

IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON SOCIETY OF
ENROLLED AGENTS,

Petitioner,
Respondent on Review,

v.

STATE OF OREGON, acting by and
through the State Board of Tax
Practitioners,

Respondent,
Petitioner on Review.

CA A156623

SC N006707

**PETITION FOR REVIEW
OF THE STATE OF OREGON, ACTING BY AND THROUGH THE
STATE BOARD OF TAX PRACTITIONERS**

Petition for review of the decision of the Court of Appeals

Opinion Filed: February 1, 2017

Author of Opinion: EGAN, J.

Before: Armstrong, Presiding Judge, and Hadlock, Chief Judge,
and Egan, Judge

Continued...

4/17

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IF REVIEW IS ALLOWED, PETITIONER INTENDS TO FILE A BRIEF ON
THE MERITS

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**PETITION FOR REVIEW
OF THE STATE OF OREGON, ACTING BY AND THROUGH THE
STATE BOARD OF TAX PRACTITIONERS**

The State Board of Tax Practitioners (Board) asks this court to review the Court of Appeals' decision in *Oregon Society of Enrolled Agents v. State of Oregon, acting by and through the State Board of Tax Practitioners*, 283 Or App 558, __P3d__ (February 1, 2017). A copy of that decision is attached. (App-1).

INTRODUCTION

This case involves the Board's authority to require a person to acquire real-world tax experience before the Board licenses that person as a "tax consultant." This case thus presents an important consumer-protection issue that affects thousands of Oregonians' tax returns each year.

The Oregon Legislature generally requires a person to acquire 1,100 hours of practical experience before the person can obtain a tax consultant license. The legislature does not require that experience for "enrolled agents" (that is, people who are qualified to represent taxpayers before the IRS) who seek a tax consultant license. ORS 673.637(2). Although the legislature has not prescribed that particular requirement for enrolled agents, ORS 673.730 broadly authorizes the Board "[t]o determine qualifications" for those who wish to become licensed tax consultants, and ORS 673.640 directs the Board to

license those who demonstrate “to the satisfaction of the board fitness for a license.”

The Board adopted OAR 800-020-0015(5) (2013), which requires enrolled agents to complete 360 hours of “relevant work experience” to obtain a tax-consultant license.¹ The Court of Appeals held that the rule exceeds the Board’s statutory authority because it conflicts with ORS 673.637(2). Whether that holding is correct presents a novel question of statutory construction, one with significant implications for Oregon taxpayers.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

ORS 673.637(2) exempts enrolled agents from the 1,100-hour experience requirement for a tax consultant license, but makes the licensing of enrolled agents “subject to” other statutes including ORS 673.730(1), which directs the Board to “determine qualifications of applicants for licensing as a tax

¹ OAR 800-020-0015(5) (2013) provides:

An Enrolled Agent applicant who is enrolled to practice before the Internal Revenue Service, holding a valid treasury card, shall submit verification by the applicant’s employer or employers on forms prescribed and furnished by the Board, that the applicant has completed a minimum of 360 hours of work experience during at least two (2) of the last five (5) years.

The Board revised the administrative rule prior to the Court of Appeals decision in this case. The current version of the rule requires 360 hours of work experience.

consultant,” and ORS 673.640(1), which requires such applicants to “demonstrate[] to the satisfaction of the board fitness for a license.” Do those statutes authorize the Board to require an enrolled agent to acquire 360 hours of practical experience in order to be licensed as a tax consultant?

Proposed Rule of Law

Yes. ORS 673.730(1) and ORS 673.640(1) authorize the Board to impose work-experience (or other) requirements for tax-consultant applicants, including enrolled agents, and nothing in ORS 673.637(2) supplants that authority.

REASONS FOR REVIEW

This case presents a significant issue of law concerning the legality of an important governmental action and a novel and substantial question of statutory interpretation. Moreover, this court has not previously addressed the issue, and the Court of Appeals likely got it wrong.

A. Licensing paid tax preparers is an important area of state regulation.

The answer to the question presented by this case—whether the Board may impose a practical experience requirement on enrolled agents seeking to be licensed as independent tax consultants—has significant consequences for Oregonians.

The majority of adults in the state file personal income tax returns. For most people “preparing their tax return is the largest financial transaction of the

year.” Mark Steber, *Taxes: DIY or Tax Pro?* Huffington Post (Jan 30, 2015).²

Errors in tax returns not only jeopardize tax revenue for the government but also expose the individual taxpayer to penalties. And many Oregonians pay someone to prepare and file their personal income tax returns. *See IRS Urges Taxpayers to Choose a Tax Preparer Wisely for the Filing Season Ahead* (Dec 2014) (noting that nationally, over half of taxpayers hire someone to prepare and file their tax returns).³

The Board oversees individuals and businesses that prepare personal income tax returns for others for a fee. Anyone other than an attorney or a certified public accountant (CPA) must be licensed by the Board in order to charge Oregon residents for preparing and filing personal income tax returns. ORS 673.610, ORS 673.615. Oregon has two levels of licenses—“tax preparers” must work under the supervision of a tax consultant, attorney, or CPA, while a “tax consultant” may independently prepare and advise on personal income tax returns. ORS 673.615(1) & (2). Two key components of Oregon’s licensing requirements are education and real-world experience. ORS 673.625.

² Available at: http://www.huffingtonpost.com/mark-steber/taxes---diy-or-tax-pro_b_6581168.html (last accessed April 7, 2017).

³ Available at: <https://www.irs.gov/uac/newsroom/irs-urges-taxpayers-to-choose-a-tax-preparer-wisely-for-the-filing-season-ahead> (last accessed April 7, 2017).

Oregon's unique and effective tax preparer licensing requirements have resulted in this state having the most competent paid tax preparation services in the country. GAO Report, *Oregon's Regulatory Regime May Lead to Improved Federal Tax Return Accuracy and Provides a Possible Model for National Regulation*, GAO-08-781 (Aug 2008) 15–17. In 2008, returns from Oregon residents that were prepared by paid tax preparers were 72% more likely to be accurate than comparable returns filed by paid preparers in the rest of the country. *Id.*

This case involves “enrolled agents” who are seeking to be licensed as Oregon tax consultants. An enrolled agent is someone who can represent taxpayers before the IRS. A person becomes an enrolled agent by passing an examination or through experience as a former IRS employee. Of course, a person's status as an enrolled agent provides no guarantee that the person has any expertise with Oregon tax law.

In Oregon, an enrolled agent may lawfully prepare tax returns for others for a fee only after obtaining a license to be a tax preparer or tax consultant. Obtaining such a license requires passing a state income tax examination. Between 2011 and 2016, an average of 53 enrolled agents took the Board's state income tax examination each year.

The Board estimates that an enrolled agent engaged in tax preparation services would likely complete a minimum of 50 to 100 personal income tax

returns per year. As a result, enrolled agents licensed as Oregon tax consultants prepare tax returns for thousands of Oregonians every year. Accordingly, the validity of the Board’s licensing requirements for such individuals presents an issue that is significant both for the state, whose tax revenues depend on accurate tax returns, and for Oregonians who pay such individuals to prepare their returns.

B. This case presents a novel question of statutory interpretation about whether the Board can require tax consultants to have real-world work experience.

The Court of Appeals’ holding—that the 360-hour rule for enrolled agents conflicts with ORS 673.637(2)—presents a question of statutory construction that, until this case, neither the Court of Appeals nor this court has had occasion to address. The Court of Appeals concluded that ORS 673.637(2) precludes the Board from imposing any additional requirements on enrolled agents who apply to be licensed as tax consultants. The statute is, at the very least, susceptible to alternate constructions, and this court has yet to address which is correct.

ORS 673.637(2) provides that

Notwithstanding ORS 673.625(1) and (3), but as otherwise provided in ORS 673.605 to 673.740, the board shall license as a tax consultant any person who is, on the date of the application for a tax consultant’s license, [an enrolled agent] if the person has passed to the satisfaction of the board an examination covering Oregon personal income tax law, theory and practice[.]

The Court of Appeals focused on the “board shall license” portion of the

statute. The court determined that “shall” in the statute was mandatory. And it held that because “shall” was mandatory, the statute “does not allow the board to impose additional qualification requirements on enrolled agents.” *Oregon Society of Enrolled Agents*, 283 Or App at 562–63.

But ORS 673.637(2) can also plausibly be construed to allow the Board to impose on enrolled agents additional requirements that fall within the “as otherwise provided in ORS 673.605 to 673.740” portion of the statute. Two statutes within that range are of particular importance. First, ORS 673.730(1) authorizes the Board to “determine qualifications of applicants for licensing as a tax consultant.” Second, ORS 673.640(1) directs the Board to “license as a tax consultant” an applicant who, among other things, “[d]emonstrates to the satisfaction of the board fitness for a license.” In light of those two statutes and ORS 673.637(2)’s express reference to those statutes, ORS 673.637(2) can reasonably be read to allow the Board to impose a real-world experience requirement on enrolled agents seeking to be licensed as tax consultants even though the *legislature* has not itself proscribed that requirement. That is, the pertinent statutes can be read as leaving the Board with the authority to construct its own requirements for tax consultant applicants as provided in ORS 673.730(1) and 673.640(1).

That the legislature would have intended the Board to retain its authority to impose licensing requirements is consistent with broader context too. The

legislature intends professional licensing boards to have “responsibility for decisions on qualifications, standards of practice, licensing, discipline and other discretionary functions relating to professional activities,” which are areas in which professional licensing board members are “qualified by education, training and experience to make necessary judgments.” ORS 670.275.⁴

Moreover, nothing in the legislative history indicates that the legislature intended to limit the board’s authority in ORS 673.730(1) and 673.640(1) to determine appropriate qualifications for licensure, including in the area of real-world experience. Instead maintaining that authority in the Board would be consistent with the legislature’s overarching goal when creating the Board—protection of taxpayers. *See Oregon Society of Enrolled Agents*, 283 Or App at 563–64 (describing the legislature creating the board in 1973 and amending licensing statutes over the years in order to protect taxpayers).

In sum, ORS 673.637(2) is susceptible to a plausible—and in context more reasonable—construction that does not conflict with OAR 800-020-0015(5). Because the proper construction of the statute is an issue this court has not previously addressed, and it is an issue that has the potential to affect many Oregonians who pay for tax preparation services, this court should grant review.

⁴ In 1971, the legislature established a number of licensing boards including the Board of Accountancy in chapter 673. 1971 Or Laws ch 753 § 3. The legislature established the Board of Tax Practitioners in 1973, in that same chapter.

CONCLUSION

This court should grant review, reverse the Court of Appeals' decision,
and hold the Board's rule valid.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

OREGON SOCIETY
OF ENROLLED AGENTS,
Petitioner,

v.

STATE OF OREGON,
acting by and through the
State Board of Tax Practitioners,
Respondent.

A156623

Submitted August 26, 2015.

Tyler Smith and Tyler Smith & Associates, P.C., filed the
briefs for petitioner.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce,
Solicitor General, and Jona J. Maukonen, Assistant Attorney
General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Hadlock, Chief
Judge, and Egan, Judge.

EGAN, J.

OAR 800-020-0015(5) held invalid.

EGAN, J.

Petitioner Oregon Society of Enrolled Agents, Inc., challenges the validity of an administrative rule promulgated by the Oregon State Board of Tax Practitioners (the board). The rule—OAR 800-020-0015(5)—requires enrolled agents to complete a minimum of 360 hours of work experience during at least two of the last five years to be a licensed tax consultant. According to petitioner, the rule is invalid because it exceeds the statutory authority granted in ORS 673.605 to 673.740 to the board, and also because the rule is preempted by federal law. We agree with petitioner that the rule exceeds the statutory authority of the board, which is dispositive; we therefore do not reach the question whether the rule is preempted by federal law. Accordingly, we conclude that the rule is invalid.

Under ORS 183.400(1), “any person” may petition the Court of Appeals to determine the validity of a rule. In making that determination, we may consider only the rule under review, the statute authorizing the rule, and documents necessary to demonstrate compliance with rulemaking procedures.¹ ORS 183.400(3). Based on our review of those sources, we must declare the rule invalid if we conclude that it violates constitutional provisions, exceeds the statutory authority of the agency that adopted the rule, or was adopted without complying with rulemaking procedures. ORS 183.400(4). Here, petitioner does not assert that the adoption of the disputed rule was procedurally flawed, and we address only whether the rule exceeds the board’s statutory authority.

We begin with the pertinent statutes. ORS chapter 673 pertains to “tax consultants” and “tax preparers.”²

¹ In accordance with that standard, we do not consider petitioner’s declarations submitted on appeal.

² The definitions of “tax consultant” and “tax preparer” are set out in ORS 673.605, which provide, as relevant:

“(6) ‘Tax consultant’ means a person who is licensed under ORS 673.605 to 673.740 to prepare or advise or assist in the preparation of personal income tax returns for another and for valuable consideration.

“(8) Tax preparer’ means any person who is licensed under ORS 673.605 to 673.740 as a tax preparer.”

ORS 673.730 sets out the general authority of the board with regard to tax consultants and tax preparers. It provides, in pertinent part:

“The State Board of Tax Practitioners shall have the following powers, in addition to the powers otherwise granted by ORS 673.605 to 673.740, and *shall have all powers necessary or proper to carry the granted powers into effect*:

“(1) To determine qualifications of applicants for licensing as a tax consultant or a tax preparer in this state; to cause examinations to be prepared, conducted and graded; and to issue licenses to qualified applicants upon their compliance with ORS 673.605 to 673.740 and the rules of the board.

“(10) To adopt rules pursuant to ORS chapter 183 *necessary to carry out the provisions of ORS 673.605 to 673.740.*”

(Emphases added.)

ORS 673.615 requires that a person must be licensed as a tax consultant or a tax preparer to charge a fee to prepare, advise, or assist in the preparation of tax returns. To apply for a license as a tax consultant or a tax preparer, a person must meet certain qualifications and pass an examination as provided in ORS 673.625. One of the qualifications to apply for a license as a tax consultant specifies that the applicant must present evidence of active employment as a tax preparer “for not less than a cumulative total of 1,100 hours during at least two of the last five years.” ORS 673.625(3)(a). However, ORS 673.637(2) sets out an exception to the tax consultant license qualification requirements in ORS 673.625 for “enrolled agents.” That statute provides:

“Notwithstanding ORS 673.625 (1) and (3), but as otherwise provided in ORS 673.605 to 673.740, the board *shall* license as a tax consultant any person who is, on the date of the application for a tax consultant’s license, *enrolled to practice before the Internal Revenue Service pursuant to 31 C.F.R. part 10* if the person has passed to the satisfaction of the board an examination covering Oregon personal income tax law, theory and practice, the provisions of ORS 673.605 to 673.740 and the code of professional conduct prescribed by the board.”

ORS 673.637(2) (emphases added). Under 31 CFR section 10.3(c), an “enrolled agent” is defined as a person who is authorized to “practice before the Internal Revenue Service.”³

In 2013, the board adopted an administrative rule that requires enrolled agents to have 360 hours of work experience to apply to take the examination for a tax consultant. OAR 800-020-0015(5) (2013) provides:

“An Enrolled Agent applicant who is enrolled to practice before the Internal Revenue Service, holding a valid treasury card, shall submit verification by the applicant’s employer or employers on forms prescribed and furnished by the Board, that the applicant has completed a minimum of 360 hours work experience during at least two (2) of the last five (5) years.”

On judicial review, petitioner challenges that rule on the ground that it exceeds the statutory authority of the board.

“[W]hen an administrative rule cannot be reconciled with a statute, it is the statute that controls.” *State v. Newell*, 238 Or App 385, 392, 242 P3d 709 (2010). Furthermore, for purposes of ORS 183.400(4)(b), a rule is deemed to exceed the agency’s statutory authority not only if the rule exceeds the express or implied authority granted to the agency in the statutes that the rule purports to implement, but also if the rule “contravene[s] some other applicable statute.” *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984). Here, the dispositive inquiry is whether the rule exceeds the board’s statutory authority because it contravenes ORS 673.637(2). In making that determination, we seek to discern the legislature’s intentions by examining the text and context of the relevant statutes and, if useful to the analysis, pertinent legislative history. See *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (describing statutory analysis).

³ 31 CFR § 10.4(a) defines who may become an enrolled agent:

“Enrollment as an enrolled agent upon examination. The Commissioner, or delegate, will grant enrollment as an enrolled agent to an applicant eighteen years of age or older who demonstrates special competence in tax matters by written examination administered by, or administered under the oversight of, the Internal Revenue Service, who possesses a current or otherwise valid preparer tax identification number or other prescribed identifying number, and who has not engaged in any conduct that would justify the suspension or disbarment of any practitioner under the provisions of this part.”

As previously discussed, ORS 673.625 lists the qualifications for an applicant to obtain a license as a tax preparer or tax consultant. However, ORS 673.637(2) specifically exempts enrolled agents from the requirements of ORS 673.625(1) and (3), which are the sections that set out the qualifications to apply to be a tax consultant. Again, ORS 673.637(2) provides:

“Notwithstanding ORS 673.625 (1) and (3), but as otherwise provided in ORS 673.605 to 673.740, the board *shall* license as a tax consultant any person who is, on the date of the application for a tax consultant’s license, *enrolled to practice before the Internal Revenue Service pursuant to 31 C.F.R. part 10* if the person has passed to the satisfaction of the board an examination covering Oregon personal income tax law, theory and practice, the provisions of ORS 673.605 to 673.740 and the code of professional conduct prescribed by the board.”

(Emphases added.) Therefore, the text of ORS 673.637(2) establishes that the board *shall* license any person who has fulfilled the following requirements: (1) the person must be “enrolled to practice before the Internal Revenue Service pursuant to 31 C.F.R. part 10,” (2) the person “has passed to the satisfaction of the board” the examination, and (3) the person has complied with the requirements provided in ORS 673.605 to 673.740, *except for* ORS 673.625(1) and (3).

Petitioner contends that, because the legislature used “shall” in ORS 673.637(2), it intended the requirements in that statute to be mandatory. *See Stanley, Adm. v. Mueller*, 211 Or 198, 208, 315 P2d 125 (1957) (“[i]t is elementary that ‘shall’ connotes the imperative”). In response, the board primarily asserts that the additional requirements in ORS chapter 673 not mentioned in ORS 673.637(2), including a licensing fee and 30 hours of continuing education for license renewal, “demonstrate that despite using the word ‘shall,’ the legislature did not intend for the *** requirements listed in ORS 673.637(2) to be the only requirements imposed on an enrolled agent seeking an Oregon tax consultant license.” The board relies on [*Pendleton School Dist. v. State of Oregon*](#), 345 Or 596, 607, 200 P3d 133 (2009), for the proposition that “shall” may carry a number of meanings depending on its context, and in this context, “shall” in ORS

673.637(2) is not mandatory. We reject the board’s argument based on the text of ORS 673.637(2).

Although ORS 673.637(2) exempts enrolled agents from the requirement of two subsections of ORS 673.625, the statute explicitly states that the *other* provisions of the chapter apply. ORS 673.637(2) states that, “notwithstanding ORS 673.625(1) and (3), *but as otherwise provided in ORS 673.505 to 637.740*, the board shall license” enrolled agents who pass the examination (emphasis added). Thus, the text of ORS 673.637(2) establishes that enrolled agents must comply with the additional licensing requirements identified by the board—a licensing fee and continuing education—even if “shall” is read as mandatory.

Compellingly, the legislature distinguished mandatory and discretionary actions in ORS 673.637 by selectively using “shall” and “may.” As petitioner points out, ORS 673.637(1) provides that the board “may” issue a license as a tax consultant or tax preparer to an applicant who presents evidence that they are licensed in a state that has substantially similar requirements for licensing as Oregon and has passed Oregon’s examination to the satisfaction of the board. In contrast, ORS 673.637(2) uses “shall.” *See* ORS 673.637(2) (“[T]he board *shall* license as a tax consultant any person who is *** enrolled to practice before the Internal Revenue Service.”). That distinction in the statute among different applicants indicates that the legislature intended “shall” in ORS 673.637(2) to be mandatory, and, thus, does not allow the board to impose additional qualification requirements on enrolled agents.

The legislative history also indicates that the legislature intended to exempt enrolled agents from any work experience requirement, because the legislature amended the enrolled agent exception multiple times but did not impose a work experience requirement. The legislature created the board and gave it licensing authority to ensure that “tax preparers are *** adequately equipped to provide tax service and advice to the taxpayers of our State” and to minimize concerns about tax preparation “fraud and incompetence.” Testimony, House Revenue Committee, House Bill (HB) 2271, Feb 23, 1973, Ex A (statement of Larry Scheer,

President of the Association of Tax Consultants). Initially, the legislature exempted enrolled agents from all licensing requirements for tax consultants. *See* Or Laws 1973, ch 387, § 3. However, in 1977, the legislature required that enrolled agents be licensed to act as a tax consultant, but exempted enrolled agents from some of the licensing requirements. *See* Or Laws 1977, ch 100, § 3. Enrolled agents were exempt from passing an examination and having at least two “tax seasons” experience as a tax preparer. *Id.* In 1983, concerned with taxpayer protection, the legislature imposed an examination requirement on enrolled agents. Or Laws 1983, ch 110, § 5; *see also* Exhibit C, House State and Federal Affairs, HB 2093, Feb 15, 1983 (accompanying statement of Bob Grundstad).

In 2011, the legislature again was concerned with taxpayer protection and amended ORS 673.625(1) to increase the required amount of time a tax preparer must have worked before applying for a tax consultant license from 780 hours worked for at least two of the past five years to 1,100 hours for the same time period; however, it left ORS 673.637(2), which exempts enrolled agents from that requirement, unchanged. Or Laws 2011, ch 95, § 3; *see also* Staff Measure Summary, House Committee on Business and Labor, HB 2066 A, Apr 19, 2011 (“In an effort to ensure that a licensed tax preparer is *adequately prepared and has an ample amount of experience*[] under a licensed tax practitioner before they are allowed to qual[ify] for taking the Licensed Tax Consultant Exam, [the bill] *** increases the minimum number of hours of experience required for licensure from 780 hours to 1,100 hours.”). Thus, even though the legislature was concerned about taxpayer protection, and it amended ORS 673.625 to include a higher minimum number of hours of experience for tax preparers to qualify to take the tax consultant examination, it did not impose a work experience requirement for enrolled agents.

In sum, we conclude that OAR 800-020-0015(5) directly contravenes ORS 673.637(2) because the text and context of the statute, as supported by the legislative history, establish that enrolled agents are exempted from the work experience requirement that the rule imposes. Therefore,

we conclude that OAR 800-020-0015(5) exceeds the statutory authority that the legislature delegated to the board.

OAR 800-020-0015(5) held invalid.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 12, 2017, I directed the original Petition for Review of the State of Oregon, Acting by and Through the State Board of Tax Practitioners to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that on April 12, 2017, I directed the original Petition for Review of the State of Oregon, Acting by and Through the State Board of Tax Practitioners to be served upon Tyler D. Smith, attorney for respondent on review, by mailing two copies, with postage prepaid, in an envelope addressed to:

Tyler D. Smith
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Continued...

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 1,781 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Jona J. Maukonen

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