

**[J-107-2003]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

WILLIAM MERRELL,	:	No. 84 WAP 2002
	:	
Appellee	:	Appeal from the Order of the
	:	Commonwealth Court entered August 9,
v.	:	2002, at No. 2965CD1999, reversing the
	:	Order of the Court of Common Pleas of
CHARTIERS VALLEY SCHOOL	:	Allegheny County entered November 3,
DISTRICT, BERNARD A. SULKOWSKI,	:	1999, at No. GD99-11670 and remanding.
MICHAEL L. BONACCI, THOMAS	:	
HELBIG, MICHAEL DEMPSTER, JEFF	:	
CHOURA, JOHN FRANJIONE, PATRICIA	:	
FREY, BRIDGET KELLY, KATHLEEN	:	ARGUED: September 8, 2003
LEWIS, BETH MCINTYRE, MARY LOU	:	
PETRONSKY,	:	
	:	
Appellants	:	

**OPINION ANNOUNCING THE JUDGMENT OF THE COURT**

**MADAME JUSTICE NEWMAN**

**DECIDED: AUGUST 18, 2004**

The Commonwealth of Pennsylvania encourages and recognizes the service of her armed forces. In terms of repayment, veterans of the Revolutionary War received grants of land in new territories,<sup>1</sup> and Pennsylvania passed the first Veterans' Preference Act in

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<sup>1</sup> Pennsylvania, like several of the original thirteen colonies, enlisted the support of her residents for military service in the Revolutionary War with an offer of free lands. It selected reserves in its western domains as the location of its bounty lands, both to garner support for the Revolution and provide stability and security in its colonial expansion. By placing veterans on the frontier, Pennsylvania could rely on military experience to protect any developing settlements from Indian incursions. See generally H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403 (2000).

1887, Act of May 19, 1887, P.L. 75 (repealed), which provided that honorably discharged Civil War veterans receive preferential treatment “for employment in all public departments and works of the Commonwealth, provided such veterans possessed the other requisite qualifications.” Op. Att’y Gen. No. 320, 192 (1940). Later, the Act of April 12, 1939, P.L. 27 (repealed), extended the veterans’ preference in public employment to “veterans of all wars wherein the Nation engaged.” Id. Over the ensuing decades, this statute has been amended, repealed, and reenacted until the version at issue in the instant matter went into effect on January 1, 1976, with little deviation from the initial Act. Within this historical perspective, we review the challenge of the Chartiers Valley School District (School District), and the members of its Board of Education (Board), to an Order of the Commonwealth Court, reversing an Order of the Allegheny County Court of Common Pleas (Common Pleas), dismissing the Complaint of William Merrell (Merrell) as untimely filed.

#### FACTS and PROCEDURAL HISTORY

The facts are not in dispute. Prior to the commencement of the 1997-98 school year, Merrell applied for an advertised position with the School District as a social studies teacher. He was not selected. In 1999, Merrell again applied for an advertised position, this time advancing to the fourth step of the School District’s five-step hiring process. By letter dated April 28, 1999, the School District informed Merrell that it had appointed another candidate. The School District did not specify the reasons for not selecting Merrell. Subsequently, on May 10, 1999, counsel for Merrell wrote to the School District Superintendent, requesting that the School District reconsider its decision to hire another candidate for the upcoming school year because Merrell was entitled to preference in employment by virtue of the Veterans’ Preference Act.<sup>2</sup>

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<sup>2</sup> Act of August 1, 1975, P.L. 233, as amended, 51 Pa.C.S. §§ 7101-7109.

Receiving no response to his letter, Merrell filed a Complaint in Equity on July 21, 1999, and an amended complaint on September 30, 1999. He alleged a diminution of wage earning capacity as well as a loss of tenure, wages, and other benefits accompanying a position with the School District. He requested that Common Pleas order the School District to hire him as a social studies teacher with credit for lost tenure, and to pay him lost wages commencing from the date that the School District initially failed to hire him for the 1997-98 school year.

In response, the School District filed Preliminary Objections, alleging that Common Pleas lacked subject matter jurisdiction on the basis that the School District is a local agency and that the provisions of the Local Agency Law, 2 Pa.C.S. §§ 551-555, 751-754, provide the exclusive means by which decisions of local government agencies can be contested. The School District claimed that its letter of April 28, 1999, constituted an adjudication from which Merrell was required to file an appeal within thirty days pursuant to Section 5571(b) of the Judicial Code, 42 Pa.C.S. § 5571(b). Relying on In re Appeal of Gomez, 688 A.2d 1261 (Pa. Cmwlth. 1997),<sup>3</sup> Common Pleas held that the April 28<sup>th</sup> letter issued by the School District was an adjudication within the meaning of 2 Pa.C.S. § 101.

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<sup>3</sup> In Gomez, a participant in a Section 8 housing program received letters from the county housing authority demanding that she reimburse the county for monies that it had paid her former landlord for damages to her leased premises. The letters threatened to remove Gomez from the housing program for non-payment. Gomez requested a hearing to dispute the damages and subsequently filed an appeal with the Berks County Court of Common Pleas (reviewing court) pursuant to Section 752 of the Local Agency Law, 2 Pa.C.S. § 752. The reviewing court dismissed the matter as not justiciable and Gomez appealed to the Commonwealth Court. That court determined that “[a] letter from an agency may qualify as an adjudication so long as the letter is the agency’s final order, decree, decision, determination, or ruling and such decision impacts on a person’s personal or property rights, privileges, immunities, duties, liabilities, or obligations.” In re Appeal of Gomez, 688 A.2d at 1263 (quoting Wortman v. Philadelphia Commission on Human Relations, 591 A.2d 331, 333 (Pa. Cmwlth. 1991)).

Noting that Merrell filed his Complaint almost ninety days after the adjudication, Common Pleas sustained the Preliminary Objections of the School District and dismissed the Amended Complaint with prejudice for lack of subject matter jurisdiction. Finally, the court observed that there is no property right in prospective employment, only in the termination of existing employment.

The Commonwealth Court reversed in an unpublished Opinion and remanded the matter to Common Pleas for an appeal *nunc pro tunc* and *de novo* review. The court agreed with the School District that the Local Agency Law provided the mandatory and exclusive statutory means to challenge a decision of the Board.<sup>4</sup> It also concluded that Merrell had a property right to preference in employment. The court relied on the decisions in Carter v. City of Philadelphia, 989 F.2d 117 (3d Cir. 1993), and Pennsylvania State Troopers Ass'n v. Pennsylvania State Police, 800 A.2d 995 (Pa. Cmwlth.), petition for allowance of appeal denied, 813 A.2d 847 (Pa. 2002), to find that a protected property interest existed and that due process concerns required notice and an opportunity to be heard. It also concluded that, based on Callahan v. Pennsylvania State Police, 431 A.2d 946 (Pa. 1981), the April 28<sup>th</sup> letter was not a valid adjudication.

### DISCUSSION

The threshold issue is whether the April 28<sup>th</sup> letter from the Board indicating that it would be hiring another candidate for the position constituted an adjudication within the context of the Local Agency Law. If it did, Merrell's Complaint was untimely and Common Pleas correctly dismissed the Complaint with prejudice.

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<sup>4</sup> We note that we have previously determined that a School District along with its Board is a local agency pursuant to the Local Agency Law. See Nicolella v. Trinity Area Sch. Dist. Sch. Bd., 281 A.2d 832, 835 (Pa. 1971).

An “adjudication” is defined in Section 101 of Administrative Law and Procedure, 2 Pa.C.S. § 101, as “[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.” Further, “[n]o adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.” 2 Pa.C.S. § 553. Thus, for a letter of elimination to qualify as a valid adjudication, it must (1) represent a final order, decree, decision, determination or ruling; (2) impact on individual personal or property rights, privileges, immunities, duties, liabilities or obligations, Guthrie v. Borough of Wilkesburg, 478 A.2d 1279, 1281 (Pa. 1984); and (3) comply with the statutory requirements of notice and an opportunity to be heard. 2 Pa.C.S. § 553. To have a property interest, an individual must have a legitimate claim of entitlement or expectation arising from an independent source, such as state law or contract. See Adler v. Montefiore Hosp. Ass’n, 311 A.2d 634, 645 (Pa. 1973), cert. denied, 414 U.S. 1131 (1974); see also Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

It is axiomatic that there is no inherent property interest in prospective employment. However, in the instant matter, a state statute, the Veterans’ Preference Act, confers an interest on those who meet certain established criteria. The applicant must be a veteran, must be honorably discharged, and must possess the minimum qualifications to perform the duties involved. 51 Pa.C.S. §§ 7101, 7104(a). Further, there is a constitutional necessity that the qualifications of the veteran be established before the veteran is entitled to the preference. See Eggleston v. City of Philadelphia, 110 A.2d 183, 185 (Pa. 1955); Carney v. Lowe, 9 A.2d 418, 420 (Pa. 1939). As we have previously indicated, there “must be some reasonable relation between the basis of preference and the object to be obtained . . . .” Commonwealth ex rel. Maurer v. O’Neill, 83 A.2d 382, 383 (Pa. 1951) (quoting Commonwealth ex rel. Graham v. Schmid, 3 A.2d 701, 704 (Pa. 1938)). “No property

interest in government employment exists *per se* . . . .” Guthrie, 478 A.2d 1282 (quoting Sterling v. Dept. of Environmental Resources, 470 A.2d 101, 104 (Pa. 1983)).

In determining that the April 28<sup>th</sup> letter was not an adjudication, the Commonwealth Court sought guidance in the decision of this Court in Callahan. There, a police officer received a letter informing him that the benefits he had been receiving pursuant to the Heart and Lung Act,<sup>5</sup> were being terminated. The officer challenged the determination of the Commonwealth Court that the letter constituted an adjudication from which he had not timely appealed. The challenge was grounded on the basis that he had been denied an opportunity to be heard. This Court essentially agreed that the letter announced a final determination of the officer’s property rights, but concluded that the Administrative Agency Law “expressly requires an agency to supply an aggrieved party notice of a hearing and an opportunity to be heard.” Callahan, 431 A.2d at 948. Therefore, Callahan represents a three-step process to determine whether an agency letter constitutes an adjudication. Initially, the determination must be made as to whether actual property rights are implicated. Next, there must be an assessment as to whether the letter constitutes final agency action. Finally, if the letter has satisfied the first two steps, it is an adjudication, but it is not a valid adjudication if there is an absence of notice and an opportunity to be heard; an invalid adjudication does not trigger a claim limitations period. Implicit in our decision was the determination that Officer Callahan had a property interest in the Heart and Lung benefits that he had been receiving and that the decision to terminate those benefits was an adjudication within the meaning of 2 Pa.C.S. § 101. Thus, in Callahan, the first two steps were not at issue, though Officer Callahan’s compliance with these two steps was obvious within the text of our Opinion. Significantly, the Court did not conclude that the letter was not an adjudication, but was careful to note throughout its analysis that the letter

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<sup>5</sup> Act of June 28, 1935, P.L. 477, as amended, 53 P.S. § 637.

in Callahan was not a valid adjudication. The third analytic step was absent, rendering the termination letter an adjudicatory nullity.

We recognize that a veteran may see little value in a preference for appointment that does not result in that appointment. It is, however, for the legislature to decide whether and to what extent state and local agencies should be constrained in their employment decisions. The presentment of a governmental gratuity does not change the nature of the gratuity. The giving of a veteran's preference does not cause that preference to become a vested right. Hence, statutory and case law in this Commonwealth has established with some clarity the proper considerations for a veteran's preference in hiring when examination scores form the basis for the hiring decision. See, e.g., Housing Authority of Chester Co. v. State Civil Service Comm'n, 730 A.2d 935 (Pa. 1999). Precedent relative to hiring decisions when there are no examination scores is less settled. See, e.g., Brickhouse v. Spring-Ford School District, 656 A.2d 483 (Pa. 1995) (Zappala, J. joined by Cappy, J. concurring, Castille, J. dissenting).

The property interest at issue here is not in the teaching position itself, but in the preference. The core principles of the Veterans' Preference Act are contained in Sections 7103, 7104, and 7107. Section 7103 provides for the addition of ten points to the score of a veteran who has passed a civil service appointment or promotion examination.<sup>6</sup> Section

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<sup>6</sup> Section 7103(a) states:

**(a) Commonwealth examinations.**--Whenever any soldier shall successfully pass a civil service appointment or promotional examination for a public position under this Commonwealth, or any political subdivision thereof, and shall thus establish that he possesses the qualifications required by law for appointment to or promotion in such public position, such soldier's examination shall be marked or graded an additional ten points above the mark or grade credited for the examination, and the total mark or grade thus obtained shall represent the final mark or grade of such soldier, and shall determine his standing on any eligible or promotional list, certified or

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7107 allows veterans to include total years of service in the military when calculating seniority for purposes of a reduction in force.<sup>7</sup> Neither of these sections is applicable to the instant matter except to assist in defining the parameters of the preference. Section 7104(a)<sup>8</sup> requires the appointing power to give preference for appointment or promotion in non-civil service positions, and Sections 7104(b) and 7104(c) grant the veteran a point preference following civil service examination.<sup>9</sup> Further, the Act encompasses three policy

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furnished to the appointing or promoting power.

51 Pa.C.S. § 7103(a).

<sup>7</sup> Section 7107 provides:

Whenever a reduction in force is necessary in any public position, or on public works of the Commonwealth and its political subdivisions, and personnel are discharged according to seniority, the number of years of service of any soldier shall be determined by adding his total years of service in the civil service or on public works to his total years of service as a member of the armed forces of the United States, or in any women's organization officially connected therewith during any war in which the United States engaged.

52 Pa.C.S. § 7107.

<sup>8</sup> Section 7104(a) states:

**(a) Non-civil service.**--Whenever any soldier possesses the requisite qualifications and is eligible to appointment to or promotion in a public position, where no such civil service examination is required, the appointing power in making an appointment or promotion to a public position shall give preference to such soldier.

51 Pa.C.S. § 7104(a).

<sup>9</sup> The statutory text for Sections 7104(b) and 7104(c) relates to civil service examinations and state:

**(b) Name on civil service list.**--Whenever any soldier possesses the  
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considerations reflected in Sections 7102<sup>10</sup> and 7107, which are “(1) recruitment of disciplined and experienced public employees, (2) reward for service to country, and (3)

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requisite qualifications, and his name appears on any eligible or promotional list, certified or furnished as the result of any such civil service examination, the appointing or promoting power in making an appointment or promotion to a public position shall give preference to such soldier, notwithstanding, that his name does not stand highest on the eligible or promotional list.

**(c) Name not on civil service list.**--In making an appointment or promotion to public office where a civil service examination is required, the appointing or promotional power may give preference to any soldier, who has passed the required examination for appointment or promotion to such position, and possesses the requisite qualifications, although his name does not appear on the eligible or promotional list certified or furnished to the appointing or promoting power.

51 Pa.C.S. 7104(b), (c).

In Schmid, this Court concluded that lowering the passing score for a veteran applicant was unconstitutional because passing an eligibility examination satisfied the requirement that persons appointed to fill public positions be “reasonably fitted for the position.” Schmid, 3 A.2d at 706. The Schmid decision held that veterans' preference is constitutional if the preference is applied after the veteran meets the minimum qualifications for the position. Id.

<sup>10</sup> Section 7102 states in pertinent part:

**(a) General rule.**--When any soldier shall take any civil service appointment or promotional examination for a public position under the Commonwealth, or under any political subdivision thereof, he shall be given credit in the manner hereinafter provided; for the discipline and experience represented by his military training and for the loyalty and public spirit demonstrated by his service for the preservation of his country, as provided in this chapter.

51 Pa.C.S. § 7102(a).

reimbursement for seniority lost while serving in the military.”<sup>11</sup> One commentator expressed the opinion that initial appointment preferences can be classified as either absolute preferences, supplemental point preferences, or tie-breaking preferences.<sup>12</sup> Milcoff at 647. We find this a reasonable classification and, within this Commonwealth, we believe that the General Assembly has statutorily provided for supplemental point preferences and tie-breaking preferences.

We observe that the statute states simply that veterans shall be given a preference for appointment before non-veterans, without describing the nature or strength of the preference. The Court addressed this ambiguity in Schmid.

In Schmid, the Court issued the first relevant holding as to the constitutionality of the Veterans’ Preference Act provision that gave veterans fifteen percent towards their score prior to taking the civil service examination. This provision permitted veterans to receive lower passing grades than non-veterans. Surveying the decisions of other jurisdictions, the Court held that veteran’s preference acts were only valid if they set forth the requirement that a veteran must possess the minimum qualifications to perform the duties required. We qualified the right of the legislature to grant such preferences by adding that “where war service is appraised, in the allotment of public positions, beyond its value, and the preference goes beyond the scope of the actual advantages gained in such service, the

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<sup>11</sup> Joseph P. Milcoff, *The Veterans’ Preference Act After Brickhouse v. Spring-Ford School District: Has the Preference been Rendered Illusory?*, 103 DICK. L.REV. 639, 644 (Spring 1999) (hereinafter “Milcoff”).

<sup>12</sup> “Defined in terms of the civil service examination, the absolute preference statute provides that all veterans who pass the test shall be preferred over all other candidates. The point-bonus preference ‘grants to the veteran a point bonus which is not conferred upon the non[-]veteran.’ The tie-breaking preference awards a preference to the veteran only when the applicants’ job qualifications are otherwise equal.” Id. at 647-48 (internal citations omitted).

classification becomes void and the privilege is held unreasonable and arbitrary.” Schmid, 3 A.2d at 704.

In Brickhouse, we attempted to define the parameters of a veteran’s preference pursuant to Section 7104(a). Mr. Brickhouse was a veteran who applied for a position as a secondary level social studies teacher. He met the minimum qualifications required for the position, but had only one year of experience teaching social studies in the eleven years following his graduation from college. In those eleven years, he had spent ten of them “working as a paralegal, a bookkeeper, a manager of a trailer park, a manager of a hunting lodge, and a worker at reform schools or other special schools for children.” Brickhouse, 656 A.2d at 486. The Spring-Ford School District decided to hire a highly qualified non-veteran, whom it felt had superior credentials. Mr. Brickhouse brought suit after the School District refused to grant him absolute veteran’s preference in hiring. The School Board granted Mr. Brickhouse a hearing and, following that hearing, the School Board found that the position had already been filled at the time that Mr. Brickhouse submitted his application, and that he was not entitled, in any event, to the position. Id. at 484-85.

The trial court permitted Mr. Brickhouse to appeal *nunc pro tunc* and dismissed his Complaint, affirming the factual findings of the School Board in the process. The Commonwealth Court reversed, holding that the Veterans’ Preference Act required that Mr. Brickhouse receive an absolute preference. The court rejected all of the arguments put forth by the School District and opined that the School District “may not defeat the purpose of the Act by recognizing other ‘requisite qualifications’ beyond what the Commonwealth [has] established.” Brickhouse v. Spring-Ford School District, 625 A.2d 711, 717 (Pa. Cmwlth.), rev’d, 656 A.2d 483 (Pa. 1993).

This Court concluded that considerable deference must be afforded the hiring authority in its determination of whether and to what extent an applicant possesses the

meritorious qualities required for a position. We posited that public employers must be free to set hiring requirements to ensure competency. It is clear, following our decision in Brickhouse that, with respect to Section 7104(a), there is no absolute preference in this statutory section for hiring veterans, particularly as no civil service list or examination is applicable to this position. Public employers are not required to hire preference eligible veterans if they do not believe the candidate is qualified or possesses the requisite experience.<sup>13</sup> Without an absolute preference in employment, Merrell does not have a property right to preference in employment such as to render the letter of April 28<sup>th</sup> an adjudication. The April 28<sup>th</sup> letter was informatory in nature, not adjudicatory. It appears that Merrell was able to advance only to level four of the five-step hiring process. He was not among, as nearly as we can determine from the scant record before this Court, the final applicants under consideration.

However, we also concluded in Brickhouse that, whether a hiring authority has properly considered the Veterans' Preference Act and established qualifications meant to circumvent that Act, is to be determined on a case-by-case basis.<sup>14</sup> The instant matter was

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<sup>13</sup> In Burger v. Bd. of Sch. Directors of McGuffey Sch. Dist., 839 A.2d 1055 (Pa. 2003), this Court noted that the express purpose of the School Code is to “establish a thorough and efficient system of public education, to which every child has a right.” Id. at 1061 (quoting Hazleton Area Sch. Dist. v. Zoning Hearing Bd., 778 A.2d 1205, 1213 (Pa. 2001)). We also indicated that the School Code vests school districts in this Commonwealth with all necessary powers to enable them to carry out the provisions of the School Code in furtherance of their essential functions. Within this mandate, a school board has the obligation to hire the most qualified teachers and the discretion to determine which candidates are the most qualified. See 24 P.S. § 11-1106.

<sup>14</sup> In Brickhouse we indicated:

We are mindful that a public employer might be able to formulate qualifications for a job in such a way as to defeat the veterans' preference required by the act. When such formulations are undertaken in bad faith without regard to legitimate need, they must fail, but determination of the

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decided on Preliminary Objections and no determination has been made that Merrell possessed the appropriate qualifications or that the School District attempted to circumvent the Act in order to merit the application of the veteran's preference. While we have stated that "veterans are not to be preferred in the assignment of public jobs merely on the strength of being veterans," Brickhouse, 656 A.2d at 486, we note that, once an applicant is able to establish entitlement to a veteran's preference, the burden falls to the employer to establish that the veteran was not qualified.

Common Pleas concluded that the April 28<sup>th</sup> letter constituted an adjudication and dismissed the Complaint with prejudice as untimely. This was clear error. While the Commonwealth Court determined that Common Pleas should have permitted "an appeal *nunc pro tunc*" with *de novo* review, an appeal *nunc pro tunc* is unnecessary in light of our determination that the April 28<sup>th</sup> letter is not an adjudication.<sup>15</sup> The proper disposition is a reversal of the Order of Common Pleas with remand to permit the matter to go forward.

### CONCLUSION

We must not overlook the fact that the nature and extent of veterans' preferences involve a question of public policy. In the enactment of the statute, a coordinate branch of

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legitimacy of the employer's formulation of hiring criteria can be done only on a case by case basis.

Brickhouse, 656 A.2d at 487.

<sup>15</sup> The Commonwealth Court also concluded that there was a deficiency of due process because Merrell was not afforded a hearing. We decline to address this facet of the instant matter because Merrell neither requested a hearing nor raised a claim of due process violation in his Complaint.

government, whose members were chosen by the people to represent them, has given expression that veterans are to be given preference in employment once they meet the qualifications established for consideration. Within its enactment, the General Assembly has provided for a point-bonus preference for those veterans required to take and pass a civil service examination and for a tie-breaking preference for candidates with comparable qualifications. In the instant matter, the preference had not yet ripened because Merrell did not succeed in reaching the final level of consideration. The applicants remaining after the close of the fourth stage, the point at which Merrell was removed from consideration, were those considered qualified for the open teaching position. Therefore, Merrell was not among the most qualified candidates for the position. The Commonwealth Court erred in concluding that the preference had become a constitutionally protected property interest. On remand, Merrell will have the opportunity to demonstrate his qualifications and, if he is able, show that there was a flaw in the process that precluded the ripening of his interest, antagonistic to precepts of the Veterans Preference Act.

We do not believe that the judiciary should become a general court of review for school district employment decisions, but do believe that, although the statute is aspirational in nature, the preference can be properly applied within the parameters that we have articulated. We emphasize again that Merrell does not have a property interest in the teaching position he sought, but in the veteran's preference that only ripens when he can establish the requisite qualifications for the position. The purpose of Section 7104(a) is not to place veterans in a better position than other applicants simply because they are veterans, Brickhouse, but to provide a preference in the final selection process among candidates of comparable quality.

The Order of the Commonwealth Court is affirmed on different grounds.

Former Justice Lamb did not participate in the decision of this case.

Mr. Justice Saylor files a concurring opinion in which Mr. Justice Nigro joins.

Mr. Justice Castille files a dissenting opinion.