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

PETITIONER ON REVIEW'S REPLY BRIEF

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. INTRODUCTION

Multnomah County employs hundreds of veterans and strongly supports the use of the veterans' preference in hiring. The Bureau of Labor and Industries (BOLI), however, has interpreted Oregon's Veterans' Preference statute, ORS 408.230, to elevate form over substance. Rather than evaluating whether a veteran *effectively* received a meaningful preference, BOLI has focused on the consistency of the public employer's *articulation* of the preference. Moreover, through administrative rule, BOLI has interpreted the statute inconsistently with statutory text, leaving employers without the guidance necessary to consistently grant veterans a meaningful preference. Accordingly, this Court should reverse the Court of Appeals' decision, which affirmed BOLI's final order.

II. ARGUMENT

A. Multnomah County devised and applied a veterans' preference for Rod Edwards.

The Multnomah County Sheriff's Office (the County) granted Respondent Rod Edwards (Edwards) a veterans' preference by providing him an interview and ranking him as the number one candidate in the applicant pool. (*See* County BOM 17-21). BOLI's insistence that those advantages do not amount to a "preference" is based on three premises: (1) BOLI's factual findings on the County's method foreclose this Court's review; (2) to the extent

the Court reviews BOLI's decision, the preference was not consistently understood by the people involved in the interview process and therefore was not properly devised; and (3) the preferences actually applied were insufficient. (BOLI BOM 20-25). BOLI is incorrect on all counts.

1. This Court can review BOLI's determination that the County failed to devise and apply a method to grant the preference.

BOLI contends that the County's factual statement and legal argument regarding the preference are contrary to BOLI's factual findings, and therefore are unreviewable by this Court. (BOLI BOM 6-7; 20). The statements BOLI identifies as foreclosing this Court's review are that BOLI was "not convinced that a policy for veterans' preference was formed in the mind of [the County] or its managers responsible for its implementation" and that the County "did not have a consistent or coherent understanding of what it meant to be the number one candidate." (BOLI BOM 20-21) (quoting ER 102, 104). Neither of those statements forecloses this Court's review.

First, the statement that the administrative tribunal was "not convinced that a policy for veterans' preference was formed in the mind of [the County] or its managers responsible for its implementation" relies on a statutory interpretation that is squarely within the province of this Court to review.[1] *See*

[1]BOLI cites no authority for its contention that being "not convinced" of something equates to an affirmative factual finding.

Karjalainen v. Curtis Johnston & Pennywise, Inc., 208 Or App 674, 681, 146 P3d 336 (2006), *rev den*, 342 Or 473 (2007) (citing *Miller v. Water Wonderland Improvement District*, 326 Or 306, 309, 951 P2d 720 (1998)) ("In no event is the *meaning* of a statutory term determined as a question of fact. That is because statutes are – by definition – law, and their interpretation always is a question of law."). BOLI's conclusion, as it explained, was based on its interpretation of ORS 408.230(2)(c): "[i]n order to be 'devised,' or 'formed in the mind,' the policy must be coherent and it must be stable." (ER 102).

That legal conclusion relies on two different interpretations of ORS 408.230(2)(c), which provides: "[An employer using an unscored process] *shall devise and apply methods* by which the employer gives special consideration." (Emphasis added.) First, BOLI concluded that the statutory term "methods" means a "policy." (ER 102). Second, BOLI concluded that the single policy must be "coherent and stable." (ER 102). As a result, BOLI drew the legal conclusion that inconsistent testimony from County employees meant that the County failed to devise and apply a single coherent and stable policy. The County does not challenge that witness testimony may have been inconsistent. The County does challenge the two legal conclusions – that the statute requires a public employer to have a single "policy" and that policy must be "coherent and stable." Accordingly, the County challenges the statutory interpretation as it relates to the facts – BOLI's conclusion that inconsistent

articulations of the preference means that the County failed to devise and apply a preference.

2. BOLI incorrectly interpreted ORS 408.230(2)(c) as requiring a single "policy" that is "coherent and stable."

BOLI incorrectly concluded that the statutory phrase requiring a public employer to "devise and apply methods" of granting a preference means that the County was required to devise a single "policy." The statute uses the plural term "methods," rather than the singular "method," indicating that more than one method of applying the preference is permissible. *See Schuette v. Dept. of Revenue*, 326 Or 213, 217-18, 951 P2d 690 (1997) (legislature's decision to use singular, as opposed to plural, terms is significant evidence of its intent). The statute does not foreclose – but rather directly contemplates – the possibility that, in an unscored process, different methods may be appropriate.

Moreover, the difference between a "policy" and a "method" is not insignificant. A "policy" is defined as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu. determine present and future decisions; a specific decision or set of decisions designed to carry out such a chosen course of action." *Webster's Third New Int'l Dictionary* 1754 (unabridged ed 2002). "Method," on the other hand, is defined as "a way, technique, or process of or for doing something." *Id.* at 1422. The

word method does not have the "definite" nature of a policy, nor does it involve the selection of a single policy from a variety of alternatives.

Second, BOLI concluded: "In order to be devised, this policy must be coherent and it must be stable." (ER 102).[2] BOLI offered no support in its order for that statutory interpretation. The definition of devise is "to form in the mind by new combinations of ideas, new applications of principles, or new arrangement of parts: formulate by thought." *Webster's* at 619. Although "coherence" and "stability" may be positive attributes, they do not reflect the policy decision of the legislature. Rather, the legislature selected "devise," which means "formulate by thought." The legislature, recognizing the inherent subjectivity of an unscored process, declined to require a "stable" preexisting and uniform rule, but rather selected wording that requires each public employer to devise the preference as appropriate to the process.

The legislative history confirms that interpretation. As BOLI acknowledges, a primary objective of the legislature in adopting that wording was to preserve employer flexibility in devising a method to apply the preference. (*See* County BOM 13-14) (extensively quoting legislative history; BOLI BOM 17-18). "Stable" is defined as "firmly established, not easily moved, shaken, or overthrown." *Webster's* at 2218. That is the exact opposite

[2] Contrary to BOLI's contention, the County does not agree with the construction that the statutory language "devise and apply methods" requires a coherent and stable method. (*See* BOLI BOM 19).

of flexibility. Requiring that of public employers is directly contrary to the legislative intent.

Moreover, inserting a requirement of "coherence" shifts the focus from whether the employer is effectively granting a preference to how effectively those involved in the process *articulate* that preference. The legislature appropriately focused the inquiry on the effectiveness of the application of the preference, not the ability of those involved in a hiring process to explain it.

3. Treating Edwards as the number one candidate and granting him an interview are effective methods of applying a veterans' preference.

In this hiring process, the County used two methods to grant a preference to Edwards. First, the County granted him an interview, and second, the County treated him as the "number one candidate."

a. Granting Edwards an interview is a preference.

The County gave Edwards an interview, despite the fact that he was substantially less qualified than the other candidates. As a preliminary matter, BOLI is incorrect that BOLI entered a factual finding that granting Edwards an interview was not a method of applying the veterans' preference. (*See* BOLI BOM 12, 22). The factual findings BOLI made regarding an interview were that "each of the three applicants was interviewed" and "[a]ll three applicants * * * submitted to an interview." (ER 74). BOLI, however, cites to the opinion portion of the order, which merely states, "The testimony was that once [the

County] found itself with only three applicants for the promotion, it decided to give all three an interview." (ER 103). None of those statements even addresses the question as to whether the preference was – as the BOLI investigator testified – the reason Edwards was interviewed. No binding factual finding on that issue exists.

BOLI also contends that if an interview satisfied the requirement to apply a preference, then it would render another provision of the statute, ORS 408.237(2),[3] superfluous. ORS 408.237, which was passed four years after the amendments at issue, provides that an employer must interview veterans under certain circumstances. Specifically, ORS 408.237 applies only in cases where veterans provide materials that demonstrate that the veteran has "transferable skills," which are those "obtained through military education or experience that substantially relate[], directly or indirectly, to the civil service position for which the veteran is applying." ORS 408.237(1)(b). Edwards submitted no such materials, and therefore no interview was required. If anything, ORS

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[3] ORS 408.237(2) provides:

> "When an interview is a component of the selection process for a civil service position or for an eligibility list for a civil service position, a public employer shall interview each veteran:
>
> (a) Whom the public employer determines meets the minimum qualifications and special qualifications for the civil service position or eligibility list; and
>
> (b) Who submits application materials that the public employer determines show sufficient evidence that the veteran has the transferable skills required and requested by the public employer for the civil service position or eligibility list."

408.237 confirms the importance the legislature places on giving veterans the opportunity for face time afforded by an interview. (*See* County BOM 19-20, citing legislative history). The decision to give Edwards an interview where none was required, and where his application materials were substandard, is a method of affording a preference.

b. Treating Edwards as the number one candidate is a preference.

In this case, those involved in the hiring process were aware that Edwards was to be treated as "the number one candidate." That concept is not confusing – out of three candidates, he would be ranked at the top unless and until his performance brought him below that ranking. His competitors for the job, on the other hand, did not start the process in the lead.

Evidence of that preference is contained within the testimony of the County managers involved in the hiring process. BOLI noted that Undersheriff Moore testified about his understanding of the preference: "Sgt. Edwards's veterans' preference was that he would be considered the number one prospect going into the process." (ER 80). As Human Resources Manager Ott testified, Edwards was "the number 1 candidate going into all three components." (ER 78). And as Chief Deputy Gates testified, Edwards was "the top candidate at each stage of the process." (ER 76). BOLI did indeed, as BOLI now points out, note that there were inconsistencies and even contradictions in the

individuals' explanations of their understanding of this method. In an unscored process, any method likely involves some subjectivity and therefore may be subject to somewhat differing understandings and explanations. Moreover, a hiring process may contain some internal confusion as to each player's role in the process itself, which does not mean that a preference is not applied.

The nature of a subjective hiring process is the very reason that the legislature incorporated the principle of flexibility in the statutory wording. The key is that the method is *effective* in granting a preference, not that it is identically and statically *described*. Indeed, in this case, the County used this method (despite the somewhat differing articulations of it) to grant Edwards an interview and to keep him in the process until the final hiring decision, despite a uniform determination that he was a much less qualified candidate than his competition (a determination BOLI concluded was supported by "sound, job-related reasons") (ER 75). It is unclear what more could be granted to Edwards short of the job.

Indeed, BOLI acknowledges that the key to veterans' preference is that it is applied "when making decisions regarding whether to advance a veteran to the next stage of the hiring process." (BOLI BOM 28) (addressing the validity of the Stages Rule). Applying the preference *effectively*, in a manner that keeps the candidate in consideration, matters more than the "coherence and stability" reflected by consistent articulations of the preference. In this case, despite the

undisputed superiority of his competition, Edwards advanced to every stage of the process, demonstrating the effectiveness of the preference.

B. The Stages Rule is inconsistent with the text of the statute.

The plain text of the veterans' preference statute provides for a preference in three circumstances, delineated as subsections of ORS 408.230(2): (a) a scored initial application screening, (b) a scored application examination, and (c) an unscored application examination. BOLI's rule implementing the statute, OAR 839-006-0450 (the "Stages Rule"), however, rejects that statutory framework in favor of requiring employers to apply a preference for veterans "[a]t each stage of the application process." To justify the Stages Rule, BOLI now offers a novel interpretation of ORS 408.230(2)(c), the subsection of the veterans' preference statute applicable to an unscored application examination.[4] BOLI contends that that subsection's wording is not limited to application examinations, but rather contains two independent requirements in each of the two clauses. According to BOLI, "the first clause

[4] ORS 408.230(2)(c) provides:

> "For an application examination that consists of an interview, an evaluation of the veteran's performance, experience or training, a supervisors 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. An employer that uses an application examination of the type described in this paragraph shall devise and apply methods by which the employer gives special consideration in the employers hiring decision to veterans and disabled veterans."

of ORS 408.230(2)(c) requires an employer to grant a veteran preferential treatment when the employer uses 'any method of ranking the applicant.'" (BOLI BOM 26). Next, "the second clause of ORS 408.230(2)(c) requires the employer to 'give special consideration in the employer's hiring decision.'" (*Id*.). BOLI argues that, taking the two together, "there are at least two points at which an employer must apply the preference in an unscored process: One, when an employer ranks applicants, and two, when the employer makes it hiring decision." (*Id*.). Reading two distinct and independent obligations into the statute is contrary to its text, context, and legislative history.

1. ORS 408.230(2)(c) imposes an obligation to apply the preference to an unscored application examination, not two distinct obligations to apply the preference to an "application examination" and a "hiring decision."

a. The text of ORS 408.230(2)(c) requires an employer to apply the preference to an unscored application examination.

The text of ORS 408.230(2)(c) does not impose two distinct obligations on public employers. Rather, it requires employers to apply a preference to an unscored "application examination." The subsection begins with the statement: "For an application examination * * * that does not result in a score, the employer shall give a preference to the veteran or disabled veteran." ORS 408.230(2)(c). The second clause, then, explains how to implement that obligation: "An employer that uses an application examination of the type

described in this paragraph shall devise and apply methods by which the employer gives special consideration in the employer's hiring decision to veterans and disabled veterans." *Id.* "Hiring decision" in this context refers to the entirety of the hiring decisional process, not the final moment when a hiring decision is made.

If the statute were read as BOLI now intends, with the two clauses creating two separate obligations for an "application examination" and a "hiring decision," the text requiring an employer to "devise and apply methods" would be limited to the second clause, the hiring decision. The second clause reads: "An employer that uses an application examination of the type described in this paragraph shall *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) (emphasis added). No such wording is found in the first clause. *See id.* If BOLI is correct that this second clause creates an independent obligation to apply the preference to the moment of the actual hiring decision, then the phrase "devise and apply methods" is limited to that moment. Nothing in the second clause relates that wording back to the first clause's obligation to apply the preference to an application examination. Under that reading, the legislature would have offered no guidance whatsoever to employers using unscored application examinations. Moreover, BOLI's claim that the County failed to "devise" methods to grant Edwards the

preference during the interview and application process would necessarily fail because the County was under no obligation to do so. Under that reading, the County was only required to "devise" a method for the hiring decision itself.

b. The statutory context and legislative history confirm ORS 408.230(2)(c) does not create independent obligations for an "application examination" and a "hiring decision."

The natural reading of the subsection – that the second sentence explains how to implement the first sentence – is consistent with the immediate context of ORS 408.230(2). The structure and text of each subsection of ORS 408.230(2) serves two functions: each describes *what* a public employer must apply a preference to, and then specifies *how* to apply it. *Multnomah County Sheriff's Office v. Edwards*, 277 Or App 540, 550, 373 P3d 1099 (2016) ("The parallel structure of paragraphs (2)(a) through (2)(c) of the veterans' preference law demonstrates that the second sentence of paragraph (c) amplifies the first sentence. The first sentence conveys the legislative mandate that the employer give veteran applicants a preference; the second sentence tells the employer how to give that preference * * *."). Subsection (c) provides in the first sentence that a preference is required for "an application examination," and, in the second sentence, states that an employer using that type of application examination "shall devise and apply methods" to grant the preference.

Another problem with BOLI's current reading is that it creates a markedly different process between scored and unscored application examinations. The two scored processes where a preference must be applied include an "initial application screening" and an "application examination * * * that results in a score." ORS 408.230(2)(a), (b). For both of those scored processes, the statute only provides that a veteran should receive five or ten points added to his or her score. *Id*. The statute does not, however, contain a second clause applicable to those sections referencing a "hiring decision." As BOLI acknowledges, a primary goal of the legislature was to treat scored and unscored processes similarly. (*See* County BOM 18; BOLI BOM 27-30). Accordingly, the legislature would not single out unscored processes to receive an additional preference at the hiring decision.

Indeed, given that the final hiring decision is not itself "scored," if the legislature intended to create an additional preference for the "hiring decision" within subsection (2) it could have included that additional preference for scored processes as well. Each subsection could contain text that an employer must "devise and apply methods" to grant a preference at the hiring decision. There is no such text in the statute, and with good reason – the legislative history does not show any intent for subsection (2) to apply to the moment of the hiring decision. (*See* County BOM 36-37); *see also* 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), https://olis.leg.state.or.us (accessed Aug 1, 2016) ("But [in] the final interview, where you are down to a handful of applicants, you wouldn't have a preference apply there."). There is no source for a statutory construction that interprets subsection (2) as applying to the hiring decision, or that treats scored and unscored processes so differently.

BOLI argues that reading a "hiring decision" requirement into the unscored process contained in subsection (c) actually "mirrors" the scored process contained in subsection (a) and (b). (BOLI BOM 26). That is so, BOLI contends, because "[w]hen an application examination results in a numerical score, ORS 408.230(4), requires an employer to appoint the veteran 'if the results of a veteran's or disabled veteran's application examination, when combined with the veteran's or disabled veteran's preference, are equal to or higher' than a non-veteran's result." (BOLI BOM 27). Accordingly, BOLI reasons, the legislature would not intend for veterans to receive a hiring advantage in a scored process but not in an unscored process. (*Id*.).

The flaw with that argument is that nothing in the statute limits subsection (4)'s hiring advantage to *scored* processes. Just the opposite – subsection (4) applies with equal measure to unscored processes as scored processes. Accordingly, there is no need to add a "hiring decision" requirement to the unscored process to make it like a scored process – the requirement is

already there. BOLI offers no support for its contention that (4) is limited to scored processes. (*See id*.). Indeed, if that subsection truly functions the way BOLI now argues, and requires employers to devise and apply a method to the hiring decision itself, there is a risk that it renders subsection (4)'s hiring advantage superfluous, as it already applies to unscored processes. It is well-settled that courts should avoid statutory interpretations that render sections superfluous. *See State v. Blair*, 348 Or 72, 79-80, 228 P3d 564 (2010). BOLI's current reading is inconsistent with the statutory text, context, and legislative history and does not support the adoption of the Stages Rule.

2. The statute delineates the three circumstances triggering the preference, rather than an unspecified number and type of "stages."

As previously explained, the statute clearly delineates three circumstances triggering the preference, located in subsections (a)-(c) of ORS 408.230(2) – a scored initial application screening, a scored application examination, and an unscored application examination. Accordingly, BOLI's rule setting aside those triggering events in favor of amorphous "stages" is inconsistent with the statute. BOLI argues, however, that nothing in the statute limits the preference to a single stage of the hiring process, because the statute references "various application examinations." (BOLI BOM 31).[5]

[5] BOLI also offers legislative history that the purpose of the 2007 amendments was to increase the effectiveness of the veterans' preference statute. (BOLI

As a preliminary matter, the County does not contend that the preference is limited to a single stage, but rather that it is limited to the three scenarios contained in the statute. Referring to those three events as "various" does not increase their number – the statute provides for three, and only three, scenarios that trigger the requirement to apply the veterans' preference. It is unclear why the legislature would delineate those circumstances if it actually intended for a preference at every single "stage" of the process. Moreover, although BOLI is correct that the statute does not *limit* the preference to a single stage, nothing in the state *requires* an employer to apply a preference at more than the statutory trigger points. BOLI cannot require employers to do more than the statute requires. *U. of O. Co-Oper. v. Dept. of Rev*., 273 Or 539, 550, 542 P2d 900 (1975) ("This court has consistently held that an administrative agency may not, by its rules, amend, alter, enlarge or limit the terms of a legislative enactment."). Accordingly, the Stages Rule should be stricken.[6]

BOM 28-30). The County does not dispute that that was one of the legislature's goals, but also does not believe that those broad statements address the specific provisions at issue in this case.

[6] BOLI also contends that adding a preference to every stage of the application process does not mathematically result in the compounding of the preference. (BOLI BOM 25 n 13). That is so, according to BOLI, because adding a ten point preference to each stage of a six-stage process results in a sixty point preference, which is still ten percent of the total points of 600. The difference here is that the statute does not require a ten percent preference to be applied to *every* stage of a multistage process. Applying a preference to a specific point in a multistage process, as the legislature intended, would amount to a meaningful preference at that stage, without compounding the preference by applying it

C. When an agency lacks statutory authority to award a remedy, the award of that remedy is a jurisdictional error that can be raised at any time.

This Court repeatedly has held that agencies have only the authority granted to them by the legislature and, as a result, agencies do not have jurisdiction to act without a legislative grant of authority. *See, e.g.*, *Ochoco Constr., Inc. v. DLCD*, 295 Or 422, 426-27, 667 P2d 499 (1983) (recognizing that agencies have only the power and authority conferred by the legislature); *Diack v. City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988) (explaining that agency jurisdiction is based on whether the legislature has authorized an agency to decide an issue). It follows that an agency act taken without statutory authority is void for lack of jurisdiction and can be raised at any time. As the County previously explained, that exception to preservation applies only when an agency lacks jurisdiction, and not when an agency improperly acts within its statutorily-delegated authority. (County BOM 47-50).

When analyzing agency action, a court looks at three separate issues: (1) did the action fall within the agency's authority, *i.e.* within the agency's jurisdiction; (2) if so, was the action taken by the necessary procedures; and (3) if so, did the substance of the action, "though *within the scope of the agency's*

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again in every other stage. Moreover, the reality of a sequential multistage hiring process is that each stage is often an elimination stage where only a certain number of candidates advance. Applying a preference to each stage in this process compounds its effect because a ten percent preference will have a potentially bigger impact each time the pool of candidates gets smaller.

or official's general authority, depart[] from a legal standard expressed or implied in the particular law being administered, or contravene[] some other applicable statute"? *See Planned Parenthood Association v. Dept. of Human Resources*, 297 Or 562, 565, 687 P2d 785 (1984) (emphasis added). Only the first of those issues involves agency jurisdiction and therefore can be raised at any time. That exception to the preservation requirement – which flows from this Court's agency and jurisdictional case law – does not create a gaping loophole, as BOLI asserts.

In contrast, a claim that an agency has improperly interpreted a statute that it is charged with administering, or otherwise improperly exercised the discretion granted to the agency, remains subject to preservation requirements because those are not jurisdictional issues. As *amicus* OTLA notes, "If the judicial officer *has the authority to make the inquiry*, he has the power to be wrong. An error of law, no matter how egregious, is not jurisdictional." *School District v. Nilsen*, 262 Or 559, 567, 499 P2d 1309 (1972) (emphasis added). However, the inverse also is true – if the agency does not have authority to take a particular action, then the agency is without jurisdiction with respect to that action. Lack of jurisdiction is not a mere error of law; it renders the action void.

Claims that an agency lacked authority to act are not nearly as common as claims that an agency improperly applied a legal standard. As a result,

claims of agency error generally are subject to preservation requirements. For example, ORS 659A.820, as referenced in ORS 408.230(7) of the veterans' preference statutes, gives BOLI authority to receive complaints that an employer has violated the veterans' preference statutes. BOLI has statutory authority to conduct contested case proceedings to resolve those complaints and to issue conclusions of law. ORS 659A.830 – 659A.850. Accordingly, BOLI has statutory authority to determine, in the first instance, whether the County violated the veterans' preference statutes, and arguments challenging BOLI's determination in that regard must be preserved. BOLI mischaracterizes the County's argument by suggesting otherwise. (*See* BOLI BOM at 42-43). In other words, BOLI's departure from a legal standard within its statutory authority does not raise a jurisdictional issue and challenges to that action are subject to preservation requirements. However, BOLI's departure from its statutory authority altogether – *i.e.* an action taken without authority – renders the agency without jurisdiction and challenges to that action can be raised at any time.[7]

[7] As BOLI notes, the same is true in the courts. In the case BOLI cited, *State v. Fults*, 343 Or 515, 518-519, 523, 173 P3d 822 (2007), the court applied preservation principles to a claim that the trial court had erred in sentencing the defendant to a term of probation that exceeded the presumptive sentence in the sentencing guidelines. The defendant did not assert that the trial court lacked authority to sentence him – and therefore lacked jurisdiction – but rather argued that the trial court had departed from a legal standard that the trial court had jurisdiction to apply. In contrast, in *Salitan v. Dashney*, 219 Or 553, 555-59,

Here, BOLI does not have statutory authority to award emotional distress damages for an employer's failure to grant a veteran a preference under ORS 408.230. *Cf. Salitan v. Dashney*, 219 Or 553, 555-59, 347 P2d 974 (1959) (concluding that judgment was void for lack of jurisdiction where remedy awarded was outside the statutory authority of the court). Because BOLI acted without legislative authority, it lacked jurisdiction. Therefore, that error can be raised at any time.[8]

D. BOLI lacks authority to award emotional distress damages for violations of the veterans' preference statute, even if BOLI has authority to award those damages in discrimination cases.

The legislature has created a remedy regime for unlawful practices, as defined in ORS 659A.001(12), that distinguishes between remedies for unlawful discrimination and remedies for failure to award a veterans' preference. Under ORS 659A.885(1), a person who files a civil action and claims a violation of the veterans' preference statute can receive injunctive relief and equitable relief, including back pay, but not emotional distress

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347 P2d 974 (1959), the court voided a judgment that exceeded the trial court's statutory $1,000 jurisdictional limit, despite the fact that the jurisdictional challenge was raised after the judgment was entered.

[8] Alternatively, this Court can address this issue as plain error. BOLI has cited no authority for the assertion that resorting to context and legislative history means that an error is not plain. Indeed, in modifying its statutory interpretation analysis, this Court has recognized that legislative history can help illuminate the meaning of a statute, even if the court has not first found some ambiguity in the text of the statute. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (explaining that court will review legislative history even if there is no ambiguity in the statute's text).

damages. Under ORS 659A.885(3), a person who files a civil action and claims a violation of the veterans' discrimination statute, ORS 659A.082, or other discrimination statutes, can receive compensatory and punitive damages, which could include emotional distress damages. As explained below, it follows that BOLI's authority to award remedies is similarly restricted.

BOLI and its *amicus* contend that the plain text of the statute gives BOLI the authority to "[e]liminate the effects" of an unlawful practice, and they argue that cases upholding BOLI's authority to award emotional distress damages in discrimination cases proves that BOLI has authority to award those damages to eliminate the effects of failure to grant the veterans' preference. However, that argument ignores the distinction that the legislature has drawn between remedies for discrimination and remedies for failure to grant a preference.

The cases cited by *amicus* OTLA all involve unlawful discrimination, rather than failure to grant a preference – and, in fact, those cases were all decided well before BOLI was given authority to enforce the veterans' preference statute in 2007.[9] (*See* OTLA 11-13). Moreover, those cases rested on the conclusion that "[i]n the context of the statute, mental anguish, as well as

[9] Because those cases were all in the context of discrimination, the legislature would not have assumed that its incorporation of ORS 408.230 into the remedy regime in ORS Chapter 659A would include authority for BOLI to award emotional distress damages. In fact, the legislature's decision to limit the remedies available in circuit court for violations of ORS 408.230 suggests that the legislature intended a similar limit on BOLI's authority. *See* ORS 659A.885(1), (2) (listing remedies for violation of ORS 408.230).

pecuniary loss, can be an effect of racial discrimination," and, as a result, that emotional distress damages could eliminate that effect. *Williams v. Joyce*, 4 Or App 482, 504, 479 P2d 513 (1971). To be sure, a veteran who does not receive the statutory preference may feel an emotional impact. However, this Court has made clear that not all emotional distress is compensable under Oregon law. *See Brewer v. Erwin*, 287 Or 435, 448, 600 P2d 398 (1979), *abrogated on other grounds by McGanty v. Staudenraus*, 321 Or 532, 901 P2d 841 (1995) (explaining that "worry and anxiety over a contractual dispute" does not give rise to emotional distress damages, nor does "the sort of annoyance, anger, or sense of frustration that frequently accompanies a dispute over a business transaction even where these common reactions are described as 'emotional distress'").

In a civil action, the legislature has determined that the emotional impact that a veteran feels when not being granted a preference is not legally compensable, whereas the emotional impact of being discriminated against is. *Compare* ORS 659A.885(1) *with* ORS 659A.885(3). The same is true for proceedings before BOLI – emotional distress from violation of the veterans' preference statute is not compensable. In fact, under prior versions of the statute, the Court of Appeals recognized that granting preferential treatment is not the same as remedying the effects of discrimination in a particular case. *Cf. Sterling v. Klamath Forest Practices Association*, 19 Or App 383, 396, 528 P2d

574 (1974) (concluding that affirmative action provisions of BOLI order "clearly mandate preferential, as opposed to equal, employment opportunity based on race, for certain inhabitants of this state in relation to others, and are, therefore, beyond the statutory authority of the Commissioner" whose authority was limited to removing discriminatory barriers for any inhabitant of the state). Given the distinction drawn by the legislature and the courts between discrimination and preference, *amicus* OTLA offers no support for the contention that BOLI's authority to award emotional distress damages in discrimination cases leads to the conclusion that the emotional impact for failure to grant a preference is a compensable "effect" that BOLI has authority to eliminate through damages. Rather, as in circuit court, a complainant at BOLI is not entitled to emotional distress damages for a violation of the veterans' preference statute. Because BOLI lacked authority to award emotional distress damages, this Court should hold that the damages award in this case is void.

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III. CONCLUSION

For the foregoing reasons, the County requests that this Court reverse the Court of Appeals decision and remand the case to BOLI for further proceedings consistent with this Court's decision.

DATED this 25th day of October, 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 as provided for by this Court's October 24, 2016 Order granting the County's motion to file an extended brief in excess of the word-count limitation in ORAP 5.05(2)(b)(i)(E); and (2) the word count of this brief (described in the Order as limited to 6,000 words) is 5,948 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).

Dated this 25th day of October, 2016.

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CERTIFICATE OF FILING

I hereby certify that I directed to be filed the foregoing **PETITIONER ON REVIEW'S REPLY BRIEF** on October 25, 2016, by efiling the original thereof with the:

State Court Administrator
Attn: Records Section
Supreme Court Building
1163 State Street
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I further certify that I served the foregoing **PETITIONER ON REVIEW'S REPLY BRIEF** on October 25, 2016, by eService and U.S. mail to each party listed below:

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