

Veterans' Preference in the Expected Service

By Justin P. Lonergan¹

8.0 Veterans' Preference

In barely over a month, Washington State voters will decide by referendum whether to approve an initiative that could significantly impact — to include curtailing or even eliminating — the state's long-established veterans' preference system. The initiative, which is known as the "Washington Diversity, Equality, and Inclusion Act," nominally focuses on restoring affirmative action in Washington.² The text of the act may, may have intended or unintended consequences on veterans' preferences.³

Washington's Existing Veterans Preference Laws

Washington State's veterans preference law is two-fold. First, the Revised Code of Washington includes a points preference for eligible veterans. The scoring criteria preference applies to hiring for positions subject to competitive testing.⁴ The statute gives veterans between a five and ten percent addition to their raw score, *assuming the veteran has otherwise achieved a passing score*.⁵ The preference applies only to hiring, and not promotion consideration.⁶

An example of this would be hiring for the Seattle Police Department. Seattle Police Department uses competitive examinations to evaluate *and select* applicants. In other words, if two applicants, one a veteran and the other not, apply and have equal test scores, the veteran would receive a five to ten percent raise in his or her status and would therefore be hired over the non-veteran. Washington's statutory preference for competitive examinations therefore differs from other systems, where points only give a veteran a preference in the initial screening process - i.e., a "foot in the door."

The second type of preference is more qualitative. R.C.W. 73.16.010, "Preference in Public Employment, states:

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²<http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Initiatives/Initiatives/INITIATIVE%201000.SL.pdf>

³Ballotpedia gives I-1000 a low readability score to voters under both of its voter comprehension methodologies. [https://ballotpedia.org/Washington_Referendum_88,_Vote_on_I-1000_Affirmative_Action_Measure_\(2019\)](https://ballotpedia.org/Washington_Referendum_88,_Vote_on_I-1000_Affirmative_Action_Measure_(2019))

⁴R.C.W. Section 41.04.010

⁵*Id.*

⁶*Id.*

[H]onorably discharged soldiers, sailors, and marines who are veterans of any war of the United States, or of any military campaign for which a campaign ribbon shall have been awarded, and their widows or widowers, shall be preferred for appointment and employment [under various forms of public employment].

Background and Text of I-1000

Initiative Measure N. 1000 (I-1000), passed the Washington legislature (both its house and senate) on April 28, 2019. I-1000 amends existing provisions of the Revised Code of Washington as follows (note: strikethroughs indicate removed language and underlines indicated added language):

(1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, ((or)) national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, or honorably discharged veteran or military status in the operation of public employment, public education, or public contracting.

(3) This section does not affect any law or governmental action that does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, ((or)) national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, or honorably discharged veteran or military status.

The initiative also provides several new and amended definitions which will likely impact whether I-1000 will result in adverse change to Washington's veteran's preference system. First, the initiative adds entirely new statutory text defining "affirmative action:"

(c) "Affirmative action" means a policy in which an individual's race, sex, ethnicity, national origin, age, the presence of any sensory, mental, or physical disability, and honorably discharged veteran or military status are factors considered in the selection of qualified women, honorably discharged military veterans, persons in protected age categories, persons with disabilities, and minorities for opportunities in public education, public employment, and public contracting. Affirmative action includes, but shall not be limited to, recruitment, hiring, training, promotion, outreach, setting and achieving goals and timetables, and other measures designed to increase Washington's diversity in public education, public employment, and public contracting; and

(d) "Preferential treatment" means the act of using race, sex, color, ethnicity, national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, and honorably discharged veteran or military status as the sole qualifying factor to select a lesser qualified candidate over a more qualified candidate for a public education, public employment, or public contracting opportunity.

Considerations on Whether I-1000 Will Substantially Change Veterans Preference

This brief article will not attempt to detail all of the various stakeholder and interested parties' positions on I-1000.⁷ Suffice to say, there is substantial confusion and disagreement over the effect of I-1000. For example, the Washington legislature conducted hearings on I-1000 in April 2019, at which one state representative asked whether I-1000 would, because of its definition sections, prohibit the type of veterans preferences afforded to date. In response, the witness, from the Washington State Office of Program Research, testified "So, I guess the court would have to try and harmonize those statutes with the provisions of the initiative, to the extent that there is a conflict." This is a significant comment, as the OPR's role is to "provide information necessary to assist House members and committees in making informed judgments about policy issues facing the State."⁸ This comment reveals a complex legal problem which is probably not going to be in the minds of an average voter because it reflects the complexity and uncertainty of statutory interpretation.

As is the case in many jurisdictions, Washington courts will not generally look beyond a statute's exact wording if it has a plain meaning. Here, I-1000 has a clear purpose statement and courts may deem the initiative's language to be "plain" on its face. For example, under the Seattle Police Department example above, the courts may find as a matter of fact that the veteran was selected solely because of his preference — the points boost secured him the job, plain and simple. If this basic — and routine — example comes before the courts, there may be no room for disagreement with what seems plainly like a "sole factor" in selecting the veteran.

Similarly, I-1000 includes none of the accepted prefatory language that would clarify its relation to other statutes. For example, the words "Subject to" or "except as otherwise provided by ..." frequently appear in statutory provisions to clarify that their effect depends on the operation of another statute. To the contrary, the phrase "Notwithstanding any other provision" operates to make a statutory section "superior" or first in effect to others. I-1000 does not contain either type of qualifier, but does explicitly state that it "does not affect" several other state state statutes or programs. Under accepted canons of statutory interpretation, Washington courts may conclude that the legislature's failure to state that I-1000 "does not affect" the veterans preference statutes is actually affirmative proof that it *intended* to affect the veterans preference statutes.

Discerning Legislative Intent May be Impossible

Washington courts will, under various circumstances, consider legislative intent when interpreting statutes. Professor Spitzer states that "I-1000 was carefully drafted to take into account a number of other relevant statutes," but the legislature did not draft I-1000, and it is

⁷See <https://crosscut.com/2019/09/opponents-say-i-1000s-affirmative-action-policy-would-hurt-veterans-uw-law-expert-disagrees>; compare with https://crosscut.com/sites/default/files/files/i-1000-thomas-jarrards-i-1000-kills-veterans-preferences-argument-may-26-2019_0.pdf

⁸See <http://leg.wa.gov/House/Committees/Pages/default.aspx>; see also <http://leg.wa.gov/House/Committees/OPRGeneral/Pages/jobs.aspx>

difficult to find clarity in the legislative meaning and record when the legislature's own policy experts (OPR) preface their interpretation with, "I guess[.]"

Similarly, Professor Spitzer's analysis may be irrelevant if courts do not even look behind the plan meaning of the statutory words -- to be clear, courts are wary of correcting legislative actions even if the legislature did its own job poorly.

Summary and Conclusion

I-1000 is a puzzling initiative. It is the type of statute that promises bold goals but which is poorly written and nobody can quite agree on what it means. It also begs the question of why this issue even needs addressing. Perhaps the end effect will be a net positive for veterans. Few veterans, however, would likely execute a war plan founded on assumptions and an intel analysis that starts with, "I guess." Washington veterans voting in November, therefore, are best served with personal due diligence and careful review of both sides of this argument.

Update – May 2022

On November 5, 2019, Washington voters rejected Initiative I-1000.⁹

⁹*Washington Initiative 1000, Affirmative Action and Diversity Commission Measure (2019)*, BALLOT PEDIA, [https://ballotpedia.org/Washington_Initiative_1000,_Affirmative_Action_and_Diversity_Commission_Measure_\(2019\)](https://ballotpedia.org/Washington_Initiative_1000,_Affirmative_Action_and_Diversity_Commission_Measure_(2019)) (last visited May 3, 2022).