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EXPANSION OF THE VETERANS PREFERENCE LAW TO TEACHERS

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I. 2009 AMENDMENTS TO THE VETERANS' PREFERENCE ACT ("VPA")

- A. Teachers Are Covered By the VPA.** All licensed employees, other than superintendents, have been covered by the VPA since July 1, 2009.
- B. Election of Remedies.** A veteran who is not in a position covered by Minn. Stats. § 122A.40 or § 122A.41, but who is covered by a collective bargaining agreement, is precluded from filing a grievance contesting his demotion or discharge if he elects to use the procedures of the VPA to challenge the discipline.

II. WHO IS COVERED UNDER THE RECENTLY AMENDED VPA?

- A. Who is a "Veteran"?** For purposes of the VPA, the term "veteran" means a United States citizen or resident alien who has been *separated under honorable conditions from any branch of the armed forces of the United States after having served on active duty for 181 consecutive days or by reason of disability incurred*

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while serving on active duty, or who has met the minimum active duty requirement as defined under federal law, or has been certified by the United States Secretary of Defense as having active military service and an honorable discharge. *See* Minn. Stat. § 197.447.

- B. Proof of Veteran’s Status.** A school district may request a copy of the veteran’s discharge form (Form DD214) as proof that the applicant or employee is eligible for the benefits of the VPA.

- C. The VPA Now Applies to “Teachers.”** The 2009 amendments struck the word “teacher” from the list of positions that are exempt from the VPA. Thus, “teachers” are now covered under the VPA.

- D. How is a “Teacher” Defined?** The VPA does not define the term “teacher.” Before the 2009 amendments, the VPA was generally construed not to apply to any employee who met the definition of a “teacher” under Minnesota Statutes section 122A.40 (section 122A.41 for cities of the first class). Therefore, a court would likely hold that the VPA now applies to anyone who meets that definition. In most cases, however, the definition of a “teacher” will be irrelevant because any position that is not specifically exempted by the VPA is covered by the VPA.
 - 1. **Minn. Stat. § 122A.40, subd. 1:** “A principal, supervisor, and classroom teacher and any other professional employee required to hold a license from the state department shall be deemed to be a “teacher” within the meaning of this section.” Thus, *at a minimum* the VPA now applies to principals, deans, school psychologists, classroom teachers, and counselors.

 - 2. **Minn. Stat. § 122A.41, subd. 1(a):** “The term ‘teacher’ includes every person regularly employed, as a principal, to give instruction in a classroom, or to superintend or supervise classroom instruction, or as a placement teacher and visiting teacher. Persons regularly employed as counselors and school librarians shall be covered by these sections as teachers if licensed as teachers or as school librarians.”

 - 3. **Are probationary teachers covered by the VPA?** Because of limited legislative history, we do not know whether the authors of the 2009 amendments to the VPA intended probationary teachers to be covered by the VPA. Education Minnesota contends that probationary teachers are covered by the VPA since they were not expressly excluded. Education Minnesota has taken the position that it will seek to enforce the Veterans Preference Rights of any probationary teachers who are non-renewed without following the provisions of the VPA. So if a school district does

not give a probationary teacher who is an honorably discharged veteran his or her veterans' preference hearing prior to non-renewal for performance reasons, or written notice of their veteran's preference rights if the teacher is being non-renewed due to reduction in staff, the district may be the subject of a test case funded by Education Minnesota. If Education Minnesota prevails, the school district would be required to reinstate the probationary teacher with back pay and benefits. Reinstatement, in some cases, would result in the probationary teacher achieving continuing contract or tenure rights.

An argument can be made that the VPA does not apply to probationary teachers. As amended in 2009, section 197.455, subdivision 1, states: "Sections 197.46 to 197.481 also apply to a veteran who is an incumbent in a classified appointment in the state civil service *and has completed the probationary period for that position, as defined under section 43A.16.*" On its face, the limitation to veterans who have completed the probationary period applies only to incumbents in a classified appointment in the *state civil service*. However, immediately after the effective date of the amendment, the legislature added a clause stating that section 197.455, subdivision 1 "applies to appointments to state *and local government positions* of employment made on or after [July 1, 2009]."

4. **Are community education teachers covered by the VPA?** Under Minn. Stat. § 122A.26, subdivision 1, a person who teaches in a community education program is generally exempt from all licensure requirements and is not considered a teacher for purposes of section 122A.40. However, community education teachers are still "teachers." Moreover, they are not specifically exempted from the VPA. Therefore, community education teachers are covered by the VPA.
5. **Are substitute teachers covered by the VPA?** The Minnesota Supreme Court has held that the VPA does not apply to "occasional or temporary" employment situations. *See Crnkovich v. Independent Sch. Dist. No. 701, Hibbing*, 142 N.W.2d 284 (Minn. 1966) (holding that an extra carpenter who was hired during the summer months was only a temporary employee and not covered by the VPA); *see also* Op. Atty. Gen. No. 85A (Sept. 23, 1964) (same). Thus, in cases where a substitute teacher occasionally works for a school district, the teacher is not covered by the VPA.
 - a. If a court were to conclude that probationary teachers are covered under the VPA, would a court also conclude that long-term substitute teachers are covered by the VPA if they are employed for an entire school year?

- b. Early court cases support the proposition that the VPA does not apply to an employee who is employed for a temporary purpose or for a “fixed term.” See *State ex rel. Castel. v. Village of Chisholm*, 217 N.W. 681, 682 (Minn. 1928). If an employee is appointed annually for a fixed term, the employment is not temporary or occasional.

E. What School District Positions Are Exempted from the VPA? The VPA does not apply to the following positions: (1) private secretary, (2) superintendent of schools, (3) one chief deputy of any elected official or head of a department, (4) any person holding a strictly confidential relation to the appointing officer, or (5) a department head.

1. **How is the term “department head” defined?** Generally, to be classified as a “department head,” a person must be in charge his/her own staff and must have the authority to directly make recommendations to the school board in regard to the discipline and discharge of employees on his/her staff. In addition, the courts consider the following factors in determining whether a person is a department head:

- a. Does the person have charge of the work done by his/her department?
- b. Does the work require technical, professional training?
- c. Is the person the highest authority of that level of government as to his/her official duties?
- d. Does the person supervise all the work in his/her department?
- e. Does the success of the department depend upon the person’s technique?
- f. Are the employees in the department under the person’s direction?
- g. Are the person’s duties more than merely different from other employees?
- h. Does the person have the power to hire and fire subordinates?

2. **Who in a school district is a “department head”?** In many school districts, it may be difficult to show that even high level administrative positions (other than the superintendent or assistant superintendent) meet the definition of a “department head.” However, the most likely candidates would be the director of human resources, the director of financial services, and the director of special education. In most districts, a director of curriculum would not be a department head.

III. REQUIREMENTS FOR NON-RENEWING, TERMINATING, OR PLACING TEACHERS ON UNREQUESTED LEAVE WHO ARE VETERANS

- A. **Nonrenewal of Probationary Teachers.** As previously discussed, Education Minnesota contends that the VPA applies to the nonrenewal of probationary teachers who are veterans. *If independent school districts do not want to risk a challenge from Education Minnesota,* then school districts need to begin the nonrenewal process early enough to comply with both the procedural requirements of the VPA and the July 1 deadline for giving a probationary teacher notice of nonrenewal under Minn. Stat. § 122A.40.

The procedures for non-renewal under the VPA are the same as the procedures for discharge (see below). In order to ensure that the school district has adequate amount of time to complete the discharge procedures under the VPA prior to the start of the next school year, it should give the probationary teacher notice of proposed discharge under the VPA in January. The school board must also adopt a resolution and give the probationary teacher notice of nonrenewal pursuant to Minn. Stat. § 122A.40 prior to July 1.

- B. **Discharge.** Before discharging a veteran, a school district must comply with the following requirements (in addition to any requirements under Minn. Stats. §§ 122A.40 and 122A.41 or the collective bargaining agreement):
1. **Notice of proposed discharge.** A school district must give a veteran written notice of its intent to discharge the veteran. The district must also notify the veteran of the right to request a hearing within sixty days after receiving the notice of intent to discharge. Minn. Stat. § 197.46.
 - a. The notice should specifically reference the statute and state that failure to request a hearing within sixty days after receiving the notice constitutes a waiver of the veteran's right to a hearing and other legal remedies for reinstatement. The notice should also state that the hearing will be before a neutral panel.
 - b. A six-year statute of limitations applies to claims under the VPA.
 - c. A district's failure to give written notice prevents the sixty-day clock from running. If the right to a hearing is asserted at a later date, the district may have substantial liability for back pay.
 2. **Grounds for discharge.** In order to discharge a veteran, a school district must be able to show at hearing that the veteran is incompetent, that the

veteran has engaged in misconduct (e.g., insubordination), or that the position was abolished in good faith.

3. **Pay pending outcome of hearing.** If the veteran requests a hearing to challenge a discharge based on misconduct or incompetence, the school district must pay the veteran until a decision upholding the discharge is issued.

C. **Unrequested Leave of Absence (“ULA”)**

1. **ULA Based on Discontinuance of Position.** A school district may place a teacher who is a military veteran on ULA in the inverse order of seniority without a showing of incompetence or misconduct, *if the reason for the ULA is the discontinuance of a position.*
 - a. **Notice under the Continuing Contract and Tenure Laws.** Pursuant to Minn. Stats. §§ 122A.40 and 122A.41, a school district must provide the teacher with written notice of the proposed ULA and an opportunity to request a hearing. Upon request, the district must then provide the teacher with a hearing under the appropriate statute before actually placing the teacher on ULA.
 - b. **Notice under the VPA.** A school district may abolish a veteran’s position in good faith, but the district must give the veteran written notice that the position is being abolished. The notice must state that the veteran has sixty days under the VPA to request a hearing before the Commissioner of Veterans Affairs or to petition the district court for a writ of mandamus if he/she believes that his/her rights are being violated under the VPA. School districts are not required to provide a veteran with a hearing *under the VPA before* terminating the veteran based on the good faith abolishment of a position. However, the veteran may request a hearing after the termination to contest whether the position was abolished in good faith.
2. **ULA based on lack of pupils or financial limitations.** The courts have not addressed whether a school district may place a teacher who is a veteran on ULA based on a lack of pupils or financial limitations. However, the Minnesota Supreme Court has held that an employer may lay off a veteran who has less seniority than a nonveteran, without showing incompetence or misconduct, because the law does not authorize the removal of a more senior employee in order to make a place for a soldier. *See Evens v. City of Duluth*, 262 N.W. 681. (Minn. 1935). Based

on the reasoning in *Evens*, a school district *arguably* may place teachers, including veterans, on ULA in the inverse order of seniority without a showing of incompetence or misconduct, even if the reason for the ULA is based on a lack of pupils or financial limitations. However, in most cases the teacher's position will in fact be eliminated as a result of the drop in enrollment or the financial limitations, so school districts should list discontinuance of position as one of the grounds for placing any teacher who is a veteran on ULA.

3. **Seniority rights of veterans.** Consistent with the Continuing Contract and Tenure Laws, the Minnesota Court of Appeals has held that "veterans have a preference over nonveteran employees less senior than they to continue to perform duties for which they are qualified if the public employer continues to need such duties performed." *Young v. City of Duluth*, 410 N.W.2d 27, 29-30 (Minn. App. 1987). The law is unclear in regard to whether a negotiated ULA plan may block a veteran from bumping into a position that is held by a less senior nonveteran employee.

D. Two Bites of the Apple? One of the 2009 amendments to the VPA states:

In matters of dismissal from such a position, a qualified veteran has the irrevocable option of using the procedures described in sections 197.46 to 197.481, or the procedures provided in the collective bargaining agreement applicable to the person, but not both. For a qualified veteran electing to use the procedures of sections 197.46 to 197.481, the matters governed by those sections must not be considered grievances under a collective bargaining agreement, and if a veteran elects to appeal the dispute through those sections, the veteran is precluded from making an appeal under the grievance procedure of the collective bargaining agreement.

EFFECTIVE DATE. This section is effective July 1, 2009, and applies to appointments to state and *local government positions* of employment made on or after that date.

1. If the above language applies to school district employees who are veterans, then a teacher who is a veteran could either file a grievance or request a VPA hearing, but not both, to challenge a discharge or layoff.
2. However, even if the above language applies to school district employees, individuals who are "teachers" within the meaning of Minn. Stats. §§ 122A.40 and 122A.41 may challenge a layoff or discharge by

requesting hearings under both the Continuing Contract or Tenure Laws and the VPA.

IV. VETERANS' PREFERENCE IN HIRING

A. Veterans' Preference in Hiring. "Recognizing that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit which cannot be readily assessed by examination, a veteran's preference shall be available to a veteran" Minn. Stat. § 197.455, subd. 2.

1. **Nondisabled veteran's credit.** "There shall be added to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of **five points** provided that the veteran obtained a passing rating on the examination without the addition of the credit points." Minn. Stat. § 197.455, subd. 4.
2. **Disabled veteran's credit.** "There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of **ten points** provided that the veteran obtained a passing rating on the examination without the addition of the credit points. There shall be added to the competitive promotional examination rating of a disabled veteran, who so elects, a credit of five points provided that (1) the veteran obtained a passing rating on the examination without the addition of the credit points; and (2) the veteran is applying for a first promotion after securing public employment." Minn. Stat. § 197.455, subd. 5.
 - a. For the purpose of the preference to be used in *securing appointment* from a competitive open examination, "disabled veteran" means a person who has a compensable service-connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces, which disability is existing at the time preference is claimed.
 - b. For purposes of the preference to be used in *securing appointment from a competitive promotional examination*, "disabled veteran" means a person who, at the time of election to use a promotional preference, is entitled to disability compensation under laws administered by the Veterans Administration for a permanent service-connected disability rated at 50 percent or more.

3. **Preference for spouses.** The preference points that are available to a veteran may be used by the surviving spouse of a deceased veteran or by the spouse of a disabled veteran who, because of disability, is unable to qualify. *See* Minn. Stat. § 197.455, subd. 7.

B. Notifying Veterans of Their Preference Rights. The VPA requires that school districts notify veterans of their right to request veterans' preference points if they pass the test for a position. Minn. Stat. § 197.455, subd. 9.

1. **Sample notice.** One way to satisfy this notice requirement is to place a notice in the employment application. The following is an example of the type of language that could be used:

If you are an honorably discharged veteran or the spouse of a deceased or disabled veteran and you want to claim veterans' preference, you must submit a copy of the completed DD214 Form to the District's Office of Human Resources. If you pass the examination(s), the District will show you your final examination score and the preference points, if any, that you may elect to use to augment the score. Five points may be added to the passing score of a nondisabled veteran or eligible spouse, and ten points may be added to the passing score of a disabled veteran or eligible spouse. Please contact the Office of Human Resources if you have any questions regarding veterans' preference points.

2. **Veteran's obligation.** To obtain the benefits and protections of the VPA, a person must provide evidence of honorable discharge from the military service or, in the case of a disabled veteran, evidence that he/she is entitled to disability compensation for a service-related disability. Generally, for nondisabled veterans, a photocopy of Form DD214 constitutes sufficient evidence. School districts may ask a veteran to provide a copy of Form DD214.

C. 100-Point Hiring System. The Minnesota Supreme Court has held that "a 100-point based rating system is implicit in the . . . point-based preference law because it is necessary to the uniform application and intended effect of that law." *Hall v. City of Champlin*, 463 N.W.2d 502, 505 (Minn. 1990). Consequently, school districts must use a 100-point hiring system when hiring any person for any position covered by the VPA, *including teachers, principals, supervisors, and other non-exempt professional employees who are hired after July 1, 2009.*

1. **When are veterans' preference points supposed to be awarded?**
 School districts must award preference points to a passing score before selecting finalists for a particular position.
 - a. If a school district is going to interview finalists for a teaching position, the district must award veterans' preference points to a passing score before determining who will be interviewed.
 - b. Typical order: evaluation → add preference points → interview → hiring decision

2. **Can a school district avoid the need to use a 100-point system by considering all veterans to be finalists and then interviewing all veterans who apply for a position?**

3. **Are districts required to use a particular type of evaluation when implementing a 100-point system?** No, school districts “may administer any type of evaluation as long as it is based on criteria capable of being reduced to a 100-point rating system.” *Hall v. City of Champlin*, 463 N.W.2d 502, 505 (Minn. 1990).
 - a. For example, a school district could implement any one, or a prorated combination, of the following:
 - (1) experience and training rating scale (100 points; passing = 70)
 - (2) oral examination (100 points; passing = 70)
 - (3) written examination (100 points; passing = 70)
 - b. Ratings for job training and experience should be tied to a job description and minimum training and experience requirements for a position.

4. **May points be added to a failing score?** No, veterans' preference points are to be awarded only to a passing score. If a candidate does not receive a passing score on any component of an evaluation, the candidate does not receive veterans' preference points and does not move to the next step.

5. **What happens in the event of a tie?** If an award of preference points results in a veteran having the same numerical rating as a non-veteran, the veteran must be given preference. *See* Minn. Stat. § 197.455, subd. 8.

6. **Must a school district hire a veteran who receives more points than the other candidates?** No, the Minnesota Attorney General has opined that an appointing authority is not required to appoint the person who receives the highest ranking, even if that person is a veteran. Minn. Att’y Gen. Op. 785-E-2 (Aug. 30, 1962); *see also McAfee v. Department of Revenue*, 514 N.W.2d 301, 305 (Minn. App. 1994). In short, the ranking determines who is entitled to an interview, but it does not necessarily determine who will be hired. After interviewing the finalists for a position, a school district may consider factors such as attitude, motivation, and personality.

D. Obligation When a Veteran Is Rejected. If a school district rejects a candidate who has received veterans’ preference points, the district must notify the candidate in writing of the reasons for the rejection and must file the notice with the school’s personnel director/officer. The written notice should be concise and should not contain information about other candidates. For example:

Pursuant to Minnesota Statutes section 197.455, subdivision 11, the purpose of this letter is to notify you that you were not selected for position of science teacher in Independent School District No. __. Although you received veterans’ preference points, you were not selected on the basis of the interview that was conducted. Thank you for your interest in employment with the District.

V. CONCLUSION

School districts must modify their hiring practices in regard to all licensed personnel, except superintendents or any other high-level administrative position that meet the VPA definition of a department head, so as to incorporate a 100-point hiring system and the preference points required by the VPA.

School districts must also modify their timelines and procedures for non-renewing, discharging, and laying off teachers and other licensed personnel who are veterans, so as to fulfill the requirements of the VPA as well as any applicable statutory or contractual requirements.

Teachers who are veterans have six years to challenge their nonrenewal, discharge or placement on unrequested leave on the grounds that the school district did not provide them with their veteran’s preference rights. If a teacher prevails, he or she will be entitled to reinstatement with back pay and benefits.