—Veterans—Preference, Employment of Veterans—Employment, Preference for Veterans—Discharged Veterans, Employment.

Held: Honorably discharged Union soldiers and sailors and their widows of the Civil War, the Spanish - American War, the Philippine Insurrection, and of the World War I, and men and women who are and will be honorably discharged from World War II, and any disabled civilian recommended by the State Rehabilitation Bureau, shall be preferred for appointment and employment in every public department, and upon all public works of the State of Montana, and of every county and city thereof, provided they possess the business capacity, competency and education to discharge the duties of the position or employment involved, and provided further, a vacancy exists in such position or employment.

2. In those positions or employments which require an examination to determine fitness, the fact that a non-veteran may receive a higher grade than a veteran does not deprive the veteran of his right to preference, so long as the veteran has received the required passing grade and is qualified for the position or employment.

3. As between a disabled veteran, whose disability is admitted by the Veterans' Administration of the United States to have been incurred in the service of any of the wars mentioned in the statute, and an able-bodied veteran, or a disabled civilian recommended by the State Rehabilitation Bureau,

the disabled veteran has a prior preference.

4. The appointing power has a discretion in making appointments, but where a veteran is concerned, such discretion may not be arbitrary, and when the veteran is qualified for the position, he is entitled to the appointment or employment in preference to a non-veteran.

December 12, 1945.

Mr. R. B. Downs, Representative
State Veterans Employment
Commission
Helena, Montana

Dear Mr. Downs:

You have requested my opinion on the following state of facts:

"A number of returning veterans are applying for examination in various cities of Montana and have been inquiring regarding their veteran rights and preferences. The question arises as to how the Civil Service law affects the State Veterans' Preference Law which covers positions in state, county and municipal governments and gives preference to veterans in appointment. If, after a veteran has taken the Civil Service examination and receives a passing grade for fireman or policeman, does not the State Veterans' Preference Law apply in the actual appointment. In other words, should not a veteran with a grade 75, who has proven himself to be qualified, receive the appointment rather than a non-veteran with a grade of 85?"

Section 5653, Revised Codes of Montana, 1935, as amended by Chapter 66, Laws of 1937, and by Chapter 160, Laws of 1943, commonly known as the Veterans' Preference Law, provides in part as follows:

"In every public department, and upon all public works of the State of Montana, and of any county and city thereof, honorably discharged Union soldiers and sailors and their widows of the Civil War, the Spanish-American War, the Philippine Insurrection, and of the World War I, and men and women who are and will be honorably discharged from the present conflict, and any dis-

abled civilian recommended by the state rehabilitation bureau, shall be preferred for appointment and employment; age, loss of limb or other physical impairments, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity, competency and education to discharge the duties of the position involved . . ."

The act further provides such honorably discharged soldiers, sailors, etc., of the wars mentioned, who have disabilities admitted by the Veterans' Administration of the United States to have been incurred in the services of any of said wars, where said disabilities do not interfere with the employment, shall be given preference before the employment of able-bodied veterans. The act further provides that such preferences shall apply only to those who have been residents of the state for one year, and also residents of such county or city where the employment is to be had.

The language of the statute is plain and unambiguous and clearly gives to veterans a preference right for appointment and employment "in every public department, and upon all public works of the State of Montana, and of any county and city thereof."

However, our Supreme Court in the case of *Horvath v. Mayor of the City of Anaconda*, 112 Mont. 266, 116 Pac. (2d) 874, while recognizing the discretionary power of the appointing authority points out that such discretion as applied to veterans is not the same as to others.

In the case cited, the relator, a veteran, brought a proceedings in mandamus to compel the Mayor to refer to the Police Commission his application filed with the Mayor as required by Section 5097, Revised Codes of Montana, 1935. It appeared at the time the application was filed with the Mayor, that there was no vacancy existing in the particular position applied for. After discussing the provisions of Section 5097, supra, not pertinent here, the court said at page 273 of the Montana report:

"Do the provisions of Chapter 66, 1937 Session Laws (now Chapter 160, Laws of 1943), change the effect of Section 5097 so far as the par-

ticular point is concerned? It is argued by relator that if the mayor may refuse to transmit the application of a veteran to the commission, then the benefits intended to be conferred by Chapter 66 are nullified. With this view we do not agree. In the case of other applicants, the mayor may reject them on any basis he chooses. That is not the case of those who are preferred under the statute. **Where an application is made by a veteran and a vacancy exists, then unless the mayor on reasonable investigation is convinced that the applicant is not qualified for the position as set out in Chapter 66, he must transmit the application to the commission.**" (Parenthesis and emphasis mine.)

And continuing, the court said:

"Upon the filing of the application of relator, the mayor could not arbitrarily ignore it were there a vacancy to be filled. It became the mayor's duty if there were a vacancy to give preference to the application of a veteran if the veteran were qualified for the position within the contemplation of the statute. Whether or not he was qualified was a matter which the mayor had a right to be determined before submitting the application. He had a discretion to exercise, and absent a showing that he acted arbitrarily or otherwise abused that discretion this court will not interfere."

It might be well to point out here that our Supreme Court in the case of *Application of O'Sullivan*, 158 Pac. (2d) 306, held those portions of Chapter 160, Laws of 1943, placing the appointing power in the Judge upon appeal and in not providing for notice to such authority prior to hearing before the court, unconstitutional and void. However, the court held further that that portion of Chapter 66, Laws of 1937, providing for an order to show cause and notice of hearing to the appointing power, was not repealed by Chapter 160 and is still in force and effect.

It would appear, therefore, from the language of the Supreme Court, that a veteran applicant for a position in any public department or employment for the state or any city or county, has

an absolute preference, provided he meets the required qualifications to perform the work or duties.

You cite a hypothetical case where a veteran applicant for a position or employment which requires an examination, and you inquire if the veteran applicant obtains a grade of 75 and a non-veteran obtains a grade of 85, would the veteran applicant have preference for the appointment or employment? I assume that a certain percentage is required as a passing grade on such examination. In such case, to qualify, it is necessary that the applicant on the examination obtain the passing grade or higher. If he obtain the passing grade, this would determine that he is qualified for the position or employment. If the veteran, in addition to qualifying in the examination by obtaining the required passing grade, is qualified to perform the duties required in such position or employment, it is my opinion his statutory preference over a non-veteran obtaining a higher grade should entitle him to the appointment, subject, of course, to the discretionary power of the appointing authority as herein pointed out. I am assuming the examination referred to is for the purpose of determining the business capacity, competency and education of the applicant to discharge the duties of the office.

It may not be amiss to point out here that in addition to the general provisions giving preference to honorably discharged service men and women, preference is given to two special classes, viz., disabled veterans and certain disabled civilians. The statute provides:

"... any disabled civilian recommended by the state rehabilitation bureau, shall be preferred for appointment and employment . . ."

And referring to honorably discharged veterans, the statute provides:

"... who have disabilities admitted by the veterans' administration of the United States to have been incurred in the service in any of said wars, where said disabilities do not interfere with the employment, said disabled veterans shall be given preference before the employment of able-bodied veterans as herein designated . . ."

It is, therefore, clear that disabled civilians recommended by the state rehabilitation bureau have the same preference for appointment and employment as honorably discharged veterans. It is, likewise, clear that disabled veterans, whose disabilities have been admitted by the veterans' administration of the United States to have been incurred in any of the wars mentioned in the statute, have a special preference over able-bodied veterans and disabled civilians recommended by the State Rehabilitation Bureau.

It is therefore my opinion:

1. Honorably discharged Union soldiers and sailors and their widows of the Civil War, the Spanish-American War, the Philippine Insurrection, and of the World War I, and men and women who are and will be honorably discharged from World War II, and any disabled civilian recommended by the State Rehabilitation Bureau, shall be preferred for appointment and employment in every public department, and upon all public works of the State of Montana, and of every county and city thereof, provided they possess the business capacity, competency and education to discharge the duties of the position or employment involved, and provided further, a vacancy exists in such position or employment.

2. In those positions or employments which require an examination to determine fitness, the fact that a non-veteran may receive a higher grade than a veteran does not deprive the veteran of his right to preference, so long as the veteran has received the required passing grade and is qualified for the position or employment.

3. As between a disabled veteran, whose disability is admitted by the Veterans' Administration of the United States to have been incurred in the services of any of the wars mentioned in the statute, and an able-bodied veteran, or a disabled civilian recommended by the State Rehabilitation Bureau, the disabled veteran has a prior preference.

4. The appointing power has a discretion in making appointments, but where a veteran is concerned, such discretion may not be arbitrary,

and when the veteran is qualified for the position, he is entitled to the appointment or employment in preference to a non-veteran.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General