

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

RECEIVED

DEC 18 2003

**PUBLIC SAFETY CIVIL
SERVICE COMMISSION**

**BEFORE THE PUBLIC SAFETY CIVIL SERVICE COMMISSION
OF THE CITY OF SEATTLE**

IN RE THE APPEAL OF)
GREG SCHMIDT,) PSCSC No. 02-001
Appellant,) FINDINGS OF FACT, CONCLUSIONS OF
vs.) LAW AND ORDER
CITY OF SEATTLE, SEATTLE POLICE)
DEPARTMENT,)
Respondent/Employer.)

PROCEDURAL BACKGROUND

This appeal was filed with the Public Safety Civil Service Commission (the "Commission") by Lieutenant Greg Schmidt of the Seattle Police Department (the "Department") challenging three decisions of Chief Kerlikowske to promote candidates other than the appellant to the position of captain within the Department. Appellant Schmidt's appeal alleges that Chief Kerlikowske's separate decisions to promote Lieutenants Mike Meehan, Fred Hill and Mike Fann to the position of captain were not based on merit and violated the Public Safety Civil Service Commission Rules (the "Rules" or "PSCSC Rules") governing promotions.

ORIGINAL

1 Commissioner Skagen recused herself from Appellant Schmidt's appeal on Appellant's
2 motion. The Commission appointed pro-tem Commissioner Elizabeth Ford in Commissioner
3 Skagen's absence. A full hearing on the merits of appellant's appeal was held before the
4 Commission on August 26, 27, and 28, and September 12, 2003. The parties submitted post-
5 hearing briefs on September 26, 2003, at which time the record was closed.

6 The Commission deliberated over appellant's appeal on October 8, 2003.

7 FINDINGS OF FACT

- 8 1. Appellant Schmidt is a lieutenant in the Seattle Police Department.
- 9 2. On May 5, 2001, Appellant Schmidt participated in a promotional examination for the
10 position of Captain within the Department. (Exhibit 54). The examination was administered
11 by the Fire/Police Examination Unit within the City's Personnel Department. After passing
12 both the oral and written examinations, Appellant Schmidt was ranked second (2nd) of
13 eleven (11) candidates on the eligible register certified by the Secretary and Chief Examiner.
14 (Exhibit 54).
- 15 3. The eligible register remained in effect from August 28, 2001 through August 28, 2003.
16 (Exhibit 54).
- 17 4. On March 26, 2002, the Department made a Request for Certification. (Exhibit 56). On that
18 same date, the Fire/Police Examination Unit returned a certification of five (5) candidates
19 eligible for consideration for promotion. (Exhibit 57). Appellant Schmidt was listed at the
20 top of this certification. (Exhibit 57). Lieutenant Meehan was also on the certification.
21 (Exhibit 57). Chief Kerlikowske promoted Lieutenant Mike Meehan from this certification
22 on May 30, 2002.

- 1 5. On September 26, 2002, the Department made a second Request for Certification. (Exhibit
2 70). The next day, September 27, 2002, the Fire/Police Examination Unit returned a
3 certification of five (5) candidates eligible for consideration for promotion. (Exhibit 57).
4 Appellant Schmidt was listed at the top of this certification. (Exhibit 57). Lieutenant Fred
5 Hill was also on the certification. (Exhibit 57). On October 4, 2002, the Department issued a
6 Personnel Order setting forth Chief Kerlikowske's decision to promote Lieutenant Fred Hill
7 to the position of Captain. (Exhibit 67). Lieutenant Hill's promotion did not become
8 effective until October 23, 2002.
- 9 6. Chief Kerlikowske used the September 26 Certification for another promotion to the position
10 of captain. (Exhibit 68; Exhibit 72). Both Appellant Schmidt and Lieutenant Fann were
11 listed on the certification. (Exhibit 57). On December 17, 2002, the Department issued a
12 Personnel Order formally announcing the promotion of Lieutenant Michael Fann to the
13 position of captain, effective retroactively to November 20, 2002. (Exhibit 68).
- 14 7. Chief Kerlikowske's decisions with respect to promotions were based in part on information
15 he and his command staff received during a presentation of an eligible candidate by the
16 candidate's immediate supervisor who was familiar with the candidate's work history.
17 (Testimony of Kerlikowske). In assessing the qualifications of a candidate for promotion,
18 Chief Kerlikowske considered demonstrated leadership skills, communication skills,
19 community relations, and tactical and operational skills. (Testimony of Kerlikowske).
20 Appellant Schmidt was presented by Captain Ron Mochizuki. (Testimony of Mochizuki).
- 21 8. Chief Kerlikowske assessed the qualifications of the candidates for promotion before making
22 each of the promotional decisions at issue here. (Testimony of Chief Kerlikowske). His
23 decisions to promote Lieutenants Meehan, Hill and Fann, and not to promote Appellant

1 Schmidt, were based on his conclusion that the qualifications of Lieutenants Meehan, Hill
2 and Fann were superior to those of Appellant Schmidt. (Testimony of Chief Kerlikowske).

3 9. There is no evidence in the record to suggest that either the Department or Chief
4 Kerlikowske unlawfully discriminated against Appellant Schmidt in passing him over for
5 promotion to the position of Captain.

6 CONCLUSIONS OF LAW

7 I. JURISDICTION

8 SMC 4.08.020 states that the general purpose of the PSCSC Ordinance (Ordinance No.
9 107791 as amended, codified at Seattle Municipal Code Chapter 4.08) is “to establish a civil
10 service commission to hear the appeals of employees in the Police and Fire Departments of the
11 City, regarding ... promotions... .” SMC 4.08.020. Among its powers and duties, the
12 Commission is mandated by ordinance “to hear and determine appeals or complaints respecting
13 the administration” of the Public Safety Civil Service System within the City. PSCSC Rule
14 6.01(c) provides as follows:

15 Any employee, or department, who is adversely affected by an alleged violation of
16 Article XVI of the Charter of the City of Seattle, the Public Safety Civil Service
17 Ordinance or the Public Safety Civil Service Commission Rules may appeal such
18 violation to the Commission.

19 Appellant Schmidt timely filed his appeal. The Commission has jurisdiction to hear
20 Appellant Schmidt’s claim that by deciding to promote other candidates eligible for the position
21 of captain and by failing to promote the appellant, the Chief of Police violated the PSCSC
22 Ordinance and Rules.
23

1 **II. VIOLATION OF PSCSC ORDINANCE AND RULES**

2 **Discretion of the Hiring Authority in the Promotion Process:**

3 At issue in this case are three promotional decisions of Chief Kerlikowske.

4 The process by which candidates become eligible for promotion within the City's Public
5 Safety Civil Service is governed by the PSCSC Ordinance and Rules. In 1998 through 2000, the
6 Commission was tasked with the responsibility of developing, administering, and grading
7 promotional examinations within the City's Public Safety Civil Service System.¹ The PSCSC
8 Rules require that promotional examinations be competitive, impartial and practical, designed to
9 qualify and rank applicants according to their relative fitness to perform the duties of the
10 position. Rule 9.09. The Secretary and Chief Examiner prepares the eligible register, and in so
11 doing, ranks candidates according to certain criteria. Rule 10.01. The general rule is that
12 eligible registers remain in force for no longer than two (2) years. Rule 10.09(c).

13 "Whenever a position covered by this system becomes vacant, the appointing authority, if
14 it desires to fill the vacancy, shall make requisition upon the Personnel Director for the names
15 and addresses of persons eligible for and willing and able to accept the appointment." SMC
16 4.08.110(A). If the appointing authority, in this case Chief Kerlikowske, chooses to fill a
17 vacancy, the Rules obligate him to promote an individual from the certified register. "The
18 appointing authority shall fill such vacancies by appointment from the register of persons
19 certified by the Personnel Director therefor." SMC 4.08.110(A). The PSCSC Rules, however,
20 do not require the Chief to promote according to rank on the register. Indeed, the Chief is

21 _____
22 ¹ In 2001, the City Council amended the PSCSC Ordinance, transferring several administrative functions of the
23 Commission's Secretary and Chief Examiner to the City's Personnel Director. During the events giving rise to
Appellant Schmidt's appeal, the Secretary and Chief Examiner had the duties of preparing, administering and
grading promotional examinations, preparing eligible registers, and preparing certified registers in response to
requisitions by the appointing authority.

1 expressly permitted to "fill such positions by appointment from the persons so certified without
2 regard to their order of certification." SMC 4.08.110(A).

3 Despite the requirement that the appointing authority promote from the certified register,
4 both the PSCSC Ordinance and Rules give the Chief significant discretion in selecting
5 individuals for promotion. Civil service laws were not intended to remove all discretion from the
6 decision-making process. Crippen v. City of Bellevue, 61 Wn. App. 251, 259, 810 P.2d 50
7 (1991) citing International Ass'n of Fire Fighters, Local 404 v. City of Walla Walla, 90 Wn.2d
8 828, 586 P.2d 479 (1978). Here, the Chief has discretion as to whether to promote at all. If he
9 chooses to promote, he must indeed do so from the certified register. However, he need not
10 promote according to rank on the certified register. Officers Guild v. City of Seattle, 113 Wn.
11 App. 431, 439, 53 P.3d 1036 (2002) (Court in upholding the City's "rule of five" for certified
12 registers, concluded that the legislature did not intend a "rule of one" for cities, like Seattle,
13 which created police and fire department civil service systems.) The PSCSC Rules do not
14 require the Chief to justify his decision or to articulate reasons when passing over an eligible
15 candidate on the certified register. Unless the Chief's motive for not promoting Appellant
16 Schmidt violates public policy, it is not relevant to the issue here. Crippen, 61 Wn. App. at 259.

17 Appellant Schmidt argues that because Chief Kerlikowske's promotional decisions were
18 subjective, they are necessarily not merit-based and are therefore invalid under the PSCSC
19 Ordinance and Rules. Appellant's argument ignores the established case law that allows the
20 appointing authority discretion in making promotional decisions. As long as the requirements of
21 the merit-based system are followed, in this case, a Rule of 5 requiring the Secretary and Chief
22 Examiner to certify five (5) eligible candidates from which the Chief may promote, and as long
23

1 as the Chief's promotional decisions are not based on unlawful factors or are contrary to public
2 policy, the Chief is allowed to use his discretion in making such decisions.

3 Here, the Chief relied in part on presentations of command staff in assessing the
4 qualifications of the candidates. He believed that Lieutenants Mike Meehan, Fred Hill, and Mike
5 Fann were better qualified than the appellant to serve as captains within the Department. Chief
6 Kerlikowske used his discretion, but based his decisions on merit. Neither the PSCSC Ordinance
7 nor Rules require the Chief to promote in order of the candidates listed on the certification. As
8 such, without evidence of illegal motivation on behalf of the Chief, the Commission will not
9 "second-guess" those decisions best left to the appointing authority. In this case, there is no
10 basis to conclude that the appellant was unlawfully passed over for promotion or that the Chief's
11 promotional decisions at issue here were made in violation of the PSCSC Ordinance or Rules.

12 To the extent that there were any irregularities in the certification process, specifically the
13 failure of the Chief to request an additional certification prior to promoting Lieutenant Fann,
14 such irregularities in no way harmed the appellant. Appellant's name was on the certification
15 from which Lieutenant Fann was promoted; he was considered by the Chief for the captain
16 vacancy to which Lieutenant Fann was promoted. Because appellant had been considered by the
17 Chief for the promotion, he was not harmed by the Chief's failure to request a new certification.


1 **ORDER**

2 Appellant Schmidt's appeal is hereby dismissed with prejudice.

3 DATED this 18th day of December, 2003.

4
5 **THE PUBLIC SAFETY CIVIL SERVICE COMMISSION:**

6
7
8 
9 _____
10 David Bown, Commissioner

11 
12 _____
13 Elizabeth Ford, Commissioner pro tem

14
15
16
17
18
19
20
21
22
23 
24 _____
25 Joel A. Nark, Commissioner