



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 10, 2004

Representative Wayne Krieger
95702 Skyview Ranch Road
Gold Beach, Oregon 97444

Re: Regulation of weapons at educational institutions

Dear Representative Krieger:

You ask whether elementary and secondary schools, community colleges and institutions within the Oregon University System have the authority to prohibit a person from carrying a permitted weapon on the campus of such schools, colleges and institutions. The short answer is no as your inquiry relates to firearms, although this conclusion is not free from doubt, and yes as to other weapons.

Discussion

In answering your inquiry, we assumed that by "permitted weapon" you mean a weapon that the person is not otherwise prohibited by state or federal law from possessing.

1. Firearms

In 1995 and 1997, the legislature enacted a series of statutes that vested solely in the Legislative Assembly the authority to regulate matters relating to firearms, while granting limited authority to counties and cities to regulate very specific aspects of firearm use and possession. See ORS 166.170 to 166.176. The statute of primary importance to your inquiry is ORS 166.170.

ORS 174.020 (1)(a) provides that "[i]n the construction of a statute, a court shall pursue the intention of the legislature if possible." The Oregon Supreme Court, in Portland General Electric v. Bureau of Labor and Industries, 317 Or. 606 (1993), set out a three-level process to analyze a statute to determine legislative intent. The first level of analysis is to examine the text and context of a statute. Id. at 610. The starting point for the first level is the text of the specific statutory provision because it "is the best evidence of the legislature's intent." Id.

In attempting to determine the meaning of the statutory provision, the court may also consider rules of statutory construction that directly relate to how to read the text. These rules may be found in statutes or in case law. Id. at 611. In addition, the court may, at this first level, examine the context of the statute including related statutes. Id.

Under Portland General Electric, if one can determine the legislature's intent from the analysis described above, no further inquiry is necessary or allowed. Only if the intent remains

unclear after the first level can one move to the second level of analysis, which is consideration of the legislative history of the statutory provision,¹ id. at 611-612; Young v. State, 161 Or. App. 32, 37-38 (1999). The third and final level of analysis, which can be reached only after going through the first two levels, is consideration of general maxims of statutory construction. Portland General Electric at 612.

Using the framework for statutory construction set out in Portland General Electric to determine what the legislature intended in enacting ORS 166.170, we begin by looking at the text of the statute itself. ORS 166.170 provides:

166.170 (1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.

(2) Except as expressly authorized by state statute, no county, city or other municipal corporation or district may enact civil or criminal ordinances, including but not limited to zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition. Ordinances that are contrary to this subsection are void.

By its plain terms, subsection (1) of the statute vests the authority to regulate all of the listed activities and things related to firearms exclusively in the Legislative Assembly. Subsection (2) of the statute goes on to specifically prohibit counties, cities and other municipal corporations and districts from enacting civil or criminal ordinances regulating the same activities and things related to firearms. The only exception to the preemption of subsection (1) and the prohibition in subsection (2) is through express authorization by state statute. For authority to be express it must be explicitly stated that the entity can exercise some sort of

¹ In 2001, the Legislative Assembly amended ORS 174.020 to expressly allow parties to offer legislative history to "assist a court in its construction of a statute." ORS 174.020 (1)(b). The amendments further provided that the court could limit consideration of legislative history to information provided by the parties and directed courts to "give the weight to the legislative history that the court considers to be appropriate." ORS 174.020 (3). It is not clear if the effect of the 2001 amendments is to allow courts to consider legislative history at the first level of analysis under Portland General Electric. See Smith v. Salem-Keizer School District and Fair Dismissal Appeals Board, 188 Or. App. 237, 245 (2003) and Stevens v. Czerniak, 336 Or. 392, n.12 (2004).

ORS 174.020 provides:

174.020 (1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.

(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.

regulatory authority over firearms. Therefore, unless there is a statute that explicitly says that some entity may regulate firearms in some manner, it may not do so.

ORS 166.171 to 166.176 are examples of such express grants of authority. ORS 166.173 authorizes cities and counties to adopt ordinances to regulate the possession of loaded firearms in public places. The statute also provides that such an ordinance does not apply to or affect certain listed persons, including a person licensed to carry a concealed handgun.

A. School districts and community college districts

For purposes of your inquiry, one should note that ORS 166.170 (2) specifically includes districts. Because "district" is not defined for purposes of ORS 166.170, the term must be given its ordinary meaning and includes school districts and community college districts. It is also important to note that the express authority granted by ORS 166.173 to regulate possession of loaded firearms in public places is given only to cities and counties and not to districts.

Although district school boards are given general rulemaking authority for the governance of their schools, ORS 332.107, and for the use of their school buildings for civic and recreational purposes, ORS 332.172, and the boards of education of a community college districts are given authority over the grounds and buildings of their districts, ORS 341.290, none of these statutes constitutes express authority to regulate firearms. The statutes do not mention firearms. At best, one could argue that such authority could be implied from the statutes; however, implied authority is not express authority and therefore is not sufficient under ORS 166.170.

Because they lack the express statutory authority required by ORS 166.170, district school boards and boards of education of community college districts may not prohibit a person from carrying a permitted weapon in their schools or on their school grounds.

B. State university system

We do not believe the answer changes when the entity enacting the regulation is a part of state, rather than local, government. Although the specific prohibition contained in ORS 166.170 (2) is directed to units of local government and one might argue that by not listing state agencies the legislature did not intend to prohibit them from enacting regulations relating to firearms, the better reading of the text and context of the statute is that the prohibition in ORS 166.170 (2) does not limit the general preemption language of ORS 166.170 (1), that ORS 166.170 (1) is intended to occupy the field and that, in the absence of express statutory authority, the statute does not leave room in which state agencies may regulate firearms. ORS 166.170 (1) does not vest authority to regulate firearms in "the state" or in "state government"; it vests that authority in the Legislative Assembly.

The context of ORS 166.170 lends weight to this reading. The Legislative Assembly has recognized the importance of and dealt specifically with the issue of possession of firearms on school, college and university property. ORS 166.370 prohibits the possession of firearms while in or on a public building. "Public building" includes public schools, colleges and universities. ORS 166.360. Violation of ORS 166.370 is a Class C felony. The Legislative Assembly also made the policy decision to allow certain persons, including those with concealed handgun licenses, to possess their firearms while in or on a public building without running afoul of ORS 166.370.

Giving ORS 166.170 (1) the meaning dictated by its terms does not leave a regulatory gap regarding possession of firearms at educational institutions. The Legislative Assembly has enacted legislation to cover that situation. Therefore, unless one can find the express statutory authorization required by ORS 166.170 (1), regulation by some entity other than the Legislative Assembly is not allowed.

The Oregon University System is governed by the State Board of Higher Education, which is given general authority to control the grounds and buildings in the system, ORS 351.060, and to adopt rules for the government of institutions under its control, ORS 351.070. Pursuant to this authority, the board has adopted OAR 580-022-0045 (3), which provides that sanctions may be imposed against any person possessing or using firearms on the grounds owned or controlled by an institution of higher education. The prohibition in the rule appears to apply to persons, such as concealed handgun licensees, who could possess a firearm on university grounds without incurring criminal liability under ORS 166.370.

We believe that ORS 166.170 (1) preempts the authority of the State Board of Higher Education to adopt OAR 580-022-0045 (3). The authority given to the board to control the use of its property and to govern its institutions is not the express authority that is needed to overcome ORS 166.170 (1).

2. Other weapons

Although the Legislative Assembly has chosen to prohibit possession of any "instrument used as a dangerous weapon" in schools, ORS 166.370, it has not enacted legislation prohibiting the possession of weapons generally on school property. We have found nothing to indicate that by not enacting such legislation the legislature intended to affirmatively permit such conduct. We find no language relating to weapons other than firearms that is similar to the preemption language in ORS 166.170 (1). Therefore, we do not believe that the legislature has occupied the field regarding the regulation of weapons other than firearms. Under the general statutory authority given to district school boards, boards of education of community college districts and the State Board of Higher Education to adopt rules for the governance of their buildings and grounds, such entities can adopt policies or rules that would prohibit the possession of permitted weapons other than firearms on their property.

Conclusion

Using the process established in Portland General Electric, we interpret ORS 166.170 to mean that district school boards, boards of education of community college districts and the State Board of Higher Education do not have authority to prohibit a person from carrying a firearm on the campuses of the schools, colleges and institutions for which they are responsible. We also conclude that they do have authority to regulate possession of weapons other than firearms on their property.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek


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and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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