SCHOOL OF LAW
UNIVERSITY of WASHINGTON

MEMORANDUM

April 24, 2019

To: Noah Purcell, Solicitor General
Taylor Wonhoff, Deputy General Counsel, Office of the Governor

From: Hugh Spitzer, Professor of Law

Re: I-1000 and Veterans Preferences

I am following up on my conversations yesterday with each of you about apparent concerns raised in the Legislature about whether Initiative 1000 might hinder the functioning of RCW 41.04.010, which provides veterans with additional percentages in the scoring of competitive examinations for public employment and promotion. I conclude that it is highly unlikely Washington courts would rule that I-1000 would interfere with the operation of that statute.

I have been informed that at the April 18, 2019, Joint House-Senate Committee Hearing on Initiative 1000, the following exchange transpired between State Representative Matthew Shea and Edie Adams of the Office of Program Research:

- *Representative Matt Shea: "Thank you Madam Chair. For those of us who are veterans, there is a concerning part of the definition section here, that appears to prohibit preferential treatment for somebody's honorably discharged status. But we routinely seem to do that all the time, with civil service points and schooling. Am I reading that correctly?"*

- *Edie Adams, OPR: Yes, Rep. Shea. "The initiative will now prohibit the use of preferential treatment with respect to veterans, and all other listed characteristics. There are a number of state laws that provide preferences for veterans. None of those statutes are being amended by the initiative. So I guess the court would have to try and harmonize those statutes with the provisions of the initiative, to the extent that there is a conflict. Under the initiative, preferential treatment is defined as using that characteristic, so veteran status, as the sole factor to choose a lesser qualified candidate over a more qualified candidate."*

Unfortunately, Ms. Adams did not explain in any detail how she reached her conclusions. I-1000 was carefully drafted to take into account a number of other relevant statutes, and, in my view, it is altogether incorrect to conclude that I-1000 would prohibit the use of the allocation of additional percentages or points for veterans as part of the employment or promotion process.

I will briefly suggest how the history, and a straightforward reading of I-1000 and RCW 41.04.010, make it clear that I-1000 poses no conflicts whatsoever with the latter statute's implementation.

By way of background, one of the flaws in Initiative 200 (I-200) was its failure to define the meaning of one of I-200's principal pillars, "Preferential Treatment."

In the November 3, 1998 State of Washington Voters Pamphlet, General Election 14 (Statement For I-200), the official ballot explanatory statement said in part:

"The measure does not define the term `preferential treatment,' and does not specify how continued implementation or enforcement of existing laws would be affected if this measure were approved. The effect of the proposed measure would thus depend on how its provisions are interpreted and applied."

Recognizing this ambiguity, last year the One Washington Equality Campaign Legal Committee drafted the following definition of "Preferential Treatment," now found in Section 11(d) of Initiative 1000:

> 11(d) "Preferential treatment" means the act of using race, sex, color, ethnicity, national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, and honorably discharged veteran or military status as the sole qualifying factor to select a lesser qualified candidate over a more qualified candidate for a public education, public employment, or public contracting opportunity.

I-1000 permits various affirmative action programs to increase diversity in public education, public employment, and public contracting. The diversity meant to be promoted includes, among other categories, honorably discharged veterans or diversity based on military status. "Affirmative Action" is defined as a policy in which an individual's race, sex, age, and various other characteristics (including veteran status) is a factor that can be considered in the selection of qualified persons. The state may implement affirmative action policies and procedures so long as they do not constitute quotas or "preferential treatment."

Note that the term preferential treatment is defined as using any one of those categories "as the *sole* qualifying factor to select a lesser qualified candidate over a more qualified candidate."

RCW 41.04.010 provides, among other things, that in determining the qualifications of applicants for public employment, veterans are providing with a "scoring criteria status." The statute provides, in effect, that qualified veterans must receive an extra five points or ten points (out of 100 points) in various hiring and promotional tests. In practice, those tests are used to qualify a certain number of candidates for final consideration for new hires or promotions. Typically there are three or more candidates who qualify, depending on the specific state or local government agency involved and the specific position. There is not a fixed number of exam-takers who are to be deemed "passing," and there is no fixed maximum on the number of candidates who can be qualified for consideration. Mechanically, RCW 41.04.010 adds points to a base score, and then the decision-maker has the discretion to pick from amongst the candidates, whether a veteran or not.

As I understand it, the mechanics of applying the additional points for a veteran works something like this at the state level: First, a veteran candidate applies for a job or promotion and presents a form known as a DD 214 to establish that he or she is an honorably discharged military veteran. At this point, the candidate has fulfilled one qualifying factor, i.e., status as a veteran. Second, the veteran takes the relevant examination. Now the candidate has fulfilled a second qualifying factor for employment: exam performance, and an additional five or ten points can be added to

that performance based on veteran status. At this point, the state can consider all the qualified candidates and choose to hire or promote the veteran candidate (or one of the other candidates). The veteran might be hired or promoted even if he or she happens to have had a lower raw score than some of the non-veteran candidates. The hiring decision is not based solely on one qualifying factor, but several.

I-1000's ban on "preferential treatment" does not conflict with RCW 41.04.010 because a person's status as a veteran is simply one of *many* factors involved in a new hire or promotion. If a veteran receives 10 extra points on a qualifying exam so that her score increases from 80 to 90 points, it is obvious that the first 80 points constitute other "qualifying factors." An individual who receives only 50 points on an exam might fall far short of consideration notwithstanding the 10 extra points from being a vet. Accordingly, it is unlikely that a court would view one's veteran status as "the sole qualifying factor" for selecting that person. Furthermore, as noted above, these exams are used to qualify candidates for further consideration, and all the candidates, whether veterans or not, are to be considered based on a range of criteria, including things such as education, experience, practical knowledge, interview performance. Again, veteran status is not a "sole qualifying factor" leading to a person being hired or promoted "over a more qualified candidate."

What would *not* be permitted under I-1000 would be the hiring or promotion of an individual based *solely* on veterans status—or race, or sex, or ethnicity, or age, or disability. In other words, a public official could not decide, "we need an X, or a Y, or a Z, and we're going to disregard everything else and pick one of those." Pre or post I-1000, individuals will ultimately be selected for public hiring or promotion based on a variety of factors.

I should note that it is important to bear in mind that statutes that theoretically might conflict are, insofar as possible, to be read together to give each statute full effect. That is not difficult to do here. Further, Section 6 of I-1000 provides that within three months of the legislation's effective date, OPR and SCS must prepare a memorandum and draft legislation regarding any appropriate statutory changes to ensure that I-1000 is consistent with other statutes. This would provide an opportunity for any concerns about potential conflicts to be carefully identified and handled by the legislature.

I hope that this discussion is useful. Please don't hesitate to contact me if I can provide additional thoughts on this matter.

Cc: Jesse Wineberry