

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 IN SUPPORT OF
PETITIONERS' PETITION FOR REVIEW**

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

Opinion Filed: April 13, 2016

Author of Opinion: DeHoog, J.

Concurring Judges: Sercombe, P.J., Tookey, J.

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TABLE OF CONTENTS

I. INTEREST OF <i>AMICI CURIAE</i>	1
II. HISTORICAL AND PROCEDURAL FACTS	3
III. QUESTION PRESENTED AND PROPOSED RULE OF LAW	3
IV. REASONS TO ALLOW REVIEW	3
V. CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<i>Coast Security Mortgage Corp. v. Real Estate Agency</i> , 331 Or 348, 15 P3d 29 (2000).....	6
<i>Multnomah County Sheriff's Office v. Edwards</i> , 277 Or App 540, __ P3d __ (2016).....	1
<i>Planned Parenthood Association v Department of Human Resources</i> , 297 Or 562, 687 P2d 785 (1984)	6
<i>State v. Gaines</i> , 346 Or 160, 206 P3d 1042 (2009).....	7

Statutes

ORS 174.109.....	4
ORS 408.225.....	4, 5
ORS 408.230.....	1, 4, 5, 7, 8, 9
ORS 659A.820.....	8
ORS 659A.885	9

Rules

ORAP 9.07.....	3, 4, 8, 9
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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 242 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon’s cities before the state courts. 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 county governments.

LOC and AOC, on behalf of their member entities, have a substantial interest in the outcome of this case because it is the first case 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 Petition for Review, the Court of Appeals decision in *Multnomah County Sheriff’s Office v. Edwards*, 277 Or App 540, __ P3d __ (2016) imposes an unworkable standard and places burdens on public employers that exceed the statutory mandate.

LOC, AOC, and their respective members wholeheartedly support veterans, and in turn, the important public purpose that Oregon's veterans' preference statutes serve. In particular, those statutes provide a means to assist veterans with entry or reentry into the civilian workplace and to reward those who have served their nation by ensuring public employers give proper weight to the veteran's skills and attributes gained while serving in the armed forces. However, given the diversity among public employers, hiring practices, and the need to tailor recruiting processes to vacant positions, 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 non-veteran applicants, the legislature limited application of the preference to the initial stage in a hiring process.

Nevertheless, the Bureau of Labor and Industries' (BOLI) administrative rules, upon which the Court of Appeals based its decision in part, fail to recognize those legislative decisions. Specifically, based on administrative rules that misconstrue the relevant statutes, both BOLI and the Court of Appeals ruled in error that Oregon's veterans' preference laws require public employers to devise and apply a rigid method of applying the preference for every recruitment conducted by that employer, and that such preference be applied at every stage of elimination in a hiring process. In addition, both BOLI and the Court of Appeals erred in awarding emotional distress damages because no

statutory basis exists for the award of such damages for an employer's alleged failure to adhere to Oregon's veterans' preference statute.

Without review and correction by this Court, every public employer in Oregon will be subject to an inflexible standard that deprives public employers of the ability to select 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.

II. HISTORICAL AND PROCEDURAL FACTS

LOC and AOC agree with the facts as set forth in petition filed by the Multnomah County Sheriff's Office and those set out in the Court of Appeals decision.

III. QUESTION PRESENTED AND PROPOSED RULE OF LAW

LOC and AOC agree with the questions presented and proposed rules of law as set out in the Multnomah County Sheriff's Office's Petition for Review.

IV. REASONS TO ALLOW REVIEW

This Court should allow review in this case because it provides this Court with the first opportunity to interpret ORS 408.230, and in turn determine the scope of BOLI's authority under that statute, which will help establish the means and methods by which all public employers must award a preference to eligible veterans in competitive hiring processes for public positions. ORAP 9.07(1)(b), (d) and (5) (whether case presents a significant issue of law,

including interpretation of a statute and legality of an important governmental action, and whether case is of first impression). Specifically, at issue in this case is what constitutes an adequate preference for veteran candidates and the degree of flexibility public employers have when granting such a preference in an unscored application process under ORS 408.230.

This case is of significant statewide impact because the issues presented arise in the competitive recruitment of every public position, and as a result, every public employer in Oregon will be affected by its outcome. ORAP 9.07(2) and (3) (whether the issue arises often and whether many people are affected by the decision). ORS 408.230, which contains the mandate to grant a veterans' preference, states in part that:

“A *public employer* shall grant a preference to a veteran or disabled veteran who applies for a vacant *civil service position* or seeks promotion to a civil service position.”

(Emphasis added.)

The phrase “public employer” is defined to include every city, county, special district, and state agency (to include this Court) in the state of Oregon that openly recruits candidates to fill a vacancy. *See* ORS 408.225(1)(e) (defining “public employer” by reference to ORS 174.109, which in turn captures “state government bodies, local government bodies and special government bodies”). Likewise, the phrase “civil service position” is broadly defined to mean “any position for which a hiring or promotion decision is made

or required to be made based on the results of a merit based, competitive process that includes, but is not limited to, consideration of an applicant's or employee's relative ability, knowledge, experience and other skills.” ORS 408.225(1)(a)(A).¹ Based on those sweeping definitions, the issues in this case arise with regularity for all public employers and affect countless numbers of applicants and the personnel who make public hiring decision on a regular basis across the state of Oregon. Therefore, resolution of the issues in this case will provide needed and much sought guidance to every public employer on its legal obligations under ORS 408.230.

This case also provides this Court with the opportunity to clarify the scope of BOLI's rulemaking authority in this area. As *Amici* have noted in other forums, BOLI lacks express authority to adopt rules establishing what acts constitute a violation of ORS 408.230. As a general proposition of administrative law, an administrative agency lacks authority to adopt rules unless the legislature delegates such authority to the agency. *Oregon Newspaper Publishers Association. v. Peterson*, 244 Or 116, 123-24, 415 P2d 21 (1966). Although BOLI has authority to hear complaints under ORS 408.230(7), the legislature has not delegated authority to BOLI to adopt rules defining specific acts that constitute a violation of ORS 408.230 or at which

¹ A civil service position need not be labeled a civil service provision to trigger the obligations under ORS 408.230. ORS 408.225(1)(a)(B).

points in a recruitment the employer is required to apply the preference, thereby leaving the statutory provisions to speak for themselves. *C.f.*, ORS 659A.805 (providing BOLI with rulemaking authority to adopt rules defining what acts constitute certain types of unlawful employment practices, of which an employer's alleged failure to apply a preference under ORS 408.230 is not one of them). Consequently, this case will provide the Court with the first opportunity to determine whether ORS 408.230 provides a clear grant of authority to BOLI to adopt the administrative rules upon which both BOLI and the Court of Appeals based their decisions.

Even if BOLI has authority to adopt rules in this area, review is also needed to ensure that those rules and the agency's decision (which was based upon the application of those rules) are consistent with the legislature's intent. *See Planned Parenthood Association v Department of Human Resources*, 297 Or 562, 574, 687 P2d 785 (1984) (explaining that a rule, even if properly adopted, is not valid if it departs from the legislative policy expressed by the enabling statute); *Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or 348, 353, 15 P3d 29 (2000) (explaining that an appellate court reviews an agency's interpretation of a statute to ensure both that it is consistent with the legislature's intent, and where the legislature has delegated authority to the agency, that the agency's interpretation is within the range of discretion allowed by the statute). When determining the legislature's intent, the courts look to the

text, context, and legislative history of the statute at issue. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

The text, context, and history of ORS 408.230 demonstrate a legislative intent to balance the interest of public employers in hiring the best possible candidate while ensuring veterans were given a benefit of additional consideration in recognition for their service. Such a balance is not an easy one to achieve. On one hand, if ORS 408.230 is interpreted too narrowly, there is a risk that veterans who have honorably served their country will be deprived of the benefit the legislature intended and not receive adequate consideration when competing for positions of public employment. On the other hand, if the statute is interpreted too broadly, then the risk is that otherwise deserving candidates will be denied consideration for public employment, and public employers, and the public that they serve, will be denied the best possible candidate – an outcome the legislature sought to avoid. *See* ORS 408.230(3) (providing that a public employer’s obligation to apply a preference is “not a requirement that the public employer appoint a veteran or disabled veteran to a civil service position”).

In interpreting ORS 408.230, both BOLI and the Court of Appeals, guided by the well-meaning policy in the statute to support veterans, erred in interpreting the statute too broadly and did so to the detriment of non-veteran candidates and the public hiring process in general. Specifically, BOLI and the

Court of Appeals arrived at an interpretation that requires the same method of preference be applied in every recruitment conducted by a public employer, and that requires the preference be applied at every stage of elimination. As the Multnomah County Sheriff's Office notes in its Petition for Review, that interpretation is not supported by the text, context, or legislative history of the statute, and results in a "preference" that is greater than what the legislature intended. Consequently, review by this Court is needed to restore the balance that the legislature intended. Specifically, review by this Court is needed to restore flexibility in how public employers can devise and apply veterans' preference and to clarify that such preference only applies to veterans who meet minimum qualifications at the initial stage of elimination in a public hiring process. ORAP 9.07(14) (whether the Court of Appeals decision appears to be wrong).

Similarly, BOLI and the Court of Appeals erred in concluding that the employee in this case was entitled to emotional distress damages – an extraordinary remedy for which there was no statutory basis. 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, for the reasons stated in Multnomah County's Petition for Review, nothing within ORS 659A grants BOLI the authority to

award emotional distress damages.² Consequently, without review and correction by this Court, public employers throughout Oregon (including those that inadvertently overlook or misinterpret the requirements of ORS 408.230) will be subject to damage awards that exceed the legislature's intended remedies for a violation of ORS 408.230. ORAP 9.07(2),(3), (14)(a) (whether the issue arises often, whether many people are affected by the decision, and whether the error results in distortion of a legal principle).

V. CONCLUSION

This case of first impression will impact the way in which every public employer in Oregon satisfies its obligations under ORS 408.230 in awarding eligible veterans a preference in public employment. The outcome of this case will affect countless individuals applying for public employment and the public agencies that employ them. BOLI and the Court of Appeals have misconstrued the statute in a way that restricts a public employer's flexibility and requires an application of the preference in a manner contrary to the legislature's intent. In addition, BOLI awarded and the Court of Appeals allowed the imposition of emotional distress damages, which is a remedy that was statutorily

² Indeed, emotional distress damages are not even available to plaintiffs filing civil actions for unlawful employment practices. *See* ORS 659A.885(1), (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).

unwarranted. Therefore, this Court should allow review of this case to provide an interpretation of the statute that restores the flexibility and balance the legislature attempted to achieve and to provide persons aggrieved by an employer's failure to follow that provision guidance on the appropriate means of seeking relief and the remedies available to them.

Respectfully submitted this 15th day of June, 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 9.05(3)(a) and (2) the word count of this brief (as described in ORAP 9.05(3)(a)) is 2,187 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 June 15, 2016, I electronically filed the foregoing **Brief of Amici Curiae League of Oregon Cities and Association of Oregon Counties in Support of Petitioners' Petition for Review** 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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