

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 06-136

Veterans' Employment Statutes

QUESTIONS

1. Is Tenn. Code Ann. § 8-30-306 sufficient to fulfill the requirements set forth in 38 U.S.C. § 4212?
2. Are the exemptions for state service positions under Tenn. Code Ann. § 8-30-101 in conflict with the United States Code, especially the exemptions for the Board of Regents and the University of Tennessee?
3. Is the listing of an open position on a publicly accessible website or through a headhunting agency sufficient to fulfill the state's "affirmative action" to employ and advance veterans required by the United States Code?

OPINION

1. 38 U.S.C. § 4212 does not set forth any requirements for the state or its agencies concerning veterans' preference in employment. The Tennessee General Assembly may, therefore, create or not create such laws as it deems appropriate.
2. No. Because these federal preference laws do not require states to create laws that adhere to federal standards, the state is free to exempt whatever agencies it chooses.
3. "[A]ffirmative action" to employ and advance employment of qualified veterans as it is used in 38 U.S.C. § 4212(a)(1) does not apply to state agencies or departments or place any requirements on them to publicize open state positions.

ANALYSIS

38 U.S.C. § 4212, as well as the other federal veterans' preference laws found in Title V of the United States Code, does not preempt the State's right to give or deny preference in employment to veterans. The Tennessee legislature may choose to provide or not provide preference to veterans in state employment as it deems appropriate. State preference laws are not required to mimic federal preference laws. 38 U.S.C. § 4212(a)(1) refers to departments or agencies of the United States, not state agencies. Specifically, the definitions applicable to 38 U.S.C. § 4212 state that the words

“department” or “agency” as they are used in § 4212 mean agencies of the Federal Government or its branches, including the District of Columbia. This section of United States Code, therefore, does not place requirements on state veterans’ preference statutes.

Though there are few cases concerning this issue, the body of case law that does exist supports the principle that federal preference laws do not preempt or mandate specific standards in state preference law. In *Brown v. State*, 279 A.2d 872, 873 (N.J. Super. Ct. App. Div. 1971), the Court rejected the plaintiff’s argument that Congress preempted the states’ power to grant preference to veterans as they deemed appropriate. The Court held that the sections of Title V concerning preference for veterans applied only to that specific federal title and not to employment preference law created by the State of New Jersey. *Id.*¹

The courts have also held that federal veterans’ preference law does not create an inherent right that must be upheld by state legislatures. In *Nick v. Mont. Dep’t of Highways*, 711 P.2d 795, 798-99 (Mont. 1985), the Supreme Court of Montana reaffirmed its previous decisions equating veterans’ preferences with other gratuities such as pensions. The Court held that failure to follow the Veterans’ Preference Act did not provide a foundation for a constitutional deprivation action because it did not create an inherent right in veterans.

Because federal preference laws were created by Congress to direct employment in federal departments and agencies only, the exemptions for state service positions found in Tennessee law do not conflict with the United States Code. The State is free to exempt agencies as it chooses, including the Board of Regents and the University of Tennessee, not only under federal preference laws but also on constitutional grounds. In *Heckman v. University of North Carolina at Chapel Hill*, 19 F. Supp. 468, 473-74 (M.D.N.C. 1998) the plaintiff claimed that the the school’s exemption from North Carolina’s Veterans’ Preference Statute violated the fourteenth amendment. The court held that the school had sovereign immunity from suit on these grounds and found in favor of the school. *Id.* at 474.

“[A]ffirmative action,” as it is used in 38 U.S.C. § 4212(a)(1) does not require any specific action on the part of the states to employ veterans in open state positions. As such, the state is free to use whatever means it feels is necessary to advertise such positions and to inform veterans of their preference rights created by the state legislature in the Tennessee Code.² Tennessee’s actions in this

¹While the preference laws promulgated by the Tennessee General Assembly such as Tenn. Code Ann. § 8-30-306 do not come under any federal requirements, please note that any specific federal employment programs that are federally funded, such as the job training program in 38 U.S.C. § 4215 or the Veterans’ Employment and Training program of 38 U.S.C. § 4102A(b)(5), are subject to the requirements of their respective sections of the United States Code.

²In contrast to state programs, the requirements placed on federally funded programs often include publicity. For instance, 38 U.S.C. § 4215(c) requires that covered veterans who apply for qualified job training programs be informed of the benefits they can receive under the program. Also, any entity of the State providing services under such

area through its state government, departments, and agencies are, therefore, not in conflict with the federal preference laws found in either 38 U.S.C. § 4212 or Title V of the United States Code.

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a federally funded program must provide information about benefits to all covered persons.