



January 31, 2011

Honorable President and Members  
of the City Council of Baltimore  
Room 409, City Hall  
100 N. Holliday Street  
Baltimore, Maryland 21202

Attn: Karen Randle  
Executive Secretary

Re: City Council Bill 10-0622 – Hiring Preferences for Persons with Disabilities

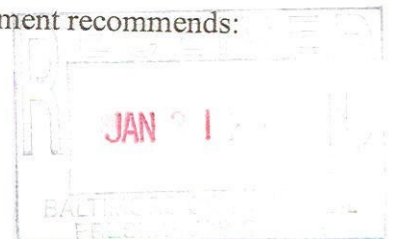
Dear President and City Council Members:

You have requested the advice of the Law Department regarding City Council Bill 10-0622. City Council Bill 622 requires the Civil Service Commission (herein “Commission”) to implement standards for establishing and maintaining a preference for the appointment of qualified persons with a disability; specifies the required contents and limitations of those standards; and generally relates to the hiring of persons with disabilities.

City Charter:

The City Charter requires that the Department of Human Resources (herein “Department”) “promote merit and fitness in City employment.” City Charter, Art. VII § 96. It mandates that the classifications used by the Department “assure that City employees are hired and promoted based on ability, efficiency, character, and industry (‘merit’).” §97 (b). The same section requires that the Department provide for examinations and “evaluative measures to assure that City employees are hired based on merit.” §97 (d). This requirement of a merit-based system is reflected in the current rules promulgated by the Department.

Therefore, requiring a hiring preference based on a disability, which is not a merit-based factor, seems inconsistent with the Charter’s requirements. However, Bill 622 remedies this inconsistency in section 7-8 (D), which ensures that the preference for disabled applicants is given only to candidates who have already been ranked highest in terms of merit. This section could be amended to reflect the language in the Charter and for clarity. The Law Department recommends:



THE STANDARDS ADOPTED UNDER THIS SECTION MAY APPLY THE PREFERENCE TO AN APPLICANT ONLY AFTER HE OR SHE HAS BEEN RANKED AMONG THE HIGHEST IN TERMS OF MERIT BASED EXAMINATIONS.

Section 44 of Article II of the Charter authorizes the City to “provide by ordinance for such additional credits to honorably discharged veterans, as may be recommended to the Mayor and City Council of Baltimore by the [Commission] ... as being just and appropriate to the several positions in the Classified Civil Service, in determining the relative standing of persons upon eligible lists for such positions.” Similarly, Article VII permits the Commission to “provide that honorably discharged veterans of war, including disabled veterans, may receive special credits for their service to the United States in determining the qualifications and relative standing of applicants for City positions.” Art. VII, §97 (f)(3).

Pursuant to this authority, Rule 23 of the Rules of the Department of Personnel (“the Rules”) contains a veteran’s preference which grants a numerical advantage to disabled veterans who apply for a civil position and compete in the point-based system. Certain conditions must be met under the current system for a veteran to be eligible for the preference. *See* Rule 23 A (2) (requiring that an application be submitted within 10 years of discharge, only honorably discharged veterans and only those who have served not less than 90 consecutive days on active duty can benefit, only Maryland residents are eligible). The Law Department defers to the Department regarding the interplay this bill would have with the existing hiring preference for veterans and can assist in the necessary revision of Rule 23.

Therefore, it is clear that a hiring preference for veterans (disabled and nondisabled) is not only legally authorized and in fact required by state law, but is incorporated into the current hiring system. This bill would supplement the current preference with a disabled preference which benefits both veterans and nonveterans and could present some conflicts with the current hiring system, which could be addressed in amendments to Rule 23. The order of preferences in the bill may conflict with other preferences in the current system which must be reconciled either in the Rules or in the bill.

The Law Department concurs with the Department in its recommendation that the bill’s order of preference in Section 7-8 (c)(3) requires clarification. The Law Department recommends deleting (c)(3)(I) which reads “AN EMPLOYEE WHO IS UNABLE TO PERFORM THE EMPLOYEE’S JOB BECAUSE OF A DISABILITY OR INJURY UNDER THE ADA.” The next two sections (II) and (III) are also unclear, because they refer to an “employee” but the bill is intended only for initial appointments and should therefore refer only to “applicants” or “candidates.” Accordingly, the Law Department recommends deleting 7-8 (C)(3)(I), (II) and (III).

Maryland Law:

Article 96 of the Maryland Code requires that the Commission promulgate rules “granting special credit or credits to honorably discharged veterans of the military and naval services of the United States and who have been residents of this State for five years or more immediately preceding

the date on which such veterans take any merit system examination.” Md Code Ann., Art. 96½ § 48. This law also provides that a greater preference *may* be granted to disabled than to nondisabled veterans. *Id.*

This law is referenced in Rule 23, discussed above.

#### Federal Law:

City Council Bill 622 presents several federal law issues. First, the definition of “disability” has been the subject of much litigation and although the local definition does not have to be identical to the one used in federal statutes on the subject, it should be precise enough to give direction to the Commission for the promulgation of regulations. Next, whether the City as an employer can require medical certification of a disability under the Americans with Disabilities Act (herein “ADA”) in this context is also an issue. Finally, there is an issue as to whether the preference given for certain eligible individuals violates the constitutional rights of those deemed not eligible.

The bill could be amended to define “disability” more specifically, thereby ensuring that only those intended by City Council to benefit from the preference are considered eligible. The ADA (42 USCS §§ 12111 *et seq.*) as well as the Federal Rehabilitation Act of 1973 (herein “The Act”) (29 U.S.C.A. §§701-794) provide clear definitions of disability that could assist in drafting an amendment to this bill. Section 7(8) of the Act (29 U.S.C.A. § 706(8)) defines an “individual with handicaps” as a person who “has a physical or mental disability which substantially limits one or more of such person’s major life activities or which constitutes or results in a substantial handicap to employment where it can be expected that the individual’s prospects of employability will benefit from vocational rehabilitation.” The phrase ‘major life activities’ has been defined to include functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 97 ALR Fed. 40. The ADA defines “disability” using the same terms. 42 USCS § 12102. The Act excludes from the definition impairments resulting from drug or alcohol abuse. 29 U.S.C.A. § 706(8).

An alternative to these definitions can be found the Department’s bill report, which suggests limiting “disability” to the criteria used by the Federal Office of Personnel Management. This would also be legally sufficient.

The ADA considers certain examinations and “inquiries” by an employer to be discrimination. 42 USCS 12112 (d)(2). However, the federal Equal Employment Opportunities Commission has addressed this issue and clarified that an inquiry for the purpose of “undertaking affirmative action because of a federal, state or local law (including a veterans’ preference law)” is permissible under the ADA. There are limitations on the inquiry, however, which should be addressed in the regulations. *See* <http://www.eeoc.gov/policy/docs/guidance-inquiries.html#10>.

Lastly, any classification made by the bill which results in disparate treatment among distinct groups of individuals is subject to an Equal Protection challenge. The classification made by Bill 622 would survive such a challenge, because the disabled are not a suspect class, thereby lowering the legal threshold to a rational basis test. *Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698, 706

(4<sup>th</sup> Cir 1999). Certainly, the objective of the bill, to encourage and promote those with disabilities in City hiring, is rationally related to the classification.

Although the Law Department makes the above recommendations and recognizes the need for revision of the Rules to implement the bill to ensure that the current hiring system is amended to alleviate any inconsistencies, City Council Bill 622 is consistent with the City Council's authority. *See* City Charter, Art. II, §47; Art. III, §11. Therefore, the Law Department would approve the bill for form and legal sufficiency.

Sincerely yours,



Ashlea H. Brown  
Special Assistant City Solicitor

cc: Angela Gibson, City Council Liaison, Mayor's Office  
George Nilson, City Solicitor  
Elena DiPietro, Chief Solicitor  
Hilary Ruley, Assistant Solicitor  
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