

Civil Service Department City of New Orleans

FIRE CAPTAIN PROMOTIONAL APPEALS

DOCKET NUMBERS

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VERSUS

DEPARTMENT OF FIRE

I. INTRODUCTION:

The Civil Service Department received and processed the Fire Captain promotional appeals of 47 firefighters protesting the Fire Superintendent's denial of their promotion pursuant to Civil Service Commission Rule VI, Section 6.1, which provides:

If any qualified candidate or employee, whose name appears on a verified appointment or promotional list, believes that his appointment, allocation or promotion has been improperly denied, he may protest the denial of such by presenting such forms or documents as the Director [of Personnel] may prescribe. The Director [of Personnel], or any person designated by him, may hold special hearings to determine the facts of such case and the Director [of Personnel] shall make his decision on the basis of the written statements, and forms presented by the employee and on the facts brought out in the hearing. The employee shall have the right to appeal to the Commission if

dissatisfied with the action of the Director [of Personnel].

The appeals were assigned to a hearing officer to hold special hearings to determine the facts of the case. These special hearings were held on March 22 -23, 2017 and on April 4-5, 2017. As a result of those hearings, the hearing officer has provided the Personnel Director with a report.

The Personnel Director, utilizing her investigative authority, has reviewed the hearing officer's report along with the employee appeal forms, the Civil Service Commission's Rules, the Louisiana State Constitution, hearing transcripts, hearing exhibits, and the attorney's post hearing briefs. Below is a report of the Department's findings and final determination in this matter.

II. FINDINGS:

Finding 1: The Civil Service Department established a competitive, ranked eligible list for Fire Captain as a result of a valid examination in accordance with Civil Service Commission Rules, the Uniform Guidelines on Employee Selection Procedures and the Louisiana State Constitution:

In observance of Civil Service Commission Rule VI, the Uniform Guidelines on Employee Selection Procedures and the Louisiana State Constitution, the Civil Service Department created a merit-based, competitive Fire Captain's examination based on a job analysis of the rank of Fire Captain.

According to the Civil Service Commission's Rules, "the purpose of Rule VI is to ensure the efficient screening and assessment of applicants for promotion and appointment under a general system based on merit, efficiency, fitness and length of service as ascertained by examination which, so far as practical, shall be competitive."

Further, Article X Section 7 of the Louisiana State Constitution requires that, "Permanent appointments and promotions in the classified state and city service shall be made

only after certification by the appropriate department of civil service under a general system based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive.”

The Uniform Guidelines on Employee Selection Procedures (“the Uniform Guidelines”) apply to federal, private, and public employers subject to Title VII of the Civil Rights Act of 1964. According to the Equal Employment Opportunity Commission (“EEOC”) the purpose of the Uniform Guidelines is to “aid in the achievement of our nation's goal of equal employment opportunity without discrimination on the grounds of race, color, sex, religion or national origin. The Federal agencies have adopted the Uniform Guidelines to provide a uniform set of principles governing use of employee selection procedures which is consistent with applicable legal standards and validation standards generally accepted by the psychological profession and which the Government will apply in the discharge of its responsibilities.¹” Employers who follow the Uniform Guidelines are more likely to provide a strong defense against claims of unlawful discrimination.

In order to create a valid examination for Fire Captain, a trained Psychometrician with over 30 years of experience in test development and validation performed a job analysis, which consisted of a series of surveys and interviews of subject matter experts (“SME”). At the request of the Civil Service Department, the Fire Administration provided a pool of thirty-three SME (30 Captains and 3 District Chiefs), which represented a cross-section of the platoons and of the assignments of Captains; were representative of the racial make-up of the classifications represented; and were dependable and well-trusted.

¹ (https://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html)

The job analysis produced 16 areas of knowledge, skills and abilities (“KSA”) that made up the job of Fire Captain. The examination content was then devised by the Psychometrician to measure those KSAs identified during the job analysis. The exam consisted of two parts: a multiple choice exam (weighted 57%) and a scenario based job simulation (weighted 43%). In advance of the exam, all candidates were provided with the KSAs to be measured in each section of the exam, their weights toward the final score, and a definition of each KSA (Appellants’ Exhibit 2). A booklist was provided to all candidates in advance of the multiple choice exam. All questions on the multiple choice exam were taken from material on the booklist. Candidate orientation sessions were required for all candidates prior to the job simulation. These orientation sessions provided information on what candidates could expect to see on the job simulation.

Assessors were brought in from other fire jurisdictions to score the job simulation using rating scales developed by the Psychometrician with SME input. Additionally, prior to making their ratings, the assessors received a handbook and on-site training on areas including the job analysis, KSAs and task list, techniques in behavioral observation, and how to avoid making common rating errors.

Following the administration and scoring of the exam, a competitive, ranked eligible list was established by Civil Service. Candidates were provided with their individual exam results. They were also given an opportunity to attend an optional individual feedback session during which they received a breakdown of their performance on each of the KSAs measured by the exam. When asked during his testimony if he had objected to Civil Service about how the

eligible list had been compiled, Fire Superintendent Timothy McConnell responded that he did not. (Tr. Vol. I at 18).

Finding 2: The Civil Service Department certified a competitive, ranked list of eligibles for Fire Captain in accordance with Civil Service Commission Rules:

On April 20, 2016, the Civil Service Department certified a competitive, ranked list of eligible candidates (“the list”) to the Fire Superintendent in accordance with Civil Service Commission Rules (Appellants’ Exhibit 4).

In August of 2014, certain provisions of the Civil Service Commission Rules were amended as part of the “Great Place to Work” rules. Civil Service Commission Rule VI, 3.1 as amended under “Great Place Work” states:

Upon a request from the appointing authority to fill a position other than by demotion, transfer, or reinstatement, the Department shall provide to the appointing authority the names of all candidates certified by the Department to meet the minimum qualifications, to have passed the examination, if any, and met any selective certification requirements requested by the appointing authority and approved by the Personnel Director. The number of names to be certified shall not be less than three. The Personnel Director may authorize an appointing authority to conduct examinations and may establish policies for appointing authority administered examinations. Such examinations shall be job-related and designed to assess applicants based on merit, efficiency, fitness, and length of service.

Civil Service Commission Rule VI, 3.5 (a.) also amended under the “Great Place to Work” rule changes states:

The eligibles certified shall be the highest ranking eligibles willing to accept employment, ranked in the following order:

1. All the eligibles on the appropriate preferred reemployment list, if any;
2. All other eligibles.

Prior to the “Great Place to Work” Rule amendments, Civil Service Commission Rule VI, 3.1 used a “Rule of Three”:

Upon a request from an appointing authority to fill a position other than by demotion, transfer, or reinstatement, the Director shall certify to the appointing authority the names of three eligibles for such position of the class of the vacant position, and if more than one vacancy is to be filled, the name of one additional eligible for each additional vacancy. In cases of demotion, transfer or reinstatement, the Director shall approve or disapprove the name of the person submitted by the appointing authority.

The former “Rule of Three” rules mandated that a civil service position be filled by one of the three individuals with the highest scores on the examination. In practice, the “Rule of Three” was often combined with the use of banding. Bands (score groups) were established based on the psychometric properties of the exam score distribution or on job analysis information. All scores falling within a given band were considered tied (former Civil Service Commission Rule V, Section 5.1). This gave appointing authorities more discretion by increasing the number of candidates that could be considered for promotion. However, bands were *never* based upon a combination of exam score and “seniority” as suggested in the NOFD post-hearing briefing. Appointing authorities were always able to consider other factors in addition to exam score such as seniority, prior work experience, training, education, job performance, and discipline when determining or selecting who to promote from a Civil Service list of eligibles. However, the “Rule of Three” in combination with banding restricted the appointing authority to selecting from the top performers on the Civil Service examination before reaching down on the list of eligibles to select lower performers on the examination.

Currently, under the “Great Place to Work,”² the Civil Service Department is required to present a competitive list in order of examination score upon an appointing authority’s request. The Civil Service Department met that requirement by providing a competitive list, based on a thorough job analysis and examination process. However, the new “Great Place to Work” Civil Service Commission Rules do not provide guidance regarding the selection of candidates from the list. Thus, the only

² (New Civil Service Commission Rule VI, 3.5 (c), 2017)

restrictions on the selection process would have to be gleaned from other provisions of the Civil Service Commission Rules and from the Louisiana Constitution.

In this case, in an effort to fill 41 vacancies, the Fire Superintendent skipped over higher ranked candidates and reached down to the bottom of the list. For example, the Fire Superintendent selected a candidate ranked number 117 out of 120 eligible candidates on the list. The Fire Superintendent stated in his testimony that he did not rely solely on the competitive exam rankings to make selections for promotion. Instead, he asserted that he relied on 15 factors included in NOFD policy ADM-27 (Appellants' Exhibit 5) which was developed three months after the Civil Service Department released its ranked, competitive list of eligible candidates for Fire Captain. (Tr. Vol. I at 25).

Finding 3: The Fire Superintendent established a selection process for promotion to Fire Captain that was in violation of Civil Service Commission Rule VI, Section 2.1, 2.3 and 3.1:

The Fire Superintendent and the Civil Service Department worked together to establish the following minimum qualifications for the position of Fire Captain:

- (1) Permanent status as a Fire Apparatus Operator or Firefighter I and four years and six months of experience with the New Orleans Fire Department in any of the following classes: Fire Recruit, Firefighter I, Fire Apparatus Operator or any combination thereof. TO BE CERTIFIED FOR PROMOTION: one must have six (6) years of the above service; and
- (2) Either the Certificate in Fire Protection Technology (FPTC) courses, or the Associates Degree in Fire Protection Technology from Delgado Community College. Associate Degrees, or higher, in a fire science related field of study from a college or university that is accredited by a regional accrediting agency may be substituted. Civil Service reserves the right to determine the appropriateness of any proposed substitution.

These qualifications were used to determine which applicants qualified to take the Fire Captain's examination. The Fire Superintendent did not provide the Civil Service staff and the applicants with any

other necessary or desirable qualifications at the time the job announcement was posted for the position.

Instead, the Fire Superintendent in cooperation with his Deputy Superintendents created NOFD Policy ADM-27 which contains his own policies and procedures for promotion to Fire Captain. NOFD Policy ADM-27 clearly identifies a selection procedure; including creating a list of “desirable qualifications” required to be eligible for promotion, and an examination process using an unstructured oral interview. This was done without any consultation with Civil Service Staff.

Additionally, within this policy, section 8.1.3 lists fifteen (15) factors that the promotional committee assessed to determine whether a candidate would be selected for a job interview and whether a candidate would be recommended for promotion to Fire Captain.

The 15 factors are as follows:

- 8.1.3.1 Effective application of department's safety and accountability procedures, and initiatives;
- 8.1.3.2 Support for and effective implementation of the department's fire prevention strategies and initiatives;
- 8.1.3.3 Performance history;
- 8.1.3.4 Disciplinary history;
- 8.1.3.5 Education;
- 8.1.3.6 Résumé;
- 8.1.3.7 Training;
- 8.1.3.8 Demonstrated leadership;
- 8.1.3.9 Interpersonal skills;
- 8.1.3.10 Problem-solving skills;
- 8.1.3.11 Years of service;
- 8.1.3.12 Civil Service examination score;
- 8.1.3.13 Commendations, awards, recognition and accomplishments;

- 8.1.3.14 Relevant experience; and
- 8.1.3.15 Additional relevant considerations, including any additional materials the candidates may wish to submit.

The Fire Superintendent's use of ADM-27's selection procedure and its list of factors is a violation of the Civil Service Commission Rules.

Civil Service Commission Rule VI, Section 2.1 Violated

By establishing NOFD Policy ADM-27, the Fire Superintendent violated Civil Service Commission Rule VI, Section 2.1 by adding desirable qualifications for appointment to the position of Fire Captain beyond the minimum qualifications that had already been established for application. In order to comply with Rule VI, 2.1, the Fire Chief should have provided "desirable qualifications" to the Civil Service staff much earlier in the process, and obtained approval from the Civil Service staff prior to publicizing the vacancy. The procedure that must be followed is found within the section of Rule VI, 2.1 relative to submitting a requisition to fill a vacancy.

- 2.1 Whenever an appointing authority proposes to fill a vacancy in the classified service, the appointing authority shall submit to the Department a statement showing the position to be filled, the duties thereof, **the necessary and desirable qualifications** of the person to be appointed thereto, and the proposed class, if known. The Department shall approve or deny the position allocation within seven (7) days for existing classifications and fifteen (15) days for new classifications, exclusive of Commission approval. The Department shall announce each vacancy within thirty (30) days of an approved allocation. The Department shall not withhold reasonable approval of the request unless it can demonstrate that the request violates the principles of the merit system. For the purposes of allocating positions to a class, the Department shall interpret the existing classes broadly and in accordance with Rule III Section 2.1, including, when appropriate, waiving supervisory requirements and allowing a department to leverage classes used by other departments for efficiency. If the appointing authority and the Director disagree on the position's minimum qualifications or the class allocation and are unable to resolve their disagreement, the issue may be brought before the Commission for a decision. (Amended August 25, 2014, effective September 1, 2014)

Appointing Authorities submit requisitions to fill vacancies, including promotions, to the Civil Service Department. Civil Service approves the allocation, attaches the appropriate eligible list, if

available, and sends it back to the requesting appointing authority. If, however, there is no list available, then Civil Service will contact the appointing authority about opening a job announcement based upon the minimum qualification listed in the job specification. The appointing authority will review the established minimum qualifications and recommend any changes or “desirable qualifications” to Civil Service. Civil Service staff will work with the department on these minimum qualifications until an agreement can be reached. In this case, the agreement regarding the minimum qualifications was reached before the requisition process occurred.

After receiving a list of eligible candidates from the Civil Service Department by e-mail on April 20, 2016 (Appellants’ Exhibit 4).) the Fire Superintendent subsequently added “desirable qualifications” necessary to be eligible for promotion. Merriam Webster’s dictionary defines “qualifications” as any knowledge, skill or ability that makes someone suitable for a particular job or position. NOFD Policy ADM-27 provides a list of factors including education, training, experience and skills which will be assessed by a promotional committee to determine if someone is suitable for a promotion to Fire Captain. The Fire Superintendent created *additional* qualifications along with a new examination process to determine who to select from the Civil Service Department’s established ranked list of eligibles. These new “desirable qualifications” were not provided to Civil Service in keeping with Rule VI, Section 2.1 and were not shared with the candidates until on or after July 26, 2016, three months after the official list of eligibles was published by Civil Service.

The requisitions to fill the 41 vacancies were submitted in September of 2016, after the Fire Superintendent’s selection process, guided by Policy ADM-27, had been executed. At that time, the Fire Superintendent already knew who he wanted to promote. There was no need for the Fire Superintendent to include “desirable qualifications” on the requisition at this point in the appointment process in keeping with Rule VI, Section 2.1. The additional “desirable qualifications” listed in the policy

were established prior to the requisitions being submitted to the Civil Service Department for approval. The Civil Service Department will assume that appointing authorities will use the minimum qualifications and examination process that is established by Civil Service in order to make a selection from a competitive eligible list unless otherwise informed by the appointing authority. In this case, the Civil Service Department was not informed of the secondary examination process established by the Fire Superintendent.

Civil Service Commission Rule VI, Section 2.3 Violated

In addition, in cases such as this, where desirable qualifications are requested after a certification (list of eligibles) is established, the appointing authority may ask for “selective certification.” The Civil Service Commission Rules define “Selective Certification” as “certification to an appointing authority by the Department (of Civil Service) of a list of names of persons who have been specifically selected from an appropriate employment list because of their possession of certain necessary and specified qualifications.” Rule VI, Section 2.3 provides for the following:

When an appointing authority has specified special necessary or desirable qualifications of candidates, the Director shall certify from a list of eligibles having such qualifications, if the Director deems that the request has offered satisfactory evidence that the nature of the position to be filled warrants such certification.

The Personnel Director never received a request to consider any additional “desirable qualifications” in keeping with Rule VI, Sections 2.1 or 2.3. If the Fire Superintendent had followed any of these rules, the Civil Service Department would have been aware of the new NOFD Policy ADM 27 and could have reviewed and approved the process before it was used to make selection decisions.

Civil Service Commission Rule VI, Section 3.1 Violated

Finally, as mentioned earlier, the Civil Service staff believes that NOFD policy ADM-27 clearly identifies an examination process using an unstructured oral interview. During Superintendent

McConnell's testimony, he referred to the interview as an exam and explained the reasoning for keeping the exam questions confidential, stating, "We asked everyone that participated in this process to sign a confidentiality agreement to try and maintain the integrity of the exam as much as possible." (Tr. Vol. I at 30).

This examination process was never reviewed or authorized by the Personnel Director as required by Civil Service Commission's Rule VI, Section 3.1:

The Personnel Director may authorize an appointing authority to conduct examinations and may establish policies for appointing authority administered examinations. Such examinations shall be job-related and designed to assess applicants based on merit, efficiency, fitness, and length of service.

While this Rule allows an appointing authority to conduct an examination, it must be authorized by the Personnel Director. Civil Service Commission Rule I, Number 37 defines "examination" as "any formal assessment or combination of assessments used to evaluate an applicant's qualifications, licenses, certificates and job-related experience. Examinations include but are not limited to tests, experience and training evaluations, minimum qualifications, résumé evaluations and structured oral interviews, and job interviews." Based on the Fire Superintendent's application of NOFD ADM-27, the Fire Superintendent conducted résumé evaluations based on the 15 factor criteria and unstructured oral interviews before making any final promotional decision. However, the Fire Superintendent did not seek input or receive approval of NOFD Policy ADM-27 or any of the selection procedures or examination processes contained within from the Personnel Director and therefore did not receive approval for the use of this appointing authority administered examination, which clearly violates Rule VI, Section 3.1.

Finding 4: The selection procedures contained within NOFD Policy Adm-27 were not in accordance with the Uniform Guidelines on Employee Selection Procedures:

As part of the promotional process, the New Orleans Fire Superintendent conducted résumé evaluations and unstructured oral interviews based on 15 factors outlined in NOFD Policy Adm-27. After reviewing the list of 15 factors and the oral interview process, and reviewing testimony regarding the development and use of these factors and the interview process, it does not appear that the Fire Superintendent's selection process listed in Adm-27 was established in accordance with the Uniform Guidelines on Employment Selection Procedures. The Uniform Guidelines, which provide standards for the proper use and validation of employment testing, "apply to tests and other selection procedures which are used as a basis for making employment decisions." Section 1607.2 B. These employment decisions may include decisions relative to hiring, promotion, demotion, training, transfers and retention. According to the Guidelines, "all employers are encouraged to use selection procedures which are valid, especially those employers operating under merit principles." *Id* Section I, Q.6. Selection procedures, as defined by the Uniform Guidelines, "include the full range of assessment techniques, including written exams, performance tests, training programs, probationary periods, interviews, reviews of experience or education, work samples, and physical requirements." *Id* Section I, Q6

There is no evidence to support the Fire Superintendent validated his examination and selection process by conducting a job analysis to identify the necessary knowledge, skills or abilities required for the job or promotion. While the Civil Service staff had conducted such a job analysis of the Fire Captain position, the Fire Superintendent did not request that information, and the Civil Service staff did not review the Fire Superintendent's examination or selection process. In addition, there is no evidence to support that the Fire Superintendent conducted either a content or criterion-related validation study required to determine the validity of his examination or selection process.

To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) measured in the selection procedure are a representative sample of the behavior(s) of the job in question. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be “operationally defined.” Operational definitions provide a clear, unambiguous, detailed description of the characteristic or attribute being measured; ensure that assessors have the same understanding of the work related behavior, knowledge skill or ability being measured; and establish a consistent rating system for all raters to follow. To prevent erroneous ratings that often occur when those completing the ratings have different views of what they are rating, the need for operational definitions is fundamental when collecting data, and thus is particularly important when a hiring or promotional decision is being made. In addition, to ensure consistency between multiple raters, the selection procedure should be scored under standardized conditions using a pre-determined scoring system that differentiates performance.

Below is a chart of the 15 factors used by the Fire Superintendent and Deputy Superintendents to rate promotional candidates during the evaluation process. Because the factors lack operational definitions, it is difficult to determine what is being measured by each factor. Complicating matters further, the Fire Superintendent failed to articulate during testimony how each factor was assessed. For example, when asked about the specific factors that made candidate Ryan Bailey an attractive candidate, Superintendent McConnell responded, “None in particular. It’s simply like I said (sic) considered all 15 factors and chose a candidate for interviews for promotion” (Tr. Vol. I at 91). This lack of a standard “ruler” often leads to ratings that are unreliable and lead to candidates being assessed inconsistently. That is, without a standard scoring system, today’s inch could be tomorrow’s foot; and two candidates with true differences may be erroneously considered as equal. Issues that should have been considered when creating the rating factors and associated scoring procedures, and the potential overlap

between factors caused by the lack of operational definitions, are noted in the chart below for each factor.

NOFD Policy ADM-27 Factors	Issues to consider when creating operational definitions and/or standardized scoring system
1. Effective application of department's safety and accountability procedures, and initiatives	How was "effective application" assessed? Number of safety violations? Number of accidents? Number of completed safety reports? Over what time period?
2. Support for and effective implementation of the department's fire prevention strategies and initiatives	How is "support" defined, and how was it rated? Was rating based on future oriented interview question, or was the rating based on their past behavior with NOPD's prevention strategies? Were points deducted if the applicant made comments against such initiatives?
3. Performance history	What performance history was rated? Number of fire calls? Number of years of service with NOFD? Number of work absences? Did this include measure of leadership both at firehouse and on scene? Did you rely on Performance Evaluations (Service Ratings) to compare employees? (Note: 97% of all the employees rated in NOFD had an Outstanding rating in 2016.)
4. Disciplinary history	What kind of discipline was included? Was rating based on number of disciplinary actions, severity of actions, or both?
5. Education	What type of education was rated beyond that required by the minimum qualifications? Was additional credited education job related? Was specific education related to the job given more credit than non-related education?
6. Résumé	What exactly was rated in the résumé? Was it performance history, education, relevant experience, and/or training? If so, this factor is not contributing any additional information as this information is assessed in other factors.
7. Training	What type of training was included? Did this include the number of completed job related training courses, and if so, which courses qualified? If training covered job knowledge what specific knowledge did the training impart?
8. Demonstrated leadership	How was this assessed? Through the applicant's work history or a situational structured oral interview question? What metrics were used for rating? What leadership skills were being assessed – following the incident command system, coordinating and allocating resources, delegation and follow-up, mentoring of subordinates?
9. Interpersonal Skills	How was this assessed? Through the applicant's work history or a situational structured oral interview question? What metrics were used for rating?
10. Problem-solving skills	How was this assessed? Through the applicant's work history or a situational structured oral interview? What metrics were used for rating?
11. Years of service	Does this only include years of service with NOFD? Were years of service with another fire department included? Were the actual years counted or was there a categorical rating?

12. Civil Service examination score	How was this rated? Was overall score used in final rating?
13. Commendations, awards, recognitions, and accomplishments	What type of commendation and awards were considered? What defines recognition or an accomplishment? How was the standardized rating established? Was it based on the number of commendations or rewards or the content of those items? Are these also rated under the under the "Résumé" factor?
14. Relevant experience	How was relevant defined? Was this experience with NOFD only? If so, how is this different than Performance history, training, and years of experience? Was relevant experience considered as experience beyond the minimum qualifications?
15. Additional relevant considerations, including any additional materials the candidates may wish to submit	Was only job related additional information considered during the rating? Without prior knowledge of what type of information candidates would submit, how was the standardized rating established? Was it based on the number of items submitted, or the content of those items?

In addition to the issues noted above, the factors appear to be differentially weighted even though that was not, according to testimony, the intention. Deputy Superintendent Eiserloh provided testimony that the 15 factors were weighted equally (Tr. Vol. I at 144-145), but the policy does not provide any standard to the candidates regarding the weight awarded to each factor in the list. For example, résumé is sixth on the list of factors to be considered. Any evaluation of a candidate's résumé would include an evaluation of a candidates experience, education and training. However, education, training and experience are listed as separate factors to be considered and weighted equally with the résumé. If in fact the résumé factor was also a measure of education, training, and experience, then those three factors, because of their multiple measures within the evaluation process, are actually given more weight than those factors that were measured only once. Again, there is uncertainty as to how factors were defined and measured, both individually and/or as part of the résumé, and then given equal weighting.

As mentioned earlier, NOFD testimony failed to indicate that the Fire Superintendent's oral interview examination process was validated. NOFD Policy Adm-27 provides for each candidate to be assessed based on the 15 factors during an interview by a promotional committee. The policy does not describe the promotional committee's type of interview process to be conducted. While best practice is to conduct a structured oral interview process, where each candidate is given the same set of interview questions and their responses evaluated with a pre-determined scoring system that differentiates performance, it appears that the promotional committee's oral interviews were "unstructured" for the following reasons. First, there is no way to tell if the same questions were asked to all the candidates as the minutes from the interviews only contained basic information regarding the date and time of the interviews (Appellants' Exhibit 9). There is no documentation of a standardized evaluation form used on each candidate. There is no indication that scales were developed to assess candidate responses in a fair and consistent manner. In fact, Superintendent McConnell testified that, "Most of the questions, as a matter of fact every question, I started off the process by telling them there was no right or wrong answer to any of the questions. It was more about their thought process." (Tr. Vol. I at 41).

When asked for a copy of the promotional committee's questions used during the interviews, the Fire Superintendent declined to provide a copy because the interview questions could be used again in another selection process. Therefore the Civil Service Department does not have an official copy of the interview questions to provide an assessment. Additionally, Deputy Superintendent Roman Nelson testified the Fire Superintendent and Deputy Superintendents had considered devising a scoring system early on but were unable to decide how much weight to give each factor. (Tr. Vol. I at 176).

The lack of standardization is furthered by the Fire Superintendent's failure to interview all candidates on the list. Deputy Superintendent Roman Nelson testified that decisions were, "Based on their résumé, their job performance, their history, and their performance in the interview." (Tr. Vol. I at 174-175). He noted that, "we looked at all 15 factors and that's how we decided who would be promoted." (Tr. Vol. I at 174-175). If interview responses were used in calculating a candidate's score on the 15 factors, then one must ask what score a candidate who was not interviewed received on the factors covered by the interview. Additionally, it is not clear how it was determined who would be interviewed and who would not. It again appears that all candidates were not measured using the same ruler.

Finally, while minutes were kept of each interview, very little information is provided that explains how the candidates were assessed by each member of the promotional committee. NOFD did not produce the applicant scores on any of the 15 factors, or even overall evaluation ratings in support of their promotional selections. Without this written record, which would include details regarding candidate responses and interviewer evaluations, there is no way to determine if the process was fair, consistent and in keeping with the Uniform Guidelines. There is no documentation to support why the Fire Superintendent reached down and selected a candidate ranked number 98 on the competitive eligible list instead of a candidate ranked number 3 on that list.

Finding 5: Based upon the application of ADM-27, the ranked competitive promotional list established as a result of the merit based, competitive examination functioned as a non-competitive promotional list where rankings had little to no meaning:

Based upon the Civil Service Commission Rules, the Personnel Director may give competitive or non-competitive examinations. Competitive examinations are required by the Civil Service Commission Rules unless one of the following conditions under Rule V, Section 8.1 relative to Non-Competitive Examination is met: (Note: list is abbreviated)

- (a) The class of work is defined by the Personnel Director as a minimum skills position requiring minimal verbal or clerical skill for proper performance of duties.
- (b) The class of work requires highly specialized professional or technical training which can be demonstrated by the possession of related certificates.
- (c) Promotional examinations where the appointing authority requests a non-competitive examination for reasons that experience in a particular division of the department is a necessity for competence in a position.
- (d) In classes of work approved by the Commission where competitive examinations are impracticable.

None of these conditions were met for the Fire Captain examination. When the Civil Service Department establishes a non-competitive list of eligibles, there is no ranking of the candidates on the list by score. Every candidate on the list is considered to have passed the examination and all candidates are considered equal on the list. For purposes of selection, the appointing authority is permitted to appoint anyone on the list.

Unlike non-competitive examinations, competitive examinations are ranked by score based upon examination results with the highest performers ranked before the lowest performers. However, for selection purposes, the Great Place to Work Rule amendments, which fails to provide guidance on the use of the ranked, competitive lists, arguably gives the appointing authority permission to appoint anyone on the list regardless of score.

In this particular case, the Fire Superintendent listed the competitive examination score as one of 15 equally weighted factors that would assist in determining who to select from the list of eligibles. When the Fire Superintendent selected the 117th ranked candidate to fill one of the 41 vacant Fire Captain positions, he presented no specific rationale as to why that candidate was better suited to fill the vacancy as opposed to the other 73 candidates who scored higher than that candidate. Since there were only 41 vacancies, if the list had been used competitively, then the first 41 individuals ranked on the list would have been considered first for the 41 vacancies unless the department could demonstrate why those candidates were not fit for the position. However, the Civil Service examination score became irrelevant, all the candidates on the list were treated as equals and the Fire Superintendent used a less

fair, valid and transparent method to make his selection decisions.

Finding 6: The Civil Service Staff does not agree that the “score results as reported by Civil Service are subjective and indicate a modest score differential among those who passed the oral exam.”

The Law Department’s argument regarding the Fire Captain promotional appeals is that there exists a “modest score differential among those who passed the oral exam (p. 8 of 15 Section III).” In this section, the Law Department further claimed: *“Moreover, review of the reported results of the oral exam by Civil Service indicates two important issues: (1) that critical information for evaluating the results was missing, by CS’ failure to identify the number for a perfect score on the oral exam; and (2) a fairly modest percentage differential existed between the candidates who passed the oral exam. Analysis of the test results is best understood by looking at the results for the written multiple choice exam, for which a perfect score was 100. For example, if someone gets a 100 on the multiple choice test and another gets a 70, there is a 30 point and 30% differential in their scores. However, if the perfect score is 1000, and we have the same 30 point difference, i.e., one scores 1000, and one scores 970, the percentage differential in the scores is only 3%.”*

Regarding the first of the two issues cited above, the tests used by Civil Service are norm-referenced. Norm-referenced testing estimates the relative position of candidates in a candidate pool with respect to the knowledges, skills and abilities being measured. In such context, the calculation of a perfect score is not informative. The important comparison when using norm-referenced testing is how candidates do in comparison with the others who also took the test, *not* how they performed compared to an ideal. In keeping with a competitive promotional process, comparisons among those competing are paramount. With competitive testing, the rank order of those competing is vital information. With a professionally-developed, valid test there is a positive correlation between test score and performance on the job. Therefore, those whose test scores are the highest ranking are

predicted to perform better on the job than those who rank lower. For example, those who scored higher on a test and are promoted would be more likely to have better performance evaluations than those who scored lower on the test and were promoted.

The second of the two issues cited makes a conclusion based on an irrelevant example. The example shows that, depending on the scale in question, a static point differential may, or may not, be meaningful. Indeed, the scale of the Fire Captain promotional test is much larger than a standard 100-point scale that would be used in criterion-referenced testing in an educational setting. Thus, a 10-point differential on a 100-point scale would clearly be more meaningful than a 10-point differential on a 1000-point scale. The use of this example, however, does not support the conclusion that there is a fairly modest differential between those passing the test. To the contrary, the difference between the top scores and the passing score is quite substantial.

One way to look at this question is to consider the actual scores. The cut off score was 881; the average score was 1000; the highest obtained score was 1,171; and 120 of 128 passed the test (Appellants' Exhibit 8). Thus the range between the highest score and passing score is 290 points. The passing score is about 75% that of the highest obtained score. Also, 93.75% of those taking the test passed. Thus, the Law Department's argument would seem to be that there are not meaningful differences among the top 93.75% of the test takers – they all did about the same on the test, despite 290 points difference in test scores.

A second way to look at this question is to consider whether there is a statistical difference between scores. Prior to the Great Place to Work Rule changes, Civil Service reported this information by use of band numbers. The "bands" of test scores represented test scores that were statistically different from one another. Banding allows one to say with 90 – 95% confidence that scores within the band are the same, statistically speaking. It uses characteristics of the test such as the standard deviation, reliability, standard error of measurement, standard error of the difference and confidence

intervals. As these test characteristics vary with each test, so also does the width of the score band. If the Fire Captain exam results had been banded, 20 bands of statistically different scores would have resulted.

In fact, at no time in the 30 plus years of banding eligible lists has Civil Service produce a list in which there was no statistical difference between passing scores. For the 2009 Fire Captain test given prior to the Great Place to Work Rule changes, the range of passing scores was between 955 and 1143 (188 points). In this range of scores, 12 statistically separate bands were developed. For the 2011 Fire District Chief test the scores ranged from 891-1163 and 18 statistically bands were developed. Therefore, the conclusion that there are not meaningful differences between test scores on the current test is not supported.

Finding 7: Evaluation of Selection Rates:

As noted in the Hearing Examiner’s report, the Fire Superintendent selected 10 candidates for promotion on September 15, 2016 and an additional 31 candidates on September 30, 2016. The Fire Superintendent testified that these 41 candidates were selected for appointment based upon the procedures contained within promotional policy NOFD ADM 27. (Tr. Vol. I at 25). In keeping with the Uniform Guidelines, the Civil Service Department conducted an adverse impact analysis on these selection results.

The following is a racial breakdown of the total group of candidates who passed the examination:

Totals for Race	Number of candidates	Percent of total
White	79	66%
African American	36	30%
Hispanic	1	1%
Asian	2	2%
Native American	1	1%
Not Specified	1	1%
Total	120	100%

The following table provides the percentages for those candidates actually selected (promoted):

Totals for Race	Number of candidates	Percent of total
White	22	54%
African American	17	41%
Native American	1	1%
Not Specified	1	1%
Total	41	100%

Selection Rate for Whites = 22/79= 27.85%

Selection Rate for African Americans = 17/36 = 47.22%

Adverse impact is described by the Uniform Guidelines as “a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.” In this case, the selection rate of the protected group (African Americans) was significantly higher than the required 80% of the selection rate of the non-protected group. The analysis actually resulted in the inverse of the 4/5th rule of thumb (“reverse discrimination”); the selection rate for Whites, the non-protected group, is 59% (27.85%/47.22%) that of African Americans, the protected group. 59% is much less than the 80% standard required by the Uniform Guidelines.

Almost half of the African-American candidates were promoted - compared to a little more than a quarter of the white candidates. Thus, a candidate’s chances of getting promoted were almost twice

as good if a candidate were African-American. Based upon this analysis, it seems likely that race may have been a factor in who received a promotion.³

In addition, the Civil Service Staff suspects that gender was also a factor as both of the eligible female candidates were promoted regardless of their placement on the register. Adverse Impact analysis was not performed based upon gender since females represented less than 2% of the applicant pool.

While the goal of a more representative Fire Department is a noble one, achieving it by excluding some candidates from promotional opportunities based upon race, without a reasonable justification, is problematic. In this case, there could be a presumption of reverse discrimination and no evidence of a validated selection device is provided by the Fire Superintendent.

Finding 8: The Civil Service Department does not agree with the City's argument that the Civil Service Department's approval of requisitions means that "NOFD Complied with Rule VI, Section 2.1:"

Civil Service Commission Rule VI, Section 2.1 provides for the following:

- 2.1 Whenever an appointing authority proposes to fill a vacancy in the classified service, the appointing authority shall submit to the Department a statement showing the position to be filled, the duties thereof, the necessary and desirable qualifications of the person to be appointed thereto, and the proposed class, if known. The Department shall approve or deny the position allocation within seven (7) days for existing classifications and fifteen (15) days for new classifications, exclusive of Commission approval. The Department shall announce each vacancy within thirty (30) days of an approved allocation. The Department shall not withhold reasonable approval of the request unless it can demonstrate that the request violates the principles of the merit system. For the purposes of allocating positions to a class, the Department shall interpret the existing

³ In keeping with the Uniform Guidelines, an analysis of the other races was not performed because the other races did not constitute at least 2% of the candidate pool.

classes broadly and in accordance with Rule III Section 2.1, including, when appropriate, waiving supervisory requirements and allowing a department to leverage classes used by other departments for efficiency. If the appointing authority and the Director disagree on the position's minimum qualifications or the class allocation and are unable to resolve their disagreement, the issue may be brought before the Commission for a decision. (amended August 25, 2014, effective September 1, 2014)

This rule as cited above is related to position allocation which is a responsibility of the Classification and Compensation Division of the Civil Service Department. In order to fill a vacancy, departments are required to submit a requisition which includes a class title, type of appointment, description of the work to be performed, salary and desirable qualifications to the Classification and Compensation Division. This division reviews the requisition to determine whether the proposed classification is appropriate for the type of work being performed. If the requisition is approved by this division, it is then submitted to the Certification Division of Recruitment. This unit will attach a list of eligibles to the requisition based upon the job class and send it back to the requesting department to make an appointment. When the requesting department makes a selection, the requisition will be returned to the Certification Division for review. In this case, the Certification Division reviewed the appointment in accordance with Rule VI, Section 3.1. However, unlike the former requirement of this Rule, appointing authorities were no longer limited to considering the top three candidates for appointment. The Great Place to Work rule revisions do not provide any procedure regarding selection and therefore, appointing authorities are able to select any candidate on the list who passed the examination regardless of score. The Certification Division performing a relatively ministerial duty of review would necessarily have to approve the selection if the candidate was on the eligible list. The Civil Service Department and the Certification Division were not informed of ADM-27 or any requirements under this policy at the time the department submitted requisitions to fill the 41 vacancies.

Finding 9: Superintendent McConnell's Promotion Decisions Violate the Louisiana Constitutional Provision Requiring Merit- Based Promotions:

Jurisdiction over constitutional claims:

The Civil Service Commission has exclusive jurisdiction over classified civil service employer-employee disputes that are employment related, including discrimination claims.⁴

While the Commission cannot judge the constitutionality or equity of its own rules since that is a function of the courts; that restriction does not apply, when an employee complains that the implementation of a rule is discriminatory.”⁵ Accordingly, this would extend to other allegations regarding the constitutionality of the Civil Service Commission Rules for the City of New Orleans as applied.

In this case, the appeals are based upon employment decisions, and claims that the Civil Service Commission Rules were not fairly applied or merit-based. This would be in contravention of the Louisiana Constitution, which requires that, “[p]ermanent appointments and promotions in the classified state and city service shall be made only after certification by the appropriate department of civil service under a general system based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive.” Article X Section 7. Thus,

⁴ *Akins v. Housing Authority of New Orleans*, 856 So.2d 1220 (La. App. 4 Cir. 9/10/03), 856 So.2d 1220, writ denied, 2003-2781 (La.12/19/03), 861 So.2d 574. *Flanagan v. Department of Environmental Quality*, 99-1332 at pp.4-6, 747 So.2d at 765-66.

⁵ La. Const. Art. V sec 1; *Beauclaire v. Greenhouse* 05-75 (La. 2/22/06); 922 So. 2d 501; *Williams v. Civil Service Comm’n of City of New Orleans*, 613 So.2d 733, 735 (La. App 4 Cir 1993).

Civil Service has the power to review whether the Civil Service Commission Rules are constitutional as applied.

In addition, although discrimination was not expressly raised, the data shows that race may have been a factor in the decision-making process. The Louisiana Constitution protects specifically against race-based discrimination. The Civil Service Commission Rules do not specifically define the term "discrimination." The Civil Service Commission Rules do however, reference discrimination under Rule II, which governs appeals of disciplinary actions and hiring. Rule II establishes the procedure for employees to follow where they believe they have been discriminated against on the basis of political or religious beliefs, sex, race, age, disability or sexual orientation. Moreover, the Louisiana State Civil Service Rule 1.14.1, defines discrimination as the "consideration of religious or political beliefs, sex, race or any other non-merit factors." While the state rules are not binding, they are also instructive. Accordingly, the Civil Service Commission Rules protect against race-based discrimination, and arguably against merit-based discrimination. Additionally, due process violations are an issue. Because this case raises issues of promotion based on unconstitutional use of non-merit based factors, race-based discrimination, and due process violations, Civil Service has jurisdiction over claims that the law is unconstitutional as applied.

Constitutionality of Great Place to Work and use of Non-Merit Factors:

Although the procedure of using a Rule of Three and Banding is no longer explicitly contained in the Civil Service Rules, the requirements of fairness, competitiveness, and merit remain enshrined in the Civil Service Commission Rules and it is, of course, an integral part of the Louisiana Constitutional provisions pertaining to Civil Service Rules.

The Louisiana Constitution requires that "promotions in the classified state and city service shall be made only after certification by the appropriate department of civil service under a general system

based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive." (Art. X(7)) Moreover, the Civil Service Rules "embrace the merit system, and their intent is to preclude favoritism."⁶ In this case, there is convincing evidence that the Superintendent's decisions were based on non-merit factors. Thus, the Great Place to Work Amendments that remove the procedural requirements of banding and the Rule of Three are unconstitutional as applied.

In this case, the Superintendent selected candidates without regard to their ranked order, choosing for example a candidate ranked number 117 in scoring over a candidate ranked number 3. The record shows that the Superintendent was unable to articulate valid reasons for not using the list in the order of candidates. For example, the Superintendent testified that he devised his own 15 factors to select candidates, but could not articulate during testimony as to how each factor was assessed. Moreover, the choices were seemingly random. Had he picked 35 from the top 41 on the list and then reached down a bit for the additional candidates for well-articulated reasons, that might suggest a more cohesive plan, and might show that the selections were merit-based. But by selecting candidates in a seemingly arbitrary manner, with no well-articulated or well-supported reasons for the selections, it appears that the selection was not based on merit but other unknown factors, which might include race and political beliefs. The Great Place to Work amendments, as applied, are discriminatory, because in this case the Superintendent used unfettered discretion to select candidates. In doing so, the Superintendent chose to completely disregard the list and the carefully considered selection process crafted by the Civil Service staff. The effect was to hire based on non-merit reasons, which is unconstitutional. As stated in Article X, Section 7 of the Louisiana Constitution, selections must be based

⁶ Sanders v. Department of Health & Human Resources, 388 So.2d 768, 771 (La.1980).

upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive.”

Constitutionality of Great Place to Work and Whether it is Discriminatory as Applied:

As has been discussed at length throughout this decision, the Superintendent disregarded the eligible list, and instead arbitrarily selected the applicants based on non-merit based factors. Although the Superintendent testified that he used his own 15 factors, his testimony was general and unsupported by the facts. For example, the factors he devised lacked operational definitions, lending themselves to inconsistent assessments. He could not articulate what weight was assigned to the various factors, and some of the factors inherently included other factors on the list—suggesting that those factors were weighted twice. The interview process was unstructured, and there is no way to ascertain what questions were asked of the candidates, let alone if they were consistently asked for the same information. Moreover, interviewers were not trained. Finally, the Superintendent has not scored any of the candidates based on his own 15 factor chart so there is no way to determine whether he applied his own factors fairly.

The list given to the Superintendent reflected the results of a rigorously designed merit-based test, carefully tailored to elicit scoring on relevant qualifications to the job at hand. The Superintendent gave no reason or justification for disregarding the results of that test and for his use of other factors. If the test had been discriminatory, whether because of a disparate impact based on race or another protected class, or whether intentionally discriminatory, the Superintendent may have been within his right to disregard it, but that is not the case here.

Testing and other selection procedures are routinely used as an effective means of hiring or promoting the most qualified applicants or employees for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate

based on race, color, sex, national origin, religion, disability, or age. Use of tests and other selection procedures can also violate the federal anti-discrimination laws even if done unintentionally, if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law. The use of seemingly benign test procedures that nevertheless disproportionately exclude people based on a protected class such as race is referred to as having a disparate or adverse impact.

When a selection procedure has a discriminatory disparate impact, an employer can engage in intentional discrimination in order to remedy that disparate impact. However, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a *strong basis in evidence* to believe it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action. Strong evidence refers to a strong showing that the tests were not job-related, or that there existed alternative selection practices with less adverse impact. *Ricci v. DeStefano*, 557 U.S. 557 (2009) (No. 07-1428)

If an employer has a strong basis in evidence that the employer might be subject to disparate impact liability, the employer could have valid grounds for disregarding the tests and could remedy the unintentional disparate impact using other criteria such as race. A fear of litigation or of being vulnerable to a disparate impact suit, however, in and of itself, is insufficient grounds for disregarding the test results.

In this case, the exam devised by the Civil Service staff was validly based on job-requirements after extensive study and analysis by professionals. Despite the fact that the exam was designed with job-related criteria and was carefully formulated to treat applicants equally, whites scored higher than blacks. However, this rate did not run afoul of guidelines for disparate impact. If it had, it would arguably provide a basis for disregarding the Civil Service exam and allow the Superintendent to

affirmatively use race to select candidates. However, in this case, the Civil Service exam was valid and there was no grounds for disregarding it. Even if it the Civil Service exam had an unintentional disparate impact, there is a lack of any evidence, let alone strong evidence, that the Civil Service exam criteria was not job-related, or that there existed alternative selection practices with less adverse impact.

There was thus no justification for the Superintendent to disregard the test and promote based on race. Although the Superintendent did not articulate that he was promoting based on race, the data suggests that conclusion. No reasons were given for giving preference to black applicants over white applicants, or for disregarding the exam results of the carefully devised Civil Service examination process.

Whether the Promotion Process Violated Due Process.

The United States and Louisiana Constitution's guarantee due process. (U.S. CONST. amend. XIV; LA. CONST. ANN. art. X, § 8(A).) In the context of civil service employment, due process affords an employee a property right in continued comparable employment. (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).)

In this case, the affected applicants were on the list of ranked, eligible certified candidates for promotion, and were higher ranked than candidates who ultimately obtained the promotion. Accordingly, the affected applicants possessed property rights which cannot be taken away without cause and procedural due process.

Due process is a flexible standard and its procedural protections are factually driven and depend on the particular situation. (*Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972))

Under Due Process, an employee whose rights may be affected is entitled to notice and to be heard. (*Wilson v. City of New Orleans*, 479 So.2d 891, 894 (La.1985).) Correlatively, this right to notice and

opportunity to be heard must be extended at a meaningful time and in a meaningful manner. (*Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972))

A review of the facts here show that (1) the Civil Service staff provided notice of promotional requirements after conducting a thorough job analysis; (2) after potential applicants were provided notice of the requirements, the Superintendent created his own scheme of requirements (NOFD ADM-27), adding desirable qualifications; and (3) the candidates did not have notice of the NOFD ADM-27 prior to the applications process. Thus the use of the NOFD ADM-27 was a violation of due process.

IV. CONCLUSION:

While it is no longer mandatory for the Fire Superintendent to select from a narrower band of three (3) candidates, the Superintendent is still obligated to use the list to inform his hiring and promotion decisions. The new Great Place to Work rules are not intended to give the Superintendent the power to create an additional scheme of requirements and qualifications, especially when this additional scheme was adopted in violation of Civil Service Rules. Moreover, the seemingly arbitrary manner in which the Superintendent selected candidates for promotion violates the Louisiana Constitution, which mandates a merit-based, competitive selection process, based on competitive examinations.

Keeping in mind the fairness and merit-based selection system enshrined in the Louisiana Constitution, and after reviewing the examination process, it seems clear that the level of success on the examination should be more than a starting point and that the Appointing Authority should give candidates' exam scores appropriate weight in the promotional decision-making process for Fire Captains. It is an objective measure of a candidate's knowledge, skills and abilities. Furthermore, if all but a handful of candidates pass the examination, in this case 120 out of 125, the list should be followed absent compelling factors. To do otherwise, and to pick anywhere from the list would render the exam

meaningless and detracts from the competitive nature of the examination process. A promotion is no longer merit based if the appointing authority can for all practical purposes pick anyone he wants.

This is particularly true when applied to the Fire Department, which is a paramilitary department, functioning very differently from the other departments. It is a highly structured hierarchy, relying on a clear chain of command, and specialized skills. Transparency and competitiveness are of course important in all departments, however, in the case of the Fire Department with a structured chain of command, the need for inferiors and superiors to feel confident in that competitive selection process is even more important. For a person to follow the orders of superiors, they must feel confident in the selection process that forged the chain of command.

Although the Fire Superintendent reasonably believed that the rule change gave him as the appointing authority absolute discretion to select anyone from the list of 120, and to use his own subjective and perhaps objective reasons to give one passing candidate preference over another, such a reading violates the Constitution and Civil Service Rules. The discretion provided under the Great Place to Work amendments must be read in light of the applicable Constitutional protections and the other Civil Service provisions. Using discretion when selecting candidates from a ranked list should be the exception, not the rule, at least as applied to paramilitary departments like a fire department. When the ranked list is deviated from, a strong and credible reason should be given. Interviews should be given in a consistent fashion. If the appointing authority is considering 40 applicants that are within the top 50 in the list, then all 50 should be interviewed. To later select number 50 and not have interviewed numbers 49 and 48 who were passed over, would be inconsistent and not provide the same opportunities to the candidates.

It would also be of benefit for the Fire Superintendent to coordinate with the Civil Service Department during the job analysis, if he believes that other factors should be considered, or in

developing an interview plan. This would also add to the sense of transparency and legitimacy to the process. Finally, and this should be obvious to all, the Civil Service Department should be adequately funded to create large promotional Fire Department examinations on a more regular and consistent basis. Administering promotional exams on a regular basis eliminates the circumstances currently faced, where such a large number of vacancies exist at one time, creates a promotional process that is very arduous and cumbersome for all concerned.

In this instance, the Great Place to Work amendments were discriminatory as applied. By selecting applicants from anywhere on the ranked list, without adequate justification, the Superintendent ultimately made decisions based on non-merit factors, which violates the Louisiana Constitution and Civil Service Rules. These amendments should be read narrowly, requiring adherence to the ranked list absent strong and credible factors, and utilizing additional criteria only if consistently applied—such as a consistent interview plan, after consultation with the Civil Service Department.

V. REMEDY:

The Fire Superintendent should have used a top down approach to select candidates based on exam scores, and should have provided a credible, merit-based reason as to why in a particular instance he disregarded the list and chose someone from lower down in the ranks. Also, his creation of new standards and qualifications after the application process raises constitutional due process issues and is in violation of Civil Service Commission Rules. The remedy for this situation is problematic as there are competing equities to consider.

The most logical approach would be to start all over again. Those promoted would be reinstated to their former position and the Fire Superintendent would work from the competitive, ranked list provided to him. Absent a merit-based, well-articulated and documented reason, he would use the ranked order to make his selection. However, that would arguably be inequitable to those who have

been promoted and now arguably have an interest in their position. Considering the equities of this situation, those who were promoted, though unconstitutionally, should remain in their position. Those who should have been promoted because they scored highest, which would be those appellants who were among the top 41, should now be promoted. Because the Fire Superintendent only promoted candidates on 9/15/16 who were among the top 24 ranked candidates during the first round of promotions, the following employees who scored among the top 24 candidates on the list are ordered promoted retroactive to 9/15/16:

Appeal	Name	Appeal	Name	Appeal	Name
#8593	DANIEL PATTERSON(20*)	#8613	SHANE BAILEY (14*)	#8633	MICHAEL SCIORTINO, JR. (16)
#8602	DANIEL STRICKLAND (19)	#8622	JOSHUA KURUDA (3)	#8641	JARED CARTER (23)
#8604	ASHLEY WOLFE (6)	#8624	ANDREW MONTEVERDE (4)	#8647	ROBERT WILTON (1*)
#8611	BRIAN MENDLESON (22)	#8632	DENNIS SCHOOR, JR. (13)		

Note: () includes rank for each candidate on the list and * means that the candidate was tied.

The following employees who were ranked among the top 41 candidates but who would not be considered during the first round of promotions are ordered promoted retroactive to 9/30/16:

Appeal	Name	Appeal	Name	Appeal	Name
#8603	BRETT HOPKINS (28)	#8634	DOUGLAS SHANAHAN (36)	#8637	JOHN VON HOVEN, JR. (26*)
#8630	MARK PORCHE, JR. (41)				

Note: () includes rank for each candidate on the list and * means that the candidate was tied.

The remainder of the candidates who were not ranked among the top 41 candidates, unfortunately, are not entitled to a promotion. Although there were 75 candidates passed over for promotion when the Fire Superintendent reached down and promoted number 117 on the list, those 75 are not now entitled to a promotion on that basis. The following candidate's appeals are denied:

Appeal	Name	Appeal	Name	Appeal	Name
#8605	RYAN NEELY (69*)	#8618	CRAIG HAYDEL (98*)	#8635	DOMINIC SIGNORELLI (48*)

#8606	BRANDON KRASK (9)	#8619	KENDRICK JONES (92)	#8636	PAUL ST. JULIEN (73*)
#8607	KENNETH PERDUE (88*)	#8620	JUSTIN KLUMPP (100)	#8638	DAVID WATKINS (83)
#8608	MICHAEL MARCELLO (51)	#8621	JUSTIN KOENIG (54)	#8639	RYAN WILLIAMSON (33)
#8609	DARREN CAMPBELL (82)	#8623	BRIAN MCKEAN (75*)	#8640	JASON MARTIN (Not on list)
#8610	STEVEN ACLORD (80)	#8625	TERRENCE MORRIS, III (71*)	#8642	JARED BAUDY (60)
#8612	STEPHEN MAUTHE (86)	#8626	DARRIN NAPOLITANO (63*)	#8643	ZACK DOMILISE (91)
#8614	JASON BANKSTON (94)	#8627	ROY NEELY (65*)	#8646	CRAIG COLLIGAN (104)
#8615	DANIEL CERRONE (55*)	#8628	PAUL PARNELL (62)	#8648	MATTHEW CHESTER (44)
#8616	SHAWN COLIN (Not on list)	#8629	EDWARD POOLE – (Not on list)	#8655	BRIAN SENNETT, SR. (75*)
#8617	JOSEPH FRANCIS (96)	#8631	STEPHEN ROY (87)		

Note: () includes rank for each candidate on the list and * means that the candidate was tied.

There were a few exceptions included in the list above that are worth noting. First, one employee ranked among the top 41 on the eligible list, Mr. Brandon Krsak (# 8606), was included on the list above because he was not qualified for appointment at the time the other appointments were made. Mr. Krsak did not possess the experience requirements necessary to be promoted at that time, and therefore, his appeal was denied. Second, there were three employees who appealed but were not on the eligible list. The appeal of Mr. Shawn Colins (#8616) is denied because he was not on the register of eligible candidates. Also, the appeals of Mr. Edward Poole (#8629) and Mr. Jason Martin (#8640) are denied because both employees are currently Fire Captains who were appointed to that job classification prior to this most recent examination process and they were not on the eligible list. In addition, Mr. Ryan Williamson (#8639), who was also included on the list above, appealed the effective date of his appointment to Fire Captain requesting an amendment of the effective date from 9/30/2016 to 9/15/16. Mr. Williamson was ranked number 33 on the eligible list and would not have been included in the first round of promotions which appeared to have been limited to candidates ranked among the top 24 candidates on the list. Therefore, Mr. Williamson's appeal is denied.

The following employees were among the top 41 candidates on the list but did not appeal being passed over for promotion. No action was taken or recommended relative to these candidates at this time.

1. John Gnuse (14)
2. William Parks (31)
3. Brian Richards (37)
4. Craig Bourg (39)
5. Randy Catchot (41)

Finally, it is recommended that the former Civil Service Commission rules regarding, the certification of and appointments from, eligible lists in place prior to the Great Place to Work rule changes be restored. The former "Rule of Three" coupled with the use of banding, granted flexibility in selection to appointing authorities without enabling them to ignore merit based selection instruments such as valid tests. A promotion is no longer merit based if the appointing authorities can, for all practical purposes, select anyone he or she wants.

Decision rendered this 30th day of November, 2017.


LISA M. HUDSON
PERSONNEL DIRECTOR

11/30/17
DATE