STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL
STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210
www.attorneygeneral.nd.gov

Wayne Stenehjem
ATTORNEY GENERAL

MEMORANDUM

TO: Lonnie Wangen, Commissioner, North Dakota Department of Veterans Affairs

FROM: Laura A. Balliet, Assistant Attorney General

RE: Veterans' Preference Appeal Process

DATE: May 17, 2018

Based on our conversations over the last week, you asked for an analysis of the process surrounding an applicant's request for an appeal hearing in accordance with N.D.C.C. § 37-19.1-04.

Issue

Whether N.D.C.C. § 37-19.1-04 is ambiguous as to the role of the Commissioner of Veterans' Affairs in the process for an applicant's request for appeal of denial of veterans' preference rights afforded in N.D.C.C. ch. 37-19.1?

Analysis

N.D.C.C. § 37-19.1-04(1) states, in part, "[a notification of nonselection by an employer must] inform the applicant of the right to an appeal hearing, …, inform the applicant that **a request for an appeal hearing must be made to the commissioner of veterans' affairs**…." It further states, "The applicant is entitled to immediate employment in the position for which the application was originally made, or an equivalent positions, together with backpay and benefits from the date the appointment should have been made less amounts otherwise earnable through due diligence, if the **hearing officer** finds in favor of the applicant." (*emphasis added.*)

N.D.C.C. § 37-19.1-04(3) states, "Within fifteen calendar days after receiving a request from an applicant or person under subsection 1 or 2, the **commissioner of veterans' affairs may request** the director of the office of administrative hearings to designate a hearing officer to hear the grievance arising under subsection 1 or 2." (*emphasis added.*)

I believe the statute, on its face, is ambiguous as to the procedure and the role of the Commissioner of Veterans' Affairs in the appeal process.

Specifically, subsection 1 refers to the applicant's request for a hearing and that the request must be sent to the Commissioner. Subsection 1 goes on to reference a "hearing officer" without explanation as to whether the hearing officer is the hearing officer specified in Subsection 3 of the same statute. Subsection 1 does not contain language requiring any action of the Commissioner other than receive the applicant's request for a hearing.

Subsection 3 states that the Commissioner **may** request that the office of administrative hearings designate a hearing officer and hold a hearing. This subsection does not provide criteria or a threshold on which the Commissioner should base determinations to forward for a request for hearing or not forward the request. On its face, it leaves the sole discretion of whether an applicant receives a hearing on the shoulders of the Commissioner without any specificity as to the Commissioner's role in making that determination.

Said another way, the statute is silent as to what the Commissioner is to do with an applicant's request for a hearing. The statute does not address whether the Commissioner is to do his own investigation into whether the claim has merit, nor does it discuss under what criteria the Commissioner should request a hearing officer be designated. I believe this lack of specificity is problematic. If the statute is read on its face, it is ambiguous as to the duties and obligations of the Commissioner of Veterans Affairs.

The North Dakota Supreme Court has held that interpretation of a statute is a question of law that is guided by the following, well-established principals:

> Our primary goal in statutory construction is to ascertain the intent of the legislature, and we first look to the plain language of the statute and give each word of the statute its ordinary meaning. When the wording of the statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. If, however, the statute is ambiguous or if adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute. A statute is ambiguous if it susceptible to meanings that are different, but rational. We presume the legislature did not intend an absurd or ludicrous result or unjust consequences, and we construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted.

State v. Brown, 2009 ND 150, ¶ 15, 771 N.W.2d 267. (quoting *In re M.W.,* 2009 ND 55, ¶ 6, 764 N.W.2d 185).

Based on these principals, it is my opinion that this statute is ambiguous, therefore, we may look to the legislative history to establish the intent of the law.

I. Summary of Statutory Changes

1973

Veterans' Preference statutes in the North Dakota Century Code were first enacted and took effect in 1973. The statutes primarily remained unchanged from 1973 until 1991.

1991

Prior to 1991, N.D.C.C. § 37-19.1-04(1) & (3) provided that an applicant could receive a hearing before a board composed of "one person chosen by the veteran, one person chosen by the employing agency, and one person chosen by the foregoing two persons." During the 52nd Legislative Assembly, these subsections were amended. Subsection 1 was amended to remove the board and provided that an applicant could request a "hearing before a hearing officer" and that the applicant was entitled to immediate appointed if the "hearing officer finds in favor of the applicant.". Subsection 3 was amended to state, "At the request of the commissioner of veterans' affairs, the attorney general **shall** appoint a hearing officer..."[1] (*emphasis added.*) This was the appeal process until 1995.

1995

During the 54th Legislative Assembly, subsection 1 was amended to require that the applicant's request for a hearing "must be delivered to the commissioner of veterans' affairs by certified mail." Subsection 3 was amended to remove the Attorney General from the hearing officer appointment process and add the Office of Administrative Hearings. As enacted in 1995, it stated, "...the commissioner of veterans' affairs **shall** request the director of the office of administrative hearings to designate a hearing officer..."[2] (*emphasis added.*) This remained the process until 1997.

1997

The 55th Legislative Assembly made one of the smallest, yet most significant changes to N.D.C.C. § 37-19.1-04(3). Subsection 3 read, "Within fifteen days after receiving a request from an applicant or person under subsection 1 or 2, the commissioner of veterans' affairs **shall** request the director of the office of administrative hearings to

---

[1] 1991 North Dakota Laws Ch. 384 (H.B. 1142).
[2] 1995 North Dakota Laws Ch. 355 (S.B. 2121).

designate a hearing officer to hear the grievance arising under subsection 1 or 2." (*emphasis added.*) This amendment struck the word "shall" and replaced it with "may", ultimately leaving the discretion of requesting a hearing officer's appointment to the sole discretion of the Commissioner.[3] This remained the process until 2007.

2007

The 60th Legislative Assembly made significant changes to the chapter of law governing Veterans' Preference, N.D.C.C. ch. 37-19.1. Included in those changes were two changes to N.D.C.C. 37-19.1-04(1).

First, the subsection was changed in reference to an applicant's right to request a hearing. The subsection read, "... [the applicant] may request a hearing before a hearing officer as provided in subsection 3." It was amended to read, "... [the applicant] may request a hearing as provided in subsection 3." The words "before a hearing officer" were struck entirely. Second, the subsection was amended to provide that applicant's for whom the "hearing officer finds in favor of" are entitled to "backpay and benefits from the date the appointment should have been made less amounts otherwise earnable through due diligence."[4]

No changes were made to subsection 3 during this Legislative Assembly. This remained the process until 2009.

2009

The 61st Legislative Assembly made significant changes to subsection 1, all related to the employer's duties and obligations in notifying an applicant of nonselection. The new language requires the employer's correspondence "... include the reasons for nonselection, inform the applicant of the right to an **appeal hearing**, inform the applicant of the requirement that the **request for a hearing** must be filed by certified mail within fifteen days after the notification, inform he applicant that a **request for an appeal hearing** must be made to the commissioner of veterans' affairs at the included commissioner's address, and inform the applicant that if the applicant **requests an appeal**, the applicant must mail a copy of the **request for an appeal hearing** to the employer... The applicant's **request for a hearing** must be in writing..." This change primarily focused on the employer's obligations.[5]

However, the new language introduces new, undefined terminology to subsection 1. For the first time, the statute uses the term "appeal hearing" although it is not specific as to

---

[3] 1997 North Dakota Laws Ch. 316 (H.B. 1118).
[4] 2007 North Dakota Laws Ch. 305 (S.B. 2353).
[5] 2009 North Dakota Laws Ch. 311 (H.B. 1510).

what may be appealed. It uses "appeal hearing" and "hearing" throughout the new language although it is unclear if the two terms are meant to be used interchangeably or to reference two distinct hearing options. While important to address the employer's obligations, I believe this change effectively results in additional ambiguity.

2017

Most recently, the 65th Legislative Assembly made amendments to N.D.C.C. § 37-19.1-04(1). The amendment addressed the use of the state's online recruiting solution system as another viable option for employers to provide notification of nonselection to applicant's, so long as the online system is able to verify receipt of such notification to effectively trigger the fifteen calendar day time period for the applicant to request a hearing.[6]

II. Analysis of Statutory Changes and Legislative Intent

As shown in the progression of amendments from the law's first enactment in 1973 through last year's Legislative Assembly, there have been significant changes to the appeal process and the applicant's right to an appeal hearing. The statute has evolved from an applicant having the right to request a hearing in front of a hearing officer to having the right to request a hearing and being obligated to provide that request to the Commissioner of Veterans' Affairs. Unfortunately, as stated, the statute in its current form is ambiguous as to the role of the Commissioner in the appeal process.

When a statute is ambiguous, the courts will look to the Legislative history to determine the intent of the Legislature in its enactment of certain changes. Most significant to the question at hand is the Legislative history surrounding changes made by the 55th Legislative Assembly in 1997. *State v. Brown*, 2009 ND 150, ¶ 15, 771 N.W.2d 267.

Although the statutory amendment was small, it is significant. House Bill 1118 amended N.D.C.C. § 37-19.1-04(3) in a manner that provided the Commissioner with the sole discretion to request a hearing from the Office of Administrative Hearings (OAH). The bill changed "shall" to "may" without offering statutory language as to the meaning of this change or defining a criteria or a threshold that should trigger a hearing request.

The Legislative History[7] shows that this change was requested by the Director of OAH with the support of the Commissioner of Veterans' Affairs. The change was also backed by the support of the Office of Attorney General. The historical record demonstrates an understanding of the procedural process for obtaining a hearing allowed for the

---

[6] 2017 North Dakota Laws Ch. 239 (H.B. 1090).
[7] 1997 House Standing Committee Minutes, House Government and Veterans Affairs Committee. *See* attached.

Commissioner, upon receipt of a request for hearing, would conduct an initial inquiry as to whether an applicant's request for a hearing had merit and should be forwarded for a hearing with OAH. The Commissioner's inquiry would involve reviewing the vacancy announcement, information provided by the prospective employer and information provided by the applicant requesting a hearing. It is my understanding this is the process still followed by the Commissioner of NDDVA.

Testimony in support of the change shows that the amendment was requested to filter frivolous hearing requests out of the system to prevent OAH from being obligated to hear appeals that were essentially without merit at the discretion of the Commissioner. Bismarck City Attorney, Charlie Whitman, testified that his office supported the bill as a way to limit cost to cities and political subdivisions who are obligated to pay the costs associated with a hearing through OAH. City Attorney Whitman testified, "...administrative hearings are expensive and they are on the political subdivisions' backs to pay for them, so at the very least, we want the veteran's affairs people to agree that it's a meritorious case."[8]

Ray Harkema, Commissioner of Veterans' Affairs at the time, testified in favor of the bill and provided written testimony in which he wrote, "This change would again give the Commissioner the discretion to determine if a hearing is warranted. It would save valuable resources of personnel and money. In many cases the applicant does not meet the minimum qualifications for the position."[9]

Assistant Attorney General James Fleming spoke in response to a question from Senator Stenehjem regarding safeguards and this legislation. AAG Fleming indicated it is an unreasonable standard to allow every veteran the right to a hearing. "In the commissioner's situation, he would be advised to pretty much assume the facts as the veteran tells him, to act reasonably and make a decision, because that is why you have a hearing to resolve the facts. The problem is when the facts even as you assume them to be true from the veteran applicant, the perfect example is the person who [applies] for a job requiring a bachelor's degree when they don't have one. Right now, if they don't get the job, they can apply for a hearing which is pretty much a futile act, but legally they can get one, and this is an absurdity that was not intended as a result of the '95 legislation. That is what we are trying to fix here."[10]

---

[8] 1997 Senate Standing Committee Minutes, Senate Government and Veterans Affairs Committee. *See* attached.

[9] 1997 House Standing Committee Minutes, House Government and Veterans Affairs Committee; and 1997 Senate Standing Committee Minutes, Senate Government and Veterans Affairs Committee. *See* attached.

[10] 1997 Senate Standing Committee Minutes, Senate Government and Veterans Affairs Committee. *See* attached.

Conclusion

Based on the foregoing history and analysis, it is clear from the Legislative History that the intent of the change from "shall" to "may" in 1997 was to provide the Commissioner with the discretion to conduct an inquiry and determine if an applicant's request for a hearing had merit before requesting a hearing officer be appointed by the Office of Administrative Hearings.

Until the currently followed process is challenged, I do not think NDDVA nor the ACOVA need to press for any Legislative changes at this time.