

MEMORANDUM

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Action:** Bill 46-09, Personnel – Regulations – Persons with Disabilities – Hiring Preference

Management and Fiscal Policy Committee recommendation (2-0, Council Vice President Ervin absent): approve the Bill with amendments.

Bill 46-09, Personnel – Regulations – Persons with Disabilities – Hiring Preference, sponsored by Councilmember Andrews, Council Vice President Ervin, Councilmember Trachtenberg, and Councilmember Navarro was introduced on December 1. A public hearing was held on January 12 and a Management and Fiscal Policy Committee worksession was held on January 26.

Bill 46-09 would require the Executive to adopt regulations establishing and maintaining a hiring preference for certain qualified persons with disabilities who apply for an initial appointment to a County merit system position. The preference would only apply to a person who is among the highest rating category in a normal competitive process.

Background

The Office of Legislative Oversight (OLO) issued a report on “Hiring Persons with Disabilities: A Review of County Government Practices” on June 10, 2008.¹ The report found that persons with disabilities face many barriers to employment that prevent them from getting jobs. The report also found that the unemployment rate for persons with disabilities is consistently higher than the unemployment rate for persons without a disability despite studies showing that employees with and without disabilities have comparable performance, longevity rates, and absenteeism rates.

The MFP Committee held 6 worksessions on the OLO report, including several briefings from the Executive Branch on hiring persons with disabilities, since the release of the report in June 2008. On November 23, 2009, the MFP Committee recommended (3-0) establishing a hiring preference for persons with disabilities in County law. On November 24, 2009, the

¹ A copy of the report is available online at:
<http://www.montgomerycountymd.gov/content/council/olo/reports/pdf/2008-9.pdf>.

Council endorsed this recommendation in concept.² Bill 46-09 would create a hiring preference in County law for the initial appointment of persons with disabilities to County merit system positions as approved in concept by the Council on November 24.

Bill 46-09 would require the Executive to adopt regulations under Method 1 to implement the hiring preference. This would be consistent with the current statutory scheme for merit system provisions, whereby a general law is enacted and the implementing details are defined in Personnel regulations adopted by the Executive and approved by the Council. Under Method 1, the Council must approve or disapprove the regulation by resolution or ask the Executive to amend it. There are several major issues discussed below that would be resolved by the Personnel regulations.

January 26 Worksession

The Committee recommended (2-0, Council Vice President Ervin absent) approval of the Bill with the following amendments:

1. Insert a definition of disability consistent with the Federal Schedule A program.
2. Place a veteran with a disability first in the order of preference and give a veteran without a disability and a non-veteran with a disability an equal preference.
3. Add a statement of findings.

Issues

1. What is the fiscal and economic impact of the Bill?

The OMB fiscal impact statement (©9) states that “the Bill will not have any material financial or economic impact on the County.” The Office of Human Resources (OHR) may have to provide some additional staff time to review and act on applications from candidates for this preference and to educate managers about the new preference. This time should be insignificant.

Since the Bill would only affect the initial appointment of persons with disabilities into County merit system positions, County businesses should not be directly impacted. To the extent that the preference helps to open up a new avenue for persons with disabilities to obtain employment in the County, it could only have a positive impact on economic development in the County.

2. Does the Council have the legal authority to create a hiring preference for persons with disabilities?

The Office of the County Attorney (OCA) recently addressed this issue in a well reasoned legal opinion dated July 29, 2009 attached at ©10-22. Although the OCA opined that a Charter Amendment would be required to create a special hiring authority to noncompetitively appoint persons with disabilities into County merit positions, the OCA determined that the

² The Council also referred the question of whether to amend the Charter to establish a special hiring authority for persons with disabilities to the Charter Review Commission at the same meeting.

County law could be amended to create a hiring preference for persons with disabilities who are rated in the highest rating category under merit system competition under the current Charter. Council staff agrees with this OCA opinion.

3. Who should be an eligible person with a disability?

Bill 46-09 would require this issue to be resolved by Personnel regulation. The County Attorney's Office recommended that the Bill be amended to resolve this issue in order to provide guidance to the Executive. See ©32-37. There are at least 2 different basic models to consider. First, the Federal Americans with Disabilities Act (ADA), which generally prohibits discrimination in employment on the basis of disability, defines a disability in 42 USC §12201 as:

- (1) *Disability*--The term "disability" means, with respect to an individual--
 - (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
 - (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment (as described in paragraph (3)).
- (2) *Major life activities*--
 - (A) In general.--For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
 - (B) Major bodily functions.--For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

This definition is applied by the courts in resolving claims of discrimination on the basis of a disability by an employee or an applicant for employment. The ADA prohibits discrimination, but does not create a preference for hiring persons with disabilities.

The Federal government uses a different definition of a person with a disability under its long established program for hiring persons with disabilities for Federal merit system positions without competition. Under this "Schedule A" hiring authority, an applicant must have mental retardation, a severe physical disability, or a psychiatric disability. The applicant must also have proof of the disability, certification of job readiness, and meet all required qualifications for the position. See, 5 CFR 213.3102(u). Eligibility for noncompetitive appointment under this special hiring authority is more restrictive than the definition of disability under the ADA.

Neither of these definitions of a person with a disability was created for use in a hiring preference under a merit system competition that would be established under Bill 46-09. Council staff found a Montana State law that creates a hiring preference for a person with a disability on initial appointment to a merit position in State or local government employment in Montana. See Montana Code §§39-30-103 *et seq.* at ©23-31. This Montana law requires a public employer to hire a person with a disability for the initial appointment to a merit system position “over any other applicant with *substantially equal qualifications* who is not a preference-eligible applicant.” (emphasis added) See §39-30-201 at ©27. An applicant seeking to use this preference must be certified by the Montana Department of Public Health and Human Services. See §39-30-107 at ©25. The Montana Supreme Court called this law a “tie-breaker” preference in *Olson v. State of Montana*, 765 P.2d 171 (Mont. 1988). The Montana law uses a definition of a person with a disability that is similar to the ADA definition. See §39-30-103(4) at ©23.

Mark Maxin, Chair of the County Commission on People with Disabilities submitted additional comments after the public hearing. See ©38-39. Mr. Maxin recommends that the Bill be amended to add a definition of disability that is consistent with the Federal Schedule A definition. However, Mr. Maxin recommends that the outdated term, “mental retardation” be replaced with the term “developmental disability.”

The universe of people who may fall into the ADA definition of a person with a disability is significantly larger than the universe of people who fit into the Schedule A definition of a person with a disability. A person with an episodic impairment such as high blood pressure and asthma may be a person with a disability under the ADA. A law prohibiting discrimination on the basis of a disability logically results in a broader definition of disability than a law creating a hiring preference for a person with a disability. The purpose of Bill 46-09 is much closer to the purpose of Schedule A than that of the ADA. **Committee recommendation:** amend the Bill to define a person with a disability consistent with the Federal Schedule A program and replace “mental retardation” with “developmental disability.” See lines 72-76 of the Bill at ©4.

4. How should this preference be applied along with other existing preferences?

Bill 46-09 would require this issue to be resolved by Personnel regulation. The Office of the County Attorney recommended that the Bill be amended to resolve this issue to provide guidance to the Executive. See ©36-37. The Personnel regulation creates the following priority at COMCOR §33.07.01.06:

- (a) The OHR Director may establish a priority eligible list to provide priority consideration in the following order to an employee who:
 - (1) is unable to perform the employee’s job because of a disability or injury under the ADA;
 - (2) is subject to reduction-in-force;
 - (3) was granted a temporary disability retirement under the Employees Retirement System or an initial or temporary disability benefit of any type under the Retirement Savings Plan but is no longer eligible for such a temporary disability retirement or benefit; or

- (4) has veterans credit.

The preference for a person with a disability must be placed within the current order of priority, including a person with a disability who is also eligible for one of the other preferences on the list. The current regulation does not require a manager to select a veteran with a disability over a veteran without a disability who is in the highest rated category.

COMCOR §33.07.01.06-12 established the following qualifications for veteran's credit:

6-12. Veterans credit. The OHR Director must give priority consideration to an eligible veteran who applies for initial appointment to a County merit system position and who is rated and placed in the highest rating category on the eligible list. An eligible veteran is an applicant who is a Maryland resident and who:

- (a) was a Maryland resident for at least 5 consecutive years immediately before submitting the employment application;
- (b) was honorably discharged from a branch of the United States armed services after at least 180 days of active military duty that ended within 5 years of the date of application;
- (c) was not granted a normal retirement from the United States armed services;
- (d) has not already used veterans credit to receive priority consideration for appointment to a Montgomery County position; and
- (e) applied for veterans credit by completing the required form and ensuring that it was received in OHR by the closing date of the announced vacancy.

The goal of Bill 46-09 would best be served by placing a veteran with a disability³ above a veteran without a disability in the priority list. The placement of a non-veteran with a disability over a veteran without a disability would best serve the goal of Bill 46-09, but at the expense of the State and County law creating the veteran preference.

An additional option for the Committee to resolve the priority of preference between a veteran without a disability and a non-veteran with a disability is to give them each an equal preference. Under an equal preference, the appointing authority could choose either candidate, but each candidate would have a preference over similarly qualified candidates without a preference. **Committee recommendation:** amend the Bill to resolve the priority of preferences by placing a veteran with a disability first and give a veteran without a disability and a non-veteran with a disability an equal preference. See lines 82-97 of the Bill at ©5.

³ A person who qualifies for veteran's credit and has a disability as defined in this law at the time of application would receive this preference, even if the person became disabled after serving in the armed forces. However, see issue 6 for further discussion of this definition.

5. Should the Bill include a statement of findings?

Mr. Maxin recommended that the Bill be amended to include a statement of findings to support the need for a hiring preference for persons with disabilities. See ©38-39. **Committee recommendation:** amend the Bill to add a statement of findings. See lines 58-67 of the Bill at ©4.

6. Should the definition of a veteran with a disability be expanded to include a veteran rated by the Department of Veterans Affairs with a compensable service-connected disability of 30 percent or more?

The Commission on People with Disabilities raised this issue after the MFP worksession. The Committee was polled on this issue after the worksession. See ©40. The amended Bill does not define a “veteran with a disability.” However, the current language in the amended Bill would require a person to meet both the veteran requirement (this is already defined in the Personnel regulation) and the definition of a person with a disability (the Federal Schedule A definition). The Commission on People with Disabilities requested that the definition be expanded to include either a person who meets both categories or a veteran who has been rated by the Department of Veteran’s Affairs to have a 30% or more service-connected disability. This would require a substantive amendment to the Bill.

There are some impairments, such as sleep apnea, that would qualify a veteran for a 30% or greater rating that might not meet the Schedule A definition of a severe physical disability. Therefore, this amendment would expand the number of people who receive the highest preference under the Bill. Under the Bill as amended by the MFP Committee at the worksession, a veteran with a 30% disability rating who does not meet the Schedule A definition of disability⁴ would still receive a hiring preference, but it would be the same as a veteran without a disability or a non-veteran with a disability. **Committee recommendation (3-0):** amend the Bill to expand the definition of a person with a disability to include a veteran with a 30% compensable disability. See lines 74-79 at ©4.

| This packet contains: | Circle # |
|---|----------|
| Bill 46-09 | 1 |
| Legislative Request Report | 8 |
| Fiscal Impact Statement | 9 |
| County Attorney Opinion dated July 29, 2009 | 10 |
| Montana Code §§39-30-103 <i>et seq.</i> | 23 |
| County Attorney Opinion dated January 7, 2010 | 32 |
| Mark Maxin email dated January 20, 2010 | 38 |
| Betsy Luecking email dated January 27, 2010 | 40 |

⁴ Many, if not most, veterans with a 30% disability rating would also meet the Schedule A definition of disability.

Bill No. 46-09
Concerning: Personnel – Regulations –
Persons with Disabilities – Hiring
Preference
Revised: January 27, 2010 Draft No.6
Introduced: December 1, 2009
Expires: June 1, 2011
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmember Andrews, Council Vice President Ervin, Councilmember Trachtenberg, and
Councilmember Navarro

AN ACT to:

- (1) require the Executive to adopt regulations establishing and maintaining a hiring preference for certain qualified persons with disabilities who apply for County merit positions;
- (2) require the preference to apply to a person who is among the highest rating category in a normal competitive process; and
- (3) generally amend the merit system law concerning hiring persons with disabilities and make stylistic and conforming changes to related provisions.

By amending

Montgomery County Code
Chapter 33, Personnel and Human Resources
Section 33-7 and 33-9

| | |
|-------------------------------------|--|
| Boldface | <i>Heading or defined term.</i> |
| <u>Underlining</u> | <i>Added to existing law by original bill.</i> |
| [Single boldface brackets] | <i>Deleted from existing law by original bill.</i> |
| <u>Double underlining</u> | <i>Added by amendment.</i> |
| [[Double boldface brackets]] | <i>Deleted from existing law or the bill by amendment.</i> |
| * * * | <i>Existing law unaffected by bill.</i> |

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 33-7 and 33-9 are amended as follows:**

2 **33-7. County Executive and Merit System Protection Board responsibilities.**

3 (a) *Generally.* In performing its functions, the Board is expected to protect
4 the merit system and to protect employee and applicant rights
5 guaranteed under the merit system, including protection against
6 arbitrary and capricious recruitment and supervisory actions, support for
7 recruitment and supervisory actions demonstrated by the facts to be
8 proper, and to approach these matters without any bias or predilection to
9 either supervisors or subordinates. The remedial and enforcement
10 powers of the Board granted herein [shall] must be [fully] exercised by
11 the Board as needed to rectify personnel actions found to be improper.
12 The Board [shall] must comment on any proposed changes in the merit
13 system law or regulations, at or before the public hearing thereon. The
14 Board, subject to the appropriation process, [shall] must [be responsible
15 for establishing] establish its staffing requirements [necessary to
16 properly implement its duties] and [to] define the duties of [such] its
17 staff.

18 (b) *Personnel regulations.* The County Executive [shall] must adopt
19 personnel regulations under Method (1) [of section 2A-15 of this Code].
20 The personnel regulations [shall] must provide the framework for:

- 21 (1) The classification of all merit system positions in the executive
22 and legislative branches;
- 23 (2) Minimum qualifications for merit system positions, methods of
24 determining qualifications and methods of selection for any
25 positions;
- 26 (3) Probationary periods, promotions, transfers;

27 (4) Causes for removal from any merit system position and methods
 28 of removal, including demotions, furloughs, and reduction of
 29 staff. However, any regulations governing a reduction in staff and
 30 employee rights attendant thereto shall be restricted to the
 31 respective branch of government in which the employee is
 32 employed; in the case of the legislative and judicial branches, this
 33 sentence shall apply to employees hired by the legislative and
 34 judicial branch, respectively, after August 1, 1983.

35 (5) Annual, sick and other leave;

36 (6) Prohibitions against political activity;

37 (7) Maintenance of personnel records; and

38 (8) Similar personnel matters as may be provided by law.

39 (c) *Classification standards.* With respect to classification matters, the
 40 County Executive [shall] must provide by personnel regulation, adopted
 41 [in the manner specified above] under Method (1), standards for
 42 establishing and maintaining a classification plan. These standards may
 43 include but are not limited to the following:

44 (1) The necessary components of class specifications;

45 (2) Criteria for the establishment of new classes, modification or
 46 elimination of existing classes;

47 (3) Criteria for the assignment of positions to classes;

48 (4) Kinds of data required to substantiate allocation of positions;

49 (5) Guidelines for comparing levels of job difficulty and complexity;
 50 and

51 (6) Criteria for the establishment or abolishment of positions.

52 The Board [shall] must conduct or authorize periodic audits of
 53 classification assignments made by the Chief Administrative Officer

54 and of the general structure and internal consistency of the classification
 55 plan, and [shall] must submit audit findings and recommendations to the
 56 County Executive and County Council.

57 (d) Hiring preference for persons with disabilities.

58 (1) Findings.

59 (A) Persons with disabilities are a largely untapped resource
 60 for outstanding candidates for County employment.

61 (B) Persons with disabilities suffer from a high unemployment
 62 and underemployment rate in the County due in part to
 63 unfounded myths, fears and stereotypes associated with
 64 many disabilities.

65 (C) A hiring preference for persons with disabilities is
 66 necessary to remedy past discrimination resulting from
 67 these unfounded myths, fears, and stereotypes.

68 (2) The Executive must adopt by personnel regulation, under Method
 69 (1), standards for establishing and maintaining a preference for
 70 the initial appointment of a qualified person with a disability into
 71 a merit system position. These standards must:

72 ~~[(1)]~~ (A) define a person with a disability [[who is]] eligible
 73 for the preference as:

74 (i) a person with medical proof of a developmental
 75 disability, a severe physical disability, or a
 76 psychiatric disability; or

77 (ii) a veteran rated by the Department of Veterans
 78 Affairs with a compensable service-connected
 79 disability of 30 percent or more;

107 has been removed, demoted or suspended and in such other cases as
108 required herein.

109 [(f)] (g) *Retirement.* The Board may from time to time prepare and
110 recommend to the Council modifications to the County's system of
111 retirement pay.

112 [(g)] (h) *Personnel management oversight.* The Board [shall] must review
113 and study the administration of the County classification and retirement
114 plans and other aspects of the merit system and transmit to the Chief
115 Administrative Officer, County Executive and [the] County Council its
116 findings and recommendations. The Board [shall] must conduct such
117 special studies and audits on any matter relating to personnel as may be
118 periodically requested by the County Council. All County agencies,
119 departments and offices and County employees and organizations
120 [thereof shall] must cooperate with the Board and have adequate notice
121 and an opportunity to participate in any such review initiated under this
122 Section.

123 [(h)] (i) *Publication.* Consistent with the requirements of [the Freedom of
124 Information Act] State law, confidentiality and other provisions of law,
125 the Board [shall] must publish, at least annually, abstracts of its
126 decisions, rulings, opinions and interpretations, and maintain a
127 permanent record of its decisions.

128 [(i)] (j) *Public forum.* The Board [shall] must convene at least annually a
129 public forum on personnel management in the County government to
130 examine the implementation of Charter requirements and the merit
131 system law.

132 **33-9. Equal employment opportunity and affirmative action.**

133 (a) *Policy.* [The county's policy shall be to] Except as provided in Section
 134 33-7(d), the County must take all personnel actions on the basis of
 135 merit and fitness without regard to political affiliation or non-merit
 136 factors, and without regard to other factors as may be provided for in
 137 chapter 27, "Human Relations and Civil Liberties," such as sex, marital
 138 status, race, religion, national origin, age or [handicap] disability. The
 139 Chief Administrative Officer [shall be responsible for initiating,
 140 developing and maintaining] must initiate, develop, and maintain [such]
 141 an equal employment opportunity and affirmative action program [as]
 142 necessary to ensure that all persons have an equal opportunity to enter
 143 and progress in the County's service on the basis of open competition
 144 and demonstrated ability. The County Executive [is authorized to issue
 145 such] may adopt regulations, [adopted] under Method (1) [of section
 146 2A-15 of this Code], [as necessary] to implement this policy. Such
 147 regulations [shall] must provide that an employee whose personal
 148 religious beliefs require the abstention from work during certain periods
 149 of time may elect to engage in an alternate work schedule in order to
 150 meet those religious requirements. The [regulation shall] regulations
 151 must [include provision for any] require an employee who elects to
 152 work an alternate schedule to [be obligated to] work an equal period of
 153 time to that taken off for such religious reasons.

* * *

155 *Approved:*

156

Nancy Floreen, President, County Council

Date

LEGISLATIVE REQUEST REPORT

Bill 46-09, Personnel – Regulations – Persons with Disabilities – Hiring Preference

| | |
|---|--|
| DESCRIPTION: | Bill 46-09 would require the Executive to adopt regulations establishing and maintaining a hiring preference for certain qualified persons with disabilities who apply for County merit positions. The preference would only apply to a person who is among the highest rating category in a normal competitive process. |
| PROBLEM: | The Office of Legislative Oversight issued a report on “Hiring Persons with Disabilities: A Review of County Government Practices” on June 10, 2008. The report found that persons with disabilities face many barriers to employment that prevent them from getting jobs. The report also found that the unemployment rate for persons with disabilities is consistently higher than the unemployment rate for persons without a disability despite studies showing that employees with and without disabilities have comparable performance, longevity rates, and absenteeism rates. |
| GOALS AND OBJECTIVES: | To establish the County as a leader in hiring qualified persons with a disability. |
| COORDINATION: | Office of Human Resources, County Attorney’s Office, Office of Legislative Oversight, Commission on People with Disabilities. |
| FISCAL IMPACT: | To be requested. |
| ECONOMIC IMPACT: | To be requested. |
| EVALUATION: | To be requested. |
| EXPERIENCE ELSEWHERE: | To be researched. |
| SOURCE OF INFORMATION: | Robert H. Drummer, Senior Legislative Attorney, 240-777-7895 |
| APPLICATION WITHIN MUNICIPALITIES: | Not applicable. |
| PENALTIES: | Not applicable. |



OFFICE OF MANAGEMENT AND BUDGET

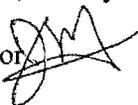
Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

January 6, 2010

TO: Nancy Floreen, President, County Council

FROM: Joseph F. Beach, Director 

SUBJECT: Council Bill 46-09, Personnel – Regulations – Persons with Disabilities – Hiring Preference

2010 JAN 12 AM 10:17

MONTGOMERY COUNTY
COUNCIL

The purpose of this memorandum is to transmit a fiscal and economic impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The proposed bill requires that the Executive adopt regulations establishing and maintaining a hiring preference for certain qualified persons with disabilities who apply for an initial appointment to a County merit system position. Under the bill, the preference would only apply to a person who is among those in the highest rating category in a normal competitive process.

FISCAL AND ECONOMIC SUMMARY

The fiscal impact is indeterminate until the County Executive drafts the regulations establishing the hiring preference and its parameters. Depending on the standards developed, the County could incur programming costs for the online application recruitment system.

The bill will not have any material financial or economic impact on the County.

The following contributed to and concurred with this analysis: Lori O'Brien, Office of Management and Budget, Lenny Moore, Department of Finance, and Melissa Voight-Davis, Office of Human Resources.

JFB:lob

- c: Kathleen Boucher, Assistant Chief Administrative Officer
- Dee Gonzalez, Offices of the County Executive
- Lenny Moore, Department of Finance
- Joseph Adler, Director, Office of Human Resources
- Melissa Voight-Davis, Office of Human Resources
- Lori O'Brien, Office of Management and Budget
- John Cuff, Office of Management and Budget

Office of the Director



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

TO: Michael Faden, Senior Legislative Attorney
County Council

FROM: Marc P. Hansen *Marc Hansen*
Deputy County Attorney

Edward B. Lattner, Chief *EBL*
Division of Human Resources and Appeals

Anne T. Windle *Anne T. Windle*
Associate County Attorney

DATE: July 29, 2009

RE: **Noncompetitive Hiring of Persons with Disabilities**

The County is considering a recommendation to establish a program to hire persons with disabilities on a noncompetitive basis. The County Charter requires that all personnel actions taken under the merit system be "based on demonstrated merit and fitness." Based on the history of this Charter provision, we have concluded that the Charter forbids the use of a noncompetitive hiring process based on an immutable, non-merit factor such as a disability. Although the Charter, forbids the use of a noncompetitive rating process based solely upon an immutable, non-merit factor such as disability, the County Council could amend the County Code to place a person with a disability on a priority eligible list for job applicants, if that person is first placed in the highest rating category through a competitive process.

BACKGROUND

In June of 2008, the Office of Legislative Oversight issued Report Number 2008-9, Hiring Persons with Disabilities: A Review of County Government Practices (OLO Report). The OLO Report notes that "a recurring question during the course of conducting the study was, 'Why doesn't the County Government develop a special hiring authority to hire persons with disabilities into merit system jobs?'" OLO Report at 93. The OLO Report continues, "The model most often suggested for the County Government to follow is the Federal Government's

Mike Faden
July 29, 2009
Page 2

Schedule A hiring program, which allows federal agencies to directly hire a person with a disability into a vacant position on a noncompetitive basis. The County Attorney advises that creating this sort of program requires an amendment to the County's Charter." *Id.*¹

ANALYSIS

I. The Charter requires that the County determine an individual's merit and fitness through a competitive rating process.

The Charter requires that all personnel actions under the merit system be based upon demonstrated merit and fitness. Specifically, Charter § 401 calls upon the County Council to establish by law a merit system for all County employees,² which "shall provide the means to recruit, select, develop, and maintain an effective, non-partisan, and responsive work force with personnel actions based on demonstrated merit and fitness" (emphasis added).³ Provisions like Charter § 401 are intended to increase the efficiency of the public service by abolishing the spoils system, providing for appointments on the basis of merit and fitness rather than on political or personal considerations, assuring tenure, and providing opportunity for advancement.⁴

Code § 33-9(a) implements Charter § 401 by providing that "[t]he county's policy shall be to take all personnel actions on the basis of merit and fitness without regard to political affiliation or non-merit factors . . . such as sex, marital status, race, religion, national origin, age or handicap."

What did the Charter intend to achieve by employing the phrase "demonstrated merit and fitness"?⁵ To be sure, the language of Charter § 401 is silent with respect to whether competition

¹ Schedule A permits, but does not require, a hiring manager to select a Schedule A applicant without considering other applicants. "To be hired 'under Schedule A' an applicant must meet the minimum job qualifications, demonstrate job readiness, and provide documentation of 'mental retardation, severe physical disabilities, or psychiatric disabilities.'" OLO Report at 26. Individuals hired pursuant to Schedule A are not initially merit system employees, but may noncompetitively become merit system employees after two years of satisfactory service.

² The charter provides that certain high level employees are outside the merit system.

³ The Charter provides that even probationary, temporary, and term employees, all of whom may be exempted from the merit system, must still be recruited, selected, and promoted by the County on the basis of demonstrated merit and fitness.

⁴ *Secretary, Maryland Department of Personnel v. Bender*, 44 Md. App. 714, 411 A.2d 107 (1980), *aff'd*, 290 Md. 345, 430 A.2d 66 (1981).

⁵ The cardinal rule of statutory construction is to ascertain and effectuate the intent of the law. *Johnson v.*

Mike Faden
July 29, 2009
Page 3

must be employed as part of the process of determining an individual's "merit and fitness". Nevertheless, after reviewing the history of Charter § 401 and how the County has implemented the merit system, we have concluded that the phrase "demonstrated merit and fitness" was intended to require open competition as a key component in reaching a determination concerning an individual's fitness for a County position. The history of the merit system created by the Charter, however, also reveals an intent to permit certain narrow exceptions to the competition requirement. But these exceptions were not so broad as to encompass an exemption from competition for a class of individuals defined by an immutable characteristic shared by members of the class, such as the presence of a disability.

A. The County has historically used a competitive rating process to demonstrate merit and fitness in all personnel actions.

In 1945 the General Assembly established a "civil service" system for the County.⁶ Prior to 1945 the County operated under a "spoils system".⁷ In 1948 the County adopted a Charter Home Rule form of government under Article XI-A of the Maryland Constitution. The 1948 Charter reflected the "informed consensus" to end the "spoils system" by adopting "strict personnel practices."⁸

The 1948 Charter used general, non-specific language to implement this policy goal of creating a civil service system. Article V, Sec. 1, b., merely required the Personnel Board to adopt personnel regulations that addressed "minimum qualifications for any such positions, methods of determining such qualifications, and methods of selection for any such positions."

The County's personnel law gave definition to the principles of a civil service system that was intended to be created by the 1948 Charter and it did so by requiring the use of a competitive rating process to determine merit and fitness. The personnel law generally required, subject to certain narrow exceptions, an open competitive examination process to determine job qualifications of an individual. The 1950 County Code required the Personnel Board to prepare examinations to establish lists of individuals eligible to hold a County position. The examination was required to be "competitive, free, and open to all persons" subject to the authority of the Personnel Board to place limitation as to "age, sex, health, physical condition, moral character and "performance of the duties" of the position to be filled."⁹ (Emphasis added) The implication

Mayor and City Council of Baltimore City, 387 Md. 1 (2005).

⁶ 1980 Report of the Charter Review Commission, p. 10.

⁷ *Id.*

⁸ *Id.* at 11.

⁹ 1950 County Code, § 150-12 a.

Mike Faden
July 29, 2009
Page 4

of this provision is clear: consideration of an individual's immutable characteristics that were unrelated to the ability of the applicant to perform the job was not permitted.¹⁰

The current Charter was approved by the voters in 1968, and created an Executive Branch of government headed by an elected County Executive. The 1948 Charter provisions regarding the personnel system were transplanted "virtually intact" into the 1968 Charter.¹¹ The County personnel law implementing the 1968 Charter remained largely unchanged from the 1950 personnel law regarding the requirement to use competitive examinations, except that the Code provided, pursuant to the new Charter, that the Chief Administrative Officer would implement the merit system in place of the Personnel Board. The implication regarding the prohibition against considering characteristics of an individual unrelated to the potential to perform job duties found in the 1950 Code was made, at least in part, explicit in the 1972 Code which explicitly prohibited discrimination on the basis of "race, creed, color, or national origin."¹²

The 1972 Code made the County's use of a competitive rating process even more apparent. Section 33-5(l) of the 1972 Code provided "for the appointment, advancement and retention of employees on the basis of merit and fitness to be ascertained in most cases by competitive examination without regard to race, religion or political affiliation." Section 33-10(d) of the 1972 Code provides: "As a general policy, entrance and promotional examinations to establish or re-establish a list of eligible applicants or promotional candidates shall be administered on a competitive basis."

In 1980 the Charter was amended placing more explicit language in the Charter regarding the nature of the merit system. This language, which remains in the current Charter, states,

The merit system shall provide the means to recruit, select, develop, and maintain an effective, non-partisan, and responsive work force with personnel actions based on demonstrated merit and fitness.

The current Code and personnel practice implements this Charter language through the use of open competition. For example, § 33-5(b)(2) states that "the recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointments."

¹⁰ That which necessarily is implied in a law is as much a part of the law as that which is expressed. *Stanford v. Maryland Police Training and Correctional Commission*, 346 Md. 374 (1997).

¹¹ 1980 Report of the Charter Review Commission, p. 11.

¹² 1972 County Code § 33-9 (i).

Mike Faden
July 29, 2009
Page 5

Reliance upon a competitive rating process to demonstrate merit and fitness is reflected in current personnel practice. The OHR Director first reviews and evaluates all applications to ensure that each applicant is eligible for the announced vacancy; the OHR Director may disqualify, at any point in the hiring process, an applicant who lacks the required minimum qualifications for the position. Montgomery County Personnel Regulations § 6-4(b) (eff. Oct. 21, 2008) ("MCPR"). Then, "[t]he OHR Director must establish a competitive rating process to create an eligible list for employment or promotion . . ." MCPR § 6-5(a)¹³ The focus of this competitive rating process is to determine the relative merit and fitness of the candidates. MCPR § 6-5(b)(2) states that the competitive rating process must result from a job analysis that documents the knowledges, skills, and abilities required to perform essential functions of the job" and must "assess the employee's ability to perform important aspects of the job."

At the conclusion of the rating process, whether making an initial appointment or a promotion, the OHR director must create an eligible list of qualified applicants "grouped in appropriate rating categories." MCPR § 6-9. The appointing department director must fill a vacant position from an eligible list and, "consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category." MCPR § 7-1(a).

Where a priority eligible list exists, the appointing authority must comply with the priority consideration provisions. MCPR § 7-1(b). A priority eligible list is a list of applicants who have priority consideration. MCPR § 1-55. Priority consideration means consideration of an applicant to a vacant position before others are considered. It does not guarantee that the candidate will be selected. MCPR § 1-54.

Given the long and consistent history of the County merit system's use of competition, we conclude that the Charter intended to establish a personnel system that measures "merit and fitness" though the crucible of competition open to all applicants without regard to personal characteristics unrelated to the performance of the position's duties. There are, however, a few, narrow exceptions to this general rule.

B. The County has permitted the use of a noncompetitive rating process only in narrow circumstances.

The County has historically permitted the use of a noncompetitive rating process only in

¹³ The need for a competitive rating process is also reflected in the County's equal employment opportunity and affirmative action program. Code § 33-9(a) states that the County's equal employment opportunity and affirmative action program must "ensure all persons an equal opportunity to enter and progress in the county's service on the basis of open competition and demonstrated ability. (Emphasis added.)

Mike Faden
July 29, 2009
Page 6

narrow circumstances. Section 150-12(5) of the 1950 Code authorized the Personnel Board¹⁴ to "give noncompetitive examinations to test fitness for reinstatement, transfer, or promotion when in the Board's opinion competitive examinations are impractical or undesirable." And while the 1972 Code explicitly favored a competitive rating process, it did allow for noncompetitive examinations where a competitive rating process "would not be practical or in the best interest of the county government and its merit system, (for example only one applicant has applied, unskilled laborer positions, development and maintenance of a career service, etc.)." 1972 Code § 33-10(e).

Current personnel practice restricts the use of a noncompetitive rating process to three situations: (A) creation of an eligible list for appointment or promotion to positions involving unskilled manual labor and for other classes of work if a competitive process is impractical (MCPR § 6-7), (B) promotion of an employee who was demoted as a result of a disability or a reduction-in-force (MCPR § 27-2(b)),¹⁵ and (C) certain priority eligible lists that allow an employee to receive priority consideration for another position at or below the grade level of an employee's prior position where an employee has lost his or her job due to circumstances beyond the employee's control (MCPR § 6-10(a)(1) - (3)). In all cases the employee or applicant must be fit for the position sought.

C. Use of a noncompetitive rating process for individuals based upon a non-merit factor such as disability would violate Charter § 401.

As seen the Personnel Regulations permit the use of a noncompetitive rating process in a limited number of circumstances—specific hard-to-fill job classes or current employees (who already obtained their jobs through a competitive rating process) demoted through no fault of their own. The extension of a noncompetitive rating process to persons based solely upon an immutable non-merit factor such as disability is dissimilar from the existing uses of the noncompetitive process permitted under Charter § 401. The use of a noncompetitive rating process in that manner would require an amendment of Charter § 401.

The noncompetitive rating process permitted under MCPR § 6-7 is limited to certain job classes, it does not extend to persons based solely upon an immutable non-merit factor such as disability. MCPR § 6-7 allows the OHR Director to establish an eligible list for employment or promotion on a noncompetitive basis "for positions involving unskilled manual labor and for other classes of work if a competitive process is impractical." In these cases, all applicants who

¹⁴ The Personnel Board was the forerunner of the Merit Board.

¹⁵ These first two situations are addressed in MCPR 6-5(a): "The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a noncompetitive process is appropriate under Section 6-[7] or 27-2(b) of these Regulations." The regulation incorrectly refers to § 6-6. MCPR § 6-7 deals with noncompetitive promotion.

Mike Faden
July 29, 2009
Page 7

met the minimum qualifications are certified to the eligible list. This noncompetitive rating process is used only where a competitive process is impractical or (e.g., difficult-to-fill or difficult-to-retain job classes), where further screening or competition among applicants is felt unnecessary. For example, this practice has been applied to jobs that require difficult to obtain degrees or licenses, that have a high turnover rate, or for jobs that have salary requirements that are difficult to meet because of market demand and have very few applicants. The noncompetitive rating list contemplated under this section does not benefit a discrete class of individuals but is intended to facilitate and promote the efficient filling of positions to carry out the mission of the County. And selection from a noncompetitively rated eligible list is still based on demonstrated merit and fitness.

Noncompetitive promotion under MCPR § 27-2(b)(2) is limited to current employees, individuals who already obtained their jobs through a competitive rating process. This provision allows a department director to noncompetitively promote a current employee who was demoted as the result of disability or reduction in force, or who was reclassified or reallocated downward, if the employee is promoted to a position at the same or a lower grade that the employee previously held, meets the job requirements for the position, passes any required physical examination, and applies for the promotion within five years of demotion, reclassification or reallocation. Further, the employee's noncompetitive promotion must be approved by the department director, is the prerogative of management, and denial of a noncompetitive promotion may not be appealed or grieved. In other words, an employee can only be noncompetitively promoted to a position for which the employee is qualified and which is comparable in grade to the position the employee originally achieved through competition and demonstrating merit and fitness.

Lastly, priority consideration through a priority eligible list under MCPR §§ 6-10(a)(1)-(3) is limited to current employees who already obtained their jobs through a competitive rating process but, through no fault of their own, are facing loss of their position. These employees receive priority consideration for positions at or below the grade level of their previous positions. This group is limited to employees who are unable to perform job functions because of disability, employees affected by reduction in force, and former employees no longer eligible for temporary disability retirement.

II. Alternatively, giving disabled individuals in the highest rating category a preference, similar to the veteran's credit, would require amendment of the Code and Personnel Regulations, but not the Charter.

Although the County cannot extend the noncompetitive rating process to persons based solely upon an immutable non-merit factor such as disability, it can place a person with a disability on a priority eligible list for job applicants, if that person is in the highest rating category after a competitive rating process. This approach is akin to the veteran's credit provided

Mike Faden
July 29, 2009
Page 8

by MCPR §§ 6-10(a)(4) & 6-12. However, the veteran's preference is mandated by state law. To provide for giving a disabled preference, this office believes that the Council would have to amend Code § 33-9, in addition to the personnel regulations.

The current Code prohibits the placement of a job applicant on a priority eligibility list based solely on the applicant's membership in a group with an immutable characteristic, e.g., race, sex, or disability.¹⁶ Code § 33-9(a) provides in pertinent part:

The county's policy shall be to take all personnel actions on the basis of merit and fitness without regard to political affiliation or non-merit factors, and without regard to other factors as may be provided for in chapter 27, "Human Relations and Civil Liberties," such as sex, marital status, race, religion, national origin, age or handicap.¹⁷

Thus, placement of a job applicant on a priority eligibility list solely on the basis of disability would violate the County's own equal employment opportunity statute. This section of the law must be amended to allow the personnel regulations to provide for priority based upon disability.¹⁸

No charter amendment is required to place persons with a disability on a priority eligible list because the personnel regulations would still require those persons with a disability to compete and demonstrate merit and fitness. Preference statutes such as veteran's acts usually contemplate a competitive process and do not deprive the appointing authority of the ability to judge the relative qualifications of the applicants.¹⁹ As noted earlier, a department director is

¹⁶ The availability of priority consideration through a priority eligible list for current employees who are disabled satisfies the County's duty of reasonable accommodation under the ADA and therefore does not violate § 33-9(a). See *Scott v. Montgomery County*, 164 F. Supp. 2d 502, 508 (D. Md. 2001) (provision in collective bargaining agreement policy restricting priority consideration to positions at or below employee's current grade meets ADA requirement of reasonable accommodation).

¹⁷ Code § 33-5(b)(6) similarly provides: "All applicants to and employees of the county merit system shall be assured fair treatment without regard to political affiliation or other non-merit factors in all aspects of personnel administration." See also MCPR § 5-2(b)(2), which provides that the County must "conduct all employment activities in a manner that ensures equal employment opportunity for all persons without regard to race, color, religion, national origin, ancestry, sex, marital status, age, disability, sexual orientation, or genetic status . . ."

¹⁸ There is no need to amend the County's anti-discrimination law. Recent amendments to the ADA's rules of construction clarify that a non-disabled person may not make a claim of "reverse disability discrimination." "Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability." Pub. Law 110-325, to be codified at 42 U.S.C. § 12201(g) (eff. Jan 1, 2009).

¹⁹ McQuillin, *Mun. Corp.* § 12.82 (3rd Ed.) (citations omitted); *Cassidy v. Municipal Civil Service Commission of the City of New Rochelle*, 37 N.Y.2d 526 (1975). Laws providing preference to veterans have been

allowed to select anyone in the highest rating category, pursuant to MCPR § 7-1(a). Where a priority eligibility list exists, the appointing authority must comply with the priority consideration provisions. MCPR § 7-1(b).

As previously discussed, the County has permitted the use of a noncompetitive rating process where a competitive process would not be practical so long as the applicant meets the minimum qualifications for the job.²⁰ For example, an eligible list may be created to fill a position that requires unskilled manual labor without using the competitive rating process; or a noncompetitive eligible list may be created for employees who have lost a County job due to circumstances beyond the employee's control—e.g. a reduction-in-force. In those situations where a noncompetitive process would otherwise be permitted, an individual with a disability could be accorded a priority placement preference without having undergone a competitive rating process.

A disability preference similar to the veteran's preference triggers an Equal Protection analysis because people with disabilities would be treated differently than other persons.

III. Since no suspect class is involved, the County need only have a rationale basis for a law which treats individuals with a disability differently.

If the Council chooses to pursue a priority eligible list based upon disability preference, the resulting legislation would create statutory classifications as to County job applicants and employees seeking promotion: those who have a disability and those who do not. The question, then, is whether such a statutory distinction violates the right to equal protection, as guaranteed by the federal and state constitutions.²¹

In reviewing classifications challenged under equal protection guarantees, the court considers the three standards: (1) strict scrutiny, (2) intermediate scrutiny (also been referred to as "heightened scrutiny"), and (3) rational basis. *Jackson v. Dackman*, 181 Md. App. 546, 569, 956 A.2d 861, 874-75 (2008).

First, equal protection analysis requires strict scrutiny of a legislative

sustained as constitutional. *See Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979), *Keim v. United States*, 177 U.S. 290 (1900).

²⁰ See Subsection I B., above.

²¹ Although the Maryland Constitution lacks an express Equal Protection Clause, Maryland courts have long held that the state's Due Process Clause embodies the concept of equal protection to the same extent as the federal Equal Protection Clause. Because of this, Maryland courts regard federal court equal protection decisions as "practically direct authorities" with regard to the state. *Jackson v. Dackman*, 181 Md. App. 546, 569, 956 A.2d 861, 874-75 (2008).

classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Laws which are subject to this demanding review violate the *equal protection clause* unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.

Second, classifications which have been subjected to a higher degree of scrutiny than the traditional and deferential rational basis test, but which have not been deemed to involve suspect classes or fundamental rights and thus have not been subjected to the strict scrutiny test, are reviewed under intermediate scrutiny. In order to be sustained, this type of classification must serve important governmental objectives and must be substantially related to achievement of those objectives. There is no brightline diagnostic, enunciated by either the Court of Appeals or the U.S. Supreme Court, by which a suspect or quasi-suspect class may be recognized readily. The Court of Appeals, however, has adopted criteria used by the Supreme Court in assessing claims of a new suspect or quasi-suspect classification. They are as follows:

(1) whether the group of people disadvantaged by a statute display a readily-recognizable, obvious, immutable, or distinguishing characteristics that define the group as a discrete and insular minority;

(2) whether the impacted group is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process; and

(3) whether the class of people singled out is subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities to contribute meaningfully to society.

Third, in most instances when a governmental classification is attacked on equal protection grounds, the classification is reviewed under the rational basis test. Generally under that test, a court will not overturn the classification unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the governmental actions were irrational. The Supreme Court, in applying this test, has been willing to uphold the constitutionality of an enactment

Mike Faden
July 29, 2009
Page 11

when 'any state of facts reasonably maybe conceived to justify it.

Jackson v. Dackman, 181 Md. App. at 570-71, 956 A.2d at 875-76 (internal citations and quotations omitted; emphasis in original).

In this case, the two classifications are individuals with a disability seeking appointment or promotion with the County and individuals without a disability seeking appointment or promotion. The Supreme Court has held that the disabled are not a suspect or quasi-suspect class entitled to special protection under the Equal Protection Clause. See *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 442-47, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (concluding that mentally disabled individuals are not a suspect or quasi-suspect class); *Brown v. N.C. Div. of Motor Vehicles*, 166 F. 3d 698, 706 (4th Cir. 1999) (extending *Cleburne* to all disabled individuals). In any event, the legislation to either provide a special hiring authority or a disabled preference benefits rather than burdens people with disabilities.

Looking to the other classification, non-disabled individuals, strict scrutiny would not be proper because legislation providing either a special hiring authority or a disabled preference would neither interfere with a fundamental right nor does it operate to the peculiar disadvantage of a suspect class. First, the Supreme Court's decisions give no support to the proposition that governmental employment is per se a fundamental right. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562, 2566-67, 49 L. Ed. 2d 520 (1976). Further, suspect classifications are those based on race or national origin. *United States v. Virginia*, 518 U.S. 515, 532-35, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Such is not the case here.

Intermediate or heightened scrutiny would also not be appropriate because non-disabled individuals seeking appointment or promotion in the County are also not a quasi-suspect class. The class of non-disabled individuals seeking appointment or promotion using the criteria used by the Supreme Court and adopted by the Maryland Court of Appeals in assessing claims of a new suspect or quasi-suspect classification, described *supra*, fails to show that this classification is quasi-suspect. First, this class does not display "readily-recognizable, obvious, immutable, or distinguishing characteristics that define the group as a discrete and insular minority. In fact, this class is very diverse as to age, sex, race, national origin and other characteristics. Second, this class has been saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection. Finally, this class is not subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities to contribute meaningfully to society. Non-disabled individuals seeking appointment or promotion in the County are neither a suspect class, warranting strict scrutiny, nor a quasi-suspect class, warranting intermediate or heightened scrutiny.

Because strict and intermediate scrutiny are not appropriate in this case, we apply the

Mike Faden
July 29, 2009
Page 12

rational basis standard of review.

Several Supreme Court cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently, and have applied the rational basis test in each case. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 593, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979) (upholding city's exclusion of methadone users from employment under rational-basis review); *Harrah Independent School District v. Martin*, 440 U.S. 194, 199-201, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979) (classification between teachers who had complied with a continuing-education requirement and those who had not is rational and does not violate the Equal Protection Clause); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314-317, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (upholding a mandatory retirement age—a classification based on age—under rational-basis review).

“Legislative classifications are valid unless they bear no rational relationship to the State’s objectives.” *Murgia*, 427 U.S. 307, 314, 96 S. Ct. 2562, 49 L. Ed. 2d 520. “[W]here rationality is the test, a State “does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.” *Id.* (citation omitted). “The School Board’s rule is endowed with a presumption of legislative validity, and the burden is on respondent to show that there is no rational connection between the Board’s action and its conceded interest in providing its students with competent, well-trained teachers.” *Martin*, 440 U.S. at 198, 99 S. Ct. 1062, 59 L. Ed. 2d 248.

Under the rational basis standard, legislation either creating a special hiring authority for the disabled or providing for a disabled preference would not be overturned unless the varying treatment of the two groups, disabled and non-disabled, is so unrelated to legitimate governmental purposes as to be irrational. In this case, the rational basis for a statute permitting different treatment of the two groups is Montgomery County’s interest in fostering a more diverse work force by encouraging employment of people with disabilities. Therefore, it is this office’s opinion that such legislation would not violate equal protection.

CONCLUSION

The Charter, Code, and personnel regulations require that the County engage in a competitive rating process to determine an individual’s merit and fitness for a merit system position. Although these laws countenance a noncompetitive rating process in certain limited circumstances—specific hard-to-fill job classes or current employees (who already obtained their jobs through a competitive rating process) demoted through no fault of their own—those circumstances are dissimilar from the program proposed presented here—noncompetitive hiring of an applicant based solely upon the applicant’s disability status. But the County could amend the Code and personnel regulations to provide for placement on a priority eligible list for a

Mike Faden
July 29, 2009
Page 13

person with a disability, if that person is in the highest rating category after a competitive rating process (or meets minimum job qualifications if a noncompetitive process is otherwise authorized).

Cc: Karen Orlansky, Director, Office of Legislative Oversight
Leslie Rubin, Office of Legislative Oversight
Fariba Kassiri, Assistant Chief Administrative Officer
Kathleen Boucher, Assistant Chief Administrative Officer
Merit System Protection Board
Leon Rodriguez, County Attorney

noncompetitive hiring of disabled person (MPH, EBL2)
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Montana Code Annotated 2009

[Previous Section](#)
 [MCA Contents](#)
 [Part Contents](#)
 [Search](#)
 [Help](#)
 [Next Section](#)

39-30-103. Definitions. For the purposes of this chapter, the following definitions apply:

(1) "Eligible spouse" means the spouse of a person with a disability determined by the department of public health and human services to have a 100% disability and who is unable to use the employment preference because of the person's disability.

(2) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the ranks of the current employees of:

- (i) a department, as defined in 2-15-102, for a position within the executive branch;
- (ii) a legislative agency for a position within the legislative branch;
- (iii) a judicial agency, such as the office of supreme court administrator, office of supreme court clerk, state law library, or similar office in a state district court for a position within the judicial branch;
- (iv) a city or town for a municipal position, including a city or municipal court position; and
- (v) a county for a county position, including a justice's court position.

(b) A personnel action limited to current employees of a specific public entity identified in this subsection (2), current employees in a reduction-in-force pool who have been laid off from a specific public entity identified in this subsection (2), or current participants in a federally authorized employment program is not an initial hiring.

(3) (a) "Mental impairment" means:

- (i) a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or any other neurologically disabling condition closely related to mental retardation and requiring treatment similar to that required by mentally retarded individuals; or
- (ii) an organic or mental impairment that has substantial adverse effects on an individual's cognitive or volitional functions.

(b) The term mental impairment does not include alcoholism or drug addiction and does not include any mental impairment, disease, or defect that has been asserted by the individual claiming the preference as a defense to any criminal charge.

(4) "Person with a disability" means an individual certified by the department of public health and human services to have a physical or mental impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and that limits the individual's ability to obtain, retain, or advance in employment.

(5) "Position" means a position occupied by a permanent or seasonal employee as defined in 2-18-101 for the state or a position occupied by a similar permanent or seasonal employee with a public employer other than the state. However, the term does not include:

- (a) a position occupied by a temporary employee as defined in 2-18-101 for the state or a similar temporary employee with a public employer other than the state;
- (b) a state or local elected official;
- (c) employment as an elected official's immediate secretary, legal adviser, court reporter, or administrative, legislative, or other immediate or first-line aide;
- (d) appointment by an elected official to a body such as a board, commission, committee, or council;
- (e) appointment by an elected official to a public office if the appointment is provided for by law;
- (f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government;
- (g) engagement as an independent contractor or employment by an independent contractor; or

(h) a position occupied by a student intern, as defined in 2-18-101.

(6) (a) "Public employer" means:

(i) any department, office, board, bureau, commission, agency, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(ii) any county, city, or town.

(b) The term does not include a school district, a vocational-technical program, a community college, the board of regents of higher education, the Montana university system, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town.

(7) "Substantially equal qualifications" means the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons.

History: En. Sec. 3, Ch. 1, Sp. L. 1983; amd. Sec. 34, Ch. 658, L. 1987; amd. Sec. 10, Ch. 646, L. 1989; amd. Sec. 28, Ch. 308, L. 1995; amd. Sec. 62, Ch. 545, L. 1995; amd. Sec. 101, Ch. 546, L. 1995; amd. Sec. 12, Ch. 339, L. 1997; amd. Sec. 34, Ch. 472, L. 1997; amd. Sec. 11, Ch. 75, L. 2005.

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24

Montana Code Annotated 2009

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

39-30-107. Certification of persons with disabilities. The department of public health and human services shall certify persons with disabilities for the purpose of employment preference as provided in this chapter.

History: En. Sec. 6, Ch. 1, Sp. L. 1983; amd. Sec. 103, Ch. 546, L. 1995; amd. Sec. 36, Ch. 472, L. 1997.

Provided by Montana Legislative Services

Montana Code Annotated 2009

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

39-30-108. No application if conflict with federal law. This chapter does not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

History: En. Sec. 10, Ch. 1, Sp. L. 1983.

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Montana Code Annotated 2009

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

39-30-201. Employment preference in initial hiring. (1) (a) Except as provided in [10-2-402](#), in an initial hiring for a position, if a job applicant who is a person with a disability or eligible spouse meets the eligibility requirements contained in [39-30-202](#) and claims a preference as required by [39-30-206](#), a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference-eligible applicant.

(b) In an initial hiring, a public employer shall hire a person with a disability over any other preference-eligible applicant with substantially equal qualifications.

(2) The employment preference provided for in subsection (1) does not apply to a personnel action described in [39-30-103\(2\)\(b\)](#) or to any other personnel action that is not an initial hiring.

History: En. Sec. 4, Ch. 1, Sp. L. 1983; amd. Sec. 11, Ch. 646, L. 1989; amd. Sec. 37, Ch. 472, L. 1997.

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Montana Code Annotated 2009

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

39-30-202. Eligibility requirements. An eligible spouse or person with a disability is not entitled to receive employment preference as provided in [39-30-201](#) unless:

- (1) the individual is a United States citizen;
- (2) the individual has resided continuously in the state for at least 1 year immediately before applying for employment;
- (3) if applying for municipal or county employment, the individual has resided for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought; and
- (4) the individual meets those requirements considered necessary by a public employer to successfully perform the essential duties of the position for which the individual is applying.

History: En. Sec. 5, Ch. 1, Sp. L. 1983; amd. Sec. 12, Ch. 646, L. 1989; amd. Sec. 38, Ch. 472, L. 1997.

Provided by Montana Legislative Services

Montana Code Annotated 2009

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

39-30-203. Duration of preference. Subject to [39-30-202](#), a person with a disability or eligible spouse qualifies for employment preference as long as the disabling condition exists.

History: En. Sec. 7, Ch. 1, Sp. L. 1983; amd. Sec. 13, Ch. 646, L. 1989; amd. Sec. 39, Ch. 472, L. 1997.

Provided by Montana Legislative Services

Montana Code Annotated 2009

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

39-30-206. Notice and claim of preference. (1) A public employer shall, by posting or on the application form, give notice of the preferences that this chapter provides in public employment.

(2) A job applicant who believes that the applicant has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed. Failure to make a timely employment preference claim for a position is a complete defense to an action in regard to that position under [39-30-207](#).

(3) If an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant claiming preference.

History: En. Sec. 8(1)-(3), Ch. 1, Sp. L. 1983; amd. Sec. 1509, Ch. 56, L. 2009.

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Montana Code Annotated 2009

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

39-30-207. Enforcement of preference. (1) An applicant who believes that the applicant has not been accorded the applicant's rights under this chapter may, within 30 days of receipt of the notice of the hiring decision provided for in [39-30-206](#), submit to the public employer a written request for an explanation of the public employer's hiring decision. Within 15 days of receipt of the request, the public employer shall give the applicant a written explanation.

(2) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in the county in which the applicant's application was received by the public employer. The petition must state facts that on their face entitle the applicant to an employment preference.

(3) (a) Upon filing of the petition, the court shall order the public employer to appear in court at a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause why the applicant was not hired for the position. At the hearing, the public employer has the burden of proving by a preponderance of the evidence that the employer made a reasonable determination pursuant to [39-30-103\(7\)](#), and the applicant has the burden of proving by a preponderance of the evidence that the applicant is a preference-eligible applicant.

(b) The time to appear provided in subsection (3)(a) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (3)(a), the court may, on motion of one of the parties or on stipulation of all of the parties, grant a continuance.

(c) If the public employer does not carry its burden of proof under subsection (3)(a) and the court finds that the applicant is a preference-eligible applicant, the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of this chapter, and a court may not grant any other relief in an action for violation of this chapter.

(4) Failure of an applicant to file a petition under subsection (2) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (1) within 15 days and a petition is filed under subsection (2), the court shall order the public employer to reopen the selection process.

(5) The Montana Rules of Civil Procedure apply to a proceeding under this section to the extent that they do not conflict with this section.

History: En. Sec. 8(4), Ch. 1, Sp. L. 1983; amd. Sec. 14, Ch. 646, L. 1989; amd. Sec. 1510, Ch. 56, L. 2009.

Provided by Montana Legislative Services



Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

TO: Joseph Adler, Director
Office of Human Resources

VIA: Marc P. Hansen *Marc P. Hansen*
Deputy County Attorney

FROM: Anne T. Windle *Anne T. Windle*
Associate County Attorney

DATE: January 7, 2010

RE: Bill 46-09

Bill 46-09 amends § 33-7 of the Montgomery County Code as follows:

- (d) *Hiring preference for persons with disabilities.* The Executive must adopt by personnel regulation, under Method 1, standards for establishing and maintaining a preference for the initial appointment of a qualified person with a disability into a merit system position. These standards must:
- (1) define a person with a disability who is eligible for the preference;
 - (2) require medical certification of a qualifying disability;
 - (3) establish the order of preference in relation to other preferences authorized by law; and
 - (4) only apply the preference to a person who is among the highest rating category in a normal competitive process.

This memo will address each of the proposed standards in turn.

Joseph Adler
January 7, 2010
Page 2

Defining a Person with a Disability Who is Eligible for the Preference

The primary legal question to be answered is whether Bill 46-09, as written, provide the County Executive with sufficient guidance to draft regulations. I believe the answer is no. It is not clear who the Council intended to benefit with a disability hiring preference. The bill needs to be amended to provide additional guidance as to who is to be considered disabled for the purposes of qualifying for the hiring preference. Specifically, the bill needs to define disability.

Under the Americans with Disabilities Act Amendment Act of 2008, ("ADAAA"), "disability" means a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or, being regarded as having such an impairment. 42 USCS 12102. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Id. Major life activity also includes major bodily functions, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. Id. Determination of whether an impairment substantially limits a major life activity is made without regard to the ameliorative effects of mitigating measures. Id. Mitigating measures include: medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; assistive technology; reasonable accommodations or auxiliary aids or services; or learned behavioral or adaptive neurological modifications. Id.

An impairment need only substantially limit one major life activity in order to be considered a disability. Id. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Id. The definition of disability is to be construed in favor of broad coverage of individuals. Id.

An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. Id.

The Equal Employment Opportunities Commission ("EEOC") is currently developing regulations to implement the ADAAA. The proposed regulations include examples of impairments that will consistently meet the definition of disability. Included are: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair (a mitigating measure), autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular

Joseph Adler
January 7, 2010
Page 3

dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48441 (2009) (to be codified at 29 C.F.R. 1630.2 (j)(5)(i)).

The proposed regulations state, "Because of the certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity." Id.

The proposed regulations also provide examples of impairments that may be disabling for some individuals but not for others. Examples are asthma, high blood pressure, learning disability, back or leg impairment, psychiatric impairments such as panic disorder, anxiety disorder, or some forms of depression other than major depression, carpal tunnel syndrome, and hyperthyroidism. Id. at 46422.

In contrast to the detailed definition of disability in the ADAAA, the Office of Personnel Management ("OPM") has taken a different approach in defining who is eligible for non-competitive appointment under Schedule A.

OPM permits non-competitive (Schedule A) appointment of people with mental retardation, severe physical disabilities, or psychiatric disabilities who have documentation of their disability from a licensed medical professional, a licensed vocational rehabilitation specialist; or any Federal or state agency that issues or provides disability benefits, and certification of job readiness. 5 C.F.R. 213.3102(u). The regulation does not define "severe physical disabilities" on the basis that doing so may limit flexibility and because such a definition or finite list may exclude future conditions from consideration under this authority.' Excepted Service – Appointment of Persons With Disabilities and Career and Career-Conditional Employment, 71 F.R. 42241, 42244 ((2006) (to be codified at 5 C.F.R. 213.3102(u)).

While there may be other ways to define disability, these two approaches should be considered in deciding who the Council wants to benefit with a disability hiring preference.

Medical Certification

Medical certification of a disability raises the issue of whether such inquiries are permissible under the ADAAA. In fact, the EEOC has addressed this issue and has found that such inquiries are permissible under certain circumstances.

An employer may ask employees to voluntarily self-identify as individuals with disabilities when the employer is:

- undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities (*i.e.*, the law requires some action to be taken on behalf of such individuals); or,
- *voluntarily* using the information to benefit individuals with disabilities.⁽⁷⁹⁾

If an employer invites employees to voluntarily self-identify in connection with the above-mentioned situations, the employer must indicate clearly and conspicuously on any written questionnaire used for this purpose, or state clearly (if no written questionnaire is used), that: (1) the specific information requested is intended for use solely in connection with its affirmative action obligations or its voluntary affirmative action efforts; and, (2) the specific information is being requested on a voluntary basis, that it will be kept confidential in accordance with the ADA, that refusal to provide it will not subject the employee to any adverse treatment, and that it will be used only in accordance with the ADA.⁽⁸⁰⁾

In order to invite self-identification for purposes of an affirmative action program that is voluntarily undertaken or undertaken pursuant to a law that encourages (rather than requires) affirmative action, an employer must be taking some action that actually benefits individuals with disabilities. The invitation to self-identify also must be *necessary* in order to provide the benefit.

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Equal Employment Opportunities Commission, Number 915.002, July 27, 2000.

<http://www.eeoc.gov/policy/docs/guidance-inquiries.html#10>

In this case, medical certification is required to ensure that an individual has a disability in order to benefit from the disability hiring preference.

Establish the Order of Preference in Relation to Other Preferences Authorized by Law

Bill 46-09, as written, does not provide guidance to the County Executive as to how the Council wants to give preference to people with disabilities in relation to other groups who currently receive priority consideration. The Montgomery County Personnel Regulations ("MCPR") currently provide for priority consideration of certain individuals as follows:

6-10. Priority eligible list.

- (a) The OHR Director may establish a priority eligible list to provide priority consideration in the following order to an employee who:
- (1) is unable to perform the employee's job because of a disability or injury under the ADA;
 - (2) is subject to reduction-in-force;
 - (3) was granted a temporary disability retirement under the Employees' Retirement System or an initial or temporary disability benefit of any type under the Retirement Savings Plan but is no longer eligible for such a temporary disability retirement or benefit; or
 - (4) has veteran's credit.

MCPR § 6-10. Applicants with a qualifying disability will need to be added to this list in some order in relation to others with priority consideration rights. As with veteran's credit, a disability preference would only apply to initial appointments, not current employees seeking transfers or promotions.

The personnel regulations provide that an eligible veteran who is applying for initial appointment and who ranks in the highest rating category must be given priority consideration. MCPR § 6-12. The state law requiring that local jurisdictions grant some type of special credit for veterans provides in part: "The said commission or board shall have the power to determine the nature and extent of the special credit or credits to be allowed such veterans and **may allow a greater credit or credits to disabled veterans than to nondisabled veterans.**" Md. Code Ann., Art. 96 ½ §48 (emphasis added). The County's personnel regulations do not distinguish between disabled and nondisabled veterans, but in light of the County's adoption of a preference of certain people with disabilities, it may be an appropriate time to consider amending the code and regulations to make that distinction. Since both the veteran and disability preference apply only to initial appointments, it needs to be clarified what the order or priority is, as to

Joseph Adler
January 7, 2010
Page 6

nondisabled veterans, disabled veterans, and someone with a disability who is not a veteran. And, how are these three groups to be prioritized in relation to RIFees and other groups who currently have priority consideration?

Apply the Preference to a Person Who is Among the Highest Rating Category in a Normal Competitive Process

The disability preference as proposed retains competition, consistent with merit system principles. However, management control over candidate selection is affected by the preference. MSPR § 7-2 (a) provides "Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category." Priority eligibility lists, when they exist, weaken management's prerogative to select the candidate of choice. This amendment adds one more category to the list of individuals who must receive priority consideration.

I understand that this memorandum was requested in anticipation of a public hearing on Bill 46-09 on January 12. If you have any questions or would like to discuss, please call me at (240) 777-6746.

cc: Kathleen Boucher
Edward B. Lattner

ATW
A09-02094

-----Original Message-----

From: Mark Maxin [mailto:markmaxin5@yahoo.com]
Sent: Wednesday, January 20, 2010 3:47 AM
To: Andrews' Office, Councilmember
Cc: Luecking, Betsy; Drummer, Bob; Adler, Joseph
Subject:

January 20, 2010

Councilmember Andrews

I tried to send this to Duchy and Leslie but it didn't work. Don't know why. Please forward this e-mail to them as well.

Per your request yesterday afternoon I submit the following re: Bill 46-09

The County's Commission on People with Disabilities believe that the hiring preference Bill 46-09 should only apply to individuals with disabilities who the Division of Rehabilitation Services certifies and who meet the definition of 5 C.F.R. 213.3102(u) (1)(although the regulation's term "mental retardation" should be replaced by the term "developmental disability") and who are qualified for the position. This hiring preference would also apply to disabled war veterans who are certified by the Veterans Administration as having a disability rating of 30% or more. Further, this preference will only apply for individuals who apply for a position and after competition, are deemed to be amongst the highest qualified applicants.

The current draft bill's general reference to person's with "certain disabilities" is somewhat misleading. By incorporating instead, the foregoing regulatory definition, the bill would not exclude any disabilities per se, it would however clarify the extent to which they must be disabled to qualify for a preference under this proposed law.

Again, as we have discussed, many high performing, extraordinary persons can have severe disabilities and accomplish amazing things.. The severity of the disability measures the extent to which their major life activity (e.g. walking, seeing, hearing) is affected, not the ability to perform the essential functions of the job. I know we all agree, however, that such persons, with or without reasonable accommodations, can be outstanding employees for this County.

One thing I might suggest. Perhaps we could add some introductory language to the bill which would underscore the Council's firm belief that persons with disabilities are an outstanding untapped resource of outstanding candidates. Further that this bill is necessary to overcome the unfounded myths, fears and stereotypes associated with many disabilities which has generally manifested itself into a high poverty and unemployment rate, as well as a extremely low participation rate in this County Government.

It is now 3:33 am on wed. morning and I cannot close without saying the following:

It has been an honor and a privilege to serve on the County's Commission on People with Disabilities. It is also an honor to serve such an enlightened Council. Though I have lost some sleep over this Bill I have gained confidence in my government. Thank you all in advance for your leadership in this matter. I look forward to discussing this Bill further during our working group meeting on Thursday.

Mark Maxin
Chair
Montgomery County Commission
on People with Disabilities

Drummer, Bob

From: Luecking, Betsy
Sent: Wednesday, January 27, 2010 10:42 AM
To: Drummer, Bob; Adler, Joseph; Windle, Anne; 'Mark Maxin (MarkMaxin5@yahoo.com)'; Boucher, Kathleen; Washington, Angela; Weisberg, Stuart
Cc: Ahluwalia, Uma; Kenney, John
Subject: Schedule A and Veterans Administration Certification Definition

Good morning:

Mark Maxin called me this morning and was quite concerned that a definition for disabled veterans was not discussed. Basically, veterans who meet the 30% disabled veteran criteria by the VA do not then want to go through the hassle of having to have another entity certify them. So, for those just determined to meet this criteria for the VA, could we accept that? Then for those veterans that become disabled that is not service connected down the road, that they then could be certified by DORS using the Schedule A definition. So, the bottom line would be a vet could be certified by either DORS or the VA. For your consideration, we suggest that we adopt the federal definition of Disabled Vet and that Vets can also be certified by DORS using the Schedule A definition if not service connected.

Suggest that we adopt the definition of Schedule A See 5 C.F.R. 213.3102(u) and Veterans Administration Retired Disabled Veteran See 5 CFR 316.402(b)(4)

To be eligible for these noncompetitive, Schedule A appointments, a person must meet the definition for being disabled and have a severe physical, cognitive, or psychiatric disability and be able to perform the job. See 5 C.F.R. 213.3102(u). Federal employers may also give a term appointment (see 5 CFR 316.402(b)(4)) to a veteran: retired from active military service with a disability rating of 30 percent or more; or rated by the Department of Veterans Affairs (VA) within the preceding year as having a compensable service-connected disability of 30 percent or more. Veterans who have a non-service related disability can be certified by DORS using Schedule A definition. The person requesting a hiring preference must obtain a certification letter which has historically been from a State Vocational Rehabilitation Office or the Department of Veterans Affairs and eligible for appointment under these special authorities.

I spoke with Sharon Julius, Regional Manager Division of Rehabilitation Services (DORS), and she confirmed that these definitions and the process works for DORS

She also indicated that DORS can certify persons who come to them as meeting the Schedule A definition, and then when the person applies for a job can provide a letter that they meet the criteria to apply, if they do. The Commission's goal is to use definitions that have precedent set in Federal Law.

Please let me know if you have any questions. Thank you so much for all of your efforts. We just want to get this right.

Please do not hit reply all - Reply back only to me, unless otherwise indicated.

Betsy Tolbert Luecking

Disability Policy Specialist

Commission on People with Disabilities

Commission on Veterans Affairs

(240) 777-1256 Voice or via MD Relay 711

Blackberry: 240-418-4865

40