Legal Analysis of Referendum 88 ("R – 88")
(I – 1000 passed by the legislature in March 2019)

September 9, 2019

To: Eric McDonald, LAMP Chair

From: Thomas G. Jarrard, JD/MBA

RE: April 24, 2019, Memorandum Re: I - 1000 issued by Hugh Spitzer.

Background:

Washington State has provided veterans preference in public employment since 1895. See RCW 41.04.010 and 73.16.010. To wit:

41.04.010. Veterans’ scoring criteria status in examinations.

In all competitive examinations, unless otherwise provided in this section, to determine the qualifications of applicants for public offices, positions, or employment, either the state, and all of its political subdivisions and all municipal corporations, or private companies or agencies contracted with by the state to give the competitive examinations shall give a scoring criteria status to all veterans as defined in RCW 41.04.007, by adding to the passing mark, grade or rating only, based upon a possible rating of one hundred points as perfect a percentage in accordance with the following:

(1) Ten percent to a veteran who served during a period of war or in an armed conflict as defined in RCW 41.04.005 and does not receive military retirement. The percentage shall be added to the passing mark, grade, or rating of competitive examinations until the veteran’s first appointment. The percentage shall not be utilized in promotional examinations;

(2) Five percent to a veteran who did not serve during a period of war or in an armed conflict as defined in RCW 41.04.005 or is receiving military retirement. The percentage shall be added to the passing mark, grade, or rating of competitive examinations until the veteran’s first appointment. The percentage shall not be utilized in promotional examinations;

(3) Five percent to a veteran who was called to active military service from employment with the state or any of its political subdivisions or
municipal corporations. The percentage shall be added to promotional examinations until the first promotion only;

(4) All veterans’ scoring criteria may be claimed:

(a) Upon release from active military service with an honorable discharge or a discharge for medical reasons with an honorable record, where applicable; or

(b) Upon receipt of a United States department of defense discharge document DD form 214, NGB form 22, or their equivalent or successor discharge paperwork, that characterizes his or her service as honorable.

RCW 41.04.010 (emphasis added in bold).

73.16.010. Preference in public employment.

In every public department, and upon all public works of the state, and of any county thereof, honorably discharged soldiers, sailors, and marines who are veterans of any war of the United States, or of any military campaign for which a campaign ribbon shall have been awarded, and their widows or widowers, shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the capacity necessary to discharge the duties of the position involved: PROVIDED, That spouses of honorably discharged veterans who have a service connected permanent and total disability shall also be preferred for appointment and employment.

RCW 73.16.010 (emphasis added in bold).

These two statutes have remained relatively unchanged since the end of World War II, and are among the most advantageous forms of hiring preference in the United States. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 261 n.7, 99 S. Ct. 2282, 2287 (1979)(“A very few States, like Massachusetts, extend absolute hiring or positional preferences to qualified veterans. Id., at n. 13. See, e. g., N. J. Stat. Ann. § 11: 27-4 (West 1976); S. D. Comp. Laws Ann. § 3-3-1 (1974); Utah Code Ann. § 34-30-11 (1953); Wash. Rev. Code §§ 41.04.010, 73.16.010 (1976).”) (emphasis added in bold). The
United States Supreme Court specifically lists both Washington statutes as an absolute hiring preference to qualified veterans. *Id.*

Our state courts have also interpreted these two statutes.

To give effect to both RCW 73.16.010 and RCW 41.04.010, as we must, we hold that in competitive examinations, veterans who are not entitled to preference under RCW 41.04.010 but who are entitled to preference under RCW 73.16.010 shall be afforded the full benefit of the latter privilege: *Where two or more candidates for employment have equal qualifications, including performance on examinations, interviews, and other testing, preference must be given the veteran.*


In sum, these statutes mandate the award of veterans preference to veterans who are otherwise qualified and pass entry level requirements for an employment position, whether that is competitive or non-competitive examination or hiring.

Section 3(1) of Initiative 1000 / R – 88 plainly states, "(1) The state shall not [...] grant preferential treatment to, any individual or group on the basis of [...] honorably discharged veteran or military status in the operation of public employment, public education, or public contracting.” Preferential treatment is defined in the Initiative as “the act of using [....] honorably discharged veteran or military status as the sole qualifying factor to select a lesser qualified candidate over a more qualified candidate.” Section 11(d).

The conflict between our existing veterans preference laws and Initiative 1000 is quite apparent from the plain text, and when challenged the existing veterans preference statutes will fall to the way side. *Infra.*
Critique of Hugh Spitzer’s Memo:

As I understand Mr. Spitzer’s memo, he argues that:

1 - 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.”

Mr. Spitzer’s bases his conclusion on an interpretation of the I – 1000 definition for preferential treatment and he cites to that definition. He asserts that I – 1000 only prohibits preferential treatment when it is used “as the sole qualifying factor to select a lesser qualified candidate over a more qualified candidate.” Spitzer memo at 2. In other words, Washington’s existing veterans preference statutes would not be in conflict with I – 1000 so long as veterans preference is not used as the sole factor “to select a lesser qualified candidate over a more qualified candidate for ... public employment.” See Section 11(d). The memo also provides an unlikely comparison between two hypothetical veteran candidates (i.e. one scoring 50 on an exam and the other scoring 80) to demonstrate that other factors may be considered in an ultimate hiring decision. Unfortunately, that analysis is severely flawed and is unsupported by the case law that does address our state’s veteran preference laws.

First, our courts have already rejected the argument that veterans preference does not operate to select a lesser qualified candidate over a more qualified candidate. Plainly, it does. In the Gossage case the Court of Appeals succinctly stated that even where there is a tie between equally qualified candidates, preference must be given to the veteran. “Where two or more candidates for employment have equal qualifications, including performance on examinations, interviews, and other testing, preference must be given
the veteran.” *Gossage v. State*, 112 Wash. App. at 427. Likewise, where there is no tie-breaker, any veteran candidate who advances in the hiring process because the award of veterans preference increased their testing score will necessarily advance past all non-veteran candidates with equal scores and many, if not all, non-veterans who have higher scores. For example, two candidates test and the veteran scores 80, where the non-veteran scores 85. Veterans preference converts the veteran’s score from 80 to 88, and the other candidate remains at 85. These two candidates are *not* considered, as Mr. Spitzer argues, based on a range of criteria because the veteran candidate is given preference over the non-veteran solely because of his or her veteran status, nothing else.

Second, the 80-point example in the memo, which states “it is obvious that the first 80 points constitute other ‘qualifying factors’” is plainly wrong. Veterans preference only applies in circumstances where the veteran is qualified for the position sought, and has obtained a passing score. RCW 41.04.010 and 73.16.010; *Gossage v. State*, 112 Wash. App. at 427. Further, qualifications include performance on examinations, interviews, and other testing. *Id.* Thus, Mr. Spitzer’s attempt to differentiate a veteran’s passing score from “other qualifying factors” is simply incorrect.

Third, because veterans preference only applies to veterans who have obtained a passing score, the example given about a candidate scoring 50 on a civil service exam clearly is irrelevant because it is implausible that such a low score would qualify as passing, and no veterans preference percentage would be applied to such a candidate.

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1 Mr. Spitzer erroneously refers to of 10 preference points being added to a score of 80. However, RCW 41.04.010 plainly states an award of 10% is applied, thus a veteran scoring 80 on the exam would only have 8 points added to their score, for a total of 88.
Fourth, although Mr. Spitzer is correct a court would properly attempt to harmonize two conflicting statutes affecting the same matter, "It is a basic rule of statutory construction that when there is a conflict between a statutory provision that treats a subject in a general way and another that treats the same subject in a specific way, the specific statute will prevail." *Gossage v. State*, 112 Wn. App. at 420, *review denied*, 148 Wn.2d 1012, 62 P.3d 890 (2003) (addressing the specific veterans preference statutes at issue). Here, Initiative 1000 is clearly a comprehensive Act, and its intent and operation to amend RCW 49.60.400 and 2013 c 242 s 7, and to include a “PROHIBITION OF DISCRIMINATION AND PREFERENTIAL TREATMENT” is very specific.

Please direct any questions or comments to:

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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

This memorandum reflects the opinions of the author, and does not constitute an opinion or position of the University of Washington.
Initiative Measure No. 1000, filed August 15, 2018

AN ACT Relating to diversity, equity, and inclusion; amending RCW 49.60.400 and 43.43.015; adding a new section to chapter 43.06 RCW; and creating new sections.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

PART I
TITLE AND INTENT

NEW SECTION. Sec. 1. This act may be known and cited as the Washington state diversity, equity, and inclusion act.

NEW SECTION. Sec. 2. The intent of the people in enacting this act is to guarantee every resident of Washington state equal opportunity and access to public education, public employment, and public contracting without discrimination based on their race, sex, color, ethnicity, national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, or honorably discharged veteran or military status. This is accomplished by: Restoring affirmative action into state law without the use of quotas or preferential treatment; defining the meaning of preferential treatment and its exceptions; and establishing a governor's commission on diversity, equity, and inclusion.

PART II
PROHIBITION OF DISCRIMINATION AND PREFERENTIAL TREATMENT

Sec. 3. RCW 49.60.400 and 2013 c 242 s 7 are each amended to read as follows:

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

(2) This section applies only to action taken after December 3, 1998.

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

(4) This section does not affect any otherwise lawful classification that:

(a) Is based on sex and is necessary for sexual privacy or medical or psychological treatment; or

(b) Is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or

(c) Provides for separate athletic teams for each sex.

(5) This section does not invalidate any court order or consent decree that is in force as of December 3, 1998.

(6) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if the director of the office of financial management, in consultation with the attorney general and the governor's commission on diversity, equity, and inclusion, determines that ineligibility (would) will result in a material loss of federal funds to the state.

(7) Nothing in this section prohibits schools established under chapter 28A.715 RCW from:

(a) Implementing a policy of Indian preference in employment; or

(b) Prioritizing the admission of tribal members where capacity of the school's programs or facilities is not as large as demand.

(8) Nothing in this section prohibits the state from remediating discrimination against, or underrepresentation of, disadvantaged groups as documented in a valid disparity study or proven in a court of law.
(9) Nothing in this section prohibits the state from implementing affirmative action laws, regulations, policies, or procedures such as participation goals or outreach efforts that do not utilize quotas and that do not constitute preferential treatment as defined in this section.

(10) Nothing in this section prohibits the state from implementing affirmative action laws, regulations, policies, or procedures which are not in violation of a state or federal statute, final regulation, or court order.

For the purposes of this section(10):

(a) "State" includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state;

(b) "State agency" means the same as defined in RCW 42.56.010;

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

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

((12)) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Washington antidiscrimination law.

((13)) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law, the United States Constitution, or the Washington state Constitution, the section shall be implemented to the maximum extent that federal law, the United States Constitution, and the Washington state Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Sec. 4. RCW 43.43.015 and 1985 c 365 s 4 are each amended to read as follows:

For the purposes of this chapter, "affirmative action" means, in addition to and consistent with the definition in section 3 of this act, a policy or procedure by which racial minorities, women, persons in the protected age category, persons with disabilities, Vietnam-era veterans, honorably discharged military veterans, and veterans with disabilities are provided with increased employment opportunities. It shall not mean any form of quota system.

PART III

CREATION OF THE GOVERNOR'S COMMISSION ON DIVERSITY, EQUITY, AND INCLUSION

NEW SECTION. Sec. 5. A new section is added to chapter 43.06 RCW to read as follows:

(1) There is created the governor's commission on diversity, equity, and inclusion. The commission is responsible for planning, directing, monitoring, and enforcing each state agency's compliance with this act. The commission may propose and oppose legislation and
shall publish an annual report on the progress of all state agencies in achieving diversity, equity, and inclusion in public education, public employment, and public contracting.

(2) The governor's commission on diversity, equity, and inclusion shall be staffed and funded within the governor's biennial budget. The executive commission members shall be appointed by the governor and serve four-year terms:

(a) Lieutenant governor;
(b) Attorney general;
(c) Superintendent of public instruction;
(d) Commissioner of the department of employment security;
(e) Secretary of the department of transportation;
(f) Director of the department of enterprise services;
(g) Director of the office of minority and women's business enterprises;
(h) Director of the department of commerce;
(i) Director of the department of veterans affairs;
(j) Executive director of the human rights commission;
(k) Director of the office of financial management;
(l) Director of the department of labor and industries;
(m) Executive director of the governor's office of Indian affairs;
(n) Executive director of the Washington state women's commission;
(o) Executive director of the commission on African-American affairs;
(p) Executive director of the commission on Asian Pacific American affairs;
(q) Executive director of the commission on Hispanic affairs;
(r) Chair of the governor's committee on disability issues and employment;
(s) Chair of the council of presidents;
(t) Chair of the board for community and technical colleges;
(u) Chair of the workforce training and education coordinating board;
(v) Executive director of the board of education;
(w) Chair of the board of Washington STEM;
(x) Chair, officer, or director of a state agency or nonprofit organization representing the legal immigrant and refugee community;
(y) Chair, officer, or director of a state agency or nonprofit organization representing the lesbian, gay, bisexual, transgender, and queer community;
(z) Any other agencies or community representatives the governor deems necessary to carry out the objectives of the commission.

(3)(a) The commission shall also consist of the following legislatively appointed members:
(i) Two state senators, one from each of the two largest caucuses, appointed by the president of the senate;
(ii) Two members of the state house of representatives, one from each of the two largest caucuses, appointed by the speaker of the house of representatives.
(b) Legislative members shall serve two-year terms, from the date of their appointment.

(4) Each commission member shall serve for the term of his or her appointment and until his or her successor is appointed. Any commission member listed in subsection (2) of this section, who serves by virtue of his or her office, shall be immediately replaced by his or her duly elected or appointed successor.

(5) A vacancy on the commission shall be filled within thirty days of the vacancy in the same manner as the original appointment.

PART IV
MISCELLANEOUS

NEW SECTION. Sec. 6. Within three months following the effective date of this section, the office of program research and senate committee services shall prepare a joint memorandum and draft legislation to present to the appropriate committees of the
legislature regarding any necessary changes to the Revised Code of Washington to bring nomenclature and processes in line with this act so as to fully effectuate and not interfere in any way with its intent. In preparing the memorandum and draft legislation, the office of program research and senate committee services shall consult with the sponsors of this initiative, the governor's committee on diversity, equity, and inclusion and the state human rights commission.

NEW SECTION. Sec. 7. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 8. For constitutional purposes, the subject of this act is "Diversity, Equity, and Inclusion."

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