BEFORE THE IOWA CIVIL RIGHTS COMMISSION

MAXINE FAYE BOOMGARDEN, Complainant, and IOWA CIVIL RIGHTS COMMISSION,

v.

HARDIN COUNTY VETERANS' COMMISSION BOARD and HARDIN COUNTY BOARD OF SUPERVISORS, Respondents.

CP # 07-86-14926

COURSE OF PROCEEDINGS

This matter came before the Iowa Civil Rights Commission on the Complaint, alleging discrimination in employment on the basis of sex, filed by Maxine Boomgarden against the Respondents Hardin County Veterans' Commission Board and Hardin County Board of Supervisors.

Complainant Boomgarden alleges that the Respondents failed to hire her for a combined position of Director of Veterans Affairs and Civil Defense Director (the latter is also known as Coordinator of Emergency Management or Director of Disaster Services) because of her sex. **Through her complaint, whichwas amended at hearing, she alleges that she was (1) subjected to different treatment on the basis of her sex and (2) was subjected to anemployment practice that has a disparate impact on women, i.e. that a preference was given to the hiring of a veteran for this combined position.Proof of sex discrimination under either the disparate treatment or disparate impact theories is sufficient to establish a violation of the Iowa CivilRights Act.**

A public hearing on this complaint was held on September 17-18, and October 28, 1991 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the City Hall in Eldora, Iowa. The record was also held open for depositions which were taken on October 14, 1991 and November 18, 1991. The Complainant, Maxine Boomgarden, was represented by Edward N. McConnell, Attorney at Law. The Respondents were represented by James Beres, Hardin County Attorney. The Iowa Civil Rights Commission was represented by Rick Autry and Jim Christenson, Assistant Attorneys General.

The Respondent's Brief was received on February 25, 1992. The Complainant's Post-Hearing Brief was received on February 21, 1992. The Iowa Civil Rights Commission's Brief was received on February 20, 1992.

The findings of fact and conclusions of law are incorporated in this contested case decision in accordance with Iowa Code § 17A.16(1) (1991). The findings of fact are required to be based solely on evidence in the record and on matters officially noticed in the record. Id. at 17A.12(8). Each conclusion of law must be supported by legal authority or reasoned opinion. Id. at 17A.16(1).

The Iowa Civil Rights Act requires that the existence of sex discrimination be determined in light of the record as a whole. *See* Iowa Code *S* 216.15(8) (formerly *S* 601A.15(8)) (1993). Therefore, all evidence in the record and matters officially noticed have been carefully reviewed. The use of supporting transcript and exhibit references should not be interpreted to mean that contrary evidence has been overlooked or ignored.

In considering witness credibility, the Administrative Law Judge has carefully scrutinized all testimony, the circumstances under which it was given, and the evidence bolstering or detracting from the believability of each witness. Due consideration has been given to the state of mind and demeanor of each witness while testifying, his or her opportunity to observe and accurately relate the matters discussed, the basis for any opinions given by the witness, whether the testimony has in any meaningful or significant way been supported or contradicted by other testimony or documentary evidence, any bias or prejudice of each witness toward the case, and the manner in which each witness will be affected by a particular decision in the case.

RULINGS ON OBJECTIONS TO EVIDENCE

1. A number of objections were made to the admissibility of either testimony or exhibits. Many of these objections were simply noted in the record because evidence which would be excluded under the rules of evidence in a jury trial may be admitted in administrative hearings. Iowa Code *S* 17A.14(1). Hearsay objections, for example, are noted in the record, as it is the well-established law of Iowa that hearsay evidence is admissible in administrative hearings. McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234, 236- 37 (Iowa 1982); Schmitz v. Iowa Dept. of Human Services, 461 N.W.2d 603, 606, 607 (Iowa App. 1990). When this procedure is followed, the objection, if it were found to be valid, may affect the weight given to the exhibit or testimony objected to, but the exhibit or testimony is admitted in the record and no ruling on the validity of that objection is made in the proposed decision.

2. Other testimony and exhibits were admitted subject to the objections with the understanding that the objections would be ruled upon in this decision. 161 IAC 4.2(5). This procedure is often followed when one of the objections is that the proffered evidence is irrelevant, immaterial, or unduly repetitious, all of which are grounds upon which the evidence should be excluded. *See* Iowa Code *S* 17A.14(1). **Rulings are made below only with respect to thoseobjections which were neither noted in the record nor ruled on during the course of the hearing.**

Ruling on Objections to Exhibits C-28, C-28-9 and C-28-10:

3. Exhibit C-28 is the affidavit of Commission investigator Karl Schilling. Mr. Schilling's affidavit verifies that he has reviewed the tapes of his interviews with Board of Supervisors members Millie Lloyd and Robert Fuller. It also states that the transcripts of these interviews, which are Exhibits C-28-9 and C-28-10, are true and accurate transcriptions. (EX. C-28 at 6-7).

4. The Respondent objected to the admission of all three exhibits based on the statute allowing investigators to testify at hearing. (Tr. at 588). This is apparently a reference to Iowa Code *S* 601A.15(6)(now *S* 216.15(6)), which permits, but does not require, investigators to testify at

hearing. Since the statute does not require investigators to testify, and certainly does not bar admission of affidavits, this objection is overruled.

5. The Respondents also objected to the admission of these exhibits on the ground of surprise, noting that Schilling was not identified as a witness in response to interrogatories requesting the identity of witnesses. However, investigator Schilling was never called as a witness by the complainant or the Commission, so Respondents cannot claim surprise on the basis of his not being listed as a witness. Furthermore, in Complainant's Answers to Interrogatories, which were filed on August 19, 1991, approximately one month prior to the hearing, the Complainant indicated it had obtained copies of the tapes of the investigator's interviews with various witnesses and had transcripts of such tapes. The Complainant also indicated in its answers that it understood that the Respondent also had copies of such tapes. Finally, the objection to surprise was made on the third day of the hearing, which took place on October 28th, approximately 5 1/2 weeks after the 2nd day of trial. These transcripts had been used for impeachment purposes earlier in the trial. (Tr. at 197-98, 453-54). This constituted further notice of these exhibits, in addition to the answers to interrogatories, prior to the time of the objection. This objection is overruled.

Ruling on Relevancy and Foundation Objections to Questions Concerning Hardin County Disasters:

6. The complainant and the Commission objected to a series of questions to the complainant on how she would react to two hypothetical disasters, a fire in the Eldora business district and a tornado in New Providence, on the grounds of relevancy. (Tr. at 91, 93). The question concerning a hypothetical fire in the Eldora was also objected to for lack of foundation, i.e. it had not been shown that the Civil Defense Director position dealt with fires. (Tr. at 91). The Respondents asserted such questions were relevant as David Roelfs had responsibility for such situations **after his hire**, and they would show the relative qualifications of him and the complainant with respect to the civil defense area. (Tr. at 93). The Respondents also indicated that they would establish this foundation by connecting it up with later evidence. (Tr. at 91).

7. The evidence showed, however, that no such hypothetical questions concerning disasters were ever asked Complainant Boomgarden, preferred candidate David Roelfs, or any other candidate during their interviews with the Veterans Affairs Commission or the Board of Supervisors. (Tr. at 129, 216, 237, 320, 379, 380, 383, 455, 492, D34). One or both of these scenarios were based on actual events, such as a tornado in New Providence, that occurred **after** David Roelfs was hired for the position. (Tr. at 92, 93, 406, 408-09).

8. It would have been impossible for the Veterans Affairs Commission or the Board of Supervisors in 1986 to have asked the complainant or other candidates about a specific disaster which hadn't yet happened or to have compared the answers of Complainant Boomgarden with the unknown post-hire future performance of David Roelfs with respect to a disaster. Under these facts, these questions do not tend "to make the existence of any fact that is of consequence to the determination of this action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401 (Definition of "relevant evidence"). The relevancy objection is sustained.

9. The foundational objection is also sustained, as the record later showed that the Coordinator of Emergency Management (Civil Defense Director) had no responsibilities with respect to any fires other than chemical ones. (Tr. at 410). The question propounded to the Complainant did not indicate the origin of the fire. (Tr. at 91). The questions and answers objected to are stricken from the record.

Ruling on Relevancy Objection to Complainant Boomgarden Testifying to Ruth Donner's Opinion As to What Millie Lloyd Would Do With Respect to theVeterans Affairs Director's Position:

10. After Complainant Boomgarden testified that she had conversations with Ruth Donner, a deputy county auditor, with respect to her application, she was asked what the content of those conversations was. This was objected to by Respondents on grounds that the conversations' content lacked relevancy. (Tr. at 26, 594). The examiner was allowed to continue the examination until it could be more clearly established whether or not the subject matter was relevant. (Tr. at 27). 11. When the Complainant's testimony indicated that she would be offering the opinion of Ruth Donner as to what supervisor Millie Lloyd would do with respect to the position, the objection was renewed. (Tr. at 72). Ultimately, the complainant testified that Donner told her that she had known Millie Lloyd a long time and Lloyd would never put a woman in the Veterans Affairs Director position. (Tr. at 27-28).

12. This testimony is relevant because it informs the finder of fact of one of the reasons why Complainant Boomgarden believed she was subjected to sex discrimination. (R. EX. # 10; Tr. at 137). Therefore, the objection is overruled.

13. This testimony, however, is not entitled to any weight in determining whether sex discrimination actually occurred for two reasons:

(1) the complainant's testimony provided no evidence of any rationale for Donner's asserted belief; and (2) Donner testified that, while it was possible she did say this, she did not recall making such a statement and did not think she would make such a statement as Lloyd had always been fair with women and has appointed women on several occasions. (Tr. at 28, 594. 596. 599-600). Also, Donner had not talked with any Board of Supervisor's members as to whom they preferred for the position. (Tr. at 602).

Ruling on Relevancy Objection to Taking of Official Notice of Section 80.3(4) of Chapter 641 of the Iowa Administrative Code:

14. Respondents requested that judicial notice be taken of administrative rule 641 IAC 80.3(4). The provisions of this rule are set forth in a document labeled Respondent's Exhibit 3. This exhibit was not admitted in the record, but was retained to provide the content of the regulation. The Commission has the authority to take official notice of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Iowa Code § 17A.14(4) (1991). Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980).

15. The Commission and the complainant objected that the regulation was not relevant to this inquiry and that notice should not, therefore, be taken of the regulation. (Tr. at 78, 79). The Administrative Law Judge asked the parties to address the proposal to take judicial notice of this regulation on brief. (Tr. at 79). No party did so. The Respondents' brief did suggest in passing that this section supported the proposition that "Complainant was not qualified to serve clients directly as a caseworker." (Respondents' Brief at 8). This regulation, which set forth changes in qualifications for the homemaker-health aide position in the Homemaker Health Aide Service (HHAS), is relevant only because Complainant Boomgarden was no longer permitted to perform a variety of duties for the HHAS, which she had previously performed successfully, at some time after it was published on December 18, 1985. (Tr. at 83-85, 130- 31, 154-56, 250-51). The effective date of the regulations was January 22, 1986. Iowa Admin. Bull. 12/18/85 (ARC 6217). Official notice is, therefore, taken of this regulation.

Ruling on Relevancy and Materiality Objection to Question to Complainant Boomgarden Concerning How Former Supervisor Jerry Pence Felt AboutSupervisor Robert Fuller:

16. During Respondents' counsel's cross-examination of Complainant Boomgarden, he asked if she had any idea how Bob Fuller, a member of the Board of Supervisors in 1986 who participated in making the hiring decision in question, and Jerry Pence, a former supervisor, felt about each other. This was objected to by Complainant's counsel as being irrelevant and immaterial. (Tr. at 106, 108-109). Complainant's answer was that she did not have any idea how Pence and Fuller felt about each other. (Tr. at 108). This question was apparently an attempt by Respondents to determine whether Boomgarden had some knowledge of political conflicts between these two and to ascertain if such conflict played a role in the decision to hire David Roelfs instead of her. (Tr. at 109). The objections are overruled.

Ruling on Relevancy Objection to Question Propounded to Jerry Pence Concerning Whether It Would Be Reasonable for Bob Fuller and Millie Lloyd toAssume That Pence's Participation in the Selection Process Was Politically Motivated:

17. After Complainant objected to Respondent's inquiry of Jerry Pence, as to whether it would be reasonable for Bob Fuller and Millie Lloyd to conclude that his (Pence's) involvement in the selection process was politically motivated, as irrelevant, Respondent modified the inquiry to ask if, based on Pence's observation of their behavior, he would be surprised if they would take that view. (Tr. at 232). Mr. Pence replied that it would not surprise him. (Tr. at 232). In light of the modification, the objection is overruled.

Ruling on Relevancy Objection to Exhibits R-6A Through R-6J:

18. Exhibits R-6A through R-6J are photographs of David Roelfs' office. They are offered to demonstrate how the office was decorated with various items supportive of the military **after** Roelfs was hired for the position. (Tr. at 415). Respondents suggest that these items are relevant because they send a message to clients that "a veteran works here." (Tr. at 417). There are three problems with the rationale that this message somehow makes these photographs relevant. First, all of these items were placed in this office **after** Roelfs was hired. (Tr. at 415). Second, there is

absolutely no evidence in the record to the effect that the manner in which the office would be decorated by either a veteran or nonveteran or, to be specific, by Roelfs or Boomgarden, had anything to do with the hiring process here. There is no evidence that either the Board of Supervisors or the Veterans Affairs Commission in any way took the manner in which the office would be decorated or what items would be displayed there or what message those items might send into account in making their recommendation and hiring decisions. Third, while the items displayed demonstrate a pro-military message, they do not necessarily state "a veteran works here" because many, if not all, of these items can be obtained by nonveterans, including United States flags, baseball caps with flags stating "these colors don't run," "Fly Navy" and other bumper stickers, "We Support Our Armed Forces" posters, a red, white and blue ribbon, military insignia, and campaign ribbons. (Tr. at 414-15). Those items, such as certain insignia and the aircraft carrier photo, which might indicate a more personal relationship with the military are not shown detail to allow one to ascertain if a client viewing them could readily determine if the items are specifically related to Roelfs or are items which may have come from other veterans or other sources.

19. Proof of the placement of these items in the office after Roelfs' hire does not tend "to make the existence of any fact that is of consequence to the determination of this action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401 (Definition of "relevant evidence"). The objections are sustained. Respondents' exhibits R-6A through R-6J are not admitted into the record.

FINDINGS OF FACT:

A. Jurisdictional and Procedural Facts:

1A. On July 14, 1986, Complainant Maxine Boomgarden filed her complaint, CP # 07-86-14926, alleging sex discrimination in employment which is prohibited by Iowa Code section 601A.6 (now 216.6). The dates of alleged discrimination stated in the complaint are "approximately the 12th of March 1986 and continuing through May 14, 1986." (Complaint). Official notice is taken that July 14, 1986 is sixty-one days after May 14, 1986. Fairness to the parties does not require that they be given the opportunity to contest this fact.

2A. The complaint was investigated. After probable cause of sex discrimination was found, conciliation was attempted and failed. Notice of Hearing was issued on June 21, 1991. (Notice of Hearing).

B. Background:

1. A number of facts that were stipulated (agreed) to by the parties are set forth in Joint Exhibit # 1. (Tr. at 6). Findings of fact which are stipulated to in Joint Exhibit # 1 are indicated by the designation "(Stip.)". Those findings which are stipulated to only in part will be designated by "Stip." followed by reference to other record evidence supporting the finding, e.g. "(Stip., R. EX. # 2)". In addition, page references to the Chaplin deposition are set forth as "D1, D2" etc. Page references to the Fischer deposition are set forth as follows: "F1, F2" etc.

2. On January 28, 1986, Gene K. Foster, Director of the Veterans Affairs Commission for Hardin County, announced his retirement effective May 30, 1986. (Stip.). Foster was also retiring from the position of Director of Civil Defense for Hardin County. (Tr. at 33). Foster had been in the position since the 1960s. (Tr. at 520). The later position is also known as Coordinator of Emergency Management. (Tr. at 371).

3. The Hardin County Commission on Veterans Affairs (VAC) is a governmental agency organized pursuant to Chapter 250 of the [1985] Iowa Code. Its principal function is to administer financial assistance programs to indigent veterans and their families who reside in Hardin County. (Stip). Approximately 70 per cent of this assistance is through programs specifically directed towards veterans while 30 per cent is thorough general relief programs. (Tr. at 419).

4. Official notice is taken of the fact that, although no mention is made of the specific position of county Veterans Affairs Director in Chapter 250, the chapter does provide that the county Veterans Affairs Commission "subject to the approval of the board of supervisors shall have power to employ necessary administrative or clerical assistants when needed, the compensation of such employees to be fixed by the board of supervisors, but no member of the commission shall be so employed." Iowa Code section 250.6 (1985). Fairness to the parties does not require that they be given the opportunity to contest these facts.

5. In 1986, the Hardin County Commission on Veterans Affairs was a three member board whose members were Merle Chaplin, Orville Gatton, and Arlo Ziebell. Gene Foster, as Director of Veterans Affairs, was responsible for performing the duties of the Commission. (Stip). Arlo Ziebell was the chairperson of the VAC. (Tr. at 170). The only employee of the Hardin County of Commissioner Affairs is the Director of Veterans Affairs. (Tr. at 325).

6. The Coordinator of Emergency Management's duties entailed extensive coordination with the state Office of Disaster Services in the event of a disaster. (Tr. at 88, 90, 387). Official notice is taken of Iowa Code sections 29C.5 and .10 (1985) which provide, respectively, that: "The office of disaster services shall be responsible for the administration of emergency planning matters, including emergency resource planning in this state . . . and co- ordination of available services in the event of a disaster." Iowa Code *S* 29C.5. "Each board of supervisors . . . shall appoint a co-ordinator of disaster services and emergency planning for that county. . . . The [county] co-ordinator shall serve as the co-ordinator of disaster services and emergency planning for that . . . county." Iowa Code *S* 29C.10. Fairness to the parties does not require that they be given the opportunity to contest these facts.

7. Extensive training consisting of three to four sessions per year, with each session lasting two to five days, is provided for Coordinators. Classes given in one year are retaken approximately three to four years later. (Tr. at 321, 387, 390-91).

8. Job descriptions for Veterans Affairs Director and Local Civil Defense Director (i.e. Coordinator) were admitted in the record. (EX. C-12). These job descriptions did not exist and were not utilized at the time of the hiring process in 1986. The evidence in the record does not completely support their reliability and accuracy with respect to job duties and qualifications in

that year. (EX. C-12; Tr. at 35, 42-43, 130, 189, 190, D15). For example, the job description for Veterans Affairs Director makes reference to "supervis[ing] and direct[ing] departmental staff" and "advises, trains, instructs, and supervises employees." (EX. C-12). In fact, the Veterans Affairs Director has no employees or staff to supervise, direct, advise, train or instruct. (Tr. at 325). However, in light of the principal function of the VAC, the "Knowledge, Skills and Abilities" section of that job description accurately reflects certain requirements for the job:

> Knowledge of the methods, procedures and principles of public welfare administration as related to the [VAC]; comprehensive knowledge of the functions and resources of community and private agencies in the public welfare field; considerable knowledge of social casework principles and techniques; ability to plan and direct a welfare program of moderate complexity; . . . ability to interpret and apply laws and regulations relating to soldier relief activities; . . . ability to prepare clear and concise reports on activities; ability to establish and maintain effective working relationships with elected officials, other County employees and the general public.

(CP. EX. # 12). See Finding of Fact No. 3.

8A. The record evidence supports the following statement from the emergency management coordinator (local civil defense director) job description which effectively summarizes the functions of that job:

> Maintains an adequate civil defense organization to facilitate disaster relief within governmental departments and volunteer organizations and coordinates activities into total disaster control; assists and guides institutions such as schools and hospitals in developing adequate disaster controls.

(EX. # C-12). This statement is supported by evidence in the record showing that the duties of this position primarily concern the coordination of disaster control activities through such actions as maintaining communications with the state disaster services organization, setting up command posts to deal with disasters, or organizing the provision of sandbags, portable toilets, and water in response to such disasters as floods. (Tr. at 406-09). A review of the job description and the other record evidence supports the proposition that this is a coordination position and neither a "hands on" firefighter, police officer, or rescue worker position nor a "command" position, such as fire chief, taking control of a crisis situation. (EX. C-12; Tr. at 422-23).

B. Summary of The Hiring Process From Advertisement Through the Interview By the Board of Supervisors:

9. On or about March 7, 1986, an advertisement was placed in the Hardin County Index for the full-time position Hardin County Civil Defense and Veterans Affairs Offices. The advertisement indicated applications were available at the County Auditor's Office. The deadline for applications was Friday, March 28, 1986. (Stip).

10. A total of forty-three people filed applications for the positions of the Director of Veterans Affairs and Civil Defense in Hardin County. (Stip.). This includes one individual who applied for the civil defense position only. (EX. C-10).

11. In late March or early April, 1986, the members of the Veterans Affairs Commission obtained and individually reviewed the applications in light of criteria set forth on an interview evaluation form. (EX. # C-15; Tr. at 179-81, 183-84, 205-06, 525-26). They then met and selected six applicants for interview. (EX. # C-10; Tr. at 181-82, 526- 28).

12. On April 12 and 23, 1986, the Hardin County Veterans Commission screened (interviewed) these six applicants; Maxine Boomgarden (the complainant), David Roelfs, Alvin Mensing, Gary Shugar, Steven Ball and Robert Drummer. (Stip.; EX. # C-10; Tr. at 39, 525-27, D7). Interview questions were based, at least in part, on the interview evaluation form. (EX. # C-15; Tr. at 199-201, 206, 532, D7). The completed forms were discarded at some time after the interviews were completed. (Tr. at 182, 212-13, 532-33, D7, D40).

13. On or about April 30, 1986, the Commission of Veterans Affairs submitted four names to the Hardin County Board of Supervisors for the Board of Supervisors to select for the position of Director of Veterans Affairs and Disaster Service. The persons named were Maxine Boomgarden, Alvin Mensing, David Roelfs, and Gary Shugar. (Stip.). This list is set forth in Exhibit C-16. (EX. C-16; Tr. at 186, D10).

14. The Board of Supervisors role in this hiring process was to make the final selection for the position from the names submitted by the VAC. (Tr. at 21, 44-45, 205, 263, 309, 312-14, 467-68, 510, 536, 539, D10, D36). In 1986, the Board of Supervisors consisted of Robert Fuller, Millie Lloyd, and Linn Adams. (Stip.).

15. The Board interviewed Complainant Boomgarden, David Roelfs, Alvin Mensing, and Gary Shugar for the combined position on May 5, 1986. (R. EX. # 10; Tr. at 49, 121-22, 268-69. 277, 284, 291, 317-18, 492). The Board also reviewed Boomgarden's and the others' applications. (Tr. at 284, 492). Interview notes taken by supervisor Lloyd were destroyed prior to the time she became aware of the complaint. (Tr. at 303-06).

16. In addition, three individuals, Lynn Wogan, Junior Lawler and Timothy Christenson, were interviewed, on May 5th, by the Board for the purpose of filling only the Coordinator of Emergency Management position. (Tr. at 267-270, 290-91, 484, 486-87). This came about because there was some discussion of the National Guard taking over the Veterans Affairs Director responsibilities on a statewide basis and of combining the Veterans Affairs Director's position with the county's General Relief Director position. (Tr. at 270). Since they were not interviewed by the VAC, they could not have filled the Veterans Affairs Director position. (Tr. at 270).

17. The Board of Supervisors had initially determined that it would decide on who would fill the position on May 7, 1986. (R. Ex. # 10; Tr. at 54, 122). At the May 7th meeting, the Board decided to defer making the decision until May 14th. (Tr. at 54, 290).

18. On or about May 10, 1986, the Hardin County Board of Supervisors requested a second list of candidates from the Commission on Veterans Affairs for its consideration. The Commission on Veterans Affairs submitted two names to the Board of Supervisors, Steven K. Ball and David Roelfs. (Stip.).

19. On May 14, 1986, the Hardin County Board of Supervisors selected David Roelfs as Director of Veterans Affairs and Disaster Services. (Stip.)

C. Complainant Boomgarden Applied for the Position:

20. On March 12, 1986, Complainant Maxine Boomgarden, a female, filed an application for employment for the position of Veterans Affairs Director. Ms. Boomgarden's application was dated January 24, 1986, but was not filed until March 12, 1986 with the County Auditor. (Stip.) It should be noted the complainant understood that she was also applying for the Coordinator position. (Tr. at 33). That this was the Respondents' understanding also is reflected by the inclusion of her name on its list of "Applicants" which has her name under the category of "Veterans Affairs and Civil Defense." (EX. C-10). Throughout the entire application, interview, and recommendation process, the VAC and Board of Supervisors understood that the position for which Complainant Boomgarden applied was a combined position. (EX. C-10, C-16; Tr. at 51, 176, 178-80, 211-12, 293, 295, 316, 526-27, 550, D33-34).

D. Complainant Boomgarden Was Qualified for the Combined Position of Director of Veterans Affairs and Coordinator of Emergency Management:

21. **For reasons stated in the Conclusions of Law, the only inquiry made with respect to the qualifications in establishing the prima facie case iswhether complainant met the minimum objective qualifications for the position. Comparison of qualifications with other applicants is, thereforenot required under the prima facie analysis used in this case, which is set forth in detail in the conclusions of law.** The only detailed sets of objective qualifications which were shown to be actually utilized during the hiring process were those set forth in the testimony of VAC commissioner Orville Gatton at hearing and his responses during the investigative interview and those set forth in the interview evaluation sheet used by the VAC. There were no established job descriptions or sets of objective criteria used by the Board of Supervisors.

Commissioner Orville Gatton's Criteria:

22. Commissioner Gatton agreed that in 1986 he was looking for a person who had the following qualifications:

> I was looking for somebody that had some experience with public relations, in dealing with people, someone who could handle the administration work of the office, somebody that knew something about the proper forms for doing administration work, and somebody who wasn't afraid of pulling out forms. Because there are a lot of forms involved in any office anymore.

> And, being the only commissioner who lives here locally, I wanted somebody who could take responsibility of the office and not be bothering me at work while they should be doing the work themselves at the office. I was looking for somebody that could handle it, that position.

(Tr. at 563).

23. Based on these criteria, his knowledge of the Complainant's work at Homemaker Health Aide Service providing assistance for elderly people, and other knowledge acquired from her application and the interview, Gatton concluded that Boomgarden conformed to his requirements and was qualified for the position. (Tr. at 564).

Interview Evaluation Form Objective Criteria:

24. The interview evaluation form, which was used only by the VAC, listed five objective and four subjective criteria. The objective criteria were (1) administrative experience (including "office management," "government budgeting/financing," "number of personnel work with currently" and "other"), (2) public relations experience (including "writing experience" and "public speaking experience"), (3) project/program development (including "size of project," "role of applicant," and "number of projects"), (4) experiences with governmental rules and regulations, and (5) disaster response experiences. (EX. # C-15). The subjective criteria were (1) Self starter? Motivated?, (2) Physical Composure, (3) Physical Appearance, and (4) Frankness and honesty during interview. (EX. # C- 15).

25. Although "disaster response experiences" is listed, the preponderance of the evidence does not support the proposition that this was viewed as a significant criterion by the VAC. According to VAC chairperson Arlo Ziebell, although the VAC was aware that the two positions were combined, the VAC was not actively involved in interviewing for the Coordinator of Emergency Management position. (Tr. at 212). Commissioner Orville Gatton testified that some questions were asked about emergency management by the VAC, but it was considered a "very minor" factor by them. (Tr. at 538). Commissioner Merle Chaplin did not mention such experience as being among the qualifications he looked for. (Tr. at D38, D45). It is perhaps significant that the "disaster services response" criterion is crossed out on the surviving blank interview evaluation form which constitutes Complainant's Exhibit C-15. (EX. C-15).

26. Complainant Boomgarden gave a detailed account of her experience and education during her interview with the VAC which lasted approximately one hour. (Tr. at 40-43, 70- 72).

27. Complainant's administrative experience included office experience since 1955 dealing with the public including a variety of ages and economic levels. (Tr. at 40). At the time of her application, and for nine years prior to it, she was employed with the Homemaker Health Aide Service (HHAS). (EX. C-2; C-4; Tr. at 70). The functions of the Homemaker Health Aide Service are described as follows:

> These services provide a trained and supervised substitute homemaker when a household experiences stress or crisis precipitated by absence, incapacity, or

> limitations of the usual homemaker. These services focus on providing information and assistance, household management and learning experiences to enhance the capacity of the household members to attain or maintain the independence of the household. Components of the service include, but are not limited to: Essential shopping; housekeeping; meal preparation; child care; respite care; money management/consumer education; family management; personal care services; and transportation.

(R. EX. # 2).

28. Complainant Boomgarden's position at HHAS was secretary-bookkeeper. (R. EX. # 2; EX. C-4). She therefore answered the telephone, scheduled appointments, and typed correspondence and other items. (R. EX. # 2; Tr. at 80-81). She was also experienced in the use of a variety of office machines. (EX. C-4; Tr. at 40).

29. However, throughout her employment for the nine year period from **January 1977 to December 1985,** to approximately one month before this position became open, she had performed administrative duties beyond those normally expected of a secretary-bookkeeper position and beyond those described in the official job description. (R. EX. # 2; EX. C-2; EX. C-4; Tr. at 76, 81-85, 132-33). See Finding of Fact No. 2. She did act as bookkeeper for the agency. (R. EX. # 2; Tr. at 71, 80). In addition, she prepared annual budgets, department budgets, records and reports. She did all banking and bank reconciliation. (EX. C-4; Tr. at 71, 135). She prepared all billing, and all monthly financial reports sent to the Board of Supervisors. The later included statistics for budget reports relating to billing, payroll tax and withholding reports. (EX. C-4; Tr. at 80). She also did all cost analysis for the purchase of service for the Department of Human Services, as well as preparing all financial record-keeping and documents for the Department of Health, which helped fund HHAS. (EX. C-4; Tr. at 41). She also maintained statistics relating to all clients of the agency. (Tr. at 80).

30. During this nine year period, Boomgarden's primary duties involved aiding clients who came to the office with claims for emergency assistance, or who were in economic or medical distress by referring them to appropriate agencies throughout the state. (EX. C-2; Tr. at 41). She worked with elected officials, county employees, and the general public every day. (Tr. at 71).

31. Prior to December 1985, Complainant also did client intake and case assessments when the director was absent or during periods between directors. (Tr. at 82-83, 130-32, 135-36). (**The longest of three such absences was at least six months. The Complainant ran the agency during such absences**). (EX. C-2; Tr. at 161-63, 168). This function involved obtaining financial and other information from clients of the agency in order to determine their needs and to prepare a program of assistance based on those needs. (Tr. at 82-83). She also counseled clients regarding disability. (Tr. at 136). After 1985, Complainant's client contact was limited to scheduling appointments, taking information for billing purposes and referring clients to other agencies. The complainant would help clients obtain needed equipment or refer them to the nursing service. (Tr. at 85-86).

32. With respect to project and program development prior to 1985, Complainant Boomgarden had worked on writing grants, including a grant through a program known as Elder Care. (Tr. at 41, 72, 136).

33. Given her extensive experience with respect to various aspects of the HHAS set forth above, it may be reasonably inferred that she had substantial experience in dealing with governmental rules and regulations to the degree that they affected, for example, the appropriate agency to which a client should be referred.

34. Complainant Boomgarden had no disaster response or civil defense experience and no inquiry was made of her with respect to such experience by either the VAC or the Board of Supervisors. (Tr. at 86, 129-30).

35. Complainant's educational experience included her high school secretarial training, refresher and bookkeeping classes. (Tr. at 72). In addition, Boomgarden had taken over 400 classroom hours in credit and money management, community resources, working with the elderly and handicapped and health. (EX. C-2; Tr. at 40, 72).

36. A portion of complainant's application is set forth in Complainant's Exhibit # 4. As noted above, it confirms some of the data to which complainant testified. This exhibit states "see attached" with respect to the inquiry on special training of the applicant, but the attachment is not included. (EX. C-4). The "attachment" is included as part of Complainant's Exhibit # 2 (EX. C-2). Official notice is taken that the attachment is included as part of her application in Respondents' Answers to Interrogatories of July 19, 1991, which were filed with the Commission. Fairness to the parties does not require that they be given the opportunity to contest this fact.

Determinations By Respondent Recommendation and Decision Makers That Complainant Boomgarden was Qualified:

37. The evidence also indicates that determinations were made by all of the Respondents' decision and recommendation makers at various points in the hiring process that the Complainant was qualified for the position as set forth here.

38. Prior to Boomgarden's interview with the VAC, VAC members Arlo Ziebell and Orville Gatton and Board of Supervisors member Millie Lloyd told her, on separate occasions, that they thought she was either qualified, very qualified, or an excellent person for the position whose chances of appointment would be good. (Tr. at 20, 29, 31, 522).

39. Immediately after Complainant Boomgarden's interview with the VAC, its members commented that she was qualified and certainly had the experience for the job. (Tr. at 43). The next day Orville Gatton told her that the VAC was very impressed with her interview and thought she was an excellent candidate. (Tr. at 47). The complainant was considered to be well qualified for the job by the VAC. (Tr. at 186, 192-94, 196, 199, 522, 528, 535-36, 563-64). The Respondent has conceded on brief that "all three members [of the VAC] felt that Complainant had good qualifications for Veterans Affairs Director." Respondents Brief at 2.

40. By recommending four names to the Board of Supervisors, the members of the VAC were signifying to the Board that all four persons named, including Complainant Boomgarden, were considered to be best qualified for the position. (Tr. at 186, 193-94, 196, 199, 264, 535-36, D11). The names were listed in alphabetical order as the VAC made no attempt to list them in order of their respective qualifications. (EX. C-16; Tr. at 186-89, 201-02).

41. Supervisor Lloyd concluded that all four candidates on the list recommended by the VAC were qualified to perform the Veterans AffairsDirector position. (Tr. at 264). Given Complainant Boomgarden's experience, Lloyd concluded she was qualified. (Tr. at 265).

42. Supervisor Robert Fuller concluded that all of the candidates recommended by the VAC, including Boomgarden, were good candidates. (Tr. at 449). He had the opportunity to work with the Complainant in her role at the Homemaker Health Aide Service and found her to be a competent and hard worker who could bring her skills to the position if appointed. (Tr. at 463-64). On May 6th, the day after her interview with the Board, Fuller informed Boomgarden in the presence of Jacqueline Carman, a coworker, that things were looking good and that the selection was down to her and 2 other applicants. (R. EX. # 10; Tr. at 49, 61, 121-22, 156-57, 162-63).

43. Supervisor Linn Adams felt that Complainant Boomgarden was well qualified for the position. (Tr. at 488, 493-494, 496, 507). Just as had happened during her interview with the VAC, the members of the Board of Supervisors mentioned during or immediately after Complainant Boomgarden's interview that they felt she had the qualifications and experience. (Tr. at 43, 50, 51, 134).

E. Despite Her Qualifications, Complainant Was Rejected For the Position, Which Was Filled By a Male:

44. The Board selected David Roelfs, a male, for the position. By selecting Mr. Roelfs, the Board simultaneously rejected Complainant Boomgarden. She was informed of her rejection by Hardin County supervisor Linn Adams. See Finding of Fact No. 19. (Tr. at 56, 493).

F. Respondents' Articulated Reasons for the Failure to Hire Complainant Boomgarden for the Position:

45. On brief, Respondents identified only two reasons as being legitimate, non-discriminatory reasons for the failure to hire Maxine Boomgarden which it had articulated through the production of evidence. The reasons so identified on brief are (1) that Complainant was not hired because she, unlike David Roelfs, was not a veteran, and (2) that she was not hired because Roelfs was a Democrat who had assisted supervisor Fuller during previous political campaigns. (Respondents' Brief at 10, 12).

46. It should be noted that Respondents did not state on brief that the relative qualifications of Roelfs and Boomgarden constituted a legitimate nondiscriminatory reason for the failure to hire Boomgarden. In their defenses listed in Response to Complaint (a response to the Notice of Hearing) Respondents asserted, with respect to qualifications, only that the Board believed it was

required to hire a qualified veteran. (Response to Complaint). In their prehearing conference form, Respondents asserted, with respect to qualifications, only that they hired a qualified person. (Respondents' Prehearing Conference Form).

G. The Veteran's Preference: A Reason Which is Neither Legitimate nor Nondiscriminatory on the Basis of Sex Under the Facts of this Case:

47. Under the facts of this case, for reasons set forth at length in the Findings of Fact and Conclusions of Law dealing with the application of the disparate impact theory to this case, the veterans' preference reason does not constitute a legitimate non-discriminatory reason for the failure to hire Complainant Boomgarden. In summary, the utilization of the veterans preference in this case is neither legal nor non-discriminatory because all of the following are true:

a. The county was not legally required to use the veteran's preference in this instance because David Roelfs was not as qualified as Complainant Boomgarden; and

b. The use of the veteran's preference in employment has a severe disparate impact on women; and

c. The use of the veteran's preference is not justified by business necessity.

See Findings No. 84-99 and Conclusions of Law No.32-70.

H. The Assertion That David Roelfs Was Selected Over Complainant Boomgarden Because He Was A Democrat Who Had Assisted Robert Fuller In Political Campaigns Constitutes A Pretext For Discrimination:

48. There is evidence in the record indicating that political influence was a factor in the decision to select Roelfs for the position over Complainant Boomgarden. (Tr. at 270-71, 344, 453). However, this reason is a pretext as the greater weight of the evidence, as set forth below, demonstrates that (1) the testimony of the members of the Respondent Board of Supervisors, who stated this decision was based on party affiliation of or campaign support by David Roelfs, is unreliable, and (2) even if true, this reason was insufficient under these facts to motivate the challenged employment action.

49. On April 9, 1986, supervisor Linn Adams, who was a friend of Complainant Boomgarden, told her that he thought the hiring decision would probably be a political hiring. He did not give her, at this or any other time, any rationale or evidence to support this conclusion. (R. EX. 10; Tr. at 34- 36, 100-01, 102, 481-82). Adams was aware that Roelfs, like supervisors Fuller and Lloyd, was a Democrat. (Tr. at 260, 439, 499). Adams made this comment based solely on rumors he had heard even before he had taken his seat on the Board in January 1985. The "general talk" was that appointments were made on the basis of political affiliation. (Tr. at 480, 482-83). This is not a reliable basis for supporting the conclusion that politics played a role in this decision.

50. Nonetheless, because of this comment by Adams, Complainant Boomgarden became concerned because, in her words, "a politician I am not." (EX. C-25; Tr. at 45-46). Therefore, at

her subsequent Veterans Affairs Commission interview, Boomgarden asked if the hiring decision was going to be political. The VAC members informed her that politics never had anything to do with their recommendation. (EX. C- 25; Tr. at 45-48, 190-91, D9). Politics did not enter into their recommendations. (Tr. at 191, 206-07, D46). The members of the VAC appeared to be so upset by her question that Boomgarden felt compelled to apologize for it. (EX. C- 25; Tr. at 47-48).

51. Millie Lloyd testified that the fact David Roelfs was a Democrat played a part in her individual decision to vote for his hire. (Tr. at 270, 344, 349) She also testified, however, that his being a veteran was "the main reason" for voting for his hire. (Tr. at 344). Her testimony with respect to the political affiliation issue was not credible because it was successfully impeached by her own prior inconsistent statements. In her interview with Karl Schilling, during the course of the investigation, she denied that politics was a factor in her decision:

> Q. [By Schilling]: Okay. Do you recall the issue of political influence coming up?
> A. [By Lloyd]: Not that I recall.
> Q. [By Schilling]: Were you aware that Mr. Roelfs had worked in Mr. Fuller's campaign?
> A. [By Lloyd]: I think--yeah, I think I remember that, yes.
> Q. [By Schilling]: Okay. did it ever come up in the discussion?
> A. [By Lloyd]: Not that I recall.
> Q. [By Schilling]: Okay. Was this a concern of yours one way or another?
> A. [By Lloyd]: No.

(EX. C-28-9; Tr. at 273-74).

52. Furthermore, Lloyd testified at hearing that although she was aware Roelfs was a Democrat, like her and Fuller, she did not know what Roelfs did to support Fuller in his political campaign. She had never discussed this topic with Fuller. (Tr. at 301, 302, 336).

53. Finally, although Boomgarden is a Republican, Lloyd did not know whether Complainant Boomgarden was a Democrat, a Republican, or an Independent. (Tr. at 113, 336, 343). The only reasons which Lloyd gave in her testimony for concluding Boomgarden was either a Republican or Independent were (1) Boomgarden was not active in the Democratic party and (2) Boomgarden often went to Linn Adams and not Fuller or Lloyd with various concerns. These reasons are not credible because those facts do not support the conclusion she claims to have drawn.

54. With respect to the first reason, it is a matter of common knowledge that there are many members of the major political parties who are not active in party politics. Official notice is taken of that fact. Fairness to the parties does not require they be given the opportunity to contest this fact. In other words, it would have been quite possible for Boomgarden to have been a Democrat while not being active in Democratic party politics.

55. With respect to the second reason, the bare fact that Boomgarden often went to Linn Adams with her concerns is hardly conclusive or indicative of political party membership. Her long-term friendship with him and his family could provide one obvious, alternate explanation. (Tr. at 34).

56. Robert Fuller testified at hearing that David Roelfs' political affiliation probably helped his candidacy for the position. (Tr. at 453). However, this testimony was contradicted by his own prior inconsistent statement made to Karl Schilling during the course of the investigation:

> Q. [By Schilling]: [W]as there, in your mind, any advantage given to Mr. Roelfs because of listing your name as a reference or any political connection?
> A. [By Fuller]: No, I am sure there wasn't.

(EX. C-28-10; Tr. at 453-54).

57. Also, the campaign assistance provided Robert Fuller by David Roelfs was minimal. For this reason it may be reasonably inferred either that the work was insufficient to motivate the vote for hire or was unlikely to have been the whole cause for the action, if Roelfs' campaign work actually did play a role in Fuller's decision. Roelfs was just one of dozens of people who assisted Fuller in 7 campaigns over a 15 year period. (Tr. at 443-44). During the course of the investigation, the following exchange occurred between Fuller and investigator Schilling:

> Q. [By Schilling]: Okay. Now Mr. Roelfs listed you as one of his references. Did he talk to you about doing that?
> A. [By Fuller]: He asked me if he could put his [sic] name down for a reference.
> Q. [By Schilling]: Okay. How had you known him before?
> A. [By Fuller]: Vaguely, just knew who he was and had run across him, maybe on just a few occasions. By being in Ackley, at some functions, I think I ran into him and, I think that's maybe how that I got to know, vaguely, who he was.
> Q. [By Schilling]: Had he ever worked in your campaigns?
> A. [By Fuller]: No, not really. I think that he was a person that supported me, but as far as working on the campaign, I - I'm not whether he went out and door knocked and things like that, ___ if you're referred to, not to my knowledge, no.

(EX. C-28-10; Tr. at 443).

58. The campaign support of Roelfs, which Fuller became cognizant of after reviewing his scrapbook approximately one to two months before the hearing, consisted of the presence of Roelfs' name in a 1982 full page newspaper ad listing well over 150 supporters and his name's presence on campaign committees in 1976 and 1980. (EX. R-7; R-8; Tr. at 444-45, 472-74).

59. David Roelfs did not know Fuller before working on his county supervisor campaign in 1976. Roelfs' campaign work was to talk to people and hand out brochures in Ackley. He also attended a total of two meetings at Fuller's house that year. (Tr. at 371-72). **Those two 1976 meetings were the only timesthat he actually had contact with Fuller during the ten years from 1976 to 1986, until the day he asked him to be a reference.** (Tr. at 372-73, 376). While

his name was on the campaign committee in 1980, Roelfs attended no meetings. (Tr. at 372). His campaign work was limited to handing out bumper stickers and brochures. (Tr. at 373).

60. In summary, the testimony of the members of the Board with respect to the political affiliation reason is unreliable for the reasons stated above. Furthermore, neither Lloyd nor Fuller asserted that political affiliation or support was the primary reason for their action in voting for Roelfs. (Nor does any of their testimony support the theory that former Republican supervisor Jerry Pence's support of Boomgarden actually played any role in their decision.) With the elimination of this and the veterans preference as legitimate, nondiscriminatory reasons, there remains no other legitimate, non-discriminatory reason identified in the Respondents' brief as having been articulated by Respondents. (For reasons stated in the conclusions of law, Respondents are limited to the legitimate, non-discriminatory reasons identified on brief). In the absence of credible evidence supporting such identified and articulated reasons, and given the *inference* of discrimination initially drawn from the establishment of the prima facie case, it may be and is concluded that Complainant Boomgarden was subjected to different treatment on the basis of her sex by the Respondents in their failure to hire her.

I. Evidence That a Discriminatory Reason More Likely Motivated the Respondents in The Hiring Process:

61. The evidence previously discussed has been sufficient to establish a circumstantial case of different treatment on the basis of sex in the failure to hire Complainant Boomgarden, as the averred legitimate non- discriminatory reasons set forth by Respondents are either illegitimate and discriminatory or unworthy of credence. In addition to this, there is evidence of statements by the Chairpersons of the VAC and the Board of Supervisors which reflect a discriminatory bias against hiring a woman for this position. Such statements are further evidence that the reasons given by Respondents are pretexts for discrimination.

1. Statements by Arlo Ziebell, Chairperson of the Veterans Affairs Commission:

62. On or about January 24, 1986, after Complainant Boomgarden had submitted her application for the position, she telephoned Arlo Ziebell, Chairperson of the VAC. (EX. C-2; Tr. at 30-31, 172, D39). Ziebell stated that he had received the application and that it certainly looked like she was qualified. When Complainant Boomgarden asked if any further references she could give to him, he indicated no. Ziebell then stated **"Well, I think you're certainly qualified, but we're just not ready for a woman in that position to be telling us what to do."** (Tr. at 31, 137). Boomgarden replied that she did not understand his comment as she thought it would be the other way around because the VAC would be telling whomever they hired what to do. Ziebell responded that **"Well, if we had a woman in there, we would certainly have to change our way of doing things."** (Tr. at 31). He expressed a concern about the relaxed way in which the VAC meetings were run and the presence of off-color language. (Tr. at 32). Ziebell admitted making these remarks. (Tr. at 172-74, 209). Respondent in its Response to Complaint admitted that Ziebell "made a remark in jest, which was not appropriate to the occasion." (Response to Complaint).

63. Ziebell also stated "We just don't want to get involved in any damn lawsuit here. We have to be careful who we hire." The Complainant's response was that, she did not understand this concern about a lawsuit and that this was the second time she had heard it. (Tr. at 32). (She had earlier heard the same concern about a lawsuit, along with an acknowledgment of her being qualified, expressed by VAC member Orville Gatton and later heard Board of Supervisors chairperson Robert Fuller make similar statements at her interview with the Board of Supervisors). (Tr. at 29, 50). She commented that "if you hire the best qualified, that ought to be good enough." (Tr. at 32).

64. Although Ziebell testified that his statements were made in jest, the Complainant did not believe this, as his explanation for the remark, i.e. the need to change the relaxed nature of the meetings if a woman were hired, was given as a serious explanation. (Tr. at 33, 99, 172-73, 209). Ziebell also testified he did not mention this conversation at the VAC meetings and had only made the comment when he talked to the Complainant. (Tr. at 214-15). Orville Gatton and Merle Chaplin testified, however, that Ziebell did tell them about his statements to Boomgarden. (Tr. at 561, D39). Ziebell's testimony to the effect that his comments were made in jest and indicating that he did not repeat these comments to others is not credible.

2. The Significance of Ziebell's Statements:

65. Although the statements made by Chairperson Ziebell are of the type normally considered to be direct evidence of discriminatory intent, it must be remembered that the VAC did name Boomgarden to the first list of four applicants recommended to the Board of Supervisors. See Finding of Fact No. 13. In the Respondent's answers to interrogatories, Ziebell's expected testimony was summarized in response to interrogatory number 4. The answer stated, in part, "Mr. Ziebell felt that at least one woman should be so included [on the initial list of 4], and proposed that Complainant's name be recommended to the Supervisors, even though she was not a veteran." (Answers to Complainant's Interrogatories). When asked about this response, Ziebell claimed that he felt that a woman should be on the list of four applicants. (Tr. at 217). When asked why he wanted a woman on the list, he testified that he felt naming a female was proper as Boomgarden was "the only lady that was most qualified on her application of any of the rest of them." (Tr. at 218). He also testified that he had taken the lead in getting Boomgarden on the list of four, although he did not know the reason why. (Tr. at 210, 218).

66. The impression left by Ziebell's testimony is that Boomgarden, in his view, should be and was named to the original list of four as a "token female." As indicated by Ziebell's comment indicating that Boomgarden was the best qualified female, such an approach tends to obscure the qualifications of highly qualified female applicants as they are compared only or primarily to other female applicants and not to male applicants. There may be a tendency to draw a distinction between the "token" female and the "real" male candidates, with only the latter being given serious consideration. In this case, as will be set forth in detail later, Complainant Boomgarden was certainly better qualified than David Roelfs, especially when an emphasis is placed on the Director of Veterans Affairs position, which was the primary concern of the VAC.

67. If the actions of the VAC in the hiring process had been limited to naming the initial list of four, the action of naming Boomgarden to that list would logically have been persuasive enough

to rebut the evidence of discrimination provided by Ziebell's statements. It must be remembered, however, that the VAC was subsequently asked by the Board of Supervisors to submit additional names. It submitted the name of Steven Ball and resubmitted the name of David Roelfs. See Finding No. 18.

68. Ball's name was submitted for the first time on the second list because he had been previously interviewed and the VAC did not desire to conduct further interviews. (Tr. at 214). The testimony of members of the VAC provides no credible, persuasive reason, however, for resubmitting only the name of Roelfs while not resubmitting the names of Boomgarden or the other previously named applicants. Chairperson Ziebell could provide no reason for the resubmission of Roelfs' name. (Tr. at 203). Orville Gatton did not know how they came up with Roelfs' name a second time, but suggested he was selected because he was a veteran. (Tr. at 544-45). This does not explain, however, why the names of other veterans, i.e. Alvin Mensing and Gary Shugar, which were originally submitted, were not resubmitted on the second list. (EX. C-10; C-16). Merle Chaplin offered three reasons: not having to reinterview, trying to find a qualified veteran, and his assumption that the VAC decided Dave Roelfs was probably better qualified as possible reasons. The first does not explain why any of the other previously named candidates were not again listed. The second does not explain why the other previously named veterans were not resubmitted. The third is offered as an unsupported assumption which is not plausible in light of Boomgarden's better qualifications and of the previously cited testimony of other members of the VAC to the effect they did not know of a reason. Therefore, Ziebell's statements remain as unrebutted evidence that sex discrimination played a role in the VAC's final act in the selection process.

69. If the testimony of members of the Board of Supervisors, to the effect that they believed they were limited in their choice to the two names on the second list, were credible, then this act had the effect of eliminating Boomgarden from further consideration. (Tr. at 279-81, 290, 298, 310-11, 337, 459, 488, 490). If the testimony of the Board on this point is not believed, the resubmission of Roelfs' name at least had the potential to have been seen as a further endorsement of Roelfs which was denied to the Complainant.

3. Statement by Robert Fuller, Chairperson of the Veterans Affairs Commission:

70. During the course of the hearing, Chairperson Robert Fuller had testified that he was looking for someone who had the qualifications and was the right age. (Tr. at 449). When asked to expand on that testimony, Fuller noted that Gene Foster had the position for many years and noted that, "My thinking was that if we could find **a young man** that would fit in the job, then it would be--he could have that job for several years." (Tr. at 464). Fuller later denied that the fact Complainant was a woman had any bearing on his decision. (Tr. at 466-67). Although Fuller's quoted statement might be characterized as a slip of the tongue, it is a slip which conveys a message, i.e. Fuller perceived this position as a position which had been and would continue to be held by a man. His denial is not credible in light of the quoted statement and in light of repeated incidents of less- than-credible testimony by Fuller and Millie Lloyd which are more fully set forth in the findings on credibility.

J. Complainant Boomgarden's Qualifications Exceeded Those of David Roelfs:

71. For reasons fully set forth in the conclusions of law, the use of the veterans preference can be addressed through disparate impact theory only if its use is not legally required. The use of the preference is only legally required if the qualifications of the nonveteran candidates are no better than those of the veteran candidate. See Conclusions of Law No. 32-38.

72. Therefore, it is necessary to ascertain whether David Roelfs was equally qualified to Complainant Boomgarden at the time the hiring decision was made. In making this determination, it is helpful to note that the preponderance of the evidence establishes that the ultimate decisionmakers in this process, the members of the Board of Supervisors, were unaware of whether or not David Roelfs possessed certain qualifications.

73. In reviewing the applications, it should be noted that, apparently due to an inadvertent error, part of Steven Ball's resume is attached to David Roelfs application at Exhibit C-5. (EX. C-5). This attachment is disregarded in evaluating Roelfs' qualifications. An examination of the copy of Roelfs' application provided by the Respondents in their Answers to Complainant's Interrogatories indicates that Exhibit C-5 is, with that exception, the full and complete application of David Roelfs.

74. The Board of Supervisors probably did not have knowledge, at the time it made its hiring decision, of the military firefighting and chemical warfare training of David Roelfs. Although the Board of Supervisors reviewed Complainant Boomgarden's and David Roelfs' application materials, neither of their applications had any indication of whether or not they had emergency management experience or training. (EX. C-2, C-4, C-5; Tr. at 284, 449, 468, 492).

75. The credible testimony of Roelfs indicates that, although the Board of Supervisors mentioned that the job was a dual position involving both veterans affairs and emergency management, he was not asked about any past emergency management experience or training he may have had during the Board's 15 minute interview with him. The focus of the Board's questioning with respect to Roelfs' qualifications was on the Veterans Affairs aspects of the job, and that was largely limited to questions about working with veterans, his concern with veterans issues, and working with people. (Tr. at 384-86, 390). As previously noted, the Board did not ask any applicants any hypothetical questions concerning how they would handle specific disasters. (Rulings on Objections No. 7).

76. Complainant Boomgarden was also not questioned by the Board concerning emergency services or disaster services experience. (Tr. at 129-30). The only discussion of training with respect to the emergency management aspect was that training would be provided for that job. (Tr. at 130).

77. Although supervisor Millie Lloyd's testimony indicates that questions were asked of Roelfs and Boomgarden concerning emergency management, this seems unlikely in light of their testimony to the contrary. (Tr. at 129-30, 319-20, 384, 386, 390). Also, she was unable to provide any specific information concerning Roelfs' military training and experience thought to be related to that area. (Tr. at 333). It is more likely than not that Lloyd's limited awareness of

Roelfs' training was due to information received after the hiring of Roelfs, perhaps during the preparation of answers to interrogatories in this case.

78. Supervisor Adams testified he did not remember any details of any of the interviews. Nor did he recall any discussions of qualifications for the emergency management coordinator position at Roelfs' interview. He believed, however, such questions were asked. (Tr. at 498).

79. Supervisor Fuller could not recall asking David Roelfs if he had any background in civil defense. (Tr. at 471).

80. The best explanation for the differing testimony of the Supervisors Lloyd and Adams and the testimony of Boomgarden, Roelfs and Fuller may be found in the previously established fact that interviews of candidates for the combined position and interviews of candidates solely for the emergency management coordinator position were held on the same day. See Findings of Fact Nos. 15 and 16. The interviews of those candidates for the emergency management coordinator position focused on emergency management. (Tr. at 486). It is probable that the interviews of the candidates for the combined position, who had been referred to the Board by the VAC, focused on the veterans affairs aspects of the position and not on emergency management. Emergency management was an aspect for which extensive training was to be provided. See Finding of Fact No. 7.

81. Although Roelfs' military training involving firefighting and chemicals was discussed with the VAC, there is no evidence that this information was transmitted from the VAC to the Board of Supervisors. (Tr. at 380). The available evidence is to the contrary. (Tr. at D30). This entire decisionmaking process is remarkable for the lack of communication between the VAC and the Board. (Tr. at 188, 203-04, 214-15, 262, 268, 380, 447, 476-77, 486-87, 545-46, 549, D20-21, D33). The evidence demonstrates that the only communications between the VAC and the Board were: (1) The VAC's recommendation of four candidates to the Board; (2) the Board's request for the names of additional candidates; and (3) the submission to the Board by the VAC of two names in response to that request. (Tr. at 188, 196, 201, 213-15, 262-64, 446-47, 539-40, D10-11, D20-21, D29-30, D33). See Findings of Fact Nos. 13, 18.

82. Roelfs was also not asked any questions by the Board concerning his experience as a "records specialist". (Tr. at 385). His application reflects only that he worked part-time for the Army Reserve from February 1984-1986 "maintaining Army Reserve career records." (EX. C-5).
83. A comparison of the qualifications of Boomgarden and Roelfs follows. *Those facts in the record for which the greater weight of the evidence establishesthe Board had no knowledge and, therefore, which should be disregarded, are in italics.* Even if these qualifications were to be considered, Boomgarden would still be better qualified in light of the two primary purposes of the position, i.e. (1) to administer financial assistance programs to indigent veterans and their families in Hardin County, and (2) to **coordinate** disaster services and emergency planning for Hardin County. See Findings of Fact Nos. 3, 6, 8, and 8A. Given Boomgarden's better qualifications, Hardin County was not legally required to exercise a veteran's preference in favor of David Roelfs. See Conclusions of Law No. 32-34.

Maxine Boomgarden

Occupation and Duties

Nine years work experience providing assistance to indigent persons.

1. 1/77-3/86. Full-time Secretary-Bookkeeper at HHAS.

Duties: 1/77 To 12/85:

1. Aiding clients with claims for emergency assistance or in medical/economic distress by referring them to appropriate agencies through out the state. 2. Working with elected officials, county employees, and general public. 3. Client intake and case assessments when director absent or between directors. Counseled disabled. 4. Administered the agency during three absences of directors for periods of up to 6 months. 5. Prepare annual department budgets, records & reports. 6. All banking & bank reconciliation for HHAS. 7. All billing and monthly financial reports to Board of Supervisors. 8. All cost analysis for purchase of service for DHS. All financial recordkeeping for Dept. of Health. 9. Client statistics. 10. Writing grants.

Duties 1/77 to 3/86:

1. Bookkeeping. 2. Client referral. 3. Obtaining billing data from clients. 4. Scheduling appointments. 5. Typing correspondence. 6. Answer telephone.

Education:

Over 400 hours of classroom training addressing credit and money management, community resources, working with the elderly and handicapped and health-related items. Bookkeeping refresher courses. 1956 high school graduate with secretarial training.

Firefighting or Chemical Warfare Training:

None.

Volunteer Activities:

Care Review Committee of local nursing homes for several years. Recommended changes to improve living conditions of residents.

David Roelfs

Occupation and Duties

Zero years work experience providing assistance to indigent persons.
1. 1979-3/86:

Farming. Self-employed.

2. 2/86-3/86: Part-time truckdriver for Nat'l Guard.

3. 2/84-2/86: Part-time records specialist for Army Reserve.

Duties: 2/84-2/86: Maintaining Army Reserve Career Records.

This job was performed 50-60 days a year for two years for a total of 3-4 months experience.

Duties involved supervision of 6 enlisted personnel engaged in routine updating of personnel records which were oriented to career advancement.Familiarity with DD214 discharge paper might be helpful as a dishonorable discharge would be disqualifying for veterans benefits. With the exception ofDD214, diffrent forms were used for benefits. Updating involved removing old file material and inserting new material.

Education:

1972 Bachelor's degree in park management and recreation.

Firefighting or Chemical Warfare Training:

1967 Graduate of two week naval firefighting course.

(With the possible exception of chemical fires, the coordinator would not normally be involved in fire situations.)

Some Army reserve training, of unknown duration, on nucclear, biological and chemical agents.
Volunteer Activities:

American Legion service officer for an unknown length of time assisting veterans in obtaining benefits.

(EX. # C-2, C-4, C-5; EX. # R-4A, R-5 Tr. at 375, 393-96, 401-06, 408, 410, 413, 422-23). **See Findings of Fact Nos. 27-35, 74-82.**

K. Although Not Legally Required to Do So, The Respondent Board of Supervisors Did Exercise a Veterans' Preference In Selecting David Roelfs:

84. For reasons fully set forth in the Conclusions of Law, it is established as a matter of law, and the Commission is required to so find, that a veterans' preference was exercised in the selection of David Roelfs for the combined position of Veterans Affairs Director and Coordinator of Emergency Services as admitted in Respondents' brief and pleadings. (Respondents' Brief at 10-12, Response to Complaint, Respondents' Prehearing Conference Form). See Conclusions of Law No. 4-7.

85. In addition to such admissions in the briefs and pleadings, there are other admissions in the record to this effect, including the testimony of supervisors Millie Lloyd and Robert Fuller. (Tr. at 279, 281, 295, 341-42, 344, 346, 448-49, 451-52, 460-63).

L. The Use of the Veterans Preference Has a Strong Disparate Impact Against The Selection of Women in Hardin County, Which Is the Relevant Labor Market:

1. The Relevant Labor Market:

86. The labor market is the area from which one would expect the employer's workforce (i.e. its employees) to be drawn. When measuring whether an employment practice has a disparate impact on women by examining the impact on women in the relevant labor market, it is helpful to determine what geographic area constitutes that market, i.e. what is the geographic area from which the employer can be expected to hire for a position?

87.

> Recruiting areas for different types of workers can vary. In general, most local employers recruit their workers and most local workers are employed within an immediate area. However, the labor market for some professional, managerial and blue-collar occupations is generally much broader geographically, with recruitment often conducted on a state, regional, or national basis.

(EX. # C-24).

88. Hardin County constitutes the relevant labor market for this combined position for three reasons. First, every applicant gave an address in Hardin County. (EX. # C-4 - C- 11). Second, one applicant, Robert Drummer, was screened out by the VAC because, although he had listed a Hardin County address on his application, they discovered that he did not actually live in Hardin County. (Tr. at 534). Third, recruitment for this position was conducted on a local basis, i.e. the position was advertised in the local newspaper, the Hardin County Index. (Stip.; EX. C-3; Tr. at 176).

2. An Examination of Census Statistics Reveals That The Exercise of a Preference for Veterans Has a Severe Disparate Impact on Women in HardinCounty:

89. The veteran's preference is a facially neutral practice which has a severe disparate impact on women. The effect of preferring veterans for a position will screen out a disproportionate number of women as compared to men in the Hardin County labor market, as well as for the State of Iowa, as shown by the following statistics. The most telling of these statistics is the one that demonstrates that, while 32.2% of the male population of Hardin County over age 18 were veterans, only 1.0% of the female population of Hardin County over age 18 were veterans. Application of the veterans preference to these potential applicants would screen out 99% of the female population of the county and only 67.8% of the male population. The statistics below demonstrate that the veterans preference operates to screen out a far higher percentage of females in Hardin County and in Iowa than males.

Hardin County Labor Force By Sex (1986)

Sex	Percent of Total Labor Force (Number)
Males	60.9% (6110)
Females	**39.1%** (3920)

Hardin County Population Over 18 By Sex (1980)

Sex	Percent of Total Population (Number)
Males	47.3% (7518)
Females	**52.7%** (8386)

State of Iowa Labor Force By Sex (1986)

Sex	Percent of Total Labor Force (Number)
Males	59.2% (834,030)
Females	**41.8%** (597,970)

Hardin County Veterans By Sex (1986)

Sex	Percent of Total Veterans (Number)
Males	96.8% (2420)
Females	**3.2%** (80)

Percentage of Hardin County Population Over 18 Which Are Veterans

Males	2420 male veterans / 7518 males 18 = .3218941 = 32.2%
Females	80 female veterans / 3920 fem. lab. for. = .020408 = 2.0%

State of Iowa Veterans By Sex (1986)

Sex	Percent of Total Veterans (Number)

Males	**96.4%** (329,300)
Females	**3.6%** (12,300)

State of Iowa Veterans Viewed As A Percentage of the Labor Force:

Males	329300 male veterans / 834030 male lab. force = .394829 = 39.5%
Females	12300 female veterans / 597970 female lab. for. = .020569 = **2.0%**

(EX. C-23, C-24, C-26). Official Notice is taken of the 1980 census population statistics for Hardin County set forth in the above category "Hardin County Population Over 18 By Sex." The parties were informed at hearing that judicial notice might be taken of this fact and given the opportunity to address this on brief. (Tr. at 579).

90. The showing of the disparate impact of the veterans preference set forth in the above labor market and potential applicant flow statistics is reinforced by an examination of the veterans status of the actual applicants.

91. A stipulation was reached to the effect that there were forty-three (43) applicants, thirty-three (33) of whom were male and nine (9) of whom were female. (Stip.). Official notice is taken of the fact that the sum of 33 and 9 is not 43, but is 42. Fairness to the parties does not require that they be given the opportunity to contest that fact. Therefore, reference is made to Exhibit C-10, which lists 43 applications, one of which, however, is the application of a male for the civil defense position only. (EX. C-10). It appears that it was the intent of the parties to stipulate to the total number of applications for the combined position, which would be 42.

92. It was also stipulated that none of the female applicants and thirty-one of the thirty-three male applicants were veterans. (Stip.). On a percentage basis, therefore, zero percent of the female applicants and 94.0 percent of the male applicants were veterans. Application of the veterans preference to the actual applicants would screen out 100% of the female applicants and 6.0% of the male applicants.

M. The Exercise of the Veterans Preference Is Not Justified By Business Necessity As It Is Not Essential to the Safe and Efficient Operation of the Veterans Affairs Commission's Programs:

93. The exercise of the veteran's preference with respect to this position was only done because it was felt by local veterans organizations and others that veterans would prefer to deal with other veterans with respect to the functions of the Veterans Affairs Commission. (Respondents Brief at 9, 10-11, Tr. at 192, 274, 276-77, 334-35, 346, 355- 58, 387, 432, 434-35, 451-52, 462-63, D29, F11, F14). It is not asserted by Respondents that the preference was related to the emergency management coordinator function. (Respondents' Brief at 9, 10-12; EX. C-17; Tr. at 276, 343).

94. The greater weight of the evidence in the record clearly does not support any affirmative defense to the effect that there is an overriding legitimate business purpose served whereby having a veteran in this position is essential to the safe and efficient operation of the functions of the Veterans Affairs Commission. Such an affirmative defense, which must be proved in order for the Respondents to prevail once disparate impact has been shown with regard to a challenged employment practice, is not even claimed by Respondents. (Respondents' Brief; Respondents' Prehearing Conference Form, Response to Complaint). See Conclusions of Law Nos. 58-59, 64-65, 70.

95. The Respondents' own experts, Bennie Spain and Charles Poncy, repeatedly acknowledged, in effect, that status as a veteran was not essential to the safe and efficient performance of the Veterans Affairs Director's job. Bennie Spain has been full time Veterans Affairs Director of Black Hawk County for six years. (Tr. at 341). Spain was aware that there were nonveterans in these positions. He estimated that, based on the attendance of Veterans Affairs Director's state meetings, 55% of the directors were veterans, 15% were nonveterans, and it was unknown what percentage of the remaining 30% were or were not veterans. (Tr. at 363-64). Spain acknowledged that "**[T]here are some [nonveteran Veterans Affairs Directors] who do excellent jobs**." (Tr. at 364). He agreed that in 1986 a nonveteran who was qualified could be appointed to the position of Veterans Affairs Director. (Tr. at 364-65). When asked if he could "think of any reason that a person with the proper skills, background, and training who was a nonveteran could not perform the same functions as you do on a daily basis?", he replied, "I don't see why they couldn't." (Tr. at 365). He repeatedly acknowledged that nonveterans could successfully perform this job. (Tr. at 364-65, 367).

96. Charles Poncy, a legislator who is an active spokesperson for veterans, also testified. (Tr. at 426-28, 430). He acknowledged that, although veterans may prefer to deal with a veteran, a nonveteran with proper training could perform the Veterans Affairs Director duties. (Tr. at 434). He agreed that it would not be absolutely necessary to have a veteran in the Veterans Affairs Director position, as long as the person hired could provide the service. (Tr. at 435).

97. In addition to Spain and Poncy, the preferred candidate, David Roelfs, who has been Veterans Affairs Director since 1986, also acknowledged that a nonveteran could do the job. (Tr. at 421-22). Roelfs agreed that being a veteran was not a business necessity for the Veterans Affairs Director position. (Tr. at 422).

98. Supervisor Robert Fuller and VAC commissioner Merle Chaplin also agreed that a nonveteran could perform the functions of the Veterans Affairs Director position. Chaplin noted that, in his view, having a veteran in that position was not a necessity, but an advantage. (Tr. at 452, D29).

99. In this case, the use of the veterans preference was not required as David Roelfs was less qualified than the Complainant Maxine Boomgarden. In addition, the use of the veterans preference in employment has a severe disparate impact on women and is not justified by business necessity. The use of the veterans preference in this case constitutes sex discrimination against Maxine Boomgarden under the disparate impact theory.

N. Compensatory Damages:

100. In accordance with the well-established law of Iowa, it is necessary to consider what amounts of money should be awarded to compensate Complainant Boomgarden for the damage she suffered from the discriminatory actions of the Respondents. See Conclusion of Law No. 72.

1. Back Pay and Front Pay:

101. David Roelfs was hired at a combined salary of $13,000 per year effective July 1, 1986 for the positions of Director of Veterans Affairs ($6,500) and Coordinator of Emergency Management ($6,500). (EX. # C-20). His W-2s reveal he actually earned $6,624.12 through the end of calendar year 1986. (EX. # C-21). This is 51% of what would have been his salary of $13000, if he had been in the position the entire calendar year.

102. Complainant Boomgarden earned $11,478.12 from her position at HHAS for the entire year of 1986. (EX. # C-22). Fifty-one percent of that amount is $5853.84. Therefore, the amount of **Back Pay** she is due for **1986** is $6,624.12 -$5853.84 = **$770.28.**

103. Although the Complainant's back wages for 1986 are not accurately calculated for 1986 in Exhibit C-27, since that exhibit erroneously assumes that she would have been in the position for that entire calendar year, it does accurately set forth the calculations of back pay for the years 1987-90:

Back Pay for 1987:
Pay for the Hardin County position: $13,740.48
- Actual earnings of Complainant: 11,699.85
Total Back Pay for 1987: $ **2,040.63**

Back Pay for 1988:
Pay for the Hardin County position: $14,498.01
- Actual earnings of Complainant: 12,210.84
Total Back Pay for 1988: **$ 2,287.17**

Back Pay for 1989:
Pay for the Hardin County position: $15,500.08
-Actual earnings of Complainant: 12,823.89
Total Back Pay for 1989: **$ 2,676.19**

Back Pay for 1990:
Pay for the Hardin County position: $16,499.85
- Projected Pay of Complainant for the Entire Year Based on 7/31/90 Resignation From HHAS and Pay Through That Date of $8694.48: 14,904.00
Total Back Pay for 1990: **$ 1,595.85**

TOTAL BACK PAY JULY 1, 1986 TO DECEMBER 31, 1990 = **$770.28** + $ **2,040.63** + **$ 2,287.17** + **$ 2,676.19** + **$ 1,595.85** =

$9370.12 BACK PAY TO 12/31/90. (EX. C-21, C-22, C-27; Tr. at 68-69).

104. While there are estimates in the record of the back pay due Complainant Boomgarden for 1991 and 1992, and it would be possible to formulate an estimate for back pay to the date of this decision, the better practice would be to set forth a formula for back pay, whereby the greater of the amounts of Complainant's actual or potential earnings (if she had not left HHAS) and the greater of either the incumbent's actual earnings in the position with Hardin County or the amount determined to be the annual salary for that position, (which takes into account the possibility that the incumbent may leave the position) can be inserted into the formula. Such a formula can also be used annually to calculate front pay through the end of 1996. 1996 will be 10 years after the failure to hire Boomgarden and would represent a reasonable time to end front pay, as, over time, any method of estimation becomes less reliable. This formula will ensure that any back pay or front pay does not exceed the difference between the income Complainant Boomgarden would have received at the Hardin County position and the greater of the Complainant's actual earnings, or potential earnings if she had remained at HHAS. Once Complainant Boomgarden's actual or potential income equals or exceeds the income she would have earned in the Hardin County position, or the end of the calendar year 1996 arrives, any further back or front pay shall cease.

105. The formula for any given year can be set forth as follows:

[(The greater of the actual annual wages paid to the incumbent of the Hardin County Veterans Affairs Director and Emergency Management Coordinator position or the salary established for that year by Hardin County) - (The greater of the Complainant's actual annual earnings or her potential earnings if she had stayed at HHAS) = pay due for the given year].

106. Complainant's potential earnings at HHAS can be estimated by projecting an average annual increase in salary equivalent to that she obtained during the years 1986 to 1990. The average annual increase during this period can be determined as follows: (1.9% + 4.4% + 5.0% + 16.2%)/4 = 6.88% average annual increase. (EX. C-27). Therefore, her potential annual earnings for the years 1991-96, if she had remained at HHAS, and assuming an average 6.88% annual increase would be:

1991 $15929.40

1992 $17025.34

1993 $18196.68

1994 $19448.61

1995 $20786.67

1996 $22216.79

107. The record also reflects that the amount established as salary for the incumbent in the Hardin County position for the first half of the calendar year 1991 is $8,500 (based on an annual salary of $17,000 for fiscal year 1990-91). (EX. C-21).

2. Insurance Premiums:

108. There is not a preponderance of evidence in the record to support the award of $6,950.77 for the difference between "insurance benefits" received by Roelfs and Boomgarden from 1986 to 1991. The record does reflect what appears to be a total of $13,405.20 paid for Roelfs' insurance premiums during that time period. (EX. C-21; C- 27). (These appear to be premiums and not "benefits" because the same amount, $1971.60, appears for three consecutive years on the sheet summarizing Roelfs' salary and benefits. (EX. C-21). And, it is clear that life, health, and dental insurance premiums are paid by Hardin County for its full- time employees. (EX. C-13). But, there is no explanation for the $6,454.43 in "benefits" received by Boomgarden during that period as listed in Exhibit C-27. Boomgarden testified that she received no insurance from HHAS, therefore it is unknown what that figure represents. (Tr. at 52). Boomgarden should be compensated, however, based on the difference between insurance premiums paid for Roelfs by Hardin County and insurance premiums, if any, paid for by either HHAS or her business.

3. Employer Contributions to Iowa Public Employee Retirement System (IPERS):

109. Boomgarden was not eligible for IPERS or other retirement program in the HHAS position, which was in a private, nonprofit corporation. (Tr. at 52). She would have received it if hired for the Hardin County position. (EX. C- 13; Tr. at 52). Therefore, she is entitled to an amount equal to the full employer contribution to IPERS for David Roelfs from 1986 to 1991, which is $5,370.50. (EX. C-21, C- 27).

4. Employer Social Security Payments (FICA):

110. Due to the increased pay which Complainant Boomgarden would have received if hired, the employer contributions to social security would have been $2,821.37 higher than those actually paid in for the period from 1986- 1991. (EX. C-21, C-27). She is entitled to be compensated for that amount.

5. Vacation Pay

111. If Boomgarden had been hired, she would have received the dollar equivalent in accumulated vacation which would have exceeded the vacation she did accrue at HHAS by the amount of $1122.74. (EX. # C-21, C-27; Tr. at 52). She should be compensated for that amount.

6. Mitigation of Back Pay Damages:

112. The Respondents did not meet their burden of proving that Complainant Boomgarden willfully failed to mitigate her damages with respect to back pay and benefits. The record shows that Boomgarden did mitigate her back pay and benefit damages by continuing in her employment at HHAS until July 31, 1990 and subsequently starting a business. (Tr. at 68, 152).

It also shows that she made application for two higher paying positions after being rejected for the Hardin County position. (Tr. at 125-26). There is no evidence in the record that there were other higher paying positions available for which she was qualified and could have applied or that she failed to use reasonable diligence in seeking such positions.

7. Emotional Distress Damages:

113. Complainant Boomgarden suffered substantial emotional distress due to the failure of Respondents to hire her. After learning she did not get the job she "went home and cried my eyes out." The newspaper had indicated, based on the second list furnished the Board by the VAC, that candidate Steven Ball had withdrawn, leaving David Roelfs as the only candidate. (EX. C-20; Tr. at 66-67). This had, understandably, given her son the impression that she had not even been considered qualified, which added to her distress. This was particularly stressful because she had been told by supervisors Lloyd, Fuller, and the members of the VAC that she was qualified. (Tr. at 67). See Findings of Fact Nos. 38-40, 42.

114. She has been upset and bothered by this decision since the day it happened, and was still bothered as of the hearing. (Tr. at 67). The first year was the worst as far as the emotional strain caused her by the discrimination she suffered in this case. (Tr. at 146). Complainant Boomgarden felt betrayed and angered by the discrimination inflicted upon her. (Tr. at 158). She was also embarrassed because the appearance had been given publicly that she was not even qualified for a position for which she is so obviously qualified based on her past experience. (Tr. at 67, 147).

115. Complainant Boomgarden did mention this case to a doctor as a source of emotional distress, although she did not seek out treatment specifically for the distress caused by this problem. (Tr. at 126-27). Complainant Boomgarden did, however, lose sleep over her treatment and would wake up at 3:00 A.M. thinking about what had happened to her. (Tr. at 146).

116. Complainant Boomgarden also suffered a substantial loss of income due to discrimination. See Findings of Fact Nos. 101-111. It can be reasonably inferred that such loss of income would cause emotional distress.

117. Complainant Boomgarden has asked for twelve thousand dollars ($12,000.00) in emotional distress damages. (EX. C-27). In light of the evidence set forth above, an award of nine thousand dollars ($9,000.00) would be full, reasonable, and appropriate compensation for the distress resulting from discrimination.

O. Credibility Findings:

118. Complainant Maxine Boomgarden, Ralph Boomgarden, Jacqueline Carman, Jerry Pence, Steven K. Ball, Marlene Ziesman, David Roelfs, Linn Adams, Bennie Spain, Charles Poncy, Marion Munsinger, and Ruth Donner were credible witnesses.

119. The credibility of Millie Lloyd and Robert Fuller is questionable as indicated by their being impeached with prior inconsistent statements on the "politics" issue. Their testimony on this issue was also incredible for other reasons. [Their testimony can be contrasted with that of

Adams, whose testimony was not unreliable because of prior inconsistent statements, but because it did not have an adequate factual basis.] See Findings of Facts Nos. 49, 51- 60.

120. Fuller and Lloyd also testified to two mutually exclusive facts, i.e. (1) that, by submitting the second list, which did not name Boomgarden, the VAC eliminated her, Shugar, and Mensing from further consideration by the Board, leaving only two veterans, Ball and Roelfs, from which to choose, and (2) the veterans preference, which is exercised only when the choice is between a veteran and nonveteran, was used in their selection of Roelfs. (Tr. at 277-81, 290, 298, 310, 333-34, 337-38, 459-61). [This testimony can be contrasted with that of Linn Adams, who thought Complainant Boomgarden was the best qualified candidate, but also felt he could not vote for her as she had been eliminated by the VAC's second list. (Tr. at 488-89). He understood that, if that were true, the Board did not need to concern itself with the veterans preference, as both remaining candidates were veterans. (Tr.at 489-90)]. It should be noted that the VAC's position is that the second list was intended to supplement the first, although Roelfs' name is repeated. (Tr. at 201, 546-47, D24-25)]. In light of the above, Fuller's and Lloyd's testimony is primarily relied upon for background information or when corroborated by other reliable evidence or other indicia of reliability.

121. In many respects, the testimony of VAC Commissioners Ziebell, Gatton, and Chaplin appears to be reliable. However, as previously noted, Ziebell's testimony with respect to having made discriminatory comments in jest and not having relayed those comments to the other board members is not credible. See Finding of Fact No. 64. The VAC Commissioners inability to provide a plausible reason for again naming Roelfs to the second list also adversely affects their credibility.

CONCLUSIONS OF LAW:

A. Jurisdiction:

1. Maxine Boomgarden's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code § 216.15(11)(formerly 601A.15(11). See Finding of Fact No. 1A. All the statutory prerequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code 216.15. See Finding of Fact No. 2A.

2. Maxine Boomgarden's complaint is also within the subject matter jurisdiction of the Commission as the allegation that the Respondent failed to hire her because of her sex falls within the statutory prohibition against unfair employment practices. Iowa Code § 601A.6 (1985). "It shall be a . . . discriminatory practice for any person to refuse to hire . . . or to otherwise discriminate in employment against any applicant . . . or employee because of the . . . sex . . .of such applicant or employee." Id.

B. Stipulated Facts:

3. There are a number of facts which have been stipulated to by the parties. See Finding of Fact No. 1. A "stipulation" is a "voluntary agreement between opposing counsel concerning

disposition of some relevant point so as to obviate [the] need for proof." BLACK'S LAW DICTIONARY 1269 (5th ed. 1979).**Stipulations as to fact are binding on a court, commission or other adjudicative body** when, as in this case, there is an the absence of proof that the stipulation was the result of fraud, wrongdoing, misrepresentation or was not in accord with the intent of the parties. In Re Clark's Estate, 131 N.W.2d 138, 142 (Iowa 1970); Burnett v. Poage, 239 Iowa 31, 38, 29 N.W.2d 431 (1948).

C. Rule Holding Parties Are Bound By Allegations Made in Pleadings and On Brief:

4. As noted in the findings of fact, Respondents identified on brief only two purportedly legitimate non- discriminatory reasons for its action in failing to hire Maxine Boomgarden, i.e. politics and the veterans preference. They admitted on brief and in their pleadings that the veterans preference had been exercised in the selection of David Roelfs. See Findings of Facts No. 45, 84. An employer making such allegations on brief or in a pleading before a court or administrative agency acting in an adjudicative capacity is bound by such allegations. Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991)(citing Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)).

5. Larson was an unemployment insurance case. Id. The Court held that an employer was bound by the reasons for termination of an employee which were stated in its brief filed with the Employment Appeal Board. Id. Since the employer had stated that the employee was terminated for inability to do work, a reason which would not disqualify the employee for unemployment benefits, it was bound by this statement. Id. Although the employee could have been terminated for misconduct in misrepresenting her qualifications, she was actually terminated for inability to do the work as admitted, on brief, by the employer. Id. Based on this admission, benefits were granted although the employer attempted to argue that the employee was terminated for misconduct. Id.

6. When an allegation, *which militates against the party making it*, is made on pleadings or in a brief, and such allegation has not been withdrawn or superseded, **it binds the party making it and must be taken as true by a court, administrative agency, or other finder of fact.** *See* Grantham v. Potthoff-Rosene Company, 257 Iowa 224, 230-31, 131 N.W.2d 256 (1965)(cited in Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)). *See also* Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991). **Thus, the Commission must take as true thefacts that (1) respondents assert, and are therefore limited to, only the two reasons cited on their brief as being their legitimate, non-discriminatoryreasons for failing to hire Complainant Boomgarden, and (2) that Respondents did exercise a veterans preference in hiring David Roelfs.** See Findings of Facts No. 45, 46, 84.

7. This does not mean that any respondent to a charge of discrimination articulates a legitimate non-discriminatory reason merely by identifying it on brief. That must be done through the production of evidence which, assuming it were believed, would set forth a lawful, non-discriminatory reason for the action alleged to be due to discrimination. Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W. 2d 512, 517 (Iowa 1990). Rather, the Respondents' legitimate non-discriminatory reasons are limited to those set forth on brief,

because by identifying only certain reasons on brief, the Respondents have admitted that those are the only reasons they may have articulated. The Respondents are bound by that admission. *See* Larson at 572. This admission is binding on the Commission it its adjudicative capacity and it may, therefore, consider only those reasons so identified on brief. *See* Id.; Grantham, 257 Iowa at 230-31,

D. Official Notice:

8. Official notice may be taken of all facts of which judicial notice may be taken and of matters within the specialized knowledge of the agency. Iowa Code § 17A.14(4). Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980). Judicial notice may be taken of all papers properly issued or filed or returned in the case then before the adjudicator. Slater v. Roche, 148 Iowa 413, 418, 126 N.W. 921, 927 (1910). *See also* C. McCormick, McCormick on Evidence 927 (2nd ed. 1984). See Finding of Fact No. 36. Judicial notice may also be taken of impartial compilations of data, such as census statistics. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 769 (Iowa 1971). See Finding of Fact No. 89. Official notice was taken with respect to various facts in Findings of Fact Numbers 1A, 4, 6, 54, 91.

E. Disparate Treatment Theory and Disparate Impact Theory:

9. This case involves two of the major theories of discrimination law, (1) disparate **treatment** theory and (2) disparate **impact** theory. Proof of discrimination under either theory is sufficient to show a violation of the Act. *See* Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W. 2d 512, 516 (Iowa 1990).

10. In the Hy-Vee case, the Iowa Supreme Court adopted the definitions of the two theories set forth by the United States Supreme Court in International Brotherhood of Teamsters v. United States:

> "Disparate treatment" . . . is the most easilyunderstood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.
>
> . . .
>
> Claims of disparate treatment may be distinguished from claims that stress **"disparate impact."** The latter **involves employment practices that are facially neutral in their treatment of different groups but that fall more harshly on one group than another and cannot bejustified by business necessity. Proof of discriminatory motive, we have held is not required under a disparate impact theory.** Either theory may, of course, be applied to a particular set of facts.

Id. (quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)(emphasis added).

F. Order and Allocation of Proof Where Complainant Relies on Circumstantial Evidence to Prove Discrimination Under the Disparate Treatment Theory:

11. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden in this proceeding was on the complainant and the Commission to persuade the finder of fact that the elements of sex discrimination in hiring. Iowa Code 216.15(7); Linn Co- operative Oil Company v. Mary Quigley, 305 N.W.2d 728, 733 (Iowa 1981). Of course, in discrimination cases, as in all civil cases, the burden of persuasion is "measured by the test of preponderance of the evidence," Iowa R. App. Pro. 14(f)(6), and not by proof beyond a reasonable doubt or other standards.

12. The burden of persuasion must be distinguished from what is known as "the burden of production" or the "burden of going forward." The burden of production refers to the obligation of a party to introduce evidence sufficient to avoid a ruling against him or her on an issue. BLACK'S LAW DICTIONARY 178 (5th ed. 1979).

13. In the typical discrimination case, in which the complainant uses circumstantial evidence to prove disparate treatment on a prohibited basis, the burdens of production, but not of persuasion, shifts. Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 443, 448 (Iowa Ct. App. 1981). **These shifting burdens of production** "***are designed to assure that the [Complainant has] his day in court despite the unavailability ofdirect evidence***." Trans World Airlines v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523, 533 (1985)(emphasis added).

14. The Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). This showing is not the equivalent of an ultimate factual finding of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 579 (1978). Once a prima facie case is established, a presumption of discrimination arises. Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W. 2d 512, 516 (Iowa 1990).

15. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows a legitimate, non-discriminatory reason for its action. Id. at 517; Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). If the Respondent does nothing in the face of the presumption of discrimination which arises from the establishment of a prima facie case, judgment must be entered for Complainant as no issue of fact remains. Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). If Respondent does produce evidence of a legitimate non-discriminatory reason for its actions, the presumption of discrimination drops from the case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

16. Once the Respondent has produced evidence in support of such reasons, the burden of production then shifts back to the Complainant to show that the reasons given are pretextual, i.e. "to show that the employer's proffered reason was not the true reason for the employment decision." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W. 2d 512, 517 (Iowa 1990). *See* Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Pretext may be shown by [1] "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent] or [2] indirectly by showing that the [Respondent's] proffered explanation is unworthy of credence." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981)).

17. This burden of production may be met through the introduction of evidence or by cross-examination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981). The Complainant's initial evidence and inferences drawn therefrom may be considered on the issue of pretext. Id. at n.10. This burden of production merges with the Complainant's ultimate burden of persuasion, i.e. the burden of persuading the finder of fact that intentional discrimination occurred. Id. 450 U.S. at 256, 101 S. Ct. at , 67 L. Ed. 2d at 217.

18. With respect to the first method of showing pretext, it seemed clear, until recently, that if the legitimate, non-discriminatory reasons articulated by an employer were shown to be false, then the adjudicator was required to find that pretext had been shown and, therefore, enter judgment for the complainant.*See e.g.* United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 717-18 (1983)(Blackmun, J. concurring); Williams v. Valentec Kisco, Inc., 964 F.2d 723, 58 Fair Empl. Prac. Cas. 1154 (8th Cir. 1992); Adams v. Nolan, 962 F.2d 791, 58 Fair Empl. Prac. Cas. 1189 (8th Cir. 1992). However, the United States Supreme Court has now held that while the finder of fact may still rely on the combination of (1) the *inference* (not the presumption) of discrimination established by the evidence which demonstrated a prima facie case and (2) a determination that the employer's articulated reasons are false or "unworthy of credence," to support a finding of discrimination; the finder of fact is allowed, but not *required,* to make a finding of discrimination under such circumstances. St. Mary's Honor Center v. Hicks, No. 92-602, slip. op. at 8 (U.S. June 25, 1993).

19. Federal court decisions, including United States Supreme Court decisions, applying Federal anti-discrimination laws or fee-shifting statutes are not controlling or governing authority in cases arising under the Iowa Civil Rights Act. *See e.g.* Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 831 (Iowa 1978). Nonetheless, they are often relied on as persuasive authority in these cases. *E.g.* Landals v. Rolfes, 454 N.W.2d 891, 898 (Iowa 1990); Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Although opinions of the United States Supreme Court are often entitled to great deference, Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866 (Iowa 1978), its decisions have been rejected as persuasive authority when their reasoning is inconsistent with the broad remedial purposes of the Act, Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d at 831, or of local civil rights ordinances. Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d at 866-67.

20. For two reasons it is not necessary, however, in this case to estimate whether this holding will be adopted by the Iowa Supreme Court with respect to the Iowa Civil Rights Act. First, even under Hicks a finder of fact is permitted to find that its "disbelief of the reasons put forward by the defendant . . . together with the elements of the prima facie case, suffice to show intentional discrimination." Id. This has been done here. See Findings of Fact Nos. 48-60. Second, the alternative method of proving pretext by "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent]" has also been utilized here. Id. at 14 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). See Findings of Fact Nos. 61-70.

1. A Prima Facie Case of Discrimination Was Established:

21. The burden of establishing a prima facie case of discrimination is not onerous. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The complainant is merely required to produce enough evidence to permit the trier of fact to infer that the employer's action was taken for a discriminatory reason. Id. at 254 n.7. A prima facie case may be shown in a variety of ways as there will be different factual circumstances present in each case. Teamsters v. United States, 431 U.S. 324, 358 (1977)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)).

22. While a prima facie case of discrimination may be established though evidence of "differences in treatment," Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W. 2d 512, 516 (Iowa 1990)(quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)), it may also be established through a "showing of treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation." City of Minneapolis v. Richardson, 239 N.W.2d 197, 202 (Minn. 1976).

23. An example of such a prima facie case of disparate treatment in hiring is established by proof that (1) Complainant is a member of a protected class, i.e. a female, (2) Complainant applied and was qualified for a position for which the employer was seeking applicants, (3) Despite her qualifications, Complainant is rejected, and (4) the position remained open and the employer continues to seek applicants of Complainant's qualifications. Schlei, Employment Discrimination Law 1298 (1983)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Of course, "the [f]acts necessarily will vary in [discrimination] cases and the specification above of the prima facie proof required . . . is not necessarily applicable to every factual situation." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

25. The presumption of illegal discrimination under this formula arises not because of any showing of different treatment between male and female applicants, but "because it eliminates the most likely legitimate causes for the employer's adverse action--a lack of minimum qualifications and the absence of a job opening. If these are not the causes, it is presumed that the employer's actions, unless otherwise explained, are more likely than not based on discrimination." Schlei, Employment Discrimination Law at 1299.

26. Given the facts of this case, a prima facie case was shown through a variant of the McDonnell Douglas formula:

> (1) Complainant is a member of a protected class, i.e. a female; (See Finding of Fact No. 20)
> (2) Complainant applied and was qualified for a position for which the employer was seeking applicants; (See Finding of Fact Nos. 20-43)
> (3) Despite her qualifications, Complainant is rejected, and; (See Finding of Fact No. 44)
> (4) the employer, after considering Complainant's application, rejects her and places a male in the position.
> (See Finding of Fact No. 44).

27. **With respect to qualifications and the prima facie case, a complainant only need show that she has met the minimum objective qualifications inorder to establish she is qualified for a position.** Woodbury County v. Iowa Civil Rights Commission, 335 N.W.2d 161, 165 (Iowa 1983)(citing United States Postal Service v. Aikens, 460 U.S. 711); Cristen Harms, 11 Iowa Civil Rights Commission Case Reports, 89, 123 (1991)(Friedman Motorcars Cases). This was established with respect to Complainant Boomgarden. See Findings of Fact Nos. 21-43.

2. Respondents Admitted One Reason for Failing to Hire

Maxine Boomgarden Which Is Unlawful and Discriminatory and Articulated, Through the Production of Evidence, One Reason Which, If Assumed to BeTrue, Is Legitimate and Non-Discriminatory:

28. Respondents have admitted that the Complainant was not hired due to the exercise of a veterans preference in favor of David Roelfs. See Finding of Fact No. 84. This reason is, under the facts of this case, illegal and discriminatory. See Conclusions of Law Nos. 32-70. Admission of an illegal and discriminatory reason does not meet the Respondents' burden of production. See Conclusion of Law No. 15.

29. Respondents did, however, produce evidence of a legitimate, non-discriminatory reason: political influence. See Finding of Fact No. 48. Since no assessment of whether the evidence produced is credible or persuasive is made at this stage of the McDonnell-Douglas analysis, Respondents have met their burden of production. *See* St. Mary's Honor Center v. Hicks, No. 92-602, slip. op. at 6 (U.S. June 25, 1993); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 67 L. Ed. 2d 207, 216-17 (1981).

3. The Complainant and the Commission Have Demonstrated That the "Political Influence" Reason For Not Hiring Complainant Boomgarden Which WasArticulated By Respondents Is a Pretext For Discrimination:

30. The "political influence" reason was shown to be a pretext for discrimination through both methods set forth in McDonnell Douglas, i.e. demonstrating that the evidence supporting the reason is "unworthy of credence" and showing that discrimination was the more likely reason for the Respondents' failure to hire. See Conclusions of Law Nos. 16, 20. There are a variety of ways

for showing that evidence of a legitimate, nondiscriminatory reason is not credible. La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409, 36 Fair Empl. Prac. Case. 913, 922 n.6 (7th Cir. 1984). Here, prior inconsistent statements of two members of the Board of Supervisors denying that political influence played a role were used to show their testimony at hearing was not credible. See Findings of Fact Nos. 51, 56. The testimony of one of these two demonstrated that she had little knowledge of David Roelf's political activities and did not even know the Complainant's political affiliation. See Findings of Fact Nos. 52-55. The opinion of the third member of the Board was shown to be based on "general talk" and not to have any substantial basis in fact. See Finding of Fact No. 49. Finally, the "political influence" reason, due to a variety of factors set forth in the findings of fact, was also shown not to be credible because it was a "proffered reason [which was] insufficient to motivate the [failure to hire]." Bechold v. IGW Systems, Inc., 817 F.2d 1282, 43 Fair Empl. Prac. Cas. 1512, 1515 (7th Cir. 1987). See Findings of Fact Nos. 51, 57-60. For example, the political campaign work of Roelfs "was something so far removed in time from the [hiring] itself that it is unlikely to have been the whole cause, even if a part of it." La Montagne, 750 F.2d at 1409, 36 Fair Empl. Prac. Cas. at 922. See Findings of Fact Nos. 57-59.

31. Pretext was also shown by evidence of statements indicating that sex discrimination was the true reason for actions of the Respondents. See Findings of Facts Nos. 61- 70. With respect to the assertion that these statements were made in jest:

> It is . . . wise to advert, as did Judge Fuld in Matter of Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 . . . to the common experience that those who discriminate unlawfully are not likely to do so in open, plainly-appearing fashion . . . . Instead, there is likely to be covert resort to subtle tactics and the pretext of intermingled motives and reasons to obscure the substantial cause. The evidence . . . was just of that character, resting in part on slips of the tongue, jests with a serious half-hidden barb, inconsistent handling, and then a smoke screen, perhaps, of obscuring lawful motivations and reasons for denying her promotion.

Pace College v. Commission on Human Rights, 38 N.Y.2d 28, 377 N.Y.S.2d 471 (N.Y. 1975). The admonition of Judge Fuld mentioned above has been quoted with approval by the Iowa Supreme Court: "One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose." Wilson-Sinclair Company v. Griggs, 211 N.W.2d 133, 140 (Iowa 1973)(quoting Holland v. Edwards, 307 N.Y. 38, 45 (1954)). By showing pretext through both methods herein discussed, sex discrimination under the disparate treatment theory has been established.

G. The Relationship Between the Veterans Preference Law and the Iowa Civil Rights Act:

32. In 1986, the year in which this hiring decision was made, the only veterans preference law which would have applied to this position was the limited veterans preference found in Iowa Code Chapter 70 (1985). This statute provided that veterans of specified past wars, including the "Vietnam Conflict beginning August 5, 1964 and ending on May 7, 1975 . . . who are citizens and residents of this state are entitled to preference in appointment and employment over other applicants **of no greater qualifications**." Iowa Code 70.1 (1985)(emphasis added).

33. This chapter contemplates a competition between a veteran covered by the statute and a non-veteran, there is no such thing as this veterans preference being applied to two competing veterans, where both of them are eligible for the preference provided by the statute. Nearguard v. Akers, 232 Iowa 1337, 1346 (1942); Douglas v. City of Des Moines, 206 Iowa 144, 147, 220 N.W. 72 (1928). See Geyer v. Triplett, 237 Iowa 664, 672, 22 N.W. 2d 329 (1946); Sorenson v. Andrews, 221 Iowa 44, 51, 264 N.W. 562 (1936); Kitterman v. Board, 137 Iowa 275, 178, 115 N.W. 885 (1908).

34. This chapter does not require a preference be given to a veteran unless the veteran is at least equally qualified to the non-veteran applicants against whom he or she is competing. Lyon v. Civil Service Commission, 203 Iowa 1203, 1212, 212 N.W. 579 (1927); see also Nearguard v. Akers, 232 Iowa 1337, 1346 (1942); Vislisel v. University of Iowa, 445 N.W. 2d 771, 772 (Iowa 1989). "[E]quality of qualifications is a condition to awarding the preference, and the purpose of requiring the ex-soldier to have equal qualifications before entitling him to preference is so as not to deprive the public of the benefit of superior service and the advantage of securing the best qualified [persons] for public service." Bender v. Iowa City, 222 Iowa 739,742, 269 N.W. 779 (1936).

35. Since the use of the veterans preference has a disparate impact on women and is not justified by business necessity, it would appear to violate the Iowa Civil Rights Act. However, Chapter 70 specifically requires a veterans preference in the limited circumstances described above. When two statutes conflict in this manner, it is best to interpret them in a manner which will give effect to both. Iowa Code 4.7. Therefore, whenever the application of a veterans preference is required under Iowa Code Chapter 70 (now renumbered to Chapter 35C), that chapter will operate as an exception to the Iowa Civil Rights Act. Whenever a veterans preference is exercised which is not required under Chapter 70, than the application of the preference may be held to violate the Iowa Civil Rights Act.

36. A similar result occurs with respect to the federal sex discrimination statute, Title VII of the Civil Rights of 1964. Title VII provides that it does not "repeal or modify any . . . law creating special rights or preferences for veterans." Section 712 of Title VII of the Civil Rights Act of 1964, as amended. However, when a a veterans preference is exercised which is not legally required, the "Courts have invalidated [such] voluntary preference under Title VII because of the adverse impact on women." Schlei, Employment Discrimination Law 433 (1983); See also Schlei, Employment Discrimination Law: Five Year Supplement 158.

37. In 1989, Chapter 250 of the Iowa Code was amended to provide that Veterans Affairs executive directors were "to possess the same qualifications as provided in section 250.3 for commission members," i.e. that they were to be veterans. (EX. R-11). This provision did not apply to any "person employed as an executive prior to the effective date of this Act," which would have been July 1, 1989, four years after the events in this case occurred. (EX. R-11) In other words, any non-veteran employed as a veterans affairs director before July 1, 1989, as the complainant would have been if hired, was permitted to remain in the position. (EX. R-11). See Iowa Code 250.6 (now 35B.6). Of course, it is not, and could not, be claimed by Respondents that this amendment is retroactive in its application or could, in any way, have been applied in

1986, over three years before its enactment. The 1989 amendment was allowed as an exhibit solely for the purpose of showing that legislator Charles Poncy had an interest in and experience in veterans affairs. (Tr. at 429-30).

38. As noted in the Findings of Fact, David Roelfs was less qualified than Complainant Boomgarden. See Findings of Fact Nos. 74-83. Therefore, the exercise of the veterans preference in Roelf's favor was not legally required and the veterans preference utilized in this case was a voluntary one which is subject to the Iowa Civil Rights Act and disparate impact analysis. See Conclusions of Law No. 35-36.

H. The Use of The Veterans Preference Has a Disparate Impact on Women:

39. The disparate impact theory of discrimination was first adopted by the Iowa Supreme Court in 1973. Wilson- Sinclair v. Griggs, 211 N.W. 2d 133, 140 (Iowa 1973). The Court quoted with approval the following language from the first United States Supreme Court decision recognizing the disparate impact theory:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment *when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.*
>
> . . .
>
> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice *which operates to exclude Negroes* cannot be shown to be related to job performance, the practice is prohibited.
>
> . . .
>
> We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing *mechanisms that operate as "built-in headwinds"* for minority groups and are unrelated to measuring job capacity.

Id. (quoting Griggs v. Duke Power, 401 U.S. 424, 430-32(1971)(emphasis added by Iowa Supreme Court). The Iowa Supreme Court held:

We adopt the persuasive rationale of Duke Power. Our legislation prohibits unfair employment practices without reference to motive, although motive is always a legitimate field of inquiry. A conscious course of practice which results in a "built-in headwind" against minorities is surely as illegal as a practice motivated by clear discriminatory intent.

Id.

40. Although Wilson-Sinclair v. Griggs and Griggs v. Duke Power were both race discrimination cases, it is well-established law that the disparate impact theory also applies in sex discrimination cases. E.g. Dothard v. Rawlinson, 433 U.S. 321, 328-329, 331 (1977); Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W. 2d 512, 521 (Iowa 1990).

41. Potential and actual applicant flow statistics were used to prove disparate impact in this case. See Findings of Fact Nos. 89-92. It has been recognized for many years that such statistics can be used to show disparate impact. In a widely cited case, the Eighth Circuit listed three principal measures of disparate impact:

> A disproportionate racial impact may be established statistically in any of three ways. The first procedure [Potential applicant flow] considers whether blacks [or women] as a class (or at least blacks [or women] in a specified geographical area) are excluded at a substantially higher rate than whites.
>
> . . .
>
> The second procedure [actual applicant flow] focuses on a comparison of the percentage of black and white [or male and female] job applicants actually excluded by the employment practice or test of the particular company or governmental agency in question.
>
> . . .
>
> Finally, a third procedure [population (labor market)/workforce comparison] examines the level of employment of blacks [or women] by the company or governmental agency in comparison to the percentage of blacks [or women] in the relevant geographical area.

Green v. Missouri Pacific Pacific Railroad, 523 F. 2d 1290, 1293-94 (8th Cir. 1975)(cited in Baldus, Statistical Proof of Discrimination 80 n.5 (1980).

42. The third procedure has since been modified by the United States Supreme Court's decision in Wards Cove Packing Company v. Antonio, 490 U.S.---, 104 L. Ed.2d 733, 747, 109 S.Ct. 2115 (1989), which was in turn modified by the enactment of the Civil Rights Act of 1991. Although this procedure was not used in this case, it shall be discussed because Respondents, on brief, have misinterpreted the focus of the Commission's and Complainant's statistical proof by claiming that it only shows an imbalance in the workforce. (Respondents' Brief at 14). Apparently respondents have confused the terms "workforce" and "labor market" for the Commission and Complainant do not rely on any workforce statistics at all, while "labor market" and population statistics are used to determine the potential applicant flow. "Workforce" refers to the employer's employees, while the labor market refers to the geographic area from which employees are drawn. Schlei, Employment Discrimination Law 1333 (1983). See Findings of Fact Nos. 86-87. In this case, workforce data are not relied upon and would not normally be relied upon given that there had been only one incumbent in the position before the 1986 opening. See Finding of Fact No. 2.

43. It is true that, under Wards Cove, evidence showing that there is a sexual imbalance in the company's workforce when compared to the relevant labor market would not be considered sufficient, by itself, to show disparate impact. Wards Cove Packing Company v. Antonio, 104 L.Ed. 2d at 751. (For example, showing that an employer's workforce (all its employees) is 15% female, while the labor market is 52% female). Rather, the statistical proof must focus on the impact of a particular employment practice, Id. The first inquiry under the method of Wards Cove would be to compare the sexual composition of the at-issue jobs and the sexual composition of the qualified population in the relevant labor market. Id., 104 L.Ed.2d at 747. (For example, that 15% of the machinists employed by an employer are female, while 30% of the machinists in the labor market are female.) Wards Cove, however, has now been modified by passage of the Civil Rights Act of 1991 to again allow a demonstration of the disparate impact of an entire decision-making process, as opposed to a particular employment practice, when the plaintiff can demonstrate that the elements of that process are not capable of separation. 42 U.S.C 2000e-2(k)(1)(B)(i).

44. In this case, the statistical proof does focus on the impact of a particular employment practice, the veterans preference, but does so by relying primarily on potential applicant flow data and, secondarily, on actual applicant flow data. See Findings of Facts Nos. A leading treatise on statistical proof of discrimination explains the potential applicant flow method:

> [T]he method of comparing qualification [selection] rates in a pool of potential applicants was first used by the Supreme Court in Griggs v. Duke Power Co. . . . Its important characteristic is that it involves an estimate of the effects of a hypothetical selection process, i.e. evidence of deferential qualifications rates among potential applicants provides a basis for estimating how they would be treated if they were considered in a selection procedure which applied the rule at issue and no other. [This] procedure can be used in any case challenging a neutral rule which embodies an objective criterion of selection on which relevant data for potential or actual applicants are available. For example, in Griggs the challenge was to a rule requiring a high school diploma as a condition for employment. The Court looked at the distribution of high school diplomas among the black and white potential applicants in North Carolina (12 percent of the black and 34 percent of the white applicants had diplomas) and concluded that the rule would have a substantial adverse impact since many more whites than blacks could satisfy the requirement. The same approach was recently used by the Court in Dothard v. Rawlinson [a sex discrimination case].

Baldus, Statistical Proof of Discrimination 107 n.14(1980).

45. In Dothard v. Rawlinson, the United States Supreme Court upheld the reliance on potential applicant flow data in the form of generalized national population statistics to show the disparate impact of minimum height and weight requirements of five feet two inches and 120 pounds on women potential applicants for correctional counselor positions in a prison in Alabama. National data demonstrated that these standards "would exclude 41.13% of the female population while excluding less than one percent of the male population." Dothard v. Rawlinson, 433 U.S. 321,

329-30 (1977). "Affirmatively stated, approximately 99.76% of the men and 58.87% of the women would meet both these physical qualifications." Id. at 330 n.12.

46. The Court rejected the argument that "a showing of disproportionate impact on women based on generalized national statistics should not suffice to establish a prima facie case" of discrimination under the disparate impact theory. Id. at 330.

47.

> The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made.

Id. at 331. Like the employer in Dothard, the Respondents have offered no countervailing statistical evidence.

48. In this case, the statistics offered are more reflective of the labor market, and thus even more probative, than national statistics such as those offered by the plaintiff in Dothard. Based on Respondent' rejection of an applicant because he lived outside the county, its recurring practices, and the residence of job applicants, an appropriate determination was made that the proper geographic scope for the labor market was Hardin County. Baldus, Statistical Proof of Discrimination 117-20 (1980); Schlei, Employment Discrimination Law 1362 (1983); Schlei, Employment Discrimination Law: 1987-89 Supplement 194 (1991). See Findings of Fact No. 48.

49. The Federal courts have held that the use of voluntary veterans preferences in employment have a disparate impact on women, are not justified by business necessity, and therefore constitute illegal sex discriminatory practices. Bailey v. Southeastern Area Joint Apprenticeship Committee, 561 F. Supp. 895, 911-12 (N.D. W. VA. 1983); Krenzer v. Ford, 429 F. Supp. 499, 502 (D.C. 1977).

49. The Equal Employment Opportunity Commission (EEOC) has also struck down voluntary veterans preferences in two cases brought before it based on their disparate impact on women. Notice N-915-056 (8/10/90)(EEOC Compliance Manual at 2099-20)(Citing EEOC Decisions para. 6577 and 6581 (CCH)(1983)).

50. The EEOC has taken "administrative notice of the fact that veterans' preferences, by their very nature, have historically placed women as a class at a disadvantage. As the cited statistics show, that disadvantage continues to this date. Therefore, it is the Commission's view that such preferences have an adverse impact on women for Title VII purposes." Id. at 2099-20).
51. The cited national statistics were the following:

Sex	Percent of Total Veterans	(Number)
Males	95.6%	(26,019,000)

Females	4.4%	(1,208,000)

Id. at 2099-17 (citing Office of Information Management and Statistics, Department of Veterans Affairs, Veteran Population (semi-annual report, 3/31/89)). When these percentages are compared to the Hardin County (96.8% male and 3.2% female) and State of Iowa (96.4% male and 3.6% female) veterans population statistics, it is clear that the EEOC would find that the veterans preference has a disparate impact on females in those locations.

52. Another way of illustrating what the Dothard court referred to as "evidence [which] . . . on its face conspicuously demonstrates a job requirement's grossly discriminating impact, " Dothard, 433 U.S. at 331, is by comparing the disparity in selection rates of potential applicants in this case to other cases where disparate impact has been found. See Id. at 330 n.12 (comparing Dothard's selection rates to those in Griggs); Baldus, Statistical Proof of Discrimination 35 (Supp. 1987).

CASE: SELECTION RATES OF POTENTIAL APPLICANTS:

Griggs v. Duke Power	34% white v. 12% black (high school)
Dothard v. Rawlinson	99.76% male v. 58.87% female (Height./Weight.)
Krenzer v. Ford	40% male v. 1% female (vet. pref.)
Hardin County (Population)	32.2% male v. 1.0% female (vet. pref.)
Hardin County (Labor Force)	39.6% male v. 2.0% female (vet. pref.)
State of Iowa (Labor Force)	39.5% male v. 2.0% female (vet. pref.)

Dothard v. Rawlinson 433 U.S. at 330 n.12; Griggs v. Duke Power, 401 U.S. at 430 n.6; Krenzer v. Ford, 429 F. Supp. at 502. See Finding of Fact No. 89.

53. In none of the three cases cited did the Courts rely on the results of tests of statistical significance or expert testimony to support the above findings of disparate impact. Such tests are used to determine whether the disparate impact reflected by a sample of a population represents an actual disparate impact within the whole population or is due to chance. See Baldus, Statistical Proof of Discrimination 189 (Supp. 1987)("[T]he question is what is the likelihood that the observed disparity represents a real impact . . . and not [a] . . . chance result that is likely to disappear when the same selection criterion is applied . . . to a much larger population of people"). In this case, the statistics presented do not show the results of the application of the criterion to a sample of the relevant population. Rather, they show the results of the application of the criterion to the entire relevant population. Under these circumstances expert testimony and tests of statistical significance are not required. In disparate impact cases "involv[ing] large samples and substantial disparities which are clearly significant [i.e. obviously not due to

chance]," courts understandably ignore the issue of whether data has been subjected to tests of statistical significance. Id. at 170, 171.

54. A final way of demonstrating the severe disparate impact which the veterans preference has in Hardin County and the State of Iowa is by applying the federal "four-fifths rule." 29 C.F.R. 1607.4(D). See Baldus, Statistical Proof of Discrimination 47 n.88 (1980); Id. at 35 (Supp. 1987). Under this rule, "[a] selection rate for any . . . sex . . . which is less than four fifths (4/5)(or eighty percent) of the rate for the group with the highest rate will generally be regarded by Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. 1607.4(D). As shown below, whether measured using the Hardin County population or labor force, or the State of Iowa labor force, the selection rate for women when the veterans preference is applied is always far less than four fifths or eighty percent of the selection rate for men. It is not more than five and one-tenth percent of the male selection rate. This shows disparate impact:

Hardin Cty. Pop. Select. Rate Women / Hardin Cty Pop. Select. Rate Men = 1.0% / 32.3% = .01 / .322 = .03 = 3.0% of selection rate for men.

Hardin Cty. Lab. Force Select. Rate Women / Hardin Cty Lab. Force Select Rate Men = 2.0% / 39.6% = .02 / .396 = .05 = 5.0% of selection rate for men.

Iowa Lab. Force Select. Rate Women / Iowa Lab. Force Select. Rate Men = 2.0% / 39.5% = .02 / .395 = .051 = 5.1% of selection rate for men.

See Finding of Fact No. 89

55. Respondents assert that the Iowa Supreme Court held in the Woodbury County case that "[a] single hiring decision by an employer is plainly insufficient to state a claim of discrimination under the disparate impact theory." Respondents Brief at 13 (citing but not quoting Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W. 2d. 443, 450 (Iowa App. 1981)). Woodbury County does not stand for such a general rule being applicable to all disparate impact cases. Woodbury County dealt with the impact of a subjective decision making process with the respect to promotions. "A claim is shown where supervisors subjectively make employment decisions without definite standards for review and a pattern clearly disfavoring minorities results." Id. at 449 (emphasis added). In Woodbury the plaintiff claimed that, in one instance only, Respondent's standard promotional procedures were not followed. Id. No pattern could emerge from a one-shot subjective decision making process.

56. In this case, however, a definite, objective standard, veterans preference, is being challenged. Under these circumstances, the objective standard can be applied to relevant populations or labor markets to ascertain if it has a disparate effect on potential applicants under the potential applicant flow method as utilized in Griggs v. Duke Power, Dothard v. Rawlinson, Krenzer v. Ford and the other cases discussed previously. See Conclusions of Law Nos. 39-41, 44-54.See also Gregory v. Litton Systems, Inc. 316 F. Supp. 401, 2 Fair Empl. Prac. Cas. 842, 843 (1970), aff'd in relevant part, 472 F. 2d 631, 5 Fair Empl.Prac. Cas. 267 (9th Cir. 1972)(individual claim of disparate impact established solely by potential applicant flow data indicating that application of objective criterion had a foreseeable disparate impact on blacks).

57. The methodology is different because the application of an objective criterion to a population of potential applicants relies on data, such as census data, which is readily available even if the criterion is only actually applied once. *See generally*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v.Duke Power, 401 U.S. 424 (1971); Krenzer v. Ford, 429 F. Supp. 499 (D.C. 1977); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (1970). With subjective hiring or promotional processes however, there must be a "track record" of the results of a number of subjective decision-making process compiled over a period of time which will then be large enough to determine whether a pattern of decision-making exists which will show a disparate impact on a protected class. See generally, Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 443, 450 (Iowa App. 1981); Rowe v. General Motors Corp., 457 F2d 438 (5th Cir. 1972).

I. The Veterans Preference Is Not Justified By Business Necessity:

58. Until the United States Supreme Court 1989 decision in Wards Cove, it was abundantly clear that an employer found to have utilized an employment practice which had a disparate impact on a protected class could escape liability only by meeting a burden of persuasion requiring that it prove that the practice was justified by a "business necessity." Dothard v. Rawlinson, 433 U.S. 321, 329, 331 n.14 (1977); Griggs v. Duke Power, 401 U.S. 424, 431 (1971); Schlei, Employment Discrimination Law 83, 91-92 (1983); Schlei, Employment Discrimination Law 1987- 89 Supplement 3-4 (1991) . See Albemarle Paper Company v. Moody, 422 U.S. 405, 425-26 (1975).

59. Before Wards Cove, the law was that;

> [F]or both private and public employers, "**the touchstone is business necessity**," Griggs, 401 U.S. at 431; a discriminatory employment practice must be shown to be **necessary to safe and efficient job performance** to survive a Title VII challenge.

Dothard v, Rawlinson, 433 U.S. 321, 331 n.14 (1977)(emphasis added). In Dothard, no business necessity was found because the employer "failed to 'rebu[t] the prima facie case of discrimination by showing that the height and weight requirements are . . . essential to effective job performance." Wards Cove Packing Co. v. Atonio, 104 LEd.2d 733, 761 (1989)(Stevens, J. dissenting)(quoting Dothard, 433 U.S. at 331).

60. In Wards Cove, however, the five member majority eased the requirements imposed on the employer for defending a disparate impact case. Instead of requiring a showing of business necessity, i.e. that a practice is essential to the safe and efficient operation of the business, the court held:

> [T]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer . . . The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not

> suffice . . . At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business.

Wards Cove Packing Co. v. Atonio, 104 L.Ed.2d at 752-53.

61. The majority also held that the employer merely carried a "burden of producing evidence of a business justification for his employment practice" and not a burden of persuasion. Id.

62. The Wards Cove business necessity standards were reiterated in Hy-Vee v. Iowa Civil Rights Commission, but were not and could not have been applied to any reason given by the employer because the employer never came up with any reason for the practice. It "came forward with **no** evidence to justify the use of the discriminatory practice. Nor does Hy-Vee even argue any business justification for the practice." Hy-Vee, 453 N.W.2d at 519, 523 (Iowa 1990)(emphasis added). Therefore, although the Wards Cove business justification standards were discussed, they have never been adopted by the Iowa Supreme Court. Id.

63. The Wards Cove decision came under intense criticism, starting, but not ending, with the dissents, because of the way it had disregarded the well-established law of disparate impact and business necessity. *E.g.* Wards Cove, 104 L.Ed.2d at 755 (1989)(Blackmun, J. dissenting) ("One wonders whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was");Id. at 759-61 (Stevens, J. dissenting) (noting that prior cases held that employer had a burden or persuasion in rebutting a prima facie case of disparate impact and expressing astonishment that the majority now held that there was no requirement that the majority now held that there was no requirement that the practice be essential); Rabinove, Major U.S. Supreme Court Civil Rights/Affirmative Action Decisions, January-June 1989, 17 J. of Intergroup Relations 50 (1990)("a measurable setback to the cause of equal employment opportunity for minorities and women"); Taylor, Supreme Court Decisions Do Grave Damage to Equal Opportunity Law, 4 Civil Rights Monitor 1 (1989) ("In [Wards Cove and Other] decisions, the Court has constructed "built-in headwinds' of its own, relaxing the duties of employers, making it far more difficult for minorities and women to prove violations of the civil rights laws").

64. As the result of the opposition to the Wards Cove abandonment of the business necessity standard and of the requirement that the employer has to persuade the fact finder that the practice is so justified, these holdings of Wards Cove were legislatively overruled by the enactment of the Civil Rights Act of 1991. R. Belton, Remedies in Employment Discrimination Law 16 (Supp. 1993). Under Title VII, an employer is now again required to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i).

65. Given that Wards Cove is now a dead letter and that the former business necessity standard has been reestablished in federal law, the later standard should be utilized by the Commission. This would also be consistent with the Commission's past decisions. In 1977, the Commission adopted a "business necessity" standard which accurately reflects that set forth by Griggs and Dothard:

> The applicable test is not merely whether there exists a business purpose for adhering to the challenged practice; the test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus the business purpose must be sufficiently compelling to override any discriminatory impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential impact on affected classes.

Genevieve Sullivan, I Iowa Civil Rights Commission Case Reports 53, 54 (1977)(adopting the test set forth in Robinson v.Lorillard Corp., 444 F.2d 791, 792 (4th Cir. 1971)). This definition has been repeatedly relied on by the Commission over the years. E.g. Nanette Tollakson, II Iowa Civil Rights Commission Case Reports 34, 38 (1978); Laura Kellen, IX Iowa Civil Rights Commission 51, 54 (1988).

66. The reason set forth for requiring a veteran in the Veterans Affairs Director position in this case is based on the idea that veterans would prefer to deal with veterans with respect to the functions of the VAC. As indicated by the evidence in the record, this reason does not meet the stringent requirements of the business necessity defense. See Findings of Fact Nos. 93-99.

67. A similar rationale set forth under circumstances similar to this case was rejected by the Federal District Court for the District of Columbia, where the policy under attack was a requirement that doctors and attorneys employed on the Board of Veterans Appeals, which disposes of appellate claims involving veterans benefits, be veterans. Krenzer v. Ford, 429 F. Supp. 499, 500-01, 503 (D.C. 1977). The argument rejected was that the nature of the work and the Veteran's Administration's constituency required only veterans on the Board. Id. at 502.

68. On the one hand, well over 50% of the appeals to the Board involved issues relating to military service, including whether to provide additional benefits for wounds or whether a death is service connected. Id. Board members would also deal personally with veterans and their families. Id. at 502-03. Veterans organizations supported the continuation of the "veterans only" requirement for Board members. Id. at 503.

69. On the other hand, five non-veteran attorneys and some non-veteran physicians had been detailed to serve on the Board in an acting capacity for varying periods of time. Id. Also some of the work of the Board clearly involved issues for which military experience is irrelevant. Id. Given that the veterans preference acted as an absolute bar to the employment of non-veterans as Board members (in other than an acting capacity), the business necessity showing "is a particularly heavy burden," which the employer failed to meet. Id.

70. In summary, the Complainant has established a prima facie case of discrimination under this theory by establishing "evidence [which] . . . on its face conspicuously demonstrates a job requirement's grossly discriminatory impact," Dothard, 433 U.S. at 331. Respondents have failed to rebut this prima facie case by meeting their burden of persuasion wherein they were required to establish a business necessity, i.e. proving that the voluntary veterans preference exercised in

this case is essential to the safe and efficient operation of the business. See Conclusions of Law Nos. 58, 64-69. In light of the above legal authorities and the facts of this case, sex discrimination under the disparate impact theory, therefore, has been established with respect to Respondents' failure to hire Maxine Boomgarden.

J. Remedies:

71. Violation of Iowa Code section 216.6 having been established the Commission has the duty to issue a cease and desist order and to carry out other necessary remedial action. Iowa Code § 216.15(8) (1993). In formulating these measures, the Commission does not merely provide a remedy for this specific dispute, but corrects broader patterns of behavior which constitute the practice of discrimination. Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971). "**An appropriate remedial order should close off 'untraveled roads' to the illicit end and not 'only the worn one.**'" Id. at 771.

Compensatory Damages:

72. The Iowa Civil Rights Act was amended effective January 1, 1979 to allow the award of "actual damages." 1978 Iowa Acts ch. 1179, *S* 16. **It is beyondquestion that, since that time, the Commission has had and still has the power to award "actual damages," which are synonymous with "compensatory damages", for the purpose of "making whole" the victims of discrimination for any losses suffered as a result of suchdiscrimination**. Iowa Code *S* 216.15(8)(a)(8)(1993); Chauffers, Teamsters, and Helpers v. Iowa Civil Rights Commission, 394 N.W.2d 375, 382 (Iowa 1986). **The Iowa Supreme Court so held in the Chauffers case in 1986, a decision which has never been overruled**. Id.

Compensation:

73. The Commission has the authority to make awards of backpay. Iowa Code § 216.15(8)(a)(1) (1993). In making such awards, interim earnings and unemployment compensation received during the backpay period are to be deducted. Id. The Complainant bears the burden of proof in establishing his or her damages. Diane Humburd, 10 Iowa Civil Rights Commission Case Rpts. 1, 9 (1989)(citing Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981)). *See*Children's Home v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Complainant may meet that burden of proof by establishing the gross backpay due for the period for which backpay is sought. Diane Humburd at 10 (citing *e.g.* EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 924 (S.D. N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977)). This the Complainant has done. See Findings of Fact No. 101-03. Backpay "should completely redress the economic injury that a discriminatee has suffered." R. Belton, Remedies in Employment Discrimination Law 337-40 (1992). Thus, it may include compensation for vacation time or pay as well as life, health, and dental insurance. Id. at 337-40; Schlei & Grossman, Employment Discrimination Law: Five Year Cumulative Supplement 536 (2nd ed. 1989). Even if a complainant does not obtain other insurance to replace that which would have been paid for by her employer, she is entitled to the amount of premiums, although not the benefits, which would have been paid by the employer. R. Belton, Remedies in Employment Discrimination Law 339-40 (1992).

74. An award of "front pay" is made with respect to wages and insurance premiums in this case. See Findings of Fact Nos. 104-07. Such an award is authorized by the Iowa Civil Rights Act. Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 532 (Iowa 1990). "Front pay is designed to compensate the discriminatee for the future economic injury that [s]he is likely to suffer between the date of judgment and the date [s]he is placed in h[er] rightful place or some other defined date." R. Belton, Remedies in Employment Discrimination Law 346 (1992). When, as here, installment in the position denied is not available as a remedy front pay is justified. *See* Id. at 353. Under these circumstances, the complainant is presumptively entitled to front pay. Id. at 353.

75. The burden of proof for establishing the interim earnings, including unemployment insurance payments, of the Complainant rests with the Respondent. Diane Humburd at 10 (citing Stauter v. Walnut Grove Products, 188 N.W.2d 305, 312 (Iowa 1973); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. at 924)). The Respondent also bears the burden of proof for establishing any failure of the Complainant to mitigate damages. Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Commission, 464 N.W.2d 478, 481 (Iowa Ct. App. 1990). The Complainant may, as Complainant Boomgarden has done here, choose to provide evidence of interim earnings she is willing to concede. Diane Humburd at 10. See Finding of Fact No. 102-03.

76. The backpay or front pay award shall end once the discriminatee's salary or wages equal what she would have received from the position she was denied. R. Belton, Remedies in Employment Discrimination Law 346 (1992).

77. The award of backpay and front pay in employment discrimination cases serves two purposes. First, "the reasonably certain prospect of a backpay award . . . provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate [employment discrimination]." Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2371-72, 45 L. Ed. 2d 280 (1975). Second, backpay serves to "make persons whole for injuries suffered on account of unlawful employment discrimination." Id. 422 U.S. at 419, 95 S.Ct. at 2372. Both of these purposes would be served by an award of backpay in the present case.

78. "Iowa Code section 601A.15(8) gives the Commissionconsiderable discretion in fashioning an appropriate remedy that will accomplish the purposes of chapter 601A." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 531 (Iowa 1990). The Iowa Supreme Court has approved two basic principles to be followed in computing awards in discrimination cases: "First, an unrealistic exactitude is not required. Second, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer." Id. at 530-531. "It suffices for the [agency] to determine the amount of back wages as a matter of just and reasonable inferences. Difficulty of ascertainment is no longer confused with right of recovery." Id. at 531 (Quoting with approval Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973)).

79. With respect to backpay from January 1, 1991 through the date of this decision the Commission has the option of either (a) retaining jurisdiction of the case in order to obtain the

data required for the formula set forth in Finding of Fact No. 105, calculate the amount of back pay for the period, and issue a supplemental order stating that amount, or (b) ordering complainant and respondents to provide this information by affidavit, supplement the record by this means, and allow the district court on enforcement of the Commission's order to calculate the amount by the formula set forth in Finding of Fact No. 105. City of Des Moines Police Department v. Iowa Civil Rights Commission, 343 N.W.2d 836, 839-40 (Iowa 1984). The Commission chooses the latter as the more practical alternative.

80. Under the same authority, the Commission chooses to order complainant and respondents to provide the life, health, and dental insurance premium information for the calendar years 1986 through 1991 inclusive by affidavit, supplement the record by this means, and allow the district court on enforcement of the Commission's order to calculate the amount by the formula set forth in the last sentence of Finding of Fact No. 108.

Damages for Emotional Distress:

81. In accordance with the statutory authority to award actual damages, the Iowa Civil Rights Commission has the power to award damages as compensation for emotional distress sustained as a result of discrimination. Chauffeurs Local Union 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 383 (Iowa 1986)(interpreting Iowa Code § 601A.15(8)). The following principles were applied in determining whether an award of damages for emotional distress should be made and the amount of such award.

Proof of Emotional Distress:

82. "[A] civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct." Hy Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 526 (Iowa 1990). "Humiliation can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d at 636 (quoted with approval in Blessum v. Howard County Board, 245 N.W.2d 836, 845 (Iowa 1980)).

83. Even slight testimony of emotional distress, when combined with evidence of circumstances which would be expected to result in emotional distress, can be sufficient to show the existence of distress. *See* Dickerson v. Young, 332 N.W.2d 93, 98-99 (Iowa 1983). Testimony of the complainant alone may be sufficient to prove emotional distress damages in discrimination cases. *See* Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977; Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. § 15388 (N.D. Ill. 1981).

84. In discrimination cases, an award of damages for emotional distress can be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). Nonetheless, such evidence in the record may be considered when assessing the existence or extent of emotional distress. *See* Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988).

Determining the Amount of Damages for Emotional Distress:

85.

> Because compensatory damage awards for mental distress are designed to compensate a victim of discrimination for an intangible injury, determining the amount to be awarded for that injury is a difficult task. As one court has suggested, "compensation for damages on account of injuries of this nature is, of course, incapable of yardstick measurement. It is impossible to lay down any definite rule for measuring such damages."
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> . . .
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> Computing the dollar amount to be awarded is a function of the finder of fact. Juries and judges have been making such decisions for years without minimums or maximums, based on the facts of the case [and] the evidence presented on the issue of mental distress.

2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24-29 (1982)(quoting Randall v. Cowlitz Amusements, 76 P.2d 1017 (Wash. 1938)).

86. The two primary determinants of the amount awarded for damages for emotional distress are the severity of the distress and the duration of the distress. Bean v. Best, 93 N.W.2d 403, 408 (S.D. 1958)(citing Restatement of Torts § 905). "'In determining this, all relevant circumstances are considered, including sex, age, condition of life, and any other fact indicating the susceptibility of the injured person to this type of harm.' And continuing 'The extent and duration of emotional distress produced by the tortious conduct depend upon the sensitiveness of the injured person.'" Id. (quoting Restatement of Torts § 905). *See also* Restatement (Second) of Torts § 905 (comment i).

Interest:

Pre-Judgment Interest:

87. The Iowa Civil Rights Act allows an award of actual damages to persons injured by discriminatory practices. Iowa Code § 601A.15(8)(a)(8). Pre-judgment interest is a form of damages. Dobbs, Hornbook on Remedies 164 (1973). It "is allowed to repay the lost value of the use of the money awarded and to prevent persons obligated to pay money to another from profiting through delay in litigation." Landals v. Rolfes Company, 454 N.W.2d 891, 898 (Iowa 1990). Pre- judgment interest is properly awarded on an ascertainable claim. Dobbs, Hornbook on Remedies 166-67 (1973). Because the amount of back pay due the Complainant at any given time has been an ascertainable claim since the time Respondents failed to hire her, pre-judgment interest should be awarded on the back pay. Such interest should run from the date on which back pay would have been paid if there were no discrimination. Hunter v. Allis Chalmers Corp.,

797 F.2d 1417, 1425-26 (7th Cir. 1986)(common law rule). The method of computing pre-judgment interest is left to the reasonable discretion of the Commission. Schlei, Employment Discrimination Law: Five Year Cumulative Supplement 543 (2nd ed. 1989). No pre-judgment interest is awarded on emotional distress damages because these are not ascertainable before a final judgment. *See* Dobbs, Hornbook on Remedies 165 (1973).

Post-Judgment Interest:

89. Post-judgment interest is usually awarded upon almost all money judgments, including judgments for emotional distress damages. Dobbs, Hornbook on Remedies 164 (1973).

Attorneys Fees:

90. The Complainant having prevailed, he is entitled to an award of reasonable attorney's fees. Iowa Code § 601A.15(8)(1989). If the parties cannot stipulate to the amount of these fees, they should be determined at a separate hearing. Ayala v. Center Line, Inc., 415 N.W.2d 603, 606 (Iowa 1987). The Commission must expressly retain jurisdiction of the case in order to determine the actual amount of attorney's fees to which Complainant is entitled to under this order and to enter a subsequent order awarding these fees. City of Des Moines Police Department v. Iowa Civil Rights Commission, 343 N.W.2d 836, 839 (Iowa 1984).

Credibility and Testimony:

91. In addition to the factors mentioned in the section entitled "Course of Proceedings" and in the findings on credibility in the Findings of Fact, the Administrative Law Judge has been guided by the following principles: First, "[w]hen the trier of fact . . . finds that any witness has willfully testified falsely to any material matter, it should take that fact into consideration in determining what credit, if any, is to be given to the rest of his testimony." Arthur Elevator Company v. Grove, 236 N.W.2d 383, 388 (Iowa 1975). "[I]n the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." NLRB. v. Pittsburgh Steamship Company, 337 U.S. 656, 659 (1949) (rejecting proposition that consistently crediting witnesses of one party and discrediting those of the other indicates bias). Second, "[t]he trier of facts may not totally disregard evidence but it has the duty to weigh the evidence and determine the credibility of witnesses. Stated otherwise, the trier of facts . . . is not bound to accept testimony as true because it is not contradicted. In Re Boyd, 200 N.W.2d 845, 851-52 (Iowa 1972).

92. Furthermore, the ultimate determination of the finder of fact "is not dependent on the number of witnesses. The weight of the testimony is the important factor." Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957). In determining the credibility of a witness and what weight is to be given to testimony, the factfinder may consider the witness' "conduct and demeanor. . . [including] the frankness, or lack thereof, and the general demeanor of witnesses," In Re Moffatt, 279 N.W.2d 15, 17-18 (Iowa 1979); Wiese v. Hoffman, 249 Iowa 416, 424, 86 N.W.2d 861, 867 (1957), as well as "the plausibility of the evidence. The [factfinder] may use its good judgment as to the details of the occurrence . . . and all proper and reasonable deductions to be drawn from the evidence." Wiese v. Hoffman, 249 Iowa 416, 424-25, 86 N.W.2d 861 (1957).

93.

> Evidence on an issue of fact is not necessarily in equilibrium because the witnesses who testify to the existence of the fact are directly contradicted by the same number of witnesses, even though there is but a single witness on each side and their testimony is in direct conflict.
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> . . .
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> Numerical preponderance of the witnesses does not necessarily constitute a preponderance of the evidence so as to require a contested question of fact to be decided in accordance therewith. . . . [T]he intelligence, fairness, and means of observation of the witnesses, and various other recognized factors in determining the weight of the evidence . . . should be taken into consideration. . . . It is, of course, well recognized that the preponderance of the evidence does not depend upon the number of witnesses.

Id., 249 Iowa at 425, 86 N.W.2d 861.

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. The Complainant, Maxine Boomgarden, is entitled to judgment because she has established that the failure to hire her for the combined position of Emergency Management Coordinator and Veterans Affairs Director by the Respondents Hardin County Veterans' Commission Board and Hardin County Board of Supervisors was based on sex in violation of Iowa Code Section 601A.6 (now 216.6).

B. Complainant Boomgarden is entitled to a judgment of nine thousand three hundred seventy dollars and twelve cents ($9,370.12) in back pay through December 31, 1990, exclusive of insurance premiums, vacation pay, and employer contributions for IPERS and social security for the loss resulting from the failure to hire her.

C. Complainant Boomgarden is entitled to a judgment of nine thousand three hundred fourteen dollars and sixty-one cents ($9,314.61) representing vacation pay, and employer contributions for IPERS and social security for the period ending December 31, 1991 for the loss resulting from the failure to hire her.

D. Complainant Boomgarden is entitled to a judgment of nine thousand dollars and zero cents ($9,000.00) in compensatory damages for the emotional distress sustained as a result of the discrimination practiced against her.

E. Interest shall be paid by the Respondents to Complainant Boomgarden on the above awards of back pay, vacation pay, and employer contributions to IPERS and social security at the rate of

ten percent per annum commencing on the date payment would have been made if complainant had received employment in the combined position of Veterans Affairs Director and Emergency Service Coordinator effective July 1, 1986 and continuing until date of payment.

F. Interest at the rate of ten percent per annum shall be shall be paid by Respondents to Complainant Boomgarden on the above award of emotional distress damages commencing on the date this decision becomes final, either by Commission decision or by operation of law, and continuing until date of payment.

G. Within 45 calendar days of the date of this order, provided that agreement can be reached between the parties on this issue, the parties shall submit a written stipulation stating the amount of attorney's fees to be awarded Complainant's attorney. If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Administrative Law Judge in writing and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of the determining the proper amount of fees to be awarded. If no written notice is received by the expiration of 45 calendar days from the date of this order, the Administrative Law Judge shall schedule a conference in order to determine the status of the attorneys fees issue and to determine whether an evidentiary hearing should be scheduled or other appropriate action taken. Once the full stipulation is submitted or the hearing is completed, the Administrative Law Judge shall submit for the Commission's consideration a Supplemental Proposed Decision and Order setting forth a determination of attorney's fees.

H. The Commission retains jurisdiction of this case in order to determine the actual amount of (a) attorneys fees (and to enter a subsequent order awarding these fees), (b) additional back pay as set forth in paragraph "I" of this order; and (c) insurance premiums as set forth in paragraph "J" of this order to which Complainant is entitled. This order is final in all respects except for the determination and award of the attorney's fees, as well as the determination of back pay and insurance premiums as set forth in paragraphs "I" and "J" below.

I. Complainant Boomgarden shall, within thirty days of the date this order becomes final, provide by affidavit to the Commission her individual actual annual earnings for the calendar years 1991 and 1992 and her additional earnings from January 1, 1993 to the date this decision becomes final either by Commission decision or by operation of law. Respondents shall, within thirty days of the date this order becomes final, provide to the Commission by affidavit the amount paid to the incumbent of the Hardin County Veterans Affairs Director and Emergency Management Coordinator position for the calendar years 1991 and 1992 and for the period from January 1, 1993 to the date this decision becomes final either by Commission decision or by operation of law. Respondents shall also provide by affidavit the amount determined to be the salary for that position for those periods of time.

J. Complainant Boomgarden shall, within thirty days of the date this order becomes final, provide by affidavit to the Commission the amount of her life, health, and dental insurance premiums paid by HHAS and her business for the calendar years 1991 and 1992 and for the period from January 1, 1993 to the date this decision becomes final either by Commission decision or by operation of law. Respondents shall, within thirty days of the date this order becomes final, provide by affidavit to the Commission the amount of the life, health, and dental

insurance premiums paid by Hardin County for the incumbent of the Hardin County Veterans Affairs Director and Emergency Management Coordinator position for the calendar years 1991 and 1992 and for the period from January 1, 1993 to the date this decision becomes final either by Commission decision or by operation of law.

K. The Respondents and Complainant shall provide to each other on July 15th of each year, from July 15, 1994 to July 15, 1996 inclusive, the information within their possession specified in Findings of Fact Nos. 104 and 105 for (1) the period from the date this decision becomes final to June 30, 1994, and for (2) the fiscal years 1994-95 and 1995- 96. The Complainant's potential earnings at HHAS shall be based on the amounts set forth in Finding of Fact No. 106. The Respondents shall then pay to Complainant for the respective periods set forth above, on each July 30th following the end of Fiscal Years 1993-94, 1994-95, and 1995- 96, the amounts resulting from application of the formula set forth in Finding of Fact No. 105.

L. Respondents are hereby ordered to cease and desist from any further practices of sex discrimination in hiring, including but not limited to the exercise of voluntary veterans preferences which are not required by law.

M. Respondents shall post, within 60 days of the date of this order, in conspicuous places at their locations in Hardin County, in areas readily accessible to and frequented by county employees, the notice, entitled "Equal Employment Opportunity is the Law" which is available from the Commission.

N. All of Respondents' future job advertising, whether print or otherwise, for a two year period commencing with the date of this order, shall state the Respondent is "An Equal Opportunity Employer". At any time during this two year period when job advertising of any nature is placed, Respondent shall also notify the Job Service of Iowa of the openings.

O. All of Respondents' management personnel involved in making decisions in hiring, including the Board of Supervisors and the Veterans Affairs Commission, shall be directed to read, and shall read, within 90 days of the date of this order, the publication Successfully Interviewing Job Applicants, which is available from the Commission.

P. Respondent Hardin County Board of Supervisors shall develop, within 120 days of the date of this order, written policies prohibiting sex discrimination in employment. Such policies shall include written policies on the veterans preference in employment designed to ensure that no veterans preference is utilized unless required by law and done in the manner required by law. These policies shall be subject to the approval of the Commission. In the event, in the sole judgment of the Commission's representative, agreement cannot be reached on the language of such policy, the version drafted by the Commission shall be adopted by the Respondent. Copies of these policies shall be provided by Respondents to all persons involved in making employment recommendations or decisions for the county of Hardin County.

Q. Respondents shall file a report with the Commission within 210 calendar days of the date of this order detailing what steps it has taken to comply with paragraphs B through F, J, and M through P inclusive of this order.

Signed this the 26th day of July 1993.

DONALD W. BOHLKEN
Administrative Law Judge
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50309
515-281-4480

FINAL DECISION AND ORDER and REMAND FOR DETERMINATION AND AWARD OF ATTORNEY'S FEES

1. On September 24, 1993, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order in its entirety with the exception of paragraph D on page 98, which awards emotional distress damages. Paragraph D is struck. The proposed decision and order as so modified is hereby incorporated in its entirety as if fully set forth herein.

Findings of Facts numbers 113 through 117 on emotional distress damages are struck in accordance with a subsequent consultation with the commissioners who ratified the act of striking these findings of fact.

2. In accordance with paragraph G on page 99 of the Decision and Order, Complainant Boomgarden and Respondents Hardin County Veterans Commission and Hardin County Board of Supervisors, Iowa are required, "provided that agreement can be reached . . . on this issue . . . [to] submit a written stipulation stating the amount of attorney's fees to be awarded Complainant" within 45 calendar days of this order. "If any of the parties cannot agree on a full stipulation to the fees, they shall so notify the Administrative Law Judge in writing and an evidentiary hearing on the record shall be held by the Administrative Law Judge for the purpose of determining the amount of the fees to be awarded."

3. In accordance with findings of fact numbers 104 through 106, conclusion of law number 79, and paragraphs H and I of the Decision and Order, the determination of back pay amounts for the calendar years 1991 and 1992 and from January 1, 1993 to the date of this order is to be accomplished by the following process:

> a. Complainant Boomgarden has already provided an affidavit detailing her earnings for the periods of 1991, 1992 and through August 1, 1993. Within thirty days of the date of this order, she shall provide an affidavit giving her earnings for the period from August 1, 1993 to the date of this order.
>
> b. The Respondents shall provide, within thirty days of the date of this order, affidavits to the Commission showing "the amount paid to the incumbent of the Hardin County Veterans Affairs Director and Emergency Management Coordinator position for the calendar years 1991 and 1992 and for the period from January 1, 1993 to the date [of this

order]" and "the amount[s] determined to be the salary for that position for those periods of time."

c. On enforcement of this order, these affidavits will be presented to the district court for its computation and award of back pay for each of these periods as set forth in finding of fact number 105 and conclusion of law number 79.

4. In accordance with finding of fact number 108, conclusion of law number 80, and paragraph J of the Decision and Order, the determination of life, health, and dental insurance premium amounts for the calendar years 1986 through 1992 and from January 1, 1993 to the date of this order is to be accomplished by the following process:

a. The affidavit previously provided by Complainant Boomgarden confirms she received no insurance or other benefits while at HHAS other than sick leave, but does not address insurance premiums paid by her business. Therefore, Complainant Boomgarden shall provide, within thirty days of the date of this order, an affidavit setting forth "the amount of her life, health, and dental insurance premiums paid by ... her business for the calendar years 1991 and 1992 and the period from January 1, 1993 to the date [of this order.]"

b. Respondents shall provide, within thirty days of the date of this order, affidavits to the Commission showing "the amount of the life, health, and dental insurance premiums paid by Hardin County for the incumbent of the Hardin County Veterans Affairs Director and Emergency Management Coordinator for the calendar years 1991 and 1992 and the period from January 1, 1993 to the date [of this order.]"

c. On enforcement of this order, these affidavits and Exhibits C-21 and C-27 will be presented to the district court for its computation and award of the difference in insurance premiums for each of these periods as set forth in finding of fact number 108 and conclusion of law number 80.

IT IS SO ORDERED.

Signed this the _____ day of _____, 1993.

Sally O'Donnell
Chairperson
Iowa Civil Rights Commission
211 E. Maple
Des Moines, Iowa 50319

Copies to:

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Asst. Attorney General

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Hardin County Veterans' Commission
ATTN: Arlo Ziebell, Chairperson
Rural Route
Hubbard, Iowa 50122

James L. Beres
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Eldora, Iowa 50627

Hardin County Board of Supervisors
Hardin County Courthouse
Eldora, Iowa 50627

NOTE: Both Respondent and Complainant filed petitions for judicial review. The Respondent appealed liability while the Complainant contested the denial of emotional distress damages. The Commission's final decision was upheld by the district court. According to the February 5, 1995 Des Moines Register, the case settled for the amount of $40,500.