IN THE SUPREME COURT OF THE STATE OF OREGON

MULTNOMAH COUNTY SHERIFF'S OFFICE,
Petitioner – Petitioner on Review,

v.

ROD EDWARDS and BUREAU OF LABOR AND INDUSTRIES,
Respondents – Respondents on Review.

Oregon Bureau of Labor and Industries
0114

Oregon Court of Appeals
A157146

Oregon Supreme Court
S064109

BRIEF OF *AMICI CURIAE* LEAGUE OF OREGON CITIES AND ASSOCIATION OF OREGON COUNTIES

Review of the decision of the Court of Appeals in a judicial review from a Final Order by the Bureau of Labor and Industries

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Author of Opinion: DeHoog, J.
Concurring Judges: Sercombe, P.J., Tookey, J.

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I. INTEREST OF *AMICI CURIAE*

Founded in 1925, the League of Oregon Cities ("LOC") is an intergovernmental entity consisting of Oregon's 241 incorporated cities that was formed to be, among other things, the collective voice of Oregon's cities before the state courts and state legislature. The Association of Oregon Counties ("AOC") is an intergovernmental entity formed in 1906 by Oregon's counties for the purpose of promoting and advocating the common interests of Oregon's 36 county governments.

LOC and AOC ("*Amici*"), on behalf of their member entities, have a substantial interest in the outcome of this case because it is the first to interpret one of the key provisions of Oregon's veterans' preference law, ORS 408.230, which applies to every competitive recruitment conducted by every public employer in the State of Oregon. Specifically, at issue in this case are the means and methods by which public employers must award a preference to eligible veterans when conducting unscored competitive recruitments for public positions. For the reasons set out below, and in the Multnomah County Sheriff's Office's Brief on the Merits, the Court of Appeals decision in *Multnomah County Sheriff's Office v. Edwards*, 277 Or App 540, 373 P3d 1099 (2016) imposes an unworkable standard and places burdens on public employers that exceed the statutory mandate.

Without correction by this Court, every public employer in Oregon will be subject to an inflexible standard that deprives public employers of the ability to hire the most qualified candidate in the recruitment and selection of public employees. The interest of *Amici*, simply stated, is to seek a restoration of the flexibility and balance that the legislature intended when it adopted ORS 408.230.

II. SUMMARY OF THE ARGUMENT

Oregon's veterans' preference statutes serve an important public purpose. Those statutes provide a means to assist veterans with entry or reentry into the civilian workplace, and to ensure public employers give proper weight to a veteran's skills and attributes gained while serving in the armed forces. However, given the diversity among public employers and hiring practices, and the need to tailor recruiting processes to accommodate that diversity, the legislature saw fit to give public employers flexibility in deciding how to administer and apply the veterans' preference. Additionally, so as to balance a meaningful preference for veterans against fairness to nonveteran applicants, the legislature limited application of the preference to a single point in a hiring process.

Nevertheless, the Bureau of Labor and Industries' ("BOLI") order in this case, the administrative rules upon which the order was based, and the Court of Appeals opinion in this matter, fail to recognize those legislative decisions.

Specifically, BOLI and the Court of Appeals ruled in error that Oregon's veterans' preference laws require public employers to devise and use a rigid method of applying the preference for every recruitment conducted by that employer, and require the preference be applied at every stage of a hiring process. In addition, both BOLI and the Court of Appeals erred in awarding emotional distress damages because no statutory basis exists for BOLI to award such damages for an employer's alleged failure to adhere to Oregon's veterans' preference statute. Consequently, this Court should reverse and remand this matter back to BOLI for a decision that is consistent with the legislature's intent, as demonstrated by the text, context, and legislative history of the relevant statutes.

III. ARGUMENT

A. BOLI lacks authority to adopt OAR 839-006-0450(2), the administrative rule that requires employers to apply the preference at "each stage of the application process."

As a preliminary matter, the Court should first address whether BOLI has authority to adopt the rules upon which the decision in this case is based. Specifically, OAR 839-006-0450(2), which requires public employers to apply a preference for a veteran at every stage of an application process for a civil service position, provides:

> "At each stage of the application process a public employer will grant a preference to a veteran or disabled veteran who successfully completes an initial application screening or an

> application examination or a civil service test the public employer administers to establish eligibility for a vacant civil service position."

Both BOLI and the Court of Appeals relied upon that rule in determining that the Multnomah County Sheriff's Office (the "County") had failed to properly devise and apply a method of preference to an unscored hiring process. Specifically, despite the County having given the preference in the form of an interview (and a presumption in subsequent stages that the veteran was the number one candidate), BOLI and the Court of Appeals concluded that the County had failed to properly apply a preference at every stage, in violation of OAR 839-006-0450(2). *See Edwards*, 277 Or App at 555-59 (discussing BOLI's application of the rule). The problem with that conclusion is that not only does the rule exceed the veterans' preference statutes by imposing on employers an obligation that is not required by those statutes (as explained further below), BOLI also lacked express or implicit authority to have adopted that administrative rule.

As a general proposition, an agency is limited to only that authority expressly provided for by statute. This Court has long recognized that an administrative agency lacks authority to take action, establish rules, or arrive at particular conclusions simply because the agency believes it is necessary to do so to serve the public interest or arrive at a just result:

> "A statute which creates an administrative agency and invests it with its powers restricts it to the powers granted. *The agency has no powers except those mentioned in the statute.* It is the statute, not the agency, which directs what shall be done. *The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare."*

Gouge v. David, 185 Or 437, 459, 202 P2d 489 (1949) (emphasis added). Consequently, a court may declare a rule invalid when it concludes that the rule "exceeds the statutory authority of the agency that adopted the rule." ORS 183.400(4).[1] A rule is invalid if it exceeds the scope of the agency's statutory grant of authority either because the legislature did not authorize the agency to engage in rulemaking or because the rule conflicts with the statute by imposing requirements that exceed the statute. *State ex rel. Engweiler v. Felton*, 350 Or 592, 627, 260 P3d 448 (2011) (noting that an agency exceeds its authority when it adopts rule without authority and when it adopts rules for which the agency had authority, but the rules impose obligations greater than what the statute requires).

When reviewing whether an agency acted within its statutory authority, the court's inquiry is limited to "the wording of the rule itself (read in context) and the statutory provisions authorizing the rule." *Wolf v. Oregon Lottery*

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[1] As a matter of procedure, a party may challenge a rule's validity either directly in a proceeding before the Court of Appeals under ORS 183.400(1), or, as is the case here, collaterally in reviewing an order or proceeding enforcing the administrative rule under ORS 183.400(2).

Commission, 344 Or 345, 355, 182 P3d 180 (2008) (citing ORS 183.400(3)(a), (b)); *see also Oregon Newspaper Publishers Ass'n. v. Dept. of Corrections*, 329 Or 115, 118-19, 988 P2d 359 (1999) (explaining that if rules "on their face comply with applicable constitutional and statutory requirements * * * any further challenge to them must be made on an 'as applied' basis"). As with other questions of statutory interpretation, in determining whether an agency has rulemaking authority, the court should seek to understand the legislature's intent by examining the text and context of the relevant statutes and, if useful to the analysis, pertinent legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). As to the question of whether BOLI has authority to adopt substantive rules interpreting ORS 408.230, the Court need not look any further than the text of the relevant statutes.[2]

Oregon's Administrative Procedures Act requires state agencies to identify both the statutory rulemaking authority and the statutes the rule is intended to implement when promulgating rules. ORS 183.335(2)(b)(A), (B). When it promulgated OAR 839-006-0450(2), BOLI cited to ORS 659A.805 as the statutory basis for BOLI's authority to adopt the rule, and ORS 408.230 as the statute the rule is intended to implement. Oregon Bulletin, Volume 47, No.

[2] Indeed, presumably because it was so firmly settled in the minds of the legislature that it was not granting BOLI rulemaking authority to implement ORS 408.230, there is no discussion about giving BOLI that authority in the legislative history of the various amendments to ORS 408.230.

12, p. 36 (December 2008) (initially adopted as an unnumbered section under OAR 839-006-0450) (App-1 to App-2).

Although ORS 659A.805 does give BOLI certain rulemaking authority, the scope of that authority does not include implementation of ORS 408.230. At no point does the text of ORS 659A.805 mention veterans or ORS 408.230. Rather, the text of ORS 659A.805 makes clear that BOLI's rulemaking authority is limited to establishing "internal operation and practice and procedure before the [BOLI] commissioner," defining what constitutes certain unlawful actions relating to housing and employment on the basis of "race, color, religion, sex, sexual orientation, national origin, marital status, or disability * * * age [and] * * * familial status or source of income." ORS 659A.805(1) (internal subsection references omitted).

The only possible linkage between ORS 408.230 and BOLI's rulemaking authority under ORS 659A.805 is a tenuous one, and not a valid basis for BOLI to adopt non-procedural rules such as OAR 839-006-0450(2). That linkage is as follows: ORS 408.230(6) provides that a violation of that section is "an unlawful employment practice" and ORS 408.230(7) provides that "a veteran or disabled veteran claiming to be aggrieved by a violation of this section may file a verified written complaint with the Commissioner of the Bureau of Labor and Industries in accordance with ORS 659A.820." ORS 659A.820, in turn, sets out a general complaint procedure for other unlawful employment practices

prescribed by that chapter. Within ORS 659A.805, the statute granting BOLI rulemaking authority, is a provision that gives BOLI authority to adopt rules "covering any other matter required to carry out the purposes of this chapter [ORS 659A]." However, to conclude that provision gives BOLI authority to reach through ORS 659A.820 (a procedural statute) to adopt a substantive rule relating to the application of veterans' preference is a textual overreach of the grant of legislative authority.

To be certain, the legislature has given BOLI authority to interpret and apply Oregon's veterans' preference statute. However, that grant of authority is expressly in the form of quasi-judicial authority wherein BOLI is allowed to issue orders in contested cases. *See* ORS 408.230(7) (referencing the complaint and contested case procedures of ORS 659A.820). At first blush it may seem academic that BOLI announced its interpretation through a rule, rather than through the case-by-case basis of a contested case proceeding. However, the difference is vitally important not only for constitutional reasons relating to separation of powers and the scope of agency delegation, but also because interpreting statutes through quasi-judicial decisions allows for development and evolution of the law in a way that rulemaking cannot achieve – and it is that difference that the legislature had in mind when it delegated quasi-judicial decision-making authority to BOLI relating to veterans' preference, without concurrent rulemaking authority.

Indeed, the legislature made an intentional choice to give BOLI the authority to hear complaints and issue orders, thereby allowing development of the law in this area to proceed over time and with experience on a case-by-case basis, subject to judicial review.[3] As discussed further below, that choice is consistent with the legislature's intent to craft ORS 408.230 in a manner that would allow public employers flexibility in meeting its requirements, in recognition of the variety of methods by which public employers select among qualified candidates. It was not the legislature's intent, as BOLI might suggest, to give BOLI rulemaking authority to "fill the gaps" created by the wording of ORS 408.230. Rather, the legislature intentionally left gaps that were designed to give public employers flexibility in meeting the requirements of ORS 408.230. However, the legislature wanted to provide persons who believed they were not given the required preference a means by which they could obtain proper relief. That was a rational and, as demonstrated by the text of the relevant statutes, intentional choice by the legislature to allow further refinement of the statute to occur over time, rather than through the rigid

[3] By making a violation of ORS 408.230 an "unlawful employment practice," the legislature also gave a person aggrieved by an employer's decision the ability to seek a remedy in circuit court without first resorting to the administrative adjudication process. *See* ORS 408.230(6) (declaring a violation of veterans' preference an "unlawful employment practice); ORS 659A.870(1), (2), ORS 659A.885(1), (2) (allowing an aggrieved veteran to file a civil action alleging a violation of ORS 408.230 in circuit court without first filing a complaint with BOLI).

inflexibility of an agency's rule developed without the benefit of understanding the variety of possible application processes. Consequently, this Court should decide as a preliminary matter that BOLI lacked clear and express statutory authority to adopt OAR 839-006-0450(2).

B. The text, context, and legislative history of ORS 408.230 shows that a public employer is required to apply a veterans' preference only once in an application process. Because OAR 839-006-0450(2) requires an employer to provide a preference at "each stage of the application process," it exceeds the scope of ORS 408.230 and is therefore invalid.

Even if BOLI had authority to adopt OAR 839-006-0450(2), the rule – and its application in this case – is invalid because it exceeds the statutory mandate imposed on public employers. Because administrative agencies obtain their rulemaking authority from the legislature, a court should presume that when challenged, an administrative rule is invalid unless it can be shown that the legislature expressly gave the agency rulemaking authority and that the rule does not exceed the scope of the statute. The Court of Appeals, however, went a different direction when it upheld OAR 839-006-0450(2), reasoning (without a close examination of the text, context and legislative history of ORS 408.230) that the rule was valid unless it could be shown that the statute expressly restricts BOLI from requiring the preference be applied at every stage of the application process.

As explained more below, this Court has rejected such reasoning, which if allowed to stand results in a presumption that once delegated rulemaking authority, administrative agencies have plenary authority unless curbed by the legislature – a result that is contrary to Article III, Section 1, of the Oregon Constitution. Additionally, the text, context and legislative history of ORS 408.230 clearly shows that a public employer is required to apply a veterans' preference only once in an application process. Consequently, even under the Court of Appeals reasoning, OAR 839-006-0450(2) is invalid because it exceeds that mandate by requiring something more than the statute requires. Consequently, this Court should declare OAR 839-006-0450(2) invalid and remand this case back to BOLI for a determination that is consistent with the legislature's intent.

1. *Under Article III, Section 1, of the Oregon Constitution, an agency's rule must fall within the limits of the enabling statute, and the test for whether an agency rule complies with that requirement is not, as the Court of Appeals held, whether anything in the statute restricts the substance of the rule, but rather whether the rule falls within and is consistent with the statute.*

Determining whether an agency rule imposes requirements that are in excess of the statute requires the court to interpret the relevant statute using the usual methods for statutory interpretation. *See Blachana, LLC v. Bureau of Labor and Industries,* 354 Or 676, 687-88, 318 P3d 735 (2014) (applying usual

statutory interpretation paradigm to determine meaning of non-delegative terms). Determining the intended meaning of a statute ultimately is a question of law. *Bergerson v. Salem-Keizer School District*, 341 Or 401, 411, 144 P3d 918 (2006). Thus, when reviewing an agency's rule against a challenge that it exceeds state law, the court's inquiry is whether the rule is consistent with the legislature's intent. *Coffey v. Board of Geologist Examiners*, 348 Or 494, 502–06, 235 P3d 678 (2010) (so analyzing agency action). However, that inquiry is subject to principles of administrative law, which in turn are based upon constitutional law principles relating to separation of powers.

As an administrative agency, and as a matter of constitutional law, BOLI lacks inherent rulemaking or adjudicatory authority. *See* Or Const, Art III, § 1 ("The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another[.]"); *Gouge*, 185 Or at 459. Rather, BOLI has only that authority specifically conferred, or delegated, to it by the legislature. *SAIF Corp. v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998) ("An agency has only those powers that the legislature grants and cannot exercise authority that it does not have."). It follows that a rule which the agency had authority to adopt, must nonetheless be consistent with statute, and a rule that imposes requirements on persons or entities that exceeds statutory requirements

is invalid. *McCarthy v. Coos Timber Co.*, 208 Or 371, 390, 302 P2d 238 (1956) ("Rules must be appropriate, reasonable, within the limitations of the law for the enforcement of which they are provided. They must be consistent with the law and of such a nature as to tend to its enforcement."). Consequently, "this [C]ourt has consistently held that an administrative agency may not, by its rules, amend, alter, enlarge or limit the terms of a legislative enactment." *Univ. of Or. Co-operative Store v. State, Dep't of Revenue*, 273 Or 539, 550, 542 P2d 900 (1975).

Indeed, there is a sound constitutional basis for this Court to not allow an administrative agency to amend, alter, enlarge or limit the terms of a legislative enactment. As one Oregon constitutional law scholar explained, "[t]he attendant danger in [administrative rulemaking] is a concentration of power in the Executive Department, which possesses the potential both for 'making' and for enforcing the law. The court's concern in this area is a lack of accountability in the governmental process." Roy Pulvers, *Separation of Powers Under the Oregon Constitution: A User's Guide*, 75 Or L Rev 443, 451-52 (1996). Consequently, to hold administrative agencies accountable, this Court has rightly required agencies, when adopting administrative rules, to stay within the rule and legislative intent of the statute being implemented. *Planned Parenthood Ass'n. v. Department of Human Resources*, 297 Or 562, 574, 687

P2d 785 (1984); *Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or 348, 354, 15 P3d 29 (2000).

Conversely, the reasoning of the Court of Appeals decision in this matter runs contrary to those well established constitutional principles governing the source and scope of administrative agency authority. Reasoning that "nothing in the text or context of the underlying statute limits the application of the veterans' preference to a single stage when employers use unscored application processes" and citing *Halperin v. Pitts*, 352 Or 482, 495, 287 P3d 1069 (2012) for the proposition that remedial statutes should be construed liberally, the Court of Appeals held that BOLI did not err in concluding that the County was required to grant Respondent Edwards a preference at more than one stage. However, because the court's inquiry should be based on constitutional principles relating to agency delegation, it should not matter whether the statute at issue is remedial or not.

Consequently, the inquiry in this case is not – as the Court of Appeals analysis suggests – whether the statute requires that the preference be applied only at the first stage of an application process, but rather whether the statute requires what BOLI's rule requires: That a public employer apply the preference at every stage of an application process. The difficulty with both BOLI's interpretation, and the Court of Appeals' holding, is that both are inconsistent with the text, context, and history of ORS 408.230, Oregon's

veterans' preference statute. For the reasons that follow, the statute does not impose a requirement on employers to apply a preference at every stage, and therefore this Court should declare BOLI's rule invalid.

2. *Because ORS 408.230 uses exact and inexact terms, BOLI is to receive no deference in interpreting those terms, the text and context of which shows that the legislature intended to require a public employer to apply veterans' preference only once during an application process.*

When interpreting the meaning of a statute as against an agency's interpretation, this Court uses its usual interpretative paradigm and examines the text and context of the statute and, if helpful, legislative history. *See Blachana,* 354 Or at 687-88 (applying usual statutory interpretation paradigm to determine meaning of non-delegative terms); *Gaines*, 346 Or at 171-72. Only with respect to delegative terms, is an administrative agency's construction of a statute entitled to a measure of deference. *See generally Springfield Education Ass'n. v. Springfield School Dist.*, 290 Or 217, 223, 621 P2d 547 (1980). When a statute uses exact or inexact terms, the courts examine the meaning of the statute without deference to the agency's construction. *Blachana*, 354 Or at 687 (agency's interpretation of nondelegative term "is not entitled to deference on review"); *Schleiss v. SAIF*, 354 Or 637, 642, 317 P3d 244 (2013) ("[T]he Director's construction of the [inexact] statutory term in his rule is not entitled to deference on review.").

Exact terms "impart relatively precise meanings," and "[t]heir applicability in any particular case depends upon agency factfinding." *Id*. at 223-24. Appellate courts review an agency's application of exact terms for substantial evidence and consistency with the legislative policy expressed by the exact term. *Coast Security Mortgage Corp.*, 331 Or at 354. Inexact terms "express a complete legislative meaning but with less precision." *Id.*; *Bergerson*, 341 Or at 411.

Delegative terms "express incomplete legislative meaning that the agency is authorized to complete." *Coast Security Mortgage Corp.*, 331 Or at 354. Examples include such terms as "good cause," "fair," "undue," "unreasonable," and "public convenience and necessity." *Springfield Education Ass'n.,* 290 Or at 228. However, agencies are not authorized to exceed the scope of the statute when completing that legislative meaning. Appellate courts review an agency's interpretation of delegative terms to ensure that the interpretation is "within the range of discretion allowed by the more general policy of the statute." *Id.* at 229.

Here, ORS 408.230 requires public employers to apply a preference in the application process for civil service positions. ORS 408.230(1), (2). Although ORS 408.230(6) and (7) give BOLI adjudicatory authority to hear complaints by veterans who believe they were entitled to, but did not receive, a preference, nowhere in the text of the statute does it use delegative terms, such

as good cause, fair, undue, reasonable, etc. Rather, the terms of the statute are exact and inexact. Specifically, ORS 408.230(2) requires a public employer to give an additional five points to a "veteran" applicant, or ten points to a "disabled veteran" applicant, for "an initial application screening used to develop a list of persons for interviews," or "for an application examination * * * that results in a score." If the application examination "consists of an interview," then the employer is required to "devise and apply methods by which the employer gives special consideration in the employer's hiring decision to veterans and disabled veterans." ORS 408.230(2)(c). Given the exact (*e.g.* "five points") and inexact (*e.g.* "application examination") phrases used in the statute, the meaning of those phrases, and whether they require an employer to apply a preference at every stage of the application process, is a question of law for which BOLI receives no deference.

At the outset, it is remarkable that nowhere in the text of ORS 408.230 does it expressly require an employer to apply a preference to an eligible veteran at every stage of a multi-stage hiring process. Indeed, the text of ORS 408.230 expressly states that the "[p]references of the type described in subsection (1) of this section are not a requirement that the public employer appoint a veteran or disabled veteran," and that "[t]he employer may base a decision not to appoint the veteran or disabled veteran solely on the veteran's or disabled veteran's merits or qualifications." ORS 408.230(3), (5). However,

that is precisely the result of BOLI's rule in an unscored multi-stage hiring process.[4] Because BOLI's rule requires the preference be employed at every stage of an application process, in an unscored multi-stage process, the compounding effect would be to practically require an employer to appoint the veteran regardless of the veteran's qualifications – a result that is clearly beyond the legislature's intended policy as set out by the text of the statute.

To be certain, ORS 408.230 is not well constructed. Its various pieces do not fit together with precision. However, those pieces can be read in harmony, and, taken together, they demonstrate the legislature's intent to give veterans a leg up in the selection for public positions by applying a preference at a single point in a selection process, and not at every stage as BOLI contends. Specifically, ORS 408.230(1) requires that a public employer grant a preference to an applicant who meets "minimum qualifications and any special qualifications for the position" and who successfully completes: (1) an "initial application screening," (2) an "application examination," or (3) a "civil service test." The legislature did not define any of those operative terms: initial

[4] BOLI may point to ORS 408.230(4) as statutory justification of its rule that the preference be applied at every stage of an application process. ORS 408.230(4) does require the employer to appoint a veteran applicant if the results of a scored application examination leads to the veteran being numerically ranked equal to or higher than a nonveteran candidate. Although that statute mandates the hiring of a veteran, as discussed below, the context of that provision shows that it applies only when the employer uses a scored single-stage hiring process.

application screening, application examination, or civil service test and the plain meaning of those terms is unremarkable as to the question of whether ORS 408.230 requires a public employer to apply the preference at every stage of a multi-stage application process. Nonetheless, the context into which those terms are used, and the overarching architecture of the statute gives insight into the legislature's intent.

In particular, the statute contemplates that a hiring process might consist of both an initial application screening and an application examination; however, the text of the statute clearly indicates that the employer is required to apply the preference only once. In drafting ORS 408.230(1), the legislature chose to use the disjunctive word "or," not the conjunctive word "and" as a means of showing what a veteran applicant must do to receive the preference. Specifically, ORS 408.230(1) states that a veteran is entitled to a preference only when he or she has met the minimum and special qualifications of the position and successfully completed "an initial application screening *or* an application examination for the position; *or* successfully completes a civil service test the employer administers to establish eligibility for the position." ORS 408.230(1) (emphasis added). The Court of Appeals and BOLI read that section as requiring a veteran to receive a preference each time they successfully complete one of those events. However, subsection (1) does not expressly require an employer do so. What subsection (1) does is establish the

prerequisites before a veteran is entitled to a preference. How an employer is to apply the preference is addressed in subsection (2), which expressly acknowledges that a hiring process may involve more than one of those events (initial application screening, application examination, or civil service test) but nonetheless requires the employer to only apply the preference once.

Specifically, ORS 408.230(2)(a) requires the employer to apply five or ten points "*for* an initial application screening used to develop a list of persons for *interviews*" but does not require additional preference be applied at the subsequent interview stage. Conversely ORS 408.230(2)(b) requires the employer to apply five or ten points " *for* an application examination, given *after* the initial application screening, that results in a score" but not to the initial application screening, even if the application screening is scored. Indeed, ORS 408.230(2)(b) further clarifies that if the scored application examination is a multi-stage exam, the employer is not required to apply the points at every stage, but rather is required to apply the preference points to the "total combined examination score without allocating the points to any single feature or part of the exam."

The legislature's use of the word "for" in subsection (2)(a),(b), and (c) is instructive. The word "for" has many meanings. As used here, "with a noun or pronoun followed by an infinitive" the use of the word for takes on a directive meaning. *Webster's Third New Int'l Dictionary* 886 (unabridged ed 2002). Its

repeated and parallel use at the beginning of each subsection within subsection (2), connotes that the legislature intended each to be considered separate and distinct processes (i.e. *for* A type of process, the employer applies Y preference, and *for* B type of process, the employer applies a Z preference), and not as the Court of Appeals indicates, a cumulative series of events for which the preference must be applied upon each relevant occurrence. *See Edwards*, 277 Or App at 556 ("The initial mandate of ORS 408.230(2) * * * requires employers to grant preferences in each of several different application processes.").

Just as ORS 408.230(2)(a) and (b) direct that the preference be applied once, ORS 408.230(2)(c) further explains that *for* a selection process with an "examination application" that consists of an unscored selection process 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" the employer is to give "a preference" (not multiple preferences). Because the legislature understood the variety of unscored processes that employers use, the legislature specifically gave employers broad latitude in determining what that preference would be. Thus, ORS 408.230(2)(c) directs the employer in an unscored selection process to "devise and apply methods by which the employer gives special consideration in the employer's hiring decision." In that regard, the statute gives employers flexibility to determine

how to apply a preference. What ORS 408.230(2)(c) does not do, expressly or implicitly, as BOLI and the Court of Appeals suggest, is require a specific method be applied at every stage of an application process.

Indeed, for a court to hold that ORS 408.230(2)(c) requires a preference be applied at every stage of an application process would require more of an employer using an unscored process than what is required of an employer using a scored selection process. There is simply no rational basis that can be supported textually, contextually, or by the legislative history of ORS 408.230 that would support such inequitable treatment between scored and unscored selection processes.

Additionally, it is worth noting that ORS 408.230(2) does not capture every conceivable combination of evaluative events that a public employer might use in a single recruitment. For example, although the statute states that an employer shall grant a preference to a veteran who successfully completes a civil service test, the statute (specifically, subsection (2)) does not expressly give employers direction on how to apply the preference in the circumstance when an employer uses a scored civil service examination. Consequently public employers are left to intuit from the rest of subsection (2) how to apply a preference in those circumstances not directly covered by subsection (2). A task this Court can greatly assist with by providing an interpretation of the statute that is arrived at by looking at the recruitment processes and evaluative

events that are expressly covered by subsection (2) of the statute, and from there, adopting an interpretation that would apply by analogy to other non-covered processes with attributes that are similar to those processes that are expressly covered by subsection (2) of the statute.

Although the Court of Appeals and BOLI have offered one possible interpretation (preference applies at every stage), that interpretation is not supported by the text or, as discussed below, the history of the statute. There is one interpretation, however, that gives effect to all parts of ORS 408.230 and provides direction to public employers for recruitment processes not expressly covered by the statute (such as a process that consists of a civil service exam). That interpretation is as follows: The text and operation of ORS 408.230(2) makes clear that the legislature intended the employer to only apply the preference once in a hiring process, and that the point at which the preference is applied depends on whether the process includes a scored stage or not. For a selection process where applicants are scored (whether scored once, or multiple times), employers are required to give the preference at the last stage that involves a score. *See*, *e.g.*, ORS 408.230(2)(a) and (b). For a selection process where applicants are not scored at any stage, the preference is likewise to be given only at one point in the selection process and at a point of the employer's choosing, so long as the preference amounts to some form of "special consideration."

3. The legislative history of ORS 408.230 indicates that the legislature intended to require public employers to apply a veterans' preference only once in an application process.

The forgoing interpretation of ORS 408.230 is strongly supported by the legislative history. The legislature has amended ORS 408.230 several times during its long existence. Most relevant here are the amendments made by Senate Bill (SB) 831 (1999), which added the concept of applying the preference to an unscored process by granting special consideration; SB 822 (2007), which added to the statute the concepts "initial application screening" and "application examination," the phrase "devise and apply," and the authority for BOLI to adjudicate veterans' claims that they were not given preference under the statute; and House Bill (HB) 2510 (2009), which added a definition of "civil service position" and amended the definition of "public employer" in ORS 408.225. *See* Or Laws 1999, ch 792; Or Laws 2007, ch 525; Or Laws 2009, ch 370.

Prior to 1999, ORS 408.230 only applied to civil service positions for which the public employer gave a scored civil service test. Under those circumstances, the employer was required to give veterans five points and disabled veterans ten points, and to conduct the ratings on a 100 point scale. In 1999, the legislature adopted SB 831, amending ORS 408.230 to eliminate reference to the 100 point scale and to require that preference be given in unscored civil service tests. Or Laws 1999, ch 792, § 1. Specifically, SB 831

required preference be applied when a test consisted of "interviews, performance, evaluation of experience and training, a supervisor's rating or any other method of ranking applicants that does not result in a score." SB 831 went on to state, however, that "[p]reference does not mean that veterans must be appointed to vacant positions," but that employers were required to "provide a uniform method by which special consideration is given to eligible veterans and disabled veterans." Those amendments spurred changes in hiring practices among public employers across the state, and many public employers would grant veterans an automatic interview, or automatically advance them to the first stage of elimination, as a means of uniformly giving special consideration.

The legislature subsequently amended ORS 408.230 in 2007. One of those changes was to replace the requirement that a public employer provide a "uniform method by which special consideration is given" with the requirement that employers "devise and apply methods by which the employer gives special consideration." Or Laws 2007, ch 525, § 2. The removal of the word "uniform" and the use of the word "methods" in the plural clearly demonstrate that the legislature intended to give public employers flexibility in how to apply the special consideration preference.

Also in 2007, the legislature introduced the additional concepts of "application examination" and "initial screening" and developed the current architecture of ORS 408.230(2), which tells an employer how to apply the

preference. The testimony surrounding those changes is instructive as to what the legislature intended. Most of the discussion was about whether a public employer had to hire a veteran as a result of the bill. Legislators expressed concern that the law not impose a rigid standard that dictated a specific result. For example, one member of the committee expressed a desire that employers still be able to base a final decision on a "gut feeling":

> "When we have definitive testing involved, I understand adding some preference points or whatever but once you get into a hiring process, particularly in some of the administrative sorts of levels, one might interview a selection of…interview a panel of individuals who are deemed qualified for the position and it's at that point that the hiring panel no longer has test scores and things of that nature. *The ultimate decision to hire, particularly in an administrative position, is sort of a, if you'll pardon my terminology, gut feeling about who might be best suited in your organization*."

Audio Recording, House Committee on Veterans Affairs, SB 822, May 22, 2007, at 8:07 (comment of Representative Jean Cowan) https://olis.leg.state.or.us (accessed August 10, 2016) (emphasis added). That same Representative raised a similar concern with regard to the section of the bill that would require a public employer to explain to a veteran why he or she was not hired:

> "I too have hired many, many people and when we get to a point, particularly at the managerial level, of having evaluated folks and brought that handful of people forward that are qualified, that meet the qualifications, that have the educational background, the experiential background or whatever, there is a point at which then the final panel that's talking to folks no longer has a specific

> reference to go on. *It's which personality appears to match the needs of the organization for a variety of reasons and that would be very difficult to get subjective about in an explanation and that's why I'm worried about this language.*"

Audio Recording, House Committee on Veterans Affairs, SB 822, May 22, 2007, at 13:28 (comment of Representative Jean Cowan) https://olis.leg.state.or.us (accessed August 10, 2016) (emphasis added). In response, another member of the committee explained that the bill allowed the employer to retain flexibility in the hiring decision:

> "As I read [the bill] * * * the employer, *i.e.* the State of Oregon, may base a decision not to appoint the veteran or disabled veteran solely on the veteran's ability, the veteran's merits and qualifications with respect to the vacant civil service position. As I read that it appears to me, as Representative Cowan raised, it's still, even if there's a three person element determining the merits and qualifications, *they still have the latitude that she's talking about*. I don't see that it says arbitrarily you hire the veteran or you don't hire the veteran. *It still falls back to who is the most qualified*."

Audio Recording, House Committee on Veterans Affairs, SB 822, May 22, 2007, at 18:43 (comment of Representative Brian Boquist) https://olis.leg.state.or.us (accessed August 10, 2016) (emphasis added).

There was no discussion about whether the preference would apply at every stage of an application process. The question was never squarely put before the committees that heard the bill, because neither the wording of the bill drafts, nor the discussion that surrounded them, would have caused the members of the committee to think that the preference had to be applied at

every stage. Indeed, what little discussion took place about when the preference would apply demonstrates that the legislature was operating from the assumption that the preference would only apply once. For example, Mike Caldwell, then Deputy Director of the Oregon Military Department, which supported the bill, explained that the intent behind the changes was to help give veterans a leg up in the public hiring process by helping them get past the initial screening process. His comments did not indicate that the preference would apply at subsequent stages. Specifically, Deputy Director Caldwell explained:

> "There's a certain art to getting your application through the first screen of the state hiring process and if you don't know the techniques that are required to make sure that you get enough points on your application (your PD 100) you don't even get to the next step, which is perhaps an interview. *What this is going to do is maybe catapult these folks past that because of their lack of artistic ability*. * * * So I think what this bill is probably going to do more than anything else is just *give that little extra bump so they get to the next stage*. And the next stage, it may very well turn out that they don't meet that particular job qualification. And there's an out in here as Representative Boquist pointed out. But, I think the important thing of this, is that might be the difference of getting them to the next stage. Simply from ignorance in how they fill out the PD 100."

Audio Recording, House Committee on Veterans Affairs, SB 822, May 22, 2007, at 20:36 (comment of Mike Caldwell, Deputy Director, Oregon Military Department) https://olis.leg.state.or.us (accessed August 10, 2016) (emphasis added). Additionally, Paula Brown, then Deputy Director of the Oregon Department of Veterans Affairs, explained how employers apply "special

consideration" preference by analogy to preference points. In her testimony she focused on how the bill would help veterans get interviews, and at no point did she suggest the preference would apply at multiple stages. Indeed, her testimony was quite to the contrary, expressly noting when preference is no longer given. Specifically, Deputy Director Brown explained:

> "Currently in Oregon the veterans' preference system primarily is applied to the interview process. Veterans are awarded the veterans' preference points and as a result often are able to get an interview that they may not otherwise get. *That is pretty much where the veterans' preference in Oregon does stop because from the interview process on then veterans are competing among a pool of candidates regardless of the preference points.* The preference points are primarily used to grant the veteran the interview."

Audio Recording, Senate Committee on Education and General Government, SB 822, April 10, 2007, at 47:55 (comment of Paula Brown, Deputy Director of Oregon Department of Veterans' Affairs), https://olis.leg.state.or.us (accessed August 10, 2016) (emphasis added).

In 2009, the legislature again addressed application of the preference when it added the definition of "civil service position" and amended the definition of "public employer." The legislature's intent behind those amendments was to make clear that all public employers in Oregon (including this Court) were required to apply the preference to all recruitments for public positions regardless of position or duration (such as staff attorneys and judicial clerks). Although those amendments were not necessarily focused on the

method of the preference or the point at which an employer was required to give the preference, the issue nonetheless was discussed. Representative Cowan, who chaired the committee hearing the bill, once again put squarely before the committee whether an employer was required to hire a veteran and also raised questions about when the preference would apply. Once again, Mike Caldwell, Deputy Director for the Oregon Military Department, explained that the preference was intended to get veterans past the initial consideration phase, and further explained that the preference would only apply once:

> "I think part of the science of getting a job, particularly in the State of Oregon is you've got to get through that first screen, which is basically done by staff folks that aren't going to do the final hiring but they give points based on your application. And there's a bit of a science to that in order to fill out the application properly * * * what this does basically is maybe when you're on the bubble, catapults that person into the next round, which then hopefully gets more one-on-one. And, then they can see the value and virtues of that particular individual. So this will do more to keep them from getting bumped right at the outset and getting into the process *and then being able to sink or swim on their own*."

Audio Recording, House Committee on Veterans and Emergency Services, HB 2510, Mar 17, 2009, at 18:33 (comment of Mike Caldwell, Deputy Director of Oregon Military Department) http://olis.leg.state.or.us (accessed Aug 10, 2016) (emphasis added). Indeed, in response to a question from Representative Cowan, BOLI's representative explained the preference process as follows, emphasizing that the preference only applies once:

> "The existing statute applies the preference points for a veteran or disabled veteran where there is a numerical score that comes out of either, for example, the initial application or perhaps preliminary interviews, those sometimes have scoring that you would account points relative to. *But the final interview, where you are down to a handful of applicants, you wouldn't have a preference apply there*."

Audio Recording, House Committee on Veterans and Emergency Services, HB 2510, Apr 9, 2009, at 39:35 (comment of Bob Estabrook, Legislative & Communications Aide, Bureau of Labor and Industries) http://olis.leg.state.or.us (accessed Aug 10, 2016) (emphasis added).

In light of the foregoing, text, context, and legislative history of ORS 408.230, it is clear that the legislature intended the veterans' preference to be applied once, and not at every stage of an application process as BOLI and the Court of Appeals concluded.[5] Consequently, this Court should declare BOLI's rule invalid and remand this case to BOLI for a determination consistent with what the legislature intended.

C. Absent a complaint and finding that a public employer intentionally discriminated against a veteran, BOLI lacks statutory authority to award emotional distress damages for an employer's failure to apply veterans' preference.

For the reasons set out in the County's Brief on the Merits, BOLI and the Court of Appeals wrongly concluded that the employee in this case was entitled

[5] Unsurprisingly, Legislative Counsel reached this same conclusion for similar reasons in a 2015 written opinion. (App-3 to App-8)

to emotional distress damages – an extraordinary remedy for which there was no statutory basis. Petitioners Brief on the Merits at 36-45. ORS 408.230 provides that a violation of the veterans' preference statutes is an "unlawful employment practice" and that a veteran aggrieved by a violation of the statute can file a complaint with BOLI in accordance with ORS 659A.820. ORS 408.230 (6), (7). However, nothing within ORS chapter 659A grants BOLI the authority to award emotional distress damages.

As noted above, a public employer's failure to grant a preference under ORS 408.230 is an unlawful employment practice for which an aggrieved individual may file a complaint with BOLI or a civil action in circuit court. *See* ORS 408.230 (6), (7); ORS 659A.870(1); ORS 659.885(1), (2). Both textually and contextually, the term "unlawful employment practice" is a subset of the term "unlawful practice," which also encompasses a variety of decisions or actions, including unlawful discrimination, for which aggrieved individuals may seek and obtain various forms of relief. *See* ORS 659A.001(11), (12) (defining "unlawful employment practice" and "unlawful practice" and specifically defining "unlawful practice" to mean, in part, "any *unlawful employment practice* or any other practice specifically denominated as an unlawful practice in this chapter * * * [or] in another statute" (emphasis added)); ORS 659A.855 (distinguishing unlawful practice from unlawful

employment practice by allowing award of civil penalties for an "unlawful practice other than an unlawful employment practice.")

With that taxonomy in mind, the remedies provisions of ORS chapter 659A express a distinction between, on the one hand, unlawful employment practices and, on the other, unlawful practices that involve discrimination. Both BOLI and the circuit court have authority to award different types of damages for unlawful employment practices, as opposed to unlawful practices involving discrimination. Where an individual has been subject only to an unlawful employment practice that does not involve discrimination, the circuit court can award only injunctive relief, other equitable relief, back pay under certain circumstances, and prevailing party costs and reasonable attorney fees. ORS 659A.885 (1) and (2) (providing cause of action for violation of ORS 408.230; limiting remedies to attorney's fees, injunctive relief and any other equitable relief that may be appropriate, including reinstatement with or without back pay).. However, where the aggrieved individual has suffered an unlawful practice involving discrimination, Oregon law allows a circuit court to award compensatory as well as punitive damages in addition to the remedies allowed for other unlawful employment practices. *See* ORS 659A.885(3), (7)

Similarly, when a complaint is filed with BOLI, whether the complaint alleges an unlawful practice that involves discrimination or an unlawful employment practice that does not involve discrimination, BOLI may only

order the employer to take action that would eliminate the effects of the unlawful practice, and award "actual damages" to the complaining party. ORS 659A.850(4). Just as the circuit court cannot award emotional distress damages as a general matter for a violation of ORS 408.230, BOLI's authority to award "actual" damages for a violation of ORS 408.230 does not carry with it authority to award emotional distress damages. However, if the complaint alleges an unlawful practice that involves discrimination, BOLI may impose civil penalties – similar to the circuit court's authority to award punitive damages in discrimination cases – but such penalties go to BOLI for the costs of adjudicating the violations, with any remainder going to the common school fund (and not the complaining party). ORS 659A.855(1), (3).

From that overview, this Court can draw important contextual observations. First, ORS chapter 659A provides penal remedies (such as punitive damages or civil penalties) where discrimination is involved. Second, the remedies BOLI can award an aggrieved party are less than those a circuit court can grant. *Compare* ORS 659A.855 (placing limits on civil penalties), *with* ORS 659A.855(3), (7) (allowing award of punitive damages, without statutory limitation). Third, where no discrimination is involved, such as in an employer's failure to award the preference,[6] the circuit court may only grant

[6] To be certain, failure to award preference alone is not unlawful discrimination. ORS 659A.082 sets out specifically what constitutes unlawful discrimination

limited relief in the form of back-pay, injunctive and equitable relief, costs and attorney's fees. *See* ORS 659A.885(1) (providing for those remedies); ORS 659A.885(2) ("An action may be brought under subsection (1) of this section alleging a violation of * * * ORS 408.230 * * *."). Therefore, it follows that when hearing a complaint alleging a violation of ORS 408.230, BOLI's authority to provide remedies would be limited to actual damages, such as back pay if the aggrieved veteran can demonstrate that he or she would have been the successful candidate had a preference been applied. Moreover, absent an additional allegation of unlawful discrimination, BOLI is without authority to award other damages, such as emotional distress damages, or civil penalties.

For those reasons, this Court should hold that BOLI lacks statutory authority to impose emotional distress damages, reverse the Court of Appeals

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against a person for service in a uniformed service, and failure to provide a preference under ORS 408.230 is not listed. *See* ORS 659A.082(2)(a) (providing that it is unlawful discrimination for a public employer to discriminate against a person because of the person's service in a uniformed service by denying a public officer or public employee the status or rights provided by ORS 408.240 to 408.280 and 408.290, but not ORS 408.230). To constitute unlawful discrimination, it must be shown that the person making the selection denied the veteran *employment* (rather than merely denying the preference) on the basis that the person is a member of a uniformed service - only then would the failure to award a preference constitute unlawful discrimination. *See* ORS 659A.082(2)(b). Thus, the remedy for a well-intentioned, but misguided or misinformed employer's failure to award the preference is appropriately limited to actual damages or other equitable relief.

conclusion to the contrary, and remand this proceeding to BOLI for an adjudication under the appropriate legal standards.

IV. CONCLUSION

The Court's holding in this case will serve two important purposes. First, as a case of first impression it will give every public employer in Oregon direction on how to satisfy its obligations under ORS 408.230 in awarding eligible veterans a preference in public employment. Second, this case provides the Court with the opportunity to reinforce constitutional standards that limit the authority of administrative agencies to only those powers delegated to them by the legislature, and to prevent overreach by administrative agencies in the exercise of those delegated powers.

For the reasons set forth in this brief, BOLI exceeded both of those limits in multiple ways. First, BOLI adopted an administrative rule that it was not authorized to enact. Next, it issued an order concluding that the County had failed to adhere to that rule, the substance of which conflicts with ORS 408.230 because it requires more of the County than is required by the statute. Finally, BOLI awarded a remedy that was not authorized by statute. The Court of Appeals affirmed without consideration of the Oregon Constitution or the methodology by which Oregon courts interpret statutes and evaluate agency authority. Allowing BOLI's rules and order, and the Court of Appeals decision, to stand will not only disadvantage public employers from being able to select

the best possible candidate, but it will also carry consequences of constitutional magnitude, inviting administrative agencies to continue to overreach beyond statutorily authorized authority and standards.

Consequently, this Court should hold that ORS 408.230 requires that public employers apply a preference only once during a selection process and that a person aggrieved by a public employer failing to do so (without discriminatory motive) is not entitled to emotional distress damages. Such a holding will restore the flexibility and balance the legislature attempted to achieve, and provide persons aggrieved by an employer's failure to follow that provision's guidance on the appropriate means of seeking relief and the remedies available to them. Therefore, *Amici* request this Court declare OAR 839-006-0450(2) invalid, reverse the Court of Appeals and remand this matter back to BOLI for a decision that is consistent with the legislature's true intent with respect of ORS 408.230 and the remedies BOLI is authorized to grant under ORS 659A.850.

Respectfully submitted this 25th day of August, 2016.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(b)) is 9,114 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 25, 2016, I electronically filed the foregoing **Brief of *Amici Curiae* League of Oregon Cities and Association of Oregon Counties** with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System, and I served the following parties by using the electronic service function of the eFiling system:

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