



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

December 5, 2005

Senator Ginny Burdick
Chair, Senate Interim Judiciary Committee
4641 SW Dosch Road
Portland OR 97239

Representative Wayne Krieger
95702 Skyview Ranch Road
Gold Beach OR 97444

Dear Senator Burdick and Representative Krieger:

You asked whether the amendments made to ORS 166.293 by chapter 14, Oregon Laws 2003 (Reviser's Bill), had the effect of eliminating ORS 166.293 (2) as a ground for revoking a concealed handgun license. It is our opinion that the 2003 amendments did not have this effect.

Your question is prompted by the opinion in *Bates v. Gordon*¹. In *Bates*, the Court of Appeals considered the effect of the 2003 amendments to ORS 166.293 and concluded that ORS 166.293 (2) could no longer be used as a ground for revoking a concealed handgun license. For the reasons that follow, we believe that the Court of Appeals erred in so holding.

ORS 166.291 and 166.292 set forth the procedure for obtaining a concealed handgun license. ORS 166.291 requires an application and establishes qualifications for applicants (must be citizen of the United States, must be at least 21 years of age, etc.). The statute further requires fingerprinting of the applicant, prescribes the form of the application and establishes fees. ORS 166.292 governs issuance of the license. The statute prescribes, among other requirements, the timing for issuance of the license and the form of the license.

ORS 166.293 addresses procedures relating to denial and revocation of concealed handgun licenses (e.g., the hearing process). Subsection (2) of the statute establishes one ground for denying issuance of a license, as follows:

[A] sheriff may deny a concealed handgun license if the sheriff has reasonable grounds to believe that the applicant has been or is reasonably likely to be a danger to self or others, or to the community at large, as a result of the applicant's mental or psychological state, as demonstrated by past pattern of behavior or participation in incidents involving unlawful violence or threats of unlawful violence.

¹ 201 Or. App. ____ (September 28, 2005) (slip op. CA A125277).

The grounds for revocation² of a concealed handgun license are set forth in ORS 166.293 (3)(a) as simply “[a]ny act or condition that would prevent the issuance of a license under ORS 166.291 and 166.292.”

The *Bates* opinion notes that until the 2003 amendments,³ ORS 166.293 (3)(a) allowed revocation of a license for “[a]ny act or condition that would prevent the issuance of a license under ORS 166.291 to 166.293.” The court then concludes that the legislature must have intended to prevent revocation of a license for the one ground for denial that was included in ORS 166.293 (i.e., danger to self or others), since ORS 166.293 was no longer referred to in this sentence.

In effect, the court reads the current language in ORS 166.293 (3)(a) to allow revocation only for an act or condition that is listed under ORS 166.291 and 166.292 and that would prevent the issuance of a concealed handgun license. In other words, the court is assuming that “under ORS 166.291 and 166.292” modifies “any act or condition.” We believe that was not the intent, nor is it the plainest reading, of the statute. In fact, the phrase “under ORS 166.291 and 166.292” modifies the immediately preceding phrase (“issuance of a license”). This is a very common practice used by attorneys in this office when drafting legislation in order to point the reader to the appropriate statutes. The intent is to direct the reader to licenses issued “under ORS 166.291 and 166.292,” not just any license.

Our interpretation is reinforced by other statutes that use this same reference. For instance, ORS 166.260 (1)(h) creates an exemption to the offense of unlawful possession of a firearm for “[a] person who is licensed under ORS 166.291 and 166.292 to carry a concealed handgun.” *See also* ORS 166.292 (4) and (5) and 166.370 (3)(d).

As you can see, under this reading the ground identified in ORS 166.293 (2) for denial of a license remains one of the “acts or conditions” that would be grounds for denial of a license issued under ORS 166.291 and 166.292. The fact that it is not listed in ORS 166.291 or 166.292 is irrelevant.

This reading is strengthened by the fact that ORS 166.292 does not contain any grounds for denial of a license. Why would the Legislative Assembly have directed readers to look for acts or conditions that are grounds for denial of a license in a statute that doesn’t contain any?

Most significantly, we note that the Court of Appeals’ reading of the statute is inconsistent with prior appellate cases addressing rules of statutory construction. The Oregon Supreme Court has indicated that Oregon courts should follow the “doctrine of the last antecedent.”⁴ The doctrine of the last antecedent is a rule of construction that is considered on the first level of statutory analysis under *PGE v. BOLI*.⁵ The court has described the doctrine as follows:

Referential and qualifying words and phrases, where no
contrary intention appears, refer solely to the last antecedent. The

² The difference between denying issuance of a license and revoking a license is key to the analysis of the statutes discussed in this opinion. A denial of issuance occurs when an application is made and the sheriff declines to issue a license to an applicant. A revocation occurs when a sheriff cancels a license after the license has been issued.

³ Section 65, chapter 14, Oregon Laws 2003.

⁴ *State v. Webb*, 324 Or. 380, 386 (1996).

⁵ 317 Or. 606 (1993).

last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.' Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. The rule is another aid to discovery of intent or meaning. . . .⁶

The decision of the Court of Appeals in *Bates* directly contradicts the position taken by the court in a recent case that presented a remarkably similar situation. In *Service Employees International Union Local 503 v. Department of Administrative Services*,⁷ the sentence in question indicated that the Oregon Department of Administrative Services:

shall direct and manage all risk management and insurance programs of state government except for employee benefit insurance programs as otherwise provided in ORS chapter 243.⁸

The court described the argument made by the department as follows:

DAS argues that "as otherwise provided in ORS chapter 243" does not modify "employee benefit insurance programs" but, instead, modifies the preceding phrase "direct and manage all . . . insurance programs."

The court then rejected this argument as follows:

We need not explore the nuances of DAS's statutory construction argument, because its underlying syntactical premise is incorrect under the "doctrine of the last antecedent." DAS asserts that the phrase "as otherwise provided in ORS chapter 243" does not modify the phrase that immediately precedes it — "employee benefit insurance programs." (Emphasis in original.) The doctrine of the last antecedent, however, provides:

"Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." Thus a proviso usually is construed to apply to the provision or clause immediately preceding it. . . .

. . .

'Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.'" (*Quoting State v. Webb.*)

⁶ *State v. Webb* at 386, quoting Norman J. Singer, *2A Sutherland Statutory Construction* (5th ed., 1992).

⁷ 183 Or. App. 594 (2002).

⁸ 183 Or. App. at 602, quoting ORS 278.405.

Here, the phrase "employee benefit insurance programs" is not separated from "as otherwise provided in ORS chapter 243" by a comma, nor is there any other textual indicator that the latter phrase modifies anything other than the former.

We do not see how the Court of Appeals' reading of ORS 166.293 in *Bates* can be reconciled with the doctrine of the last antecedent as applied in *Service Employees*.

Furthermore, the Court of Appeals seems to have disregarded the clear statement found in ORS 174.535 that the 2003 Reviser's Bill does not alter the substance of the sections amended by that bill. As amended by the 2003 bill,⁹ ORS 174.535 provides in relevant part:

It is the policy of the Legislative Assembly to revise sections from Oregon Revised Statutes and Oregon law periodically in order to maintain accuracy. However, nothing in . . . this 2003 Act is intended to alter the legislative intent or purpose of statutory sections affected by . . . this 2003 Act except insofar as the amendments thereto, or repeals thereof, specifically require.

Using the standard analysis of *PGE v. BOLI*, the court should have looked at ORS 174.535 in determining the context of the 2003 amendments. If the court still found the 2003 amendments to be ambiguous, a review of the Judiciary Committee testimony on the 2003 bill would have indicated that the bill was not intended to make substantive changes to the law. In addition, the Reviser's Bill has one feature that distinguishes it from almost all other bills considered by the Legislative Assembly. Following each section of the bill is a note that explains what the amendments to a given section are intended to do. The note following the amended ORS 166.293 in the 2003 Reviser's Bill is as follows: "**NOTE:** Eliminates needless series references in (3) and (6)." (Emphasis in original.)

This note is perhaps the best legislative history that you could find with regard to the legislative intent behind the amendments to ORS 166.293. The note says nothing about eliminating a ground for revoking concealed handgun licenses. In fact, it would be remarkable if the note did so indicate. To the best of our knowledge, and consistent with the directions of ORS 174.535, our office has never allowed provisions in the Reviser's Bill that have substantive impact on the law. Insofar as we are aware, this is the first time that any contention has been made that a provision of a Reviser's Bill had the effect discussed in *Bates*. The reasonable conclusion to be drawn from this note is that the Legislative Assembly did not intend that the amendments in the 2003 Reviser's Bill should limit the grounds for revoking concealed handgun licenses.

Finally, we note that even if the interpretation made by the Court of Appeals was correct in every respect, the court should still have held that the 2003 Reviser's Bill did not have the effect of eliminating ORS 166.293 (2) as a ground for revoking a concealed handgun license. Section 20, Article IV of the Oregon Constitution, provides that:

Every Act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in

⁹ Section 1, chapter 14, Oregon Laws 2003.

the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title.

Oregon appellate courts have relied on this constitutional provision in several cases to void provisions in bills that are not expressed in the title of the bill.¹⁰ The title of the 2003 Reviser's Bill is "Relating to correction of erroneous material in Oregon law."¹¹ We see no argument for asserting that the use of ORS 166.293 (2) as a ground for revoking a concealed handgun license constitutes "erroneous material in Oregon law." Consequently, if the changes made to ORS 166.293 by the 2003 Reviser's Bill had the meaning described by the Court of Appeals, the court should also have found that the changes were not expressed in the title and, therefore, were void.

Based on this analysis, we believe that the Court of Appeals erred in concluding that the 2003 amendments to ORS 166.293 had the effect of eliminating ORS 166.293 (2) as a ground for revoking a concealed handgun license.

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Very truly yours,

/s/

David Heynderickx
Acting Legislative Counsel

¹⁰ See, e.g., *State v. Latourette*, 168 Or. 584 (1942).

¹¹ It is not by chance that Reviser's Bills use this title. The intent is to prevent proposed amendments to the bill that would make exactly the type of substantive change that is discussed in this opinion.