

1995

James R. Collins v. Salt Lake County Fire Civil Service Commission : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 950836-CA

IN THE UTAH COURT OF APPEALS

JAMES R. COLLINS, :
Appellant and : APPEAL NO. 950836-CA
Plaintiff, :
vs. :
THE SALT LAKE COUNTY FIRE :
CIVIL SERVICE COMMISSION, : TRIAL COURT NO. C-88-6084
Appellee and :
Defendant. :

BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE GLENN K. IWASAKI, DISTRICT COURT JUDGE

PRIORITY CLASSIFICATION NO. 15

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COURT OF APPEALS

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JURISDICTIONAL STATEMENT

This appeal is from a final Order of the Third District Court in and for Salt Lake County, State of Utah. The Utah Court of Appeals has jurisdiction to review this matter pursuant to Utah Code Ann. Section 78-2a-3(2)(a) (1995 Supp.).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

(I) The trial court erred in finding that the Commission was authorized to delegate the preparation and administration of promotional examinations to an employee of the Commission pursuant Utah Code Ann. Sections 17-28-3 and 17-28-4. The interpretation of a statute is a question of law which is reviewed for correctness. Dall v. State, 888 P.2d 680, 685 (Utah App. 1994); Krauss v. Utah State Dep't of Transp., 852 P.2d 1014, 1017 (Utah App.) cert. denied, 862 P.2d 1356 (Utah 1993); Ward v. Richfield City, 798 P.2d 757, 759 (Utah 1990); Lounsbury v. Capel, 836 P.2d 188, 192 (Utah App.), cert. denied, 843 P.2d 1042 (Utah 1992).

(II) The trial court erred in finding that the Commission fulfilled its obligations under Utah Code Ann. Section 17-28-7 (1991 Supp.). The interpretation of a statute is a question of law which is reviewed for correctness. Dall, 888 P.2d at 685; Krauss, 852 P.2d at 1017; Ward, 798 P.2d at 759; Lounsbury, 836 P.2d at 192.

(III) The trial court erred in finding that the proceedings before the Commission were fair and not unconstitutional.

Utah appellate courts apply a correction-of-error standard when reviewing constitutional challenges to a Commission's rulings. Bunnell, 740 P.2d at 1333; Utah Dept. of Admin. Serv's, 658 P.2d at 608 (Utah 1983).

(IV) The trial court erred in upholding the Commission's decision and in finding that the Exam was fair and not unconstitutional. Utah appellate courts apply a correction-of-error standard when reviewing constitutional challenges to a Commission's rulings. Bunnell v. Industrial Comm'n, 740 P.2d 1331, 1333 (Utah 1987); Utah Dept. of Admin. Serv's v. Public Serv. Comm'n, 658 P.2d 601, 608 (Utah 1983). With regard to the trial court's upholding of the Commission's findings, the Commission's findings of fact are reviewed under a substantial evidence standard. "[S]ubstantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Hercules, Inc. v. Utah State Tax Comm'n, 877 P.2d 169, 172 (Utah App. 1994) (quoting Orton v. State Tax Comm'n, 864 P.2d 904, 908 (Utah App. 1993); Grace Drilling Co. v. Industrial Comm'n, 776 P.2d 63, 68 (Utah App. 1989)).

DETERMINATIVE STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The determinative statutes, rules and constitutional provisions are set forth in the addendum where not set forth fully in the body of this brief.

STATEMENT OF THE CASE

This appeal is from the final order of the district court reviewing the formal adjudicative proceedings of the Fire Civil Service Commission. Plaintiff and Appellant James R. Collins ("Collins") filed a Verified Complaint in the Third District Court in September of 1988 alleging that the Fire Civil Service Commission failed to meet its statutory requirement in administering the Battalion Chief Exam (the "Exam") given on January 26-27, 1988, and that the Exam itself was unfair. (R. 1-10).

Collins filed a Verified Amended Complaint on the 14th of December, 1988 adding allegations that the actions of the Fire Civil Service Commission ("Commission") in administering the Exam and in connection with the administrative hearing held on July 20, 1988 were arbitrary, capricious, and constituted a denial of Collins' rights. Collins' Verified Amended Complaint sought relief in the form of (i) an injunction enjoining the Defendants from certifying promotions based upon the Exam results; (ii) an Order declaring the Exam invalid; (iii) a Writ of Mandamus requiring that Collins be certified as eligible for promotion to the next available position of Battalion Chief; (iv) a Writ of Mandamus requiring the Commission to produce requested information; and damages. (R. 64-86).

Upon Defendant's Motion to Limit the Court's Review (R. 349-59), the district court entered an Order, dated January 26, 1995, which stated that the district court would conduct an appellate review of the Commission's proceedings but would consider

issues of due process violations and would allow some de novo testimony regarding the disputed facts (R. 406-409).

The trial of this matter was held on the 13th of October, 1995 (R. 550). After hearing the testimony of Clare Rasmussen, Former Chair of the Commission, and Larry Hinman, Former Chief of the Salt Lake County Fire Department, the district court denied Plaintiff's relief and dismissed Plaintiff's claims. (R. 550-56). This appeal followed.

STATEMENT OF THE FACTS

Appellant Collins was a captain in the Salt Lake County Fire Department when he sat for the Battalion Chief Promotional Examination (the "Exam") in January of 1988 (R. 64-65). The Exam was prepared under the direction of Jim Christiansen ("Christiansen"), a paid employee of Salt Lake County who then worked under the designation of the Executive Director of the Fire Civil Service Commission (the "Commission") (R. 573). The Exam was not prepared by the Commission itself, nor did the Commission take an active role in administering the Exam or scoring the Exam results (R. 578-79).

A. Flaws in Exam.

The Exam was divided into six portions: (i) written exercise; (ii) promotability; (iii) fire simulation; (iv) individual oral; (v) group oral; and (vi) seniority (R. 525, 549A, 570-571). Collins placed eighth out of eight participants and thereafter contested three specific sections of the Exam: the promotability

section, the fire simulation section, and the written exercise section (R. 525, 529, 549A). Collins' grievances came on for a hearing before the Commission--the same body statutory charged with administering the Exam--on the 20th of July, 1988 (R. 525, 549A).

Concerning the fire simulation portion of the Exam, the problem was written by Robert Swenson who was an assistant chief in the Fire Department. Christiansen, the hired Executive Director of the Commission, wrote the grading evaluation for the fire simulation problem. (R. 526, 549A). Collins challenged the lack of instructions to the evaluators regarding the use of a command organizational chart during the Exam.

Concerning the written examination section, Collins contended that (i) it contained a problem which had been used in the past, and also resembled a situation similar to an actual incident in which at least two evaluators had participated; and (ii) although each evaluator was to rate each candidate in terms of comprehensiveness: whether "the summary include[d] all relevant information," the evaluators were not given a list of the "relevant information" to be included. (R. 527-28, 549A).

Concerning the promotability section of the Exam, Collins claimed (i) that a candidate might have an advantage over other candidates by having a supervisor who is an evaluator; and (ii) that Collins' personnel file, which was reviewed by evaluators from within the Fire Department, was incomplete. (R. 528-30; 549A).

In addition to the substantive problems with the Exam, Collins contended that the Exam was not administered in accordance

with the Commission's statutory mandate. The Commission took no role relative to the promotional portion of the Exam. Nor did the Commission prepare the Exam or review the Exam. (R. 530, 549A, 569, 578-79).

Additionally, evaluators from within the Fire Department were used to evaluate the candidates resulting in disproportionate scores on those portions where the identities of the candidates were known to the evaluators (inside boards) as opposed to those where the candidates were unknown to the evaluators (outside boards). For instance, Collins' performance on the outside boards was consistently higher than his performance on the inside boards. Collins scored in the eighty percent range on those sections of the Exam which were outside boards. Yet, Collins scored in the seventy percent range or lower on sections of the Exam which were inside boards. Collins' average score on the outside boards was higher than the candidate who ultimately ranked second overall, yet Collins ultimately ranked eighth out of eight candidates overall. (R. 531-32; 549A).

B. Due Process Issues.

Not only were there problems with the Exam itself, there were also flaws in the Commission's hearing of Collins' grievances. For instance, Collins' grievances regarding the fairness of the Exam were heard by the Commission which is the very body statutorily authorized to prepare and conduct the exam. (R. 549A). This situation was ripe for due process violations. Additionally, Collins was not given access to many documents and information for

which access was vital to a complete and fair adjudication of Collins' grievances. (R. 581-82).

After the hearing on or about the 20th of July, 1988, the Commission ruled against Collins in a decision dated August 18, 1988. The Commission held among other things the Exam was "administered properly, all candidates were tested fairly, and there was no evidence of bias or irregularity." (R. 462). Collins then filed his Verified Complaint contesting the Exam and the July 20th hearing (R. 1-10).

C. District Court Action.

Ultimately, this case came on for trial on the 13th of October, 1995 (R. 550). The issues at trial were limited to whether the Commission abused its discretion, failed to act as required by statute, and violated the due process rights of Collins in the administration of the Exam and the subsequent hearing on Collins' grievances. At trial, Collins asserted that Utah Code Ann. Section 17-28-6 mandated that the Commission prepare and administer the Exam, and that the Commission wholly failed in its charge, resulting in an unfair examination process. (R. 566-89).

Collins also asserted that the Commission's review of Collins' grievances with the examination process was a violation of his due process rights since the same tribunal charged with administering a fair examination heard Collins' claims and decided upon the fairness of the examination at the hearing in 1988 (R. 566, 582).

At the conclusion of trial, the court ruled that Utah Code Ann. Section 17-28-7 (1991 Supp.) applied instead of Utah Code Ann. Section 17-28-6, and notwithstanding Collins' claim that Utah Code Ann. Section 17-28-7 also required the Commission to prepare and conduct the Exam, the Commission fulfilled its obligations under the statute by delegating its duties to Christiansen. The court reasoned that Utah Code Ann. Section 17-28-3, the Fire Civil Service Commission Act, allowed the Commission to have an employee, specifically a secretary, to perform such duties as may be required, including preparing and administering a promotional examination for the Fire Department. (R. 587-89).

The trial court concluded among other things that (i) the Commission fulfilled its obligations pursuant to Utah Code Ann. Section 17-28-7 (1991 Supp.); (ii) the decision of the Commission dated August 18, 1988 was rational and reasonable; (iii) although not perfect, the hearing before the Commission was fair and not unconstitutional; (iv) that the Commission's decision concerning Collins' discovery requests was rational and reasonable; (v) the Exam, while not perfect, was constitutional and fair; and (vi) Collins has failed in his burden to show clear error by the Commission in conducting the Battalion Chief exam in 1988. (R. 551-56) Collins subsequently filed this appeal (R. 557).

SUMMARY OF ARGUMENTS

Collins advances four arguments on appeal in support of his assertion that the Exam was invalid, unfair, and unconstitutional: (i) the Exam administered in January of 1988 was invalid because the Commission was not statutorily authorized to delegate the task of preparing and administering the Exam to Jim Christiansen who was not a member of the Commission; (ii) the Commission did not fulfill its obligations pursuant to Utah Code Ann. Section 17-28-7 (1991 Supp.); (iii) the Administrative Hearing before the Commission violated Collins' due process rights and therefore was unconstitutional; and (iv) the Exam itself was unfair and unconstitutional.

Regarding Collins' first argument on appeal, Collins asserts that the Commission was statutorily required to prepare and administer the January 1988 battalion chief examination. The Commission abdicated its statutory responsibility by delegating the task of preparing and administering the Exam to Jim Christiansen who was not a member of the Commission. This delegation of authority was not permitted by Utah Code Sections 17-28-3 and 17-28-4 as the trial court found. The impermissible delegating rendered the entire examination process invalid. Collins has been injured by the Commission's reliance upon an invalid examination in promoting certain personnel while not promoting Collins to the rank of battalion chief based solely upon the results of the invalid examination.

Collins' second argument on appeal is closely related to his first. The Commission's delegation of the preparation and administration of the examination to Jim Christiansen was not only impermissible under Utah Code Ann. Sections 17-28-3 and 17-28-4, it also constituted a violation of the Commission's statutory mandate under Utah Code Ann. Section 17-28-7 (1991 Supp.). As such, the examination must be invalidated and Collins is entitled to recover his damages resulting from not being promoted because of the invalid examination.

Collins' third argument concerns the grievance proceedings before the Commission itself. The Commission, the entity statutorily required to prepare and administer the examination, was the same entity which reviewed the fairness of the examination. This arrangement constitutes a fundamental violation of Collins' right to due process.

Collins asserts, in his final argument on appeal, that in addition to being invalid, the examination was unfair and as such was unconstitutional. Obvious flaws existed in several portions of the examination, which flaws precluded the examination from "fairly test[ing] the fitness in every respect of persons examined." Utah Code Ann. Section 17-28-7 (1991 Supp.). The trial court erred in determining that the examination was constitutionally fair.

The fact that the Commission did not prepare and administer the battalion chief examination of January 1988 is a sufficient basis, as a matter of law, to invalidate the examination and to remand this matter to the trial court for a determination of

Collins' damages. Combined with the remaining errors in the examination, the administrative hearing, and the trial court's review thereof, there can be no doubt that Collins is entitled to recover his damages as a result of the invalid examination.

ARGUMENT

- I. THE TRIAL COURT ERRED IN FINDING THAT THE COMMISSION WAS AUTHORIZED TO DELEGATE THE PREPARATION AND ADMINISTRATION OF PROMOTIONAL EXAMINATIONS TO JIM CHRISTIANSEN PURSUANT TO SECTIONS 17-28-3 AND 17-28-4 OF THE UTAH CODE.

Collins' first assignment of error on appeal is that the trial court erroneously interpreted Utah Code Ann. Sections 17-28-3, 17-28-4 and 17-28-7 (1991 Supp.) and that based upon its erroneous interpretation, it incorrectly found and concluded that the Commission had properly delegated the task of preparing and administering the Exam to Jim Christiansen. The finding of fact in question states:

15. Plaintiff asserted that the Fire Civil Service Commission could not delegate its authority to prepare and conduct examinations pursuant to §17-28-6. The Court finds that the Fire Civil Service Commission had the authority pursuant to §17-28-3 to have a qualified employee as secretary, i.e. Jim Christiansen, and further finds that §17-28-4 states that the secretary shall perform such other duties as may be required. This section allows Mr. Christiansen the authority to prepare promotional examinations for the Fire Civil Service Commission. The Court further finds that it appears that Mr. Christiansen fulfilled the duties contained in §17-28-3 and §17-28-4 Utah Code Annotated.

(R. 553-54). However, this interpretation is inconsistent with the statutory language and was unsupported by the evidence at trial.

Plaintiff does not contest the court's determination that Utah Code Ann. Section 17-28-6 applied and not Utah Code Ann. Section 17-28-7; rather, Plaintiff contends that the court incorrectly interpreted Utah Code Ann. Sections 17-28-3 and 17-28-4 to authorize the Commission to abdicate their responsibilities to Jim Christiansen.

Section 17-28-6 stated:

Each of such county firemen's civil service commissions shall prepare and conduct examinations of persons applying for employment in the particular county fire departments coming within its jurisdiction, classify persons successfully passing such examinations in the order of their ascertained merit and prepare a list thereof, make certification of such classifications when required, and make, publish and distribute necessary rules and regulations relative to such examinations, classifications and certifications and as may be proper and desirable in the administration of its duties under this act.

Utah Code Ann. Section 17-28-6 (1991 Supp.). Clearly, this statute mandates that the Commission prepare and conduct the promotional examinations. The trial court erred in relying upon Utah Code Ann. Sections 17-28-3 and 17-28-4 in determining that the Commission could delegate its statutory duties to someone who was not a member of the Commission.

Utah Code Ann. Section 17-28-3 authorized the board of county commissioners to assign a secretary to the fire civil service commission:

Each of such county firemen's civil service commissions shall be organized by its members by selecting one of its members chairman and shall have assigned to it by the board of county commissioners . . . a qualified employee of the county to act as secretary. Such county employee shall be acceptable to the county firemen's civil service commission and shall act and serve as such secretary without additional compensation. The board of county

commissioners of . . . shall also provide suitable accommodations, equipment and necessary funds to enable the county firemen's civil service commission of its county to attend properly to its business.

Utah Code Ann. 17-28-3 (1991 Supp.).

Section 17-28-4 set forth the duties of the secretary:

The secretary of the county firemen's civil service commission shall keep record of all its meetings and of its work and official acts and shall perform such other service as may be required by such civil service commission and shall have the custody of the commission's books and records.

Utah Code Ann. Section 17-28-4 (1991 Supp.). Clearly, the secretary's duties were clerical in nature. The statutory scheme as it existed in 1989 simply did not allow for the Commission to abdicate its responsibilities to someone who was not a member of the Commission. Certainly, the statutes did not allow the clerical secretary to perform such functions.

Additionally, there was absolutely no evidence presented at the trial of this matter to suggest that Jim Christiansen served the Commission in the capacity of a clerical secretary. In fact, the testimony of Clare Rasmussen--a member of the Commission in 1989--was that there was a secretary for the Commission but that Jim Christiansen was not hired as the secretary for the Commission (R. 578).

The evidence presented at trial showed that Christiansen was fulfilling the responsibilities that belonged to the Commission--not Christiansen--to develop, administer, and correct the promotional examinations. Christiansen served in the capacity of Executive Secretary until 1992 at which time Christiansen became

the Executive Director pursuant to a statutory amendment (R. 569). Christiansen selected the final scenario for the fire simulation portion of the Exam (R. 570). Christiansen prepared the instructions for the Exam (R. 570). Christiansen prepared the grading criteria since he was the individual with the technical expertise (R. 570). Christiansen's role was to develop and administer examinations for the Commission (R. 573). Clearly, these functions were not clerical in nature. Rather, they constituted an impermissible exercise of authority statutorily given to the Commission only.

Moreover, the amendments to the statutes relating to the Firemen's Civil Service Commission in 1992 demonstrate that it was not the legislature's intent under the prior statute to bestow the clerical secretary to the Commission with the responsibilities and statutory authority granted to the Commission. "According to Utah law, subsequent amendments to a statute shall be persuasive evidence of the purpose and intent of the legislature in passing the former statute." State v. Swapp, 808 P.2d 115, 121 n. 9 (Utah App. 1991).

The 1992 amendments to Section 17-28-6 created the position of executive director of the Commission, a position Christiansen had previously held without statutory authority. This statute now provides for the appointment of an executive director for the Commission whose duties include managing and administering examinations, classifying persons who pass examinations in order of merit, and making rules necessary for the administration of exami-

nations. Utah Code Ann. Section 17-28-7 (1995). These duties are far and apart from the duties articulated in the amendments to Utah Code Ann. Sections 17-28-3 and 17-28-4 which also provide for the assignment of a secretary to the Commission whose duties are limited to record keeping functions. Utah Code Ann. Sections 17-28-3 and 17-28-4 (1995).

Clearly, the amendments to Utah Code Ann. Section 17-28-6 amply demonstrates that it was never the legislature's intent to allow for the clerical secretary to the Commission to administer promotional examinations. Moreover, since the office of executive director was not created until 1992, Jim Christiansen simply had no statutory authority to assume this title and to prepare and administer the Exam, and the Commission abdicated its statutory duty by allowing him to do so. Since the Commission did not prepare and administer the Battalion Chief Examination of January 1988 as it was required to do, the Exam was invalid. The Exam should have been declared invalid and a new Exam, conducted in accordance with statutory mandate, should have been administered. Collins has been injured as a result of the Commission's reliance upon the invalid Exam results and is entitled to damages resulting therefrom.

II. THE TRIAL COURT ERRED IN FINDING THAT THE COMMISSION FULFILLED ITS OBLIGATIONS UNDER SECTION 17-28-7 OF THE UTAH CODE.

In its Findings of Fact and Decision, the trial court found as follows:

14. This Court finds that the Fire Civil Service Commission did, in fact, fulfill its obligations pursuant to §17-28-7 U.C.A. (1952, as amended).

(R. 553). Utah Code Ann. Section 17-28-7 (1991 Supp.) provided, in relevant part:

No person shall be appointed to any position or place of employment in any fire department coming within the provisions of this act until he shall have successfully passed such examination as shall be given by the county firemen's civil service commission Such examination shall be public, competitive and free and shall be held at such time and place as the county firemen's civil service commission shall from time to time determine and shall be for the purpose of determining the qualifications of applicants for positions or places of employment. They shall be practical and shall fairly test the fitness in every respect of persons examined to discharge the duties of the position or place of employment sought and shall include tests of physical qualifications and health.

Utah Code Ann. Section 17-28-6 (1991 Supp.). The trial court erred in determining that the Commission fulfilled its obligations under § 17-28-7 since the Commission did not have the authority to delegate its obligation to administer the exam to Jim Christiansen and since the Exam itself was not fair.

As set forth in Section I. of this brief and as a matter of law, the Commission did not have the statutory authority to delegate its responsibilities to Jim Christiansen and the trial court erred in so finding. Moreover, the evidence presented to the trial court clearly demonstrated that the Commission played virtually no role in writing or administering the Exam.

The evidence marshalled in support of the trial court's findings demonstrated that the Commission accepted requests from the Fire Chief to administer promotional examinations (R. 568); the

Commission would give approval to go ahead with an examination (R. 569); the Commission merely attended the examination to ensure that no cheating occurred by the candidates (R. 579); and after the examinations were administered, the Commission would rank the results (R. 578). Instead, the evidence overwhelmingly supports Appellant's position that the Commission abdicated its statutory duties by turning the examination process over to Jim Christiansen.

For instance, Larry Hinman, Fire Chief in 1988, testified at trial that the Commission rarely or never walked through the content of the Exam (R. 569). Clare Rasmussen, a member of the Commission, testified that the Commission did not hire Christiansen as a secretary (R. 578); the Commission was not involved in the preparation of examinations (R. 578); the Commission did not write the Exam (R. 578); Mr. Rasmussen never reviewed the examinations for content (R. 578); Mr. Rasmussen never participated in selecting individuals to administer or grade examinations; the Commission never appointed an advisory committee to review the examinations; and the Commission never specifically delegated authority to anyone to write the examinations (R. 579). Clearly, the overwhelming evidence demonstrates that the Commission did not give the battalion chief examination of January, 1988, the Commission did not have the authority to delegate the task to Jim Christiansen, and it was clear error for the trial court to conclude otherwise.

III. THE TRIAL COURT ERRED IN FINDING THAT THE PROCEEDINGS
BEFORE THE COMMISSION WERE FAIR AND NOT UNCONSTITUTIONAL.

As part of the trial court's review of the examination process, the trial court examined the Commission's decision of August 18, 1988 wherein the Commission concluded that "each separate phase and the examination in its entirety meets the statutory requirement that it shall be 'public, competitive, and free' and 'shall fairly test the fitness in every respect of the persons examined.'" (R. 897-98). After the trial of this matter and based upon the record before it, the trial court found "that the Administrative Hearing process conducted by the Fire Civil Service Commission, although not perfect, was fair and not unconstitutional." (R. 554). This finding is clearly erroneous.

Collins was denied due process by the mere fact that his grievance was heard by the Commission which was the same body statutorily charged with preparing and administering the Exam, the subject of Collins' grievance. "[E]very person who brings a claim . . . at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal. Fairness requires not only an absence of actual bias, but endeavors to prevent even the possibility of unfairness." Bunnell v. Industrial Comm., 740 P.2d 1331, 1333 (Utah 1987) (quoting Anderson v. Industrial Comm., 696 P.2d 1219, 1221 (Utah 1985)).

Such fundamental fairness was not afforded to Collins. Collins' appeal concerning the fairness of the Exam was heard by the same body charged with formulating and administering the Exam.

Naturally, the Commission was not a fair tribunal. The review by the Commission would be analogous to this Court's appellate review of its own decision. Obviously, such a situation would present questions of neutrality and objectivity on appeal.

Clearly, notions of fairness required that Collins be afforded an administrative hearing free from "even the possibility of unfairness." Anderson, 696 P.2d at 1221. Just as clearly, Collins' due process rights were violated by the fact that he was not granted such a fair and unbiased hearing.

IV. THE TRIAL COURT ERRED IN UPHOLDING THE COMMISSION'S DECISION AND IN FINDING THAT THE EXAM WAS FAIR AND NOT UNCONSTITUTIONAL.

The trial court found that "the exam process was not perfect, but it was constitutional and fair." It additionally found that "the defendant has not born his burden in that no clear error was shown in the process that constituted the Battalion Chief exam 1988." (R. 555). Collins agrees that the exam process was not perfect. However, Collins additionally asserts that he did establish that the exam was unfair and constitutional.

The marshalled evidence in support of the Commission's determination that the test was fair consisted mainly of the self-serving testimony of members of the Fire Department, not the Commission. For instance, at the hearing before the Commission, Robert Swenson, a member of the Fire Department, testified that (i) merit ratings were not used to evaluate candidates because they were unreliable (R. 754); (ii) the fire simulation portion of the

Exam was written by one person and the grading schedule for that problem was written by another person (R. 755); (iii) and board members met to discuss critical points of the fire simulation (R. 756).

Jim Christiansen testified before the Commission that (i) merit ratings were not used in evaluating candidates (R. 770); (ii) it is difficult to assemble a broad based board of evaluators (R. 772); (iii) Christiansen developed guidelines for the evaluators to use in evaluating the candidates' performances (R. 775); (iv) Christiansen met with the evaluators to review the guidelines with them (R. 775); (vi) Christiansen met with Swenson and the three selected evaluators to review the fire simulation problem (R. 775-76); (vii) Christiansen did not give the same written question more than twice so that candidates would not become too familiar with the problem (R. 784); (viii) handwritten responses to written questions were typed before being given to evaluators (R. 787); (ix) any relationship between the written question and an actual incident was purely coincidental (R. 790).

This evidence, however, does not negate or lessen the inadequacies of the battalion chief examination. Although there were problems with all six portions of the Exam, most egregious concerned the fire simulation portion, the written examination portion, and the promotability portion (R. 525, 549A, 570-571).

Concerning the fire simulation portion of the Exam, the problem was written by Robert Swenson who was an assistant chief in the Fire Department. Christiansen, the hired Executive Director of

the Commission, wrote the grading evaluation for the fire simulation problem. (R. 526, 549A). Collins challenged the lack of instructions to the evaluators regarding the use of a command organizational chart during the Exam.

Concerning the written examination section, Collins contended that (i) it contained a problem which had been used in the past, and also resembled a situation similar to an actual incident in which at least two evaluators had participated; and (ii) although each evaluator was to rate each candidate in terms of comprehensiveness: whether "the summary include[d] all relevant information," the evaluators were not given a list of the "relevant information" to be included. (R. 527-28, 549A).

Concerning the promotability section of the Exam, Collins claimed (i) that a candidate might have an advantage over other candidates by having a supervisor who is an evaluator; and (ii) that Collins' personnel file, which was reviewed by evaluators from within the Fire Department, was incomplete. (R. 528-30; 549A).

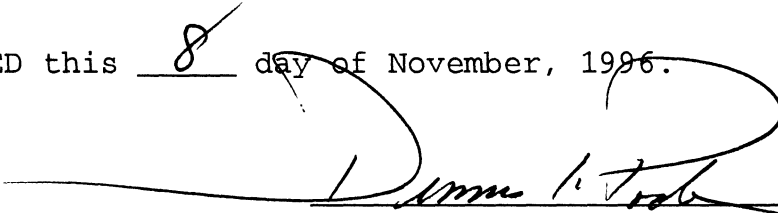
The fact that evaluators from within the Fire Department were used to evaluate the candidates resulting in disproportionate scores on those portions where the identities of the candidates were known to the evaluators (inside boards) as opposed to those where the candidates were unknown to the evaluators (outside boards) also supports Collins' position. For instance, Collins' performance on the outside boards was consistently higher than his performance on the inside boards. Collins scored in the eighty percent range on those sections of the Exam which were outside

boards. Yet, Collins scored in the seventy percent range or lower on sections of the Exam which were inside boards. Collins' average score on the outside boards was higher than the candidate who ultimately ranked second overall, yet Collins ultimately ranked eighth out of eight candidates overall (R. 531-32; 549A). In light of this compelling evidence, the trial court clearly erred in determining that the Exam was fair and constitutional.

CONCLUSION

For the foregoing reasons, Appellant Collins respectfully requests that this court reverse the district court's judgment and remand this matter to the district court for a determination of damages.

DATED this 8 day of November, 1996.

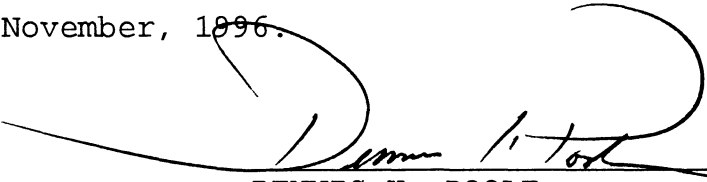

DENNIS K. POOLE
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Attorneys for Appellant and Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing BRIEF OF APPELLANT in Appeal No. 950836CA were mailed, U.S. Mail, postage pre-paid to the following:

DOUGLAS R. SHORT
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this 8 day of November, 1996.



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Organization of commission — Secretary — Accommodations, equipment.

Each of such county firemen's civil service commissions shall be organized by its members by selecting one of its members chairman and shall have assigned to it by the board of county commissioners of the county in which it is organized, a qualified employee of the county to act as secretary. Such county employee shall be acceptable to the county firemen's civil service commission and shall act and serve as such secretary without additional compensation. The board of county commissioners of such county shall also provide suitable accommodations, equipment and necessary funds to enable the county firemen's civil service commission of its county to attend properly to its business.

History: L. 1945, ch. 36, § 3; C. 1943, Supp., 19-24a-3.

17-28-4. Duties of secretary — Records, books.

The secretary of the county firemen's civil service commission shall keep a record of all its meetings and of its work and official acts and shall perform such other service as may be required by such civil service commission and shall have the custody of the commission's books and records.

History: L. 1945, ch. 36, § 4; C. 1943, Supp., 19-24a-4.

17-28-6. Commission powers and duties — Examination, classification and certification.

Each of such county firemen's civil service commissions shall prepare and conduct examinations of persons applying for employment in the particular county fire departments coming within its jurisdiction, classify persons successfully passing such examinations in the order of their ascertained merit and prepare a list thereof, make certification of such classifications when required, and make, publish and distribute necessary rules and regulations relative to such examinations, classifications and certifications and as may be proper and desirable in the administration of its duties under this act.

History: L. 1945, ch. 36, § 6; C. 1943, Supp., 19-24a-6. act," as used in this section, means L. 1945, ch. 36, which enacted §§ 17-28-1 to 17-28-14.

Meaning of "this act." — The term "this

17-28-7. Appointments to fire department — Examinations — Eligibility — Tests.

No person shall be appointed to any position or place of employment in any fire department coming within the provisions of this act until he shall have successfully passed such examination as shall be given by the county firemen's civil service commission provided however, any applicant taking such examination who is an honorably discharged veteran of the United States Army, Navy, Marine Corps or Coast Guard shall be given a preferential rating over all other persons taking such examination who are not such veterans, of five per centum of the grade otherwise received in said examination in determining the final grade of such applicant. Such examination shall be public, competitive and free and shall be held at such time and place as the county firemen's civil service commission shall from time to time determine, and shall be for the purpose of determining the qualifications of applicants for positions or places of employment. They shall be practical and shall fairly test the fitness in every respect of persons examined to discharge the duties of the position or place of employment sought and shall include tests of physical qualifications and health.

History: L. 1945, ch. 36, § 7; C. 1943, Supp., 19-24a-7.

Meaning of "this act." — See the note under this catchline following § 17-28-6.

(1) The County Fire Civil Service Council shall select one of its members as chair.

(2) The legislative body of the county in which it is organized shall assign a qualified employee of the county to act as secretary to the council and a qualified attorney to act as legal counsel to the council, each of which shall be acceptable to the council and shall act and serve without additional compensation.

(3) The county legislative body shall provide suitable accommodations, equipment, and necessary funds to enable the council of its county to properly conduct its business.

History: L. 1945, ch. 36, § 3; C. 1943, Supp., 19-24a-3; L. 1992, ch. 115, § 5.
Amendment Notes. — The 1992 amend-

ment, effective April 27, 1992, rewrote the section to such an extent that a detailed analysis is impracticable.

7-28-4. Duties of secretary.

The secretary of the County Fire Civil Service Council shall keep a record of all its meetings, work, and official acts, and shall perform other service as required by the council. The secretary shall have custody of the council's books and records.

History: L. 1945, ch. 36, § 4; C. 1943, Supp., 19-24a-4; L. 1992, ch. 115, § 6.
Amendment Notes. — The 1992 amend-

ment, effective April 27, 1992, rewrote the section to such an extent that a detailed analysis is impracticable.

7-28-6. County Fire Civil Service executive director — Powers and duties.

(1) (a) Within each county subject to this chapter, there is created the office of executive director of County Fire Civil Service, who shall be appointed by the county legislative body.

(b) The executive director shall be a person with proven experience in personnel management and shall be accountable to the county legislative body for his performance in office.

(c) The position of executive director shall be a merit position under Title 17, Chapter 33, County Personnel Management Act, and shall be recruited and selected in the same manner as the holders of other career service merit positions, with the concurrence of the County Fire Civil Service Council.

(2) The County Fire Civil Service executive director shall:

(a) exercise, on behalf of the county, executive or administrative duties regarding the management and administration of the County Fire Civil Service System, including the management and administration of examinations, classification of duties, preparation of hiring registers, recommendations regarding civil service regulations and policies, and other duties provided in this chapter;

(b) classify persons successfully passing examinations in the order of their ascertained merit and prepare a list of them:

(c) make, publish, and distribute necessary rules relative to examinations, classifications, and certifications as may be proper and desirable the administration of this chapter;

(e) establish and maintain records of employees in the County Fire Civil Service System setting forth as to each employee class, title, pay, status and other relevant data;

(f) make necessary and proper reports to the County Fire Civil Service Council, the fire chief, or the county legislative body;

(g) apply and carry out the provisions of this chapter and the policies and rules adopted under it; and

(h) perform other lawful acts that may be necessary or desirable to carry out the purposes of this chapter.

(3) The executive director shall appoint the members of and act as chair of a County Fire Civil Service Advisory Committee which shall assist the executive director in making recommendations to the county legislative body regarding County Fire Civil Service System rules and policies.

History: L. 1945, ch. 36, § 6; C. 1943, Supp., 19-24a-6; L. 1992, ch. 115, § 8.
Amendment Notes. — The 1992 amend-

ment, effective April 27, 1992, rewrote the section to such an extent that a detailed analysis is impracticable.

17-28-7. Examinations.

(1) A person may not be appointed to any civil service position as firefighter in any fire department subject to the provisions of this chapter until he has successfully passed an examination and been certified as eligible for consideration by the County Fire Civil Service executive director, except that any honorably discharged veteran of the United States military service shall receive preferential employment consideration for entry into the County Fire Civil Service System.

(2) All examinations shall be public, competitive, and free and fairly test the ability of persons to discharge the duties of the position.

History: L. 1945, ch. 36, § 7; C. 1943, Supp., 19-24a-7; L. 1992, ch. 115, § 9.
Amendment Notes. — The 1992 amend-


ment, effective April 27, 1992, rewrote the section to such an extent that a detailed analysis is impracticable.

1995 REPLACEMENT

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FILED DISTRICT COURT
Third Judicial District

NOV 17 1995

By 
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

JAMES R. COLLINS,)	FINDINGS OF FACT
)	AND DECISION
Plaintiff,)	
)	
-vs-)	
)	
THE SALT LAKE COUNTY FIRE)	Civil No. C-88-6084
CIVIL SERVICE COMMISSION,)	
and LARRY HINMAN,)	Judge Glenn K. Iwasaki
)	
Defendant.)	

This matter came on for hearing on October 13, 1995. The plaintiff was present and represented by counsel Dennis K. Poole. The defendant, Salt Lake County Fire Civil Service Commission, was present and represented by counsel, Jerry G. Campbell, Deputy Salt Lake County Attorney. The Court reviewed the record and heard testimony of Clair Rasmussen, Former Chair of the Fire Civil Service Commission and Larry Hinman, Former Chief of the Salt Lake County Fire Department. Based upon a review of the extensive record and testimony, the Court finds as follows:

1. The plaintiff, James R. Collins, is an employee and captain in the Salt Lake County Fire Department.

2. In accordance with an established policy of the Fire Civil Service Commission, an examination or test for promotion to the position of Battalion Chief was administered by the Salt Lake County Fire Department on January 26th and 27th, 1988. This test is given every two years by the Fire Civil Service Commission.

3. Collins placed eighth out of eight persons participating in the examination in 1988. Collins challenged his ranking and alleged deficiencies in the promotion examination process before the defendant Fire Civil Service Commission. A hearing on the merits of his grievance regarding the testing process was held on or about July 20, 1988.

4. The Civil Service Commission ruled against Mr. Collins in a decision dated August 18, 1988.

5. On September 16, 1988, Collins, through then attorney of record, Duane R. Smith, Esquire, filed the above entitled action contesting the examination and grievance hearing process.

Plaintiff requested the following relief:

A. A preliminary injunction prohibiting defendants from certifying persons eligible for promotion.

B. An order declaring the Battalion Chief examination administered by defendant Commission to be invalid.

C. An order declaring the results of said examination invalid.

D. For an order requiring defendants to evaluate plaintiff's examination using criteria consistent with statutory requirements.

E. For an order requiring that the plaintiff be certified as eligible for promotion to the next available position of Battalion Chief.

6. On September 23, 1988, defendants filed a Motion to Dismiss on the basis that the Court had no jurisdiction to hear an appeal under §17-28-13, Utah Code Annotated.

7. Plaintiff's request for a temporary restraining order from Judge Daniels was granted on September 26, 1988.

8. On October 7, 1988, a hearing was held on defendant's Motion to Dismiss and plaintiff's Motion for Preliminary Injunction. Judge Daniels ruled that:

A. Plaintiff's remedy is pursuant to Rule 65B(b)(2), of the Utah Rules of Civil Procedure (now codified as Rule 65B(e)(2)).

B. That the inquiry of the Court shall be limited to whether the Fire Civil Service Commission abused its discretion.

C. Denied plaintiff's Motion for Preliminary Injunction.

D. Allowed plaintiff to file an amended complaint.

9. On December 9, 1988 plaintiff filed an amended complaint and defendant's filed their answer on December 19, 1988.

10. On May 24, 1989, defendants' filed two motions with the Court (a) Define the scope of review; and (b) Dismiss Larry Hinman

as a defendant.

11. On June 23, 1989, oral argument was heard on defendant's motions. Based upon the stipulation of the parties, defendant Larry Hinman was dismissed with prejudice as a defendant in the above entitled action.

12. After a review of the record, the Court heard testimony and arguments on October 13, 1995.

13. The plaintiff asserted that §17-28-6, Utah Code Annotated (1953 as amended) of the Fire Civil Service Commission Act controls of this Court's review. This Court finds §17-28-6 by its clear language applies to persons applying for employment whereas, §17-28-7 applies to persons appointed to positions, such as the case which is now before the Court.

14. This Court finds that the Fire Civil Service Commission did, in fact, fulfill its obligations pursuant to §17-28-7 U.C.A. (1952, as amended).

15. Plaintiff asserted that the Fire Civil Service Commission could not delegate its authority to prepare and conduct examinations pursuant to §17-28-6. The Court finds that the Fire Civil Service Commission had the authority pursuant to §17-28-3 to have a qualified employee as a secretary, i.e. Jim Christiansen, and further finds that §17-28-4 states that the secretary shall perform such other duties as may be required. This section allows Mr. Christiansen the authority to prepare promotional examinations for the Fire Civil Service Commission. The Court further finds

that it appears that Mr. Christiansen fulfilled the duties contained in §17-28-3 and §17-28-4 Utah Code Annotated.

16. The Court finds that its review is of the record with additional testimony for a limited purpose and not a trial de novo. The record below is reviewed to determine if the Fire Civil Service Commission abused its discretion or exceeded its jurisdiction. The Court finds that the decision of the Fire Civil Service Commission of August 18, 1988 was rational and reasonable.

17. The Court, in its review of the record, gives great deference to the findings of fact contained in the decision of August 18, 1985. The decision contained substantial facts that were supported by the record and the Court finds no abuse of discretion by the Fire Civil Service Commission in reaching its decision.

18. The Court finds that the Administrative Hearing process conducted by the Fire Civil Service Commission, although not perfect, was fair and not unconstitutional.

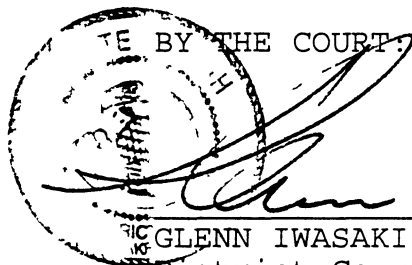
19. The Court finds that former Chief Hinman's explanation of flaws in the testing process for appointments because of gender discrimination is different than the plaintiff's challenges of flaws in the promotional examinations process and the Court is required to review the statutory scheme as it existed in 1988.

20. The Court finds that the Fire Civil Service Commission decision on May 25, 1995 concerning discovery requests by the plaintiff were rational and reasonable.

ORDER

Plaintiff's amended complaint is hereby dismissed with prejudice.

DATED this 17th day of November, 1995.



APPROVED AS TO FORM:

/s/ Dennis K. Poole
DENNIS K. POOLE
Attorney for Plaintiff
collins2

BEFORE THE SALT LAKE COUNTY
FIRE CIVIL SERVICE COMMISSION

JIM COLLINS,	:	FINDINGS OF FACT,
	:	CONCLUSIONS OF LAW, AND
Appellant,	:	DECISION
-v-	:	
SALT LAKE COUNTY	:	
FIRE CIVIL SERVICE COMMISSION	:	
AND FIRE DEPARTMENT,	:	
Respondents.	:	

The above-entitled matter came on for hearing before the Salt Lake County Fire Civil Service Commission on July 20, 1988 at the hour of 2:30 p.m. Commission members Clair D. Rasmussen, Bruce T. Jones, and Don W. Black were present. The Appellant, Jim Collins, was present and represented by legal counsel, Duane R. Smith. Also present was Deputy Chief Robert Timmerman, Assistant Chief Robert Swenson, Battalion Chief Dale McMillan, and Battalion Chief Robert Hannay representing the Fire Department. Jim Christiansen and Kay Gates, Commission staff, were present.

BACKGROUND

Jim Collins is a Captain in the Salt Lake County Fire Department and was one of eight candidates who participated in a Battalion Chief civil service examination in January, 1988. Jim Collins' position on the promotional register, which was based on the examination results, was number eight.

Mr. Collins, through his counsel, filed a written grievance and request for hearing with the Civil Service Commission. The grievance contended that certain portions of the examination were sufficiently deficient as to fail to comply with the statutory requirement that such examinations shall be "public, competitive, and free" and "shall fairly test the fitness in every respect of the person examined."

The examination included five separate phases, each of which was weighted based on a 100 point total. The candidate's promotability rating was also included. The identification, brief description, and weight of each phase is shown below:

<u>Examination Component</u>	<u>Weight</u>
<u>Written Exercise</u> This problem required the candidate to summarize, in writing, the contents of a file of memos relating to a problem employee and make a recommendation as to what should be done. The candidate's test papers were evaluated by a three person board, consisting of the Deputy Chief and two Assistant Chiefs. Candidates were rated by consensus in four areas: comprehensiveness, organization, quality of recommendation, and writing skills on a 1 to 5 scale. The section on writing skills was evaluated by the Fire Department's Fiscal Officer/Information Systems Manager and the Payroll Coordinator.	20%
<u>Department Promotability Rating</u> The rating was designed to assess the candidate's job performance and professional achievements with the Department. Each candidate was evaluated by a Board consisting of five Battalion Chiefs in the Department in the following areas: Emergency Leadership, Emergency Supervision, Administrative Skills, Professionalism, and Contributions on a five point scale. Each rating was performed by consensus.	30%

3. Fire Simulation Problem 20%
This exercise required the candidates to verbally respond to a hypothetical fire situation. Candidates were rated by three Department Battalion Chiefs using consensus ratings in the following areas: Unit Identification, Assumption of Command, Designation of Command, and Location of Command on a 0 to 1 scale and Life Safety, Secure Scene, Response to Fire, Medical Sector, and Command Structure on a 0 to 5 scale.
4. Individual Oral Interview 15%
Performed by an "external" Board
5. Leaderless Group Discussion 15%
Performed by an "external" Board
6. Seniority Rating 10
Candidates were credited with 1/2 point per year service up to and including twenty years.

The allegations were directed only at the Written Exercise, the Department Promotability Rating, and the Fire Simulation Problem.

ALLEGATIONS

WRITTEN EXERCISE

1. The Written Exercise was based on an actual incident of which two of the evaluators were personally involved and thereby were not able to objectively evaluate the solution to the problem.

2. Five of the eight candidates had an unfair advantage having previously taken the same test on a prior Battalion Chief Examination.

PROMOTABILITY RATING

3. Merit ratings were not included.

4. The Fact Sheets were not properly received.

5. Evaluators had no first-hand knowledge of the Appellant.

FIRE SIMULATION

6. The Appellant failed to complete the organization chart which he believed to be optional under the INCIDENT COMMAND SYSTEM and was thereby adversely and unfairly rated vis-a-vis the other candidates.

7. Other candidates may have been "prepped" for the interviews giving an unfair advantage to those participants.

COMPARISON OF APPELLANT'S SCORES BETWEEN EXERCISES SCORED BY DEPARTMENT EVALUATORS VIS-A-VIS "OUTSIDE" EVALUATORS

8. The Appellant scored higher than most other candidates on the "outside exercises" and lower than most of the other candidates on exercises scored by Department officers, thereby indicating a bias in evaluation procedures.

TESTIMONY AND EVIDENCE

Testimony to the foregoing was provided by the Appellant and through cross-examination of witnesses, including Assistant Chief Swenson, Battalion Chief Hannay, and Executive Director Jim Christiansen. Written documents (evidence) were submitted including the following exhibits:

Exhibit #1

The Department Personnel file of Jim Collins

Exhibit #2

A one page sheet entitled RANKING BY PHASE. This sheet shows the scores in rank order of each of the candidates (names excluded) for each phase of the examination. The scores of the Appellant are indicated.

Exhibit #3

Department Policy on ADOPTION OF INCIDENT COMMAND SYSTEM,
Chapter 6 Section 1

Exhibit #4

Candidate instruction sheet for the Fire Simulation
Exercise, the rating sheet, and the organization chart.

Exhibit #5

The scoring guide and scoring form for the Written Exercise.

In response to the allegations, testimony was heard from:
Assistant Chief Swenson, Battalion Chief McMillan, Battalion
Chief Hannay, and Jim Christiansen.

Having heard and reviewed the testimony and examined the
evidence, the Commission hereby enters the following:

FINDINGS OF FACT

1. The Written Exercise was a hypothetical problem that had
previously been used as part of a merit examination in the
Sheriff's Office. Any similarity regarding the content of this
problem to a situation that may have occurred in the Fire
Department is purely coincidental.

2. The Written Exercise was the same as that given in a
1986 Battalion Chief examination and five of the eight candidates
had participated in that exam.

3. It has been a standard practice for years to use the
same or similar questions or problems that were used in prior
Civil Service examinations. The assumption was made, based on
years of observations, that candidates on average do not improve
their scores as a result of being previously exposed to the
problem or question.

4. The average scores of the five candidates who repeated the written test was 13.4 (20 possible). The average score of the same group in the 1986 exam was 13.9 (20 possible). The scores of two of the five candidates improved, while three declined. The average scores of the three "new" candidates, including the Appellant, was 15.5. The average score of all candidates was 14.06. Mr. Collins' score was 14.0.

5. The score of 14 (20 possible) indicates a level of performance at the mid-point between adequate (12) and excellent (16).

6. The written examination papers were scored in such a manner that the evaluators had no knowledge as to the identity of the candidates.

7. All of the Fact Sheets were properly signed and timely filed.

8. Merit ratings were not included in the candidate's personnel file nor considered in the evaluation as part of the Department Promotability Rating. There has been a long standing precedent not to employ merit ratings in Civil Service tests due to the virtual consensus that these ratings are not valid or a reliable indication of job performance or performance potential for the position tested for.

9. There was contradictory testimony as to the extent or degree that the evaluators had "first hand" knowledge of the Appellant's job performance. There was some evidence to indicate

that the evaluators as a group had greater "first hand" knowledge of some of the applicants than others.

10. The Appellant received a score of 21.60 (30 possible) on the Promotability Rating, which was the low score. The high score was 25.20 and the average score was 23.99.

11. The score of 21.60 indicates a level of performance between GOOD (18) and EXCELLENT (24).

12. The organizational chart that the evaluators had access to as part of the Fire Simulation Exercise was not required to be filled out by the candidates and was not considered by the evaluators in rating the candidates.

13. There was no evidence to indicate that any of the candidates had access to any specific information relating to the Fire Simulation Exercise prior to participating in the exercise. There was testimony that a candidate, who participated in a Civil Service test for the position of Captain, received from one of the evaluators on the Battalion Chief exam, a "list" of criteria that should be considered in responding to any fire scene.

14. The Appellant's raw score on the fire problem solving areas of the Fire Simulation problem: Life Safety, Secure Scene, Response to Fire, Medical Sector, and Command Structure was 19.5 (25 possible). A score of 15 is considered GOOD and a score of 20.0 is EXCELLENT.

15. A comparison of the candidate's scores in each phase of the examination shows that the Appellant does in fact score

higher than average on the two exercises scored by the "outside" evaluators and lower in the three exercises scored by Department evaluators (See Exhibit #2). The high, low, and mean score for each exercise along with the Appellant's score is shown below:

	<u>Written</u>	<u>Promot.</u>	<u>Fire Simul.</u>	<u>Oral</u>	<u>Group</u>
High	17.50	25.20	20.00	13.42	13.50
Low	9.50	21.60	13.80	9.17	6.75
Mean	14.06	23.99	17.90	11.49	10.53
Score of Appellant	14.00	21.60	13.80	12.00	12.25

CONCLUSION

The Written Exercise was hypothetical and scored anonymously. Although five of the eight candidates had previously taken the same test two years earlier, there is no evidence that the other three candidates were disadvantaged. The five "repeaters" actually scored slightly lower on the 1988 exam. In addition, the average score of the three "new" candidates was higher than the five "repeaters". We therefore conclude that this portion of the exam was administered fairly in that no one candidate or groups of candidates were unfairly treated.

With respect to the Department Promotability examination, we conclude that: all of the candidate Fact Sheets were properly signed and timely filed, that the merit ratings were properly excluded from the evaluation process, and that no candidate was unfairly evaluated due to the allegation that the Board did not possess first-hand knowledge of the candidate's job performance.

On the latter point, the Commission noted that the testimony is somewhat contradictory; however, our conclusion is based on the question, "Did the Board have sufficient knowledge and information as to be able to give a reasonably accurate and valid rating to the Appellant and each of the other candidates?" The composition of the Board may have been such that the Appellant did not have as much first-hand representation as some of the other candidates; however, assuming the latter, one cannot conclude that some candidates were advantaged relative to others. Although first-hand knowledge is important, the Commission accepts the testimony that the Department Promotability Board, as a collective unit, did in fact possess sufficient job related knowledge to enable them to render a fair, unbiased evaluation for each of the candidates.

There was no evidence that the members of the Fire Simulation Board used, as one of their scoring criteria, the Organization Chart. Each of the Board members had an Organization Chart, but used it only for reference.

B.C. Hannay did in fact give a list of general firefighting criteria to a candidate who had competed on the Captain's Civil Service examination. The list contained factors obtained from several reading sources and was of a very general nature but had no specific relevance to the criteria established for the Battalion Chief Fire Simulation problem. There was no evidence that any candidate had been "prepped" for this exercise; hence,

the Commission concludes that all candidates were treated fairly.

The Appellant did receive relatively lower scores on the exercises scored by the Department evaluators vis-a-vis the outside board evaluators. It was implied that these differences may have been due to bias and/or lack of objectivity on the part of the Department raters and that the appropriate procedure was to use "outside" raters on all exercises. (See Exhibit #2 and Findings of Fact #14).

First, as previously noted, the Written Exercise evaluated by the Department assessors was scored anonymously, thereby eliminating the likelihood of any bias. The Department Promotability Rating was based on the job performance history of the candidate. This evaluation logically requires only persons familiar with the candidate's actual job performance to perform the rating.

The Fire Simulation Exercise could be performed by either Department evaluators or persons outside of the Department or a combination of "internal" and "outside" evaluators. Testimony revealed that "combined" boards have been used in the past, but have been abandoned in favor of Department assessors only. Problems with using outside people include the following:

- 10 Difficulty in obtaining raters who are not familiar with candidates
- 11 The competence of "outside" raters not known
- 12 Outside raters are not familiar with Salt Lake County tactics, policies and procedures.

In addition, there was no evidence or testimony to the effect that any of the evaluators were biased or prejudiced against the Appellant or favorably disposed toward any of the other candidates.

Although the Appellant's scores were lower than average in both the Department Promotability Rating and Fire Simulation Exercise in relationship to the "outside" rater scores, the differences are relatively small. On the "outside" Group and Individual Exercises, the Appellant scored 1.92 and .50 points above the mean (15 possible), while he scored 2.4 (30 possible) and 4.1 points (20 possible) under the mean on the Department Promotability Rating and Fire Simulation. Certainly these differences are not unusual and, in the absence of additional information, cannot be construed to indicate bias or irregularity. The Commission notes that the candidate's scores in these two phases are considered to be good to excellent, based on the rating scale criteria employed for these two evaluations.

The purpose of a Civil Service examination is to evaluate the candidate's overall competence to perform in the capacity of the rank tested for. In order to achieve this end, this examination was designed to assess the broad range of knowledge, skills, abilities, and personal characteristics relevant to the position of Battalion Chief. The multi-phase nature of this test reflects that purpose or goal. Each phase is designed to tap specific aspects of the candidate's performance potential and

each phase is different from any other component. The Leaderless Group Exercise is geared to elicit certain behaviors that are different from those in the Fire Simulation Exercise. The underlying rationale is that by combining the candidate's scores in each of the exercises, a more comprehensive and accurate assessment of the candidate's overall competence is established. Most candidates in most examinations will tend to do well in some phases of the examination and not so well in others. There is no logical or empirical basis for assuming that a candidate who does well in one phase must do well in others. Indeed any kind of pattern is possible.

The Appellant indicated that an Assessment Center approach is the most appropriate method of testing for the Battalion Chief position. The content of this examination closely approximates that of an assessment center. In order to be called an Assessment Center, the examination must have a minimum of four job related exercises, with multiple raters, with all raters performing a consensus evaluation on each candidate after all exercises have been completed. The examination contained three exercises that are normally used in an Assessment Center.

It is the determination of this Commission that each of the contested phases of the examination was administered properly, all candidates were tested fairly, and there was no evidence of bias or irregularity. We therefore conclude that each separate phase and the examination in its entirety meets the statutory

requirement that it shall be "public, competitive, and free" and "shall fairly test the fitness in every respect of the persons examined."

DECISION

The Appellant requested that the Civil Service Commission either (1) re-examine all candidates or (2) reassess Mr. Collins' examination scores. The Commission finds that there is no reasonable basis for overturning the results of the examination and thereby denies that request and holds that the examination results and promotability register be reaffirmed.

Dated this 18 day of Aug, 1988.



CLAIR D. RASMUSSEN/Chairman



BRUCE T. JONES/Vice-Chairman



DON W. BLACK/Member

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and exact copy of the foregoing Findings, Conclusions, and Decision to legal counsel for the Appellant, Duane R. Smith, 4885 South 900 East, Suite 306, Salt Lake City, Utah 84117 and to Fire Chief Larry Hinman, 2001 South State #S3300, Salt Lake City, Utah this 18 day of Aug, 1988.

Kay L. Gates