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 No. 0114 CA A157146 SC S064109

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, BUREAU OF LABOR AND INDUSTRIES

Review of the Decision of the Court of Appeals
on Judicial Review of the Final Order
of the Bureau of Labor and Industries

Opinion Filed: April 13, 2016
Author of Opinion: Roger J. DeHoog, Judge
Before: Sercombe, Presiding Judge, and Tookey, Judge,
and DeHoog, Judge.

Continued…

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, BUREAU OF LABOR AND INDUSTRIES

INTRODUCTION

Veterans in Oregon face substantial hurdles to finding employment. In light of those difficulties and in recognition of the service that veterans have provided, Oregon law requires public employers to give a preference to veterans in the application process and hiring decision for jobs with state and local governments.

In this case, the Multnomah County Sheriff's Office (the County) failed to comply with the veterans' preference statute, ORS 408.230(2)(c), in its hiring process for an open lieutenant position. As the Bureau of Labor and Industries (BOLI) found, the County did not devise a method for granting the preference to Sgt. Edwards, a disabled veteran, and did not apply any method of giving Edwards preferential treatment when examining his application or when making the final hiring decision. Because the County failed to give Edwards the preference he deserved, BOLI properly awarded damages for the emotional distress that Edwards suffered as a result.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

As used in ORS 408.230(2)(c), what did the legislature intend by requiring public employers to "devise and apply methods" of granting the veterans preference in unscored application examinations?

First Proposed Rule of Law

The phrase "devise and apply methods" in ORS 408.230(2)(c) requires a public employer using an unscored application process to formulate a coherent and stable method for applying the preference and then apply that method for the recruitment at issue.

Second Question Presented

Does ORS 408.230(2)(c) require a public employer to apply the veterans' preference at multiple stages of the hiring process?

Second Proposed Rule of Law

Yes. When a hiring process involves an application examination that ranks the applicants and then a final hiring decision, ORS 408.230(2)(c) requires a public employer to apply the preference at both stages.

Third Question Presented

Did the County comply with ORS 408.230(2)(c)?

Third Proposed Rule of Law

No. The County failed to comply with ORS 408.230(2)(c) in two ways. It did not formulate a coherent and stable method of granting the required

veterans' preference during the hiring process. And it failed to apply any preference when it ranked the pool of applicants and when it made the final hiring decision.

Fourth Question Presented

Under OAR 839-006-0450(2), BOLI requires public employers to apply the veterans' preference at each stage of the hiring process. To the extent it is pertinent, is that rule consistent with the veterans' preference statutes?

Fourth Proposed Rule of Law

Although this court need not reach this question, if it does, the answer is yes. BOLI's rule is within its authority and consistent with veterans' preference statutes—ORS 408.230 and ORS 408.237—which require that public employers give veterans a preference at each stage of the hiring process.

Fifth Question Presented

Did BOLI plainly err in awarding damages for the emotional distress that resulted from the County's violation of the veterans' preference law?

Fifth Proposed Rule of Law

No. Under ORS 659A.850, BOLI has statutory authority to award damages for emotional distress that results from violations of the veterans preference statute. At a minimum, any error is subject to reasonable dispute, and therefore this court should not review for plain error.

SUMMARY OF ARGUMENT

The veterans' preference law requires public employers to give an advantage to veterans when making hiring decisions. For a hiring decision that is based on scored exams, the application of the preference is simple: the employer adds five points to the exam score for a veteran and ten points for a disabled veteran. For hiring decisions that do not involve a scored examination, the law also requires employers give veterans a preference. In that scenario, public employers are required to "devise and apply methods" of giving veterans "special consideration" in the hiring decision.

The veterans' preference law, ORS 408.230, recognizes that public employers use a wide variety of application processes when making hiring decisions and, accordingly, gives employers flexibility to establish how the preference applies in a given hiring decision. That flexibility, however, must be exercised within the parameters established by the statute. First, the statute requires that an employer develop a stable, coherent method for applying the preference and then follow that method in its hiring process. Second, the statute requires the public employer to apply the preference when it ranks applicants following an application examination. Third, the statute requires the public employer to apply the preference to the final hiring decision.

Here, the County sought to hire a new lieutenant. Sgt. Edwards, a disabled veteran, applied for a promotion to the position. In examining

Edwards' application and making its hiring decision, the County failed under all three of the statutory parameters for an unscored process. First, the County failed to devise and apply a method of giving Sgt. Edwards special consideration. As the final order details, the County employees involved in the hiring process had inconsistent and contradictory understandings of how the preference was to be applied, when it was to be applied, and who was to apply it. Second, because the County lacked a coherent and stable method of applying the preference, the County also failed to give Edwards special consideration when the interviewers ranked Edwards as an applicant and when the Sheriff made the final hiring decision. To be clear, BOLI did not conclude that the County was required to promote Edwards; the record showed that there were legitimate reasons for the County to rank Edwards as the third of three candidates. But in ranking Edwards and in making the final hiring decision, the law required the County to formulate a method of applying the preference and follow through with that method, regardless of whether Edwards ended up being ranked first, second, or third. The County did not follow the law, and BOLI properly awarded damages to remedy the emotional distress Edwards suffered as a result.

In its opening brief, the County asserts that the veterans' preference law is very narrow. It argues that public employers satisfy the law by giving a veteran some modicum of consideration at some discrete point in the hiring

process. Under the County's view, for example, a public employer would satisfy the preference requirement by merely granting a veteran an interview. The employer would not have to give the veteran any special consideration when ranking applicants or when making a final hiring decision.

The County's narrow view cannot be squared with the legislature's intent to give veterans preferential treatment in *hiring decisions*, including application examinations that result in a ranking of candidates. If the preference did not apply to hiring decisions—and instead could be satisfied by granting an interview or by giving some consideration before the hiring decision is made—the veterans' preference would have limited impact on a veteran's ability to find employment, the very problem that ORS 408.230 is designed to address.

Supplemental Statement of Facts

BOLI provides a supplemental statement of facts to properly focus the court's analysis on BOLI's undisputed factual findings. The County did not challenge BOLI's findings before the Court of Appeals or before this court. Accordingly, BOLI's findings are the facts on judicial review. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 134, 903 P2d 351 (1995), *overruled on other grounds*, *State v. Hickman*, 358 Or 1, 358 P3d 987 (2015). The County's statement of facts, however, is inconsistent with that standard and includes portions of the County's and BOLI's testimony from the contested case hearing that conflicts with BOLI's unchallenged findings. (*See* BOM 5-7

(describing testimony from the County's witnesses and from BOLI's investigator but not BOLI's contrary factual findings)). As described below, BOLI found that the County did not have a stable or coherent method of granting Edwards a preference in the hiring process and that the County failed to grant Edwards any meaningful preference when it ranked him or when it made its hiring decision.

A. Sgt. Edwards, a disabled veteran, applied for a promotion to lieutenant and was rejected.

Complainant Rod Edwards, a disabled veteran and sergeant with Multnomah County Sheriff's Office, applied for a promotion to lieutenant. Of the three applicants, only Edwards qualified for special preference in the promotion decision under the veterans' preference statute. All three applicants met the minimum qualifications for the position. (ER 73). The County evaluated each applicant based on the applicant's letter of interest and resume; a "360 review," which collected information from the applicant's co-workers; and an interview with three members of the command staff—Undersheriff Moore, Chief Deputy Gates, and Captain Reiser. After the interview, each of the three interviewers made independent rankings of the applicants based on the interview, 360 reviews, and the letter of interest and resume. Those recommendations were then submitted to Sheriff Staton, who made the final hiring decision. (ER 76).

Each interviewer ranked Edwards third of the three candidates, and Sheriff Staton did not promote him. Edwards asked the County for a written explanation of its decision not to promote him to lieutenant, pursuant to ORS 430.230(5). Jennifer Ott, the human resources manager for the Sheriff's Office, wrote a letter to Edwards stating, "Because there were no numerical tests involved in which to apply your veteran preference points, we applied your points as you went in this process and you were the number one candidate at the top of the list of the three potential candidates for promotion." (ER 78). The County gave no additional explanation for how Edwards' "points" were applied and did not describe what it meant for Edwards to be the "number one candidate" at the beginning of the hiring process. Edwards then filed a complaint with BOLI under ORS 408.230(7) and ORS 659A.820, alleging that the County had committed an unlawful employment practice by failing to give him preferential treatment in the hiring decision, as required by ORS 408.230. (Ex A-2).

BOLI investigated the complaint and issued a notice of hearing and formal charges, alleging that the County had failed to "devise and apply methods" of granting Edwards special consideration in the hiring process and that the County had failed to grant the preference at each stage of the application process. (ER 70-71).

B. As BOLI found, the County failed to formulate a stable and coherent method of granting the veterans' preference in ranking the applicants or in its final hiring decision.

Following the contested case hearing, BOLI found that the County offered conflicting and contradictory explanations for when it applied the preference to Edwards' application, who was responsible for applying the preference, and how the preference applied to the hiring decision. The final order describes the contradictory evidence in detail. For example, in her letter to Sgt. Edwards, the County's human resources manager, Ott, wrote that the preference (articulated in the letter as "points") was applied at the beginning of the hiring process. Similarly, Ott testified at the hearing that the preference was to be applied at the beginning of the process only. Yet Ott contradicted her own testimony by later claiming that *she* had applied the preference—not at the beginning—but rather at the end of the process. (ER 99).

The final order also found inconsistencies in the evidence about *who* applied the preference. (ER 99). For example, in her letter to Sgt. Edwards, Ott stated that, "once the process had been completed," she instructed the interviewers to consider Edwards as the "top candidate," but that they should make their recommendation for promotion based on each individual's merits and qualifications, apparently without reference to any preference. (ER 99; Ex A-17). Ott and Undersheriff Moore both testified that the interviewers were *not* to apply the preference; rather it was to be applied by Ott. (ER 99; Tr 346, 376-

77). Yet Ott also testified that she "was not involved in the hiring process." (ER 77, 99-100). As BOLI explained, if the preference involved "a mere ministerial addition of 'points' to a test," such a statement would make sense. (ER 100). But where there is no simple objective methodology, Ott's testimony indicated a profound confusion at the County over who was to actually "apply" the preference. (ER 100).

BOLI also relied on testimony from Chief Deputy Gates in finding that the County was confused over who would apply the preference. Gates testified that he *did* apply the preference by considering Edwards to be the top candidate at each stage, and that he needed a reason not to keep him as the top candidate. Yet Gates also testified that he did *not* apply the veterans' preference; rather, he evaluated each component of the application process on its own merits. (ER 76, 100; *see, e.g.*, Tr 279, 281, 285-89, 293, 303-04). Similarly, when directly asked whether he had personally applied any veterans' preference in his decision, Undersheriff Moore testified that "it was only Sheriff Staton who would actually 'technically' apply the veterans' preference, along with Ms. Ott, after the interview." (ER 81; Tr 445).

BOLI found additional inconsistencies about *when* the interviewers were advised about the preference and *how* it would be applied. In her letter to Edwards, Ott stated that the interviewers were "'advised' about the fact that Sgt. Edwards would be considered the 'top candidate' only 'once the process

had been completed,'" referring to the application and resume, the 360 review, and the interview. (ER 100; Ex A-17). But Ott testified at the hearing that she told the interviewers "prior to the interviews occurring" that Sgt. Edwards was the "top candidate going into the process." (ER 100; Tr 330).

The final order also found that the County and its witnesses had not been consistent in their description or articulation of the preference itself. (ER 101). Although the most frequently used description was that Edwards was the "top candidate," both Ott and Undersheriff Moore also referred to the preference as meaning that the job was Sgt. Edwards' "to lose." (ER 101; Tr 330, 348). Ott and Undersheriff Moore later referred to the preference as being whether Sgt. Edwards was "ready for promotion" or whether he "could be successful in that job." (ER 101; Tr 331, 424-25). Chief Deputy Gates suggested that the preference consisted of only having to explain *why* Sgt. Edwards was ranked last, and not that he received any actual advantage. (Tr 303-04). Ott used yet another description of the preference; namely, that Sgt. Edwards would get the job if he was "first, second, or a competitive [or close] third." (ER 101). As BOLI noted, Ott initially stated, "quite emphatically," that she had given this formulation of the preference to the interviewers and to the sheriff. But she later stated that those were her own terms and had not been communicated to anyone. (ER 101).

The final order noted that "these inconsistencies" were compounded by the fact that the County had submitted written materials—"the Job Announcement, the Candidate Orientation to the Exam Process and the Candidate Bulletins"—claiming that those documents described the veterans' preference and how it would be applied. But those documents "either [did] not address veterans' preference at all, or they only address[ed] the preference by discussing 'points,' which were not used in this process." (ER 100-101).

The final order also rejected the County's contention—raised in the County's exceptions to the proposed order—that Edwards had been granted an interview as a way of applying the preference. Based on the evidence at the contested case hearing, BOLI found that "once [the County] found itself with only three applicants for the promotion, it decided to give all three an interview." (ER 103). The evidence did not show "that granting the interview to [Edwards] was part of any method by which a veterans' preference would be given." (ER 103).

C. BOLI concluded that the County violated ORS 408.230.

Based on its factual findings, BOLI concluded that the County had violated ORS 408.230 in several, interrelated respects. First, it concluded that the County failed to devise and apply any method "by which to apply veterans' preference during, or as a result of, the stage of the process when the application materials were evaluated by" the interviewers. (ER 101). Second,

even assuming that the County had devised and applied such a method, the formulation that it most consistently advanced—considering Edwards the "top candidate" or the "number one candidate" going into the process—was "substantively inadequate to provide the preference required by the statute." (ER 104-106). Finally, the County failed to devise and apply any method of applying the veterans' preference at the end of the process, when the promotion decision was made. (ER 106-108).

To remedy the County's unlawful employment practices, BOLI ordered the County to produce "a coherent, consistent, written and reasonable method by which to apply veterans' preference at each stage of any hiring or promotion decisions." (ER 120). BOLI also awarded Edwards $50,000 in damages for the emotional distress he suffered as a result of the County's unlawful practices. (ER 119).

The County appealed and the Court of Appeals affirmed BOLI's order. *Multnomah County Sheriff's Office v. Edwards*, 277 Or App 540, 373 P3d 1099 (2016).

ARGUMENT

The central questions for this case concern what is required for a public employer to "devise and apply [a] method" for providing the veterans' preference in an unscored application examination and when that preference must be applied. As discussed in detail below, BOLI properly construed the

phrase "devise and apply" in ORS 408.230(2)(c) as requiring an employer to create a method of applying the preference and then actually use that method in a consistent and coherent manner during the unscored application examination. Similarly, BOLI properly construed ORS 408.230(2)(c) as requiring the County to apply the preference when it ranked Edwards after evaluating his application and when it made the final hiring decision. For those same reasons, BOLI acted within its statutory authority under ORS 408.230 when it promulgated the "stages rule," OAR 839-006-0450(2), which directs public employers to apply a preference at each stage of the application process.[1] Finally, BOLI has clear statutory authority to award emotional distress damages, an issue that the County did not challenge below and one that this court should not reach on plain-error review.

A. BOLI properly concluded that the County violated the veterans' preference statute.

1. Overview of Veterans' Preference Statutes

Under ORS 408.230(1), a public employer must grant a preference to a veteran who applies for a "civil service position;"[2] "successfully completes an

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[1] As discussed below, this court does not need to address BOLI's authority to promulgate the stages rule because the statute itself required that the preference be applied to the County's evaluation of Edwards' application and to the final hiring decision.

[2] ORS 408.225(1)(a)(A) broadly defines "civil service position" as "any position for which a hiring or promotion decision is made or required to be

Footnote continued…

initial application screening or an application examination for the position;" and who meets the "minimum qualifications and any special qualifications for the position."[3] ORS 408.230(2) then details how an employer must apply the preference. For hiring processes that result in a score, a veteran receives five preference points and a disabled veteran receives ten preference points.[4] ORS 408.230(2)(a)-(b).

Public employers must also give veterans a preference in hiring processes that do not result in a score:

> 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.

(…continued)
made based on the results of a merit based, competitive process that includes, but is not limited to, consideration of an applicant's or employee's relative ability, knowledge, experience and other skills."

[3] There is no dispute that the promotion to lieutenant was a civil service position and that Edwards met the underlying requirements to be eligible for the preference as a disabled veteran.

[4] An assumption underlying the allocation of preference points is that they would be applied to applications that were scored on a 100-point scale, so that the preference amounts to a 5% or 10% addition. (Tape Recording, Senate Rules and Elections Committee, SB 831, May 20, 1999, Tape 59, side A (statements of Senators Neil Bryant and Charles Starr).

ORS 408.230(2)(c).

That provision contains two related commands. First, a public employer must give a "preference" to veterans in any unscored application process that results in the employer ranking the applicants. Second, an employer that uses an unscored application process must develop and apply a method of giving the veteran "special consideration" in its hiring decision. As the Court of Appeals concluded and the County does not dispute on review, an employer grants the preference required under ORS 408.230(2)(c) by devising and applying a method of giving veterans "special consideration." *Multnomah County*, 277 Or App at 550.

2. The final order properly concluded that the County failed to devise and apply a method of granting Edwards special consideration.

a. Under ORS 408.230(2)(c), a public employer must formulate a stable and coherent method of giving a veteran special consideration and then apply that method to its hiring decision.

In the final order, BOLI correctly concluded that to "devise and apply methods" of granting "special consideration," an employer must form a coherent method of granting special consideration and then apply that method to the hiring decision. (ER 102); *Multnomah County*, 277 Or App at 553 (affirming BOLI's interpretation of "devise and apply"). BOLI based that construction of the statute on the plain meaning of "devise," which is defined as

"to form in the mind by new combinations of ideas, new applications of principles, or new applications of parts; formulate by thought." *Webster's Third New International Dictionary* 619 (unabridged ed 2002). BOLI reasoned that for a method to actually be "devised," *i.e.*, "formed in the mind," the method "must be coherent and stable" and must be "similarly understood by the persons who were implementing it." (ER 102).

Before this court, the County seems to agree with that construction of the statute.[5] The County's proposed rule of law is that an employer complies with the requirement to "'devise and apply methods' of granting the veterans 'special consideration' if the employer has formulated a process for applying the preference that it then applies in the recruitment at issue." (BOM 2). Similarly, the County relies on the plain meaning of "devise" and acknowledges that an employer "must formulate a process for providing a veteran with a preference" when the employer uses an unscored application examination. (BOM 11-12).

For its part, BOLI agrees with four points that the County raises in its construction of the statute. First, BOLI agrees that ORS 408.230(2)(c) grants public employers flexibility in how they devise and apply methods to give

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[5] In the Court of Appeals, as here, the County did not challenge BOLI's construction of "devise and apply." *Multnomah County*, 277 Or App at 554. The County did raise an argument that "special consideration" had distinct meaning from "preference" in ORS 408.230(2)(c), but the County does not renew that argument on review.

veterans "special consideration" in hiring decisions. Second, BOLI agrees that ORS 408.230(2)(c) does not require an employer to have a single method for applying the preference that is used in every unscored application examination; stated differently, BOLI agrees that an employer could devise different methods to apply the preference as needed for the specific recruitment. Third, BOLI agrees that the statute does not require an employer to reduce its method of applying the preference to writing.

Fourth, BOLI and the County have similar understandings of the term "special consideration." The County asserts that "special consideration" means "something not otherwise available to the veteran in the regular course of the hiring process," citing the dictionary definition of "special." (BOM 17). The County then asserts that the preference—*i.e.*, the special consideration—given for an unscored application process should "operate much in the same way that it did in a scored process, essentially creating a five or ten percent preference." (BOM 18). BOLI reached a similar conclusion in the final order, (ER 105), and BOLI agrees with those two assertions, with the caveat that the plain text of ORS 408.230(2)(c) requires that the "special consideration" to be given in the

employer's "hiring decision," not simply the hiring process. That issue is discussed more thoroughly below in section A.3 of this brief. [6]

To summarize, the parties largely agree that—as both BOLI and the Court of Appeals concluded—the phrase "devise and apply methods" in ORS 408.230(2)(c) imposes a simple requirement: a public employer must formulate a stable and coherent method of giving a veteran special consideration and then apply that method to its hiring decision. "Special consideration" means an advantage given to the veteran that is the equivalent of a five or ten percent preference in the hiring decision. As BOLI's factual findings conclusively show, the County failed to meet that legal standard.

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[6] In much of its briefing on the meaning of the phrase "devise and apply methods," the County attacks legal positions that BOLI has not taken. The County asserts that BOLI interpreted ORS 408.230(2)(c) as requiring public employers to draft a written policy for applying the veterans' preference in unscored application examinations and to apply that written policy in the same way to all recruitments. (BOM 11). The County is incorrect. It confuses BOLI's interpretation of the statute with the remedial measures BOLI imposed on the County in its final order. (*See* ER 120 (ordering the County to take remedial measures, including drafting "a coherent, consistent, written and reasonable method by which to apply veterans' preference at each stage of any hiring or promotion decisions that must meet the criteria of ORS 408.230(2)(c)"). The final order does not conclude that the veterans' preference statute itself requires a written policy.

b. The County failed to devise a stable and coherent method of giving the veterans' preference.

i. BOLI's factual finding that the County had no method of granting the preference binds this court.

BOLI concluded that the County failed to devise any method of applying the preference to Edwards' application. (ER 104). The factual findings underlying that conclusion—that the individuals involved in the hiring process did not have a mutual understanding of what the preference meant, how the preference was to be applied, who would apply it, or when it would be applied—have not been challenged by the County in this court or in the Court of Appeals. Accordingly, those findings bind this court.

ii. To the extent the County considered Edwards to be the "number one candidate" at the start of the process, that did not satisfy its obligation to give the veterans' preference.

Despite BOLI's unchallenged findings to the contrary, the County argues that it devised and applied a method for granting the preference because it treated Edwards as the "number one candidate" going into the hiring process. (BOM 17-18). That argument disregards the standard of review. *See* ORS 183.482(7) ("[T]he court shall not substitute its judgment for that of the agency as to any issue of fact."). The County asserts that the interview panel, the sheriff, and the human resources manager had a common understanding of what it meant for Edwards to be the "number one candidate" and then applied that common understanding. But BOLI found exactly the opposite: "the forum

is not convinced that a policy for veterans' preference was formed in the mind of [the County] or its manager responsible for its implementation." (ER 102). BOLI also found that the County "did not have a consistent or coherent understanding of what it meant to be the number one candidate." (ER 104). Accordingly, the County's argument that it did, in fact, devise and apply a method for applying the preference necessarily fails.[7]

BOLI also determined that even if the County had actually devised and applied a method that considered Edwards the "number one candidate" going into the hiring process, that formulation was substantively inadequate. Although this court does not need to reach the issue based on BOLI's factual findings—just as BOLI did not need to reach the issue in the final order—BOLI's reasoning is correct.

The final order detailed at length why being considered "the number one candidate" was substantively insufficient to provide the preference required by the statute. (ER 104-06). BOLI pointed to Chief Deputy Gates' testimony that treatment as the "number one candidate" going into the hiring process meant that Sgt. Edwards "would move forward in the process 'if he was equal to or

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[7] In any event, as detailed in the supplemental statement of facts, BOLI's conclusion that the County had no stable or coherent method of applying the preference is supported by substantial evidence in the record.

greater than' the other candidates." (ER 104-05).[8] BOLI concluded that the County's formulation of the preference was insufficient, because, if Edwards were "equal to or greater than" the other candidates, presumably he would move forward in the hiring process even without a veterans' preference. Conversely, if another candidate was at all superior to Edwards, then Edwards would not necessarily move forward. Because considering Edwards to be the "number one candidate" was not substantively similar to giving Edwards a ten point preference, the County's formulation of the preference was inadequate, even assuming it had actually been devised and applied.

iii. The County's decision to interview Edwards did not reflect that it had a coherent method for giving the veterans' preference that satisfied ORS 408.230(2)(c).

The County also argues that it complied with its obligation to have a method for giving the veterans' preference because it granted Edwards an interview. (BOM 20). Again, that argument is foreclosed by BOLI's factual findings. In the final order, BOLI expressly found that the County interviewed Edwards because he was one of three candidates and met the minimum

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[8] BOLI noted that Gates' testimony was "actually unclear on whether Sgt. Edwards needed to be just 'equal to' the other candidates or 'greater than' the other candidates in order to move forward. BOLI assumed for purposes of discussion "that he meant that Sgt. Edwards would move forward in the hiring process if his qualifications were deemed equal to or superior to those of the other candidates." (ER 104 n 9).

qualifications; the County did not factor Edwards' status as a disabled veteran into the decision to grant the interview and granting the interview was not part of any method devised by the County under ORS 408.230(2)(c). (ER 103-04). The County did not dispute that factual finding. As a result, the County cannot now assert that granting the interview was part of its method of giving Edwards special consideration.

Additionally, the County's argument does not comport with the statute. The plain text of ORS 408.230(2)(c) requires the preference to be applied when the employer uses an application examination that ranks the applicants in a way that does not result in a score. In part, the preference—the "special consideration"—must also be applied in the employer's "hiring decision." ORS 408.230(2)(c). Applying the preference to the decision to grant an interview does not somehow satisfy the requirement that employers apply the preference when making the actual decision whether to hire someone.

Moreover, if ORS 408.230(2)(c) could always be satisfied by granting an interview then the statute would be duplicative of ORS 408.237. That statute requires a public employer grant a veteran an interview whenever an interview is part of the "selection process for a civil service position" and the veteran meets the "minimum qualifications and special qualifications" for the position,

including a demonstration of "transferable skills."[9] ORS 408.237(2). If the County's argument were correct, then an employer's compliance with ORS 408.237 would necessarily mean that the employer had applied a preference for purposes of ORS 408.230(2)(c) and nothing more would be required. ORS 408.230(2)(c) would only impose a requirement to apply a preference when the hiring process did not involve an interview. There is no indication that the legislature intended that result, and this court should avoid construing ORS 408.230(2)(c) in a way that would render it superfluous. *See* ORS 174.010 (court is to give effect to all provisions of a statute, if possible); *State v. Cloutier*, 351 Or 68, 104-05, 261 P3d 1234 (2011) (rejected construction of statute that would render portions superfluous).

3. The final order properly concluded that the County failed to apply the veterans' preference to its ranking of Edwards or to its final hiring decision.

In addition to devising a method for applying the preference, BOLI properly concluded that ORS 408.230(2)(c) required the County to apply the preference to each stage of the hiring process at which it ranked the applicants

[9] ORS 408.237 also requires that the veteran's application materials show "transferable skills" related to the civil service position. ORS 408.237(2). "Transferable skill" means "a skill that a veteran has obtained through military education or experience that substantially relates, directly or indirectly, to the civil service position for which the veteran is applying." ORS 408.237(1)(b).

and to the final hiring decision. The County failed to apply the preference at either of those stages.

a. The text, context, and legislative history of ORS 408.230(2)(c) show that the preference must be applied when a public employer ranks the applicants and makes the final hiring decision.

Whether ORS 408.230(2)(c)[10] requires the preference to be applied at multiple points in the hiring process is a question of legislative intent, which this court determines by looking primarily to the text and context of the relevant statutes along with any relevant legislative history. *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009).

In addition to describing how an employer must give veterans a preference in the hiring process, ORS 408.230(2)(c) also describes when an employer must give the preference. The plain text of ORS 408.230(2)(c) shows that the legislature contemplated that the preference would be applied at multiple points in a hiring process that involves an unscored application

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[10] Again, 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 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 employers hiring decision to veterans and disabled veterans.

examination. The first clause of ORS 408.230(2)(c) requires an employer to grant a veteran preferential treatment when the employer uses "any * * * method of ranking an applicant," including interviews, performance evaluations, and supervisor rankings. As discussed above, in granting that preference, the second clause of ORS 408.230(2)(c) requires the employer to "give special consideration in the employer's hiring decision." ORS 408.230(2)(c). From the text of that statute, then, 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 its hiring decision.[11] Those are both points at which a veteran could either move forward in the hiring process or be removed from consideration.

The statutory context supports the plain text reading. In requiring the preference to be applied when an applicant is ranked and when the hiring decision is made, ORS 408.230(2)(c) mirrors the way the preference functions for a scored application process. For a scored application process governed by ORS 408.230(2)(a) and (b), veterans' preference points must be added to the veteran's score "for an initial application screening used to develop a list of

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[11] Those two points could merge in a hiring process where the only ranking of applicants was the final hiring decision or where an applicant was eliminated if ranked below a certain threshold. Also, there could be more than one point in a hiring process when the public employer ranks applicants.

persons for interviews" and "for an application examination, given after the initial screening." When 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. That context shows three points where an employer must give preference points in a scored process: at the initial screening, at the application examination, and at the hiring decision. Nothing in the text or context suggests that the legislature intended for a veteran to receive the preference on the application examination and at the hiring decision for a scored application process but lose that advantage when the employer opted for an unscored application examination.

When looked at as a whole, ORS 408.230 shows an overall intent to give veterans a preference at the decision points in a given application process. To that end, a veteran receives preference points in a scored screening and on a scored exam, which are both stages where a veteran will be ranked and possibly removed from consideration. The veterans' preference points also apply to hiring decisions based on a scored exam, another stage at which a veteran can be removed from consideration. Similarly, for unscored processes, veterans receive a preference whenever applicants are ranked and when the employer makes the hiring decision, both stages at which a veteran can be rejected.

The legislative history for Senate Bill 822 (2007), which added the provisions at issue in this case, also shows that the preference in ORS 408.230(2)(c) must be applied when a candidate is ranked and when the hiring decision is made. The legislative history is clear that the 2007 amendments were intended to increase the effectiveness of the preference over previous versions of the statute by requiring employers to apply the preference broadly when making decisions regarding whether to advance a veteran to the next stage of the hiring process, including the final hiring decision.

Under the prior version of the veterans' preference statute, enacted in 1999, public employers were not required to give veterans special consideration in the "hiring decision" for unscored application examinations. Rather, the law provided, in relevant part:

> If the test consists of interviews, performance, evaluation of experience and training, a supervisor's rating or any other method of ranking applicants that does not result in a score, preference must still be provided to veterans and disabled veterans. Preference does not mean that veterans must be appointed to vacant positions, but does provide a uniform method by which special consideration is given to eligible veterans and disabled veterans seeking public employment.

ORS 408.230(1) (1999), *amended by* Or Laws 2007, ch 525. Under the 1999 version of the statute, employers were not required to give any advantage at all when deciding whether to hire a veteran. Similarly, for a scored process, there was no requirement that an employer hire a veteran who had a higher score.

ORS 408.230(1) (1999). The 2007 amendments were intended to give veterans a real advantage in public employment by applying the preference to application processes that resulted in a ranking of candidate and to "hiring decisions." The amendments also made the preference mandatory and enforceable.

Senator Ryan Deckert, introduced Senate Bill 822 on behalf of Robert Thornhill, Chairman of the Oregon VFW's Employment and Civil Service Committee, and other veterans and veterans organizations. Exhibit B, Senate Education and General Government Committee, SB 822, April 10, 2007 (Testimony of Senator Ryan Deckert). Mr. Thornhill testified that Senate Bill 822 was intended to give a "meaningful preference" to Oregon veterans by having the preference apply in the "selection process" for both scored and unscored application examinations. Exhibit A, Senate Education and General Government Committee, SB 822, April 10, 2007 (Testimony of Robert Thornhill). Mr. Thornhill noted that under the 1999 version law, the veterans' preference "does not enter into the current selection process in any fashion whatsoever" for an unscored application. *Id*. at 3. The 2007 amendments were intended to require public employers to grant the preference for "non-scored positions." *Id*. at 5. The amendments were also intended to increase transparency and accountability by requiring employers to explain their

decision-making process to a veteran who was not hired and by providing enforcement mechanisms. *Id.*

Paula Brown, Deputy Director of the Oregon Department of Veterans' Affairs, testified in support of the Senate Bill 822 because it "seeks to enhance the employment preference" for veterans. Audio Recording, Senate Education and General Government Committee, SB 822, April 10, 2007, at 47:45 (statement of Paula Brown), https://olis.leg.state.or.us (accessed Sept 26, 2016). Deputy Director Brown went on to describe Oregon's current preference system under the 1999 statute as helping veterans get interviews but nothing else.[12] She supported Senate Bill 822 because it would expand the preference beyond what was available under the 1999 version of the statute. *Id.*

In short, the text, context, and legislative history of ORS 408.230(2)(c) show that the legislature intended for public employers to give a veteran preferential treatment when the employer ranks the applicants for a position and when the employer makes its hiring decision.

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[12] The County cites Deputy Director Brown's testimony and asserts that it supports the notion that ORS 408.230(2)(c) was intended to "give veterans an advantage at the *outset* of the process." (BOM 25-26). The County is wrong. Deputy Director Brown described the 1999 version of the preference to contrast the expanded preference created by Senate Bill 822, which increased application of the preference for scored and unscored processes.

b. The County's interpretation of ORS 408.230(2)(c) as limiting employers to one application of the preference is inconsistent with the statute.

The County and *amici* offer a much narrower interpretation of ORS 408.230 in general and ORS 408.230(2)(c) specifically. The County acknowledges that a public employer is required to apply the preference in each of the scenarios described in ORS 408.230(2)(a)-(c). Accordingly, the County accepts that an employer could be required to apply a preference twice, if, for example, the employer used "both an initial application screening and an application examination (scored or unscored)." (BOM 31-32). But for an unscored examination like the one the County used here, the County argues that the preference can only be applied once. *Amici* take an even more restricted view and argue that the preference can only be applied once in the entire application process, scored or unscored. (*Amici* Br 15-30). Both the County and *amici* deny that the preference applies to the hiring decision in an unscored hiring process.

The County's and *amici*'s arguments fail. First, nothing in the statute establishes that a veterans' preference must *only* be given at a single stage of the hiring process. To the contrary, the statute mandates that the preference is to be applied to various "application examinations." ORS 408.230(2). In subsection (2)(c)—the section that specifically requires an employer to "devise and apply methods"—the statute specifically refers to an "application

examination" that may consist of several tools. These tools—an interview; an evaluation of performance, experience, or training; a supervisor's rating; and "any other method of ranking an applicant that does not result in a score"—may frequently be used in the latter stages of a hiring or promotion decision. They may also be used in conjunction with an initial scored screening application "used to develop a list of persons for interviews." ORS 408.230(2)(a). And again, in subsection (2)(b), the statute specifically refers to an "application examination, given after the initial screening." Thus, in subsection (2)(b), "application examination" refers to an examination that may be used to initially screen candidates, as well as one that is not restricted to initial screening, suggesting that the preferences are to be awarded at multiple stages of the hiring process.

Second, the County and *amici* are wrong that an employer is not required to apply the preference to its hiring decision. Under the plain text of ORS 408.230(2)(c), special consideration must be given to a veteran in the employer's "hiring decision." Similarly, for scored application examinations, an employer must consider the veterans' preference in deciding which candidate to hire. In a scored process, the employer must hire 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 the results" of a non-veteran. ORS 408.230(4) (emphasis added).

Thus, for both unscored and scored processes, the employer must apply the preference to the hiring decision.

To support their interpretation of the statute, the County and *amici* rely primarily on legislative history. To be sure, that history contains statements from proponents of Senate Bill 822 stating that one effect of the veterans' preference law was to give veterans a preference in the early stages of a hiring process. But, as discussed above, the County's argument disregards that the 1999 version of the statute had given some help to veterans in getting interviews and that the purpose of the 2007 amendments was to increase and amplify the preference. More importantly, the County's and *amici*'s interpretation of ORS 408.230(2) would eviscerate the 2007 amendments and would permit public employers to disregard a veteran's public service in making their hiring decisions so long as the employer granted some modicum of preference at an earlier stage of the hiring process. That interpretation is inconsistent with the text, context, and legislative history of the statute.

Additionally, under the County's and *amici*'s interpretation of ORS 408.230, a veteran could get drastically different treatment depending on whether the employer used a scored or an unscored application examination. When the employer used a scored exam, the veteran would receive points on the exam. If the employer used a scored exam to make its hiring decision, that veteran would receive the points at that stage of the process and would get the

additional benefit of being appointed if the veteran's scores were equal to or greater than a non-veteran's scores. But in an unscored application process, the County asserts that it could grant a veteran an interview and then give the veteran no preference at all when ranking the applicants or when making its hiring decision. That construction of the statute would essentially create a loophole whereby employers could effectively avoid giving any meaningful veterans' preference at all. There is no indication in the text of the statute or in the legislative history that the legislature intended for veterans to receive preferential treatment in such an inconsistent, even arbitrary, manner.[13]

4. The County violated ORS 408.230(2)(c) by failing to grant Edwards a preference when it ranked him and when it made the final hiring decision.

As noted, in the final order, BOLI concluded that the County failed to devise and apply a method of granting the veterans' preference to Edwards during his application examination, which resulted in a ranking from the

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[13] The County also argues that requiring the preference to be applied at multiple stages would lead to the absurd result of the preferences stacking or compounding until a veteran would have to be appointed, at the exclusion of more qualified candidates. The County uses the example of a 10% preference being applied across six stages of a scored application examination to result in 60% preference. (BOM 33-34). The County is wrong both mathematically and legally. If an employer were to apply a 10% preference over six 100 points tests, the total preference for the entire process would still be 10%. For each test, the veteran would get a 10 point advantage: Over six tests the advantage would be a total of 60 points out of 600 total points, which is still a 10% preference.

interview panel. (ER 96-102). BOLI also concluded that the County failed to apply the preference at the final stage of the hiring process, the decision by Sheriff Staton. (ER 106-108). Because BOLI correctly interpreted ORS 408.230(2)(c) as requiring the County to apply the preference at those two stages and because the County does not dispute BOLI's factual findings, this court should affirm the final order's conclusion.

5. BOLI acted within its statutory authority in promulgating the stages rule, OAR 839-006-0450(2).

The County argues that the "stages rule," OAR 839-006-0450(2), [14] which BOLI construed as requiring the County to give Edwards a preference when the County ranked him based on the application examination and at the final hiring decision, is outside the agency's statutory authority. As discussed above, ORS 408.230(2)(c) itself requires the preference to be applied at those two stages of the hiring process. Because the final order is consistent with the statute, this court does not need to address the validity of the stages rule. If this court reaches the issue, it should hold that the stages rule is consistent with the statute and therefore within BOLI's statutory authority.

Through the rule, BOLI has interpreted the veterans' preference laws as requiring public employers to grant a preference "at each stage of the

[14] All citations to BOLI's rules are to the 2012 version in place at the time of the contested case hearing. The rule was amended after the contested hearing occurred.

application process." OAR 839-006-0450(2). That interpretation is entirely consistent with the statutory scheme. The veterans' preference statutes require public employers to give a veteran preferential treatment when calculating scores for screening and application examinations (ORS 408.230(2)(a),(b)), when using an unscored application examination that results in a ranking (ORS 408.230(2)(c)); and when making the hiring decision (ORS 408.230(2)(c); 408.230(4)). BOLI correctly interpreted those provisions as requiring the employers to apply a preference at each stage in the hiring process.

a. BOLI has authority to promulgate substantive rules like OAR 839-006-0450(2) that interpret the veterans' preference statutes.

In an *amici* brief, the League of Oregon Cities and Association of Oregon Counties argue that BOLI lacked authority to promulgate OAR 839-006-0450(2). *Amici* acknowledge BOLI's authority to administer and enforce the veterans' preference laws but argue that its rulemaking authority is limited to procedural as opposed to substantive rules. (*Amici* Br at 8). They are wrong.

As an initial matter, this court should not address that argument because it was not raised in the contested case proceeding or in the Court of Appeals. *See Emerald Steel Fabricators, Inc v BOLI*, 348 Or 159, 164, 230 P3d 518, 521–22 (2010) (applying preservation requirements to contested case hearing).

Preservation aside, *amici*'s argument ignores BOLI's broad rulemaking authority to administer and enforce Oregon's employment laws. At least three statutory provisions reflect that BOLI's rulemaking authority is not limited to making procedural rules. First, ORS 651.060(4) provides that "[t]he commissioner may adopt such reasonable rules as may be necessary to administer and enforce any statutes over which the commissioner or the bureau has jurisdiction." The stages rule is authorized by that statute because the rule furthers BOLI's ability to administer and enforce the veterans' preference law. Second, ORS 659A.800(2) gives BOLI "general jurisdiction and power for the purpose of eliminating and preventing unlawful practices." The term "unlawful practices" includes any unlawful *employment* practice, such as violations of the veterans' preference statute. *See* ORS 659A.001(11), (12) (defining "unlawful employment practice" and "unlawful practice"); ORS 408.230(6) (violation of veterans' preference law is an unlawful employment practice). Third, ORS 659A.805(1)(e) gives the Commissioner the broad authority to promulgate rules to combat unlawful practices, and includes a catchall provision allowing the commissioner to promulgate rules "[c]overing any other matter required to carry out the purposes" of ORS chapter 659A. ORS 659A.805(1)(e).

The stages rule, OAR 839-006-0450(2), is well within the grant of authority given to BOLI by those statutes. Accordingly, BOLI has rulemaking authority under ORS 659A.805—as well as under ORS 651.060(4)—to

promulgate rules like OAR 839-006-0450 to aid enforcement and to ensure that unlawful employment practices are eliminated.[15]

b. OAR 839-006-0450(2) is consistent with the veterans' preference statutes, which require an employer to give veterans preferential treatment when deciding to grant an interview, ranking of the applicants prior to the final hiring decision, and in making the final hiring decision itself.

Whether the veterans' preference statutes authorize OAR 839-006-045(2)—the "stages rule"—is a question of legislative intent, which this court determines by looking primarily to the text and context of the relevant statutes. *See Springfield Educ. Ass'n v Springfield School Dist. No. 19*, 290 Or 217, 223, 621 P2d 547 (1980) (describing methodology for interpreting agency rules); *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009) (describing methodology for interpreting statutes).

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[15] *Amici* note that BOLI listed ORS 659A.805 as the statute authorizing OAR 839-006-0450 during the rulemaking process, and appear to argue that the rule is invalid if ORS 659A.805 does not provide BOLI with the authority to promulgate substantive rules. (*See Amici* Br 6-7, App 2). As noted in the text, BOLI has overlapping authority to promulgate rules under ORS 651.060(4). Because that statute provides overlapping authority for OAR 839-006-0450, *amici* or the County could not be prejudiced by BOLI's reliance on ORS 659A.805. *See* ORS 183.400(6) ("The court shall not declare a rule invalid solely because it was adopted without compliance with applicable rulemaking procedures after a period of two years after the date the rule was filed in the office of the Secretary of State, if the agency attempted to comply with those procedures and its failure to do so did not substantially prejudice the interests of the parties.").

Here, BOLI promulgated the stages rule to provide guidance on when employers must give veterans preferential treatment. The rule 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.

OAR 839-006-0450(2). The other sections of OAR 839-006-0450 mirror the statutory language in ORS 408.230 and ORS 408.237.

As discussed above, the plain text of ORS 408.230 confirms that the legislature contemplated that the preference would be applied at multiple points in the hiring process, and not just at a single stage as the County contends. For an application process that does not involve a scored exam, ORS 408.230(2)(c) requires the employer to give a preference when the employer ranks an applicant who is a veteran and when the employer makes the final hiring decision. Similarly, for a scored application process under ORS 408.230(2)(a)-(b), there are at least three stages at which the preference points would need to be applied: (1) an initial screening used to develop a list of interview candidates (ORS 408.230(2)(a)); (2) an application examination, given after an initial application screening (ORS 408.230(2)(b)); and (3) the hiring decision (ORS 408.230(4)).

Looked at as a whole, ORS 408.230 expresses a legislative intent to give veterans a preference at the decision points in a given application process,

whether scored or unscored. Additionally, ORS 408.237(2) requires a public employer to give an interview to a veteran when the veteran meets the minimum qualifications for the position and an interview is part of the application process. Although that statute does not use the term "preference," it shows the legislature's intent to give veterans advantageous treatment in getting to the interview stage of an unscored hiring process.[16] OAR 839-006-0450(2), then, is consistent with legislative intent to require employers to apply the preference at stages in the hiring process where an applicant is ranked or subject to elimination from the hiring process.[17]

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[16] ORS 408.237(2) does not apply when candidates for interviews are selected from an eligibility list that is compiled based on a test or series of tests. ORS 408.237(1), (3).

[17] The County devotes several pages of its briefing to highlighting testimony from BOLI's investigator regarding the number of stages in the County's application process. (BOM 27-30). The County then argues that stages rule presents a "moving target" based on that testimony. (BOM 30-31). The final order concluded that the County's application process had two stages, as discussed in the text. The testimony from BOLI's investigator at the contested case hearing was based on the scant written materials provided by the County during BOLI's investigation. (ER 96-97). The County's materials did not describe any discrete stages in its hiring process. In any event, the investigator's testimony is irrelevant to the question of whether the rule is consistent with the veterans' preference statute.

B. BOLI did not err, let alone plainly err, in awarding damages for the emotional distress that Edwards suffered as a result of the County's unlawful employment practices.

To remedy the effects of the County's violation of ORS 408.230(2)(c), BOLI awarded Sgt. Edwards $50,000 in damages for his emotional distress. On review, the County argues that BOLI plainly erred in so doing because the agency lacks statutory authority to award damages for emotional distress.[18] The County is wrong. ORS 659A.850 authorizes BOLI to award "actual damages" to remedy the effects of unlawful employment practices. That grant of authority includes the power to assess damages for emotional distress that resulted from the County's violation of the law. Although BOLI's authority to award such damages is easily discernable from the statutory scheme, this court does not need to address the issue at all because the County failed to preserve it.

1. BOLI's authority to award damages for emotional distress is not a jurisdictional question.

The County first argues that preservation principles do not apply to its damages argument because BOLI's authority to award damages for emotional distress is a "jurisdictional" question that this court can review at any time. The County is wrong.

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[18] Before the Court of Appeals, the County also argued that the damages award was not supported by substantial evidence. The County does not renew that argument on review.

To support its argument, the County cites a number of cases noting that administrative agencies and courts can only hear matters and issue decisions within their respective jurisdictions. (BOM 47-48). But none of those cases stand for the proposition that an agency's or a court's authority to impose a particular *remedy* is a jurisdictional question that escapes the preservation rules. Rather, when an appellant alleges that a court has exceeded its statutory authority in issuing an order, for example, the rules of preservation apply. *See, e.g.*, *State v. Fults*, 343 Or 515, 523, 173 P3d 822 (2007) (applying plain-error doctrine in reviewing unpreserved claim of sentencing error). The County has cited no case where an appellate court has treated the remedy ordered by an administrative agency as a jurisdictional issue, and BOLI is aware of none.

Moreover, the County offers such a broad notion of what "jurisdiction" means in the administrative context that its exception to the preservation requirement would swallow the rule. The County's argument is that agencies can only act within their statutory authority and that an agency lacks power—*i.e.*, "jurisdiction"—to take any action outside of that authority. The County then analogizes an agency's lack of statutory authority to take an action—awarding damages for emotional distress—with a court's lack of jurisdiction to hear a matter. If the County were correct, then there would be no need to preserve *any* legal argument before an administrative agency. For example, the merits question in this case is whether BOLI properly concluded that the

County violated the veterans' preference law. If BOLI interpreted the veterans' preference law incorrectly, then it acted outside of its statutory authority. By the County's reasoning, that would be a jurisdictional flaw that this court could review at any time.

In this case, the legislature has given BOLI broad jurisdiction and equally broad remedial powers. BOLI has "general jurisdiction and power" to eliminate and prevent "unlawful practices," ORS 659A.800 (2), and has the authority to "take *all steps necessary* to eliminate and prevent unlawful practices." ORS 659A.800(1) (emphasis added). The term "unlawful practices" includes any unlawful *employment* practice, such as violations of the veterans' preference statute. *See* ORS 659A.001(11), (12) (defining "unlawful employment practice" and "unlawful practice"); ORS 408.230(6) (violation of veterans' preference law is an unlawful employment practice).

Once BOLI finds that an employer has engaged in an unlawful practice, BOLI is required to issue a cease-and-desist order. ORS 659A.850(4). That order can require the employer to perform any act that is "reasonably calculated" to:

> *Eliminate the effects of the unlawful practice* that the respondent is found to have engaged in, *including but not limited to paying an award of actual damages suffered by the complainant* and complying with injunctive or other equitable relief[.]

ORS 659A.850(4)(a)(B) (emphasis added). Under the plain wording of that statute, BOLI is authorized to "eliminate the effects" of a violation of the veterans' preference statute. In doing so, BOLI can award "actual damages" that result from the violation. Here, BOLI proved that Sgt. Edwards suffered emotional distress as a result of the County's unlawful practices. Accordingly, BOLI may award damages to compensate Edwards for that distress and thereby fully remedy the unlawful practice. *See Brewer v. Erwin*, 287 Or 435, 449, 600 P2d 398 (1979), *abrogated on other grounds by McGanty v. Staudenraus*, 321 Or 532, 901 P2d 841 (1995) (the term "actual damages" can include noneconomic damages when supported by statutory context).

Under those statutes, there is no question that BOLI had the authority to hear Edwards' complaint and issue an order to remedy the County's unlawful employment practices. Plainly, the County is attempting to shoehorn a question about the scope of BOLI's statutory authority into a jurisdictional question in order to avoid the consequences of having failed to raise this issue below. The court should reject the County's efforts.

2. The County does not identify any "plain error" that may be reviewed despite the County's failure to preserve its argument.

Because the County failed to preserve its claim, it is reviewable only if it amounts to plain error. *See* ORAP 5.45(1) (containing plain-error exception). The County's argument on damages does not qualify as plain error because the

alleged error is not obvious. *Ailes v. Portland Meadows, Inc*., 312 Or 376, 381, 823 P2d 956 (1991) (plain error must be "obvious" such that it is "not reasonably in dispute"). Here, the plain text of ORS 659A.850 supports BOLI's interpretation. As noted, under the plain text of that statute, the legislature authorized BOLI to "eliminate the effects" of a violation of the veterans' preference statute. In doing so, BOLI can award "actual damages," including damages for emotional distress, so long as the evidence shows that the damages are an effect of the violation.

At the least, no appellate court has reached a contrary conclusion. This appeal is the first case to address the veterans' preference statute since it was made subject to enforcement under ORS chapter 659A. For that reason, in addition to the plain text of the statute, this court should not conclude that BOLI's interpretation is obviously wrong and beyond reasonable dispute. *See State v. Serrano*, 355 Or 172, 182, 324 P3d 1274 (2014) (because the court had never had the issue before it for resolution, defendant failed to demonstrate "the obviousness of the posited unpreserved error").

In arguing for plain error review, the County asserts that the error is obvious "because the face of the statute demonstrates that the agency lacks authority to award emotional distress damages in these types of cases." (BOM 52). But the County acknowledges that the term "actual damages" could include non-economic damages as well. (BOM 39). To explain why damages

for emotional distress are not available, the County relies on a complex construction of the statute based on the context of the veterans' preference law and ORS chapter 659A, and the legislative history behind those statutes. (BOM 39-46). Under the County's own reasoning, then, the meaning of "actual damages" is not obvious.

In any event, the County's argument is mistaken. Its argument rests on the premise that the veterans' preference statute is intended to help veterans find employment (an economic concern) and so "actual damages" must mean economic damages only in the context of the veterans' preference statute. The fundamental problem with that argument is that it fails to give sufficient weight to the plain text of ORS 659A.850. Again, BOLI is authorized to craft a remedy that eliminates "the effects of the unlawful practice * * * including * * * paying an award of actual damages suffered by the complainant." ORS 659A.850(4)(a)(B). The most direct reading of that statute is that "actual damages" include any damages suffered by the complainant as an "effect" of the unlawful practice.

Moreover, the County acknowledges that ORS 659A.850 authorizes BOLI to provide the remedy for a wide range of unlawful practices, including discrimination. (BOM 44-45). But the County's argument disregards that Oregon courts have long held that BOLI can award emotional distress damages to remedy unlawful discrimination under that statute. For example, the Court of

Appeals has held that "[i]n construing the word 'effect' we must give the word its obvious meaning. In the context of the statute, mental anguish, as well as pecuniary loss, can be an effect of racial discrimination." *Williams v. Joyce*, 4 Or App 482, 504-05, 479 P2d 513 (1971) (holding that predecessor to ORS 659A.850 authorized BOLI to award damages for humiliation and mental suffering as "actual compensation for actual harm"); *see also Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979) (upholding *Williams* and noting that the legislature had amended the statute after the *Williams* decision but did not exclude emotional distress damages as a permissible remedy). [19]

Lastly, the County argues that ORS 659A.885, which allows a complainant to file a claim in circuit court, suggests that BOLI cannot award damages for emotional distress under ORS 659A.850. That is so, the County argues, because a court is authorized to "order injunctive relief and any other equitable relief that may be appropriate, including but not limited to

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[19] The County also suggests, based purely on legislative history, that "actual damages" are only available in fair housing claims. (BOM 42). The County asserts that "there is no indication that the legislature intended those words to reach beyond their application to fair housing claims." (BOM 42). In fact, the plain text of ORS 659A.850(4) makes "actual damages" available as a remedy for *any* unlawful practice. *See White v. Jubitz Corp*, 347 Or 212, 223, 219 P3d 566, 572 (2009) ("[L]egislative history cannot substitute for, or contradict the text" of a statute in determining the statute's meaning.)

reinstatement or the hiring of employees with or without back pay." ORS 659A.885. In the County's view, a circuit court could not award emotional distress damages for a violation of the veterans' preference statute and so BOLI cannot award such damages either. (BOM 40-41, 45). Assuming that the County's construction of ORS 659A.885 is correct, that statute does not help the County's argument. There is no suggestion in the text of ORS 659A.850 or 659A.885 that BOLI is limited to the remedies available in circuit court for a particular violation. Again, under the plain text of ORS 659A.850, BOLI has broad authority to remedy the effects of unlawful practices, whether that unlawful practice is a violation of the veterans' preference law or a violation of Oregon's anti-discrimination statutes.

Because BOLI did not plainly err in awarding damages based on Edwards' emotional suffering, this Court should reject the County's argument and affirm the damages award.

CONCLUSION

This court should affirm BOLI's final order and the decision of the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 6, 2016, I directed the original Brief on the Merits of Respondent on Review, Bureau of Labor and Industries to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Jacqueline S. Kamins, attorney for petitioner on review, Sean J. Riddell, attorney for respondent on review, Rod Edwards, Sean E. O'Day, attorney for amicus curiae, League of Oregon Cities, and Rob Bovett, attorney for amicus curiae, Association of Oregon Counties, by using the electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 11,266 words. I further 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(2)(b).

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