

Opinion No. 46**Joint Merit System—Veterans—Disabled Veterans—Disabled Civilians
—Veterans Preference Law.**

- Held:**
- 1. When a position requiring a written or oral examination is under consideration, the preference accorded to veterans, disabled veterans, and certain dependents of such veterans by virtue of Chapter 26, Montana Session Laws of 1949, the Veterans Preference Law, shall consist of an additional ten percent (10%) for disabled veterans, their wives, and widows of veterans and an additional five per cent (5%) for all other veterans, their wives and dependents, such percentage to be added to the examination ratings. The Joint Merit System must recommend the applicants in the order of the final examination ratings, i. e. actual examination grades plus percentage additions as provided by statute.**
 - 2. Disabled civilians do not have a statutory authorization for additional percentages and therefore in the case of a written or oral examination cannot be accorded a percentage preference. In the event of a tie in the final examination ratings, a preference for the position should be granted to the disabled civilians.**

August 11, 1949.

Mr. Melvin P. Martinson, Supervisor
Joint Merit System
Helena, Montana

Dear Mr. Martinson:

You have requested an opinion as to the construction of the Veterans Preference Law in regard to the following problem:

"Suppose there are three disabled veterans who rank number 1, 5, and 11 on a theoretical list, three non-disabled veterans who rank number 2, 6, and 9, three civilians certified by the Vocational Rehabilitation Department who rank number 8, 10, and 12 and three

other civilians who rank 3, 4, and 7. Veterans on this list have been given the 5 and 10 percent of the total aggregate rating required by law. When we prepare a list of three names for the appointing authority in accordance with other Merit System rules on certifications, in what order should the names be selected?"

The Veterans Preference Law is Section 5653, Revised Codes of Montana, 1935, as last amended by Chapter 26, Montana Session Laws of 1949.

Section 5653 as contained in Chapter 26, Laws of 1949, is as follows in part:

"In every public department, and upon all public works of the State of Montana, and of any county and city thereof, the following shall be preferred for appointment and employment:

1. Veterans, their wives and widows, and dependents of disabled Veterans.
2. Disabled civilians recommended by the State Rehabilitation Bureau.

Provided further, that age, loss of limb or other physical impairment which does not in fact incapacitate, shall not be deemed to disqualify the above described veterans or disabled veterans, provided they possess the business capacity, competency and education to discharge the duties of the position involved.

Provided further, that those of the above described veterans who have disabilities admitted by the Veterans Administration of the United States to have been incurred in the service in any of said wars, where said disabilities do not in fact incapacitate, shall be given preference before the employment of able-bodied veterans.

- b. When written or oral examinations are required, for employment as above described, disabled veterans and their wives, and widows of veterans shall have added to their examination ratings, a credit of ten percentum (10%) and all other veterans, their wives, and dependents shall have added to their examination ratings credit of five percentum (5%). The fact that an applicant has claimed a veteran's credit shall not be made known to the examiners, until ratings of all applicants have been recorded. The credit shall then be added to the examination rating, and the records shall show the examination rating and the veteran's credit.

Before the amendment by Chapter 26, Laws of 1949, Section 5653 Revised Codes of Montana, 1935, did not contain any provision for adding percentages of 10% in case of a disabled veterans and 5% in the

case of a veteran when a written or oral examination was required for the position to be filled. Section 5653 as contained in Chapter 223, Laws of 1947, did not differentiate between positions where an examination was required and positions where an examination was not required. It was just a straight preference as point preferences were not embraced by the act.

But now paragraph B of Section 1 of Chapter 26, Laws of 1949, provides for percentage preferences for disabled veterans, veterans, and dependents of such disabled veterans, and veterans, when a written or oral examination is required for the position. It is my conclusion from a careful study of Chapter 26, that in the case of a position where such written or oral examination is involved, the 10% or 5% added to the examination ratings shall represent the entire preference contemplated by the legislature. My conclusion is based upon the premise that the legislature did not mean that the veterans preference should override all other considerations. For example, if a veteran and a civilian took an examination for a position and the veteran had a score of 70 and the civilian a score of 94, the legislature did not intend that the veteran should have the position when there was such a discrepancy in the respective abilities of the two applicants. Five per cent for veterans and ten percent for disabled veterans are the limits of the statutory preference in the case of a written or oral examination and when such percentages are added the Joint Merit System must recommend the applicants in the order of their final rating.

While providing for additional percentages for veterans and disabled veterans when an examination is required, Chapter 26, Laws of 1949, makes no provision for additional percentages for disabled civilians recommended by the State Rehabilitation Bureau. Thus, the question arises, does a disabled civilian certified by the State Rehabilitation Bureau have a preference of any kind when the position to be filled requires a written or oral examination. In a job where no examination is required Chapter 26 provides that a disabled civilian so certified, "Shall be preferred for appointment and employment," but as stated above, in the case of an examination, additional percentages for disabled civilians are not provided.

It is my opinion that a disabled civilian can be given no percentage preference in the case of a written or oral examination. The legislature has not provided a measure for the amount of preference to be accorded to a disabled civilian in such a case. While the spirit of the act makes it plain that a disabled civilian is to be accorded a preference in appointment and employment, the Legislature, inadvertently, I believe, failed to set up a yardstick in the case of a written or oral examination. Certainly when the final examination ratings of applicants are compiled, the Merit System Council cannot arbitrarily add percentages of varying amounts to the scores of disabled civilians. Such procedure could throw the entire preference system into confusion. The only feasible means of keeping the preference system operative in the case of written or oral examinations is to exclude disabled civilians

from a percentage preference in such case. However, the disabled civilians should in the case of a tie in the final ratings on a written or oral examination be entitled to a preference to the extent of receiving the position in the event of a tie.

It is indeed regrettable that such decision must be reached for as hereinbefore stated the spirit of the act is to give disabled civilians a preference along with the veterans and disabled veterans. I suggest that the omission in paragraph b, Section 1, Chapter 26, Laws of 1949, to include a percentage preference for disabled civilians be called to the attention of the legislative assembly at the next session in order to allow the spirit of the act to be fulfilled.

Therefore, it is my opinion that under Chapter 26, Laws of 1949, providing for preference for veterans, non-veterans, certain dependents of such veterans, and disabled civilians, when a written or oral examination is required for a position, the final examination ratings of the applicants, composed of actual examination grades plus percentage additions as provided by the statute, shall constitute the order in which the Joint Merit System shall recommend the applicants for the position available. Disabled civilians do not have a statutory authorization for additional percentages and therefore in the case of a written or oral examination cannot be accorded a percentage preference, however, in the event of a tie in the final ratings, a preference for the position should be granted to disabled civilians.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.