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February 17, 2010

Benton City Council
114 South East Street
Benton, Arkansas 72015

RE: Opinion concerning Civil Service Commission Promotion Procedure

Dear Aldermen:

On January 11, 2010 the City Council requested that I, as city attorney, provide the Council with an opinion of the promotion process employed by the Civil Service Commission in the recent filling of the Assistant Fire Chief position. In preparing my opinion, I will first provide a brief statement of the facts, as I know them to be.

Statement of the Facts

At the time of this incident, the employee at question had been serving as assistant fire chief temporarily. It was recently disclosed to the civil service commission that he had filled this position for greater than sixty (60) days and in fact had filled it for several years on a temporary basis. The fire chief in November announced his retirement, which was to become effective December 31, 2009.

Thereafter, the employee was given a "stock" promotional exam for the position of assistant fire chief which was purchased from an outside vendor. The test was not reviewed prior to being administered by either the fire chief or members of the civil service commission. This particular exam was based upon an out of date manual. The employee was the only individual who took the exam, which occurred in the middle of December approximately.

After the exam was administered, it was graded by a member of the Human Resources department for the city. After review, it was determined that the employee had not received a score on the exam which was high enough to allow him to proceed on to the next level of the promotion process. The secretary of the civil service commission then emailed the score (which was later determined to be an incorrect figure, but still a non-passing grade for promotional purposes) to the civil service commissioners, the fire chief and to the chairman of the city council's health and safety committee. This particular committee makes recommendations for selecting civil service commission members to the council as a whole and considers matters pertaining to the police and fire departments. The employee then reviewed his exam along with his score sheet and challenged twenty (20) questions on the exam. The fire chief then reviewed those challenges along with the test and determined that thirteen (13) questions should be thrown out for various reasons. This was then communicated to the civil service commission.

Steve Lee, alderman and committee chairman, then inquired into the results of the exam and determined that the commission had voted by email to (1) throw out thirteen (13) examination questions, and (2) to authorize the promotion of the employee to the rank of assistant fire chief, both of which were done at the request of the fire chief. Thirteen (13) questions was the exact number necessary to give the employee a grade on the exam high enough to continue on to the next level of the promotion process. Upon learning this, I contacted the chairman of the commission immediately. This occurred on December 30th. I advised the chairman their vote was illegal and all action taken by the commission, including the promotion, was void for violating the public meeting section of the FOIA. I was told by the commission chairman the matter would be addressed at their next meeting in January, which was the following week.

Later that afternoon, the commission chairman called a special meeting of the civil service commission for December 31st to vote on whether or not throw out the questions and to promote the employee. I was informed of the meeting by a member of the news media on the evening of the 30th and not by the commission chairman. Against my advice, the commission voted to throw out the questions at issue and subsequently voted to promote the employee in back to back votes, according to the minutes of the meeting.

Inquiries for documents then began concerning this matter and an opinion from the Attorney General on the release of documents was obtained by the city. A copy of the opinion is attached to this opinion, which authorized the release the requested documents with the possible exception of Document 3, noted below. The AG was of the opinion Document 3 (the challenges to the questions) was not a personnel record and could be released, but the city must determine whether or not the document would reveal the actual test examination questions and should not be released pursuant to A.C.A. §14-51-301(b)(2).

After receiving the opinion from the Attorney General, I contacted the testing company concerning document 3 and provided a copy of the challenges to it for review.

The company told me the challenges would not reveal or disclose their examination nor would it violate their copyright and I was given their authorization, to the extent necessary, to release the challenges to their questions. Because of this authorization along with past opinions of the Attorney General which state the statutory prohibition against releasing examination materials extends only to the exam itself, a copy of the employee's challenges is attached to this opinion, along with the following redacted documents:

Document 1: Email dated December 17, 2009 from Sam Gipson to the Civil Service Commissioners and to Alderman Steve Lee stating (incorrectly) that the test score. It also states the fire chief may delete some of the questions which will result in the employee passing the test.

Document 2: Email chain with two emails, both dated December 18, 2009. The first email is from Sam Gipson to the fire chief asking for direction on what to do about the test. The response pertains to how to proceed with reviewing the test by the fire chief.

Document 3: Letter from the fire chief to Sam Gipson dated December 23, 2009 stating his findings regarding the twenty (20) questions that were challenged by the employee. The letter includes the following attachments: (a) Memo from the employee outlining the basis of his challenges; (b) the test key; (c) the employee's score sheet. The test key and the score sheet are not attached.

Document 4: Email chain with a starting date of December 23, 2009 from Sam Gipson to the civil service commissioners, stating the employee's score after submission to the chief and asking the commission to approve the results. The email also states that the promotion of the employee would like to be made before the retirement of the fire chief. (The test score does not appear to be correct in the message.)

Document 5: Email dated December 23, 2009 from commission chairman Robert Balentine to Commissioner Sam Gipson concurring with the promotion.

Document 6: Email dated December 23, 2009 from Commissioner Sheryl Childs approving the action with the employee.

Document 7: Email dated December 23, 2009 from Commissioner Frank Baptist approving the test results.

Document 8: Email dated December 23, 2009 from Commissioner Sam Gipson to Alderman Lee explaining the calculations of the test score.

Document 9: Email dated December 25, 2005 from Commissioner Sam Gipson to the commissioners and to Alderman Lee stating the test results of the employee.

Document 10: Email from the fire chief stating his calculations of the employee's score.

Document 11: Email dated December 29, 2009 from Mr. Gipson to the employee stating his corrected score.

Document 12: Email dated December 30, 2009 from Commissioner Sam Gipson to the commissioners stating the results of the employee's agility test.

Document 13: Email chain dated December 30, 2009. The first email is from Chairman Balentine to the commissioners stating there is an issue involving the promotion of the employee that must be discussed urgently. The response is from Commissioner Frank Baptist to the commissioners stating there was a sense of urgency in having the position filled.

Document 14: Email chain dated December 30, 2009 from the city attorney to Chairman Balentine and to Alderman Lee giving an opinion on what course the commission should take with respect to the December 31, 2009 meeting.

Document 15: Memo dated January 4, 2009 from the employee to Mayor Holland complaining of a hostile work environment caused by Alderman Lee.

Document 16: Memo from Mayor Holland to the employee concerning his allegation of a hostile work environment.

Document 17: Letter from attorney Robert Newcomb dated January 11, 2009 concerning the employee's status with the city.

Document 18: Response to Mr. Newcomb's letter from the city attorney, dated January 11, 2009.

Document 19: The Attorney General's opinion regarding the release of the above documents.

Document 20: Email chain dated August 22, 2006 from Chairman Emmons to Chief Blankenship advising four of five commissioners had given consent for issuing a verbal approval of requested rule changes concerning the promotion process for firemen. The email also contains the proposed rule, the basis for the change from Chief Blankenship and a copy of one email from Commissioner Childs voting to approve the change.

In all of the above documents, the exam score of the employee has been redacted in compliance with the Attorney General's opinion.

Analysis of the Facts and the Law

In reviewing the promotion process, the first consideration must be of the rules and regulations adopted by the commission in order to determine if they were followed. I was provided with three different rulebooks and several emails concerning the rules of the commission by the fire department. None of the three rules books are dated (except for one dated change in two of the books) and for the most part the books are similar in most respects except for the rules of the fire department. Of the three books, the rules as they pertain to the promotional process for firemen are all significantly different.

The emails I have been provided give some insight as to how these particular changes may have occurred over the past several years. In 2006 the commission took either a vote either by email or by telephone to make changes to the promotional procedures of firemen. The email by Chairman Emmons informed the fire chief that he had obtained consent from four of the five commissioners for a rule change, which was to be formalized at their next meeting on September 6, 2006. There are no minutes of this particular meeting that can be located.

On January 5, 2009 Chief Blankenship transmitted to the commission a request to amend the rules as they pertain to applicant testing. The requested rewording of the rules is contained within what has been characterized to me as the current commission rulebook by Human Resources. There are not any minutes to reflect when this change was approved by the commission nor the manner of its approval. This is also no record of a public hearing, as required by law, occurring before the rule changes were instituted by the commission.

The procedure for the commission to create rules is codified at A.C.A. §14-51-301. It provides that the adoption and amendment of rules shall take place after “public notice and hearing”. This requires at a minimum publication of the proposed rules in order to allow comment on the changes by the public at a hearing. At the present time, there is not any proof the current rulebook of the commission was adopted utilizing this procedure. There is also an absence of minutes to reflect how any of the three commission rulebooks were adopted by the commission in years past. I have been told by the commission secretary that the commission has not conducted public hearings or provided public notice of its rule changes since his service on the commission. This being the case, I recommended to the commission that it (1) publish notice of the adoption of rules; (2) conduct a public hearing on the adoption; and (3) adopt rules and that it do so immediately. This occurred this past week and rules are now legally in place.

Because of the improper manner in which rules have been adopted in the recent past, the lack of minutes to substantiate how any of the three rulebooks were adopted, and the lack of dating of the three rulebooks as well, it is not possible to determine whether or not the commission followed the “rules” because at this point it is not possible to determine what the rules were at the time. However, if we consider what has been

utilized as the last version of the commission rules, it appears that these “rules” were not followed with respect to the promotion of the Assistant Fire Chief.

First, the “rules” provide that in order to promote an individual, the employee must have a seventy percent (70%) on the promotional exam in order to proceed to the next level of the promotion process. As stated above, this did not occur. It was not until the commission met on December 31st and voted to throw out thirteen (13) questions, which was the number necessary to give a passing grade on the exam, that a passing grade was achieved. It is my opinion, that the “rules” as written do not provide a mechanism for making this type of challenge to exam questions.

The “rules” provide that an employee may review their answer sheet. It also provides that “an error on the test paper or in the rating of any phase of an evaluation shall be corrected if called to the attention of the commission.” An “error on the test paper” in my opinion would indicate what is being reviewed are “grading errors” meaning that the correct answer was given but marked wrong incorrectly on the score sheet.

In addition, the employee can challenge the “rating of any phase of the evaluation.” The “rules” provide that in order to calculate a final score to determine whether an employee is to be certified on the promotional list, the employee shall first take a written test, followed by a physical agility test and a score determined for the years in firefighting. All three of these factors shall be calculated to determine promotion eligibility. The written test comprises eighty (80%) of the overall score, the physical agility test comprises ten percent (10%) of the score with the remaining ten percent (10%) beginning determined by the years in service. It is my opinion that an employee may challenge the calculation of these factors in their overall score if the scores are calculated incorrectly. In incorrect calculation could affect whether or not an employee is one of the top three candidates for promotion.

After reviewing the plain wording of the “rules”, there is not a provision for the review of the exam by an employee that would allow the challenge of “bad” questions. In order to treat all employees who desire promotion fairly and equally, it is my opinion that throwing out questions after the fact, absent an express rule change that allows such a challenge, violates what the “rules” were considered to be. It is fundamentally unfair to allow one employee to have the opportunity to knock out what amounts to thirteen percent (13%) of his examination without affording similar opportunities to past and future candidates for promotion. Doing so hampers the perceived fairness of the promotion process and casts doubt on its impartiality to the other employees and to the public.

Second, the “rules” provide that a written test is to be passed first. Once the minimum score is achieved, the employee then proceeds to the next phase of the promotion process, which is the physical agility test. The wording of the rule provides that “a written test shall be the first step in the testing process...a minimum score of seventy percent (70%) must be made in order for the applicant to continue the testing

process.” The “rules” clearly provide that the first step is the written test. Here, the commission relied on a physical agility test given prior to the passing of the written exam. While the test occurred roughly a week earlier, the express wording of the promotional process states it is to occur after the written test is passed. It specifically provides the order of the promotional process in very clear language. To allow the use of any physical agility test given prior to passing the written exam opens the door to the use of tests given at any time, whether a week, a month or a year prior. At what point will the cut off be for considering a prior test once this door is opened, absent a revision of the “rules”?

Third, after the overall score is calculated, (the written, physical agility and years of service) the commission secretary is to certify the promotion list to the chief for consideration, a copy of which is to be provided to the city clerk. Once the list is certified, the chief is then to pick from the list and make his promotion request through the mail or by fax no later than fourteen (14) days before the effective date of the promotion.

In this particular instance, the commission met on December 31st, voted to throw out thirteen (13) questions which then gave a passing score on the written exam, accepted an out of date physical agility test, did not calculate the composite score including the years of service and did not certify an eligibility list which was then transmitted to the fire chief with a copy to the city clerk. In short, the commission did not, in my opinion, follow what was considered to be the “rules” at the time with respect to this promotion. Unfortunately, the commission appears to have rushed this promotion and did not follow through on what would be their normal operating procedure for making a promotion. According to the email documents attached to this opinion, this appears to have occurred because it was the fire chief’s last day on the job.

But as stated above, what the “rules” were at the time is in dispute due to the rule making process, as provided for by state law, not being followed. Unfortunately, this is especially true for the promotion rule process for firemen. This being the case, the city must look to what state law provides regarding testing and the promotion process as the authority in this instance. These laws are codified at A.C.A.§14-51-301 and A.C.A.§14-51-306. In sum, these statutes provide the following relevant provisions:

- a) Open and competitive examinations to test the relative fitness of applicants for the position.
- b) The examinations are to be protected from disclosure and copying, except that commission shall designate a period of time following the conclusion of testing in which an employee taking an examination shall be entitled to review his or her own test results.
- c) The creation and maintenance of eligibility lists for each rank of employment, in which shall be entered the names of the successful candidates in their order of standing.
- d) Certification to the department head of the three highest on the eligibility list for appointment for that rank of service.

- e) Establishing eligibility lists for promotion based upon open, competitive examinations.
- f) All examinations shall be fair and impartial and such as to test the qualifications of the applicants for the particular service and position filled.

The concern is that after considering the “basics” of what state law provides, the promotion process employed in this instance violates the several of the provisions noted above. In particular, state law provides that the examination shall be fair and impartial and shall test the qualifications of the applicant. Here, by throwing out thirteen (13) questions which was the number necessary to a passing grade does not give the appearance of a “fair and impartial” examination.

Of particular concern is that the commission did not fully review the challenges made by the employee nor did the commission review the actual exam questions because at that point in time the exam had been returned to the vender.

Rather than go back to the company, which supplied the test to review the exam, to review the challenges, the commission chose to rely on the fire chief and his opinion that the questions were not clearly written or good for assessment. The problem with proceeding in the manner alone is best summarized as follows, “Currently our promotional tests are required to be written by employees within the department. The tests are not validated and I believe that we are courting difficulty with this procedure. I have requested that the procedures be restructured to allow the use of “packaged” tests purchased from outside testing agencies. These tests are validated and will provide protection from civil action.” This is a quote from the email from Chief Blankenship to Chairman Emmons on August 21, 2006 requesting the rule change noted above.

The 2006 rule change incorporated a change that the civil service commission would begin using tests from outside agencies in order to validate the testing process. Yet after making this change and presumably accepting the reasoning of the chief to take the testing process out of the hands of city employees, the commission went back to this procedure at the most critical point in time, that being after the test was administered and the score known and most importantly what it would take to continue on with the promotion process.

When you couple these facts along with the timing of the promotion, that being the last day of Chief Blankenship’s tenure as fire chief, the examination does not give the appearance of being “fair and impartial” as required by state law. As stated above, when I was made aware of the vote, which violated the open meeting statute of the FOIA, I contacted Chairman Ballentine on December 30th about the matter and informed him that the vote taken was illegal and the commission’s action invalid. I was told this matter would be taken up at the next meeting of the commission, which was scheduled for the first week in January. Instead, a special meeting was called to deal with the situation immediately. This particular special meeting was described as being a “whirlwind” by one of the commissioners at a later meeting. When you consider these facts along with a

disregard of the “rules” as the commission thought them to be on December 31st, as outlined above, in my opinion the actions of the commission on December 31, 2009 violated A.C.A. §14-51-306, which calls for “fair and impartial examinations.”

In addition, the state law noted above requires that the commission certify the eligibility list to the fire chief for consideration as to whom he may promote. The minutes do not reflect the creation of such a list in the rush to approve the promotion.

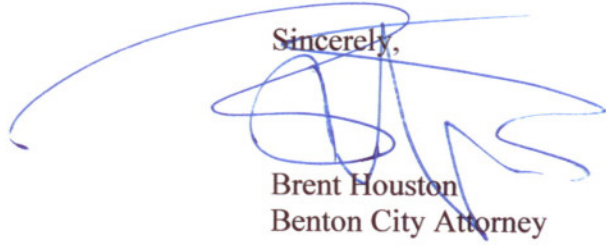
Lastly, state law only provides for a review of the examination. It does not provide for a mechanism to challenge questions. With properly adopted rules not being in place and there not being a procedure for challenging the exam questions within state law, the employee could only review the exam results. At that point in time, the commission lacked the authority to remove examination questions because there were no procedures in place to do so.

Opinion and Recommendation

Based upon the foregoing, it is my opinion and recommendation to the commission that the following occur:

1. The promotion of the Assistant Fire Chief be set aside before the probationary period expires and the employee be restored to the rank of Captain. The probationary period is six (6) months from the date the promotion was approved on December 31, 2009. The basis for doing so is stated above.
2. Advertise that a new promotional exam for the rank of Assistant Fire Chief will be given.
3. Retesting of the employee along with any other interested applicant occur in a timely manner.
4. The employee should be encouraged to re-take the promotional exam.
5. Have a promotional exam based upon current manuals, not ones that are out of date by several years. This should be true of all promotional exams regardless of rank, not just this particular test.
6. Because we do not presently have a permanent fire chief, the commission request Human Resources contact a city of similar size to that of Benton and request that its fire chief review the promotional exam prior to it being administered in order to have a validated exam. In the alternative, I am recommending the most senior ranking member of the fire department, who is not taking the promotional exam, develop a promotional test for assistant chief, with the assistance of an outside testing agency. I would also recommend the fire department utilize the same procedures for developing the examination which is currently being utilized by the police department.

Sincerely,

A handwritten signature in blue ink, appearing to be "Brent Houston", written over the typed name.

Brent Houston
Benton City Attorney

Enclosures

BDH/jr