



STATE OF OREGON
Legislative Counsel Committee

May 14, 2015

To: Representative John Lively
Chair, House Committee on Veterans and Emergency Preparedness

From: BeaLisa Sydlik, Deputy Legislative Counsel

Subject: Research Request Regarding Veterans' Preference in Public Employment

This memorandum addresses your request for a comparison of the Oregon Administrative Rules (OAR) of the Bureau of Labor and Industries (BOLI) to the statutes establishing and implementing the veterans' preference and interview rights of veterans contained in ORS 408.225 to 408.237. The memorandum also addresses issues and concerns about the statutory language that may have created confusion in application of the preference and interview rights by public employers. Please note that this memorandum is focused on the current rules and statutes involving the veterans' preference and interviews and does not address any proposed legislation introduced this session.

The Veterans' Preference: BOLI Administrative Rules and Applicable Statutes

OAR 839-006-0435 to 839-006-0470 set forth BOLI's rules for application of ORS 408.225 to 408.237. The rules, for the most part, repeat verbatim the language of the statutes but with some important exceptions, as follows:

839-006-0445(2): This rule states that, except as specifically provided in the rule, "there are no limitations to the number of times a person can claim the preference."

839-006-0450(2): This rule states that "[a]t each stage of the application process a public employer will grant a preference to a veteran or disabled veteran. . . ."

These rules differ from the enabling legislation in that the statutes do not specifically state that there are no limitations to the number of times a person can claim the preference nor do they state that the preference must be applied at each stage of the application process. ORS 408.230 (1) requires a public employer to "grant a preference to a veteran or disabled veteran." (Emphasis added.) ORS 408.230 (2) states that "[t]he employer shall grant the preference in the following manner. . . ." (Emphasis added.) Finally, there is no language in the enabling legislation that states a preference must be applied "[a]t each stage of the application process" as set forth in OAR 839-006-0450 (2).

Under ORS 174.127, references in the statute laws of this state to the singular number may include the plural and the plural number may include the singular. However, the object and purpose of a statute must also be considered when determining the meaning of a statute.

Application of ORS 174.127 is qualified.¹ A court will not follow a general principle of statutory construction if to do so would result in a strained interpretation of the statute.

Whether use of the words “a” and “the” in ORS 408.230 (1) and ORS 408.230 (2) means the right to a preference is singular or plural is determined by examining the text and context of the statute, including related statutes and case law and then looking to legislative history as necessary. See State v. Gaines, 346 Or. 160, 171-172, 206 P.3d 1042 (2009); State v. Klein, 352 Or. 302, 309 (2012).

The related statutes pertaining to the veterans’ preference (ORS 408.225 to 408.237) do not clarify whether the veterans’ preference is singular or plural. With respect to case law, our office could find only one case that addressed the issue. In Brown v. Dearborn, 52 Or. App. 237, 628 P.2d 405 (1981), the Oregon Court of Appeals held that veterans who had received preference points on entrance examinations for a position with a city police department were not entitled to receive additional preference points when they subsequently took an examination for promotion within the department after the Legislative Assembly had extended the veterans’ preference to promotional examinations. In that case, it was pointed out that there were nonparty veterans who had not had preference points applied at the time of their entrance examinations but were accorded the preference points at the time they took their promotional examinations. The court’s holding that veterans who had received the preference points at the time of the entrance examination could not also receive the preference later when applying for promotions supports a conclusion that the veterans’ preference was intended, at least as it existed in 1981, to apply only once and not on multiple occasions.

This interpretation is supported by the legislative history of the most recent versions of the veterans’ preference laws in Oregon.

1995: ORS 408.235, as it existed in 1995, provided that a veteran was eligible to use “the preference provided for in ORS 408.230 only for a position for which application is made within 15 years of discharge or release from service. . . .” ORS 408.235 (2) then provided that “the preference” could be used only for “a position” applied for by July 1, 1999. Also, ORS 408.235 (3) in 1995 stated that “[o]nce a veteran has used the preference provided for in ORS 408.230 and has successfully completed trial service and attained regular employee status, the veteran may not use the preference again.” (Emphasis added.) Thus, the veterans’ preference has historically been limited in the number of times and the circumstances in which it may be used.²

2007: The veterans’ preference laws were largely rewritten but still provide that “[a] public employer shall grant a preference to a veteran or disabled veteran. . . .” and that “[t]he employer shall grant the preference in the following manner”. The restriction that the preference could be used only for a position for which application was made within 15 years of discharge or release was retained. However, the limitations that a veteran whose service was during the Vietnam War had to apply for public employment by July 1, 1999, and that once a veteran had successfully completed trial service and attained regular employee status could not use the preference again, were removed.³ General J. Michael Caldwell, then deputy director of the Oregon Military Department, testified at a legislative hearing that the preference allowed veterans’ applications for public employment to get through the first phase of an application

¹ See, State of Oregon v. John Daily Brooks, Jr., 187 Or. App. 388, 397 (2003).

² See chapter 777, Oregon Laws 1995.

³ See chapter 525, Oregon Laws 2007.

process, that otherwise veteran applications often did not get to the next step, and that the legislation would help move applicants to the next stage of the application process. While these statutory changes imply that the preference could be accorded for different positions that were applied for, there was no testimony given at hearings in 2007 that the preference would apply more than once per position or at each stage of the application process for a single position.⁴

2011: ORS 408.230 was amended to add the requirements that a veteran or disabled veteran who applies for a vacant civil service position or who seeks a promotion to a civil service position must meet “minimum qualifications and any special qualifications for the position.” This legislation, however, retained reference to granting of “a preference” and that “[t]he employer shall grant the preference in the following manner.”⁵ There was no testimony given at hearings in 2011 that the preference would apply more than once per position applied for or at each stage of the application process.

Interviews: BOLI Administrative Rules and Applicable Statutes

839-006-0450(6): This rule mirrors the language of ORS 408.237. Both the rule and the statute provide that, when an interview is a component of the selection process for a civil service position or for an eligibility list, a public employer must interview each veteran who:

(a) Meets the minimum qualifications and special qualifications for the position or list;
and

(b) Submits application materials that show sufficient evidence, as determined by the public employer, of “transferable skills required and requested by the public employer” for the position or list. (Emphasis added.)

The term “transferable skills” is defined in both the rule and the statute as “a skill that a veteran has obtained through military education or experience that substantially relates, directly or indirectly, to the civil service position for which the veteran is applying.”⁶

ORS 408.237 was enacted in 2011. It is clear from the language of the statute and from the testimony before legislative committees that only those veterans who meet not only minimum and special qualifications, but who also demonstrate transferable skills to the employer’s satisfaction, must be interviewed.

Testimony before the House Committee on Veterans Affairs and the Senate Committee on Veterans’ and Military Affairs in 2011⁷ regarding House Bill 3207 (chapter 484, Oregon Laws 2011) demonstrates the following legislative intent and considerations:

- There are concerns that veterans have high unemployment, one reason being that they cannot get interviews.
- Veterans do better in interviews than on tests.
- Not every veteran should be interviewed; to do so would lead to false hopes.
- Veterans need training on how to present their military training and expertise to show that they have “transferable skills” for a civil service position.

⁴ April 10 and 26, 2007, and May 22, 2007, hearings before Senate Committee on Education and General Government.

⁵ See chapter 82, Oregon Laws 2011.

⁶ OAR 839-006-0440(10) and ORS 408.237 (1)(b).

⁷ March 1 and 29, 2011, public hearings and work sessions before the House Committee on Veterans Affairs, and May 11, 18 and 25, 2011, before the Senate Committee on Veterans’ and Military Affairs.

- The League of Oregon Cities and the Association of Oregon Counties are concerned that some civil service positions have hundreds of applicants who meet the minimum and special qualifications. The requirement that veterans also have “transferable skills” narrows the interview pool to something manageable.
- Legislators do not intend to dictate to employers how many persons they must interview; some legislators considered the concept of putting a cap on the number of applicants who may be interviewed.
- A proposal that every veteran be interviewed was eventually overruled in committee because of logistical and budgetary concerns. This was narrowed down to interviews only for veterans with transferable skills.
- Veterans bear the responsibility for demonstrating they have the transferable skills required for the position.
- The interview requirement of the legislation does not affect the veterans’ preference law already in effect.
- The Oregon Department of Veterans’ Affairs will work with veterans to develop instructions and methods for translating transferable skills into the qualifications for civil service positions.

Issues Raised by Ambiguity in the Statutes and Rules

Interpretation and application of both the veterans’ preference and the interview requirement has been made difficult by the lack of definitions of terms used in the relevant statutes, as follows:

- “Initial application screening” is an undefined term used in ORS 408.230 (1)(a).
- “Application examination” is an undefined term used in ORS 408.230 (1)(a).
- “Minimum qualifications” is an undefined term used in ORS 408.230 (1)(b).
- “Special qualifications” is an undefined term used in ORS 408.230 (1)(b).
- “Special consideration” is an undefined term used in ORS 408.230 (2).

ORS 408.230 (1) requires a public employer to grant a preference to a veteran or disabled veteran who applies for a vacant civil service position or who seeks a promotion to a civil service position with a higher maximum salary if the veteran or disabled veteran:

- (a) Successfully completes an initial application screening or an application examination for the position; or
 - (b) Successfully completes a civil service test administered by the employer; and
 - (c) Meets the minimum qualifications and any special qualifications for the position.
- (Emphasis added.)

These terms are essential to determining when a public employer is required to grant a preference. Since the terms are undefined, there is considerable debate and inconsistency in what they mean and how they are applied. For the preference to be uniformly applied by all public employers, the terms must be clearly defined to take into account the various types of civil service positions that exist, the different requirements for each type of civil service position, and the fact that public employers have different processes for screening potential candidates, including components such as reference checks, background and criminal history checks, psychological and physical examinations, single or multiple interviews, nonscored and pass-fail tests, and the use of telephone, online or in-person interviews. Without clear definitions, ambiguity and inconsistent application of the laws result.

Incomplete Statutory Instructions for Applying the Preference

ORS 408.230 (2) sets forth how the preference required by subsection (1) of that statute shall be applied:

(a) ORS 408.230 (2)(a) provides that when there has been “an initial application screening used to develop a list of persons for interviews, the employer shall add five preference points to a veteran’s score and 10 preference points to a disabled veteran’s score.” (Emphasis added.) The term “initial application screening” is not defined in statute or rule; thus, there are application screenings that may be done not to develop a list of persons for interviews but for other reasons, such as to determine qualifications, to perform background or criminal history checks, to administer examinations or to do reference checks. The statute does not address how the preference is to be applied when an initial application screening is done for a purpose other than to develop a list of persons for interviews.

(b) ORS 408.230 (2)(b) provides that when there has been “an application examination, given after the initial application screening, that results in a score, the employer shall add . . . five preference points to a veteran’s score and 10 preference points to a disabled veteran’s score.” (Emphasis added.) The term “application examination” is not defined anywhere in statute or rule; thus, there are application examinations that may conceivably be administered before or without an initial application screening even taking place. The statute leaves unexplained how the preference should be applied when an “application examination” is done before or without an “application screening.”

(c) ORS 408.230 (2)(c) provides that when “an application examination that consists of an interview, an evaluation of the veteran’s performance, experience or training, a supervisor’s rating or any other method of ranking an applicant that does not result in a score, the employer shall give a preference to the veteran or disabled veteran.” (Emphasis added.) The public employer is required to “apply methods by which the employer gives special consideration in the employer’s hiring decision to veterans and disabled veterans.” (Emphasis added.) Since neither “methods” nor “special consideration” is defined or explained in the statute, the instruction to employers appears to be that the employer shall develop or create such methods and special consideration in the public employer’s discretion.

These three scenarios are the only circumstances listed in rule or statute to provide instruction to public employers as to how to apply the required preference. However, the number and type of different hiring processes and decisions that public employers across the state use and make cannot possibly be addressed by these three scenarios alone.

Conflicting Statute and Rule Provisions Regarding Mandatory Hiring

ORS 408.230 (4) and OAR 839-006-0460(1) provide that a public employer must appoint a veteran or disabled veteran to a vacant civil service position if the results of the veteran’s or disabled veteran’s application examination, when combined with the preference, are equal to or higher than the results of an application examination for an applicant who is not a veteran or disabled veteran. Neither this statute nor this rule addresses whether the public employer must appoint a veteran or disabled veteran when only an initial application screening, or an application examination that does not result in a score, is the basis of the hiring decision.

ORS 408.230 (3) and OAR 839-006-0460(2) state generally that providing for a preference does not mean a public employer is required to appoint a veteran or disabled

veteran to a civil service position. ORS 408.230 (5) and OAR 839-006-0460(3) state that a public employer may base a decision not to appoint a veteran or disabled veteran solely on the veteran's or disabled veteran's merits or qualifications with respect to the vacant civil service position. These latter provisions conflict with the requirements of ORS 408.230 (4) and OAR 839-006-0460(1) that a public employer must appoint a veteran or disabled veteran if the combined results of the application examination and the preference are equal to or higher than the results of another applicant who is not a veteran or disabled veteran. It is difficult to reconcile these provisions, since they appear to both require appointment by the public employer and leave the decision to appoint a veteran or disabled veteran to the discretion of the public employer.

Conclusion

The BOLI rules that state that a veteran or disabled veteran is entitled to use the veterans' preference an unlimited number of times and that the preference applies multiple times at each stage of the application process for a civil service position is not necessarily supported by the legislative intent as reflected in the text and content of the relevant statutes, the existing case law or the legislative history. Furthermore, the lack of definitions and the ambiguity and vagueness of the statutes and how to apply them makes it difficult for public employers to discern and comply with the legislative intent.

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