

**TESTIMONY OF  
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NATIONAL ECONOMIC COMMISSION  
THE AMERICAN LEGION  
BEFORE THE  
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,  
THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA  
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
ON  
VETERANS' PREFERENCE WITHIN THE FEDERAL GOVERNMENT**

**MARCH 30, 2006**

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates this opportunity to share its views on veterans' preference in the Federal government.

Congress enacted the Veterans' Preference Act of 1944 to address the readjustment needs of the men and women who served their country during a time of war. The law was designed to assist veterans in regaining the lost ground suffered in their civilian careers as a result of military service.

When The American Legion was founded in 1919, one of its first mandates was to convert the existing patchwork of veterans' preference laws, administrative rules and executive orders into one national policy that would be protected by law. That goal was realized 25 years later when President Roosevelt signed the Veterans' Preference Act of 1944 into law.

With the closing of World War II the Federal government enthusiastically complied with the provisions of the new veterans' preference law. Unfortunately, as time passed and the memory of war faded, so did America's concern for fulfilling its obligation to its citizen-soldiers. Today, provisions of the original legislation and its amendments, as codified in Title 5, United States Code (USC), seem almost non-existent to many veterans' across the country.

The American Legion believes there are several reasons for this. A large number of Federal managers do not understand or agree with the reasoning for granting veterans' preference to those who fought to keep this country free, nor do they understand or care how this process works. These problems are compounded by the fact that many veterans are unaware and confused regarding their rights under veterans' preference statutes.

The American Legion's National Veterans' Preference Committee recognized the need for better education and published a pamphlet entitled *Questions and Answers About Veterans' Preference*. The purpose of the pamphlet is to not only answer veterans' most commonly asked questions about this entitlement, but to also educate the general public about veterans' preference.

In the early 1970s, veterans' preference became politically controversial. As public opposition to the war in Vietnam escalated, the stigma of the war spilled over to those who served in the armed forces. The American Legion wants to ensure that the current war on terror does not become as unpopular and that negative sentiment does not spill over to those currently serving in the armed forces. The number of veterans complaining of losing jobs, veterans' preference discrimination, homelessness, health care benefits, and other quality-of-life issues are increasing.

During the time of the Vietnam War, affirmative action legislation was enacted that required Federal agencies to establish "goals" and "timetables" for the recruitment of women and minorities for careers in civil service. Because veterans' preference is an earned entitlement and not an affirmative action program, there have never been quotas for the hiring of veterans'. As a result, there is very little incentive for Federal agencies to hire veterans; therefore, choosing to ignore the law.

While The American Legion recognizes the importance of increasing employment opportunities for women and minorities, we are concerned that all too often that goal has been accomplished by denying veterans their rights under veterans' preference laws. Ironically, a large percentage of women and minorities are veterans. In fact, the percentage of minorities serving in the armed forces reflects a larger percentage than the overall percentage of minorities in America.

Under affirmative action, women and minorities are protected from discrimination by the rules and regulations of the Equal Employment Opportunity Commission (EEOC). As a result, those protected by EEOC may file a formal complaint if they feel they have been discriminated against in hiring, promotion or retention. Unfortunately, that same level of EEO protection is not afforded to veterans under veterans' preference even though veterans make up an extremely small percentage of all Americans (less than 10 percent).

While Title 5, USC, section 3330a, states: "A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor." This appeal language is too narrow and prevents some veterans from receiving consideration of their veterans' preference complaint.

The American Legion believes that appeal rights must include the right to file a complaint based on an allegation that the agency violated rights under any statute or regulation relating to veterans' preference or under any statute or regulation that may affect the operation of veterans' preference.

As a result of the current law, Federal managers who have ignored veterans' preference often times, may not have been held accountable. The weakness in the redress authority must be strengthened.

### **Office of Personnel Management (OPM)**

OPM has a statutory obligation to ensure that agencies abide by statutes providing veterans' preference and we applaud their efforts since 9/11 to promote and protect veterans' preference

throughout the Federal Government. The American Legion has thanked former OPM Director Kay Cole James and current OPM Director, Linda Springer, for efforts to reach out to the veterans' service organizations (VSOs) with invitations to attend OPMs annual meetings, OPM's participation in VSOs' annual conferences and National Conventions, and the veterans' community appreciates these efforts to provide outreach service to veterans and service members stationed around the country. However, The American Legion is still deeply concerned that veterans are not receiving the hiring preference that they rightfully deserve.

With the mandatory downsizing of the Federal government and the implementation of the Flexibility Act, many Federal agencies have become extremely creative in finding ways of circumventing veterans' preference regulations.

Unfortunately, in violation of veterans' preferences statutes, Federal agencies sometimes make appointments by methods that do not require the recognition of veterans' preference. Some of these methods have been approved and endorsed by OPM in the name of "flexibility in hiring." One major focus of The American Legion during the last five years has been to challenge the validity of such appointment methods.

### **Outstanding Scholar Program**

One program that does not require application of preference rules is the Outstanding Scholar Program. In 2001 and 2003, The American Legion filed *amicus* briefs with the Merit Systems Protection Board (MSPB) on behalf of veterans who claimed that the Outstanding Scholar Program violated their preference rights. In the fall of 2005, the MSPB determined that hiring an Outstanding Scholar over a preference eligible was a violation of veterans' preference. (*Dean v. Department of Agriculture*, 99 M.S.P.R. 533 2005) However, OPM, the Federal agency charged with protecting veterans' preference, is asking the MSPB to reconsider this favorable decision. OPM's position is that hiring an Outstanding Scholar is not subject to veterans' preference. The American Legion not only sent a letter to the Director of OPM to reiterate our concern over OPM's filing of a motion for reconsideration in the Dean case, but we are also currently appearing as a friend of the court (*amicus curiae*), arguing that the MSPB decision that found in favor of veterans' preference should prevail.

Several other Federal employment issues were recently decided in favor of veterans. The OPM's Clerical and Administrative Support Positions (CASP) assessment tool, which established a standing register of applicants without regard to veterans' preference, was found to violate veterans' preference rights. (*Deems v. Department of the Treasury*, 100 M.S.P.R. 161) The MSPB also decided that although employees are not entitled to veterans' preference in the Merit promotion process an internal applicant for vacancy is entitled to veterans' preference on the same terms as external applicants. (*Perkins v U.S. Postal Service*, 100 M.S.P.R.)

### **National Security Personnel System**

In October 2004, OPM and DoD representatives briefed The American Legion on the National Security Personnel System (NSPS). According to OPM and DoD press releases: "The NSPS represents the most significant change to the civil service since the Civil Service Reform Act of

1978, with flexibilities never before afforded that have the potential to impact the entire Federal work force. These new flexibilities are being married with pillars of the civil service, such as Veterans' Preference, in order to create a new, agile personnel system."

In November 2004, during a special quarterly VSO meeting with OPM representatives, The American Legion expressed its concerns that deficiencies and flaws in veterans' preference rules in the current Federal personnel system would be continued or magnified in the NSPS. A follow up letter was sent to OPM outlining those concerns. The following is a summary of those concerns with the current personnel system:

*Veterans' preference laws are intended to give veterans an advantage over other applicants for Federal positions and during a reduction in force (RIF). Veterans earned this advantage by serving their country. For many years, veterans' preference laws successfully provided significant advantages as intended. However, over many years, agencies have gradually gained access to appointment methods that do not require providing preference. Other weaknesses in the current system relate to enforcement of veterans' preference, accountability and disciplinary actions for veterans' preference violations, and the limited appeal rights for violations of veterans' preference.*

The following is a summary of some current problems and a description of how any new personnel system might avoid these problems:

- **Lack of Accountability, Corrective Action and Enforcement of Veterans' Preference Laws**

Title 5, USC, section 2302 (e) states that no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11) providing that violating veterans' preference requirements is a prohibited personnel practice.

However, an enforcement mechanism to hold human resource managers accountable for not applying veterans' preference in appointments to the NSPS should be added to NSPS regulations.

There is a definite need for the creation of disciplinary action under Title 5, USC, section 1215 or a similar statute, should a violation of a veterans' preference prohibited personnel practice occur in the NSPS. Such disciplinary action is available for violations of other prohibited personnel practices.

The NSPS regulations should also establish an Office of Veterans' Affairs in order to ensure an ongoing, vigilant review of NSPS hiring and RIFs with regard to veterans' preference. The Office of Veterans' Affairs within NSPS should have the power to investigate and prosecute violations of veterans' preference so that there is prompt, appropriate corrective action, such as hiring or other actions, to make a veteran "whole" again.

- **Availability of Appointment Methods not Requiring Application of Veterans' Preference**

The Outstanding Scholar (OS) Program, allows agencies to ignore veterans' preference in appointments to a wide variety of Federal positions. See DELEGATED EXAMINING OPERATIONS HANDBOOK § 2.8 (October 1999) stating that veterans' preference does not apply to the OS program.

The consent decree upon which the OS Program is based unlawfully exempts a class of individuals from veterans' preference statutes and, in addition, violates Title VII of the Civil Rights Act of 1964, as amended, Title 42, USC section 2000e et seq., which specifically states that nothing in Title VII should be interpreted to repeal or modify a Federal law creating special rights or preference for veterans.

The American Legion urges that the NSPS rely on hiring tools that require application of veterans' preference and not use any hiring method not requiring the consideration veterans' preference law.

- **Use of Multiple Certificates for a Single Position Weakens "Pass over" Rules**

Title 5, USC, section 3318(b) protects veterans' preference by requiring a special review process where an appointing authority proposes to *pass over* a preference eligible on a certificate in order to select "an individual who is not a preference eligible." In addition, certain disabled veterans are provided notice and the opportunity to respond to the proposed *pass over*. (See Title 5, USC, section 3318(b)(2))

When this *pass over* law was passed, agencies prepared only a single certificate for each open position. However, over time agencies began to prepare separate certificates for each different hiring flexibility that might be used to fill the position. (As noted earlier, some hiring authorities do not require that veterans' preference be applied; for example, OS does not require that veterans' preference be applied). Agencies began to fill a single position by choosing from among multiple certificates. The use of multiple certificates at the current time means that an appointing authority may *pass over* a preference eligible heading one certificate simply by choosing from another certificate drawn from a hiring authority that does not require application of veterans' preference. This weakens veterans' preference and renders impotent the important section 3318 protections against *pass overs*.

The NSPS should incorporate important pass over protections into its system. Also the NSPS should not allow the creation of multiple certificates or lists for a single position. NSPS should rank the various hiring flexibilities--flexibilities that require veterans' preference should top the hierarchy of hiring flexibilities.

- **Lack of Hierarchy in Appointment Methods**

As noted above, a number of hiring flexibilities are available under the current Federal hiring system. If hiring authorities that do not apply veterans' preference continue to exist, The American Legion believes that appointment methods requiring application of veterans' preference should explicitly be favored over other methods and top the

hierarchy of appointment methods. The NSPS should only be able to resort to a lower hiring flexibility in limited cases when there is an absolute necessity.

- **Weakness in the Ability of Veterans' to Appeal Veterans' Preference Violations**

Title 5, USC, section 3330a, states: "A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor." This appeal language is too narrow and prevents some veterans from receiving consideration of their veterans' preference complaint.

The American Legion believes that appeal rights must include the right to file a complaint based on an allegation that the agency violated rights under any statute or regulation relating to veterans' preference or under any statute or regulation that may affect the operation of veterans' preference.

### **Conclusion**

The American Legion would like to reiterate how important veterans' preference in Federal hiring is to returning service members and veterans. It is equally important that OPM maintain enforcement power over Federal agencies. In a time of rapid change and with the pending departure of 400,000 service members within the next two years, The American Legion believes that the current structure within OPM that is designed to monitor, inform, promote and enforce veterans' preference laws is clearly inadequate. The American Legion recommends that Congress provide additional funding for an Office of Veterans Affairs within OPM that is adequately staffed and funded. Such an office could better exercise OPM's mandate to protect veterans' preference.

Mr. Chairman, a grateful nation created the concept of veterans' preference for those citizens who served this country in the armed forces. Due to the current War on Terror, thousands of service members of the Reserve component, who make up 40 percent of the current fighting force in Iraq and Afghanistan, will now qualify for veterans' preference due to their extraordinary contribution to the freedoms we all enjoy as Americans. The American Legion urges this Subcommittee to send a strong message to Congress to do more to preserve and protect veterans' preference.

Mr. Chairman, this concludes my statement.