

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

LARRY D. LABREC,	)	
	)	No. 55148-5-1
Appellant,	)	
	)	
v.	)	DIVISION ONE
	)	
CITY OF SEATTLE; SEATTLE FIRE	)	
DEPARTMENT; PUBLIC SAFETY	)	UNPUBLISHED OPINION
CIVIL SERVICE COMMISSION OF	)	
THE CITY OF SEATTLE,	)	
	)	
Respondents.	)	FILED: October 30, 2006

**DWYER, J.** — Larry LaBrec, formerly a lieutenant with the Seattle Fire Department (“department”), appealed to the Seattle Public Safety Civil Service Commission (“PSCSC” or “commission”) after he was not promoted to the rank of captain, despite being eligible. The commission rejected both LaBrec’s claim that the department’s promotional process violated civil service laws and his claim that he had been illegally discriminated against based on his age. On certiorari, the King County Superior Court sustained the majority of the commission’s decision, but remanded LaBrec’s age discrimination claim to the commission. We sustain the commission’s decisions in all respects, thus reversing the superior court’s order remanding the age discrimination claim and affirming the balance of its decision.

**FACTS**

From March 1998 until August 2000, the department utilized the following process for promotion to the rank of captain. First, the PSCSC administered and graded a civil service examination. Second, upon request from Chief Sewell, the PSCSC generated a list of candidates for promotion to captain, with the candidates listed in rank order based on their examination performance. Third, Chief Sewell invited the top five candidates on the list, as well as individuals lower on the list, to interview with him.<sup>1</sup> Finally, following the interviews, Chief Sewell promoted one of the top five candidates on the PSCSC list to the rank of captain.<sup>2</sup>

Between July 1998 and August 2000, Chief Sewell promoted 21 individuals to captain following this method. LaBrec was not promoted, despite being among the top five candidates for each of these promotions.

On August 18, 2000, LaBrec appealed to the commission, arguing that the department's promotional process violated civil service laws and that he had been discriminated against based on his age.

After a seven-day hearing, the commission ruled against LaBrec on both claims. Consistent with its procedural rules, the commission limited the scope of its consideration of LaBrec's appeal to the two promotions that occurred within ten days of LaBrec's filing his appeal with the commission.

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<sup>1</sup> Chief Sewell interviewed LaBrec in July 1998 and in November 1999.

<sup>2</sup> Under the Civil Service laws applicable to Chief Sewell, he was authorized to select from among the top five individuals on the PSCSC list, without regard to rank order, a process called the "rule of five."

On certiorari, the King County Superior Court sustained the commission's decisions on all grounds except the age discrimination claim, which it remanded to the commission for entry of more detailed findings of fact and conclusions of law.

### DISCUSSION

LaBrec appeals from the superior court's order, contending that the commission erred by (1) asserting subject matter jurisdiction over the age discrimination claim, (2) limiting the scope of its review to those actions occurring within 10 days of the filing of LaBrec's appeal, and (3) denying LaBrec's challenge to the promotional process. We sustain the commission's findings of fact, conclusions of law, and decisions as to each of these claims.

Respondents cross-appeal, assigning error to the superior court's order remanding the age discrimination claim. Finding this argument meritorious, we reverse the decision of the superior court and affirm the commission's decision on this claim.

#### Standard of review

Review of the commission's decision pursuant to writ of certiorari is governed by RCW 7.16.120.<sup>3</sup> This court sits in the same position as the superior

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<sup>3</sup> The questions involving the merits to be determined by the court upon the hearing are:

(1) Whether the body or officer had jurisdiction of the subject matter of the determination under review.

(2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.

court when reviewing the commission's decision. Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 29, 891 P.2d 29 (1995). We review legal issues de novo, and will reverse a decision when a legal conclusion is contrary to law. RCW 7.16.120(3). We review factual issues to determine whether they are supported by competent and substantial evidence. RCW 7.16.120(4), (5). This factual review is deferential, Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782, 903 P.2d 986 (1995), and requires us to view the evidence and the reasonable inferences therefrom "in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." State ex rel. Lige & Wm. B. Dickson v. County of Pierce, 65 Wn. App. 614, 618, 829 P.2d 217 (1992). In this case, that party is the PSCSC.

#### **I. Superior court's remand to the commission**

Respondents urge this court to reverse the superior court's remand of LaBrec's age discrimination claim to the commission for entry of more detailed findings of fact and conclusions of law. The superior court ordered remand for the purpose of conforming the commission's ruling with the test outlined in Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 23 P.3d 440 (2001). Specifically, respondents argue that the commission need not explicitly set forth its findings and conclusions with the degree of specificity that Hill requires of a trial court, so

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(3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

(5) Whether the factual determinations were supported by substantial evidence.

long as the findings of fact reached by the commission are supported by substantial and competent evidence in the record, and the conclusions of law reached by the commission are not contrary to law. We agree. Accordingly, we reverse the superior court's decision to remand this claim to the commission.

The commission's memorandum decision stated, in part:

There is no evidence to suggest a pattern of age discrimination against Appellant LaBrec over the life of the 1998-2000 eligible register. Of the twenty-one (21) candidates promoted from the certified register during this period, ten (10) were within a protected age class. Chief Sewell made no comments to suggest he chose not to promote Appellant LaBrec because of his age. Chief Sewell decided not to promote Appellant LaBrec because the Chief believed that others were more qualified. No evidence exists to support the conclusion that Chief Sewell or others in the promotional process failed to promote Appellant LaBrec because of his age or even considered his age in failing to promote him to the position of Captain.

Pursuant to the Hill decision, a burden-shifting analysis applies to resolution of claims of this type. Initially, the plaintiff bears the burden of setting forth a prima facie case of unlawful discrimination. If a prima facie case is established, a rebuttable presumption of discrimination takes hold, and the evidentiary burden shifts to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action. Once the presumption is rebutted, the burden of proof shifts back to the plaintiff, who must show that the defendant's stated reason for the adverse action was, in fact, pretextual. Hill, 144 Wn.2d at 181-82.

Review of the administrative record demonstrates that the commission applied all three elements of the Hill analysis.

First, the record demonstrates that LaBrec made a prima facie case of age discrimination. LaBrec was 52 years old when he filed his appeal with the commission. Of the two individuals promoted to captain with 10 days of the filing of LaBrec's appeal, one was 34 years old, the other was 49 years old.

Second, the commission found that the City proffered a legitimate, non-discriminatory explanation for not promoting LaBrec to captain. The commission expressly accepted the truth of Chief Sewell's testimony that he did not promote LaBrec because he believed that other candidates were more qualified. Substantial evidence in the record, including Chief Sewell's testimony, and the résumés, letters of recommendation, and interview assessments of promoted candidates, supports the commission's conclusion as to the second element of the Hill test.

Third, the commission concluded that the record was devoid of evidence that Chief Sewell failed to promote LaBrec because of his age, or that Chief Sewell "even considered [LaBrec's] age," in deciding not to promote him. The commission thus rejected the notion that Chief Sewell's proffered explanation for not promoting LaBrec was pretextual.

Although the commission's decision was not issued in a form that precisely comported with the Hill test, the commission clearly engaged in the

proper analysis. Its findings of fact were supported by substantial and competent evidence and its decisions and conclusions of law were not contrary to law.

Accordingly, we reverse the trial court's order remanding the matter to the commission and sustain the commission's decision on this claim.

## **II. PSCSC subject matter jurisdiction**

LaBrec objects to the commission's findings of fact and conclusions of law regarding his age discrimination claim. Specifically, LaBrec asserts that the commission lacked subject matter jurisdiction to adjudicate such a claim, and that the Seattle Office of Civil Rights had exclusive jurisdiction to hear such claims. We conclude to the contrary, holding that the commission possessed subject matter jurisdiction over the dispute.

The commission articulated the following basis for its assertion of subject matter jurisdiction:

SMC 4.08.020 states that the general purpose of the PSCSC Ordinance ... is "to establish a civil service commission to hear the appeals of employees in the Police and Fire Departments of the City, regarding ... promotions...." SMC 4.08.020. Among its powers and duties, the Commission is mandated by ordinance "to hear and determine appeals or complaints respecting the administration" of the Public safety Civil Service System within the City ....

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

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

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

SMC 4.08.140(D) grants employees of the Public Safety Civil Service the right to fair and equal treatment as provided in the City's Fair Employment Practices Ordinance codified at SMC 14.04. SMC 14.04.040 in turn declares that it is an unfair employment practice within the City for any employer "to discriminate against any person with respect to ... promotion ... or with respect to any matter related to employment." SMC 14.04.030(F) defines "discrimination" or "discriminate" as:

... any act, by itself or as part of a practice, which is intended to or results in different treatment or differentiates between or among individuals or groups of individuals by reason of ... age....

Because the Commission has jurisdiction to hear and determine appeals or complaints 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, the Commission has jurisdiction to hear Appellant LaBrec's claim alleging age discrimination in the promotion process.

The commission's interpretation of this issue is correct.

Further support for the commission's assertion of subject matter jurisdiction is found in SMC 14.04.020, concerning the jurisdiction of the Office of Civil Rights, that ordinance provides, in part:

D. Nothing in this chapter shall be deemed to deny any person the right to institute any action or to pursue any civil or criminal remedy for the violation of such person's civil rights.

E. To avoid duplication of efforts or otherwise conserve agency resources, the Director [of the Office of Civil Rights] may suspend or close a case for any reason consistent with this chapter, including the reason that the case is being actively pursued in another forum.



This policy declaration indicates that the Seattle legislative authority contemplated a variety of appropriate forums for adjudication of discrimination claims, and expressly provided for such alternatives.

Accordingly, we conclude that the commission possessed subject matter jurisdiction over LaBrec's age discrimination claim.

## **II. Limitation of LaBrec's appeal**

LaBrec next contends that the commission erroneously limited his hearing to those promotions occurring within 10 days of the filing of his appeal with the commission, pursuant to PSCSC Rule 6.03.<sup>4</sup> We conclude that the commission's application of PSCSC Rule 6.03 was not contrary to law.

First, the commission properly limited LaBrec's appeal to specific personnel actions. PSCSC Rule 6.03 specifically requires the subject of the appeal to be an "action." In DiGiovanni v. City of Tukwila, 54 Wn. App. 627, 774 P.2d 1244 (1989), this court, in interpreting an ordinance requiring an appeal within 10 days of an "action" by the city council, stated: "'Action' is ordinarily defined as 'the process of doing' ... 'a thing done: deed.'" 54 Wn. App. at 630.

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<sup>4</sup> Rule 6.03 provides: "APPEALS - TIME - FORM. A notice of appeal shall be filed at the Commission offices within ten (10) days of the action that is the subject of the appeal. The notice of appeal shall be in writing and include the mailing address and street address where service of process and other papers may be upon the appellant. The notice of appeal shall also contain a brief description of the facts giving rise to the appeal, and a concise statement of the reason for the appeal. Forms provided by the Commission may be used for such notice, but are not required."

Further, the commission's decision to apply its 10-day limitation rule and thereby limit the scope of LaBrec's appeal was within the commission's discretion.<sup>5</sup>

Accordingly, we conclude that the commission's application of PSCSC Rule 6.03 was not contrary to law.

#### **IV. The promotional process**

LaBrec next asserts that the commission erroneously concluded that Chief Sewell's use of structured interviews as a basis for selecting from among eligible candidates was a proper exercise of his discretion. We disagree. Thus, we sustain the commission's findings of fact and conclusions of law resolving this claim.

LaBrec first contends that Chief Sewell lacked any authority to interview candidates. However, as the PSCSC noted in its ruling, SMC 4.08.110(A) states:

To facilitate the selection of appointees ..., the appointing authority may require such persons to come before him/her and shall be entitled to inspect such persons' application and examination papers ...

(Emphasis added.) This provision plainly authorized Chief Sewell's interviews of candidates for promotion.

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<sup>5</sup> The commission has the discretion to waive the requirements of any of its hearing rules under PSCSC Rule 6.33, which states, "Upon stipulation of all parties to a proceeding, or upon a showing that the purposes of the Charter and ordinances of The City of Seattle would be better served, the commission may waive the requirements of any of these rules."

Additionally, as the PSCSC ruling also noted, PSCSC Rule 9.39<sup>6</sup> provided Chief Sewell with authority to conduct an examination of individuals eligible for promotion. The commission found "sufficient evidence to support the conclusion that the highly structured interviews were additional examinations, given at the discretion of Chief Sewell" and that "the interviews were contemplated by PSCSC Rule 9.39 and were therefore within the discretion of the Chief." These conclusions of law are not contrary to law.

LaBrec next argues that the commission erroneously concluded that Chief Sewell's use of structured interviews was not contrary to civil service laws.

However, the PSCSC examination process substantially fulfilled the objective of the relevant civil service laws, as Chief Sewell was only authorized to promote from among the top five eligible candidates as determined by the competitive examination.<sup>7</sup> The validity of the PSCSC examination process, and its fulfillment of the purpose of civil service laws compelled a similar result in Seattle Police Officers Guild v. City of Seattle, 151 Wn.2d 823, 92 P.3d 243 (2004). Our Supreme Court found the Seattle Police Department's "rule of five"

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<sup>6</sup> "Promotional eligibles and Civil Service employees accepting appointment to another class shall be subject to examination at the discretion of the department head, to the extent of determining whether they will be physically and temperamentally able to perform the duties of the position involved." PSCSC Rule 9.39.

<sup>7</sup> The PSCSC exams substantially fulfilled the objective of the relevant civil service laws and are not at issue. Further, there is no dispute that the 21 individuals promoted were among the top five candidates when they were promoted. Accordingly, LaBrec's citation to Simonds v. Kennewick, 41 Wn. App. 851, 706 P.2d 1080 (1985) (invalidating exams conducted and evaluated by the fire chief and others in the fire department, rather than by the civil service commission), is inapposite. Here, the competitive PSCSC exam was properly administered and its results properly utilized.

process to be consistent with civil service principles.<sup>8</sup> Further, the Court stated that the plaintiffs had not demonstrated that the City's "rule of five" failed to substantially accomplish the purpose of chapter 41.12 RCW, i.e., ensuring that its officers receive promotions based on merit:

On its face, the City's civil service ordinance honors merit principles by granting employees the right to "compete openly for positions on the basis of knowledge, skills, and abilities." The City's system ensures that officers qualify for promotional opportunities based on their performance on the civil service exam.

Seattle Police Officers Guild, 151 Wn.2d at 834 (internal citation omitted).<sup>9</sup>

Based on this analysis, and given the validity of the PSCSC examination process in the instant case, we conclude that LaBrec's argument that the department's promotional process violated civil service laws must fail.

LaBrec's assertion that Chief Sewell abused his discretion in making promotional decisions by failing to articulate specific reasons for selecting among the candidates is similarly unavailing. Under SMC 4.08.110(A), the chief is expressly permitted to "fill such vacancies by appointment from the register of persons certified ... without regard to their order of certification." No laws,

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<sup>8</sup> Chapters 41.08 and 41.12 RCW set out the model civil service system for firefighters and police officers respectively. The statutes are so similar that a decision under either statute constitutes authority for both. Seattle Police Officers' Guild v. City of Seattle, 121 Wn. App. 453, 455-57, 89 P.3d 287 (2004).

<sup>9</sup> In so ruling, the Court stated, "Chapter 41.12 RCW does not require strict adherence to its prototype civil service system." Seattle Police Officers Guild, 151 Wn.2d at 832. The Court also stated, "[T]he statute expressly states that cities must accomplish only the "purpose" rather than follow the particular methods prescribed by chapter 41.12 RCW. RCW 41.12.010." Seattle Police Officer' Guild, 151 Wn.2d at 834.

ordinances or rules expressly required Chief Sewell to justify his decisions or to articulate reasons for passing over eligible candidates.

We find that the administrative record contains substantial and competent evidence to support the commission's findings of fact concerning this claim. Accordingly, we sustain the commission's conclusion that Chief Sewell's interviews and promotional process did not violate applicable laws, ordinances, or PSCSC rules.

Finally, as LaBrec did not prevail in this appeal, we deny his request for an award of attorney fees.

The PSCSC's findings of fact, conclusions of law, and decisions are sustained. The order of the superior court is affirmed in part and reversed in part.

Deny, J.

We concur:

Eleonori, J.

Azid, J.