

BOLI Raises the Stakes

Violation of veterans' preference for public employers

 By Kyle Abraham

A recent decision from the Commissioner of Oregon's Bureau of Labor and Industries ("BOLI") raised the stakes on violations of veterans' preference laws in public employment.

Under Oregon law, public employers must provide a preference to military veterans who apply for a job or promotion. In the Matter of Multnomah County Sheriff's Office BOLI found Multnomah County (Employer) failed to apply the required preference for a veteran applying for a promotion.

Current law provides that if an employer uses a process to select an applicant for a job or promotion that includes a numeric score, the employer applies a preference by simply adding the equivalent of five percentage points to the score of a veteran applicant and ten percentage points to the score of a disabled-veteran applicant. On the other hand, if an employer uses an unscored selection process (such as a standard interview process), the law provides no method for application of the preference, but instead requires employers to devise and apply methods giving "special consideration" to veterans. The law fails to provide a definition of special considerations, and employers are left without any guidance on what special consideration" means.

In its decision, BOLI acknowledged that the law provides no guidance to public employers on how to give special consideration for an unscored selection process. But, BOLI stated that special consideration requires an employer to do more than identify a veteran-applicant as the number one candidate before interviews. BOLI also stated that special consideration requires more than providing the veteran with an interview.

A second issue raised in the Multnomah County case was, when, in the selection process, must an employer provide the veteran with special consideration? The Employer argued that special preference need only be given at one stage in the selection process, the initial stage. BOLI, however, relying on its administrative authority, interpreted the law as requiring employers to grant veterans preference at each stage of a selection process.

Ultimately, BOLI announced a new rule: It is a per se violation of the law for a public employer to fail to devise a method for applying special consideration for veteran applicants in an unscored selection process. Under this rule, if an employer fails to devise a method, a minimally-qualified veteran will be entitled to monetary damages if the veteran is not selected for the position.

After finding that the Employer violated the law, BOLI awarded emotional distress damages of \$50,000. Initially, the Administrative Law Judge had recommended an award of \$25,000; however, the Commissioner's opinion increased the emotional distress award. Notably, the Commissioner's decision stated that if the Employer had established a policy of applying the required special consideration, the award for damages would have been significantly reduced or eliminated.

Multnomah County is appealing BOLI's decision. In the meantime, the case provides insight into how BOLI will address veterans' preference claims. Employers are encouraged to consult legal counsel for assistance in drafting a legally sufficient policy for veterans' preference. **L&C**



Kyle Abraham represents management in both traditional labor and employment law matters. In his employment law practice, Kyle works closely with employers to develop effective workplace policies and provide proactive advice and counsel, and he defends employers involved in litigation. Kyle is an experienced litigator who has successfully represented clients before U.S. district courts, Oregon and Washington state courts, the Equal Employment Opportunity Commission, Oregon's Bureau of Labor and Industries, and other state and federal agencies.

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