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 OPENING BRIEF ON THE MERITS AND EXCERPT OF RECORD

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.

Jacqueline Kamins, OSB No. 064972
Katherine Thomas, OSB No. 124766
Multnomah County Attorney's Office
501 SE Hawthorne Blvd., Ste. 500
Portland, Oregon 97214
jacqueline. kamins@multco.us
katherine.thomas@multco.us
Attorneys for Petitioner on Review
Multnomah County Sheriff's Office

Sean E. O'Day, OSB No. 003387
League of Oregon Cities
1201 Court Street, NE, Ste. 200
Salem, Oregon 97301
soday@orcities.org
Attorney for Amicus Curiae League of Oregon Cities

August 2016

Rob Bovett, OSB No. 910267
Association of Oregon Counties
1201 Court Street, NE, Ste. 300
Salem, Oregon 97301
robovett@aocweb.org
Attorney for Amicus Curiae Association for Oregon Counties

Sean J. Riddell, OSB No. 013943
Attorney at Law
1300 SE Stark Street, Ste. 208
Portland, Oregon 97214
sean.riddell@live.com
Attorney for Respondent on Review Rod Edwards

Carson Whitehead, OSB No. 105404
Department of Justice
1162 Court Street, NE
Salem, Oregon 97301-4096
carson.l.whitehead@doj.state.or.us
Attorney for Respondent on Review BOLI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Legislative History

Other Authorities

I. STATEMENT OF THE CASE

This case requires the Court to interpret portions of Oregon's veterans' preference statutes – which apply to every public employer and to the majority of public positions – to determine how public employers must apply the preference. In particular, this Court must determine (1) what a public employer must do to satisfy the statutory requirement to "devise and apply methods" to give "special consideration" to veterans in an unscored application process; (2) whether the preference must be applied at "stages" of the application process in addition to the circumstances required by the statute; and (3) whether the Bureau of Labor and Industries ("BOLI") has authority to award emotional distress damages to veterans whose preference is applied incorrectly. Those are issues of first impression that will impact every public employer and many, if not most, of the public hiring processes in the state.

II. QUESTIONS PRESENTED

1. When an employer uses an application examination that does not result in a score, does a public employer satisfy the requirement to "devise and apply methods" of granting the preference as required by ORS 408.230(2)(c) if the employer has formulated a process for applying the preference that it then applies in the recruitment at issue?
2. When an employer uses an application examination that does not result in a score, does granting an interview or treating the applicant as the number one candidate satisfy the requirement to grant the preference required by ORS 408.230?

3. Did BOLI exceed its authority and the scope of ORS 408.230 by adopting a rule requiring employers to apply veterans' preference "at each stage of the application process"?

4. Did BOLI exceed its authority by awarding emotional distress damages?

III. PROPOSED RULES OF LAW

1. Yes, a public employer satisfies the veterans' preference requirement in ORS 408.230(2)(c) to "devise and apply methods" of granting veterans "special consideration" if the employer has formulated a process for applying the preference that it then applies in the recruitment at issue. ORS 408.230(2)(c) does not require an employer to adopt a single, uniform, written method for applying the veterans' preference in any hiring process that does not result in a score.

2. Yes, in a hiring process that does not result in a score, a public employer satisfies the requirement to grant a preference by giving some special consideration not otherwise available to the veteran, including granting an interview to an applicant who otherwise would not have received one or treating the applicant as the number one candidate.

3. Yes, the requirement in OAR 839-006-0450(2) that an employer must apply the preference at "each stage" of the application process is inconsistent with the text, context, and legislative history of the statute.

4. Yes, BOLI exceeded its authority because emotional distress damages are not available for an improper application of the veterans' preference.

IV. NATURE OF THE PROCEEDING

This case arose out of a Multnomah County Sheriff's Office ("County") hiring process in 2012 for promotion from sergeant to lieutenant. When Respondent Rod Edwards ("Edwards") was not awarded the promotion, he filed a complaint with BOLI alleging that the County had failed to provide him the veterans' preference required by statute and that the County's actions caused him mental, emotional, and financial harm. ER-19 to ER-21. BOLI and

Edwards sought an order enjoining the County from violating the veterans' preference law, mandating the creation and implementation of a veterans' preference policy, and awarding damages. ER-29 to ER-31. After a contested case hearing, BOLI ordered the County to devise a written method for applying veterans' preference at each stage of any applicable hiring or promotion decision and to train its managers and staff on application of the preference. ER-120. In addition, although BOLI determined that Edwards was not entitled to any back pay or front pay, BOLI awarded Edwards $50,000 in emotional distress damages. ER-115, ER-120 to ER-121.

V. FACTS OF THE CASE

The County posted an internal job announcement for promotion from sergeant to lieutenant, a management level position requiring significant leadership skills. ER-72. Three sergeants applied for the promotion, including Edwards, who is a disabled veteran. ER-73.

To make the promotion decision, the County used an unscored application process that consisted of (1) an initial review of a letter of interest and résumé, (2) an interview with three members of the internal sheriff's office command staff, (3) evaluation and ranking of applicants by the three members of the internal command staff based on the letter of interest and résumé, 360 reviews from the applicants' peers, and the interview, and (4) with the benefit

of the command staff recommendations, a final hiring decision by the sheriff. ER-73, ER-74, ER-76.

The County's process began with review of a letter of interest and résumé. ER-73, ER-74. The letter of interest and résumé from Edwards showed a carelessness not shown by the other applicants. ER-74. For example, Edwards's résumé had numerous grammatical and spelling errors, including the misspelling of his own name. ER-1 to ER-4, ER-42, ER-44. Despite those deficiencies, the County granted Edwards an internal command staff interview, as a means of satisfying the statutory veterans' preference requirement. *See* ER-45 (testimony of Human Resources manager explaining that preference was applied in giving Edwards an interview).

Prior to the interviews, the County conducted a 360 review, which consisted of a survey of the applicants' co-workers – at all levels of the organization, including civilians – about topics such as leadership style, teamwork, and conflict resolution. ER-5 to ER-11, ER-74, ER-75. The comments from Edwards's 360 reviews were significantly worse – indeed, there were "more and stronger negative comments" – than those for the other applicants. ER-75. His co-workers described his leadership style as "autocratic," "authoritarian," "abrasive," and "the cause of workplace conflict," and they indicated that he would put his own interests before those of the

County and other employees, stating that he "would throw an employee under the proverbial bus if he needed to." ER-5, ER-6, ER-8.

Going into the interview process, and despite those deficiencies, the County treated Edwards as the number one candidate as another means of applying the statutory veterans' preference. ER-45 (testimony of Human Resources manager that Edwards was the number one candidate going into the process). In his interview, Edwards admitted and accepted the criticism of some of his 360 reviews in noting that, although his leadership style had changed in the past year, his prior style had been that of a "dictator." ER-47. At the conclusion of the interviews, and following review of the letters of interest, résumés, and 360 reviews, each interviewer ranked Edwards last. ER-12 to ER-18, ER-75. All three interviewers found the sergeant who ultimately received the promotion to be "much more qualified" than Edwards. ER-75. As BOLI later concluded, there were "sound, job-related reasons" for that conclusion. ER-75; *see also* ER-112 ("On this record, [BOLI] cannot find that Sgt. Edwards's qualifications, without the preference, are equal to or higher than those of the other applicants."). Nonetheless, Edwards remained a candidate when the sheriff made his final hiring decision. ER-76, ER-78.

Edwards did not receive the promotion and subsequently filed a complaint with BOLI, alleging that the County had failed to provide a veterans' preference as required by statute. ER-19 to ER-21, ER-69. At a contested case

hearing, the County provided testimony that it applied a preference by (1) granting Edwards an interview and (2) ranking him as the number one candidate going into the interview process. ER-45 (testimony of Human Resources manager explaining that preference was applied by giving Edwards an interview); ER-45 (testimony of Human Resources manager that Edwards was the number one candidate going into the process); ER-41 (testimony of interview panelist Gates that Edwards would be considered the top candidate); ER-46 (testimony of interview panelist Moore that Edwards was to be considered number one going into the process).[1]

BOLI's investigator confirmed in her testimony that the County had applied the preference by granting Edwards an interview. ER-32, ER-33, ER-38 (testimony of BOLI investigator that "that first stage of applying they gave Mr. Edwards a preference to interview and that – that they satisfied that requirement that a preference be granted at that stage" and that "it seemed they granted him an interview and that was due to veterans' preference"). BOLI's

[1] As the Court of Appeals noted, the County's Human Resources manager testified that Edwards was the number one candidate going into the process, that the job was "his essentially to lose," and that the job was his if he scored "first, second or even a competitive third." *Multnomah County Sheriff's Office v. Edwards*, 277 Or App 540, 547, 373 P3d 1099 (2016); ER-43. Despite those different articulations, as noted above, there was a consistent understanding by the Human Resources manager and the interview panelists that Edwards was to be treated as the number one candidate. *See also* ER-43, ER-45 (testimony of Human Resources manager explaining that Edwards was given a preference "by giving my indication to the panelists that he is the top candidate * * * [t]hat he's the number one candidate going into the process").

investigator also testified that she did not know what the different stages of the process were under BOLI's rule, but that, despite the agency's inability to identify those stages, the preference needed to be applied at each stage. ER-36 (testimony of BOLI investigator stating, "I feel like it is unclear what the different stages are, but that it [the veterans' preference] needs to be applied at each stage.").

After the hearing, BOLI concluded that the County failed to apply veterans' preference because the County did not "devise and apply" a method to grant Edwards special consideration. ER-84. Specifically, despite the testimony of BOLI's investigator, BOLI rejected the County's argument that granting an interview was an application of the preference and also concluded that considering Edwards the number one candidate was an insufficient method of granting the preference.[2] ER-85, ER-103 to ER-106. In addition, BOLI concluded that the County did not have a method for granting the preference at the final hiring stage of the process when the sheriff made his decision, and awarded Edwards $50,000 in emotional distress damages. The Court of Appeals affirmed. *Multnomah County Sheriff's Office v. Edwards*, 277 Or App 540, 542, 373 P3d 1099 (2016).

---

[2] BOLI concluded that the preference "must provide something more than simply being the top candidate going into the process, a formulation that can be characterized as a barely measureable head start." ER-106. However, BOLI also stated that "[m]aking a veteran the number one candidate might well qualify as a sufficient preference." ER-104.

VI. SUMMARY OF THE ARGUMENT

Under Oregon law, veterans are entitled to an advantage in most public hiring processes. BOLI's interpretation and application of the statutory preference, however, exceeds its authority and leaves veterans and employers without meaningful guidance. Under the text of ORS 408.230, a public employer using an unscored application process can comply with the veterans' preference requirement to "devise and apply methods" for granting "special consideration" to veterans if it has formulated a process for applying the preference and then applies it in the specific hiring at issue. Granting an interview to an applicant who otherwise would not have received one or treating that applicant as the number one candidate are acceptable types of "special consideration." Additionally, BOLI's rule requiring a preference to be applied at "each stage of the application process" conflicts with the veterans' preference statute in three ways. The rule expands when the preference is applicable, the number of times it must be applied, and whether it applies to the final hiring decision, in direct contradiction to the statutory text and legislative intent. Finally, the legislature did not intend to give BOLI authority to award emotional distress damages to individuals aggrieved by incorrect applications of the veterans' preference.

VII. ARGUMENT

Every public employer in Oregon must grant a veterans' preference to veterans who apply for civil service positions and meet certain basic prerequisites. ORS 408.230(1) (requiring public employers to "grant a preference" to veterans and disabled veterans applying for civil service positions). The statute prescribes the manner in which public employers must grant the preference. ORS 408.230(2). For an initial application screening used to develop a list of persons for interviews, the employer must add five points to a veteran's score and ten points to a disabled veteran's score. ORS 408.230(2)(a). That same method is used for an application examination that results in a score. ORS 408.230(2)(b). However, for an application examination that does not result in a score – because, for example, it consists of "an interview, an evaluation of the veteran's performance, experience or training, a supervisor's rating or any other method of ranking an applicant that does not result in a score" – the statute requires only that the public employer "devise and apply methods by which the employer gives special consideration" to the veteran. ORS 408.230(2)(c).

/ / /

/ / /

/ / /

/ / /

A. A public employer satisfies the veterans' preference requirement in ORS 408.230(2)(c) to "devise and apply methods" for granting veterans "special consideration" if the employer has formulated a process for applying the preference that it then applies in the recruitment at issue.

Under Oregon law, public employers must grant a preference to veterans and disabled veterans who apply for or seek promotion to civil service positions. *See* ORS 408.230(1) (providing 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 with a higher maximum salary rate"). A public employer that uses an unscored application examination must "devise and apply methods by which the employer gives special consideration in the employer's hiring decision to veterans and disabled veterans."[3] ORS 408.230(2)(c). Neither statute nor BOLI rule define the phrase "devise and apply methods." However, the text, context, and legislative

---

[3] ORS 408.230(2)(c) provides,

"(2) The employer shall grant the preference in the following manner:

"* * * * *

> "(c) For an application examination that consists of an interview, an evaluation of the veteran's performance, experience or training, a supervisor's rating or any other method of ranking an applicant that does not result in a score, the employer shall give a preference to the veteran or disabled veteran. 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."

history of the statute demonstrate that the "devise and apply methods" requirement was intended to provide employers with flexibility in determining how to apply the veterans' preference in a hiring process that does not result in a score – no single, uniform method is required. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (explaining that statutory analysis begins with text and context, before turning to legislative history).

The legislature's use of the word "devise" connotes more flexibility than uniformity. *Compare Webster's Third New Int'l Dictionary* 619 (unabridged ed 2002) (defining devise as "to form in the mind by new combinations of ideas, new applications of principles, or new arrangement of parts : formulate by thought"), *with id.* (including obsolete definition of devise as "to describe fully : relate in detail"). Although a person applying the veterans' preference must have "formulate[d] by thought" the preference that that person will apply, the statutory text does not require an employer to prepare a single "coherent, consistent, written" method that applies to "any hiring or promotion decisions," as BOLI required in its Order. ER-120. Rather, it is sufficient for an employer to know how it will apply the preference in a particular hiring process.

The informal process that the word "devise" represents suggests that the legislature also intended the broader definition of "method" to apply. *Compare Webster's* at 1423 (defining method as "a way, technique, or process of or for doing something" or "a body of skills or techniques"), *with id.* (defining

"method" as "orderly arrangement, development, or classification" and explaining that it "can apply to any plan or procedure but usu. implies an orderly, logical, effective plan or procedure, connoting also regularity"). Although an employer must formulate a process for providing a veteran with a preference, that process may vary between recruitments just as the hiring process itself may vary between recruitments. Nothing in the text of the statute requires uniformity among different recruitment processes.

Indeed, the definition of "public employer," adopted at the same time as the "devise and apply" requirement, expressly recognizes that an entity need not adopt a single, uniform process for applying the preference. *See* Or Laws 2007, ch 525, § 1; *Force v. Dept. of Rev.*, 350 Or 179, 188, 252 P3d 306 (2011) ("'[C]ontext' includes, among other things, other parts of the statute at issue."). Specifically, the legislature did not limit that definition to just the agency or political subdivision and instead also included "any person authorized to act on behalf of the state or any agency or political subdivision of the state with respect to control, management or supervision of any employee." Or Laws 2007, ch 525, § 1. By including "any person authorized to act on behalf of" a public entity in that definition, the legislature recognized that individuals involved in a hiring process on behalf of a public entity might devise and apply a method for granting the preference, so long as there was a process that ensured that a preference in fact was provided. That flexibility is particularly

important in an application process that does not result in score, where a certain amount of subjectivity is inherent in the hiring process. In recognition of that, the legislature emphasized actual application of the preference over each individual's articulation of that preference – as long as a preference properly was applied in a hiring process, the legislature did not demonstrate an intent to require a preexisting, written policy.

The evolution of the text of the statute further underscores that conclusion. *See State v. Ziska*, 355 Or 799, 806, 334 P3d 964 (2014) (explaining that context includes prior versions of a statute, "including any wording changes in a statute over time"). Although the legislature extended application of the veterans' preference to unscored hiring processes in 1999, it did not add the requirement for employers to "devise and apply methods" for applying the preference until 2007. *See* Or Laws 1999, ch 792, § 1; Or Laws 2007, ch 525, § 2. Prior to 2007, the legislation required that there be a "uniform method" for providing the preference in an unscored process. Or Laws 1999, ch 792, § 1. However, in 2007, the legislature removed the word "uniform" and provided that there could be multiple "methods," recognizing that uniformity across public employers, within a single employer, or even within a single hiring process was not realistic. *See* Or Laws 2007, ch 525, § 2; *see also* Audio Recording, House Committee on Veterans Affairs, SB 822, May 22, 2007, at 13:28, 8:07 (statements of Representative Cowan),

https://olis.leg.state.or.us (accessed May 19, 2016) (explaining the need for flexibility because, particularly for managerial positions, the application process may take into account "which personality appears to match the needs of the organization" and a "gut feeling"); Testimony, House Committee on Veteran's Affairs, SB 822, May 22, 2007, Ex A (statement of Robert H. Thornhill, who requested sponsorship of the bill) (explaining that the statute provides managers with "flexibility in determining how preference is to be granted for these positions"). In removing the uniformity requirement, the legislature provided employers with more flexibility in creating a method or methods for applying the preference.[4]

Here, the County satisfied the statutory requirement to devise and apply methods of granting a preference in an unscored process because the County

[4] It is not surprising that the legislature removed the uniformity requirement, given the concerns that were voiced when the legislature first adopted that wording in 1999. For example, one legislator was concerned that it would be difficult to develop a "uniform method," recognizing that different departments and units of government might have very different processes outside of a scored examination. Tape Recording, Senate General Government Committee, SB 831, Apr 8, 1999, Tape 53, side B (statement of Senator Shields) (explaining that for personnel interviews, processes might vary between departments or governments). Although some legislators believed that the "uniform method" would equate to a five or ten percent preference, the legislature opted to provide public employers with flexibility by not specifying the way in which the preference would be applied. *See* Tape Recording, Senate Rules and Elections Committee, SB 831, May 20, 1999, Tape 59, side A (statements of Senator Neil Bryant and Senator Charles Starr) (discussing uniform method as application of a five or ten percent preference). Even greater flexibility was restored to employers with the removal of the word "uniform" and substitution of the plural word "methods" in 2007.

granted Edwards an interview that he otherwise would not have received and treated Edwards as the top candidate going into the interview process. Each person involved in the hiring process consistently stated that Edwards would be treated as the number one candidate going into the interview process. Although each person in the interview process had his or her own articulation of how the County was giving Edwards the preference, the Human Resources manager and members of the interview panel had a consistent understanding that Edwards would be given a preference through granting him an interview and treating him as the number one candidate.

More importantly, Edwards was *in fact* given an interview and treated as the top candidate, despite submitting application materials that were significantly inferior to those of the other candidates. The text, context, and legislative history of the statute demonstrate that the purpose of the "devise and apply" requirement was to ensure that a preference in fact would be applied in an unscored process. Recognizing the inherent subjectivity of such processes, the legislature emphasized substance over form – rather than looking for a single, preexisting, and uniform articulation of the preference, the legislature required that such a preference in fact be formed in the mind of a public employer, and then applied. Here, the County met that requirement – the Human Resources manager and each panelist had formed in his or her mind a process for providing Edwards with a preference and then applied that

preference in the recruitment: Edwards was granted an interview and each person treated Edwards as the top candidate.[5] That is sufficient to satisfy the statutory requirement.

In sum, the text, context, and legislative history of ORS 408.230 demonstrate that the legislature intended to give employers – and those conducting an application process on behalf of their employers – significant flexibility to "devise and apply methods" for giving "special consideration" to veterans. That flexibility recognizes the inherent subjectivity of unscored processes, as well as the multitude of different types of unscored application processes that employers might use. BOLI and the Court of Appeals adopted an interpretation of ORS 408.230(2)(c) that is directly contrary to that legislative intent by requiring rigid uniformity when applying the preference in

---

[5] Moreover, as discussed below, the statute requires the County to apply the preference only once for the entirety of the application examination, and the County did so by granting Edwards an interview. Therefore, any additional preference was not required by statute.

The Court of Appeals also suggested that there was confusion about who would apply the preference and when. *See, e.g.*, *Edwards*, 277 Or App at 546 (explaining that one interviewer factored the preference in, but stated that the sheriff technically would apply the preference). Regardless of what the interviewers understood regarding when the "technical" preference would be applied, the Human Resources manager and the interview panelists complied with the statute because they all in fact applied a preference by treating Edwards as the number one candidate, as indicated by the testimony cited above. *See also* ER-48, ER-49 (testimony of panelist Moore that because position was an "executive at-will appointment," he was not sure how the process would work but nonetheless that he "knew essentially the job was [Edwards's]" and that Edwards was "number one, no matter what").

an unscored process. Because the County did devise and apply a method to grant Edwards special consideration, this Court should reverse the Court of Appeals and remand this case to BOLI for a decision that is consistent with the flexible standard that the legislature intended when it adopted ORS 408.230(2)(c).

B. In a hiring process that does not result in a score, a public employer satisfies the requirement to grant a preference by giving some special consideration not otherwise available to the veteran, including granting an interview to an applicant who otherwise would not have received one or treating the applicant as the number one candidate.

Neither ORS 408.230(2)(c) nor any BOLI rule provide a metric for determining whether the public employer's method of applying the preference in an unscored process is sufficient. The statutory text requires only that the veteran be given "special consideration," essentially, something not otherwise available to the veteran in the regular course of the hiring process. *See Webster's* at 2186 (defining "special" to mean "supplemental to the regular : EXTRA" and "assigned or provided to meet a particular need not covered under established procedures"). Indeed, as noted above, the legislature itself was unsure what the methods for applying the preference in an unscored process would be, which explains why the legislature provided employers with flexibility to "devise and apply" methods appropriate for each hiring process. Nonetheless, the legislative history provides two indications of the legislature's

understanding regarding how employers could satisfy the preference requirement, both of which the County satisfied.

First, when the preference was extended to unscored hiring processes in 1999, the legislature understood that the preference would operate much in the same way that it did in a scored process, essentially creating a five or ten percent preference. Tape Recording, Senate Rules and Elections Committee, SB 831, May 20, 1999, Tape 59, side A (statements of Senator Neil Bryant and Senator Charles Starr) (discussing uniform method as application of a five or ten percent preference). In this case, in a pool of three candidates, Edwards was treated as the number one candidate despite significantly inferior application materials – that advantage far exceeded the ten percent preference that he would have received on a scored application examination.[6] *See* Audio Recording,

[6] In its Order, BOLI stated that treating Edwards as the number one candidate was insufficient because it was "a formulation that can be characterized as a barely measurable head start." ER-106. However, a five or ten percent preference would be considered by many a "barely measureable head start," and the legislative history supports the conclusion that that is all that the legislature intended. *See*, *e.g.*, Audio Recording, House Committee on Veterans Affairs, SB 822, May 22, 2007, at 21:23 (statement of General Mike Caldwell, Deputy Director of the Military Department), https://olis.leg.state.or.us (accessed May 19, 2016) (explaining that the legislation would "give that little extra bump"). BOLI did not provide reasoning to support the conclusion that the statute requires more than that or that the preference requires the applicant to "necessarily move forward" (though notably, Edwards did move forward through the entire process despite consistently being ranked third on his merits). ER-105 (explaining in BOLI Final Order that County's preference "means that if another candidate was at all superior, Sgt. Edwards would not necessarily move forward").

House Committee on Veterans Affairs, SB 822, May 22, 2007, at 19:49 (statement of Representative Jeff Barker), https://olis.leg.state.or.us (accessed May 19, 2016) ("And if you have people and you did kind of grade them and the veteran was number five, then obviously you wouldn't jump to number one.").

Second, the legislature was interested in ensuring that veterans would, at a minimum, get past the initial screening to the interview stage of the process. Audio Recording, House Committee on Veterans Affairs, SB 822, May 22, 2007, at 21:23 (statement of General Mike Caldwell, Deputy Director of the Military Department), https://olis.leg.state.or.us (accessed May 19, 2016) (explaining that the legislation would "give that little extra bump" so that applicants could pass the initial screening to get to an interview); Audio Recording, Senate Education and General Government Committee, SB 822, Apr 10, 2007, at 47:55 (statement of Paula Brown, Deputy Director of Oregon

---

In fact, under federal law, hiring processes that do not use numeric ratings instead use a category rating system where those eligible for the preference are listed "ahead of individuals who are not preference eligibles" in the same quality category, and certain disabled veterans "shall be listed in the highest quality category." *See* 5 USC § 3319 (a), (b) (2016). Although there are additional nuances in federal law, treating a veteran as the number one candidate is similar to that federal system. *See* Audio Recording, House Committee on Veterans Affairs, SB 822, May 22, 2007, at 12:38 (statement of Greg Warnock, Oregon War Veterans Association), https://olis.leg.state.or.us (accessed May 19, 2016) (noting that bill's intent was to match federal hiring program).

Department of Veterans' Affairs), https://olis.leg.state.or.us (accessed May 19, 2016) (explaining that when veterans are awarded the preference they "often are able to get an interview that they may not otherwise get" and that preference is "primarily used to grant the veteran the interview"). In other words, the legislature understood that a preference that resulted in an interview that otherwise would not have been granted without the preference – as was the case here – would satisfy the statutory requirements.

Therefore, although the contours of the method for applying the preference are left up to each public employer, the legislative history demonstrates that providing an interview that otherwise would not be granted or treating an applicant as the number one candidate, particularly in a three-person applicant pool, would satisfy the requirement to provide a preference in an unscored application process. Because BOLI and the Court of Appeals reached a contrary conclusion, and that conclusion is contrary to law, this Court should reverse the Court of Appeals and remand the case to BOLI to apply the correct legal standard – providing an interview that otherwise would not be granted and treating an applicant as the number one candidate each qualify as sufficient methods of granting "special consideration" under ORS 408.230(2)(c).

/ / /

/ / /

/ / /

C. BOLI's rule requiring a preference to be applied at "each stage of the application process" conflicts with the statute.

BOLI's rule implementing the veterans' preference statute requires employers to apply a preference for veterans "[a]t each stage of the application process." OAR 839-006-0450 (the "Stages Rule").[7] For the reasons set forth below, the Stages Rule conflicts with the veterans' preference statute.

An administrative agency may adopt regulations to implement a statute, however, this Court has "consistently held that an administrative agency may not, by its rules, amend, alter, enlarge or limit [its] terms." *U. of O. Co-Oper. v. Dept. of Rev*., 273 Or 539, 550, 542 P2d 900 (1975).

When an agency's interpretation of a statute is at issue, the standard of review depends upon whether the statutory language amounts to an exact term, an inexact term, or a delegative term. *Springfield Educ. Assn. v. School Dist*., 290 Or 217, 223, 621 P2d 547 (1980). "Exact terms" are sufficiently precise such that "the meaning of which [terms] are easily discernible on their face and require only agency factfinding in their application." *J.R. Simplot Co. v. Dep't of Agric*., 340 Or 188, 196-97, 131 P3d 162 (2006) (citing *Springfield*, 290 Or

---

[7] OAR 839-006-0450 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."

at 223). Inexact terms, on the other hand, are less clear. "Although they embody a complete expression of legislative meaning, that meaning always may not be obvious." *Coast Sec. Mortg. Corp. v. Real Estate Agency*, 331 Or 348, 354, 15 P3d 29 (2000) (internal citation omitted). Finally, "delegative terms" express incomplete legislative meaning that the agency is authorized to complete. *Springfield*, 290 Or at 228. The legislature uses "delegative terms" when it "intends to confer discretion on the agency to refine and execute generally expressed legislative policy." *J.R. Simplot Co.*, 340 Or at 197 (internal quotation omitted).

The statutory source of the Stages Rule is ORS 408.230(2). *See Edwards*, 277 Or App at 554 (recognizing that OAR 839-006-0450 "implements ORS 408.230(2)"). ORS 408.230(2) delineates three precise circumstances that trigger the application of the veterans' preference: (a) an "initial application screening used to develop a list of persons for interviews," (b) "an application examination, given after the initial application screening, that results in a score;" and (c) "an application examination that consists of an interview, an evaluation of the veteran's performance, experience or training, a supervisor's rating or any other method of ranking an applicant that does not result in a score." ORS 408.230(2)(a)-(c). The terms "initial application screening," and "application examination" (either scored or unscored) found in

ORS 408.230(2)(a) to (c) are the basis for BOLI's requirement that a preference must be applied at each "stage" of the process.

"Initial application screening" and "application examination" are inexact terms. They express a "complete legislative policy" that a veterans' preference is to be afforded to the screening and examination portions of the hiring process, but they are not so "obvious" there is not room for some interpretation. *See Coast Sec. Mortg. Corp.*, 331 Or at 354 (internal citation omitted); *see also WaterWatch of Oregon, Inc. v. Water Res. Dep't*, 268 Or App 187, 205, 342 P3d 712 (2014) (concluding that the text "maintain * * * the persistence of [listed] fish species" is an "inexact term" because "it expresses a complete legislative policy to ensure that further development of municipal permits will maintain fish persistence, but it is not so precise that it is an 'exact term'"). Because application examination and initial screening are inexact terms, BOLI's interpretation of them is afforded no deference, and this Court reviews them to determine the legislative intent. *See Springfield*, 290 Or at 223.

1. The Stages Rule expands the circumstances in the hiring process that trigger a veterans' preference.

The text, context, and legislative history of the statute demonstrate that the veterans' preference applies to three scenarios in the employment process. The circumstances that trigger the application of a veterans' preference are the subsections of ORS 408.230(2): (a) an initial application screening, (b) a scored

application examination; and (c) an unscored application examination. The Stages Rule, however, dramatically expands the scope of the statutory mandate. The rule does not define or clarify the statutory scenarios, but rather sets them aside entirely in favor of requiring the application of a veterans' preference at "each stage" of any application process. OAR 839-006-0450. A "stage" is defined as a "period or step in a process, activity, or development." *Webster's* at 2219. The Stages Rule apparently requires employers to apply a preference at each "period" or "step," contrary to the statutory text identifying (and thereby limiting) the precise parts of a hiring process that do trigger a preference.

An interpretation that treats each type of hiring process as "stages" of every hiring process is also contrary to the statute's legislative history. When the statute was first enacted, five (or ten for a disabled veteran) preference points were added to a scored recruitment civil service exam. *See Davis v. Civil Service Board*, 39 Or App 695, 699-700, 593 P2d 1209 (1979). In 2007, the legislature amended the statute to ensure that unscored application examinations were, in practice, afforded the same preference as scored application examinations. As the legislative history confirms, these preference points were designed to assist veterans in the earliest stages of the process move into the rest of the process – *not* provide a preference to each step of the process.

As the Deputy Director of the Oregon Department of Veterans' Affairs 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 Education and General Government Committee, SB 822, Apr 10, 2007, at 47:55 (comment of Paula Brown, Deputy Director of Oregon Department of Veterans' Affairs), https://olis.leg.state.or.us (accessed May 19, 2016) (emphasis added).

And as the Director of the Military Department testified:

> "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.**"

Audio Recording, House Veterans' Affairs Committee, SB 822, May 22, 2007, at 20:36 (comment of General Mike Caldwell, Deputy Director of the Military Department), https://olis.leg.state.or.us (accessed May 19, 2016) (emphasis added).[8]

[8] *See also* Audio Recording, House Committee on Veterans and Emergency Services, HB 2510, Mar 17, 2009, at 18:33 (comment of General Mike

Clearly, the main goal of the preference, initially applicable to civil service recruitment exams, was to give veterans an advantage at the *outset* of the process. Accordingly, the legislature focused the preference-triggering events on screenings and examinations. This history is flatly inconsistent with a requirement that the preference be applied at each and every step of the hiring process.

Regulations that expand the scope of the originating statute are routinely struck down. For example, in *Employment Division v. Smith*, the Court of Appeals construed a regulation interpreting when the Employment Division can amend an unemployment benefits eligibility decision. 64 Or App 33, 666 P2d 1369 (1983). The statute authorized such an amendment only to address "clerical errors" and "any issues not previously ruled upon or * * * where new facts * * * become available." *Id*. at 36 (quoting ORS 657.265(6)). The regulation, however, provided that decisions may be amended "upon discovery of new information, error or misinterpretation of policy, rules or law." *Id*. (quoting OAR 471-30-039(4)). The Court of Appeals noted that an "agency may not, by its rules, expand the authority granted it by the terms of a statute."

Caldwell, Deputy Director of Oregon Military Department), https://olis.leg.state.or.us (accessed Aug 1, 2016) (amending statute to clarify definitions) ("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."); *see* Brief of *Amici Curiae* League of Oregon Cities and Association of Oregon Counties at 24-31 (citing additional legislative history in discussion of OAR 839-006-0450(2)).

Id. As a result, the Court of Appeals struck down the regulation, because it "expand[ed] the limited grounds for amendment of eligibility decisions." *Id*. at 37-38.

The Stages Rule similarly expands the limited circumstances triggering a preference far beyond the initial application screenings, unscored application examinations, and scored application examinations contained in the statutory text. That is an invalid interpretation of the statutory language. *See Joint Council of Teamsters No. 37 International Brotherhood of Teamsters, etc. v. Oregon Liquor Control Com*., 46 Or App 135, 139-41, 610 P2d 1250 (1980) (regulation's definition of statutory term "pasteurization" comprises processes that are not contained within the commonly understood meaning of "pasteurization" and therefore impermissibly expands statute's scope); *see also Miller v. Employment Div*., 290 Or 285, 289, 620 P2d 1377 (1980) (agency regulation may not carve exceptions to the statutory text).

Moreover, unlike the statute's clear delineation of circumstances that trigger the preference, the Stages Rule offers no such clarity. A public employer can comply with the statute by applying a preference during an initial application screening, a scored application examination, and/or an unscored application examination, but violate the Stages Rule by inadvertently failing to apply the preference at some unspecified separate "stage" in the process. An

excerpt of the BOLI investigator's testimony in the instant case demonstrates this lack of clarity:

> "Q: And what were the stages of the hiring process?
>
> "A: What looked like letter of interest and résumé, the command staff interview and then the 360 reviews to all have equal weight. So it looked like they he submitted his proper documentation and then at that point that was the first stage, and the second stage would have been the interview that he went to.
>
> "Q: Okay. What about the 360 reviews?
>
> "A: And that would have been a third stage or a second.
>
> "Q: Okay.
>
> "A: Second stage.
>
> "ALJ ROSENHOUSE: I'm sorry? I thought you said before the 360s were part of the first stage?
>
> "THE WITNESS: Well, I guess I consider them three different -- I guess I would see them as multiple stages, and so the 360 interviews -- or, reviews were one stage and then the application materials and the interview -- application materials to get an interview and letter of interest would be another stage. And then you'd have your interview and there would be -- there would need to be some sort of preference applied at that interview stage.
>
> "ALJ ROSENHOUSE: I'm still not clear on what she considers stages * * * to be, and when you say stages, I assume you're saying that veterans' preference points have to be applied at -- * * * at every single stage.
>
> "* * *
>
> "THE WITNESS: If I may, I -- I feel like it is unclear what the different stages are, but that it needs to be applied at each stage. And it seemed as though the first stage was certainly that

interview. And then after that there was another -- the bulk of the recommendations and everything happened after the interview and that there should be some sort of preference applied at that second stage. And I believe somewhere in an email there was also -- that was read -- there was also a mention of multiple stages of the process, too, which (indiscernible audio).

"* * *

"ALJ ROSENHOUSE: I still don't understand and maybe it's something for you to address in closing. But I -- I don't know what the Agency's position is as to what they think the stages are where veterans' preference points are supposed to be applied, if, in fact, veterans' preference points are to be applied at every stage.

"* * *

"Q: And what would you state that the first stage of the process was?

"A: I would think the letter of interest and résumé would be the first stage.

"Q: And did you -- were you able to conclude whether veterans' preference was applied during the letter of interest and résumé stage of the hiring process?

"A: It looked like it may -- may have been. It's a little unclear, but it seemed they granted him an interview and that was due to veterans' preference.

"Q: Okay. And would you agree that there was another stage to the hiring process, after the letter of interest and résumé?

"A: Yes, so after they selected the candidates for the interview, the second stage would have been the interview.

"Q: Okay. And was it clear to you during your investigation whether the command staff interview and the 360 reviews were separate stages of the interview process --

"***

"A: To be honest, it was a little unclear to me at that point, you know, where -- what -- which one came first or what the stages were. They were certainly separate components, though.

"Q: Okay.

"ALJ ROSENHOUSE: And I'm sorry, the separate components are interview and what?

"MS. CASEY: Letter of interest and résumé.

"ALJ ROSENHOUSE: Okay. Well, I got letter of interest and résumé as first stage.

"MS. CASEY: Command --

"ALJ ROSENHOUSE: And then you were talking about the second stage and I heard interview. And I'm not sure if I also heard command staff interview and 360s are part of that or different from that or only one of them is.

"***

"Q: Okay. Would you consider three components -- could three components of a process be three stages of a process?

"A: They could be.

"Q: Okay. But you would agree at the very least that there was at least two stages to this promotional process?

"A: Yes."

ER-35 to ER-40.

Given the latitude BOLI has in defining "stages," it is not difficult to imagine scenarios in which the employer could apply points to an application examination, in compliance with the statute, but fail to apply points during the somewhat moving target of a "stage," and thus violate the rule. That is an impermissible outcome. *See Fajer v. Department of Human Resources*, 51 Or

App 105, 108, 111, 625 P2d 140, *rev den*, 291 Or 151 (1981) (finding rule that could create scenarios inconsistent with the statute to be invalid).

2. The Stages Rule greatly expands the number of preferences an employer must apply.

In addition to affecting different parts of the hiring process than covered by the statute, the Stages Rule requires a greater *number* of applications of the preference than covered by statute. The veterans' preference statute's plain text is limited as to the number of veterans' preferences an employer must apply. ORS 408.230(2) provides that the employer "shall grant the preference in the following manner:" for "an initial application screening" or a scored "application examination," an "employer shall add five preference points to a veteran's score and 10 preference points to a disabled veteran's score." ORS 408.230(2)(a),(b). For an unscored application examination, an employer must apply "special consideration" that corresponds to the five or ten point bump. ORS 408.230(2)(c). Each of these events requires one application of the preference. When an employer uses one of these mechanisms, it must apply a preference for that mechanism. If an employer is able to use more than one mechanism – such as both an initial application screening and an application examination (scored or unscored), an employer must – at most – apply two

preferences. This amounts to the extent of available preferences under the statute.[9]

The statutory context confirms this natural reading of the statutory text. Subsection (b) – applicable to a scored application examination – explicitly requires an employer to "add preference points to the *total* combined examination score *without allocating the points to any single feature or part of the examination*." ORS 408.230(2)(b) (emphasis added). So, if an application examination for an administrative position consists of a typing test, an oral examination, and a computer software test, resulting in a total score, the preference is applied to the "total combined examination score" and not each individual component. Accordingly, the entire application examination is afforded one preference.

The language regarding the "total score" is not repeated in subsection (2)(c) – relating to unscored application examinations. However, as noted above (at pp. 18-19), the legislature's purpose in including the requirement contained in (2)(c) was to apply a corresponding preference to an unscored application examination as to a scored application examination (amounting to five percent or ten percent). Indeed, the parallel structure of the subsections

[9] As *amici curiae* point out, there is strong support in the legislative history and statutory context to conclude that the legislature intended the application of a single preference. *See* Brief of *Amici Curiae* League of Oregon Cities and Association of Oregon Counties at 15-31.

reflects that legislative intent to apply similar preferences to scored and unscored application examinations. *See Edwards*, 277 Or App at 550 (recognizing the "parallel structure of paragraphs (2)(a) through (2)(c)"). Like scored application examinations, unscored application examinations would receive a *single* preference applied to the entire examination, not to any single "part" or "feature" of the examination.

Each circumstance identified in the statute – a screening, a scored application examination, and an unscored application examination – triggers the application of a single preference. The Stages Rule, however, results in the compounding of multiple preferences applied within a single hiring process, which is directly contrary to this legislative intent. For example, in this case, BOLI identified the "stages" of the County's unscored application examination in different formulations, but at times appeared to include the résumé and letter of interest as one stage, the 360 reviews as another stage, the interview as yet another stage, and the final hiring decision as the final stage.[10] Each of these four "stages" of the unscored application examination requires a separate application of the preference under the rule. However, if these stages were components of a *scored* application examination contained in subsection ORS

[10] *See* ER-50 (BOLI closing argument) ("[O]ne stage was a letter of interest and a résumé, that a second stage was review of 360 reviews, that a third stage was an interview and that there may have been a fourth stage in which the Human Resources Department and Sheriff Staton made a final decision based on the recommendations of the hiring panel.").

408.230(b), they would be entitled to a single preference, not four separate preferences. The Stages Rule's treatment of scored applications differently from unscored applications is directly contrary to legislative intent, and gives veterans in an unscored process a considerably greater preference than veterans in a scored process.

These compounding preferences also run counter to another provision of the statute. ORS 408.230(3) states that the preference is not "a requirement that the public employer appoint a veteran or disabled veteran to a civil service position" and ORS 408.230(5) provides that an "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 * * * ." However, an application screening, followed by a typing test, an oral examination, a computer software test, an interview, and a hiring decision, could each be "stages" of the hiring process. In that event, each of the six "stages" would require a preference for the veteran applicant. If, as the legislature intended, the preference corresponds to the preference applicable to scored process, each of those stages could require approximately a ten percent preference for a disabled veteran. It is difficult to imagine an applicant with a sixty percent advantage not having at least an equal score to his peers. Therefore he must be hired, despite his lack of qualifications. ORS 408.230(5). In essence, this amounts to a requirement that

a public employer hire the veteran, in direct contradiction to the statute. ORS 408.230(3).[11]

3. The Stages Rule improperly requires another preference at hiring, in contradiction to the plain text and legislative intent.

The Stages Rule is at odds with yet another provision of the statute. In the instant case, BOLI concluded that the hiring decision is a "stage" of the application process. *See Edwards*, 277 Or App at 546, 548; *see also* n. 10, *supra*. However, hiring is not included in ORS 408.230(2), the section from which the Stages Rule is derived. *See Edwards*, 277 Or App at 550 (recognizing that OAR 839-006-0450 "implements ORS 408.230(2)"). Rather, ORS 408.230(2) is limited to application screenings and application examinations. *See* ORS 408.230(2). BOLI's inclusion of hiring in the Stages Rule exceeds its authority.

Moreover, hiring *is* provided for elsewhere in the statute, an advantage that is separate and apart from the preference for screenings and examinations contemplated in ORS 408.230(2). Under ORS 408.230(4), an employer must hire a veteran "if the results of a veteran's or disabled veteran's application

---

[11] It is worth noting that, prior to the current statute, the veterans' preference statute only allowed veterans to use their preference a single time over the course of their career, let alone a single hiring process. *See* Or Laws 2007, ch 525, § 3 (amending statute to eliminate the language: "Once a veteran has used the preference provided for in ORS 408.230 and has successfully completed trial service and attained regular employee status, the veteran may not use the preference again.").

examination, when combined with the veteran's or disabled veteran's preference, are equal to or higher than [the non-veteran's]." However, BOLI's regulation appears to require, as it did in this case, an additional preference at the hiring "stage" of the application examination contained in ORS 408.230(2). Accordingly, at the hiring decision – which BOLI considers a *stage* of the application examination – an employer must use the *results* of the application examination. In baking terms, this is akin to a pie recipe that calls for flour, sugar, and the completed pie. Courts must avoid constructions in which "the statutory provision at issue would become nonsense." *Mid-Century Ins. Co. v. Perkins*, 344 Or 196, 212, 179 P3d 633, *adh'd to as modified on recons*, 345 Or 373, 195 P3d 59 (2008).

Moreover, under the Stages Rule, an employer must apply a preference to hiring because it constitutes a "stage" of the process. However, there is already a statutory advantage to be applied at hiring found in subsection (4). Given the compounding of multiple stages of preference, this further compounding of the preferences leaves little room for an employer to hire a non-veteran, contrary to the plain language of the statute. ORS 408.230(3).

The legislative history confirms that the preference found in ORS 408.230(2) was not meant to be applied at hiring. As BOLI's representative testified: "But [in] 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), https://olis.leg.state.or.us (accessed Aug 1, 2016).

BOLI's Stages Rule exceeds the scope of the statute and BOLI's authority. This Court should declare the rule invalid and remand this case to BOLI to apply the statutory text as the legislature intended.

D. The statutory text, context, and legislative history make clear that BOLI does not have authority to award emotional distress damages for violations of the veterans' preference statute.

Despite denying Edwards back pay or front pay, BOLI awarded Edwards $50,000 in emotional distress damages. If this Court concludes that the County failed to properly apply the preference in this case, it nonetheless should reverse BOLI's award of emotional distress damages because the statute does not authorize BOLI to make such an award.

BOLI's interpretation of the available statutory damages is reviewed for legal error. ORS 183.482(8)(a). As discussed above (at pp.21-22), BOLI's interpretation of inexact statutory terms is not entitled to deference. *Springfield*, 290 Or at 223.

Although this Court generally interprets remedial statutes broadly, a "court is not at liberty * * * to read into a remedial statute a remedy that the legislature did not intend to create." *Stockton v. Silco Constr. Co.*, 319 Or 365,

376-77, 877 P2d 71 (1994). Specific to BOLI, this Court has recognized that "the legislature did not intend to vest in the Commissioner completely unfettered discretion" to take remedial action. *See School District No. 1 v. Nilsen*, 271 Or 461, 495, 534 P2d 1135 (1975) (concluding that Commissioner who finds unlawful employment practice may not impose complex supervision requirements where this is no indication of unwillingness to comply); *see also Fred Meyer v. Bureau of Labor*, 39 Or App 253, 269, 592 P2d 564 (1979) (requirement that Fred Meyer needed to post notices in all stores for an isolated instance of discrimination had no "apparent reasonable relationship to the accomplishment of statutory purposes based on unlawful employment practice in this case").[12]

1. The statutory language "actual damages" does not explicitly include emotional distress damages.

The source for BOLI's authority to award damages for violations of the veterans' preference statute is found in ORS 659A.850.[13] Under this section, if BOLI finds a violation, it shall "issue an appropriate cease and desist order * * * [which] may require the respondent to * * * [e]liminate the effects of the unlawful practice that the respondent is found to have engaged in, including but

[12] Although the County did not object to this aspect of the damages award, this Court may review it as a jurisdictional matter, or as plain error, as described more thoroughly below.

[13] The veterans' preference statute provides that a veteran claiming to be aggrieved by a violation of the statute may file a complaint with BOLI in accordance with ORS 659A.820. ORS 408.230(7).

not limited to paying an award of *actual damages* suffered by the complainant." ORS 659A.850(4)(a)(B) (emphasis added). The section provides for an award of "actual damages" to eliminate the effect of the unlawful practice, but it does not define whether emotional distress damages are encompassed by the phrase "actual damages."

Although the term "actual" as opposed to "general" could connote only economic damages,[14] the Oregon Court of Appeals has recognized: "Sometimes 'actual' damages is intended to include only pecuniary harm, sometimes not." *Brown v. Am. Prop. Mgmt. Corp*., 167 Or App 53, 59, 1 P3d 1051 (2000).[15] Accordingly, the question becomes one of straight statutory construction: did the legislature intend "actual damages" to include noneconomic, such as emotional distress, damages? *Id*.

2. The statutory context demonstrates that the legislature did not intend "actual damages" to include emotional distress damages for violations of the veterans' preference statute.

Although the plain text of ORS 659A.850 does not answer definitively whether the legislature intended for the term "actual damages" to include an award of noneconomic damages, such as emotional distress damages, for

[14] *See, e.g.*, *Marshall v. May Trucking Co*., 2004 U.S. Dist. LEXIS 8675, 2004 WL 1050870 (D Or Apr 6, 2004) (assuming "actual damages" in Oregon wage discrimination statute is limited to economic damages).

[15] The Court of Appeals based its conclusion that "actual damages" sometimes includes noneconomic damages on the fact that one Oregon statute, ORS 97.760, uses the term "actual damages," and, explicitly defines them as follows. "Actual damages include special and general damages, which include damages for emotional distress." ORS 97.760(3)(b).

violations of the veterans' preference statute, the remainder of ORS chapter 659A provides sufficient statutory context. The legislature delineated the remedies it believed appropriate for individuals aggrieved by any practice in violation of ORS chapter 659A in the subsection applicable to those who elect to file a civil action. ORS 659A.885.

Under ORS chapter 659A, a person who alleges that an employer has failed to apply the veterans' preference can elect to proceed to a hearing with BOLI under ORS 659A.850 or file a civil action in circuit court under ORS 659A.885. *See* ORS 659A.870 (explaining that filing civil action waives right to file complaint with BOLI). Similar to BOLI's authority under ORS 659A.850 to order compliance with "injunctive or other equitable relief," a person aggrieved by unlawful employment practices who files a civil action is entitled to receive "injunctive relief and any other equitable relief that may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay." ORS 659A.885(1). That relief is available for all claims brought under ORS chapter 659A, including, for example, a claim of improper sick leave calculation, the denial of leave to attend a criminal proceeding, and an incorrect application of the veterans' preference. *Id*. (citing ORS 408.230, ORS 408.237, ORS 653.601).

Additional remedies are available for the bulk of the other unlawful practices enforceable in ORS chapter 659A. *See* ORS 659A.885(2)-(5).

Persons aggrieved by some of the more egregious practices, such as wage discrimination, may, in addition to the equitable relief found in subsection (1), obtain compensatory damages. ORS 659A.885(4), (5). Victims of the most egregious forms of unlawful practices, such as discrimination or harassment, are able to seek the same economic damages to redress the violations as in (1), but also compensatory and punitive damages to remedy the effects of the unlawful discrimination. ORS 659A.885(3). These offenses include race discrimination, sex discrimination, and discrimination against people with disabilities. *Id*. (citing ORS 659A.030, ORS 659A.103-145). In short, aggrieved persons can seek greater remedies based on the egregiousness of the unlawful practice. This comprehensive and detailed remedy regime evinces the legislative intent to tailor the available remedies to the scope of the violation.

3. Legislative history confirms that "actual damages" were not intended to include emotional distress damages for violations of the veterans' preference statute.

The legislative history makes it readily apparent that the wording "actual damages" was not added to make emotional distress damages available to compensate for violations of the veterans' preference statute. That term was included as part of a housing discrimination bill designed to bring Oregon housing discrimination law in line with the requirements of federal fair housing laws. Staff Measure Summary, Senate Committee on Judiciary, SB 725, Apr 17, 2007 (explaining that bill "attempts to bring Oregon's housing

discrimination laws in-line with federal laws, and permit BOLI to contract with [federal agency] HUD to enforce, at the state level, all of the fair housing laws" and that bill establishes procedures for BOLI "in property discrimination actions"). As the Labor Commissioner testified: "All [this bill] does is gets us substantially equivalent to current federal law. Period. It doesn't add one other thing that isn't in current federal law." Audio Recording, House Committee on Workforce and Economic Development, SB 725, May 25, 2007, at 13:44 (statement of Dan Gardner, BOLI Commissioner), https://olis.leg.state.or.us (accessed Aug 15, 2016).

The words "actual damages" were included for a narrow purpose – to bring state fair housing laws in line with federal fair housing laws.[16] The legislative history contains no discussion of those words, and, more importantly, contains no suggestion that the legislature intended to use those words to alter the comprehensive remedy regime provided for in ORS 659A.885. There is no indication that the legislature intended those words to reach beyond their application to fair housing claims. There is certainly no indication that the legislature intended to use those words to give BOLI

[16] To the extent an amendment would endeavor to bring the remedies applicable for veterans' preference in line with federal law, under the federal law that Oregon is modeled after, veterans are not able to recover emotional distress damages. *See* 5 USC § 3330c (2016) (providing for damages in the form of lost wages and benefits, and, for willful violations, back pay).

authority to award emotional distress damages for failure to apply the veterans' preference.

The legislative history of the veterans' preference statute is also consistent with a legislative decision to make unlawful practices subject to only equitable relief. In 2007, the veterans' preference statute was amended to provide, for the first time, a statutory remedy for veterans who believed they had not received the correct veterans' preference. *See* Or Laws 2007, ch 525, §§ 2(6), (7), 4(2). The 2007 amendments allowed aggrieved veterans to "file a verified written complaint with the Commissioner of the Bureau of Labor and Industries in accordance with ORS 659A.820." *Id.* §2(7). At the time of those amendments, the legislature included violations of the veterans' preference statute in the category of claims of ORS 659A.885, authorizing civil actions, that merit equitable remedies. *Id.* § 4. Notably, although those amendments added violation of the veterans' preference statute to the civil action statute, ORS 659A.885, the amendments did not authorize BOLI to award "actual damages" in the administrative tribunal for violation of the veterans' preference. Rather, the existing language authorized BOLI to issue an order that required a respondent to "[e]liminate the effects of the unlawful practice that the respondent is found to have engaged in." *See* Or Laws 2007, ch 903, § 10. At the time of the creation of a remedy for aggrieved veterans, the only statutory remedy was an equitable one – nothing in the 2007 amendments

changed that remedy. And, as described above, the separate legislation adding the words "actual damages" was not intended to alter the available remedies for violation of the veterans' preference statute, but rather was intended to provide remedies for violations of housing laws.

The legislative intent behind the entirety of ORS chapter 659A is consistent with the legislative rationale to make compensatory and punitive damages available only for more egregious, intentional acts of discrimination. The stated purpose of ORS chapter 659A is to remedy "unlawful discrimination of any kind based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status." ORS 659A.003. To accomplish that purpose, "the Legislative Assembly intends * * * to provide * * * [a]n adequate remedy for persons aggrieved by certain acts of unlawful discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status, disability or familial status, or unreasonable acts of discrimination in employment based upon age." ORS 659A.003(2). The legislature's stated priority was to ensure the adequacy of remedies for victims of intentional discrimination.

Specific to veterans' claims, the legislature made explicit the distinction between remedies for failure to apply the preference and remedies for discrimination based on military status. ORS 659A.082 prohibits discrimination against veterans based on their military service. A veteran who

has been actively discriminated against can file a claim under that section and receive compensatory damages to remedy the emotional distress one would experience from discrimination. *See* ORS 659A.885(3) (allowing for compensatory and punitive damages for violation of statute prohibiting discrimination based on military status). The legislature could have applied those remedies to violations of the veterans' preference statute but elected not to. Rather, the legislature made only equitable remedies available for violations of those provisions. As a result, individuals who experience misapplication of the veterans' preference, like individuals aggrieved by improper sick leave calculations, can receive equitable remedies to address the error.

That conclusion is consistent with the overall purpose of the veterans' preference statute, which is "to accord qualified veterans an *advantage* in hiring and promotion in the classified service." *Davis*, 39 Or App at 700 (emphasis added). The statute requires that the public employer give a "preference" to the veteran. ORS 408.230(1). A preference is "[t]he act of favoring one person or thing over another; the person or thing so favored." *Black's Law Dictionary* 1197 (7th ed 1999). An employer's failure to properly apply an advantage would not make them subject to the more expansive remedies available for those who intentionally commit unlawful practices such as discrimination.[17]

[17] This principle is consistent with principles underlying Oregon common law. Generally, in Oregon, in order to recover for the infliction of emotion distress, a

Moreover, the legislative history of the amendments to the veterans' preference statute demonstrates a consistent legislative intent to accommodate employers in their application of the veterans' preference. *See, e.g.*, Testimony, House Committee on Veteran's Affairs, SB 822, May 22, 2007, Ex A (statement of Robert H. Thornhill, who requested sponsorship of the bill) (explaining that the statute provides managers with "flexibility in determining how preference is to be granted for these positions"). The legislature intended to enable employers' ability to devise and apply methods to comply with the statute in order to meet the unique needs of their workplace. Requiring employers to compensate employees who may experience emotional distress over these efforts belies the concept of preserving flexibility. Because BOLI did not have authority to award Edwards emotional distress damages, this Court should hold that the damages award in this case is void.

E. BOLI lacked statutory authority to award emotional distress damages and that jurisdictional error rendered the award void or, in the alternative, constituted plain error. As a result, this Court should consider the merits of the County's damages argument.

BOLI awarded Edwards $50,000 in emotional distress damages, despite the lack of statutory authority to do so. The County did not directly object to

---

plaintiff must demonstrate that the tortfeasor acted intentionally. *See, e.g.*, *Hammond v. Cent. Lane Communications Ctr.*, 312 Or 17, 22-26, 28, 816 P2d 593 (1991) (no liability because plaintiff has not shown that any misconduct on defendants' part that a trier of fact could find was anything more than negligent).

that aspect of the emotional distress damages award, and therefore, this Court can review it only if there is an exception to the preservation requirement. *See* ORAP 5.45(1) ("No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court * * *."). Two exceptions to that requirement apply in this case: (1) the error is jurisdictional and therefore can be raised at any time, and (2) the award of damages constitutes "plain error" under ORAP 5.45(1).

Agencies are created by statute and therefore an agency has "only such power and authority as has been conferred upon it by its organic legislation." *Ochoco Constr., Inc. v. DLCD*, 295 Or 422, 426, 667 P2d 499 (1983); *SAIF Corp. v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998) (explaining that "an agency has only those powers that the legislature grants and cannot exercise authority that it does not have"). Given that limitation, this Court has recognized that whether an agency has "jurisdiction" to take an action depends on whether that action falls within the agency's delegated authority. *See Planned Parenthood Association v. Dept. of Human Resources*, 297 Or 562, 565, 687 P2d 785 (1984) ("In the proper sequence of analyzing the legality of action taken by officials under delegated authority, the first question is whether the action fell within the reach of their authority, the question which in the case of courts is described as 'jurisdiction.'"); *Diack v. City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988) ("'Jurisdiction' depends on whether the matter

is one that the legislature has authorized the agency to decide."). Just as the legislature may *limit* the jurisdiction of courts, this Court's cases require the legislature to expressly *confer* jurisdiction and the scope of that jurisdiction on agencies in statute – and any quasi-judicial action taken outside that authority is void. *PGE v. Ebasco Services, Inc.*, 353 Or 849, 859, 306 P3d 628 (2013) (explaining that violation of a statute "intended to impose a limitation on the trial court's authority to exercise its jurisdiction" may render a judgment void); *Gonzalez v. Schrock Cabinet Co.*, 168 Or App 36, 47, 4 P3d 74 (2000), *rev den*, 331 Or 674, 21 P3d 96 (2001) (Landau, J, dissenting) ("An agency decision rendered without jurisdiction is void."). In sum, an agency that lacks statutory authority to take a quasi-judicial action lacks jurisdiction – and a jurisdictional issue may be raised at any time. *See Diack*, 306 Or at 293 ("If a party may not stipulate to an agency's jurisdiction, it follows that the party also may not waive a jurisdictional issue by 'acquiescence.'"); *Ebasco Services, Inc.*, 353 Or at 856-57 (explaining that "principles relating to preservation of error do not apply to void judgments" resulting from lack of jurisdiction); *cf. Sunshine Dairy v. Peterson*, 183 Or 305, 345, 193 P2d 543 (1948) ("The rule requiring plaintiff to exhaust administrative remedies before resorting to the court has no application when the attack upon the administrative order is based upon the contention that the administrative body is without statutory power to issue the order.").[18]

[18] This Court has made clear that there is a distinction between actions that are

In this case, to the extent that BOLI had authority to award damages, the legislature has limited that authority to requiring an employer to pay only "actual damages suffered by complainant," as well as requiring compliance "with injunctive or other equitable relief." ORS 659A.850. The legislature did not authorize BOLI to award emotional distress damages. Because BOLI's award of emotional distress damages exceeded its statutory authority in ORS 659A.850 to award "actual damages," BOLI lacked jurisdiction to enter the damages award, which renders that award void. As a result, a challenge to the agency's jurisdiction to enter that award can be raised at any time. *See Ebasco*, 353 Or at 856 (explaining that a void judgment "can be attacked at any time and any place, whether directly or collaterally"); *Salitan v. Dashney*, 219 Or 553, 555-59, 347 P2d 974 (1959) (concluding that judgment awarding amount that exceeded trial court's statutory $1,000 jurisdictional limit was void because trial court lacked subject matter jurisdiction, even where jurisdictional challenge was not raised until after judgment was entered).[19] Therefore, this Court should

---

outside the authority of an agency, and actions that, although within the scope of the agency's general authority, "departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute." *Planned Parenthood*, 297 Or at 565 (explaining that distinction). Only the former types of action are jurisdictional, and therefore subject to challenge at any time.

[19] Although ORS 659A.800 grants "general jurisdiction" to BOLI for the purpose of "eliminating and preventing unlawful practices," that grant does not equate the agency's quasi-judicial jurisdiction with that of a court of general jurisdiction. Rather, the reference to "general jurisdiction" confers on BOLI the

address the merits of whether BOLI lacked jurisdiction to award Edwards emotional distress damages, rendering that portion of the Order void.

Even if this Court concludes that BOLI's damage award is not void for lack of jurisdiction, this Court can consider the issue because BOLI's action amounts to "plain error." For error to be plain, it must be (1) an error of law (2) that is apparent (3) on the face of the record. ORAP 5.45(2). As this Court has recognized, there is no need to address the second and third factors before first determining whether there was error at all. *State v. Oatney*, 335 Or 276, 294,

---

authority to *enforce* ORS chapter 659A, not the authority to act as a court of general jurisdiction in *adjudicating* claims under ORS chapter 659A. *Compare* ORS 420A.023(3) ("A youth correction officer acting as a peace officer * * * retains the authority until the law enforcement agency that has general jurisdiction over the area in which the escape or attempted escape took place assumes responsibility for recapturing the person."), *with* ORS 305.405(1) (providing that the tax court "[i]s a court of record and of general jurisdiction"), *and* ORS 109.381(1) ("A judgment of a court of this state granting an adoption, and the proceedings in such adoption matter, shall in all respects be entitled to the same presumptions and be as conclusive as if rendered by a court of record acting in all respects as a court of general jurisdiction * * *."). In fact, the statute provides for a remedy in a court of general jurisdiction if a complainant elects that option. *See* ORS 659A.870 (allowing a person to file a civil action in circuit court or federal district court rather than filing a complaint with BOLI).

Nothing in ORS 659A.800 changes the general rule that an agency's quasi-judicial authority must be provided expressly by the legislature, as the legislature has done in ORS 659A.850 granting BOLI the authority to award "actual damages." *SAIF*, 326 Or at 561 (explaining that agency powers are limited to those granted by the legislature). Indeed, the grant of authority in ORS 659A.850 would be superfluous and unnecessary if the reference to "general jurisdiction" in ORS 659A.800 conferred the powers of a court of general jurisdiction on the agency. *See Crystal Communications, Inc. v. Dept. of Rev.*, 353 Or 300, 311, 297 P3d 1256 (2013) ("As a general rule, we construe a statute in a manner that gives effect, if possible, to all its provisions.").

66 P3d 475 (2003), *cert den*, 540 US 1151, 124 S Ct 1148, 157 L Ed 2d 1045 (2004) ("There is no reason to address the issue whether allowing the jury to decide the unalleged issue of deliberateness is error 'apparent on the face of the record' without first determining whether it was error at all."). Therefore, this Court should begin by determining whether BOLI erred in awarding emotional distress damages.

Because BOLI's award of emotional distress damages was an error of law on the face of the record, this Court must determine whether that error was "apparent," which this Court has interpreted to mean that "the point must be obvious, not reasonably in dispute." *Ailes v. Portland Meadows*, 312 Or 376, 381, 823 P2d 956 (1991). A point may be "obvious" even if there was no appellate case law on the issue at the time of the underlying proceedings. *See State v. Turnidge*, 359 Or 364, 443-46, 374 P3d 853 (2016) (analyzing merits of unpreserved argument that trial court should have given limiting instruction under *State v. Leistiko*, 352 Or 172, 282 P3d 857, *adh'd to as modified on recons*, 352 Or 622, 292 P3d 522 (2012) "[b]ecause this court issued its decision in *Leistiko* after the trial in this case"); *State v. Jury*, 185 Or App 132, 136-37, 57 P3d 970 (2002) (determining that error apparent on the face of the record "is not temporally restricted to the time of trial").

This Court recognized that principle in *State v. Vanornum*, 354 Or 614, 630, 317 P3d 889 (2013). There, the issue was whether giving a particular jury

instruction was an error that was obvious and not reasonably in dispute. A prior Supreme Court case had held that the instruction "impermissibly shift[ed] the focus of the jury's deliberations on a defendant's self-defense claim from what the defendant reasonably believes to what the officer believes. That is incorrect and should not be included in the instructions to the jury during the trial on remand." *State v. Oliphant*, 347 Or 175, 198, 218 P3d 1281 (2009). In *Vanornum*, the state argued that *Oliphant* was limited to its facts because there were other instructional errors involved in that case. *Vanornum*, 354 Or at 630. Based on the extremely limited analysis in *Oliphant* outlined above, that argument was reasonable, and the scope of the holding in *Oliphant* was reasonably in dispute. This Court resolved that dispute – requiring a new interpretation by this Court – by concluding that the statement that the instruction "is incorrect" put the error of giving the instruction beyond reasonable dispute, regardless of the other instructional errors in the case. *Id.* at 631. Similarly, although this Court has not previously determined whether BOLI has authority to impose emotional distress damages for failure to apply the veterans' preference, the error nonetheless is "apparent" or "obvious" because the face of the statute demonstrates that the agency lacks authority to award emotional distress damages in these types of cases.

Moreover, this Court should exercise its discretion to correct BOLI's error, taking into account the factors articulated in *Ailes*. 312 Or at 382, 382 n

6. In particular, the nature of the case and the gravity of the error both weigh heavily in favor of correcting the error. This issue is of significant importance to veterans and employers alike, as each seeks to understand the scope of liability for failure to apply the veterans' preference. If BOLI does not have authority to impose emotional distress damages for this purpose, then the error is indeed grave because a legislatively-created agency has acted beyond the scope of its authority and will continue to do so in proceedings statewide. This Court is the only body that can remedy that type of improper extension of government power, and the Court therefore should address the merits of whether BOLI has authority to award emotional distress damages.

VIII. 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 August, 2016.

JENNY M. MADKOUR, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON

/s/ Jacqueline Kamins
Jacqueline Kamins, OSB No. 064972
jacqueline.kamins@multco.us
Katherine Thomas, OSB No. 124766
katherine.thomas@multco.us
Of Attorneys for Petitioner-Petitioner on Review

CERTIFICATE OF FILING

I hereby certify that I directed to be filed the foregoing **PETITIONER ON REVIEW'S OPENING BRIEF ON THE MERITS AND EXCERPT OF RECORD** on August 25, 2016, by efiling the original thereof with the:

State Court Administrator
Attn: Records Section
Supreme Court Building
1163 State Street
Salem, OR 97310

I further certify that I served the foregoing **PETITIONER ON REVIEW'S OPENING BRIEF ON THE MERITS AND EXCERPT OF RECORD** on August 25, 2016, by eService and U.S. mail to each party listed below:

Sean J. Riddell
Attorney at Law
1300 SE Stark Street, Suite 208
Portland, Oregon 97214
sean.riddell@live.com

Sean E. O'Day
League of Oregon Cities
1201 Court Street, NE, Ste. 200
Salem, Oregon 97301
soday@orcities.org

Carson Whitehead
Department of Justice
1162 Court Street, NE
Salem, Oregon 97301-4096
carson.l.whitehead@doj.state.or.us

Rob Bovett
Association of Oregon Counties
1201 Court Street, NE, Ste. 300
Salem, Oregon 97301
rbovett@aocweb.org

JENNY M. MADKOUR, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON

/s/ Jacqueline Kamins
Jacqueline Kamins, OSB #064972
jacqueline.kamins@multco.us
Of Attorneys for Petitioner on Review