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Carter v. City of Philadelphia: Veterans May Have Won a Battle Over Veterans' Preference in Promotions, But Have They Won the War?

I. Introduction

Veterans¹ who are state or municipal employees receive preferential treatment in Pennsylvania.² This preferential treatment has been potentially expanded by the United States Court of Appeals for the Third Circuit in *Carter v. City of Philadelphia*,³ which held that veterans in Pennsylvania have a constitutionally protected property interest in receiving preference in *promotions* for civil service positions.⁴ If *Carter* stands,⁵ the decision is likely to have a profound impact on veterans' preference in Pennsylvania. The decision also impacts Home Rule in Pennsylvania,⁶ as well as Philadelphia's Civil Service Regulations,⁷ because the decision held that the Veterans' Preference Act is the exclusive veterans' preference law of Pennsylvania.⁸

1. The term "veteran," as used in this Comment, is synonymous with the term "soldier" as defined in the Veterans' Preference Act, 51 PA. CONS. STAT. ANN. §§ 7101-7109 (1976 & Supp. 1993) [hereinafter Veterans' Preference Act]. "Soldier" is defined as:

[A] person who served in the armed forces of the United States, or in any women's organization officially connected therewith, during any war or armed conflict in which the United States engaged, or who so served or hereafter serves in the armed forces of the United States, or in any women's organization officially connected therewith, since July 27, 1953, including service in Vietnam, and who has an honorable discharge from such service.

51 PA. CONS. STAT. ANN. § 7101 (1976 & Supp. 1993). Additionally, those who served in the state National Guard and the United States Army Reserve are entitled to veterans' preference. *Heskovitz v. State Civ. Serv. Comm'n*, 534 A.2d 160 (Pa. Commw. Ct. 1987).

2. The Veterans' Preference Act, 51 PA. CONS. STAT. ANN. §§ 7101-7109, confers preferential treatment on veterans in state and municipal hirings.

3. 989 F.2d 117 (3d Cir. 1993).

4. *Id.*

5. While *Carter* has not been appealed, the decision failed to address whether granting veterans' preference in promotions is constitutional. Thus the decision will have no impact on veterans' preference if Pennsylvania courts decide that granting preference in promotions is unconstitutional. See discussion *infra* part III.

6. The Third Circuit based its opinion on the First Class City Home Rule Act, PA. STAT. ANN. tit. 53, §§ 13101-13157 (1957 & Supp. 1993)[hereinafter Home Rule Act]. See discussion *infra* part IV. Home Rule is essentially the state transferring to municipalities the authority to govern in certain specified areas. See *infra* notes 157-159 and accompanying text.

7. *Carter* held that Philadelphia Civil Service Regulation § 9.024, which prohibited veterans' preference in promotion, was invalid. As a result of *Carter*, Philadelphia altered its civil service regulations to grant veterans' preference in promotions. See Amendments to Phila. Civ. Serv. Regs. §§ 9.024, 11 (Approved Oct. 19, 1994).

8. *Carter v. City of Philadelphia*, 989 F.2d 117, 122 (3d Cir. 1993).

The *Carter* decision, however, failed to address the issue of whether giving preference to veterans in promotions is constitutional in Pennsylvania. As a result, the *Carter* decision gave veterans a constitutionally protected property interest in something that may be unconstitutional. This Comment analyzes the *Carter* decision and addresses questions that the decision left unresolved. Specifically, this Comment explores the constitutionality of giving veterans' preference in promotions and attempts to determine what preference in promotions is due under the Veterans Preference Act. This Comment will also look at the impact the *Carter* decision will have on Home Rule in Pennsylvania as a result of the court's holding that the Veterans' Preference Act is the exclusive veterans' preference law in Pennsylvania.

Part II of this Comment discusses the *Carter* decision itself, including the relevant holdings and case history. Part III discusses *Carter's* impact on veterans' preference law in Pennsylvania. Subpart A of part III includes a brief overview of veterans' preference law in Pennsylvania. Subpart B of part III addresses the constitutionality of veterans' preference law in promotions in Pennsylvania. Subpart C of part III addresses the issue of what promotional preference should be afforded veterans in Pennsylvania. Finally, part IV discusses *Carter's* impact on Home Rule in Pennsylvania and the application of the Veterans' Preference Act to the entire Commonwealth.

II. The *Carter* Decision

Warren C. Carter was a veteran of the armed forces and a Philadelphia Police Officer since 1969.⁹ In 1989, Carter took a civil service promotion examination for the position of police sergeant.¹⁰ Carter passed the exam and was consequently ranked number two hundred and eighty on the civil service promotion list.¹¹ In April 1990, 125 officers were promoted from the list, but Carter was not one of them.¹² In August of that year, all those on the promotion list were given the option of taking a special Spanish oral fluency examination, which Carter did not take.¹³ In June, 1991, one hundred and fifty-eight additional officers were promoted from the list, including eight who had completed the Spanish exam.¹⁴ Of these eight who were promoted and

9. *Id.* at 118.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Carter v. City of Philadelphia*, 989 F.2d 117, 118 (3d Cir. 1993).

14. *Id.*

had completed the Spanish exam, six ranked lower than Carter on the promotion list.¹⁵ In November 1991, the list expired without Carter receiving a promotion.¹⁶

Carter filed suit against the City of Philadelphia, the Police Commissioner, the Director of Personnel and the Acting Director of Personnel.¹⁷ Carter sought relief under 42 U.S.C. § 1983 alleging that the defendants, acting under the color of state law, deprived him of a property interest without due process of law.¹⁸ Carter argued that under the Pennsylvania Veterans' Preference Act, he had a protected property interest in receiving preference in promotion.¹⁹ According to Carter, the City of Philadelphia deprived him of this protected interest without due process because such preference was not given.²⁰ Further, Carter alleged that section 9.024 of the Philadelphia Civil Service Regulations, which denies veterans' preference in promotion, was unconstitutional because it deprived him of his guaranteed property right.²¹

Carter originally filed the case in the Court of Common Pleas of Philadelphia, but the defendants removed the case to federal court based on the presence of a federal claim.²² The District Court for the Eastern

15. *Id.* at 119.

16. *Id.*

17. *Id.*

18. *Carter v. City of Philadelphia*, 989 F.2d 117, 119 (3d Cir. 1993). 42 U.S.C. § 1983 (1983) states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

19. *Carter v. City of Philadelphia*, 989 F.2d 117, 119 (3d Cir. 1993).

20. *Id.* Specifically Carter alleged protection under 51 PA. CONS. STAT. ANN. § 7104(b)(1976 & Supp. 1993). That section states:

Name on civil service list. Whenever any soldier possesses the requisite qualifications, and his name appears on any eligible or *promotional list*, certified or furnished as the result of any such civil service examination, the appointing or promoting power in making an appointment or promotion to a public position *shall give preference* to such soldier, notwithstanding, that his name does not stand highest on the eligible or promotional list.

Id. (emphasis added).

21. *Carter*, 989 F.2d at 119. Philadelphia Civil Service Regulation § 9.024 stated, "The method of examination, and the rules governing the same, and the method of certifying, shall be the same as provided for applicants for original appointment, *except that veterans shall have no preference in promotions.*" Phila. Civ. Serv. Reg. § 9.024 (emphasis added). The amended version of Philadelphia Civil Service Regulation § 9.024 omits the language "except that veterans shall have no preference in promotions." Amendments to Philadelphia Civil Service Regulation § 9.024 (Approved Oct. 19, 1994).

22. *Carter*, 989 F.2d at 118.

District of Pennsylvania found that Carter did not have a secured property interest in receiving veterans' preference, granted the defendants' motion to dismiss, and remanded to the Court of Common Pleas.²³ The district court reasoned that because the city was under home rule, they had the authority to create their own civil service regulations.²⁴ Thus, section 9.024 of the Philadelphia Civil Service Regulations overrode the Veterans' Preference Act as it applied to employees of the city.²⁵

Carter appealed the district court's decision to the United States Third Circuit Court of Appeals, which vacated the district court's decision to grant the defendants' motion to dismiss and remanded to the district court.²⁶ The Third Circuit held that the Exclusivity Section of the Veterans' Preference Act²⁷ conflicted with section 9.024 of the Philadelphia Civil Service Regulations and was therefore invalid.²⁸ Thus, according to the Court of Appeals, the Veterans' Preference Act applied to Carter, and his right to preference in promotion was constitutionally protected.²⁹

The Third Circuit based its decision on the fact that the Home Rule Act,³⁰ in conjunction with the Exclusivity Section of the Veterans' Preference Act,³¹ granted Carter a protected property interest in receiving veterans' preference in promotion.³² The court concluded that the City could not deny this property interest without due process.³³ Because home rule does not allow municipalities to make laws contrary to the acts of the General Assembly³⁴ and the Veterans' Preference Act contained the Exclusivity Section, section 9.024 of the Philadelphia Civil

23. *Carter v. City of Philadelphia*, No. 91-7502, 1992 U.S. Dist. LEXIS 6784 (E.D. Pa. May 13, 1992).

24. *Carter*, 989 F.2d at 118. See Home Rule Act, PA. STAT. ANN. tit. 53, §§ 13101-13157. The district court specifically cited section 13131 of the Home Rule Act which grants cities of the first class "complete powers of legislation and administration in relation to its municipal functions." *Carter*, 1992 U.S. Dist. LEXIS 6784 at *7 (quoting PA. STAT. ANN. tit. 53, § 13131 (1957)).

25. *Carter*, 989 F.2d at 118.

26. *Id.*

27. 51 PA. CON. STAT. ANN. § 7109 (1976 & Supp. 1990) [hereinafter Exclusivity Section]. This section entitled "Law Exclusive" states, "[t]his chapter shall be construed as being the *exclusive law applying to the Commonwealth, and its political subdivisions, in giving preference to soldiers in appointment or promotion to, or in retention in, public position or on public works.*" *Id.* (emphasis added).

28. *Carter*, 989 F.2d at 118. Compare Phila. Civ. Serv. Reg. § 9.024 with 51 PA. CONS. STAT. ANN. § 7109 and 51 PA. CONS. STAT. ANN. § 7104(b).

29. *Carter*, 989 F.2d at 118.

30. PA. STAT. ANN. tit. 53, §§ 13101-13157 (1957 & Supp. 1994).

31. 51 PA. CONS. STAT. ANN. § 7109 (1976 & Supp. 1990).

32. *Carter*, 989 F.2d at 118.

33. *Id.*

34. See PA. STAT. ANN. tit. 53, §§ 13131, 13133 (1957) and discussion *infra* Part IV.B.

Service Regulations, which denied preference in promotions, was contrary to the Veterans' Preference Act and thus invalid.³⁵ Although prior decisions by Pennsylvania courts held that civil service was a purely municipal function,³⁶ the court distinguished these cases because they did not address statutes containing exclusivity provisions similar to the provision found in the Veterans' Preference Act.³⁷

The Third Circuit remanded to the district court to determine how the preference in promotion should operate.³⁸ However, the court did indicate that those promoted over Carter could have been properly promoted because they possessed special qualifications.³⁹ The case was ultimately settled prior to the district court's rendering a decision on remand.⁴⁰

III. The *Carter* Decision and Veterans' Preference

If *Carter* stands,⁴¹ its most profound effect will be on veterans' preference. *Carter* held that veterans in Pennsylvania have a constitutionally protected property interest in receiving preference in promotion.⁴² While the Third Circuit's holding may not appear to expand veterans' preference,⁴³ when *Carter* is examined in the context of prior decisions of Pennsylvania courts and the actual application of the Veterans' Preference Act, the decision vastly expands veterans' preference in Pennsylvania.

This part addresses the *Carter* decision as it relates to veterans' preference in Pennsylvania. Subpart A will briefly discuss the history of veterans' preference in Pennsylvania. Subpart B addresses the

35. *Carter*, 989 F.2d at 118.

36. *Id.* at 121 (citing *In re Addison*, 122 A.2d 272 (Pa. 1956) (upholding provision of Home Rule Charter restricting judicial review of an appeal from a Philadelphia Civil Service Commission was valid despite a general statute to the contrary), *appeal dismissed*, 352 U.S. 956 (1957); *Ebald v. Philadelphia*, 128 A.2d 352 (Pa. 1957) (holding that the Philadelphia Civil Service Regulation governing disability compensation is a municipal concern and thus supersedes conflicting state statute); and *Lennox v. Clark*, 93 A.2d 834 (Pa. 1953) (removing or discharging city employees is a municipal matter for which power authorized in Home Rule Charter prevails)).

37. *Carter*, 989 F.2d at 121.

38. *Id.* at 123.

39. *Id.* The Third Circuit stated that Philadelphia Civil Service Regulation § 11.031 allows appointing authorities to promote those with special experience above others on the list who did not possess the particular qualification. *Id.*

40. See Docket for *Carter v. City of Philadelphia*, Civil Action No. 91-7502 (E.D. Pa. filed May 13, 1992).

41. See *supra* note 5.

42. *Carter v. City of Philadelphia*, 989 F.2d 117, 123 (3d Cir. 1993).

43. The reasoning of *Carter* is based on the application of Home Rule and the Exclusivity Section of the Veterans' Preference Act. See discussion *infra* part IV.

constitutionality of veterans' preference. Subpart C considers the issue of what preference in promotion should be granted to veterans in Pennsylvania.

A. *The History of Veterans' Preference in Pennsylvania*

Veterans' preference has a long history in Pennsylvania, dating back to 1887 when Civil War Veterans were first given preferential treatment.⁴⁴ Eventually the legislature expanded the preference to include veterans of all wars in which the United States has been engaged.⁴⁵ Today, the Veterans' Preference Act covers any soldier who has been honorably discharged, as well as those who have served in the state National Guard and the United States Army Reserves.⁴⁶

While veterans' preference has a long history in Pennsylvania, many questions concerning veterans' preference remain in the Commonwealth. As the next section discusses, the biggest question left unresolved is the constitutionality of giving veterans' preference in promotions.

B. *The Constitutionality of Veterans' Preference and Carter*

Although veterans' preference has a long history in Pennsylvania, the constitutionality of giving veterans' preference in promotions has not been resolved. As discussed in section 4 of this subpart, it is unclear whether the Pennsylvania Supreme Court has deemed *all* veterans' preference in promotion unconstitutional, or only certain sections of the Veterans' Preference Act. The *Carter* decision failed to address this issue,⁴⁷ despite the defendants' raising it in their brief.⁴⁸ The Third Circuit's refusal to address the constitutionality issue weakens the *Carter* opinion because, in effect, the decision gave Pennsylvania veterans a constitutionally protected property interest in something that may be

44. The Act of May 19, 1887, Pub. L. No. 75, 1887 Pa. Laws 132 (repealed), gave honorably discharged Civil War Veterans preferential treatment in appointment and employment in civil service positions so long as the other requisite qualifications were met. For a discussion of veterans' preference laws in Pennsylvania prior to 1940, see Op. Att'y. Gen. No. 320 at 192 (1940).

45. See, e.g., The Act of April 12, 1939, Pub. L. No. 22, 1939 Pa. Laws 27 (repealed).

46. 51 PA. CONS. STAT. ANN. § 7101 (1976); *Heskovitz v. State Civ. Serv. Comm'n*, 534 A.2d 160 (Pa. Commw. Ct. 1987).

47. *Carter v. City of Philadelphia*, 989 F.2d 117, 121 n.5 (3d Cir. 1993). The Third Circuit in a footnote stated that "[t]he constitutionality of the preference of § 7104(b) . . . is not before us, nor does it appear, historically, to have ever been challenged on these grounds before the Commonwealth's appellate courts." *Id.*

48. Appellee's Brief at 11-13, *Carter v. City of Philadelphia*, 989 F.2d 117 (3d Cir. 1993)(No. 92-1483). The City raised the argument that based on *Commonwealth ex rel. Maurer v. O'Neill*, 83 A.2d 382 (Pa. 1951), the granting of preference in promotions was invalid under section 7104. Appellee's Brief at 11-13.

unconstitutional. Ultimately, if the holding of *Carter* is to stand, the issue of the constitutionality of granting preference in promotion must be resolved by the Pennsylvania courts.

1. *General Challenges to Veterans Preference Statutes.* - In general, the United States Supreme Court has held veterans' preference statutes to be constitutional.⁴⁹ In *Personnel Administrator of Massachusetts v. Feeney*,⁵⁰ a woman challenged an absolute veterans' preference statute⁵¹ on grounds that it violated the Equal Protection Clause of the Fourteenth Amendment by operating to exclude women from high ranking civil service positions. The Massachusetts statute requires that when a veteran passes a civil service exam, the veteran's name must be automatically placed at the top of the list, even if a non-veteran has a superior score.⁵² The Supreme Court held that the Massachusetts veterans' preference statute does not unconstitutionally discriminate against women even though the preference given is absolute and could be

49. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

50. *Id.* For an in depth look at the *Feeney* opinion see Lynn Williams Dischler, Note, 11 SETON HALL L. REV. 86 (1980); Pat Labbadia, III, *The Veterans' Preference Statutes: Do They Really Discriminate Against Women?*, 18 DUQ. L. REV. 653 (1980).

51. "Absolute preference" requires that veterans who pass a civil service examination are entitled to employment preference over all other candidates who pass the examination. John H. Fleming & Charles A. Shanor, *Veterans Preferences in Public Employment: Unconstitutional Gender Discrimination?* 26 EMORY L.J. 13, 52 (1977)[hereinafter Fleming & Shanor]. Thus, a veteran who barely passes an examination is entitled to a position over a non-veteran with a perfect score. *Id.* While Fleming & Shanor put Pennsylvania in the category of an "Absolute Preference" state, *Id.* at 17 n.13, this is not entirely correct. While certain sections of the Veterans' Preference Act may be construed as granting "absolute preference," see *infra* note 137 and accompanying text, portions of the Pennsylvania Veterans' Preference Act would fall into the "Point-Bonus Preferences" category which includes those statutes that give veterans additional points towards their final score on civil service exams. Fleming & Shanor *supra* note 51, at 54; see 51 PA. CONS. STAT. ANN. § 7103 (1976 & Supp. 1990)(conferring ten additional points to veterans on Commonwealth civil service examinations, and a 15% bonus on municipal civil service examinations).

52. MASS. GEN. LAWS ANN. ch. 31, § 26 (West 1992). The statute also dictates an order of preference for placement on the eligible list and reads as follows:

The names of persons who pass examinations for original appointment to any position in the official service shall be placed on eligible lists in the following order: (1) disabled veterans, in the order of their respective standings; (2) veterans, in the order of their respective standings; (3) widows or widowed mothers of veterans who were killed in action or died from a service connected disability incurred in wartime service, in the order of their respective standings; (4) all others in the order of their respective standings. . . .

Id. The section does not apply to promotions, See *MacCarthy v. Director of Civ. Serv.*, 64 N.E.2d 617 (Mass. 1946)(holding that the word "appointment" denotes only the original entry into the classification and does not apply to promotions within that classification), although Massachusetts does grant preference in promotions in other sections of its civil service act. See MASS. GEN. LAWS ANN. ch. 31, § 3 (West 1992).

invoked continuously throughout a veteran's lifetime.⁵³ The Court held that the statute is constitutional despite a showing that the statute disproportionately favors males in hiring for civil service positions.⁵⁴

2. *Equal Protection Challenges to the Pennsylvania's Veterans' Preference Act.* - Prior to the Supreme Court's decision in *Personnel Administrator of Massachusetts v. Feeney*, Pennsylvania's Veterans' Preference Act of 1945⁵⁵ was challenged on similar grounds, that is, that the act discriminated against women.⁵⁶ In *Feinerman v. Jones*,⁵⁷ the plaintiff contended that the provision of the Veterans' Preference Act of 1945 that grants a ten point bonus to any veteran receiving a passing grade on a civil service exam discriminated against women.⁵⁸ The court determined that the right to be given fair consideration for public employment is not a "fundamental right," and therefore applied a "rational basis test" to determine the constitutionality of the Veterans' Preference Act of 1945.⁵⁹ The court found a rational basis for the legislature's decision to give preference to veterans and concluded that the alleged discrimination was unintentional.⁶⁰ Consequently, the court held that the Veterans' Preference Act of 1945 does not discriminate against women and as a result is constitutional.⁶¹

3. *Other Challenges to Pennsylvania's Veterans' Preference Act.* - As a result of the decisions in *Personnel Administrator of Massachusetts v. Feeney* and *Feinerman v. Jones*, veterans' preference statutes, including Pennsylvania's, are not unconstitutional on equal protection grounds.

53. *Feeney*, 442 U.S. at 256.

54. *Id.* at 281. *Feeney* demonstrated that only 1.8% of all Massachusetts women have achieved veteran status and are afforded preference under the statute. *Id.* at 270. See also Fleming & Shanor, *supra* note 51, at 13 n.3, setting forth Department of Defense statistics concerning the number of women personnel in the armed forces for selected years from 1940 through 1976.

55. The Veterans' Preference Act of 1945, Pub. L. No. 337, 1945 Pa. Laws 837 [hereinafter Veterans Preference Act of 1945], is identical to the current Veterans' Preference Act, 51 PA. CONS. STAT. ANN. §§ 7101-7109, as it was saved from repeal by Act of Oct. 7, 1974, Pub. L. No. 226, 1974 Pa. Laws 676, and was reenacted as the current Veterans Preference Act, Act of Aug. 1, 1975, Pub. L. No. 92, 1975 Pa. Laws 233.

56. *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973).

57. *Id.*

58. *Id.* at 255. The provision challenged was § 3 of the Veterans' Preference Act of 1945, 1945 Pa. Laws 837, which is now 51 PA. CONS. STAT. ANN. § 7103(a) (1976 & Supp. 1990).

59. *Feinerman*, 356 F. Supp. at 258. See also *Williams v. State Civ. Serv. Comm'n*, 300 A.2d 799, 802 (Pa. Super. Ct. 1973) (holding that the right to government employment is not fundamental; thus application of the rational basis test to determine the constitutionality of the Veterans' Preference Act was appropriate).

60. *Feinerman*, 356 F. Supp. at 258.

61. *Id.* at 262.

However, certain preferences granted under the Veterans' Preference Act have been held unconstitutional. This section addresses the constitutional challenges to the individual preferences granted under the Veterans' Preference Act.

(a) *The constitutionality of granting preference before the veteran achieves the minimum requirements for the position.* - The first relevant holding as to the constitutionality of Pennsylvania's Veterans' Preference Act was set forth by *In Commonwealth ex rel. Graham v. Schmid*.⁶² In *Schmid*, the Pennsylvania Supreme Court construed the constitutionality of a provision which gave veterans fifteen percent towards their score prior to taking the civil service examination, thus allowing veterans to receive lower passing grade than non-veterans.⁶³ After looking at veterans' preference laws in other states, the court determined that veterans' preference acts were valid if they proscribe that a veteran possess the minimum qualifications to perform the duties involved.⁶⁴ The minimum qualifications can be in the form of an examination, but the preference must be given after the veteran receives a passing grade.⁶⁵

The court likened the lowering of the veteran's passing grade to exempting him or her from taking the exam, which had previously been held unconstitutional in Pennsylvania.⁶⁶ The court held the section of the statute that gave veterans a fifteen percent credit in advance of taking an examination to be unconstitutional.⁶⁷ However, the court noted that

62. 3 A.2d 701 (Pa. 1938).

63. *Id.* at 702-03. The court looked at section 4405 of the Third Class City Code, Pub. L. No. 317, § 4405, 1931 Pa. Laws 1111 (codified as amended PA. STAT. ANN. tit. 53, § 39405 (1957)). When the court looked at that section in 1938, it was entitled "Grading for Discharged Soldiers or Sailors" and read:

When any person who was engaged in the military or naval service of the United States during any war in which the United States engaged, and has an honorable discharge therefrom, shall take any examination for appointment or promotion, his examination shall be marked or graded fifteen per centum perfect before the quality or contents of the examination shall be considered. When the examination of any such person is completed and graded, such grading or percentage as the examination merits shall be added to the aforesaid fifteen per centum, and such total mark or grade shall represent the final grade or classification of such person and shall determine his or her order of standing on the eligible list.

Id.

64. *Schmid*, 3 A.2d at 705.

65. *Id.*

66. *Id.* at 706. In *Wood v. Philadelphia*, 46 Pa. Super. 573 (1911), the court held that a statute exempting veterans and their widows and children from taking civil service exams was invalid as there were no grounds for such a statute.

67. *Schmid*, 3 A.2d at 707.

credit may be given to veterans who have passed an examination and are placed on an eligible list.⁶⁸

The *Schmid* decision is fairly straightforward. It held that veterans' preference is constitutional if the preference is applied *after* the veteran meets the minimum qualifications for the position. However, the next relevant decision regarding veterans' preference is where the veterans' preference law begins to become unclear, and where the distinction between preference in promotion and preference in appointment becomes significant.

(b) *The distinction between granting preference in appointments and granting preference in promotions.* - In *Commonwealth ex rel. Maurer v. O'Neill*,⁶⁹ the court examined the constitutionality of the predecessor to the present Veterans' Preference Act.⁷⁰ Specifically, the plaintiff in *O'Neill* challenged the constitutionality of the provision which gave veterans a ten point bonus in promotional exams so long as the veteran first passed the civil service exam.⁷¹ After reiterating their holding in *Schmid*, that preference in appointments is constitutional, the Pennsylvania Supreme Court held that because there is a difference in appointments and promotions, the awarding of a ten point preference to veterans in promotions is unconstitutional.⁷² To determine the constitutionality of the challenged provision, the court used the test laid down in *Schmid*⁷³ which states:

[T]here must be some reasonable relation between the basis of preference and the object to be obtained, the preference of veterans for the proper performance of duties. Public policy, as well as constitutional restrictions, prohibits an unrestrained preference as it

68. *Id.*

69. 83 A.2d 382 (Pa. 1951)(Stearne, J., dissenting).

70. See Veterans' Preference Act of 1945, 1945 Pa. Laws 837.

71. *O'Neill*, 83 A.2d at 382. The section challenged was section 3 of the Veterans Preference Act of 1945, 1945 Pa. Laws 837, which is now section 7103(a) of the current Veterans' Preference Act, 51 PA. CONS. STAT. ANN. § 7103(a) (1976 & Supp. 1990). That section states:

Whenever any soldier shall successfully pass a civil service appointment or promotional examination . . . such soldier's examination shall be marked or graded an additional ten points above the mark or grade credited for the examination and the total mark . . . thus obtained . . . shall determine his standing on any eligible or promotional list, certified or furnished to the appointing or promoting power.

Id.

72. *O'Neill*, 83 A.2d at 384. "Promotion" is a change to a position within a civil service class which has a higher maximum salary. PA. STAT. ANN. tit. 71, § 741.3(u) (1990). While "appointment" is not defined, it is generally construed as one's initial entry into a civil service class.

73. *O'Neill*, 83 A.2d at 383.

does a preference credit based on factors not representative of their true value.⁷⁴

Relying on this test, the court noted that preference in appointments is constitutional because the "discipline, experience and service" the veterans obtain through their time in the service make them more desirable for public positions that require discipline, loyalty and public spirit.⁷⁵ However, the court concluded that granting preference in promotions places too high a value on the benefit to public service from military training.⁷⁶ The court noted that as time passed, the benefit of such service begins to diminish as both veterans and non-veterans become proficient in their duties.⁷⁷ Thus, the court held that granting the same point preferences in promotions that are granted in appointments is unjustified and highly prejudicial.⁷⁸ Central to the court's holding is the fact that appointments and promotions are distinguishable.⁷⁹

Justice Stearne dissented, finding it impossible to hold the act constitutional as applied to appointments but not promotions.⁸⁰ He found no distinction between appointments and promotions.⁸¹ However, even if Justice Stearne accepted the notion that there is a distinction between appointments and promotions, he determined that the Veterans' Preference Act applied equally in both cases because discipline, experience, and military service have the same potential value to appointments as to promotions.⁸² Justice Stearne gave the example of

74. *Id.* (quoting *Commonwealth ex rel. Graham v. Schmid*, 3 A.2d 701, 704 (Pa. 1938)).

75. *Id.*

76. *Id.* The court again quoted *Schmid* in discussing the limitations placed on veterans' preference. "[W]here war service is appraised, in the allotment of public positions, beyond its value, and the preference goes beyond the scope of the actual advantages gained in such service, the classification becomes void and the privilege is held unreasonable and arbitrary." *O'Neill*, 83 A.2d at 383 (quoting *Schmid*, 3 A.2d at 704).

77. *Id.*

78. *Id.*

79. *Id.* at 384.

80. *Id.* One commentator also questioned the majority's distinction between appointments and promotions. See Recent Case, 65 HARV. L. REV. 505 (1952). The commentator noted that the legislation should not have been invalidated unless it was so unreasonable that it rebutted the presumption of constitutionality. *Id.* at 506. Questioning the superiority of the veteran over the non-veteran, the commentator wrote "if a court chooses to accept the somewhat forced concept of the veteran's superior capacities, it seems unwise for it then to undertake the essentially legislative function of determining the value of those qualities." *Id.* at 507.

81. *Commonwealth ex rel. Maurer v. O'Neill*, 83 A.2d 382, 384 (Pa. 1951)(Stearne, J., dissenting). Justice Stearne relied on *Pittsburgh Sch. Dist. Appeal*, 52 A.2d 17 (Pa. 1947), in reaching this conclusion. There the court noted that a promotion is really the surrender of one position and an appointment to a higher one. *Id.* at 19.

82. *O'Neill*, 83 A.2d at 385. The Connecticut Supreme Court took a similar view to that of Justice Stearne in *State ex rel. Higgins v. Civ. Serv. Comm'n of Bridgeport*, 90 A.2d 862 (1952).

positions in the fire department and posed the question: how can military training and experience be of value to the hoseman, but military training as a captain, major, or colonel, not be of value to the fire chief?⁸³

Justice Stearne also noted that for the majority's holding to be correct and the act to be unconstitutional, there must be an unreasonable classification resulting from preference to veterans in promotions.⁸⁴ For there to be an unreasonable classification, the non-veteran must "catch up" to the veteran by the time promotional exams are taken so that there is no justification for granting preference to the veteran.⁸⁵ Justice Stearne stated that in a vast number of cases, the non-veteran does not catch up with the veteran, as the non-veteran does not necessarily acquire the loyalty, experience, and discipline the veteran possesses before being promoted to a position.⁸⁶ Nor was there evidence before the court to show the classification was unreasonable or that the non-veteran "catches up" with the veteran.⁸⁷

Finally, Justice Stearne noted that the legislature enacted the section because veterans are unable to take promotional exams while in military service, and the Veterans' Preference Act compensates for this fact.⁸⁸ He also noted that courts in other states have upheld veterans' preference in promotions.⁸⁹

4. *The Constitutionality of Granting Preference in Promotions in Pennsylvania.* - Despite the Pennsylvania Supreme Court's holding in *O'Neill*, in 1975 the state legislature re-enacted the Veteran's Preference Act of 1945 with the identical language, including the provision giving ten points to veterans in promotional examinations.⁹⁰ However, re-

In upholding preference in promotions, the court refused to take the position of the *O'Neill* majority because they felt the qualities gained in military service did not merely evaporate, but continued to remain with the veteran and afforded the same potential value in promotions and appointments. *Higgins*, 90 A.2d at 866.

83. *O'Neill*, 83 A.2d at 385.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Commonwealth ex rel. Maurer v. O'Neill*, 83 A.2d 382, 386 (Pa. 1951)(Stearne, J., dissenting).

89. *Id.* (citing *Jones v. O'Toole*, 212 P. 9 (Cal. 1923); *Herman v. Sturgeon*, 293 N.W. 488 (Iowa 1940); *Geyer v. Triplett*, 22 N.W.2d 329 (Iowa 1946); *Zanfes v. Olson*, 7 N.W.2d 901 (Iowa 1943); *Opinion of the Justices*, 85 N.E.2d 238 (Mass. 1949); *Bateman v. March*, 64 N.Y.S.2d 678 (N.Y. Sup. Ct. 1946); *cf. Cook v. Mason*, 283 P. 891 (Cal. Dist. App. Ct. 1929); *Goodrich v. Mitchell* 75 P. 1034 (Kan. 1904); *State ex rel. King v. Emmons*, 190 N.E. 468 (Ohio 1934)).

90. *See compare* Veterans' Preference Act of 1945, Pub. L. No. 337, 1945 Pa. Laws 837 *with* Veterans' Preference Act, 51 PA. CONS. STAT. ANN. §§ 7101-7109.

enacting the provision did not make it constitutional or give it new validity.⁹¹ As a result, the ten point provision found in section 7103 of the Veterans' Preference Act is still unconstitutional as applied to promotions according to *O'Neill*.

Despite the holding of *O'Neill*, the issue remains undecided as to whether all veterans' preference in promotion is unconstitutional in Pennsylvania. If the *O'Neill* decision is read broadly, it would seem that veterans' preference in Pennsylvania, as applied to promotions, is unconstitutional altogether.⁹² One could argue that because the court reasoned that as time passes the advantages received from military training diminish, veterans' preference in promotion can not be constitutionally applied in any instance.⁹³ The court stated that the advantages gained by veterans from their military training is of "very little importance" to promotions.⁹⁴ However, the court contradicted this statement when it stated that in some promotional instances military training can render veterans superior candidates.⁹⁵ A sounder reading of *O'Neill* reveals that while the ten point provision is unconstitutional, veterans' preference in promotion as a whole remains in tact.⁹⁶ The

91. See 1 PA. CONS. STAT. ANN. § 1922(4) (Supp. 1993); *In re Buhl's Estate*, 150 A. 86 (Pa. 1930)(holding that the general rule is that when a later act is adopted using the same language as the prior act which has been construed by the Supreme Court of Pennsylvania, the presumption is that the repeated language is to be construed the same manner as in the earlier statute); *In re Estate of Lock*, 244 A.2d 677 (Pa. 1968)(same). The Statutory Construction Act of 1972 provides "[t]hat when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language." 1 PA. CONS. STAT. ANN. § 1922(4).

92. The Philadelphia City Solicitor read *O'Neill* as denying veterans' preference in promotion in any instance. Op. City Solicitor No. 119 (April 15, 1954). In that opinion, the city solicitor addressed the question of whether, after *O'Neill*, any preference in promotion could be granted to veterans other than the 10 point bonus. *Id.* The city solicitor stated:

Conceivably, the holding of the *O'Neill* case could be limited to the granting of the ten-point bonus on promotional examinations with the result that other preferential treatment might be accorded to veterans, since the specific holding in the *O'Neill* case concerned only the ten-point bonus. However, the reasoning of the majority would apply to all preferences which might be granted on promotion. . . .

..... This reasoning would negate preferences in appointments. Moreover, the Pennsylvania State Civil Service Commission has followed this view in interpreting the Veterans' Preference Act. As a result, veterans employed by the Commonwealth are granted no preference in promotion appointments.

Id.

93. See *Commonwealth ex rel. Maurer v. O'Neill*, 83 A.2d 382 (Pa. 1951).

94. *Id.*

95. *Id.*

96. The Pennsylvania Attorney General has not gone so far as to say that all preference in promotions are unconstitutional. Cf. Op. Atty. Gen. No. 76-17 (1976) (addressing whether the 10 point provision as applied to promotions was now valid because the General Assembly re-enacted

court state quite clearly, "We can come only to the conclusion that, because of the difference between an original appointment and a promotion, the award of the *ten percentage point preference* to veterans in examinations for promotions is unreasonable and therefore unconstitutional."⁹⁷

Additionally, the court's holding was based on the fact that the ten point preference given in promotions was equivalent to that given in appointments, and the legislature had no reason to give equal preference when there is a distinction between appointments and promotions.⁹⁸ Thus, the court left open the possibility of giving some lesser degree of preference to veterans in promotions than in appointments, so long as there is a reasonable relation between the preference granted and the performance of the public duties.⁹⁹

When the *O'Neill* decision is examined in the context of decisions construing its opinion, one can see that the holding was restricted to finding the ten point provision unconstitutional as applied to promotions rather than finding veterans' preference in promotions unconstitutional as a whole. As the next subsection discusses, a more recent decision has potentially expanded the test used to determine the constitutionality of granting veterans' preference found in *O'Neill*.

(a) *Potential expansion of the Schmid test.* - *Northeastern Educational Intermediate Unit #19 v. Stephens*¹⁰⁰ expanded the notion that a rational relation must exist between the preference due and the position sought.¹⁰¹ In *Stephens*, the court construed section 7107 of the Veterans' Preference Act, which deals with computing seniority for reducing the work force.¹⁰² A schoolteacher, who was a veteran, was

it). The Attorney General read *O'Neill* to hold that the 10 point provision as applied to promotional examinations was unconstitutional. *Id.* The Attorney General did not state that the *O'Neill* decision held that all preferences in promotion were unconstitutional as the Philadelphia City Solicitor did in 1954. *See Id.*; *cf. supra* note 92.

97. *O'Neill*, 83 A.2d at 383 (emphasis added).

98. *Id.*

99. *See Id.* (quoting Commonwealth ex rel. Graham v. Schmid, 3 A.2d 701, 704 (Pa. 1938)).

100. 510 A.2d 1267 (Pa. Commw. Ct. 1986).

101. *See Schmid*, 3 A.2d at 704.

102. 51 PA. CONS. STAT. ANN. § 7107 (1976) is entitled "Computation of seniority for reduction in force." That section states:

Whenever a reduction in force is necessary in any public position, or on public works of the Commonwealth and its political subdivisions, and personnel are discharged according to seniority, the number of years of service of any soldier shall be determined by adding his total years of service in the civil service or on public works to his total years of service as a member of the armed forces of the United States, or in any women's organization officially connected therewith during any war in which

furloughed because he did not receive credit for his time served in the military.¹⁰³ Had he received such credit, he would have kept his position.¹⁰⁴ The Pennsylvania Commonwealth Court upheld the lower court's decision to reinstate the veteran because he should have received credit for his time served in the military in computing his seniority.¹⁰⁵

In construing the constitutionality of section 7107, the Commonwealth Court stated it did not need to find a nexus between the military experience and the position, because the a situation did not involve a change in actual status as occurs when someone is appointed or promoted.¹⁰⁶ Instead, the court examined the provision on equal protection grounds and determined that the provision compensates the veteran for the disadvantage he suffered due to his exclusion from the labor market during his time of service.¹⁰⁷ The court stated that compensating the veteran for lost time "is a reasonable government objective which bears a rational relationship to the method employed, and hence the application of the Act to the instant situation withstands constitutional scrutiny."¹⁰⁸

Stephens seems to expand the notion that the preference given must bear a relation to the position sought, since the court determined that compensating the veteran for lost time is a reasonable legislative objective. It is unclear, however, whether the holding would apply to preference in promotions, as the court appeared to limit its holding to the furlough provision.¹⁰⁹

(b) *Carter and the constitutionality of preference in promotions.* - The courts have not yet resolved whether preference in promotions is

the United States engaged.

Id.

103. *Stephens*, 510 A.2d at 1269.

104. *Id.*

105. *Id.* at 1273.

106. *Id.* The court examined *Schmid* and *O'Neill* and determined that the reason a nexus was required between military performance and the position sought in order for the preference to be constitutional was because an appointment or promotion involves an actual change in status of the veteran which could enhance him to the detriment of the Commonwealth. *Id.* In cases of furlough, the veteran's status is not being enhanced, but only maintained, and the veteran has already established that there is no possible detriment to the Commonwealth. *Stephens*, 510 A.2d at 1273.

107. *Id.* Compensation or "rehabilitation" is one of several justifications used by legislatures for granting veterans preference. Fleming & Shanor, *supra* note 51, at 48-50. In addition, "reward," "job-relatedness," and "inducement" are also used as justifications for granting veterans' preference. *Id.*

108. *Northeastern Educational Intermediate Unit #19 v. Stephens*, 510 A.2d 1267, 1273 (Pa. Commw. Ct. 1986).

109. *Id.*

constitutional in Pennsylvania, although it appears that some preference in promotion could be constitutional even under *O'Neill*. Ultimately, if *Carter* stands the Pennsylvania Supreme Court must address the question of whether veterans' preference in promotion is constitutional.

Although *O'Neill* found that the ten-point provision of the Veterans' Preference Act was invalid as applied to promotions,¹¹⁰ the act contains other provisions that grant preference in promotions.¹¹¹ These provisions have never been held unconstitutional and still seem to require preference to be given to veterans whose names appear on a promotional list.¹¹² If veterans' preference in promotions is constitutional, courts must determine what preference is due in promotions under the Veterans' Preference Act, an issue addressed in the next subpart.

C. *What Preference is Due?*

Assuming that the *Carter* decision stands and veterans' preference in promotion is constitutional, the next issue concerns what preference is due to veterans on promotional lists.¹¹³ The *Carter* court remanded to the district court to make this determination.¹¹⁴ Because there is virtually no authority in Pennsylvania dealing with the issue of veterans' preference in promotion, one can only speculate as to how a court will determine this issue.¹¹⁵

110. Commonwealth ex rel. Maurer v. O'Neill, 83 A.2d 382, 383 (Pa. 1951).

111. See, e.g., 51 PA. CONS. STAT. ANN. § 7104 (1976).

112. See 51 PA. CONS. STAT. ANN. § 7104.

113. The *Carter* decision specifically addressed the preference under 51 PA. CONS. STAT. ANN. § 7104 and concluded that preference in promotion was due under that section. *Carter v. City of Philadelphia*, 989 F.2d 117, 123 (3d Cir. 1993).

114. *Id.* *Carter* was settled prior to the district court making such a determination. See Docket for *Carter v. City of Philadelphia*, Civil Action No. 91-7502 (E.D. Pa. filed May 13, 1992).

115. In response to the *Carter* decision, the City of Philadelphia now grants preference in promotions. See Amendments to Phila. Civ. Serv. Regs. §§ 9.024, 11 (Approved Oct. 19, 1994). Section 11 now reads:

11.10 VETERANS' PREFERENCE FOR ORIGINAL APPOINTMENT OR PROMOTIONS. In those cases where the two (2) eligibles certified to fill a vacancy are veterans and/or non-veterans, the following conditions shall control:

11.101 Where two (2) veterans are certified, either may be appointed.

11.102 Where a veteran and non-veteran are certified from an open-competitive eligible list, the veteran shall be appointed, provided, however, that if the veteran declines the appointment, the appointing authority may either appoint the non-veteran or demand another eligible to replace the declination.

11.103 Whenever any veteran possesses the requisite qualifications, and his or her name appears on a promotional list from which certifications are to be made, the veteran shall be given the preference of having the weighted average equivalent of one (1) additional year of seniority added to their final score for purposes of determining who may be certified as

It is clear from *O'Neill* that the ten point provision of the Veterans' Preference Act is unconstitutional as applied to promotional exams.¹¹⁶ Thus, it would seem futile to argue that the ten-point provision still applies to promotions, despite the legislature's reenactment of that provision.¹¹⁷ However, section 7104 of the Veterans' Preference Act, on which the *Carter* was decided, still seems applicable to promotions until a Pennsylvania court rules otherwise.¹¹⁸ The next section will analyze the preference due in promotions under section 7104 of the Veterans' Preference Act. This subpart attempts to predict what veterans' preference in promotion is due, if any, under the Veterans' Preference Act.

1. Attempting to Predict Preference Due in Promotions Under Section 7104 of the Veterans' Preference Act. - To determine the preference due in promotions under section 7104, it is helpful to examine the decisions construing that section. Although these decisions deal with appointments, rather than promotions, they may help to predict the preference due in promotions under section 7104 should *Carter* stand.

eligible to be considered for the promotion, notwithstanding that, without such preference, his or her name may not stand high enough on the promotional list to warrant certification. Where a veteran and non-veteran are certified from a promotional eligible list, the appointing authority shall give appropriate consideration to each certified applicant's qualifications; records of performance, seniority and conduct; preference as a veteran; and any other job-related criteria. Based on these factors the appointing authority may select either the veteran or non-veteran.

11.104 Where two (2) non-veterans are certified, either non-veteran may be appointed.

116. See *supra* notes 69-91 and accompanying text.

117. See *supra* note 91 and accompanying text.

118. Paragraph (b) of section 7104 is set out *supra* note 20. The remainder of this section reads as follows:

(a) **Non-civil service.** - Whenever any soldier possesses the requisite qualifications and is eligible to appointment to or promotion in a public position, where no such civil service examination is required, the appointing power in making an appointment to or a promotion to a public position *shall* give preference to such soldier.

.....

(c) **Name not on civil service list.** - In making an appointment or promotion to public office where a civil service examination is required, the appointing or promotional power *may* give preference to any soldier, who has passed the required examination for appointment or promotion to such position, and possesses the requisite qualifications, although his name does not appear on the eligible or promotional list certified or furnished to the appointing or promoting power.

(a) *Mandatory preference in appointments under section 7104 of the Veterans' Preference Act.* - In *Rasmussen v. Borough of Aspinwall*,¹¹⁹ the Commonwealth Court of Pennsylvania examined section 7104(b) of the Veterans' Preference Act as it applies to appointments. The court held that a veteran who receives the highest score on an appointment examination, after receiving the ten-point preference, must be hired in accordance with section 7104(b) of the Veterans' Preference Act.¹²⁰

Rasmussen was a veteran who applied for a position as a patrolman with the Aspinwall Police Department.¹²¹ After receiving the highest score on the civil service examination after the ten-point preference was applied, he was certified for selection along with the second and third ranking test takers.¹²² The Borough did not hire Rasmussen, but rather chose one of the other two applicants, who were both non-veterans.¹²³ After the Borough reaffirmed its decision to hire the non-veteran, Rasmussen filed suit contending that pursuant to section 7104(b) of the Veterans' Preference Act, he must be hired over the non-veterans.¹²⁴ The Common Pleas Court rejected Rasmussen's argument and granted the Borough's motion for summary judgment.¹²⁵

The Commonwealth Court reversed, holding that when one of the persons certified from an eligible list is a veteran, section 7104 requires that the veteran be chosen over the non-veteran.¹²⁶ The court stated that in section 7104(b), the use of the word "shall" commands that the council appoint the certified veteran if he or she is one of the three on the

119. 519 A.2d 1074 (Pa. Commw. Ct. 1987).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1075.

124. *Rasmussen v. Borough of Aspinwall*, 519 A.2d 1074, 1075 (Pa. Commw. Ct. 1987).

125. *Id.*

126. *Id.* at 1076.

certified list.¹²⁷ Thus, section 7104(b) confers mandatory preference to veterans in appointments if their names appear on a certified list.

(b) *Expansion of the notion of mandatory preference under section 7104.* - The notion of mandatory preference under section 7104 was further expanded in *Brickhouse v. Spring Ford Area School District*.¹²⁸ The Commonwealth Court construed section 7104(a) of the Veterans' Preference Act relating to non-civil service positions.¹²⁹ Relying on *Rasmussen*, the court held that because section 7104(a) used the word "shall" in the same manner as it was used in section 7104(b), the preference granted under section 7104(a) was mandatory.¹³⁰

Brickhouse was a veteran who applied for a position as a social studies schoolteacher.¹³¹ He met the minimum qualifications required for the position, but had only one year of experience teaching social studies in the eleven years following his graduation from college.¹³² The school board decided to hire a highly qualified non-veteran who had superior credentials.¹³³ Brickhouse brought suit after the school board refused to grant him veterans' preference and hire him for the position.¹³⁴ The court held that because Brickhouse met the minimum

127. *Id.* Section 1184 of the Borough Code, Act of February 1, 1966, Pub. L. No. 581, § 1184, 1965 Pa. Laws 1656, 1734 (codified as amended, PA. STAT. ANN. tit. 53, § 46184 (Supp. 1993)), requires that one of the three names on the certified list be hired. That section states:

[T]he council shall notify the commission of any vacancy which is to be filled and shall request the certification of a list of eligibles. The commission shall certify for each existing vacancy from the eligible list, *the names of three persons . . .* who have received the highest average. The council shall thereupon, with sole reference to the merit and fitness of candidates, make an appointment from the three names certified . . .

Id. (emphasis added). If a veteran is one of the three certified, he must be hired. *Rasmussen*, 519 A.2d at 1076. The word "shall" found in section 7104(b) was contrasted with section 7104(c) which uses the word "may." *Id.* The court concluded that under 7104(b), which deals with veterans who have been certified as the result of their civil service, the awarding of preference is mandatory, rather than discretionary as it is in 7104(c), which deals with the situation when the veteran is not certified but remains on the eligible list. *Id.*; Compare 51 PA. CONS. STAT. ANN. § 7104(b), with 51 PA. CONS. STAT. ANN. § 7104(c). Section 7104(c) allows the appointing or promoting authority to go outside the certified list and pick a veteran for a position, so long as the veteran has met the minimum requirements, *i.e.*, passes the test. 51 PA. CONS. STAT. ANN. § 7104(c).

128. 625 A.2d 711 (Pa. Commw. Ct. 1993).

129. *Id.* Non-civil service positions are those in which there is no examination or list of eligibles involved in the hiring process. *Id.* at 714.

130. *Id.*

131. *Id.* at 712.

132. *Brickhouse v. Spring Ford Area Sch. Dist.*, 625 A.2d 711, 713 (Pa. Commw. Ct. 1993).

133. *Id.*

134. *Id.*

qualifications, he must be hired, even over a teacher with superior qualifications.¹³⁵

Brickhouse represents one of the most expansive veterans' preference decisions. According to *Brickhouse*, if a veteran meets the minimum requirements and applies for a non-civil service position, a veteran must be hired over any non-veteran as mandated in section 7104(a).¹³⁶ Because it is clear that section 7104 confers mandatory veterans' preference in appointments, the next question is whether this mandatory preference applies to promotions.

2. *Does the mandatory preference conferred under 7104 apply to promotions?* - The *Brickhouse* and *Rasmussen* decisions conclude that the preference granted under sections 7104(a) and (b) is mandatory. Because neither section has been found unconstitutional as to promotions, it follows that any veteran on a promotional certified list must be given preference in hiring decisions.

However, the Third Circuit in *Carter* refused to say that section 7104 is mandatory as applied to promotions. The Third Circuit stated that if the defendant could show a valid reason for promoting the lower ranking individuals over Carter, then passing him over for the promotion was not necessarily improper.¹³⁷ Additionally, the mandatory preference granted under section 7104 does not appear to be constitutional as applied to promotions. If such preference were granted, it would be equal to the preference granted in appointments, which is clearly unconstitutional under *O'Neill*.¹³⁸ Thus, what preference under section 7104 can be granted constitutionally according to *O'Neill*? The following subsection addresses this question.

(a) *Applying section 7104 to promotions within the constitutional parameters set by O'Neill*. - If preference in promotions is granted under section 7104, the preference must be constitutional. Under *O'Neill*, the preference granted in appointments must not be the same as the preference granted in promotions.¹³⁹ Additionally, *Schmid* and *O'Neill* hold that a rational relation must exist between the preference granted and

135. *Id.*

136. Because of this holding, section 7104(a) could be construed as granting "absolute preference" as defined in Fleming & Shanor, *supra* note 51.

137. *Carter v. City of Philadelphia*, 989 F.2d 117, 123 (3d Cir. 1993).

138. *Commonwealth ex rel. Maurer v. O'Neill*, 83 A.2d 382, 383 (Pa. 1951)(Stearne, J., dissenting).

139. *Id.*

the position being sought.¹⁴⁰ So, if the courts construe veterans' preference in promotion as valid, a system will have to be developed to grant this preference in a constitutional manner.

One way to grant preference in promotion would be to give preference under the "Rule of Three." The "Rule of Three" requires that the top three scoring individuals on an eligible list be certified for a vacancy.¹⁴¹ The appointing or promoting authority then must choose one of these top three individuals for the position.¹⁴² This ensures that an individual with one of the top three scores is appointed or promoted to the position. Under section 7104 of the Veterans' Preference Act, if any of those individuals is a veteran, the veteran must be appointed.¹⁴³ The same could apply to promotions, although in practice it does not.¹⁴⁴

Under *O'Neill*, veterans may not receive additional points on promotional examinations. Thus, if a veteran achieved a ranking in the top three, it would be on his or her own merits, rather than by the addition of ten points as conferred in appointments. The veteran would prove that he or she is a superior candidate without the aid of veterans' preference points. Section 7104 would then require that the veteran be hired over the other certified individuals.

Whether such a preference would be constitutional under *Schmid* and *O'Neill* is not clear. However, it seems that such a preference would almost certainly be constitutional under the Commonwealth Court's interpretation of *Schmid* and *O'Neill* in *Northeastern Educational Intermediate Unit # 19 v. Stephens*.¹⁴⁵ Recall that in *Stephens*, the

140. *Id.*; Commonwealth ex rel. Graham v. Schmid, 3 A.2d 701, 704 (Pa. 1938).

141. The "Rule of Three" is statutory, and is contained in the Civil Service Act. PA. STAT. ANN. tit. 71, § 741.601 (1990). That section reads as follows:

Whenever a vacancy is likely to occur or is to be filled in a permanent position in the classified service, the appointing authority shall submit to the director a statement indicating the position to be filled. . . . the director shall thereupon certify to the appointing authority the names of three eligibles willing to accept appointment who are highest on the appropriate promotion list or employment list. . . .

Id. Similar provisions are contained in the civil service laws relating to cities of the second class, PA. STAT. ANN. tit. 53, § 23446 (1957), cities of the third class, PA. STAT. ANN. tit. 53, § 39406 (Supp. 1993), and boroughs, PA. STAT. ANN. tit. 53, § 46184 (Supp. 1993). The term "rule of three" is misleading because ties are included among the top three ranking individuals, thus more than three individuals may be certified.

142. See, e.g., PA. STAT. ANN. tit. 71, § 741.602 (1990).

143. 51 PA. CONS. STAT. ANN. § 7104(b) (1976).

144. Under State Civil Service Regulation 580.21 enacted February 12, 1992, veterans' preference applies only to appointments and not promotions, thus, even though the "Rule of Three" is used in both appointments and promotions, veterans' preference is only granted in appointments.

145. 510 A.2d 1267 (Pa. Commw. Ct. 1986). See *supra* notes 100-09 and accompanying text.

Commonwealth Court stated that the reason for the nexus requirement between military experience and the position applied for is because of a possible detriment to the Commonwealth by change of the veteran's actual status.¹⁴⁶ However, under the "Rule of Three" scenario just posed, the Commonwealth experiences no detriment because it has already been determined that the veteran is one of the three most qualified individuals for the position on his or her own merits.

The promotion of a veteran could be rationally construed as compensating a veteran for the time spent in the military because the veteran was out of the labor market and did not have the opportunity to be promoted during that time lost.¹⁴⁷ This preference could even be considered a reward for his military service.¹⁴⁸ Additionally, in some cases there would be a rational relation between the veteran's military training and the position sought if, for example, the position is one involving leadership, the use of a firearm, or combat type skills.¹⁴⁹

(b) *Applying preference under the "Rule of Three" in practice.* - The application of section 7104 to the "Rule of Three," while theoretically seeming to be a sensible solution to granting preference in promotions, would not always work in practice. In granting promotions,

146. *Id.* at 1273.

147. The rationale presented in *Stephens* explaining why veterans preference is valid to add seniority to prevent furlough of veterans is to compensate the veteran for the disadvantage he would have suffered from his exclusion from the labor market. *Id.* at 1273. The veteran who was not in the labor market may be disadvantaged when it comes to promotional decisions because he may have inferior experience in terms of years served in the prior position, or in the number of years in civil service.

148. Reward can be the only rationale for section 7105 entitled "Lack of training, age, or physical impairment." 51 PA. CONS. STAT. ANN. § 7105 (1976). That section states:

The lack of academic or scholastic training or experience, age, loss of limb or other physical impairment which does not in fact incapacitate any such soldier shall not be deemed to disqualify him, provided he possesses the other requisite qualifications to satisfactorily perform all of the duties which the position requires.

Id. One of the most interesting cases construing this section's predecessor is *Maloney v. Borough of Yeadon*, 50 Del. C. 33, 28 Pa. D. & C.2d 190 (1963). In that case, a veteran fell short of the minimum height requirements by two and one-quarter inches. *Id.* The court held that because the section now construed as 7105 requires a veteran not be disqualified because of physical impairment if he or she meets all of the other qualifications, the height requirement was waived as to the veteran, and he was awarded the position. *Id.* Thus, it could be stated that veterans' preference caused *Maloney* to grow two and one-quarter inches.

Additionally, reward can be the only justification for preferring spouses of deceased or disabled soldiers. 51 PA. CONS. STAT. ANN. § 7108 (1976 & Supp. 1993). Section 7108 says "[t]he same preferential rating given to soldiers under the provisions of this chapter shall be extended to include the spouses of deceased or disabled soldiers." *Id.*

149. See Justice Stearne's dissent in *O'Neill* discussed *supra* text accompanying notes 80-89.

civil service exams and the "Rule of Three" are not always used in deciding who is certified.¹⁵⁰

Other methods of certification do not involve examinations but are based on merit and minimum qualifications. Using these other methods results in certified lists comprised of all those individuals who have met certain minimum qualifications. The effect of granting mandatory preference when these other methods are used would result in a situation similar to that in *Brickhouse*, if the veteran met the minimum qualifications, he or she would have to be promoted. This may be unconstitutional under *O'Neill*, as the result would be to grant equal, if not greater, preference in promotions than in appointments.

If granting veterans' preference were limited only to those promotional situations when the "Rule of Three" were used, hiring agencies would simply use other methods to compile their certified lists to avoid having to grant the preference. Thus, while granting preference within the "Rule of Three" may appear to be a logical solution to granting veterans' preference in promotions, the result is not realistic. However, the next subsection which examines the discretionary preference of section 7104(c), may provide the realistic and logical solution that is needed.

(c) *Discretionary preference as a logical solution.* - The most logical and realistic solution to granting preference in promotions under section 7104 of the Veterans' Preference Act is the discretionary preference of 7104(c), which allows an appointing or promotional power to go outside a certified list to chose a veteran.¹⁵¹ Section 7104(c) allows a hiring authority to go outside a certified list to choose a veteran only if the veteran has met the minimum qualifications.¹⁵² This would appear to be constitutional if there is a reasonable relation between the job and military service, such as in the example of the promotion of a police officer to a swat team. It would certainly seem that military training may be of great benefit to the position, and in that case, it seems fair to allow an appointing or promoting officer to go outside the certified list to promote a veteran as long as the minimum requirements are met.

150. The Civil Service Act allows "promotion based on meritorious service and seniority to be accomplished without examination, if (i) the person has completed his probationary period in the next lower position, (ii) he meets the minimum requirements for the higher position, and (iii) he receives the unqualified recommendation of both his immediate superior and the appointing authority of his department or agency. PA. STAT. ANN. tit. 71, § 741.501 (1978).

151. See 51 PA. CONS. STAT. ANN. § 7104(c) (1976), *supra* note 118.

152. *Id.*

Additionally, hiring authorities prefer discretionary preference to mandatory preference.

D. So Where Do Carter and Veterans' Preference Stand?

Until it is finally determined whether veterans' preference in promotions is constitutional in Pennsylvania, *Carter* stands on shaky ground. However, a logical look at the decisions relating to the constitutionality of veterans' preference seems to indicate that preference in promotion could be constitutional in certain instances. To hold that preference in promotion is unconstitutional in all instances is an unfair reading of the *O'Neill* decision and would render many legislative veterans' preference policies extinct.

The question of what preference is due in promotions is an even more difficult question if one does not know whether preference in promotion is constitutional. Applying the mandatory preference required under section 7104 to promotions seem to be unconstitutional under *O'Neill*. If the legislature decides that it would like to continue to afford veterans' preference in promotions, the legislature should determine what constitutional preference is due.

Until the constitutionality of veterans' preference is determined, *Carter* means little in the area of veterans' preference. But if it is determined that veterans' preference in promotion is constitutional, *Carter* has given veterans a constitutionally protected property interest in receiving preference in promotion, which is a major victory for veterans' preference in Pennsylvania.

IV. The *Carter* Decision, the Exclusivity of the Veterans' Preference Act and Home Rule

The *Carter* decision also held that the Veterans' Preference Act is the exclusive veterans' preference law in Pennsylvania. The Third Circuit based this decision on the Home Rule Act.¹⁵³ This part of the Comment discusses the *Carter* decision's affect on home rule municipalities and their civil service regulations as they relate to veterans' preference. Subpart A will briefly describe the concept of home rule and its history in Pennsylvania. Subpart B will discuss *Carter's* holding as it relates to home rule municipalities.

153. *Carter v. City of Philadelphia*, 989 F.2d 117 (3d Cir. 1993). See First Class City Home Rule Act, PA. STAT. ANN. tit. 53 §§ 13101-13157 (1949 & Supp. 1993)

A. *What is Home Rule?*

Home rule has a relatively recent history in Pennsylvania, although the Pennsylvania Constitution allowed cities of the first class to adopt home rule as early as 1922.¹⁵⁴ Philadelphia was the first city permitted to adopt home rule,¹⁵⁵ and today all municipalities in the Commonwealth are permitted to adopt home rule.¹⁵⁶ Although precisely defining home rule may not be easy,¹⁵⁷ the concept is not difficult: "the source of authority to act in specified areas is transferred from the state and various municipal codes to the individual municipality and its home rule charter."¹⁵⁸ One specified area where the Commonwealth has transferred authority to municipalities is in the area of civil service.¹⁵⁹

B. *Application of the Veterans' Preference Act to Home Rule Municipalities.*

The Third Circuit concluded that the Veterans' Preference Act is the exclusive veterans' preference law in Pennsylvania.¹⁶⁰ The court

154. Gary E. French, *Home Rule in Pennsylvania*, 81 DICK. L. REV. 265, 268 (1977)[hereinafter French]. See *id.* at 266-270, for a complete history of home rule in Pennsylvania.

155. The Home Rule Amendment to the PA. CONST., art. XV, § 1 (repealed 1968), conferred the power on the Pennsylvania Legislature to adopt Home Rule. The amendment provides: "Cities . . . may be given [by the legislature] the right and power to frame and adopt their own charters and to exercise the powers and authority of local self-government, subject, however, to such restrictions, limitations, and regulations, as may be imposed by the Legislature." Philadelphia's Home Rule Charter went into effect on January 7, 1952. See *Lennox v. Clark*, 93 A.2d 834, 839 (Pa. 1953).

156. French, *supra* note 154, at 265. PA. STAT. ANN. tit. 53, §§ 1-101 to 1-1309 (1974 & Supp. 1993).

157. Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 279 (1968).

158. French, *supra* note 154, at 265.

159. See *Lennox v. Clark*, 93 A.2d 834 (Pa. 1953); *Ebald v. City of Philadelphia*, 128 A.2d 352 (Pa. 1957). In *Lennox*, the court stated:

There seems to exist an erroneous impression . . . regarding section 18 of the Home Rule Act which forbids the city to exercise powers contrary to powers granted by acts of the General Assembly applicable in every part of the Commonwealth or to all cities of the Commonwealth. . . . limitations of power referred to in section 18 concern only laws in relation to substantive matters of State-wide concern, such as the health, safety, security and general welfare of all the inhabitants of the State, and not to matters affecting merely the *personnel* and *administration* of the offices local to Philadelphia and which are of no concern to citizens elsewhere.

Id. at 845 (emphasis in original). The framers of the Philadelphia Home Rule Charter intended matters affecting personnel administration to be governed by their own civil service regulations. *Ebald*, 128 A.2d at 354; see Philadelphia Home Rule Charter Sections 7.7-400 and 7.7-401 (codified at 351 PA. CODE §§ 7.7-400 & 7.7-401 (1992)).

160. *Carter v. City of Philadelphia*, 989 F.2d 117, 121-122 (3d Cir. 1993). See *Exclusivity Section*, 51 PA. CONS. STAT. ANN. § 7109 (1976).

determined that, because home rule forbids a participating city or municipality to make laws contrary to the acts of the General Assembly or the Pennsylvania or United States Constitutions,¹⁶¹ the City of Philadelphia was required to follow the Veterans' Preference Act and was unable to make its own laws concerning veterans' preference.¹⁶²

Although generally cities and municipalities can govern in the area of civil service,¹⁶³ they cannot contradict the acts of the General Assembly.¹⁶⁴ Prior to the decision in *Carter*, the Pennsylvania Commonwealth Court decided that, because the Borough Code¹⁶⁵ provided for the appointment and promotions of police officers, a Borough may not make its own rules governing this area, despite being under home rule.¹⁶⁶ This pronouncement by the Commonwealth Court makes it clear that promoting police officers is not a purely municipal function.¹⁶⁷

Because of the Commonwealth Court's ruling and the exclusivity section of the Veterans' Preference Act, it was clear to the Third Circuit in *Carter* that the City of Philadelphia had violated the Home Rule Act in adopting its own veterans' preference law.¹⁶⁸ *Carter*, in ruling that the Veterans' Preference Act applies to the City of Philadelphia, merely reaffirmed the rule that a home rule city or municipality may not make laws contrary to acts of the General Assembly.¹⁶⁹ The Veterans' Preference Act is explicit in that it is the exclusive veterans' preference

161. PA. STAT. ANN. tit. 53 § 13131 (1949). That section entitled "General grant of power and authority" states:

The charter of any city adopted or amended in accordance with this act may provide for a form or system of municipal government and for the exercise of any and all powers relating to its municipal functions, *not inconsistent with the Constitution of the United States or of this Commonwealth.*

Id. (emphasis added). Additionally PA. STAT. ANN. tit. 53 § 13133 (1949), entitled "Limitations," provides "[n]otwithstanding the grant of powers contained in this act, *no city shall exercise powers contrary to, or in limitation or enlargement of, powers granted by acts of the General Assembly which are:* . . . (b) Applicable in every part of the Commonwealth. (c) Applicable to all the cities of the Commonwealth." (emphasis added).

162. *Carter*, 989 F.2d at 122.

163. *See supra* note 161.

164. *See supra* note 161.

165. Borough Code, Pub. L. No. 58, 1965 Pa. Laws 1656 (codified as amended PA. STAT. ANN. tit. 53, §§ 45101-48501 (1966)).

166. *Norristown Fraternal Order of Police, Lodge 31 v. DeAngelis*, 611 A.2d 322 (Pa. Commw. Ct. 1992).

167. *Carter v. City of Philadelphia*, 989 F.2d 117, 121 (3d Cir. 1993).

168. *Id.* at 122.

169. *See supra* note 161.

law in Pennsylvania, but the City of Philadelphia chose to ignore this in adopting its own civil service regulations.¹⁷⁰

Thus, home rule municipalities are not free to enact any laws without restriction in governing their own citizens. The restrictions placed on them are real, not illusory. If the legislature wishes to govern an area of the law on a statewide basis, the home rule municipality must conform to the legislature's wishes. Ultimately the result reached in *Carter*, that the Philadelphia Civil Service Regulation denying veterans' preference in promotion was invalid, was correct.

IV. Conclusion

The *Carter* decision could have a great impact on veterans' preference, but the decision has two weaknesses. First, the decision failed to address whether veterans' preference in promotion is constitutional in Pennsylvania, thus holding that veterans have a constitutionally protected property interest in something that is potentially unconstitutional. Second, the court failed to determine what preference is to be afforded veterans in promotions. Until it is determined whether veterans' preference in promotion is constitutional, the decision should not have much impact except to confuse the area of veterans' preference even further.

If veterans' preference in promotion is held to be constitutional, the *Carter* decision is obviously a great expansion of veterans' preference rights. Veterans in Pennsylvania will have a constitutionally protected property interest in receiving preference, and if denied such a right, will be able to make out a claim under 42 U.S.C. § 1983. Obviously, if veterans' preference in promotion is held to be unconstitutional, the decision will have no impact whatsoever.

The *Carter* decision did, however, clear up one area of veterans' preference law in Pennsylvania when it held that the Veterans' Preference Act is the exclusive veterans' preference law in Pennsylvania. This holding is firmly based in home rule analysis, and municipalities must take note that they are not entitled to make their own provisions in the area of veterans' preference.

The future of *Carter* and veterans' preference then is uncertain at best. If anything, the *Carter* decision has sent out a signal that there are many issues regarding veterans' preference that need to be addressed by

170. In a telephone interview with the Philadelphia Civil Service Commission (October 19, 1993), it was noted that prior to *Carter*, Philadelphia Civil Service Regulations have never granted preference in promotion since their adoption in 1952.

both the Pennsylvania courts and legislature. It seems the battle over veterans' preference in Pennsylvania has just begun.

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