

HB 38 INTRODUCED BY PAVLOVICH
REVISING VETERANS' AND HANDICAPPED PERSONS'
EMPLOYMENT PREFERENCE ACT

1/05	INTRODUCED	
1/05	REFERRED TO STATE ADMINISTRATION	
1/05	FISCAL NOTE REQUESTED	
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1 HOUSE BILL NO. 38
 2 INTRODUCED BY PAVLOVICH
 3
 4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING CERTAIN
 5 PUBLIC EMPLOYERS TO USE SCORED PROCEDURES FOR SELECTING
 6 PERSONS FOR APPOINTMENT TO CERTAIN POSITIONS; GRANTING
 7 PREFERENCE TO CERTAIN MILITARY VETERANS AND THEIR ELIGIBLE
 8 RELATIVES IN APPOINTMENT TO THESE POSITIONS AND IN RETENTION
 9 DURING REDUCTIONS IN FORCE; ELIMINATING THE PREFERENCE
 10 PROVIDED TO VETERANS AND THEIR ELIGIBLE SPOUSES UNDER THE
 11 MONTANA VETERANS' AND HANDICAPPED PERSONS' EMPLOYMENT
 12 PREFERENCE ACT AND REVISING THE PREFERENCE PROVIDED TO
 13 HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES UNDER THAT
 14 ACT; AND AMENDING SECTIONS 10-2-402, 39-30-101 THROUGH
 15 39-30-103, 39-30-201 THROUGH 39-30-203, 39-30-207, 49-2-405,
 16 AND 49-3-103, MCA."
 17
 18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 19 NEW SECTION. Section 1. Definitions. For the purposes
 20 of [sections 1 through 7], the following definitions apply:
 21 (1) "Active duty" means full-time duty with military
 22 pay and allowances in the armed forces, except for training,
 23 for determining physical fitness, or for service in the
 24 reserve or national guard.
 25 (2) "Armed forces" means the United States army, navy,

1 air force, marine corps, and coast guard.
 2 (3) "Disabled veteran" means a person, whether or not
 3 he is a veteran as defined in this section, who was
 4 separated under honorable conditions from active duty in the
 5 armed forces and has established the present existence of a
 6 service-connected disability or is receiving compensation,
 7 disability retirement benefits, or pension because of a
 8 public statute administered by the veterans administration
 9 or a military department.
 10 (4) "Eligible relative" means:
 11 (a) the unmarried surviving spouse of a veteran or
 12 disabled veteran;
 13 (b) the spouse of a disabled veteran who is unable to
 14 qualify for appointment to a position;
 15 (c) the mother of a veteran who lost his life under
 16 honorable conditions while serving in the armed forces
 17 during a period named in subsections (8)(a)(i) through
 18 (8)(a)(iii) if:
 19 (i) her husband is totally and permanently disabled;
 20 (ii) she is widowed, divorced, or separated from the
 21 father and has not remarried; or
 22 (iii) she has remarried but is widowed, divorced, or
 23 legally separated from her husband when preference is
 24 claimed; and
 25 (d) the mother of a service-connected permanently and

1 totally disabled veteran if:

2 (i) her husband is totally and permanently disabled;

3 (ii) she is widowed, divorced, or separated from the
4 father and has not remarried; or

5 (iii) she has remarried but is widowed, divorced, or
6 legally separated from her husband when preference is
7 claimed.

8 (5) "Position" means a permanent, temporary, or
9 seasonal position as defined in 2-18-101 for a state
10 position or a similar permanent, temporary, or seasonal
11 position with a public employer other than the state.
12 However, the term does not include:

13 (a) a state or local elected official;

14 (b) appointment by an elected official to a body such
15 as a board, commission, committee, or council;

16 (c) appointment by an elected official to a public
17 office if the appointment is provided for by law;

18 (d) a department head appointment by the governor or
19 an executive department head appointment by a mayor, city
20 manager, county commissioner, or other chief administrative
21 or executive officer of a local government; or

22 (e) engagement as an independent contractor or
23 employment by an independent contractor.

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

25 (i) any department, office, board, bureau, commission,

1 agency, or other instrumentality of the executive branch of
2 the government of the state of Montana or a college,
3 community college, or university; and

4 (ii) any county, city, or town.

5 (b) The term does not include a school district, a
6 postsecondary vocational-technical center or program, or any
7 instrumentality of the legislative or judicial branches of
8 the government of the state of Montana.

9 (7) "Under honorable conditions" means a discharge or
10 separation from active duty characterized by the armed
11 forces as under honorable conditions. The term includes
12 honorable discharges and general discharges but does not
13 include dishonorable discharges or other administrative
14 discharges characterized as other than honorable.

15 (8) (a) "Veteran" means a person who was separated
16 under honorable conditions from active duty in the armed
17 forces performed:

18 (i) in a war;

19 (ii) in a campaign or expedition for which a campaign
20 badge has been authorized by the United States congress or
21 the United States department of defense;

22 (iii) during the period beginning April 28, 1952, and
23 ending July 1, 1955; or

24 (iv) for more than 180 consecutive days, other than for
25 training, any part of which occurred during the period

1 beginning February 1, 1955, and ending October 14, 1976.

2 (b) The term does not include a retired member of the
3 United States armed forces who is eligible for or receiving
4 a military retirement allowance based on length of service
5 and does not include any other retired member of a public
6 retirement system, except social security, that is supported
7 in whole or in part by tax revenues.

8 (9) "War" means:

9 (a) the Spanish-American War, beginning on April 21,
10 1898, and ending on July 4, 1902, both dates inclusive;

11 (b) World War I, beginning on April 6, 1917, and
12 ending on July 2, 1921, both dates inclusive;

13 (c) World War II, beginning on December 7, 1941, and
14 ending on April 28, 1952, both dates inclusive;

15 (d) the Korean conflict, military expedition, or
16 police action, beginning on June 26, 1950, and ending on
17 January 31, 1955, both dates inclusive; and

18 (e) the Vietnam conflict, beginning on August 5, 1964,
19 and ending on May 7, 1975, both dates inclusive.

20 NEW SECTION. Section 2. Scored procedures required.
21 For the purpose of applying the point preference provided
22 for in [section 3] and Title 39, chapter 30, a public
23 employer shall use a scored procedure or a combination of
24 scored procedures totaling 100 points for selecting a person
25 for appointment to a position. Scored procedures may

1 include written examinations, structured oral interviews,
2 performance tests, or other quantifiable procedures that
3 fairly test the relative capacity and fitness of an
4 applicant for a position.

5 NEW SECTION. Section 3. Additional points for certain
6 applicants. (1) Except as provided in subsections (2) and
7 (3), a public employer shall add the following points to the
8 score of an applicant for appointment to a position who
9 received 70 points or more in a scored procedure:

10 (a) 5 points if the applicant is a veteran; and

11 (b) 10 points if the applicant is a disabled veteran
12 or an eligible relative.

13 (2) No veteran, disabled veteran, or eligible relative
14 is entitled to the points under subsection (1) unless the
15 person is a United States citizen.

16 (3) A disabled veteran who receives 10 points under
17 subsection (1)(b) is not entitled to an additional 5 points
18 under subsection (1)(a).

19 NEW SECTION. Section 4. Notice and claim of
20 preference. (1) A public employer shall, by posting or on
21 the application form, give notice of the point preference
22 provided in [section 3].

23 (2) A job applicant who believes he has a point
24 preference shall claim the preference in writing before the
25 time for filing applications for the position involved has

1 passed. Failure to make a timely preference claim for a
2 position is a complete defense to an action instituted by an
3 applicant under [section 5] with regard to that position.

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

8 NEW SECTION. Section 5. Enforcement of preference.

9 (1) An applicant who believes he is entitled to but has not
10 been given the point preference under [section 3] may,
11 within 30 days of receipt of the notice of the hiring
12 decision provided for in [section 4], submit to the public
13 employer a written request for an explanation of the public
14 employer's hiring decision. Within 15 days of receipt of the
15 request, the public employer shall give the applicant a
16 written explanation.

17 (2) After following the procedure described in
18 subsection (1), the applicant may, within 90 days after
19 receipt of notice of the hiring decision, file a petition in
20 the district court in the county in which his application
21 was received by the public employer. The petition must state
22 facts which on their face entitle the applicant to a point
23 preference.

24 (3) (a) Upon filing of the petition, the court shall
25 order the public employer to appear in court at a specified

1 time not less than 10 or more than 30 days after the day the
2 petition was filed and show cause why the applicant was not
3 hired for the position. At the hearing, the public employer
4 has the burden of proving by a preponderance of the evidence
5 that the employer applied the points under [section 3] and
6 made a reasonable hiring decision. The applicant has the
7 burden of proving by a preponderance of the evidence that he
8 is a preference eligible applicant.

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

14 (c) If the public employer does not carry its burden
15 of proof under subsection (3)(a) and the court has found
16 that the applicant is a preference eligible applicant, the
17 court shall order the public employer to reopen the
18 selection process for the position involved and shall grant
19 the applicant reasonable attorney fees and court costs. The
20 remedy provided by this section is the only remedy for a
21 violation of [sections 1 through 7], and a court may not
22 grant any other relief in an action for violation of
23 [sections 1 through 7].

24 (4) Failure of an applicant to file a petition under
25 subsection (2) within 90 days bars the filing of a petition.

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

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

8 NEW SECTION. Section 6. Retention during reduction in
9 force. (1) Except as provided in subsections (2) and (3),
10 during a reduction in force, a public employer shall retain
11 in a position a:

12 (a) veteran, disabled veteran, or eligible relative
13 whose performance has not been rated unacceptable under a
14 performance appraisal system, over other employees with
15 similar job duties and qualifications and same length of
16 service; and

17 (b) disabled veteran with a service-connected
18 disability of 30% or more whose performance has not been
19 rated unacceptable under a performance appraisal system,
20 over other veterans, disabled veterans, and eligible
21 relatives with similar job duties and qualifications and
22 same length of service.

23 (2) No employee is entitled to preference in retention
24 under subsection (1) unless the person is a United States
25 citizen.

1 (3) The preference in retention under subsection (1)
2 does not apply to a position covered by a collective
3 bargaining agreement.

4 NEW SECTION. Section 7. Adoption of rules. The
5 department of administration shall adopt rules implementing
6 [sections 1 through 6]. The department's rules apply to all
7 public employers, local as well as state.

8 Section 8. Section 10-2-402, MCA, is amended to read:
9 "10-2-402. Superintendent to be given veterans'
10 preference. In the selection of the superintendent of the
11 Montana veterans' home, the department of institutions shall
12 apply the preference granted to veterans and disabled
13 veterans under [section 3], but not the preference granted
14 to other persons, ~~by~~ under [section 3] or Title 39, chapter
15 30."

16 Section 9. Section 39-30-101, MCA, is amended to read:
17 "39-30-101. Short title. This chapter may be cited as
18 the "Montana Veterans~~+~~ and Handicapped Persons' Employment
19 Preference Act".

20 Section 10. Section 39-30-102, MCA, is amended to
21 read:

22 "39-30-102. Purposes. The purposes of this chapter are
23 to ~~recognize--veterans-and-disabled-veterans-for-service-to~~
24 ~~their--country~~, recognize past employment discrimination
25 against handicapped persons, and facilitate the

1 habilitation, rehabilitation, and readjustment of veterans,
2 disabled veterans, and handicapped these persons."

3 Section 11. Section 39-30-103, MCA, is amended to
4 read:

5 "39-30-103. Definitions. For the purposes of this
6 chapter, the following definitions apply:

7 {1}--"Active-duty" means full-time duty other than for
8 training in the regular components of the United States
9 army, air force, navy, marine corps, or coast guard with
10 full pay and allowances. The term does not include monthly
11 drills, summer encampments, initial training, or other
12 inactive or active duty for training in the national guard
13 or reserves.

14 {2}--"Disabled veteran" means an individual, whether or
15 not he is a veteran as defined in this section, who:

16 {a)--served on active duty;

17 {b)--has been separated from service by honorable
18 discharge; and

19 {c)--suffers a service-connected disability determined
20 by the United States veterans administration to be 30% or
21 more disabling;

22 {3}{1} "Eligible spouse" means:

23 {a)--the unmarried surviving spouse of a veteran who
24 died while on active duty or whose death resulted from a
25 service-connected disability; or

1 {b} the spouse of:

2 {i)--a disabled veteran determined by the United States
3 veterans administration to have a 100% service-connected
4 disability who is unable to use his employment preference
5 because of his disability;

6 {ii)--a person on active duty determined by the United
7 States government to be missing in action or a prisoner of
8 war; or

9 {iii} a handicapped person determined by the department
10 of social and rehabilitation services to have a 100%
11 disability who is unable to use his employment preference
12 because of his disability.

13 {4}{2} "Handicapped person" means an individual
14 certified by the department of social and rehabilitation
15 services to have a physical or mental impairment that
16 substantially limits one or more major life activities, such
17 as writing, seeing, hearing, speaking, or mobility, and
18 which limits the individual's ability to obtain, retain, or
19 advance in employment.

20 {5}{3} (a) "Initial hiring" means a personnel action
21 for which applications are solicited from outside the ranks
22 of the current employees of:

23 (i) a department, as defined in 2-15-102, for a
24 position within the executive branch;

25 (ii) a legislative agency, such as the consumer

1 counsel, environmental quality council, office of the
2 legislative auditor, legislative council, or office of the
3 legislative fiscal analyst, for a position within the
4 legislative branch;

5 (iii) a judicial agency, such as the office of supreme
6 court administrator, office of supreme court clerk, state
7 law library, or similar office in a state district court for
8 a position within the judicial branch;

9 (iv) a city or town for a municipal position, including
10 a city or municipal court position; and

11 (v) a county for a county position, including a
12 justice's court position.

13 (b) A personnel action limited to current employees of
14 a specific public entity identified in subsections (a)(i)
15 through (a)(v) of this subsection ~~†5†~~ (3), current employees
16 in a reduction-in-force pool who have been laid off from a
17 specific public entity identified in subsections (a)(i)
18 through (a)(v) of this subsection ~~†5†~~ (3), or current
19 participants in a federally authorized employment program is
20 not an initial hiring.

21 ~~†6†~~(4) (a) "Mental impairment" means:

22 (i) suffering from a disability attributable to mental
23 retardation, cerebral palsy, epilepsy, autism, or any other
24 neurologically handicapping condition closely related to
25 mental retardation and requiring treatment similar to that

1 required by mentally retarded individuals; or

2 (ii) an organic or mental impairment that has
3 substantial adverse effects on an individual's cognitive or
4 volitional functions.

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

10 ~~†7†~~(5) "Position" means a permanent or seasonal
11 position as defined in 2-18-101 for a state position or a
12 similar permanent or seasonal position with a public
13 employer other than the state. However, the term does not
14 include:

15 (a) a temporary position as defined in 2-18-101 for a
16 state position or similar temporary position with a public
17 employer other than the state;

18 (b) a state or local elected official;

19 (c) employment as an elected official's immediate
20 secretary, legal advisor, court reporter, or administrative,
21 legislative, or other immediate or first-line aide;

22 (d) appointment by an elected official to a body such
23 as a board, commission, committee, or council;

24 (e) appointment by an elected official to a public
25 office if the appointment is provided for by law;

1 (f) a department head appointment by the governor or
 2 an executive department head appointment by a mayor, city
 3 manager, county commissioner, or other chief administrative
 4 or executive officer of a local government; or

5 (g) engagement as an independent contractor or
 6 employment by an independent contractor.

7 ~~(8)~~(6) (a) "Public employer" means:

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

12 (ii) any county, city, or town.

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

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

25 ~~(10) (a) "Veteran" means a person who:~~

1 ~~(i) served on active duty during time of war or~~
 2 ~~declared national emergency or in a campaign or expedition~~
 3 ~~for which a campaign badge was authorized by the United~~
 4 ~~States congress or the United States department of defense;~~
 5 ~~and~~

6 ~~(ii) has been separated from service by honorable~~
 7 ~~discharge;~~

8 ~~(b) The term does not include a retired member of the~~
 9 ~~United States armed forces who is eligible for or receiving~~
 10 ~~a military retirement allowance based on length of service~~
 11 ~~and does not include any other retired member of a public~~
 12 ~~retirement system, except social security, that is supported~~
 13 ~~in whole or in part by tax revenues.~~

14 ~~(11) "War or declared national emergency" means:~~

15 ~~(a) World War I, beginning on April 6, 1917, and~~
 16 ~~ending on November 11, 1918, both dates inclusive;~~

17 ~~(b) World War II, beginning on December 7, 1941, and~~
 18 ~~ending on December 31, 1946, both dates inclusive;~~

19 ~~(c) the Korean conflict, military expedition, or~~
 20 ~~police action, beginning on June 27, 1950, and ending on~~
 21 ~~January 31, 1955, both dates inclusive; and~~

22 ~~(d) the Vietnam conflict, beginning on August 5, 1964,~~
 23 ~~and ending on May 7, 1975, both dates inclusive."~~

24 Section 12. Section 39-30-201, MCA, is amended to
 25 read:

1 "39-30-201. Employment Point preference in initial
 2 hiring. (1) ~~(a)~~ Except as provided in 10-2-402, in an
 3 initial hiring for a position, if a job applicant who is a
 4 ~~veteran, disabled-veteran,~~ handicapped person, or eligible
 5 spouse meets the eligibility requirements contained in
 6 39-30-202 and claims a preference as required by 39-30-206,
 7 a public employer shall ~~hire-the-applicant-over-any-other~~
 8 ~~applicant-with-substantially-equal-qualifications-who-is-not~~
 9 ~~a-preference-eligible-applicant~~ add 10 points to the score
 10 of an applicant who received 70 points or more in a scored
 11 procedure.

12 ~~(b)--in-an-initial-hiring,-a-public-employer-shall-hire~~
 13 ~~a-disabled-veteran-or--handicapped--person--over--any--other~~
 14 ~~preference---eligible--applicant--with--substantially--equal~~
 15 ~~qualifications-~~

16 (2) The employment preference provided for in
 17 subsection (1) does not apply to a personnel action
 18 described in subsection (5) (3)(b) of 39-30-103 or to any
 19 other personnel action that is not an initial hiring."

20 Section 13. Section 39-30-202, MCA, is amended to
 21 read:

22 "39-30-202. Eligibility requirements. No ~~veteran,~~
 23 ~~disabled--veteran,~~ eligible spouse, or handicapped person is
 24 entitled to receive employment preference as provided in
 25 39-30-201 unless:

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

11 Section 14. Section 39-30-203, MCA, is amended to
 12 read:

13 "39-30-203. Duration of preference. Subject to
 14 39-30-202,

15 ~~(i) a handicapped person,-the or eligible spouse of-a~~
 16 ~~handicapped-person-as-described-in-subsection-(3)(b)(iii)-of~~
 17 ~~39-30-103,-a-disabled-veteran,-or-the-spouse-of--a--disabled~~
 18 ~~veteran--as--described--in-subsection-(3)(b)(i)-of-39-30-103~~
 19 ~~qualifies for employment preference as long as the disabling~~
 20 ~~condition exists.~~

21 ~~(2)--a-veteran,-as-defined-in-39-30-103,-who-is--not--a~~
 22 ~~disabled--veteran,-as--defined--in-39-30-103,-qualifies-for~~
 23 ~~employment-preference-for-no-longer-than-15-years--following~~
 24 ~~separation--from--service--or--for--no--longer--than-5-years~~
 25 ~~following-December-20,-1983,-whichever-is-later.~~

~~(3)--the-surviving-spouse-of-a-veteran-as-described--in
 subsection--(3)(a)--of--39-30-103--qualifies--for-employment
 preference-for-as-long-as-the-spouse-remains-unmarried;--and
 (4)--the--spouse--of--a--person-described-in-subsection
 (3)(b)(ii)--of--39-30-103--qualifies-for-employment--preference
 for-as-long-as-the-person-is-missing-in-action-or-a-prisoner
 of-war."~~

Section 15. Section 39-30-207, MCA, is amended to read:

"39-30-207. Enforcement of preference. (1) An applicant who believes he has not been accorded his 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 his application was received by the public employer. The petition must state facts which 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 applied the points under 39-30-201 and made a reasonable determination pursuant to subsection (9) of 39-30-103 and the hiring decision. The applicant has the burden of proving by a preponderance of the evidence that he 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 has found 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.

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

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

8 Section 16. Section 49-2-405, MCA, is amended to read:

9 "49-2-405. Veterans' and handicapped persons'
 10 employment preference. The application of an-employment a
 11 preference as provided for in [sections 1 through 7], Title
 12 39, chapter 30, and 10-2-402 by a public employer as defined
 13 in [section 1] and 39-30-103 may not be construed to
 14 constitute a violation of this chapter."

15 Section 17. Section 49-3-103, MCA, is amended to read:

16 "49-3-103. Permitted distinctions. (1) Nothing in this
 17 chapter shall prohibit any public or private employer:

18 (a) from enforcing a differentiation based on marital
 19 status, age, or physical or mental handicap when based on a
 20 bona fide occupational qualification reasonably necessary to
 21 the normal operation of the particular business or where the
 22 differentiation is based on reasonable factors other than
 23 age;

24 (b) from observing the terms of a bona fide seniority
 25 system or any bona fide employee benefit plan, such as a

1 retirement, pension, or insurance plan, which is not a
 2 subterfuge to evade the purposes of this chapter, except
 3 that no such employee benefit plan shall excuse the failure
 4 to hire any individual; or

5 (c) from discharging or otherwise disciplining an
 6 individual for good cause.

7 (2) The application of an-employment a preference as
 8 provided for in [sections 1 through 7], Title 39, chapter
 9 30, and 10-2-402 by a public employer as defined in [section
 10 1] and 39-30-103 may not be construed to constitute a
 11 violation of this chapter."

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB038, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

An act requiring certain public employers to use scored procedures for selecting persons for appointment and granting preferences to military veterans and their eligible relatives and revising employment preference to handicapped persons.

ASSUMPTIONS:

1. To apply the scoring method (identified in Section 2 of this bill) to quantifiable procedures the validity of such procedures must be established.
2. The state will follow federal laws and regulations to establish the validity of hiring procedures.
3. Full implementation of the proposed legislation will take two bienniums due to the complexity of validity hiring procedures.

FISCAL IMPACT:

	<u>FY88</u>	<u>FY89</u>
<u>Expenditures:</u>	8 FTE	8 FTE
Personal Services	\$ 219,889	\$ 219,889
<u>Operating Expense</u>	<u>30,000</u>	<u>30,000</u>
General Fund Total	\$ 249,889	\$ 249,889

This impact is only for Executive and University System agencies. The Judicial and Legislative Branch Agencies set their own personnel policies. These agencies would have the same obligations but their impact is unknown. If a decision is made to go with scored examinations the costs would be considerably higher. The state of Idaho had a FY84 budget of \$1,043,000 per year to perform these duties. The Department of Labor has set the cost of applying aptitude tests for the state at over \$300,000 per year.

Revenues:

N/A

EFFECT ON COUNTY OR OTHER LOCAL REVENUE OR EXPENDITURES:

Local impact cannot be determined. Using the above assumptions the costs could be well above the state's cost due to the local governments not having the advantage of a centralized personnel division or uniform personnel policies.

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:

N/A

David L. Hunter DATE 1/14/87
DAVID L. HUNTER, BUDGET DIRECTOR
Office of Budget and Program Planning

Robert Pavlovich DATE 1/15/87
ROBERT PAVLOVICH, PRIMARY SPONSOR

Fiscal Note for HB038, as introduced.

HB-38

Fiscal Note Request, HB038, as introduced.

Form BD-15

Page 2

TECHNICAL OR MECHANICAL DEFECTS IN PROPOSED LEGISLATION OR CONFLICTS WITH EXISTING LEGISLATION:

Under federal laws and regulations when scoring procedures are used for ranking candidates, the selection procedure (test, structure interviews, etc.) must be validated. This can be a complex and time consuming task, For the Executive Branch alone, full implementation could take up to five years. For example, the state currently has only one validated test (Social Worker I). This test took over one year to structure to meet the criteria of validation. The state has 1,500 job classifications. No matter what selection procedure is used in hiring people into these jobs, validation of that procedure is mandatory.

APPROVED BY COMMITTEE
ON STATE ADMINISTRATION

STATEMENT OF INTENT

HOUSE BILL 38

House State Administration Committee

A statement of intent is required for this bill because section 6 requires the department of administration to adopt rules implementing sections 1 through 5. The legislature intends the rules to adequately provide for the administration of the point preference provided for in section 2 and the retention preference provided for in section 5, but to include only those rules that are reasonably necessary.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to both state and local government employers. In formulating its rules, the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of public employers.

It is the intent of the legislature that the department formulate and adopt rules relating but not limited to the following matters and take into account the following considerations:

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant shall document and submit evidence of such things as the applicant's status as a veteran, disabled veteran, eligible relative, and United States citizen. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants and that, once an applicant has substantially complied with the rules, a public employer should make every reasonable attempt to verify the existence of the preference.

(2) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the congress of the United States or department of defense.

(3) Separations and discharges. The legislature intends the rules to apply federal law and further define separations under honorable conditions and the various types

1 of discharges.

2 (4) Hiring decision notices and explanations. The
3 legislature intends the rules to provide for the form and
4 content of written notices of hiring decisions, including
5 whether the position was obtained as the result of
6 application of the point preference by the public employer,
7 written requests for explanations of hiring decisions, and
8 written explanations of hiring decisions.

9 (5) Reopening of selection process. The legislature
10 intends the rules to provide for a method of reopening the
11 selection process for a job should a court order the
12 selection process reopened and to include a method of giving
13 notice to those who applied for the job, informing them of
14 the reopening and the reason therefor.

15 (6) Appraisal methods. The legislature intends the
16 rules to assist public employers in developing methods of
17 appraising employee performance for the purpose of applying
18 the retention preference.

1 HOUSE BILL NO. 38
2 INTRODUCED BY PAVLOVICH

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING--CERTAIN
5 PUBLIC--EMPLOYERS--TO--USE--SECRET--PROCEDURES--FOR--SELECTING
6 PERSONS--FOR--APPOINTMENT--TO--CERTAIN--POSITIONS; GRANTING
7 PREFERENCE TO CERTAIN MILITARY VETERANS AND THEIR ELIGIBLE
8 RELATIVES IN APPOINTMENT TO THESE CERTAIN POSITIONS AND IN
9 RETENTION DURING REDUCTIONS IN FORCE; ELIMINATING THE
10 PREFERENCE PROVIDED TO VETERANS AND THEIR ELIGIBLE SPOUSES
11 UNDER THE MONTANA VETERANS' AND HANDICAPPED PERSONS'
12 EMPLOYMENT PREFERENCE ACT AND REVISING THE PREFERENCE
13 PROVIDED TO HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES
14 UNDER THAT ACT; AND AMENDING SECTIONS 10-2-402, 39-30-101
15 THROUGH 39-30-103, 39-30-201 THROUGH 39-30-203, 39-30-207,
16 49-2-405, AND 49-3-103, MCA."

17
18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

19 NEW SECTION. Section 1. Definitions. For the purposes
20 of [sections 1 through 7 6], the following definitions
21 apply:

22 (1) "Active duty" means full-time duty with military
23 pay and allowances in the armed forces, except for training,
24 for determining physical fitness, or for service in the
25 reserve or national guard.

1 (2) "Armed forces" means the United States army, navy,
2 air force, marine corps, and coast guard.

3 (3) "Disabled veteran" means a person, whether or not
4 he is a veteran as defined in this section, who was
5 separated under honorable conditions from active duty in the
6 armed forces and has established the present existence of a
7 service-connected disability or is receiving compensation,
8 disability retirement benefits, or pension because of a
9 public statute administered by the veterans administration
10 or a military department.

11 (4) "Eligible relative" means:

12 (a) the unmarried surviving spouse of a veteran or
13 disabled veteran;

14 (b) the spouse of a disabled veteran who is unable to
15 qualify for appointment to a position;

16 (c) the mother of a veteran who lost his life under
17 honorable conditions while serving in the armed forces
18 during a period named in subsections (8)(a)(i) through
19 (8)(a)(iii) if:

20 (i) her husband is totally and permanently disabled;

21 OR

22 (ii) she is widowed,--divorced,--or-separated from the
23 father and has not remarried; OR AND

24 (iii) ~~she has remarried but is--widowed,--divorced,--or~~
25 ~~legally--separated--from--her--husband--when--preference--is~~

1 ~~claimed; and~~
 2 (d) the mother of a service-connected permanently and
 3 totally disabled veteran if:
 4 (i) her husband is totally and permanently disabled;
 5 OR
 6 (ii) she is widowed, ~~divorced, or~~ separated from the
 7 father and has not remarried; ~~or~~
 8 ~~(iii) she has remarried but is widowed, divorced, or~~
 9 ~~legally separated from her husband when preference is~~
 10 ~~claimed.~~
 11 (5) "Position" means a permanent, temporary, or
 12 seasonal position as defined in 2-18-101 for a state
 13 position or a similar permanent, temporary, or seasonal
 14 position with a public employer other than the state.
 15 However, the term does not include:
 16 (a) a state or local elected official;
 17 (b) appointment by an elected official to a body such
 18 as a board, commission, committee, or council;
 19 (c) appointment by an elected official to a public
 20 office if the appointment is provided for by law;
 21 (d) a department head appointment by the governor or
 22 an executive department head appointment by a mayor, city
 23 manager, county commissioner, or other chief administrative
 24 or executive officer of a local government; or
 25 (e) engagement as an independent contractor or

1 employment by an independent contractor.
 2 (6) (a) "Public employer" means:
 3 (i) any department, office, board, bureau, commission,
 4 agency, or other instrumentality of the executive branch of
 5 the government of the state of Montana or a college,
 6 community college, or university; and
 7 (ii) any county, city, or town.
 8 (b) The term does not include a school district, a
 9 postsecondary vocational-technical center or program, or any
 10 instrumentality of the legislative or judicial branches of
 11 the government of the state of Montana.
 12 (7) "Under honorable conditions" means a discharge or
 13 separation from active duty characterized by the armed
 14 forces as under honorable conditions. The term includes
 15 honorable discharges and general discharges but does not
 16 include dishonorable discharges or other administrative
 17 discharges characterized as other than honorable.
 18 (8) (a) "Veteran" means a person who was separated
 19 under honorable conditions from active duty in the armed
 20 forces performed:
 21 (i) in a war;
 22 (ii) in a campaign or expedition for which a campaign
 23 badge has been authorized by the United States congress or
 24 the United States department of defense;
 25 (iii) during the period beginning April 28, 1952, and

1 ending July 1, 1955; or

2 (iv) for more than 180 consecutive days, other than for
3 training, any part of which occurred during the period
4 beginning February 1, 1955, and ending October 14, 1976.

5 (b) The term does not include a retired member of the
6 United States armed forces who is eligible for or receiving
7 a military retirement allowance based on length of service
8 and does not include any other retired member of a public
9 retirement system, except social security, that is supported
10 in whole or in part by tax revenues.

11 (9) "War" means:

12 (a) the Spanish-American War, beginning on April 21,
13 1898, and ending on July 4, 1902, both dates inclusive;

14 (b) World War I, beginning on April 6, 1917, and
15 ending on July 2, 1921, both dates inclusive;

16 (c) World War II, beginning on December 7, 1941, and
17 ending on April 28, 1952, both dates inclusive;

18 (d) the Korean conflict, military expedition, or
19 police action, beginning on June 26, 1950, and ending on
20 January 31, 1955, both dates inclusive; and

21 (e) the Vietnam conflict, beginning on August 5, 1964,
22 and ending on May 7, 1975, both dates inclusive.

23 ~~NEW SECTION. Section 2. Scored procedures required.~~
24 ~~For the purpose of applying the point preference provided~~
25 ~~for in section 31 and Title 39, chapter 30, a public~~

1 ~~employer shall use a scored procedure or a combination of~~
2 ~~scored procedures totaling 100 points for selecting a person~~
3 ~~for appointment to a position. Scored procedures may~~
4 ~~include written examinations, structured oral interviews,~~
5 ~~performance tests, or other quantifiable procedures that~~
6 ~~fairly test the relative capacity and fitness of an~~
7 ~~applicant for a position.~~

8 NEW SECTION. Section 2. Additional points for certain
9 applicants. (1) Except as provided in subsections (2) and
10 (3), a public employer shall add the following points to the
11 score of an applicant for appointment to a position who
12 received 70 points or more in a scored procedure:

13 (a) 5 points if the applicant is a veteran; and

14 (b) 10 points if the applicant is a disabled veteran
15 or an eligible relative.

16 (2) No veteran, disabled veteran, or eligible relative
17 is entitled to the points under subsection (1) unless the
18 person is a United States citizen.

19 (3) A disabled veteran who receives 10 points under
20 subsection (1)(b) is not entitled to an additional 5 points
21 under subsection (1)(a).

22 NEW SECTION. Section 3. Notice and claim of
23 preference. (1) A public employer shall, by posting or on
24 the application form, give notice of the point preference
25 provided in [section 3 2].

1 (2) A job applicant who believes he has a point
2 preference shall claim the preference in writing before the
3 time for filing applications for the position involved has
4 passed. Failure to make a timely preference claim for a
5 position is a complete defense to an action instituted by an
6 applicant under [section 5 4] with regard to that position.

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

11 NEW SECTION. Section 4. Enforcement of preference.

12 (1) An applicant who believes he is entitled to but has not
13 been given the point preference under [section 3 2] may,
14 within 30 days of receipt of the notice of the hiring
15 decision provided for in [section 4 3], submit to the public
16 employer a written request for an explanation of the public
17 employer's hiring decision. Within 15 days of receipt of the
18 request, the public employer shall give the applicant a
19 written explanation.

20 (2) After following the procedure described in
21 subsection (1), the applicant may, within 90 days after
22 receipt of notice of the hiring decision, file a petition in
23 the district court in the county in which his application
24 was received by the public employer. The petition must state
25 facts which on their face entitle the applicant to a point

1 preference.

2 (3) (a) Upon filing of the petition, the court shall
3 order the public employer to appear in court at a specified
4 time not less than 10 or more than 30 days after the day the
5 petition was filed and show cause why the applicant was not
6 hired for the position. At the hearing, the public employer
7 has the burden of proving by a preponderance of the evidence
8 that the employer applied the points under [section 3 2] and
9 made a reasonable hiring decision. The applicant has the
10 burden of proving by a preponderance of the evidence that he
11 is a preference eligible applicant.

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

17 (c) If the public employer does not carry its burden
18 of proof under subsection (3)(a) and the court has found
19 that the applicant is a preference eligible applicant, the
20 court shall order the public employer to reopen the
21 selection process for the position involved and shall grant
22 the applicant reasonable attorney fees and court costs. The
23 remedy provided by this section is the only remedy for a
24 violation of [sections 1 through 7 6], and a court may not
25 grant any other relief in an action for violation of

1 [sections 1 through 7 6].

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

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

11 NEW SECTION. Section 5. Retention during reduction in
 12 force. (1) Except as provided in subsections (2) and (3),
 13 during a reduction in force, a public employer shall retain
 14 in a position a:

15 (a) veteran, disabled veteran, or eligible relative
 16 whose performance has not been rated unacceptable under a
 17 performance appraisal system, over other employees with
 18 similar job duties and qualifications and same length of
 19 service; and

20 (b) disabled veteran with a service-connected
 21 disability of 30% or more whose performance has not been
 22 rated unacceptable under a performance appraisal system,
 23 over other veterans, disabled veterans, and eligible
 24 relatives with similar job duties and qualifications and
 25 same length of service.

1 (2) No employee is entitled to preference in retention
 2 under subsection (1) unless the person is a United States
 3 citizen.

4 (3) The preference in retention under subsection (1)
 5 does not apply to a position covered by a collective
 6 bargaining agreement.

7 NEW SECTION. Section 6. Adoption of rules. The
 8 department of administration shall adopt rules implementing
 9 [sections 1 through 6 5]. The department's rules apply to
 10 all public employers, local as well as state.

11 Section 7. Section 10-2-402, MCA, is amended to read:
 12 "10-2-402. Superintendent to be given veterans'
 13 preference. In the selection of the superintendent of the
 14 Montana veterans' home, the department of institutions shall
 15 apply the preference granted to veterans and disabled
 16 veterans under [section 3 2], but not the preference granted
 17 to other persons ~~by~~ under [section 3 2] or Title 39,
 18 chapter 30."

19 Section 8. Section 39-30-101, MCA, is amended to read:
 20 "39-30-101. Short title. This chapter may be cited as
 21 the "Montana Veterans¹-and Handicapped Persons' Employment
 22 Preference Act"."

23 Section 9. Section 39-30-102, MCA, is amended to read:
 24 "39-30-102. Purposes. The purposes of this chapter are
 25 to ~~recognize--veterans--and--disabled--veterans--for--service--to~~

1 their--country; recognize past employment discrimination
2 against handicapped persons; and facilitate the
3 habilitation, rehabilitation, and readjustment of veterans;
4 disabled-veterans; and handicapped these persons."

5 Section 10. Section 39-30-103, MCA, is amended to
6 read:

7 "39-30-103. Definitions. For the purposes of this
8 chapter, the following definitions apply:

9 {1}--"Active-duty" means full-time duty other than for
10 training in the regular components of the United States
11 army; air force; navy; marine corps; or coast guard with
12 full pay and allowances; The term does not include monthly
13 drills; summer encampments; initial training; or other
14 inactive or active duty for training in the national guard
15 or reserves;

16 {2}--"Disabled veteran" means an individual, whether or
17 not he is a veteran as defined in this section, who:

18 {a)--served on active duty;

19 {b)--has been separated from service by honorable
20 discharge; and

21 {c)--suffers a service-connected disability determined
22 by the United States veterans administration to be 30% or
23 more disabling;

24 {3}{1} "Eligible spouse" means:

25 {a)--the unmarried surviving spouse of a veteran who

1 died while on active duty or whose death resulted from a
2 service-connected disability; or

3 {b) the spouse of:

4 {i)--a disabled veteran determined by the United States
5 veterans administration to have a 100% service-connected
6 disability who is unable to use his employment preference
7 because of his disability;

8 {ii)--a person on active duty determined by the United
9 States government to be missing in action or a prisoner of
10 war; or

11 {iii) a handicapped person determined by the department
12 of social and rehabilitation services to have a 100%
13 disability who is unable to use his employment preference
14 because of his disability.

15 {4}{2} "Handicapped person" means an individual
16 certified by the department of social and rehabilitation
17 services to have a physical or mental impairment that
18 substantially limits one or more major life activities, such
19 as writing, seeing, hearing, speaking, or mobility, and
20 which limits the individual's ability to obtain, retain, or
21 advance in employment.

22 {5}{3} (a) "Initial hiring" means a personnel action
23 for which applications are solicited from outside the ranks
24 of the current employees of:

25 (i) a department, as defined in 2-15-102, for a

1 position within the executive branch;

2 (ii) a legislative agency, such as the consumer

3 counsel, environmental quality council, office of the

4 legislative auditor, legislative council, or office of the

5 legislative fiscal analyst, for a position within the

6 legislative branch;

7 (iii) a judicial agency, such as the office of supreme

8 court administrator, office of supreme court clerk, state

9 law library, or similar office in a state district court for

10 a position within the judicial branch;

11 (iv) a city or town for a municipal position, including

12 a city or municipal court position; and

13 (v) a county for a county position, including a

14 justice's court position.

15 (b) A personnel action limited to current employees of

16 a specific public entity identified in subsections (a)(i)

17 through (a)(v) of this subsection ~~†5†~~ (3), current employees

18 in a reduction-in-force pool who have been laid off from a

19 specific public entity identified in subsections (a)(i)

20 through (a)(v) of this subsection ~~†5†~~ (3), or current

21 participants in a federally authorized employment program is

22 not an initial hiring.

23 ~~†6†~~(4) (a) "Mental impairment" means:

24 (i) suffering from a disability attributable to mental

25 retardation, cerebral palsy, epilepsy, autism, or any other

1 neurologically handicapping condition closely related to

2 mental retardation and requiring treatment similar to that

3 required by mentally retarded individuals; or

4 (ii) an organic or mental impairment that has

5 substantial adverse effects on an individual's cognitive or

6 volitional functions.

7 (b) The term mental impairment does not include

8 alcoholism or drug addiction and does not include any mental

9 impairment, disease, or defect that has been asserted by the

10 individual claiming the preference as a defense to any

11 criminal charge.

12 ~~†7†~~(5) "Position" means a permanent or seasonal

13 position as defined in 2-18-101 for a state position or a

14 similar permanent or seasonal position with a public

15 employer other than the state. However, the term does not

16 include:

17 (a) a temporary position as defined in 2-18-101 for a

18 state position or similar temporary position with a public

19 employer other than the state;

20 (b) a state or local elected official;

21 (c) employment as an elected official's immediate

22 secretary, legal advisor, court reporter, or administrative,

23 legislative, or other immediate or first-line aide;

24 (d) appointment by an elected official to a body such

25 as a board, commission, committee, or council;

1 (e) appointment by an elected official to a public
2 office if the appointment is provided for by law;

3 (f) a department head appointment by the governor or
4 an executive department head appointment by a mayor, city
5 manager, county commissioner, or other chief administrative
6 or executive officer of a local government; or

7 (g) engagement as an independent contractor or
8 employment by an independent contractor.

9 ~~{8}~~{6} (a) "Public employer" means:

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

14 (ii) any county, city, or town.

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

21 ~~{9}~~--"Substantially equal qualifications"--means--the
22 qualifications--of-two-or-more-persons-among-whom-the-public
23 employer-cannot-make-a-reasonable-determination--that--the
24 qualifications--held-by-one-person-are-significantly-better
25 suited-for-the-position-than-the-qualifications-held-by--the

1 other persons;

2 ~~{10}~~--(a)--"Veteran"--means-a-person-who:

3 ~~{i}~~--served-on-active-duty-during-time-of-war-or
4 declared-national-emergency-or-in-a-campaign--or--expedition
5 for--which--a--campaign--badge--was-authorized-by-the-United
6 States-congress-or-the-United-States-department-of--defense;
7 and

8 ~~{ii}~~--has--been--separated--from--service--by--honorable
9 discharge;

10 ~~{b}~~--The-term-does-not-include-a-retired-member-of--the
11 United--States-armed-forces-who-is-eligible-for-or-receiving
12 a-military-retirement-allowance-based-on-length--of--service
13 and--does--not--include-any-other-retired-member-of-a-public
14 retirement-system,--except-social-security,--that-is-supported
15 in-whole-or-in-part-by-tax-revenues.

16 ~~{11}~~--"War-or-declared-national-emergency"--means:

17 ~~{a}~~--World-War-I--beginning--on--April--6,--1917--and
18 ending-on-November-11,--1918,--both-dates-inclusive;

19 ~~{b}~~--World--War--II--beginning-on-December-7,--1941,--and
20 ending-on-December-31,--1946,--both-dates-inclusive;

21 ~~{c}~~--the--Korean--conflict,--military--expedition,--or
22 police--action,--beginning--on--June-27,--1950,--and-ending-on
23 January-31,--1955,--both-dates-inclusive;--and

24 ~~{d}~~--the-Vietnam-conflict,--beginning-on-August-5,--1964,
25 and-ending-on-May-7,--1975,--both-dates-inclusive;"

1 Section 11. Section 39-30-201, MCA, is amended to
2 read:

3 "39-30-201. Employment Point preference in initial
4 hiring. (1) ~~(a)~~ Except as provided in 10-2-402, in an
5 initial hiring for a position, if a job applicant who is a
6 ~~veteran, disabled veteran, handicapped person, or eligible~~
7 ~~spouse~~ meets the eligibility requirements contained in
8 39-30-202 and claims a preference as required by 39-30-206,
9 a public employer shall hire ~~the applicant over any other~~
10 ~~applicant with substantially equal qualifications who is not~~
11 ~~a preference-eligible applicant~~ add 10 points to the score
12 of an applicant who received 70 points or more in a scored
13 procedure.

14 ~~(b) In an initial hiring, a public employer shall hire~~
15 ~~a disabled veteran or handicapped person over any other~~
16 ~~preference-eligible applicant with substantially equal~~
17 ~~qualifications.~~

18 (2) The employment preference provided for in
19 subsection (1) does not apply to a personnel action
20 described in subsection ~~(5)~~ (3)(b) of 39-30-103 or to any
21 other personnel action that is not an initial hiring."

22 Section 12. Section 39-30-202, MCA, is amended to
23 read:

24 "39-30-202. Eligibility requirements. No ~~veteran,~~
25 ~~disabled veteran,~~ eligible spouse or handicapped person is

1 entitled to receive employment preference as provided in
2 39-30-201 unless:

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

13 Section 13. Section 39-30-203, MCA, is amended to
14 read:

15 "39-30-203. Duration of preference. Subject to
16 39-30-202, 1

17 ~~(1) a handicapped person, the or eligible spouse of a~~
18 ~~handicapped person as described in subsection (3)(b)(iii) of~~
19 ~~39-30-103, a disabled veteran, or the spouse of a disabled~~
20 ~~veteran as described in subsection (3)(b)(i) of 39-30-103~~
21 ~~qualifies for employment preference as long as the disabling~~
22 ~~condition exists; 1~~

23 ~~(2) a veteran as defined in 39-30-103, who is not a~~
24 ~~disabled veteran as defined in 39-30-103, qualifies for~~
25 ~~employment preference for no longer than 15 years following~~

1 separation--from--service--or--for--no--longer--than--5--years
 2 following--December--207--1983--whichever--is--later--

3 {3}--the--surviving--spouse--of--a--veteran--as--described--in
 4 subsection--{3}(a)--of--39-30-103--qualifies--for--employment
 5 preference--for--as--long--as--the--spouse--remains--unmarried--and

6 {4}--the--spouse--of--a--person--described--in--subsection
 7 {3}(b)(ii)--of--39-30-103--qualifies--for--employment--preference
 8 for--as--long--as--the--person--is--missing--in--action--or--a--prisoner
 9 of--war--"

10 Section 14. Section 39-30-207, MCA, is amended to
 11 read:

12 "39-30-207. Enforcement of preference. (1) An
 13 applicant who believes he has not been accorded his rights
 14 under this chapter may, within 30 days of receipt of the
 15 notice of the hiring decision provided for in 39-30-206,
 16 submit to the public employer a written request for an
 17 explanation of the public employer's hiring decision. Within
 18 15 days of receipt of the request, the public employer shall
 19 give the applicant a written explanation.

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

1 (3) (a) Upon filing of the petition, the court shall
 2 order the public employer to appear in court at a specified
 3 time not less than 10 or more than 30 days after the day the
 4 petition was filed and show cause why the applicant was not
 5 hired for the position. At the hearing, the public employer
 6 has the burden of proving by a preponderance of the evidence
 7 that the employer applied the points under 39-30-201 and
 8 made a reasonable determination pursuant to subsection--{9}
 9 of--39-30-103--and--the hiring decision. The applicant has the
 10 burden of proving by a preponderance of the evidence that he
 11 is a preference eligible applicant.

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

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

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

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

10 Section 15. Section 49-2-405, MCA, is amended to read:

11 "49-2-405. Veterans' and handicapped persons'
 12 employment preference. The application of an-employment a
 13 preference as provided for in [sections 1 through 7 6],
 14 Title 39, chapter 30, and 10-2-402 by a public employer as
 15 defined in [section 1] and 39-30-103 may not be construed to
 16 constitute a violation of this chapter."

17 Section 16. Section 49-3-103, MCA, is amended to read:

18 "49-3-103. Permitted distinctions. (1) Nothing in this
 19 chapter shall prohibit any public or private employer:

20 (a) from enforcing a differentiation based on marital
 21 status, age, or physical or mental handicap when based on a
 22 bona fide occupational qualification reasonably necessary to
 23 the normal operation of the particular business or where the
 24 differentiation is based on reasonable factors other than
 25 age;

1 (b) from observing the terms of a bona fide seniority
 2 system or any bona fide employee benefit plan, such as a
 3 retirement, pension, or insurance plan, which is not a
 4 subterfuge to evade the purposes of this chapter, except
 5 that no such employee benefit plan shall excuse the failure
 6 to hire any individual; or

7 (c) from discharging or otherwise disciplining an
 8 individual for good cause.

9 (2) The application of an-employment a preference as
 10 provided for in [sections 1 through 7 6], Title 39, chapter
 11 30, and 10-2-402 by a public employer as defined in [section
 12 1] and 39-30-103 may not be construed to constitute a
 13 violation of this chapter."

-End-

HB 0038/si
COMMITTEE
ON APPROPRIATIONS
WITHOUT RECOMMENDATION
MOTION TO MOVE FROM
COMMITTEE TO 2ND READING

STATEMENT OF INTENT

HOUSE BILL 38

House State Administration Committee

A statement of intent is required for this bill because section 6 7 requires the department of administration to adopt rules implementing sections 1 through 5 6. The legislature intends the rules to adequately provide for the administration of the point preference provided for in section 2 3 and the retention preference provided for in section 5 6, but to include only those rules that are reasonably necessary.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to both state and local government employers. In formulating its rules, the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of public employers.

It is the intent of the legislature that the department formulate and adopt rules relating but not limited to the following matters and take into account the following considerations:

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant shall document and submit evidence of such things as the applicant's status as a veteran, disabled veteran, eligible relative, and United States citizen. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants and that, once an applicant has substantially complied with the rules, a public employer should make every reasonable attempt to verify the existence of the preference.

(2) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the congress of the United States or department of defense.

(3) Separations and discharges. The legislature intends the rules to apply federal law and further define separations under honorable conditions and the various types

1 of discharges.

2 (4) Hiring decision notices and explanations. The
3 legislature intends the rules to provide for the form and
4 content of written notices of hiring decisions, including
5 whether the position was obtained as the result of
6 application of the point preference by the public employer,
7 written requests for explanations of hiring decisions, and
8 written explanations of hiring decisions.

9 (5) Reopening of selection process. The legislature
10 intends the rules to provide for a method of reopening the
11 selection process for a job should a court order the
12 selection process reopened and to include a method of giving
13 notice to those who applied for the job, informing them of
14 the reopening and the reason therefor.

15 (6) Appraisal methods. The legislature intends the
16 rules to assist public employers in developing methods of
17 appraising employee performance for the purpose of applying
18 the retention preference.

HOUSE BILL NO. 38
INTRODUCED BY PAVLOVICH

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING--CERTAIN
PUBLIC--EMPLOYERS--TO--USE--SECRET--PROCEDURES--FOR--SELECTING
PERSONS--FOR--APPOINTMENT--TO--CERTAIN--POSITIONS; GRANTING
PREFERENCE TO CERTAIN MILITARY VETERANS AND THEIR ELIGIBLE
RELATIVES IN APPOINTMENT TO THESE CERTAIN POSITIONS AND IN
RETENTION DURING REDUCTIONS IN FORCE; ELIMINATING THE
PREFERENCE PROVIDED TO VETERANS AND THEIR ELIGIBLE SPOUSES
UNDER THE MONTANA VETERANS' AND HANDICAPPED PERSONS'
EMPLOYMENT PREFERENCE ACT AND REVISING THE PREFERENCE
PROVIDED TO HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES
UNDER THAT ACT; AND PROVIDING AN APPROPRIATION TO THE
DEPARTMENT OF ADMINISTRATION; AMENDING SECTIONS 10-2-402,
39-30-101 THROUGH 39-30-103, 39-30-201 THROUGH 39-30-203,
39-30-207, 49-2-405, AND 49-3-103, MCA; AND PROVIDING
EFFECTIVE DATES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
NEW SECTION. Section 1. Definitions. For the purposes
of [sections 1 through 7 6 7 AND 12], the following
definitions apply:
(1) "Active duty" means full-time duty with military
pay and allowances in the armed forces, except for training,

for determining physical fitness, or for service in the
reserve or national guard.

(2) "Armed forces" means the United States army, navy,
air force, marine corps, and coast guard.

(3) "Disabled veteran" means a person, whether or not
he is a veteran as defined in this section, who was
separated under honorable conditions from active duty in the
armed forces and has established the present existence of a
service-connected disability or is receiving compensation,
disability retirement benefits, or pension because of a
public statute administered by the veterans administration
or a military department.

(4) "Eligible relative" means:
(a) the unmarried surviving spouse of a veteran or
disabled veteran;
(b) the spouse of a disabled veteran who is unable to
qualify for appointment to a position;
(c) the mother of a veteran who lost his life under
honorable conditions while serving in the armed forces
during a period named in subsections ~~(8)(a)(i) through~~
~~(8)(a)(iii)~~ (9)(A)(I) THROUGH (9)(A)(III) if:

(i) her husband is totally and permanently disabled;
OR
(ii) she is widowed, ~~divorced, or separated~~ from the
father and has not remarried; or AND

1 ~~(iii) she has remarried but is widowed, divorced, or~~
 2 ~~legally separated from her husband when preference is~~
 3 ~~claimed, and~~

4 (d) the mother of a service-connected permanently and
 5 totally disabled veteran if:

6 (i) her husband is totally and permanently disabled;

7 OR

8 (ii) she is widowed, divorced, or separated from the
 9 father and has not remarried; or

10 ~~(iii) she has remarried but is widowed, divorced, or~~
 11 ~~legally separated from her husband when preference is~~
 12 ~~claimed.~~

13 (5) "Position" means a permanent, temporary, or
 14 seasonal position as defined in 2-18-101 for a state
 15 position or a similar permanent, temporary, or seasonal
 16 position with a public employer other than the state.

17 However, the term does not include:

18 (a) a state or local elected official;

19 (b) appointment by an elected official to a body such
 20 as a board, commission, committee, or council;

21 (c) appointment by an elected official to a public
 22 office if the appointment is provided for by law;

23 (d) a department head appointment by the governor or
 24 an executive department head appointment by a mayor, city
 25 manager, county commissioner, or other chief administrative

1 or executive officer of a local government; or

2 (e) engagement as an independent contractor or
 3 employment by an independent contractor.

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

5 (i) any department, office, board, bureau, commission,
 6 agency, or other instrumentality of the executive branch of
 7 the government of the state of Montana or a college,
 8 community college, or university; and

9 (ii) any county, city, or town.

10 (b) The term does not include a school district, a
 11 postsecondary vocational-technical center or program, or any
 12 instrumentality of the legislative or judicial branches of
 13 the government of the state of Montana.

14 (7) "SCORED PROCEDURE" MEANS A WRITTEN TEST,
 15 STRUCTURED ORAL INTERVIEW, PERFORMANCE TEST, OR OTHER
 16 SELECTION PROCEDURE OR A COMBINATION OF SUCH PROCEDURES
 17 WHICH RESULT IN A NUMERICAL SCORE TO WHICH POINTS CAN BE
 18 ADDED.

19 ~~(7)(8)~~ "Under honorable conditions" means a discharge
 20 or separation from active duty characterized by the armed
 21 forces as under honorable conditions. The term includes
 22 honorable discharges and general discharges but does not
 23 include dishonorable discharges or other administrative
 24 discharges characterized as other than honorable.

25 ~~(8)(9)~~ (a) "Veteran" means a person who was separated

1 under honorable conditions from active duty in the armed
2 forces performed:

- 3 (i) in a war;
- 4 (ii) in a campaign or expedition for which a campaign
5 badge has been authorized by the United States congress or
6 the United States department of defense;

7 (iii) during the period beginning April 28, 1952, and
8 ending July 1, 1955; or

9 (iv) for more than 180 consecutive days, other than for
10 training, any part of which occurred during the period
11 beginning February 1, 1955, and ending October 14, 1976.

12 (b) The term does not include a retired member of the
13 United States armed forces who is eligible for or receiving
14 a military retirement allowance based on length of service
15 and does not include any other retired member of a public
16 retirement system, except social security, that is supported
17 in whole or in part by tax revenues.

18 (9)(10) "War" means:

19 (a) the Spanish-American War, beginning on April 21,
20 1898, and ending on July 4, 1902, both dates inclusive;

21 (b) World War I, beginning on April 6, 1917, and
22 ending on July 2, 1921, both dates inclusive;

23 (c) World War II, beginning on December 7, 1941, and
24 ending on April 28, 1952, both dates inclusive;

25 (d) the Korean conflict, military expedition, or

1 police action, beginning on June 26, 1950, and ending on
2 January 31, 1955, both dates inclusive; and

3 (e) the Vietnam conflict, beginning on August 5, 1964,
4 and ending on May 7, 1975, both dates inclusive.

5 NEW SECTION. SECTION 2. SCORED PROCEDURES NOT
6 REQUIRED. NOTHING IN [SECTIONS 1 THROUGH 7 AND 12] OR IN
7 TITLE 39, CHAPTER 30, REQUIRES A PUBLIC EMPLOYER TO USE A
8 SCORED PROCEDURE OR A COMBINATION OF SCORED PROCEDURES FOR
9 SELECTING A PERSON IN AN INITIAL HIRING.

10 ~~NEW-SECTION. Section 2. Scored procedures required.~~
11 ~~For the purpose of applying the point preference provided~~
12 ~~for in {section 3} and Title 39, chapter 30, a public~~
13 ~~employer shall use a scored procedure or a combination of~~
14 ~~scored procedures totaling 100 points for selecting a person~~
15 ~~for appointment to a position. Scored procedures may~~
16 ~~include written examinations, structured oral interviews,~~
17 ~~performance tests, or other quantifiable procedures that~~
18 ~~fairly test the relative capacity and fitness of an~~
19 ~~applicant for a position.~~

20 NEW SECTION. Section 3. Additional points for certain
21 applicants. (1) Except as provided in subsections (2) and
22 (3), a public employer shall add the following points to the
23 score of an applicant for appointment to a position who
24 received 70 points or more in a scored procedure:

25 (a) 5 points if the applicant is a veteran; and

1 (b) 10 points if the applicant is a disabled veteran
2 or an eligible relative.

3 (2) No veteran, disabled veteran, or eligible relative
4 is entitled to the points under subsection (1) unless the
5 person is a United States citizen.

6 (3) A disabled veteran who receives 10 points under
7 subsection (1)(b) is not entitled to an additional 5 points
8 under subsection (1)(a).

9 NEW SECTION. Section 4. Notice and claim of
10 preference. (1) A public employer shall, by posting or on
11 the application form, give notice of the point preference
12 provided in [section 3 2 3].

13 (2) A job applicant who believes he has a point
14 preference shall claim the preference in writing before the
15 time for filing applications for the position involved has
16 passed. Failure to make a timely preference claim for a
17 position is a complete defense to an action instituted by an
18 applicant under [section 5 4 5] with regard to that
19 position.

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

24 NEW SECTION. Section 5. Enforcement of preference.
25 (1) An applicant who believes he is entitled to but has not

1 been given the point preference under [section 3 2 3] may,
2 within 30 days of receipt of the notice of the hiring
3 decision provided for in [section 4 3 4], submit to the
4 public employer a written request for an explanation of the
5 public employer's hiring decision. Within 15 days of receipt
6 of the request, the public employer shall give the applicant
7 a written explanation.

8 (2) After following the procedure described in
9 subsection (1), the applicant may, within 90 days after
10 receipt of notice of the hiring decision, file a petition in
11 the district court in the county in which his application
12 was received by the public employer. The petition must state
13 facts which on their face entitle the applicant to a point
14 preference.

15 (3) (a) Upon filing of the petition, the court shall
16 order the public employer to appear in court at a specified
17 time not less than 10 or more than 30 days after the day the
18 petition was filed and show cause why the applicant was not
19 hired for the position. At the hearing, the public employer
20 has the burden of proving by a preponderance of the evidence
21 that the employer applied the points under [section 3 2 3]
22 and made a reasonable hiring decision. The applicant has
23 the burden of proving by a preponderance of the evidence
24 that he is a preference eligible applicant.

25 (b) The time to appear provided in subsection (3)(a)

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

5 (c) If the public employer does not carry its burden
6 of proof under subsection (3)(a) and the court has found
7 that the applicant is a preference eligible applicant, the
8 court shall order the public employer to reopen the
9 selection process for the position involved and shall grant
10 the applicant reasonable attorney fees and court costs. The
11 remedy provided by this section is the only remedy for a
12 violation of [sections 1 through 7 6 7 AND 12], and a court
13 may not grant any other relief in an action for violation of
14 [sections 1 through 7 6 7 AND 12].

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

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

24 NEW SECTION. Section 6. Retention during reduction in
25 force. (1) Except as provided in subsections (2) and (3),

1 during a reduction in force, a public employer shall retain
2 in a position a:

3 (a) veteran, disabled veteran, or eligible relative
4 whose performance has not been rated unacceptable under a
5 performance appraisal system, over other employees with
6 similar job duties and qualifications and same length of
7 service; and

8 (b) disabled veteran with a service-connected
9 disability of 30% or more whose performance has not been
10 rated unacceptable under a performance appraisal system,
11 over other veterans, disabled veterans, and eligible
12 relatives with similar job duties and qualifications and
13 same length of service.

14 (2) No employee is entitled to preference in retention
15 under subsection (1) unless the person is a United States
16 citizen.

17 (3) The preference in retention under subsection (1)
18 does not apply to a position covered by a collective
19 bargaining agreement.

20 NEW SECTION. Section 7. Adoption of rules. The
21 department of administration shall adopt rules implementing
22 [sections 1 through 6 5 6 AND 12]. The department's rules
23 apply to all public employers, local as well as state.

24 Section 8. Section 10-2-402, MCA, is amended to read:
25 "10-2-402. Superintendent to be given veterans'

1 preference. In the selection of the superintendent of the
 2 Montana veterans' home, the department of institutions shall
 3 apply the preference granted to veterans and disabled
 4 veterans under [section 3 2 3], but not the preference
 5 granted to other persons ~~by under [section 3 2 3] or~~ Title
 6 39, chapter 30."

7 Section 9. Section 39-30-101, MCA, is amended to read:
 8 "39-30-101. Short title. This chapter may be cited as
 9 the "Montana ~~Veterans~~ and Handicapped Persons' Employment
 10 Preference Act."

11 Section 10. Section 39-30-102, MCA, is amended to
 12 read:

13 "39-30-102. Purposes. The purposes of this chapter are
 14 to ~~recognize veterans and disabled veterans for service to~~
 15 ~~their country,~~ recognize past employment discrimination
 16 against handicapped persons, and facilitate the
 17 habilitation, rehabilitation, and readjustment of ~~veterans,~~
 18 ~~disabled veterans, and handicapped~~ these persons."

19 Section 11. Section 39-30-103, MCA, is amended to
 20 read:

21 "39-30-103. Definitions. For the purposes of this
 22 chapter, the following definitions apply:

23 (i) ~~"Active duty" means full-time duty other than for~~
 24 ~~training in the regular components of the United States~~
 25 ~~army, air force, navy, marine corps, or coast guard with~~

1 ~~full pay and allowances. The term does not include monthly~~
 2 ~~drills, summer encampments, initial training, or other~~
 3 ~~inactive or active duty for training in the national guard~~
 4 ~~or reserves;~~

5 (2) ~~"Disabled veteran" means an individual, whether or~~
 6 ~~not he is a veteran as defined in this section, who:~~

7 (a) ~~served on active duty;~~

8 (b) ~~has been separated from service by honorable~~
 9 ~~discharge; and~~

10 (c) ~~suffers a service-connected disability determined~~
 11 ~~by the United States veterans administration to be 30% or~~
 12 ~~more disabling;~~

13 (3) (1) "Eligible spouse" means:

14 (a) ~~the unmarried surviving spouse of a veteran who~~
 15 ~~died while on active duty or whose death resulted from a~~
 16 ~~service-connected disability; or~~

17 (b) the spouse of:

18 (i) ~~a disabled veteran determined by the United States~~
 19 ~~veterans administration to have a 100% service-connected~~
 20 ~~disability who is unable to use his employment preference~~
 21 ~~because of his disability;~~

22 (ii) ~~a person on active duty determined by the United~~
 23 ~~States government to be missing in action or a prisoner of~~
 24 ~~war; or~~

25 (iii) a handicapped person determined by the department

1 of social and rehabilitation services to have a 100%
 2 disability who is unable to use his employment preference
 3 because of his disability.

4 ~~(4)~~(2) "Handicapped person" means an individual
 5 certified by the department of social and rehabilitation
 6 services to have a physical or mental impairment that
 7 substantially limits one or more major life activities, such
 8 as writing, seeing, hearing, speaking, or mobility, and
 9 which limits the individual's ability to obtain, retain, or
 10 advance in employment.

11 ~~(5)~~(3) (a) "Initial hiring" means a personnel action
 12 for which applications are solicited from outside the ranks
 13 of the current employees of:

14 (i) a department, as defined in 2-15-102, for a
 15 position within the executive branch;

16 (ii) a legislative agency, such as the consumer
 17 counsel, environmental quality council, office of the
 18 legislative auditor, legislative council, or office of the
 19 legislative fiscal analyst, for a position within the
 20 legislative branch;

21 (iii) a judicial agency, such as the office of supreme
 22 court administrator, office of supreme court clerk, state
 23 law library, or similar office in a state district court for
 24 a position within the judicial branch;

25 (iv) a city or town for a municipal position, including

1 a city or municipal court position; and

2 (v) a county for a county position, including a
 3 justice's court position.

4 (b) A personnel action limited to current employees of
 5 a specific public entity identified in subsections (a)(i)
 6 through (a)(v) of this subsection ~~(5)~~ (3), current employees
 7 in a reduction-in-force pool who have been laid off from a
 8 specific public entity identified in subsections (a)(i)
 9 through (a)(v) of this subsection ~~(5)~~ (3), or current
 10 participants in a federally authorized employment program is
 11 not an initial hiring.

12 ~~(6)~~(4) (a) "Mental impairment" means:

13 (i) suffering from a disability attributable to mental
 14 retardation, cerebral palsy, epilepsy, autism, or any other
 15 neurologically handicapping condition closely related to
 16 mental retardation and requiring treatment similar to that
 17 required by mentally retarded individuals; or

18 (ii) an organic or mental impairment that has
 19 substantial adverse effects on an individual's cognitive or
 20 volitional functions.

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

1 ~~{7}~~{5} "Position" means a permanent or seasonal
 2 position as defined in 2-18-101 for a state position or a
 3 similar permanent or seasonal position with a public
 4 employer other than the state. However, the term does not
 5 include:

6 (a) a temporary position as defined in 2-18-101 for a
 7 state position or similar temporary position with a public
 8 employer other than the state;

9 (b) a state or local elected official;

10 (c) employment as an elected official's immediate
 11 secretary, legal advisor, court reporter, or administrative,
 12 legislative, or other immediate or first-line aide;

13 (d) appointment by an elected official to a body such
 14 as a board, commission, committee, or council;

15 (e) appointment by an elected official to a public
 16 office if the appointment is provided for by law;

17 (f) a department head appointment by the governor or
 18 an executive department head appointment by a mayor, city
 19 manager, county commissioner, or other chief administrative
 20 or executive officer of a local government; or

21 (g) engagement as an independent contractor or
 22 employment by an independent contractor.

23 ~~{8}~~{6} (a) "Public employer" means:

24 (i) any department, office, board, bureau, commission,
 25 agency, or other instrumentality of the executive, judicial,

1 or legislative branch of the government of the state of
 2 Montana; and

3 (ii) any county, city, or town.

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

10 ~~{7}~~ "SCORED PROCEDURE" MEANS A WRITTEN TEST,
 11 STRUCTURED ORAL INTERVIEW, PERFORMANCE TEST, OR OTHER
 12 SELECTION PROCEDURE OR A COMBINATION OF SUCH PROCEDURES
 13 WHICH RESULT IN A NUMERICAL SCORE TO WHICH POINTS CAN BE
 14 ADDED.

15 ~~{9}~~ "Substantially equal qualifications" means the
 16 qualifications of two or more persons among whom the public
 17 employer cannot make a reasonable determination that the
 18 qualifications held by one person are significantly better
 19 suited for the position than the qualifications held by the
 20 other persons;

21 ~~{10}~~ ~~{a}~~ "Veteran" means a person who:

22 ~~{i}~~ served on active duty during time of war or
 23 declared national emergency or in a campaign or expedition
 24 for which a campaign badge was authorized by the United
 25 States congress or the United States department of defense;

1 and

2 (ii) has been separated from service by honorable

3 discharge;

4 (b) The term does not include a retired member of the

5 United States armed forces who is eligible for or receiving

6 a military retirement allowance based on length of service

7 and does not include any other retired member of a public

8 retirement system, except social security, that is supported

9 in whole or in part by tax revenues;

10 (iii) "War or declared national emergency" means:

11 (a) World War I, beginning on April 6, 1917, and

12 ending on November 11, 1918, both dates inclusive;

13 (b) World War II, beginning on December 7, 1941, and

14 ending on December 31, 1946, both dates inclusive;

15 (c) the Korean conflict, military expedition, or

16 police action, beginning on June 27, 1950, and ending on

17 January 31, 1955, both dates inclusive; and

18 (d) the Vietnam conflict, beginning on August 5, 1964,

19 and ending on May 7, 1975, both dates inclusive."

20 NEW SECTION. SECTION 12. SCORED PROCEDURES NOT

21 REQUIRED. NOTHING IN [SECTIONS 1 THROUGH 7 AND 12] REQUIRES

22 A PUBLIC EMPLOYER TO USE A SCORED PROCEDURE OR A COMBINATION

23 OF SCORED PROCEDURES FOR SELECTING A PERSON IN AN INITIAL

24 HIRING.

25 Section 13. Section 39-30-201, MCA, is amended to

1 read:

2 "39-30-201. Employment Point preference in initial

3 hiring. (1) (a) Except as provided in 10-2-402, in an

4 initial hiring for a position, if a job applicant who is a

5 veteran, disabled veteran, handicapped person, or eligible

6 spouse meets the eligibility requirements contained in

7 39-30-202 and claims a preference as required by 39-30-206,

8 a public employer shall hire the applicant over any other

9 applicant with substantially equal qualifications who is not

10 a preference eligible applicant add 10 points to the score

11 of an applicant who received 70 points or more in a scored

12 procedure.

13 (b) In an initial hiring, a public employer shall hire

14 a disabled veteran or handicapped person over any other

15 preference eligible applicant with substantially equal

16 qualifications.

17 (2) The employment preference provided for in

18 subsection (1) does not apply to a personnel action

19 described in subsection (5) (3)(b) of 39-30-103 or to any

20 other personnel action that is not an initial hiring."

21 Section 14. Section 39-30-202, MCA, is amended to

22 read:

23 "39-30-202. Eligibility requirements. No veteran,

24 disabled veteran, eligible spouse, or handicapped person is

25 entitled to receive employment preference as provided in

1 39-30-201 unless:

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

12 Section 15. Section 39-30-203, MCA, is amended to

13 read:
14 "39-30-203. Duration of preference. Subject to
15 39-30-202,

16 ~~{1} a handicapped person, the or eligible spouse of a~~
17 ~~handicapped person as described in subsection {3}{b}{iii} of~~
18 ~~39-30-103, a disabled veteran, or the spouse of a disabled~~
19 ~~veteran as described in subsection {3}{b}{ii} of 39-30-103~~
20 ~~qualifies for employment preference as long as the disabling~~
21 ~~condition exists,~~

22 ~~{2} a veteran, as defined in 39-30-103, who is not a~~
23 ~~disabled veteran, as defined in 39-30-103, qualifies for~~
24 ~~employment preference for no longer than 15 years following~~
25 ~~separation from service or for no longer than 5 years~~

1 following December 20, 1983, whichever is later:

- 2 ~~{3} the surviving spouse of a veteran as described in~~
- 3 ~~subsection {3}{a} of 39-30-103 qualifies for employment~~
- 4 ~~preference for as long as the spouse remains unmarried, and~~
- 5 ~~{4} the spouse of a person described in subsection~~
- 6 ~~{3}{b}{ii} of 39-30-103 qualifies for employment preference~~
- 7 ~~for as long as the person is missing in action or a prisoner~~
- 8 ~~of war."~~

9 Section 16. Section 39-30-207, MCA, is amended to
10 read:

11 "39-30-207. Enforcement of preference. (1) An
12 applicant who believes he has not been accorded his rights
13 under this chapter may, within 30 days of receipt of the
14 notice of the hiring decision provided for in 39-30-206,
15 submit to the public employer a written request for an
16 explanation of the public employer's hiring decision. Within
17 15 days of receipt of the request, the public employer shall
18 give the applicant a written explanation.

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

25 (3) (a) Upon filing of the petition, the court shall

1 order the public employer to appear in court at a specified
 2 time not less than 10 or more than 30 days after the day the
 3 petition was filed and show cause why the applicant was not
 4 hired for the position. At the hearing, the public employer
 5 has the burden of proving by a preponderance of the evidence
 6 that the employer applied the points under 39-30-201 and
 7 made a reasonable determination-pursuant-to--subsection--(9)
 8 of--39-30-103-and-the hiring decision. The applicant has the
 9 burden of proving by a preponderance of the evidence that he
 10 is a preference eligible applicant.

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

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

25 (4) Failure of an applicant to file a petition under

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

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

9 Section 17. Section 49-2-405, MCA, is amended to read:
 10 "49-2-405. Veterans' and handicapped persons'
 11 employment preference. The application of ~~an employment a~~
 12 preference as provided for in [sections 1 through 7 6 7 AND
 13 12], Title 39, chapter 30, and 10-2-402 by a public employer
 14 as defined in [section 1] and 39-30-103 may not be construed
 15 to constitute a violation of this chapter."

16 Section 18. Section 49-3-103, MCA, is amended to read:
 17 "49-3-103. Permitted distinctions. (1) Nothing in this
 18 chapter shall prohibit any public or private employer:

19 (a) from enforcing a differentiation based on marital
 20 status, age, or physical or mental handicap when based on a
 21 bona fide occupational qualification reasonably necessary to
 22 the normal operation of the particular business or where the
 23 differentiation is based on reasonable factors other than
 24 age;

25 (b) from observing the terms of a bona fide seniority

1 system or any bona fide employee benefit plan, such as a
2 retirement, pension, or insurance plan, which is not a
3 subterfuge to evade the purposes of this chapter, except
4 that no such employee benefit plan shall excuse the failure
5 to hire any individual; or

6 (c) from discharging or otherwise disciplining an
7 individual for good cause.

8 (2) The application of ~~an-employment~~ a preference as
9 provided for in [sections 1 through 7 6 7 AND 12], Title 39,
10 chapter 30, and 10-2-402 by a public employer as defined in
11 [section 1] and 39-30-103 may not be construed to constitute
12 a violation of this chapter."

13 NEW SECTION. SECTION 19. APPROPRIATION. THERE IS
14 APPROPRIATED FROM THE GENERAL FUND TO THE DEPARTMENT OF
15 ADMINISTRATION \$6,519 DURING THE BIENNIUM BEGINNING JULY 1,
16 1987, FOR THE IMPLEMENTATION OF [SECTIONS 1 THROUGH 7 AND
17 12].

18 NEW SECTION. SECTION 20. EXTENSION OF AUTHORITY. ANY
19 EXISTING AUTHORITY OF THE DEPARTMENT OF ADMINISTRATION TO
20 MAKE RULES ON THE SUBJECT OF THE PROVISIONS OF THIS ACT IS
21 EXTENDED TO THE PROVISIONS OF THIS ACT.

22 NEW SECTION. SECTION 21. EFFECTIVE DATES. (1) SECTION
23 19 AND THIS SECTION ARE EFFECTIVE JULY 1, 1987.

24 (2) SECTIONS 1 THROUGH 18 AND 20 ARE EFFECTIVE OCTOBER
25 1, 1987.

-End-

STATEMENT OF INTENT

HOUSE BILL 38

House State Administration Committee

A statement of intent is required for this bill because section ~~6 7 6~~ requires the department of administration to adopt rules implementing sections 1 through 5 ~~6 5 AND 11~~. The legislature intends the rules to adequately provide for the administration of the point preference provided for in section ~~7 3~~ and ~~the retention preference provided for in section 5 6~~, but to include only those rules that are reasonably necessary.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to both state and local government employers. In formulating its rules, the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of public employers.

It is the intent of the legislature that the department formulate and adopt rules relating but not limited to the following matters and take into account the following considerations:

(1) Claiming preference -- documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant shall document and submit evidence of such things as the applicant's status as a veteran, disabled veteran, eligible relative, and United States citizen. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants and that, once an applicant has substantially complied with the rules, a public employer should make every reasonable attempt to verify the existence of the preference.

(2) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the congress of the United States or department of defense.

(3) Separations and discharges. The legislature intends the rules to apply federal law and further define separations under honorable conditions and the various types



1 of discharges.

2 (4) Hiring decision notices and explanations. The
3 legislature intends the rules to provide for the form and
4 content of written notices of hiring decisions, including
5 whether the position was obtained as the result of
6 application of the point preference by the public employer,
7 written requests for explanations of hiring decisions, and
8 written explanations of hiring decisions.

9 (5) Reopening of selection process. The legislature
10 intends the rules to provide for a method of reopening the
11 selection process for a job should a court order the
12 selection process reopened and to include a method of giving
13 notice to those who applied for the job, informing them of
14 the reopening and the reason therefor.

15 ~~(6) Appraisal methods. The legislature intends the~~
16 ~~rules to assist public employers in developing methods of~~
17 ~~appraising employee performance for the purpose of applying~~
18 ~~the retention preference.~~

1 HOUSE BILL NO. 38

2 INTRODUCED BY PAVLOVICH

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING--CERTAIN
5 PUBLIC--EMPLOYERS--TO--USE--SCORED--PROCEDURES--FOR--SELECTING
6 PERSONS--FOR--APPOINTMENT--TO--CERTAIN--POSITIONS; GRANTING
7 PREFERENCE TO CERTAIN MILITARY VETERANS AND THEIR ELIGIBLE
8 RELATIVES IN APPOINTMENT TO THESE CERTAIN POSITIONS AND IN
9 RETENTION DURING REDUCTIONS IN FORCE; ELIMINATING THE
10 PREFERENCE PROVIDED TO VETERANS AND THEIR ELIGIBLE SPOUSES
11 UNDER THE MONTANA VETERANS' AND HANDICAPPED PERSONS'
12 EMPLOYMENT PREFERENCE ACT AND REVISING THE PREFERENCE
13 PROVIDED TO HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES
14 UNDER THAT ACT; AND PROVIDING AN APPROPRIATION TO THE
15 DEPARTMENT OF ADMINISTRATION; AMENDING SECTIONS 10-2-402,
16 39-30-101 THROUGH 39-30-103, 39-30-201 THROUGH 39-30-203,
17 39-30-207, 49-2-405, AND 49-3-103, MCA; AND PROVIDING
18 EFFECTIVE DATES."

19
20 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

21 NEW SECTION. Section 1. Definitions. For the purposes
22 of [sections 1 through 7 ~~6~~ 7-AND-12 6 AND 11], the following
23 definitions apply:

24 (1) "Active duty" means full-time duty with military
25 pay and allowances in the armed forces, except for training,

1 for determining physical fitness, or for service in the
2 reserve or national guard.

3 (2) "Armed forces" means the United States army, navy,
4 air force, marine corps, and coast guard.

5 (3) "Disabled veteran" means a person, whether or not
6 he is a veteran as defined in this section, who was
7 separated under honorable conditions from active duty in the
8 armed forces and has established the present existence of a
9 service-connected disability or is receiving compensation,
10 disability retirement benefits, or pension because of a
11 public statute administered by the veterans administration
12 or a military department.

13 (4) "Eligible relative" means:

14 (a) the unmarried surviving spouse of a veteran or
15 disabled veteran;

16 (b) the spouse of a disabled veteran who is unable to
17 qualify for appointment to a position;

18 (c) the mother of a veteran who lost his life under
19 honorable conditions while serving in the armed forces
20 during a period named in subsections ~~(8)(a)(i) through~~
21 ~~(8)(a)(iii)~~ (9)(A)(I) THROUGH (9)(A)(III) if:

22 (i) her husband is totally and permanently disabled;

23 OR

24 (ii) she is widowed, divorced, or separated from the
25 father and has not remarried; or AND

1 ~~(iii) she has remarried but is widowed, divorced, or~~
 2 ~~legally separated from her husband when preference is~~
 3 ~~claimed; and~~

4 (d) the mother of a service-connected permanently and
 5 totally disabled veteran if:

6 (i) her husband is totally and permanently disabled;

7 OR

8 (ii) she is widowed, divorced, or separated from the
 9 father and has not remarried; or

10 ~~(iii) she has remarried but is widowed, divorced, or~~
 11 ~~legally separated from her husband when preference is~~
 12 ~~claimed.~~

13 (5) "Position" means a permanent, temporary, or
 14 seasonal position as defined in 2-18-101 for a state
 15 position or a similar permanent, temporary, or seasonal
 16 position with a public employer other than the state.

17 However, the term does not include:

18 (a) a state or local elected official;

19 (b) appointment by an elected official to a body such
 20 as a board, commission, committee, or council;

21 (c) appointment by an elected official to a public
 22 office if the appointment is provided for by law;

23 (d) a department head appointment by the governor or
 24 an executive department head appointment by a mayor, city

25 manager, county commissioner, or other chief administrative

1 or executive officer of a local government; or

2 (e) engagement as an independent contractor or
 3 employment by an independent contractor.

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

5 (i) any department, office, board, bureau, commission,
 6 agency, or other instrumentality of the executive branch of
 7 the government of the state of Montana or a college,
 8 community college, or university; and

9 (ii) any county, city, or town.

10 (b) The term does not include a school district, a
 11 postsecondary vocational-technical center or program, or any
 12 instrumentality of the legislative or judicial branches of
 13 the government of the state of Montana.

14 (7) "SCORED PROCEDURE" MEANS A WRITTEN TEST,
 15 STRUCTURED ORAL INTERVIEW, PERFORMANCE TEST, OR OTHER
 16 SELECTION PROCEDURE OR A COMBINATION OF SUCH PROCEDURES
 17 WHICH RESULTS IN A NUMERICAL SCORE TO WHICH POINTS CAN BE
 18 ADDED.

19 ~~(7)~~(8) "Under honorable conditions" means a discharge
 20 or separation from active duty characterized by the armed
 21 forces as under honorable conditions. The term includes
 22 honorable discharges and general discharges but does not
 23 include dishonorable discharges or other administrative
 24 discharges characterized as other than honorable.

25 ~~(8)~~(9) (a) "Veteran" means a person who was separated

1 under honorable conditions from active duty in the armed
2 forces performed:

- 3 (i) in a war;
- 4 (ii) in a campaign or expedition for which a campaign
5 badge has been authorized by the United States congress or
6 the United States department of defense;
- 7 (iii) during the period beginning April 28, 1952, and
8 ending July 1, 1955; or
- 9 (iv) for more than 180 consecutive days, other than for
10 training, any part of which occurred during the period
11 beginning February 1, 1955, and ending October 14, 1976.
- 12 (b) The term does not include a retired member of the
13 United States armed forces who is eligible for or receiving
14 a military retirement allowance based on length of service
15 and does not include any other retired member of a public
16 retirement system, except social security, that is supported
17 in whole or in part by tax revenues.

18 ~~(9)~~(10) "War" means:

- 19 (a) the Spanish-American War, beginning on April 21,
20 1898, and ending on July 4, 1902, both dates inclusive;
- 21 (b) World War I, beginning on April 6, 1917, and
22 ending on July 2, 1921, both dates inclusive;
- 23 (c) World War II, beginning on December 7, 1941, and
24 ending on April 28, 1952, both dates inclusive;
- 25 (d) the Korean conflict, military expedition, or

1 police action, beginning on June 26, 1950, and ending on
2 January 31, 1955, both dates inclusive; and
3 (e) the Vietnam conflict, beginning on August 5, 1964,
4 and ending on May 7, 1975, both dates inclusive.

5 NEW SECTION. SECTION 2. SCORED PROCEDURES NOT
6 REQUIRED. NOTHING IN [SECTIONS 1 THROUGH 7-AND-12 6 AND 11]
7 OR IN TITLE 39, CHAPTER 30, REQUIRES A PUBLIC EMPLOYER TO
8 USE A SCORED PROCEDURE OR A COMBINATION OF SCORED PROCEDURES
9 FOR SELECTING A PERSON IN AN INITIAL HIRING.

10 NEW SECTION. Section 2. Scored procedures required.
11 For the purpose of applying the point preference provided
12 for in {section 3} and Title 39, chapter 30, a public
13 employer shall use a scored procedure or a combination of
14 scored procedures totaling 100 points for selecting a person
15 for appointment to a position. Scored procedures may
16 include written examinations, structured oral interviews,
17 performance tests, or other quantifiable procedures that
18 fairly test the relative capacity and fitness of an
19 applicant for a position.

20 NEW SECTION. Section 3. Additional points for certain
21 applicants. (1) Except as provided in subsections (2) and
22 (3), a public employer shall add the following points to the
23 score of an applicant for appointment to a position who
24 received 70 points or more in a scored procedure:

- 25 (a) 5 points if the applicant is a veteran; and

1 (b) 10 points if the applicant is a disabled veteran
2 or an eligible relative.

3 (2) No veteran, disabled veteran, or eligible relative
4 is entitled to the points under subsection (1) unless the
5 person is a United States citizen.

6 (3) A disabled veteran who receives 10 points under
7 subsection (1)(b) is not entitled to an additional 5 points
8 under subsection (1)(a).

9 NEW SECTION. Section 4. Notice and claim of
10 preference. (1) A public employer shall, by posting or on
11 the application form, give notice of the point preference
12 provided in [section 3 2 3].

13 (2) A job applicant who believes he has a point
14 preference shall claim the preference in writing before the
15 time for filing applications for the position involved has
16 passed. Failure to make a timely preference claim for a
17 position is a complete defense to an action instituted by an
18 applicant under [section 5 4 5] with regard to that
19 position.

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

24 NEW SECTION. Section 5. Enforcement of preference.
25 (1) An applicant who believes he is entitled to but has not

1 been given the point preference under [section 3 2 3] may,
2 within 30 days of receipt of the notice of the hiring
3 decision provided for in [section 4 3 4], submit to the
4 public employer a written request for an explanation of the
5 public employer's hiring decision. Within 15 days of receipt
6 of the request, the public employer shall give the applicant
7 a written explanation.

8 (2) After following the procedure described in
9 subsection (1), the applicant may, within 90 days after
10 receipt of notice of the hiring decision, file a petition in
11 the district court in the county in which his application
12 was received by the public employer. The petition must state
13 facts which on their face entitle the applicant to a point
14 preference.

15 (3) (a) Upon filing of the petition, the court shall
16 order the public employer to appear in court at a specified
17 time not less than 10 or more than 30 days after the day the
18 petition was filed and show cause why the applicant was not
19 hired for the position. At the hearing, the public employer
20 has the burden of proving by a preponderance of the evidence
21 that the employer applied the points under [section 3 2 3]
22 and made a reasonable hiring decision. The applicant has
23 the burden of proving by a preponderance of the evidence
24 that he is a preference eligible applicant.

25 (b) The time to appear provided in subsection (3)(a)

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

5 (c) If the public employer does not carry its burden
6 of proof under subsection (3)(a) and the court has found
7 that the applicant is a preference eligible applicant, the
8 court shall order the public employer to reopen the
9 selection process for the position involved and shall grant
10 the applicant reasonable attorney fees and court costs. The
11 remedy provided by this section is the only remedy for a
12 violation of [sections 1 through 7 ~~6 7-AND-12 6 AND 11~~], and
13 a court may not grant any other relief in an action for
14 violation of [sections 1 through 7 ~~6 7-AND-12 6 AND 11~~].

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

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

24 ~~NEW SECTION. Section 6. Retention during reduction in~~
25 ~~force. (1) Except as provided in subsections (2) and (3),~~

1 during a reduction in force, a public employer shall retain
2 in a position a:

3 (a) ~~veteran, disabled veteran, or eligible relative~~
4 ~~whose performance has not been rated unacceptable under a~~
5 ~~performance appraisal system over other employees with~~
6 ~~similar job duties and qualifications and same length of~~
7 ~~service, and~~

8 (b) ~~disabled veteran with a service-connected~~
9 ~~disability of 30% or more whose performance has not been~~
10 ~~rated unacceptable under a performance appraisal system,~~
11 ~~over other veterans, disabled veterans, and eligible~~
12 ~~relatives with similar job duties and qualifications and~~
13 ~~same length of service.~~

14 (2) ~~No employee is entitled to preference in retention~~
15 ~~under subsection (1) unless the person is a United States~~
16 ~~citizen.~~

17 (3) ~~The preference in retention under subsection (1)~~
18 ~~does not apply to a position covered by a collective~~
19 ~~bargaining agreement.~~

20 ~~NEW SECTION. Section 6. Adoption of rules. The~~
21 ~~department of administration shall adopt rules implementing~~
22 ~~[sections 1 through 6 ~~5 6-AND-12 5 AND 11~~]. The~~
23 ~~department's rules apply to all public employers, local as~~
24 ~~well as state.~~

25 Section 7. Section 10-2-402, MCA, is amended to read:

1 "10-2-402. Superintendent to be given veterans'
 2 preference. In the selection of the superintendent of the
 3 Montana veterans' home, the department of institutions shall
 4 apply the preference granted to veterans and disabled
 5 veterans under [section 3 2 3], but not the preference
 6 granted to other persons, by under [section 3 2 3] or Title
 7 39, chapter 30."

8 Section 8. Section 39-30-101, MCA, is amended to read:
 9 "39-30-101. Short title. This chapter may be cited as
 10 the "Montana Veterans¹ and Handicapped Persons' Employment
 11 Preference Act".

12 Section 9. Section 39-30-102, MCA, is amended to read:
 13 "39-30-102. Purposes. The purposes of this chapter are
 14 to recognize veterans and disabled veterans for service to
 15 their country, recognize past employment discrimination
 16 against handicapped persons, and facilitate the
 17 habilitation, rehabilitation, and readjustment of veterans,
 18 disabled veterans, and handicapped these persons."

19 Section 10. Section 39-30-103, MCA, is amended to
 20 read:

21 "39-30-103. Definitions. For the purposes of this
 22 chapter, the following definitions apply:

23 (i) "Active duty" means full-time duty other than for
 24 training in the regular components of the United States
 25 army, air force, navy, marine corps, or coast guard with

1 full pay and allowances. The term does not include monthly
 2 drills, summer encampments, initial training, or other
 3 inactive or active duty for training in the national guard
 4 or reserves:

5 (2) "Disabled veteran" means an individual, whether or
 6 not he is a veteran as defined in this section, who:

7 (a) served on active duty;

8 (b) has been separated from service by honorable
 9 discharge; and

10 (c) suffers a service-connected disability determined
 11 by the United States veterans administration to be 30% or
 12 more disabling;

13 (3)(1) "Eligible spouse" means:

14 (a) the unmarried surviving spouse of a veteran who
 15 died while on active duty or whose death resulted from a
 16 service-connected disability; or

17 (b) the spouse of:

18 (i) a disabled veteran determined by the United States
 19 veterans administration to have a 100% service-connected
 20 disability who is unable to use his employment preference
 21 because of his disability;

22 (ii) a person on active duty determined by the United
 23 States government to be missing in action or a prisoner of
 24 war; or

25 (iii) a handicapped person determined by the department

1 of social and rehabilitation services to have a 100%
2 disability who is unable to use his employment preference
3 because of his disability.

4 {4}(2) "Handicapped person" means an individual
5 certified by the department of social and rehabilitation
6 services to have a physical or mental impairment that
7 substantially limits one or more major life activities, such
8 as writing, seeing, hearing, speaking, or mobility, and
9 which limits the individual's ability to obtain, retain, or
10 advance in employment.

11 {5}(3) (a) "Initial hiring" means a personnel action
12 for which applications are solicited from outside the ranks
13 of the current employees of:

14 (i) a department, as defined in 2-15-102, for a
15 position within the executive branch;

16 (ii) a legislative agency, such as the consumer
17 counsel, environmental quality council, office of the
18 legislative auditor, legislative council, or office of the
19 legislative fiscal analyst, for a position within the
20 legislative branch;

21 (iii) a judicial agency, such as the office of supreme
22 court administrator, office of supreme court clerk, state
23 law library, or similar office in a state district court for
24 a position within the judicial branch;

25 (iv) a city or town for a municipal position, including

1 a city or municipal court position; and

2 (v) a county for a county position, including a
3 justice's court position.

4 (b) A personnel action limited to current employees of
5 a specific public entity identified in subsections (a)(i)
6 through (a)(v) of this subsection {5} (3), current employees
7 in a reduction-in-force pool who have been laid off from a
8 specific public entity identified in subsections (a)(i)
9 through (a)(v) of this subsection {5} (3), or current
10 participants in a federally authorized employment program is
11 not an initial hiring.

12 {6}(4) (a) "Mental impairment" means:

13 (i) suffering from a disability attributable to mental
14 retardation, cerebral palsy, epilepsy, autism, or any other
15 neurologically handicapping condition closely related to
16 mental retardation and requiring treatment similar to that
17 required by mentally retarded individuals; or

18 (ii) an organic or mental impairment that has
19 substantial adverse effects on an individual's cognitive or
20 volitional functions.

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

{7}{5} "Position" means a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position 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 advisor, 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; or

(g) engagement as an independent contractor or employment by an independent contractor.

{8}{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 postsecondary vocational-technical center or 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) "SCORED PROCEDURE" MEANS A WRITTEN TEST, STRUCTURED ORAL INTERVIEW, PERFORMANCE TEST, OR OTHER SELECTION PROCEDURE OR A COMBINATION OF SUCH PROCEDURES WHICH RESULTS IN A NUMERICAL SCORE TO WHICH POINTS CAN BE ADDED.

~~(9) "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.~~

~~{10} (a) "Veteran" means a person who:~~

~~(i) served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States congress or the United States department of defense;~~

1 and
 2 ~~{ii} has been separated from service by honorable~~
 3 discharge;

4 ~~{b} The term does not include a retired member of the~~
 5 ~~United States armed forces who is eligible for or receiving~~
 6 ~~a military retirement allowance based on length of service~~
 7 ~~and does not include any other retired member of a public~~
 8 ~~retirement system, except social security, that is supported~~
 9 ~~in whole or in part by tax revenues;~~

10 ~~{ii} "War or declared national emergency" means:~~

11 ~~{a} World War I, beginning on April 6, 1917, and~~
 12 ~~ending on November 11, 1918, both dates inclusive;~~

13 ~~{b} World War II, beginning on December 7, 1941, and~~
 14 ~~ending on December 31, 1946, both dates inclusive;~~

15 ~~{c} the Korean conflict, military expedition, or~~
 16 ~~police action, beginning on June 27, 1950, and ending on~~
 17 ~~January 31, 1955, both dates inclusive; and~~

18 ~~{d} the Vietnam conflict, beginning on August 5, 1964,~~
 19 ~~and ending on May 7, 1975, both dates inclusive."~~

20 NEW SECTION. SECTION 11. SCORED PROCEDURES NOT
 21 REQUIRED. NOTHING IN [SECTIONS 1 THROUGH 7 AND 12 6 AND 11]
 22 REQUIRES A PUBLIC EMPLOYER TO USE A SCORED PROCEDURE OR A
 23 COMBINATION OF SCORED PROCEDURES FOR SELECTING A PERSON IN
 24 AN INITIAL HIRING.

25 Section 12. Section 39-30-201, MCA, is amended to

1 read:

2 "39-30-201. Employment Point preference in initial
 3 hiring. (1) ~~{e}~~ Except as provided in 10-2-402, in an
 4 initial hiring for a position, if a job applicant who is a
 5 ~~veteran, disabled veteran,~~ handicapped person, or eligible
 6 spouse meets the eligibility requirements contained in
 7 39-30-202 and claims a preference as required by 39-30-206,
 8 a public employer shall ~~hire the applicant over any other~~
 9 ~~applicant with substantially equal qualifications who is not~~
 10 ~~a preference eligible applicant~~ add 10 points to the score
 11 of an applicant who received 70 points or more in a scored
 12 procedure.

13 ~~{b} In an initial hiring, a public employer shall hire~~
 14 ~~a disabled veteran or handicapped person over any other~~
 15 ~~preference eligible applicant with substantially equal~~
 16 ~~qualifications.~~

17 (2) The employment preference provided for in
 18 subsection (1) does not apply to a personnel action
 19 described in subsection ~~{5}~~ {3}(b) of 39-30-103 or to any
 20 other personnel action that is not an initial hiring."

21 Section 13. Section 39-30-202, MCA, is amended to
 22 read:

23 "39-30-202. Eligibility requirements. No ~~veteran,~~
 24 ~~disabled veteran,~~ eligible spouse, or handicapped person is
 25 entitled to receive employment preference as provided in

1 39-30-201 unless:

2 (1) he is a United States citizen;

3 (2) he has resided continuously in the state for at

4 least 1 year immediately before applying for employment;

5 (3) if applying for municipal or county employment, he

6 has resided for at least 30 days immediately before applying

7 for employment in the city, town, or county in which

8 employment is sought; and

9 (4) he meets those requirements considered necessary

10 by a public employer to successfully perform the essential

11 duties of the position for which he is applying."

12 Section 14. Section 39-30-203, MCA, is amended to

13 read:

14 "39-30-203. Duration of preference. Subject to

15 39-30-202,

16 ~~{i}~~ a handicapped person, ~~the~~ or eligible spouse of ~~a~~

17 ~~handicapped person as described in subsection {3}{b}{iii} of~~

18 ~~39-30-103, a disabled veteran, or the spouse of a disabled~~

19 ~~veteran as described in subsection {3}{b}{i} of 39-30-103~~

20 ~~qualifies for employment preference as long as the disabling~~

21 ~~condition exists,~~

22 ~~{2} a veteran, as defined in 39-30-103, who is not a~~

23 ~~disabled veteran, as defined in 39-30-103, qualifies for~~

24 ~~employment preference for no longer than 15 years following~~

25 ~~separation from service or for no longer than 5 years~~

1 ~~following December 20, 1983, whichever is later,~~

2 ~~{3} the surviving spouse of a veteran as described in~~

3 ~~subsection {3}{a} of 39-30-103, qualifies for employment~~

4 ~~preference for as long as the spouse remains unmarried, and~~

5 ~~{4} the spouse of a person described in subsection~~

6 ~~{3}{b}{ii} of 39-30-103, qualifies for employment preference~~

7 ~~for as long as the person is missing in action or a prisoner~~

8 ~~of war."~~

9 Section 15. Section 39-30-207, MCA, is amended to

10 read:

11 "39-30-207. Enforcement of preference. (1) An

12 applicant who believes he has not been accorded his rights

13 under this chapter may, within 30 days of receipt of the

14 notice of the hiring decision provided for in 39-30-206,

15 submit to the public employer a written request for an

16 explanation of the public employer's hiring decision. Within

17 15 days of receipt of the request, the public employer shall

18 give the applicant a written explanation.

19 (2) The applicant may, within 90 days after receipt of

20 notice of the hiring decision, file a petition in the

21 district court in the county in which his application was

22 received by the public employer. The petition must state

23 facts which on their face entitle the applicant to an

24 employment preference.

25 (3) (a) Upon filing of the petition, the court shall

1 order the public employer to appear in court at a specified
 2 time not less than 10 or more than 30 days after the day the
 3 petition was filed and show cause why the applicant was not
 4 hired for the position. At the hearing, the public employer
 5 has the burden of proving by a preponderance of the evidence
 6 that the employer applied the points under 39-30-201 and
 7 made a reasonable determination-pursuant-to-subsection-(9)
 8 of-39-30-103-and-the hiring decision. The applicant has the
 9 burden of proving by a preponderance of the evidence that he
 10 is a preference eligible applicant.

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

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

25 (4) Failure of an applicant to file a petition under

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

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

9 Section 16. Section 49-2-405, MCA, is amended to read:
 10 "49-2-405. Veterans' and handicapped persons'
 11 employment preference. The application of ~~an--employment a~~
 12 preference as provided for in [sections 1 through 7 6 7-AND
 13 12 6 AND 11], Title 39, chapter 30, and 10-2-402 by a public
 14 employer as defined in [section 1] and 39-30-103 may not be
 15 construed to constitute a violation of this chapter."

16 Section 17. Section 49-3-103, MCA, is amended to read:
 17 "49-3-103. Permitted distinctions. (1) Nothing in this
 18 chapter shall prohibit any public or private employer:

19 (a) from enforcing a differentiation based on marital
 20 status, age, or physical or mental handicap when based on a
 21 bona fide occupational qualification reasonably necessary to
 22 the normal operation of the particular business or where the
 23 differentiation is based on reasonable factors other than
 24 age;

25 (b) from observing the terms of a bona fide seniority

1 system or any bona fide employee benefit plan, such as a
2 retirement, pension, or insurance plan, which is not a
3 subterfuge to evade the purposes of this chapter, except
4 that no such employee benefit plan shall excuse the failure
5 to hire any individual; or

6 (c) from discharging or otherwise disciplining an
7 individual for good cause.

8 (2) The application of an-employment a preference as
9 provided for in [sections 1 through 7 6 7-AND-12 6 AND 11],
10 Title 39, chapter 30, and 10-2-402 by a public employer as
11 defined in [section 1] and 39-30-103 may not be construed to
12 constitute a violation of this chapter."

13 NEW SECTION. SECTION 18. APPROPRIATION. THERE IS
14 APPROPRIATED FROM THE GENERAL FUND TO THE DEPARTMENT OF
15 ADMINISTRATION \$6,519 DURING THE BIENNIUM BEGINNING JULY 1,
16 1987, FOR THE IMPLEMENTATION OF [SECTIONS 1 THROUGH 7-AND-12
17 6 AND 11].

18 NEW SECTION. SECTION 19. EXTENSION OF AUTHORITY. ANY
19 EXISTING AUTHORITY OF THE DEPARTMENT OF ADMINISTRATION TO
20 MAKE RULES ON THE SUBJECT OF THE PROVISIONS OF THIS ACT IS
21 EXTENDED TO THE PROVISIONS OF THIS ACT.

22 NEW SECTION. SECTION 20. EFFECTIVE DATES. (1) SECTION
23 19 18 AND THIS SECTION ARE EFFECTIVE JULY 1, 1987.

24 (2) SECTIONS 1 THROUGH 18--AND--20 17 AND 19 ARE
25 EFFECTIVE OCTOBER 1, 1987.

-End-

STANDING COMMITTEE REPORT

Page 1 of 4 pages

Finance and Claims

Page 2 of 4 pages

House Bill 38

April 13 19 87

SENATE

April 13 19 87

MR. PRESIDENT

We, your committee on FINANCE AND CLAIMS

having had under consideration House Bill No. 38

third reading copy (blue color)

REVISING VETERANS AND HANDICAPPED PERSONS EMPLOYMENT PREFERENCE ACT

PAVLOVICH (Williams)

Respectfully report as follows: That House Bill No. 38 be amended as follows:

- 1. Statement of Intent, page 1, line 6. Strike: "6" Insert: "7"
2. Statement of Intent, page 1, line 7. Strike: "5 AND 11" Insert: "6"
3. Statement of Intent, page 1, line 11. Following: "6" Insert: "and the retention preference provided for in section 6"
4. Statement of Intent, page 3. Following: line 18 Insert: "(6) Appraisal methods. The legislature intends the rules to assist public employers in developing methods of appraising employee performance for the purpose of applying the retention preference."
5. Title, lines 12 through 14. Strike: "AND" on line 12 through "ACT" on line 14

6. Page 1, line 22. Strike: "6 AND 11" Insert: "7"

7. Page 4, lines 7 and 8. Strike: "or" on line 7 through "university" on line 8

8. Page 4, line 11. Following: "," Insert: "a community college, the board of regents of higher education, the Montana university system,"

9. Page 6, line 6. Strike: "6 AND 11" Insert: "7"

10. Page 6, line 7. Strike: "OR" through "30,"

11. Page 6, line 9. Strike: "IN" through "HIRING" Insert: "for employment"

12. Page 9, line 12. Strike: "6 AND 11" Insert: "7"

13. Page 9, line 14. Strike: "6 AND 11" Insert: "7"

14. Page 10. Following: line 19 Insert: "NEW SECTION. Section 6. Retention during reduction in force. (1) Except as provided in subsections (2) and (3), during a reduction in force, a public employer shall retain in a position a: (a) veteran, disabled veteran, or eligible relative whose performance has not been rated unacceptable under a performance appraisal system, over other employees with similar job duties and qualifications and the same length of service; and (b) disabled veteran with a service-connected disability of 30% or more whose performance has not been rated unacceptable under a performance appraisal system,

XXXXXX XXXXXX

(continued)

Chairman

(CONTINUED)

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April 13 19 87

over other veterans, disabled veterans, and eligible relatives with similar job duties and qualifications and the same length of service.

(2) No employee is entitled to preference in retention under subsection (1) unless the person is a United States citizen.

(3) The preference in retention under subsection (1) does not apply to a position covered by a collective bargaining agreement."

Renumber: subsequent sections

15. Page 10, line 22.
Strike: "5 AND 11"
Insert: "6"

16. Page 16, lines 10 through 14.
Following: "(7)" on line 10
Strike: "SCORED" through "ADDED" on line 14
Insert: "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"

17. Page 17, lines 20 through 24.
Strike: section 11 in its entirety
Renumber: subsequent sections

18. Page 18, line 2.
Strike: "Point"
Insert: "Employment"

19. Page 18, line 2.
Following: "a)"
Insert: "(a)"

20. Page 18, lines 10 and 12.
Strike: "add" on line 10 through "procedure" on line 12
Insert: "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 handicapped person over an eligible spouse with substantially equal qualifications"

(continued)

A

NE

AND AS AMENDED
BE CONCURRED IN

April 13 19 87

21. Page 21, line 6.
Strike: "applied" through "and"

22. Page 21, line 8.
Strike: "hiring" through "The"
Insert: "determination pursuant to 39-30-103(7) and the"

23. Page 22, line 13.
Strike: "6 AND 11"
Insert: "7"

24. Page 23, line 9.
Strike: "6 AND 11"
Insert: "7"

25. Page 23, line 17.
Strike: "6 AND 11"
Insert: "7"

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SENATOR REGAN, Chairman