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PUBLIC SAFETY CIVIL
SERVICE COMMISSION

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

IN RE THE APPEAL OF)

LARRY D. LABREC,)

Appellant,)

vs.)

CITY OF SEATTLE, SEATTLE FIRE)
DEPARTMENT,)

Respondent/Employer.)

MEMORANDUM DECISION

PROCEDURAL BACKGROUND

This appeal was brought on August 18, 2000 by Lieutenant Larry LaBrec, challenging Chief Sewell's failure to promote him to the position of Captain within the Fire Department. Appellant LaBrec's appeal alleges that Chief Sewell violated the Public Safety Civil Service ("PSCSC") Ordinance and Rules by conducting structured interviews – or additional examination -- of eligible candidates for the position of Captain during the life of the 1998-2000 Captain Promotional Register. Appellant LaBrec argues that such additional examination usurps the authority of the Public Safety Civil Service Commission and violates the PSCSC Ordinance and Rules. Appellant LaBrec further alleges that Chief Sewell violated the PSCSC Ordinance and Rules when he

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1 interviewed "delayed eligible" candidates -- those candidates who were not on the certified register,
2 but may have been eligible for promotion at some future date. Appellant LaBrec finally alleges that
3 Chief Sewell, in failing to promote Lieutenant LaBrec, discriminated against him on the basis of
4 age.

5 In his appeal, Appellant LaBrec challenges each of Chief Sewell's decisions not to promote
6 him during the life of the certified register, a two-year period from March 20, 1998 through August
7 15, 2000.

8 The Commission held a hearing on the merits of Appellant LaBrec's appeal on October 28 –
9 31 and November 4–6, 2003. Appellant LaBrec was represented by an attorney, as was the
10 Department. Both parties submitted post-hearing briefs on January 10, 2003, at which time the
11 record was closed.

12 The Commission deliberated over Appellant LaBrec's appeal on January 23, February 10,
13 and February 28, 2003.

14 **FINDINGS OF FACT**

- 15 1. Appellant LaBrec served with the Seattle Fire Department ("Department") from 1970
16 until his retirement in March 2001.
- 17 2. In 1998, Appellant LaBrec participated in a promotional examination for the position of
18 Captain. The examination was administered by the Public Safety Civil Service Commission
19 ("Commission" or "PSCSC"). Appellant LaBrec was ranked sixth (6th) on the eligible register
20 certified by the PSCSC.
- 21 3. The eligible register remained in effect from March 20, 1998 through August 15, 2000.
- 22 4. When Captain positions became open within the Department, Chief Sewell, the hiring
23 authority for the Department at that time, met with candidates eligible for promotion and some

1 "delayed eligible" candidates -- candidates not on the certified register, yet potentially eligible
2 for promotion at some point in the future.

3 5. Chief Sewell conducted these interviews with one other Department Chief as an
4 interviewer. They were highly structured, designed, in the Chief's view, to assess the
5 candidates' relative abilities. The Chief conducted five rounds of interviews: early June/July
6 1998; late July 1998; October/November 1998; November 1999; and June 2000. The questions
7 posed to candidates in the five rounds of interviews varied considerably.

8 6. Based in part on the answers given to the questions presented during the structured
9 interviews, Chief Sewell evaluated eligible candidates in several different areas deemed by the
10 Chief to show competence in areas he felt were important for success in the position of Captain.

11 As a result of the interviews, the candidates were assessed and compared to other candidates.

12 7. In Chief Sewell's opinion, additional important factors to be considered in determining
13 whether a candidate should be promoted were whether the candidate had any experience in
14 administrative assignments within the Department and whether the candidate had volunteered for
15 special projects. Chief Sewell also believed educational experience to be an important factor for
16 promotion.

17 8. Appellant LaBrec participated in two (2) structured interviews conducted by Chief
18 Sewell.

19 9. During the life of the 1998-2000 eligible register, Chief Sewell promoted twenty-one (21)
20 Lieutenants from the Certified Register to the position of Captain within the Department. All of
21 the candidates promoted during this time were eligible candidates listed on the certified register.

22 Despite being eligible for each of the twenty-one (21) open positions, Appellant LaBrec was
23 never promoted to the position of Captain.

1 10. Chief Sewell believed that the candidates promoted to Captain were more qualified than
2 Appellant LaBrec.

3 11. At the time Appellant LaBrec was passed over for promotion on August 14, 2000, he was
4 52 years old.

5 12. Of those two (2) candidates that were promoted on August 14, 2000, one (1) was within a
6 protected age class. One (1) was not within a protected age class.

7 13. Of the twenty-one (21) candidates promoted off the eligible register, ten (10) were within
8 a protected age class.

9 14. Appellant LaBrec filed this appeal with the Commission on August 18, 2000, after the
10 Certified Register had expired.

11 15. Appellant LaBrec retired from the Department in March 2001.

12 CONCLUSIONS OF LAW

13 **I. JURISDICTION**

14 **a. Violation of Ordinance and Rules Claim:**

15 SMC 4.08.020 states that the general purpose of the PSCSC Ordinance (Ordinance No.
16 107791 as amended, codified at Seattle Municipal Code Chapter 4.08) is “to establish a civil
17 service commission to hear the appeals of employees in the Police and Fire Departments of the
18 City, regarding ... promotions....” SMC 4.08.020. Among its powers and duties, the
19 Commission is mandated by ordinance “to hear and determine appeals or complaints respecting
20 the administration” of the Public Safety Civil Service System within the City. PSCSC Rule
21 6.01(c) provides as follows:

22 Any employee, or department, who is adversely affected by an alleged violation of
23 Article XVI of the Charter of the City of Seattle, the Public Safety Civil Service

1 Ordinance or the Public Safety Civil Service Commission Rules may appeal such
2 violation to the Commission.

3 The Commission has jurisdiction to hear LaBrec's claim that by failing to promote
4 Lieutenant LaBrec, the Chief violated the PSCSC Ordinance and Rules.

5 **b. Discrimination Claim:**

6 While clarifying that one of the Commission's purposes is to hear appeals regarding
7 promotions, SMC 4.08.020 also provides that:

8 ...[a]ll appointments and promotions to Police and Fire Department positions, retention
9 therein and removal therefrom shall be based on merit and according to the policies and
10 procedures hereinafter specified... .

11 SMC 4.08.140(D) grants employees of the Public Safety Civil Service the right to fair and equal
12 treatment as provided in the City's Fair Employment Practices Ordinance codified at SMC

13 14.04. SMC 14.04.040 in turn declares that it is an unfair employment practice within the City
14 for any employer "to discriminate against any person with respect to ... promotion ... or with
15 respect to any matter related to employment." SMC 14.04.030(F) defines "discrimination" or
16 "discriminate" as:

17 ...any act, by itself or as part of a practice, which is intended to or results in different
18 treatment or differentiates between or among individuals or groups of individuals by
19 reason of race, color, age, sex, marital status, sexual orientation, gender identity, political
20 ideology, creed, religion, ancestry, national origin; or the presence of any sensory, mental
21 or physical handicap.

22 Because the Commission has jurisdiction to hear and determine appeals or complaints
23 respecting the administration of the SMC Chapter 4.08, and further, because SMC 4.08.140(D)
incorporates the right of employees to be free of age discrimination with respect to promotions,
this Commission has jurisdiction to hear Appellant LaBrec's claim alleging age discrimination in
the promotion process.

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3 **II. TIMELINESS**

4 In his appeal, Appellant LaBrec challenges each of Chief Sewell's decisions not to promote
5 him during the life of the eligible register, a two-year period from March 20, 1998 through August
6 15, 2000. The Department argues that Appellant LaBrec's claim is time barred, with the exception
7 of Chief Sewell's most recent decision not to promote Lieutenant LaBrec, occurring on August 14,
8 2000.

9 PSCSC Rule 6.03 requires employees and departments, if adversely affected, to file an
10 appeal within ten (10) days: "A notice of appeal shall be filed at the Commission offices within ten
11 (10) days of the action that is the subject of the appeal."

12 Appellant LaBrec filed his appeal with the Commission on August 18, 2000, after the
13 eligible register had expired and within ten (10) days of the Chief's decision on August 14, 2000 not
14 to promote Appellant LaBrec, but to promote two other eligible candidates instead. Despite being
15 passed over for promotion numerous times before August 2000, Appellant LaBrec did not file an
16 appeal with this Commission. Each time Appellant LaBrec was passed over for promotion, he had
17 an opportunity to appeal to this Commission. He chose not to do so. His delay necessarily results
18 in his earlier claims being time-barred. This Commission, therefore, considers only the Chief's
19 failure to promote Appellant LaBrec on August 14, 2000.

20 **III. VIOLATION OF PSCSC ORDINANCE AND RULES**

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

22 The process by which candidates become eligible for promotion within the City's Public
23 Safety Civil Service is governed by the PSCSC Ordinance and Rules. In 1998 through 2000, the

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

8 "Whenever a position covered by this system becomes vacant, the appointing authority, if
9 it desires to fill the vacancy, shall make requisition upon the Personnel Director for the names
10 and addresses of persons eligible for and willing and able to accept the appointment." SMC
11 4.08.110(A), Rule 11.3. If the appointing authority, in this case Chief Sewell, chooses to fill a
12 vacancy, the PSCSC Rules obligate him to promote an individual from the certified register.
13 "The appointing authority shall fill such vacancies by appointment from the register of persons
14 certified by the Personnel Director therefor." SMC 4.08.110(A); Rule 11.11. The PSCSC Rules,
15 however, do not require the Chief to promote according to rank on the register. Indeed, the Chief
16 is expressly permitted to "fill such positions by appointment from the persons so certified
17 without regard to their order of certification." SMC 4.08.100(A).

18 Despite the requirement that the appointing authority promote from the certified register,
19 both the PSCSC Ordinance and Rules give the Chief significant discretion in selecting
20 individuals for promotion. Civil service laws were not intended to remove all discretion from the

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

12 In this case, there is no dispute that the Commission administered a promotional
13 examination for the position of Captain within the Department. The Secretary and Chief
14 Examiner prepared the Fire Captain Promotional Exam register, which remained in effect from
15 March 20, 1998 through August 15, 2000. (Extended pursuant to PSCSC Rule 10.09).
16 Appellant LaBrec was ranked 6th on the register. Upon receipt of the certified registers, Chief
17 Sewell conducted highly structured interviews.

18 Appellant LaBrec concedes that the appointing authority has discretion in selecting
19 candidates for promotion. He argues, however, that in this case, the Chief exercised his
20 discretion in a manner that violated the PSCSC Ordinance and Rules. LaBrec argues that by
21 conducting highly structured interviews, the Chief required candidates to submit to examinations
22 in addition to the promotional examination administered by the Commission, and thus violated
23 civil service laws.

1 Neither the PSCSC Ordinance nor Rules dictate how an appointing authority may
2 exercise discretion in selecting candidates for promotion. Indeed, interviews by the appointing
3 authority are expressly permitted by the PSCSC Ordinance and Rules. "To facilitate the
4 selection of appointees from the persons so certified, the appointing authority may require such
5 persons to come before him/her and shall be entitled to inspect such persons' application and
6 examination papers...." SMC 4.08.100(A).

7 The appointing authority may also require eligible candidates to submit to additional
8 examination. PSCSC Rule 9.39 provides:

9 Promotional eligibles and Civil Service employees accepting appointment to another
10 class shall be subject to examination at the discretion of the department head, to the
11 extent of determining whether they will be physically and temperamentally able to
12 perform the duties of the position involved.

13 Rule 9.39 (emphasis added).

14 It is not entirely clear to the Commission whether the highly structured interviews
15 conducted by Chief Sewell were in fact permitted "interviews" as contemplated by SMC
16 4.08.100(A). However, there is sufficient evidence to support the conclusion that the highly
17 structured interviews were additional examinations, given at the discretion of Chief Sewell, to
18 determine whether the candidates were temperamentally able to perform the duties of Captain
19 within the Department. While highly unusual, perhaps unnecessary, and unwelcome within the
20 Department, the interviews were contemplated by PSCSC Rule 9.39 and were therefore within
21 the discretion of the Chief. The evidence supports the conclusion that the questions posed to the
22 candidates were designed to elicit information upon which the Chief could evaluate candidates'
23 relative abilities to perform the duties of Captain. Chief Sewell, unlike his predecessors in the

1 position of Chief in the Department, exercised his discretion to require additional examination,
2 which in this case did not benefit Appellant LaBrec.

3 Based in part on the responses given during the interviews and his belief that other
4 candidates were more qualified than Appellant LaBrec, Chief Sewell chose not to promote
5 Appellant LaBrec. Chief Sewell promoted twenty-one (21) Lieutenants to the position of
6 Captain during the life of the eligible register. Appellant LaBrec was ranked 6th on the register,
7 yet was never promoted. While very sympathetic to Appellant LaBrec's claims, this Commission
8 cannot conclude that Chief Sewell exercised his discretion in a manner that violated the
9 Ordinance or Rules. Nor can the Commission conclude that Chief Sewell, by interviewing
10 "delayed eligible" candidates, none of whom was promoted when not eligible, violated the
11 Ordinance and Rules.

12 **III. AGE DISCRIMINATION**

13 Appellant LaBrec argues that in failing to promote him, Chief Sewell discriminated
14 against him on the basis of age. The evidence does not support LaBrec's claim.

15 At the time Appellant LaBrec was passed over for promotion on August 14, 2000, he was
16 52 years old, and within a protected age class. Chief Sewell promoted two (2) other candidates
17 at that time. One (1) was within a protected age class. One (1) was not. The evidence does not
18 support a conclusion that Chief Sewell chose not to promote Appellant LaBrec on August 14
19 because of his age.

20 There is no evidence to suggest a pattern of age discrimination against Appellant LaBrec
21 over the life of the 1998-2000 eligible register. Of the twenty-one (21) candidates promoted
22 from the certified register during this period, ten (10) were within a protected age class. Chief
23 Sewell made no comments to suggest he chose not to promote Appellant LaBrec because of his

1 age. Chief Sewell decided not to promote Appellant LaBrec because the Chief believed that
2 others were more qualified. No evidence exists to support the conclusion that Chief Sewell or
3 others in the promotional process failed to promote Appellant LaBrec because of his age or even
4 considered his age in failing to promote him to the position of Captain.

5 **ORDER**

6 Appellant LaBrec's appeal is hereby dismissed with prejudice.

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9 DATED this 28 day of February, 2003.

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11 **THE PUBLIC SAFETY CIVIL SERVICE COMMISSION:**

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13 
14 Noreen Skagen, Commissioner

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16 
17 David Bown, Commissioner

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24 Commissioner James Fossos dissents.