Foster Garvey

Model Civil Service Rules for Washington State Local Governments

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MODEL CIVIL SERVICE RULES

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INTRODUCTION

A. HISTORY

The development of Civil Service in response to patronage hiring in government has a long history in the United States. Military hero and President Andrew Jackson took full advantage of his position that "to the victor belongs the spoils." However, Thomas Jefferson is as much responsible for institution of the spoils system as any American president. *See* Vaughn, *Principles of Civil Service Law* (1976); and E. Kaplan, *The Law of Civil Service* (1958).

The movement for reform in federal employment services was highlighted by the 1881assassination of President James A. Garfield by a disgruntled Republican party member whose demand for a patronage appointment had been disregarded. *See Kaplan* at 10. The Pendleton Act (Civil Service Act of 1883) created the Federal Civil Service and a Civil Service Commission to protect civil servants. Initially, approximately ten percent of the federal bureaucratic positions were selected on merit principles. By the twenty-first century, roughly 90 percent of positions were under the Civil Service protection. K. Brudney & J. Culver, *Critical Thinking and American Government*, 215 (1998). It took nearly 100 years for Congress to provide any significant modifications to the federal civil service. During the Carter administration, Congress enacted the Civil Service Reform Act of 1978. The Act established the Senior Executive Service to provide an executive or senior level of workers/officers serving in the federal service without conventional civil service job protections. The Reform Act of 1978 also established federal legislation to protect whistleblowers.

While the state of Washington may not boast of such a colorful history in the development of its Civil Service, it nevertheless does have nearly 90 years of state involvement. The state mandates for city fire fighters and police systems, chapters 41.08 and 41.12 RCW, were enacted respectively in 1935 and 1937. County sheriffs' civil service was enacted by initiative in 1958 (Initiative Measure No. 23), as was civil service for state employees in 1960 (Initiative Measure No. 207). And charter cities such as Seattle, Spokane and Tacoma have maintained civil service systems for over a century. As a result, many cases that address civil service issues predate the state-mandated systems.

B. LOCAL RULES

During development of civil service systems throughout the state, commissions have adopted rules for their operation. While rules are uniform in many respects, agencies and consultants (such as the Municipal Research and Services Center) frequently receive requests from commissions for assistance concerning specifics of rules. To provide a ready reference to local Commissions and their personnel, the Association of Washington Cities Labor Relations Institute initially commissioned the preparation of a set of model civil service rules. Subsequent editions have been prepared by the author with the support of other Foster Garvey attorneys.

These model rules are not intended to be implemented in the place of existing civil service rules without careful consideration of existing rules, procedures, and local conditions. However, the rules provide a comprehensive system for the administration of a local civil service system and may be adopted in total if desired. A better approach would be to use these rules as a

guide for development of a system that is most appropriate to a city, county or other municipality. Though most systems throughout Washington are established for public safety personnel, the rules are intended to provide an administrative system covering employee classifications throughout a government structure.

The model rules are organized by chapter with each chapter followed by comments. Many comments incorporate references to legal authority. Local commissions always should consult with the city attorney, county prosecutor, or other legal advisor concerning current case law and statutory amendments.

We hope that you will find this publication to be a regular and useful source of reference.

Acknowledgement

This Fourth Edition of the Model Rules is published and released in conjunction with the forty-third annual Civil Service Conference. The Conference was originally conceived and organized by the Association of Washington Cities; and later, by AWC's Local Government Personnel Institute. The author has been fortunate to have worked with the Conference throughout its history. Many suggestions from Conference participants have contributed to these Model Rules.

We thank the Local Government Personnel Institute and the Washington State Bar Association for permission to use previously published materials that have been modified or adopted for this book. Additionally, the employment and labor attorneys at Foster Garvey PC are recognized for their support in the preparation of this Fourth Edition. Particularly, Alyssa Melter and Matt Kelly are acknowledged for their work in edits to various chapters of these Model Rules.

1. GENERAL PROVISIONS.

1.01 AUTHORITY AND APPLICATION. These rules are promulgated pursuant to the authority granted by [Chapter 41.08 RCW, Civil Service for City Firemen/Chapter 41.14 RCW, Civil Service for City Police/Chapter 41.14 RCW, Civil Service for Sheriff's Office]. These rules are applicable to proceedings before the Civil Service Commission and should be read in conjunction with the specific provisions of [the referenced RCW chapter], and the enabling ordinance [or resolution] providing for the civil service.

1.03 SCOPE AND PURPOSE. These rules govern the continuing administration of the Civil Service System of [City/County]. The purpose of these rules is to assure that the Civil Service System in [City/County] is administered in accordance with the [Charter and] ordinances of [City/County], and that all proceedings before the Commission are conducted in an orderly, fair and timely manner.

1.05 PRESUMPTION OF VALIDITY. The Civil Service System implemented by these rules substantially accomplishes the purpose of [referenced RCW chapter]. Variations from state models are based on local conditions and are intended to maintain the purposes of civil service systems: merit selection, tenure, and an independent civil service commission. These rules are presumed to be valid and shall be upheld unless in direct conflict with the purposes of [referenced RCW chapter]. [Note, County use of this provision should be guarded. See Comments.]

1.07 SEVERABILITY. If any provision of these rules or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of these rules which can be given effect without the invalid provision or application, and to this end, any section or word is declared to be severable.

COMMENTS TO RULE 1: GENERAL PROVISIONS

1.01 A. Jurisdiction—General. Over 30 years before the State of Washington adopted its first statute requiring cities to provide civil service for firefighters, the Supreme Court already addressed the extent of jurisdiction of a civil service commission. The occasion for the Supreme Court's analysis was the attempted termination of a Seattle Police Department "night clerk" by that city's civil service commission. *Easson v. City of Seattle*, 32 Wash. 405, 73 P.496 (1903). Easson had been accused by members of the public of mistreatment of prisoners in the City Jail. When the Chief of Police failed to act, the commission took it upon itself to terminate Easson's employment. Easson challenged the action. In its analysis, the Court began by distinguishing the authority of the commission from that of the "appointing authority." A decade earlier, the United States Supreme Court had occasion to consider a similar issue. In upholding the President's power to remove executive branch officers, the Court acknowledged the rule that the right of removal inheres in the right to appoint unless limited by constitution or statute. *Shurtleff v. United States*, 189 US 311 (1893); *Easson v. Seattle*, 32 Wash. at 411. In contrasting the appointing authority from commission authority, the *Easson* Court described generally the purpose and functions of civil service.

> The object of the civil service regulations seems to be to provide a system for the selection of capable officers, uninfluenced by mere personal or political consideration. The test of efficiency is usually made by a system of examinations such as the civil service commission of the City of Seattle is authorized to conduct. These examinations relate to intellectual qualifications, and perhaps in some measure to other fitness in the way of personal character. As a result of the test, the commission prepares lists of names of those found to be qualified, and from such lists, the appointing officer selects and appoints. The function of the commission seems to be… to recommend the appointment… but the actual appointment… is made by another.

Easson v. Seattle, 32 Wash. at 412-413.

The Court acknowledged that the commission is to act as a "check" on the appointing officer to ensure that the employee is not removed based on "mere personal, political, or other insufficient motives." *Id.*

> Thus, the functions of the commission are such that the members thereof are evidently intended to be free from any consideration in connection with either appointments or

> removals, except those that are purely meritorious. That they more fully discharge their duty in that spirit, they are not given the power of either actual appointment or removal.

Easson v. Seattle, 32 Wash. at 413.

This foundation has been carried forward in subsequent Supreme Court decisions. *See Reynolds v. Kirkland Police Commission*, 62 Wn.2d 720, 384 P.2d 819 (1963), discussed below.

The *Easson* case also emphasizes that civil service in some communities predates the enactment of state legislation. The early charters of first-class cities such as Seattle, Tacoma, Bellingham, and Spokane provided for civil service for city employees. It was those systems that formed the basis for the subsequent state legislation that mandated civil service for police and fire agencies. Nevertheless, many of those charter systems remained in effect and provided for a merit system of employment for personnel throughout city government, not just in the police and fire services. These rules attempt to provide for a uniform system, whether for the public safety or other municipal service. However, the most common systems are applicable to the police and fire services.

The statutes are clear that civil service does not create positions or slots of employment. *See*, *e.g.*, RCW 41.12.110. That authority rests with a government's legislative authority, acting through its budget and other legislative functions. Occasionally, there is conflict between the authority of a commission to classify positions and the authority of a government to create positions or to designate work. For example, each rank or position of employment in the government sector does not necessarily require a separate classification. See discussion at Chapter 6; *State ex rel. Reilley v. Civil Service Commission*, 8 Wn.2d 498, 112 P.2d 987 (1941). An obvious example is that of a police department's assignment of a police officer to perform the job of motorcycle officer. The position of motorcycle officer would not typically be considered a "classification." Rather, it is a position or assignment in the operating department. Motorcycle officer would have a civil service classification of "police officer." The job assignment, whether beat cop, motorcycle officer, or crime scene investigator does not necessarily dictate the civil service classification or standing.

There are circumstances in which a system may provide for the appointment of personnel to positions that are outside of the classified service. For example, the Legislature by Chapter 143, Laws of 2002, amended RCW 41.12.050 to permit certain cities to create positions in an "unclassified service." The positions that the legislation authorize as "unclassified" include assistant chief, deputy chief, bureau commander

and administrative assistant or administrative secretary. This exempt service is similar to provisions of the County civil service statute. *See* RCW 41.14.070.

> If a position initially selected by the police chief to be in the unclassified service is in the classified civil service at the time of the selection, and if the position is occupied, the employee occupying the position has the right to return to the next highest position or a like position in the classified civil service.

RCW 41.12.050(3). The provisions for return to the classified service from an appointment to the unclassified service are not uniform throughout all civil service systems. In many systems, the promotional appointment to a position outside of the classified civil service does not provide for automatic rights of return to the classified service, and, of course, in any case if the termination from the unclassified service is for cause, the employment relationship would be terminated (subject to whatever contract or appeal rights may exist between the employing agency and the officer or employee).

B. Flexibility. The Civil Service System created by a city or town is not required to be identical to the system described by state law, so long as the city or town system substantially accomplishes the purposes of state law. For example, a state Supreme Court decision provides that a new employee can be selected from the top three names on a Civil Service list, even though the state law says only the top name can be selected. *See* discussion in Comments to Rule 10.05.

Counties are without the flexibility afforded to cities and towns in the creation of a civil service system. County systems must conform to all specific provisions of Chapter 41.14 RCW. *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Commissioners*, 92 Wn.2d 844, 851, 601 P.2d 943 (1979). However, the general provisions of the county sheriff civil service statute will allow for some local variations and flexibility in system implementation.

C. Purpose of Civil Service. The purpose of a Civil Service created pursuant to state law is to establish a system to:

(1) provide for promotion on the basis of merit,

(2) give police officers tenure, and

(3) provide for a Civil Service Commission to administer the system, and to investigate by public hearing, removals, suspensions, demotions, and discharges by the appointing power to determine whether such action was or was not made for political or religious

reasons and whether it was or was not made in good faith for cause.

Reynolds v. Kirkland Police Commission, 62 Wn.2d 720, 725, 384 P.2d 819 (1963). In considering a local civil service system, the standards set out in *Reynolds* must be followed. The system must provide for promotion based on merit; tenure to employees in the system; and, administration of the system by the Commission and authority of the Commission to investigate the system and hear appeals from employees subject to discipline. In *Reynolds*, Chief Reynolds and a sergeant challenged their demotions. The court reviewed the City of Kirkland's attempt to implement the provisions of Chapter 41.12 RCW, "Civil Service for City Police." The court found that the Police Commission created by the City of Kirkland recommended discipline to the appointing authority but also sat as an appeal board to determine if the action, taken in accordance with the Commission's own recommendations, was or was not made for political or religious reasons and if it was or was not made in good faith for cause. The board recommended discipline and then ruled on appeals from the discipline imposed. The Commission was also authorized to sit as a policy board in matters relating to the Kirkland Police Department. The Supreme Court found that the Kirkland system did not establish a Commission to conduct the investigative hearings required by the state statute, but rather established a police Commission with inconsistent functions. The limited authority of the Commission discussed by the Supreme Court in its 1903 *Easson* decision, was again emphasized in *Reynolds* – this time following consideration of the later enacted statutes.

D. Coverage.

(1) Scope of Coverage—Civilians. Local variations in the types of employees covered by a Civil Service System are not generally accepted. *See Teamsters v. City of Moses Lake*, 70 Wn. App. 404 853 P.2d 951 (1993). There, the court held that the exclusion of non-commissioned (civilian) members of the police department from the Civil Service System was invalid. Commissions should generally defer to the enabling legislation of the local government on this issue.

(2) Scope of Coverage—Chiefs. A city or town may deny Civil Service status to any fire chief appointed after July 1, 1987, or to a Chief of Police appointed after July 1, 1987, if the police department includes six or more commissioned officers. The exemption of the positions must be provided by ordinance.

Part-time employees are not "full paid" and are not entitled to Civil Service status if the city wishes to exclude them.

Prior to legislation allowing cities to exempt the position of chief from civil service, the court in *Samuels v. City of Lake Stevens*, 50 Wn. App. 475, 749 P.2d 187 (1988) ruled that the city's effort to exclude the position of chief of police violated Chapter 41.12 RCW. The decision did not analyze the City of Lake Stevens' system to determine its consistency with civil service purposes under *Reynolds*. Rather, the court applied a narrow review, more consistent with the approach seen in *Clallam County Deputy Sheriff's Guild*. Other systems continue to follow a more traditional approach of allowing a limited number of positions exempt from civil service. *See*, E. Kaplan, *The Law of Civil Service,* Chapter IV (1958); RCW 41.06.070 (state civil service) and RCW 41.14.070 (county civil service). A rule that holds more flexible city systems to a standard more stringent than preemptive state or state-mandated systems does not appear warranted.

(3) Scope of Coverage—Exempt Assignments. County Sheriff Civil Service has long provided for a certain number of exempt personnel. *See* RCW 41.14.070. And the state civil service exempts nearly all of the top four or five levels of department administration from the application of the state personnel system. City fire chiefs subject to Chapter 41.08 RCW and police chiefs subject to Chapter 41.12 RCW were permitted to be exempted from Civil Service by Chapter 339, Laws of 1987. *See* RCW 41.08.050 and RCW 41.12.050. In 2002, the legislature further amended RCW 41.12.050 to authorize creation of police positions in an "unclassified service." Chapter 143, Laws of 2002. The initial selection of positions to be in the unclassified service and therefore exempt from Civil Service are to be made by the police chief. The chief then notifies the Civil Service Commission of the selection of the unclassified positions. RCW 41.12.050(3). The Civil Service Commission has no jurisdiction to review or approve the chief's designation. Subsequent changes in the designation of positions not in the unclassified service are subject to the approval of city administration **and** the Civil Service Commission, after an open meeting. Persons with regular standing in a lower classification prior to appointment to an unclassified position are provided with return rights by the statute. RCW 41.12.050(3).

(4) Pre-exiting Employment Privilege. If a city has not had a civil service requirement and must create one, some employees will become civil service employees automatically. Any chief and all officers who have held their positions for at least six months when Civil Service is enacted become Civil Service employees automatically. They are not required to take tests or to be reappointed, and they are regular, not probationary employees.

1.03 When a Civil Service System Is Mandatory. Civil Service Systems are required by state law for the following:

A. Police Departments. Cities and towns are required to have Civil Service Systems whenever their police force includes fully paid police officers.

B. Fire Departments. Cities and towns are required to have Civil Service Systems whenever they have any full-time paid officers or fire fighters.

State law does not require other cities or towns to provide Civil Service Systems for their police or fire departments, but local ordinances or charters may apply and require the system. Thus, for example, a part-time fire chief who commanded a volunteer force or a police officer in a department consisting of only the chief and part-time officer assisted by a volunteer reserve force would not be entitled to have Civil Service protection under state law. However, a city or town ordinance may give them Chief Civil Service status anyway.

Cities organized as Code cities under Chapter 35A RCW may enact Civil Service Systems for other employees. Similarly, a city organized under a charter as contemplated by RCW 35.21.600 may require Civil Service if the charter calls for such a system.

C. Counties. Civil service is provided for county deputy sheriffs and other employees of a county sheriff following the 1958 Initiative Measure No. 23, now codified at Chapter 41.14 RCW. Unlike cities, county systems are far more constrained in establishing local variations. In *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Commissioners*, 92 W.2d 844, 601 P.2d 943 (1979), the court noted the distinctions between the city statutes (Chapters 41.08 and 41.12 RCW) and the county law (Chapter 41.14 RCW) in finding preemptive effect of state law when there was conflict with the county personnel system.

D. Fire Districts. RCW 52.30.040 authorizes fire districts to provide for Civil Service. The Washington Supreme Court found this authority permissive, not mandatory. *Roberts v. Clark County Fire Protection District No. 4*, 44 Wn. App. 744, 723 P.2d 488 (1986) (holding that a fire district employee's termination after 10 months of probationary employment does not violate the six-month probation standard in RCW 41.08.100). Fire districts are not mandated to maintain Civil Service. *Roley v. Pierce County Fire Protection District No. 4*, 869 F.2d 491 (9th Cir. 1989).

Further, should a fire district provide for Civil Service, it needn't comply completely with RCW 41.08:

> [T]he Legislature did not intend to require that a district comply in every respect with RCW 41.08 when adopting a civil service system. RCW 41.08.010 provides that civil service system provisions for city firemen shall not be

> applicable to those departments whose own regulations substantially accomplish the purpose of RCW 41.08. If the Legislature believed it acceptable for cities to adopt regulations for their fire departments that substantially comply with RCW 41.08, surely they did not intend to require fire districts to follow RCW 41.08 explicitly. It is more reasonable and consistent with the fair reading of the statutes in question to authorize fire districts to have their own regulations, if those rules substantially accomplish the purposes of RCW 41.08.

Roberts, 44 Wn. App. at 748. The court's recognition that Chapter 41.08 and 41.12 RCW need not be explicitly followed provides support for continuing efforts to improve civil service systems through innovative measures. Such efforts are to be directed at furthering civil service purposes of merit, tenure, and commission independence. Reynolds.

E. Ports. A careful reading of RCW 41.12.030 suggests that the provisions for civil service for police officers may extend beyond cities and towns. The statute reads: "There is hereby created in every city, town **or municipality**…." Some unions have argued, and municipalities agreed, that the provisions of the statute require a municipality (even if not a city or town) to provide a civil service system for police officers employed by that municipality.

1.05 Chapter 41.08 RCW creates a Civil Service System for city fire fighters. The chapter provides, however, that local charter or regulations may be enacted so long as the local regulations substantially accomplish the purpose of Chapter 41.08. Chapter 41.12 RCW includes the same authority for local government when creating a Civil Service System for city police. Chapter 41.14 RCW concerning county sheriffs does not contain the same language. Instead, Class AA counties have been authorized to assign powers and duties of Civil Service to other county agencies or departments. RCW 41.14.065.

While the courts have acknowledged the local authority granted by RCW 41.08.010 and 41.12.010, the courts have not hesitated to scrutinize with a certain zealousness the particulars of a system. [*See* discussions concerning the period of probation in comments to Rule 11, and discussion of the "Rule of 3" in comments to Rule 10.] Because the courts have looked at the particulars of the system instead of the system in total, cities also must be cautious in adoption of rules that vary substantially from the outline provided by state statute. This approach tends to inhibit creativity, innovation, and system improvement and development. It is recommended that Commissions who are seeking through innovative methods to accomplish the three purposes of Civil Service, as discussed in *Reynolds*, document the purpose and foundation for such programs to educate a reviewing court.

2. ADMINISTRATION AND OPERATIONS.

2.01 COMMISSION—MEETINGS—QUORUM. In the necessary conduct of its work, the Commission shall meet on the [specific date] of each month, at [specific time], in [specific place] unless there is no pending business requiring Commission action. Notice of special meetings shall be provided as required by the Open Public Meetings Act (Chapter 42.30 RCW, as amended). The Commission shall conduct hearings as required. Notice of hearings shall be provided as required by these rules. Two members of the Commission shall constitute a quorum. No action of the Commission shall be effective unless two members concur therein. All Commission meetings or hearings, regular or as required, shall be open and public provided, however, that the Commission may meet in executive session as authorized by the Open Public Meetings Act. *See* RCW 42.30.140(1) and (2).

2.03 CHAIR—VICE CHAIR. At the first regular meeting in January of each year, the Commission shall elect one of its members as Chair and another member to serve as Vice Chair for a term of one year. Should a Chair and/or Vice Chair resign or be removed from the position prior to the expiration of his/her term, the Commission, upon appointment of a new member, shall proceed to the election of a new Chair and/or Vice Chair.

2.05 RULES OF ORDER. [Roberts/Reeds/. . .] Rules of Order shall be final authority on all questions of procedure and parliamentary law not otherwise provided by these rules. However, with the concurrence of two commissioners such rules may be waived or modified. In quasi-judicial proceedings, the Commission shall be guided, but not bound by, the Civil Rules for Superior Court.

2.07 COMMISSIONERS—CHALLENGE. Any challenge to a Commissioner's participation at a hearing shall be made by an interested party prior to the commencement of a hearing. The challenged Commissioners shall review and rule on the challenge prior to proceeding with the hearing. Failure to timely raise a challenge shall constitute a waiver of the challenge by the party unless, in the exercise of reasonable diligence, a basis for challenge is unknown by a party prior to commencement of a hearing.

2.08 COMMISSIONERS—CHALLENGE—NECESSITY. If, as a result of disqualification(s) pursuant to Rule 2.07, there is no longer a lawfully constituted quorum available, then by reason of necessity, the disqualified Commissioners(s) shall return and proceed with the hearing.

2.09 OFFICE HOURS. The office [and post office] address of the Civil Service Commission is _____. The regular office hours of the Commission [secretary/staff] shall be _____.

2.11 PUBLIC RECORDS. Public records of the Commission shall be available for inspection and copying during the regular office hours of the Commission staff.

No fee will be charged for inspection of public records. Inspection will be permitted during office hours in a space provided by the Commission staff, and under its supervision, and must be accomplished without excessive interference with the essential functions of the Commission. Copies will be made available at actual cost or as provided by [City/County] ordinance. These rules shall be printed for free public distribution.

2.13 RECORD OF PROCEEDINGS. The Commission shall keep a record of its proceedings. The record of the Commission will not include a written verbatim report of proceedings unless ordered. The Commission may retain a court reporter to record all or part of a proceeding. In addition, a party to a proceeding, at his/her own expense, may have a court reporter record all or part of a proceeding. On appeal or review, costs of transcription may be recovered by the Commission, or a prevailing party, at the discretion of the reviewing court or the Commission. Upon appeal or review, transcription and certification of a record of proceedings shall be arranged by the Secretary.

2.15 REPORTS—APPLICANTS, ELIGIBLES, EMPLOYEES.

2.15.01 Each applicant, eligible and employee shall keep the Commission informed, by written notice to the Secretary, of current address and telephone number, and shall report any change of name through marriage or otherwise.

2.15.02 Each eligible shall keep the Secretary informed, in writing, regarding availability and any refusal to accept appointment or promotion and the reasons therefor.

2.17 REPORTS—DEPARTMENT HEADS. A department head shall immediately report to the Secretary in such detail and on such forms as the Secretary may prescribe:

2.17.01 Every appointment, transfer, promotion, demotion, reduction, layoff, reinstatement, suspension, leave of absence without pay, return to duty, assignment, change of position within a class or within an assignment title, change of title, change of compensation;

2.17.02 Every separation from the service with the reasons therefor;

2.17.03 Every refusal or failure to accept appointment by a person whose name has been certified.

COMMENTS TO RULE 2: ADMINISTRATION AND OPERATIONS

2. GENERAL COMMENTS.

A. Commission Tenure. These rules do not address, or provide for, issues concerning appointment, tenure, or removal of civil service commissioners. The enabling ordinance of the city or county should provide for such actions, consistent with the applicable statutory provision. *See* RCW 41.08.030, 41.12.030, and 41.14.030. Because the Commission cannot provide for its own existence, the enabling legislation and not Commission rules need to be considered. In the absence of local provisions, the provisions of the applicable State statute will govern.

B. Structure. The Civil Service Commission is at least a three-member panel. Some cities provide for five commissioners. Additionally, some systems (*e.g.*, City of Federal Way) provide for *pro tem* commissioners in the absence of a regularly appointed commissioner. Such authority must be found in a city's ordinance. Commissions cannot adopt rules providing for commissioner appointment (or for that matter, removal).

C. Eligibility. Commissioners must be citizens of the United States, and they must have been residents of the city or town they serve for at least three years before their appointment to the Civil Service Commission. ("Residence" generally means dwelling place. Commissioners should ask their attorneys if having a business place in the city is "residence" for Civil Service purposes.) Each Commissioner must be an elector (registered voter) of the county in which the Commissioner resides.

Note, RCW 41.08.030 and 41.12.030 provide that at the time of appointment, only two of the three Commissioners can belong to the same political party. This rule is of questionable use today and is regularly ignored.

D. Appointment; No Confirmation. Commissioners are appointed by the same person who is authorized to select, appoint or employ the fire chief or police chief. That may be either the Mayor or City Manager. Council confirmation of the appointment is not required by state law.

E. Term. State law suggests commissioners are to serve for six-year staggered terms. Many commissions are established with shorter terms in recognition of the difficulty of securing a long-term volunteer commitment from qualified candidates for appointment.

F. Compensation. Commissioners serve without compensation. However, nothing prohibits reimbursement for expenses incurred in service as a commissioner.

G. Removal. Commissioners cannot be removed until (1) they have been served a written notice of charges against them, (2) they are given notice of a hearing, and (3) a full hearing has been convened.

The civil service statutes do not specify who may file charges against a Commissioner or who convenes the hearing involving a Commissioner. We can infer from the statute only that the removal procedure must be fair and open to public scrutiny. Perhaps, like the U.S. Congress, a Commission could regulate its own membership. However, because a commissioner may not fairly accuse a fellow Commissioner of misconduct and then convene a hearing to rule on the accusation, the better approach is for the same authority who appoints a Commissioner (whether Mayor or Town Manager, etc.) to be the charging party. The City or Town Council could serve as a hearing body. In case of a problem in removing a Commissioner, the City Attorney should be consulted for a detailed opinion.

H. Commission Attorney. The Commission is entitled to representation by the City or Town Attorney or to appoint its own special counsel in any case. Commissioners should consult the City Attorney about whether they are entitled to a separate lawyer if no "case" is pending. In counties the prosecutor is charged with enforcement of commission rules and suits.

I. Commission Budgets. The city or county is required to supply the Commission with a meeting place, supplies, and the clerical help necessary to allow the Commission to conduct its business.

J. Duties of the Commission. The duties of a Civil Service Commission are to:

- Appoint a Chair
- Convene regular meetings
- Appoint a Secretary-Chief Examiner
- Make rules to implement the Civil Service system
- Authorize the conduct and grading Civil Service tests
- Investigate complaints about enforcement of the Civil Service System
- Conduct hearings regarding discipline of Civil Service employees
- Assure that employees are selected or promoted from lists provided by the Commission
- Keep records
- Certify payrolls

2.01 A. Monthly Meetings and Extra Meetings. Civil Service Commissions organized under state law are required to meet at regular monthly meetings. RCW 41.08.040, 41.12.040, and 41.14.050.

The Commission is required to elect a chairperson and to convene meetings at least monthly. Even if no business needs to be done, the Commission should maintain a schedule of monthly meetings. The Secretary may be authorized to adjourn the meeting in the absence of business (and presumably in the absence of commissioners). The Commission must convene additional meetings if they are necessary for the Commission to conduct its business.

2.05 A Commission should designate a specific set of parliamentary procedures to govern questions not otherwise provided by the rules. However, because of the informality of most Commission proceedings, rules of parliamentary procedure need not be necessary or appropriate. Because the chair makes procedural rulings, only if the other commissioners disagree would the rules of parliamentary procedure be involved.

2.07 This rule is to prevent, if possible, an issue from arising on appeal that was not raised before the Commission initially.

In 1984, the state legislature enacted RCW 42.36.060. The statute placed limitations on the application of the appearance of fairness doctrine. The statute states the standard rule that no member of a decision-making body, while engaged in a quasi-judicial proceeding, may engage in ex parte communications with opponents or proponents with respect to the proposal that is the subject of the proceeding. The statutory provision does provide exceptions to that rule. It is strongly recommended that a Commission **NOT** rely on those exceptions. Ex parte communications (which means without the other party being present) should be avoided, absolutely. Should there be ex parte communications, inadvertently or otherwise, a Commissioner should place on the Commission record the substance of the communication at the earliest available time.

2.11 Civil Service rules must be provided at no cost, as authorized by Chapters 41.08, 41.12, and 41.14 RCW.

A. Scope of Public Records. Certain limited exemptions to the State's public disclosure laws are listed in Chapter 42.56 RCW. The following exemptions may have application to Civil Service records:

RCW 42.56.230(2): Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.

RCW 42.56.240(1): Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to

discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

RCW 42.56.240(2): Information revealing the identity of persons who file complaints with investigative, law enforcement, or penology agencies, other than the [public disclosure] commission, if disclosure would endanger any person's life, physical safety, or property: If at the time the complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the [public disclosure] commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath.

RCW 42.56.250:

(1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;

(2) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;

(3) The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contract information of dependents of employees or volunteers of a public agency that are held by any public agency in personnel records, public employment related records, or volunteer rosters, or are included in any mailing list of employees or volunteers of any public agency. For purposes of this subsection, "employees" includes independent provider home care workers as defined in RCW 74.39A.240;

(4) Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW [Washington Law Against Discrimination] against the person; and (b) requests his or her identity or any identifying information not be disclosed;

(5) Investigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment.

B. Certain Cases.

(1) The public employee's record exemption of was considered in *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 737 P.2d 1302 (1987). In *Hollister*, a union sought an injunction to prevent the State Department of Retirement Systems from releasing disability records of retired fire fighters and police officers. Although exempt, the court was required by the statute to determine if release of the records would violate the personal privacy rights of the retirees. The court noted that in *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), the information protected from public disclosure by the privacy right is that information which a reasonable person would find highly offensive to disclosure and which is not of public interest. *Hollister*, 48 Wn. App. at 134. The retirees' records contained information concerning back injury, asthma, emphysema, ulcers, and possible arterial problems. These were not the kinds of illnesses considered to be "unpleasant, disgraceful, humiliating," or otherwise "highly offensive to reasonable people." Therefore the records did not meet the test for a violation of the right to privacy and were not exempt under RCW 42.17.310. *Id.* at 136. Further, deletion of information identifying individual retirees was not required since none of the records met the *Hearst* test for violation of privacy. *Id.* at 137-48.

(2) Several other recent cases have reviewed the provision for disclosure of public records considering employees' privacy concerns. The Washington Supreme Court found that the public employee exemption did not apply to the records of law enforcement officers against whom complaints had been sustained. *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988). The court determined that the "law enforcement" exemption did apply when the nondisclosure of certain officers' names (but not the records and reports) was essential to effective law enforcement and the integrity of the law enforcement agency in the minds of the public. In another case, the appellate court has ruled that a records release waiver signed by a sheriff's deputy as part of the application process waived the employee's rights only under the Federal Privacy Act and not the State Public Disclosure Act. *Read v. Pierce County Civil Service Comm'n for Sheriff's Employees*, 55 Wn. App. 1019, (unpublished, 1989).

Accordingly, the court ordered the release of the employee's records upon his request. *See also Barfield v. City of Seattle*, 100 Wn.2d 878, 676 P.2d 438 (1984).

(3) Public records include emails on the government's system. *Tiberino v. Spokane County*, 103 Wn. App. 680, 13 P.3d 1104 (2000). In *Tiberino*, an employee of the Spokane County prosecutor's office was discharged for excessive personal use of email. The county printed the emails in preparation for litigation. The local paper sought copies of the emails. The Court, in evaluating the public records request, determined that the emails were public records (they were on the County computer system). However, the emails themselves contained personal information and were not disclosed. The employee was not terminated because of the content of the email, but the extent of the personal email. *See also Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993) (information in the prosecutor's file compiled in case preparation were public records).

(4) In *Yakima Newspapers v. City of Yakima*, 77 Wn. App. 319, 890 P.2d 544 (1995), the Court approved release of the settlement agreement concerning termination of a city employee. Similarly, in *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998), a prosecutor's personnel files were found to be public records.

2.13 Chapter 41.08, 41.12, and 41.14 RCW require the Commission to certify the transcript of its proceedings, upon an appeal being filed in the Superior Court. *See*, *e.g.*, RCW 41.14.120. Under similar systems, but interpreting different statutory language, the courts have determined that the personnel authority is responsible for the cost of the transcript used on appeal. *Zoutendyk v. State Patrol*, 95 Wn.2d 693, 628 P.2d 1308 (1981); *Pryse v. Yakima School District No. 7*, 30 Wn. App. 16, 632 P.2d 60 (1981). The proposed rule preserves the Commission's opportunity to recover costs of transcript preparation, should a court determine that recovery is authorized. The rule also provides for recovery if the cost of transcription is for court "review," as distinguished from "appeal," of matters other than discipline. Because it is possible that the Commission will be required to prepare a transcript in a case arising other than from an appeal of discipline, the Commission may argue that the rule in Zoutendyk does not apply. In light of the previously referenced cases, it is likely that the courts will continue to require the Commission to bear the initial responsibility for costs of transcript preparation when cases arise on appeal. In cases that subject the Commission to review other than by appeal, a court should find that review is analogous to that discussed in *Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Board*, 92 Wn.2d 1, 593 P.2d 151 (1979), and allow a Commission to recover costs of transcript preparation.

3. SECRETARY-CHIEF EXAMINER.

3.01 SECRETARY-CHIEF EXAMINER—APPOINTMENT. A Secretary-Chief Examiner (hereinafter, "Secretary") shall be appointed by the Commission.

3.03 The Secretary shall be appointed as a result of a competitive examination, which examination

[City: may be either original and open to all properly qualified citizens of the city, or promotional and limited to persons already in the service of the police, fire or other city department as the Commission may decide.]

[County: must be open to all properly qualified citizens of the County, provided that no appointee of the Commission, either as Chief Examiner or as an Assistant to the Chief Examiner, shall be an employee of the Sheriff's Department.]

3.05 SECRETARY—DISCIPLINE. The Secretary may be subject to suspension, reduction, or discharge in the same manner and subject to the same limitations as are provided in the case of members of the classified service.

3.07 SECRETARY—AUTHORITY. In addition to acting as Secretary of the Commission, the Secretary shall:

3.07.01 Be the general manager and executive officer of the Civil Service Department, responsible to the Commission, and shall direct the activities of all personnel in the Civil Service Department, including their appointments and removals;

3.07.02 Delegate duties where necessary and supervise the work of all persons employed in the Department, including the preparation, conduct, and scoring of examinations, and maintenance of the classification plan;

3.07.03 Report to the Commission from time to time as directed concerning the details of the work of the Department;

3.07.04 Prepare the budget for the Department, approve accounts, and administer generally the expenditure of funds appropriated for the operation of the Department;

3.07.05 Classify all Civil Service positions in the classified service, maintain a schematic list of all such classes in the classification plan, and prepare and maintain specifications for each class;

3.07.06 Determine which examinations shall be conducted, the minimum qualification of applicants, the subjects to be covered in each examination, methods of testing, and the relative weights to be given to the various parts of the examination; supervise the conduct of the examinations, appointing such experts, special examiners, and other persons he or she may deem

necessary; decide all questions relating to the eligibility of applicants, the admissibility of applicants to the examinations, extension of time and all questions arising during the course of an examination; prepare and submit a report prior to and after each examination to the Commission, together with a report on all appeals from rulings or appeals from any part of the examination; and [Note: *see* Rule 8.01, "Ordering Examinations."]

3.07.07 Perform all other functions necessary for the proper carrying-out of these rules and the provisions of law relating to the Civil Service System, and such additional duties as may be assigned to the Secretary from time to time by the Commission.

3.09 REVIEW OF AND APPEAL FROM ACTIONS OR DECISIONS OF THE SECRETARY.

3.09.01 The Commission on its own motion may review or modify any action or decision of the Secretary.

3.09.02 Any person adversely affected by any action or decision of the Secretary may request the Commission to revise or modify such action or decision. Such request shall be in writing setting forth with reasonable certainty the action objected to, the grounds supporting the request, and the relief sought, and must be made within ten (10) days from the date of notice of such action unless established otherwise in these Rules. The Commission shall thereupon, if in its opinion good cause is shown, conduct a hearing thereon.

COMMENTS TO RULE 3: SECRETARY-CHIEF EXAMINER

3.01 The Commission's staff includes at least the Secretary-Chief Examiner and may include other employees or consultants if Commission business requires their services and the city or town budgets for them.

The position of Secretary-Chief Examiner is specifically authorized by statute. *See* RCW 41.08.040, 41.12.040, and 41.14.050. RCW 41.12.040 with RCW 41.14.050 provide for differing selection criteria for the examination and selection of the Secretary-Chief Examiner.

3.03 The Secretary-Chief Examiner is appointed by the Commission. The Commission may appoint the Commissioner either by convening a competition for an entry-level appointment from among all applicants who live in the city or town; or, the Commission may promote a Secretary-Chief Examiner from among employees already serving the police or fire departments of the town or city. (Although the statute limits eligibility for the position of Secretary-Chief Examiner, a local system may vary from the statutory scheme so long as the purposes of the State civil service program are served.) For example, the Secretary-Chief Examiner position may be held by one person or divided into two positions—one to serve as Secretary and one to serve as Chief Examiner.

3.05 The Secretary-Chief Examiner may be suspended, demoted or discharged only in good faith for cause. The Secretary-Chief Examiner can be disciplined only according to the same procedures that the Commission provides for disciplining police officers or fire fighters.

3.07 The duties of the Secretary-Chief Examiner are to:

- Keep records for the Commission
- Preserve reports made to the Commission
- Superintend and keep records of Commission examinations
- Perform other duties that are assigned by the Commission

Other appropriate duties for the Secretary-Chief Examiner may include:

- Keeping minutes of Commission meetings
- Providing proper notice of regular and special meetings of the Commission
- Scheduling hearings and notifying all parties of hearing schedules

A skillful Secretary-Chief Examiner may also research Civil Service rules and recommend rule amendments to the Commission.

A. Independent Investigation. Civil Service Commissions frequently will direct chief examiners to conduct investigations of employee or

departmental conduct. The authority of a Commission to conduct, or order, an independent investigation is challenged in AGO 1986 No. 9. The Skamania County Prosecuting Attorney asked the following question:

> May a police Civil Service Commission investigate allegations of misconduct in the performance of police duties made by a citizen against an individual police officer?

The Attorney General answered the question in the negative. In analyzing the matter, the Attorney General reviewed the provisions of Chapter 41.12 RCW, and particularly RCW 41.12.090. That section provides in pertinent part that:

> No person in the classified Civil Service who shall have been permanently appointed or inducted into Civil Service under provisions of this chapter, shall be removed, suspended, demoted or discharged except for cause, and only upon written accusation of the appointing power, or any citizen or taxpayer…

The opinion contains the great understatement that "this section is not a model of clarity in all respects." The Attorney General concluded that "the police Civil Service Commission's investigatory power does not authorize it to conduct an initial investigation respecting the conduct of classified personnel. The Commission's right to investigate does not arise until a written demand for an investigation has been filed, following removal, suspension, demotion or discharge, as provided in RCW 41.12.090."

One of the compelling reasons for the Attorney General's conclusion is the policy against a Commission sitting as an accuser in and a judge of the same controversy. Should a Commission undertake an investigation, the conflict naturally arises. The Attorney General's conclusion is dictated by an attempt to eliminate such a potential conflict.

B. Residence of Secretary. In AGO 1989 No. 20, the Attorney General concluded that RCW 41.08.040 and 41.12.040 required the person filling the position of secretary/chief examiner to be either an existing employee of the city or a city resident. The opinion traced the various amendments to the civil service laws that have resulted in the prohibition on residency requirements for police and firefighters. Those same amendments were found not to have impacted the statutes' section regarding secretary qualifications. This opinion is another example of conflicting readings of the city civil service statutes. These shifts between flexibility and strict adherence continue to pose difficulties for cities, many of whom do not maintain residency requirements for the position of secretary.

As discussed previously, the purpose of Chapters 41.08 and 41.12 RCW is to establish a civil service system to provide promotion on the basis of merit, tenure in employment, and an independent commission to administer the system and investigate employee discipline. *Reynolds v. Kirkland Police Commission*, 62 Wn.2d 720, 384 P.2d 819 (1963). In deciding whether a civil service system providing for the appointment of a non-resident Examiner would substantially accomplish these purposes, a city may consider several factors.

First, restrictions on employment are generally disfavored as contrary to the merit principles that are at the base of civil service systems. *See Eggert v. City of Seattle*, 81 Wn.2d 840, 505 P.2d 801 (1973) (civil service preference for one-year residents of Seattle invalidated); and *see Bjorseth v. City of Seattle*, 15 Wn. App. 797, 551 P.2d 1372 (1976). Second, a city is required to administer a personnel system far more intricate and complex than that in existence in the mid-1930's when RCW 41.08.040 and RCW 41.12.040 were enacted. Third, the pool of qualified applicants for secretary is not limited by city limits or other political or geographic constraints. Fourth, most civil service testing is done through use of non-resident consultants or examinations prepared by non-resident organizations. Fifth, the legislature has expressed its opposition to residency requirements in Chapters 41.08 and 41.12 RCW, and in the general laws governing city personnel administration. *See*, RCW 35A.13.110 (residency within a code city shall not be a requirement for appointments made by or under the authority of a city manager). Therefore, the appointment of a non-resident secretary may not be contrary to any of the purposes of the state civil service laws.

4. DEFINITIONS.

The following words and phrases shall have the meanings hereinafter described unless the context in which they are included clearly indicates otherwise.

4.01 ACTUAL SERVICE. Time in which a given employee has been engaged under Civil Service appointment in the performance of the duties of a position or positions and shall include absences with pay.

4.03 ALLOCATION. The locating or placing in the classified service of a position in the class appropriate to it on the basis of duties and responsibilities and required qualifications of such position.

4.05 APPLICANT. Anyone who has filed an application to take a Civil Service examination.

4.07 APPOINTING AUTHORITY. The person or persons authorized to hire, promote or discharge employees.

Alternatives:

[A person who is authorized to employ others on behalf of the City, which means: (1) the Fire Chief with respect to any Fire Department position included in this system, or (2) the Chief of Police with respect to any Police Department position included in this system.]

[The County Sheriff is invested by law with power and authority to select, appoint, or employ any deputy, deputies or other employees included in this system.]

4.09 APPOINTMENT

4.09.01 APPOINTMENT—REGULAR. The appointment of a certified eligible.

4.09.02 APPOINTMENT—PROVISIONAL. A limited appointment of (a) certified [or non-certified] person to a classified position which is not vacant but is currently unfilled due to an authorized leave of absence; or (b) a non-certified person to a classified position for which there is no current eligible register.

4.09.03 APPOINTMENT—TEMPORARY. A limited appointment other than from an eligible register for the purpose of performing work belonging in the classified service. A reduction of a regular employee is not a temporary appointment. Temporary appointment includes emergency appointment.

4.11 ASSIGNMENT. An employee may be assigned to a position which carries additional salary and additional limited responsibilities and is within the scope of the specification for the class from which assignment is made.

4.13 BREAK IN SERVICE. A separation from Civil Service status with a loss of accumulated service credit as occasioned by a "quit," "resignation," "discharge" or "retirement."

4.15 CANDIDATE. Any applicant who has completed, or is in the process of completing, a Civil Service examination.

4.16 CAUSE. Cause shall mean good, sufficient or just cause as determined by the Commission; exercised by the appointing authority in good faith and without discrimination on the basis of religion, politics or other protected classification; and, in consideration of the total context of a disciplinary action, including procedural fairness and consideration of an employee's work record.

4.17 CERTIFICATION. [Certified Eligible List] A list of names from an eligible register transmitted by the Civil Service Commission to an appointing authority from which such appointing authority may fill a vacancy.

4.19 CERTIFY. Verification to the appointing authority that a list of names of candidates for employment has been selected from the list of persons tested and found eligible for employment.

[4.21 CITY. The City of [_____.]

4.23 CIVIL SERVICE EMPLOYEE. Any employee who has Civil Service status.

4.25 CIVIL SERVICE REGISTER. See Eligible Register.

4.27 CLASS. A position or group of positions designated by the Commission as having similarity in duties and responsibilities, by reason of which the same examination may be used for each position in the group.

4.29 CLASS SERIES. Two or more classes which are similar as to line of work but which differ as to degree of responsibility and difficulty and which have been arranged in a ladder of steps in a normal line of promotion, such as [Police Officer, Police Sergeant, Police Lieutenant].

4.31 CLASS SPECIFICATION. A description of the essential characteristics of a class and the factors and conditions that separate it from other classes, written in terms of duties, responsibilities and qualifications.

4.33 COMMISSION. The Civil Service Commission. "Commissioner" means any one member of the Commission.

4.35 CONTINUOUS SERVICE. Employment without interruption, except for absences on approved leave or absence to serve in the armed forces of the United States.

[4.37 COUNTY. [_____ County.]

4.39 DEMOTION. Removal of an employee, for cause, from a higher to a lower class of employment or salary step within a class.

4.41 DEPARTMENT. Any department subject to civil service as established by ordinance. The legal head of any such department is the "Department Head" or Department Head's designee.

4.43 DISCHARGE. Termination, separation, dismissal, or removal from the service for cause.

4.45 ELIGIBLE. Anyone qualified for a given class through examination and placed on the proper eligible register; also, "Certified Eligible."

4.47 ELIGIBLE REGISTER. A register or list of successful examinees for a given class from which certification may be made to fill vacancies in such class; also, "Register of Eligibles."

4.49 EMPLOYEE. Anyone holding a position in the Civil Service System of the [City/County].

4.49.01 EMPLOYEE—REGULAR. Any employee who has been appointed from a certification and who has satisfactorily served the full probationary period.

4.49.03 EMPLOYEE—TEMPORARY. Any employee appointed to fill an emergency, temporary or short-term need [or to fill a position for which no register is available].

4.49.05 EMPLOYEE—EXEMPT. Any employee in a position of employment which is not subject to Civil Service rules and regulations, and in which one serves at the discretion of the appointing authority.

4.49.07 EMPLOYEE—PROBATIONARY. A person appointed from a certification who has not yet completed the specified trial period of employment.

4.49.09 EMPLOYEE—PROVISIONAL. Any employee appointed provisionally to a position.

Note: A regular employee is the only employee with rights under Rule 19.01.

4.51 EXAMINATION. The process of testing the fitness and qualifications of applicants for positions in a class.

a. EXAMINATION—OPEN [or ENTRANCE]. An examination open to any member of the public meeting the requirements as stated in the official bulletin announcing the examination.

b. EXAMINATION—PROMOTIONAL. An examination limited to employees meeting the requirements stated in the official bulletin announcing the examination.

4.53 EXAMINATION BULLETIN [or OFFICIAL BULLETIN] An examination announcement containing basic information about the class of position, the requirements for filing, how to apply, and the other pertinent information. The examination announcement shall be posted in the [Personnel Department/Commission Office] and in other suitable locations.

4.55 FINAL EXAMINATION SCORE. Total of earned exam score plus additional veteran's and other preference or service credit points (*see*, RCW 41.04.012) for which an applicant is eligible.

[4.57 IN-HOUSE REGISTER. A list of the names of civil service employees, in the order of final examination rating, who have passed an examination for an entrance position or class.]

4.59 LAYOFF. The interruption of service and pay of any regular or temporary employee because of lack of work or funds, except that the term shall also apply to the separation of temporary employees who have completed the stipulated period of employment.

4.61 OFFICIAL NEWSPAPER. The newspaper designated as official by the [City/County], or as otherwise designated by the Commission.

4.63 POSITION. Any group of duties and responsibilities in the service of the [City/County] which one person is required to perform as full[- or part-time] employment, and which is included in the [City/County] budget.

a. POSITION—REGULAR. A position included in the official annual budget that is neither specified as seasonal employment, nor limited for a period of less than the budget year; also any such position established during a given budget year, unless the Department Head certifies to the Civil Service Commission that such position will not be continued in the succeeding year's budget.

b. POSITION—PERMANENT PART-TIME. Employment in a permanent position for work on a basis of less than eight hours a day or less than forty hours a week, but on a regular schedule.

4.65 PROBATION OR PROBATIONARY. The status of an employee during a trial period following a permanent appointment from an eligible register. This trial period is part of the examination process and is a working test during which an employee is required to demonstrate, by actual performance of the duties, fitness for the position to which certified and appointed.

4.67 PROMOTION. The appointment of an employee to a higher class or to a position of higher skill or responsibility level. Any change in employment other than by a temporary or provisional appointment (1) from a lower class to any position in any higher class in the same promotional series of classes as determined by the Commission, or (2) to a position which although an entrance position is of higher skill and/or responsibility, shall constitute a promotion.

4.69 QUIT. Any voluntary separation of an employee from the [City/County] service without acceptance of a resignation by the appointing authority.

4.71 REALLOCATION. The allocation of a position to a different class in the Classification Plan.

4.72 REASSIGNMENT. A change from one position to another position under the jurisdiction of the appointing authority in accordance with state and federal law because the employee can no longer perform the essential functions of the employee's current position.

4.73 REDUCTION. The removal of an employee from a higher class to a lower class of employment for reasons other than cause.

4.75 REGISTER. A list of candidates for employment who have passed an employment examination, whose names may be chosen and certified by the Commission for submission to the appointing authority for consideration for employment. *See* 4.47, "Eligible Register."

4.77 REINSTATEMENT. Reappointment of a regular employee to a position in a class in which the employee was a regular employee.

4.79 REINSTATEMENT REGISTER. A list of names of persons who were regular employees in a given class and who were laid off and are entitled to reinstatement in such class. A reinstatement register may also include former employees on disability retirement who are capable mentally and physically for reinstatement.

4.81 RESIGNATION. A written request by an employee for separation from a class or from the [City/County] service. To be valid, such request must show written approval of the appointing authority.

4.83 RETENTION CREDIT. The employee's service credit in a given class or position and any higher position in a series or any other credit used by the Commission to determine order of lay-off.

4.85 RETIREMENT. The termination of employment for service or disability pursuant to applicable retirement laws.

4.87 SECRETARY. Secretary-Chief Examiner as defined in Chapter 3.

4.89 STANDING—REGULAR. The full Civil Service status of a regular employee.

4.91 SUSPENSION. Temporary removal of an employee from employment with or without pay, for cause, or pending determination of charges against the employee which could result in demotion or discharge.

4.93 UNCLASSIFIED SERVICE. The positions in [City/County] that are not subject to civil service and are identified as exempt positions, assignment levels, or other position authorized by law.

4.95 VETERANS' PREFERENCE. Preference in examinations and employment, based on military service, as provided and defined by applicable laws.

COMMENTS TO RULE 4: DEFINITIONS

4.49 EMPLOYEE.

A. Employee—Regular. Not all public employees are subject to Civil Service protection. A regular employee is an employee, who upon examination, appointment, and service of a probationary period attains status in the "civil" or "career service." This status is a tenure in employment, and has as its main benefit for the public employee a protection from arbitrary or political treatment by the employer. A regular employee has a right to appeal the basis for disciplinary action to the Commission.

B. Employee—Temporary or Provisional. Most public personnel systems allow for provisional, emergency, and temporary appointments for limited periods. Such appointments are generally subject to fewer requirements than a permanent or regular appointment. *See* 3 Eugene McQuillin, *The Law of Municipal Corporations*, Section 12.81a (4th ed. 1990). Employment rights seldom accrue due to provisional or temporary appointments. *See Reiger v. City of Seattle*, 57 Wn.2d 651, 359 P.2d 151 (1961). *Compare*, *Scannell v. City of Seattle*, 97 Wn.2d 701, 648 P.2d 435 (1982) (vacation benefits allowed by city charter for intermittent workers).

A related designation of employment status is that of day laborer or intermittent. Employment as a day laborer has few attributes of permanency. Work is on a day-to-day basis, as the need of the employer dictates. *State ex rel. Cole v. Coates*, 74 Wn. 35, 38-39, 132 P. 727 (1913). *See also Butchek v. Collier*, 174 Wash. 311, 24 P.2d 619 (1933); *Scannell v. City of Seattle*, 97 Wn.2d 701, 648 P.2d 435 (1982). RCW 49.44.160, enacted in 2002, prohibits public employers from "misclassifying employees, or taking other action to avoid providing or continuing to provide" employment benefits. The legislation is a further effort to address the use of "perma-temps" – personnel working full (or nearly full) time but without benefits.

C. Employee—Probationary. See comments to Rule 11.

D. Employee—Exempt or Discretionary Employees. Civil Service laws and protections do not apply to officers having a definite term of office (*e.g.*, elected officials). They do not generally apply to heads of departments, deputies, assistants, "confidential" employees, attorneys, and other professionals. *See* 3 Eugene McQuillin, *The Law of Municipal Corporations*, Section 12.76 (4th ed. 1990); 15A Am. Jur. 2d *Civil Service*, § 18 (2d ed. 2000). Exempt positions are usually enumerated to provide clarification for governmental operations. It is more convenient to administer a system with all employees included in Civil Service and some employees specifically excluded than to identify each employee who

is subject to Civil Service status. Consequently, in many cases, controversy is focused on the propriety of a position's exemption, when the general rule of public employment presumes the opposite: there is no right to public employment absent a specific inclusion in Civil Service.

With respect to municipal court operations, the Supreme Court in *Massie v. Brown*, 84 Wn.2d 490, 527 P.2d 476 (1974), narrowly construed the provisions of RCW 35.30.131 to grant Civil Service rights only to the position of Director of the Traffic Violations Bureau in the City of Seattle. Warrant servers, under the immediate supervision of the Director, were ruled exempt from Civil Service because of their close relationship with the judicial process. The functions of the warrant servers were found to resemble those of bailiffs and probation officers, positions traditionally exempt from Civil Service.

For a decision dismissing application for review of the state personnel system's decision on position exemption, *see Federation v. Personnel Board*, 23 Wn. App. 142, 594 P.2d 1375 (1979).

In public safety Civil Service Systems, membership is specifically defined by statute. *See* RCW 41.08.050 and 41.12.050. The number of exempt employees authorized in a sheriff's office is specifically authorized in RCW 41.14.070; and in police departments in RCW 41.12.050.

5. RULE-MAKING.

5.01 AMENDMENTS OF RULES. The Commission may amend these rules or adopt new rules by majority vote of the Commission at any regular or special meeting of the Commission.

[Option: Unless upon emergency declared by all Commissioners present, amendment to these rules shall be first discussed in an open regular or special meeting at least one meeting prior to adoption. Upon declaration of emergency, a rule amendment may be adopted at the meeting at which the amendment is first proposed.]

5.03 EFFECTIVE DATE OF RULES. All rules and amendments shall become effective immediately upon their adoption by the Commission, unless some later date is specified therein.

5.05 COPIES OF RULES. A copy of these rules and a copy of all subsequent rules or amendments shall be sent as soon as practicable after adoption to [city clerk/county auditor/or other central government record center] and to each affected department of the [City/County]. A copy shall be maintained in the office of the Commission for public inspection, and copies shall be available for free public distribution as required by state law.

5.07 EFFECT OF RULES. The terms and conditions of Civil Service employment are governed by these rules, and applicable statute [and ordinance]. No employee shall have a property interest in or as a result of these rules. These rules, and rules the Commission may enact, regulate the mode and appointment of tenure in the Civil Service, and employees are subject to these rules and amendments thereto.

COMMENTS TO RULE 5: RULE-MAKING

5.01 ADOPTION—AMENDMENT. Commission practices differ widely in rule adoption practice. This is only one of many alternatives available for consideration.

5.05 FREE COPIES OF RULES. If the provisions of the state law are found binding, the Commission is required to duplicate its rules and make copies available to the public for free. (This is a specific statutory exemption from the general Public Disclosure law that allows a city or town to charge its costs for copies.)

5.07 In 1982, the State Court of Appeals confirmed that a Civil Service employee has no "right" to require a Civil Service Commission to maintain existing rules. In *Greig v. Metzler*, 33 Wn. App. 223, 653 P.2d 1346 (1982), the court reviewed Greig's demotion from the position of sergeant. After Greig had been appointed sergeant, the Cowlitz County Civil Service Commission adopted a rule giving return rights to employees returning to the classified service from a non-classified position. Greig was "bumped" from his sergeant position when an employee returned to the sergeant's classification from a non-classified position. Greig argued that he had a property interest in the continuation of his tenure as a sergeant. The court determined that Greig's interest was defined by state law and the rules which the Commission adopted:

> Terms and conditions of public employment are controlled by statute and not by contract. The legislature may enact statutes regulating the mode and appointment of tenure in public employment and employees are subject to statutory amendments. *See, e.g., Association of Capitol Powerhouse Engineers v. State*, 89 Wn.2d 177, 570 P.2d 1042 (1977). We hold these same principles apply to the rule promulgated here . . . although [the bumping] rule was promulgated after Greig's appointment . . . it is our holding he is subject to the rule.

Greig v. Metzler, *supra*.

The State Supreme Court revisited this issue two years later. The Washington Federation of State Employees challenged the legislature's amendment of the state Civil Service Law to provide for performance evaluation and other system changes. The public employees' union contended that the state's civil service laws formed the basis of a contractual relationship between the state and its public employees, and that the contract vested at the time the employee entered public service. The court rejected this position in *State Employees v. State*, 101 Wn.2d 536, 682 P.2d 869 (1984).

> The rights challenged here are neither deferred benefits nor do they give rise to contractual expectancies. Rather, the effective provisions (certification, increment salary increases, lay-offs, and

> re-employment from lay-offs) are best categorized as terms of public employment (tenure) and part of a system of personnel administration. *See* RCW 41.06.010; RCW 28B.16.010. Tenure is regulated by legislative policy.

While public employees' pension benefits have been determined to be contractual in nature and vest at the time the employee enters public service, *Bakenhus v. City of Seattle*, 41 Wn.2d 695, 296 P.2d 536 (1956), terms of public employment are not contractual and are subject to change by the public authority. Rule 5.07 clearly states that rule in order that employees do not have a question about the authority of the commission to amend rules.

6. CLASSIFICATION.

6.01 CLASSIFICATION PLAN. A class specification shall be prepared and maintained for each class in the Civil Service System. Such specifications shall describe generally the class, distinguish it from other classes, give examples of typical duties of the class, and contain, when applicable, a statement of those qualifications for applicants for positions in the class not otherwise provided in these rules.

6.03 ADMINISTRATION OF POSITION CLASSIFICATION. The Secretary will make, or cause to be made, position classification studies of individual positions or groups of positions whenever it is deemed necessary; whenever the duties or responsibilities of existing positions have undergone significant changes; whenever notification is received that new positions are to be established by the legislative authority; or upon request of an appointing authority or an affected employee if title classification of such position has not been reviewed within the last 12 months.

6.05 CLASSIFICATION OF POSITIONS

6.05.01 Each position in the classified service shall be classified at the direction of the Secretary and allocated to its appropriate class in accordance with the character, difficulty, and responsibility of its designated duties. Positions shall be allocated to a given class when:

(a) The same descriptive title may be used to designate each position in the class;

(b) The same level of education, experience, knowledge, ability, and other qualifications may be required of incumbents; and

(c) Similar tests may be used to select incumbents.

6.05.02 All classes involving the same character of work but differing as to level of difficulty and responsibility shall be assembled into a class series.

6.05.03 Compensation or salary shall not be a factor in determining the classification of any position or the standing of any incumbent.

6.05.04 In allocating any position to a class, the specification for the class shall be considered as a whole. Consideration shall be given to the general duties, the specific tasks, the responsibilities, the required and desirable qualifications for such position, and the relationship to other classes. The examples of duties in a specification shall not be construed as exclusive or restrictive, and an example of a typical task or a combination of two or more examples shall not be taken, without relation to all parts of the specification, as determining that a position should be included within a class.

[OPTIONAL:

e. No one whose position has been allocated to its appropriate class shall be assigned or required to perform duties generally performed by persons holding positions in other classes, except in case of emergency or for limited periods of time when approved by the Secretary, provided that nothing in this provision shall be construed as preventing the assignment of duties of a higher rank as part of a training period, or for relief periods, provided, further, the clause in any specification "and to perform related work as required" shall be liberally construed.]

f. It shall be the duty of responsible administrative officers in the various departments to report to the Secretary any and all organizational changes which will abolish or effect changes in existing positions or establish new positions. When an appointing authority requests the establishment of any new or additional position of more than 60 days' duration, or a change in allocation of an existing position, a request for such consideration shall be addressed to the Secretary, accompanied by a statement of the duties, responsibilities and qualification requirements of the position. In those instances where gradual shifts in work emphasis or changing work conditions have effected material changes in existing positions, the Secretary shall be notified in writing by the Department before the end of the budget year. In those instances in which the duties of a position are materially changed for other reasons, the Secretary shall be notified immediately and not later than ten (10) days from the date of such change.

g. ASSIGNMENT. An employee may be assigned to a position which carries additional salary and limited additional duties and responsibilities and is within the scope of the specification for the class from which assignment is made. If the duties of the position for which an assignment is proposed are beyond the scope of the official specification for the base class, such position must be separately classified and eligibility established by examination. No permanent or vested rights shall be acquired by reason of such assignment, and such assignments shall be subject to review and change by the appointing authority at any time.

[OPTIONAL:

6.07 RECORDS

6.07.01 Separate records of each position in the classified Civil Service shall be maintained by the Civil Service in the following manner:

(a) Each position record shall include a notation of the authority for establishing the position, the name of each successive incumbent, all classification actions relating to it, its organizational and physical location in the department, and a current description of its duties.

(b) A personnel record for each employee shall be kept with a record of the position occupied by the incumbent.

(c) It shall be the duty of each appointing authority to supply to the Secretary, in writing, all necessary information to enable the Civil Service Department to maintain such records described in (1) and (2) above, including any significant change in the duties of the position to another position in the same or to a different class.

6.07.02 The Secretary shall report any classification action to the department head concerned and to the [City Council/County Commissioners]. The department head shall be responsible for notifying subordinates of any classification action affecting status or allocation of positions.]

6.09 EFFECT OF CLASSIFICATION CHANGES ON INCUMBENT [Short Form]

6.09.01 Whenever the title of a class is changed without a change in duties or responsibilities, the incumbent shall have the same status in the retitled class as held in the former class.

6.09.02 Whenever a position is reclassified from one class to a higher class, the incumbent shall not continue in the same position, except temporarily, without gaining eligibility for the new class by examination and receipt of an appointment in accordance with these rules.

6.09.03 Whenever a position is reclassified from one class to a lower class, the regular incumbent may, with the concurrence of the appointing authority and the Commission, elect to take a voluntary reduction to the lower class or, at the employee's option and with the concurrence of the appointing authority and the Commission, may remain in the reclassified position for a temporary period as limited by the Commission only until transfer can be made to another position in the class in which the employee has regular standing.

6.09 EFFECT OF CLASSIFICATION CHANGES ON INCUMBENT [Long Form]

6.09.01 TITLE CHANGE. Whenever the title of a class is changed without a change in duties or responsibilities, the incumbent shall have the same status in the retitled class as held in the former class.

6.09.02 UPGRADING OF POSITION. Whenever a position is reclassified from one class to a higher class, the incumbent may continue in the same position temporarily but must gain eligibility for the new class by examination and receipt of an appointment thereto in accordance with these rules. Provided, that the Commission may authorize the appointment of the incumbent to the new position without examination after considering the particular facts involved. A regular employee shall be qualified to take the examination for the higher class regardless of an existing eligible register for that class. A regular employee who fails the examination or is not appointed shall have tenured status in the lower class and may be appointed to another position, transferred or voluntarily reduced according to these rules. A probationary employee may be permitted, upon approval of the Commission, to qualify for the higher class in the same manner as a regular employee. A probationary employee who is not permitted to take the examination or who is not appointed to the position, may be appointed to another position, transferred, or enrolled on an appropriate eligible register for the lower class.

6.09.03 DOWNGRADING OF POSITION. Whenever a position is reclassified from one class to a lower class, the incumbent employee shall retain Civil Service status in the class from which the position is reallocated and shall, if practicable, be appointed to another position in that class or voluntarily transferred in accordance with these rules. Otherwise, the employee shall be granted full status in the lower class and placed on a reinstatement register for the higher class. The probationer's name shall be enrolled on an appropriate eligible register for the higher class with the same standing as at the time of original certification.

COMMENTS TO RULE 6: CLASSIFICATION

6. GENERAL COMMENTS.

Classification is the organization of positions of employment according to their duties, functions and responsibilities. E. Kaplan, *The Law of Civil Service,* 120 (1958). A classification plan provides foundation for a comprehensive personnel system. Classification provides uniformity in work standards, and a guide to salary administration. It is an orderly means of regulating employee Civil Service status and is a readily identifiable career guide for employees.

> While classifications vary, largely in the various jurisdictions, it would seem unquestioned that they must be on a basis of positions bearing a reasonable relation to each other. The duties of the position, and not the title, determine the proper classification.

3 Eugene McQuillin, *The Law of Municipal Corporations*, § 12.77 (4th ed. 1990). A Civil Service Commission's exercise of this classification authority is a ministerial or administrative action. 15A Am. Jur. 2d *Civil Service*, *supra* at Section 19; 1 Am. Jur. 2d *Administrative Law* 877 § 81 (1962). Even though a classification decision involves the exercise of a high degree of discretion and judgment, the decision is not in any sense judicial. McQuillin, *supra*; 1 Am. Jur. 2d, supra.

In responding to a court challenge to a classification, the court in *State ex rel. Reilley v. Civil Service Commission*, 8 Wn.2d 498, 112 P.2d 987 (1941) discussed prior court decisions in relation to its review of a Civil Service Commission's classification decision:

> Our search of the authorities makes it clear to us that civil service commissions . . . have a discretionary power in the matter of classification, as will be noted in the following . . . :
>
> It seems to me that the cases cited indicate the true extent to which the court should assume to supervise the action of the civil service commission. If the classification of the commission clearly violates the constitution or the statute, mandamus should issue a corrected classification. If the action of the commission is not palpably illegal, the court should not intervene.

Id., *citing People ex rel. Schau v. McWilliams*, 185 N.Y. 92, 77 N.E. 785 (1906). *See also Leonard v. Civil Service Comm'n*, 25 Wn. App. 699, 611 P.2d 1290 (1980).

6.01 Disparate Wage Scale. An employer may avoid Equal Pay Act liability for utilizing a job classification system which has a disparate wage scale if it is based on legitimate business-related considerations. *Aldrich v. Randolph Central School District*, 963 F.2d 520 (2d Cir. 1992).

6.05 A superior court decision has discussed the ability of a city to remove the power of the Civil Service Commission to classify positions. *Tukwila Police Officers Assoc. v. City of Tukwila and Tukwila Civil Service Comm'n*, No. 87-2-02161-1, slip. op. (King County, Wash. Sup. Ct. Sept. 26, 1989). The court held that Chapter 41.12 RCW mandates that the Civil Service Commission retain jurisdiction over classification of positions and that the City could not remove that power by ordinance. It also held that the City did not have authority to remove the Assistant Police Chief from the jurisdiction of the Civil Service Commission, following the decision in *Samuels v. City of Lake Stevens*, 50 Wn. App. 475, 749 P.2d 187 (1988), and that both clerical personnel and commissioned officers are subject to the Civil Service System, relying on RCW 41.12.050 ("The classified Civil Service . . . shall include all fully paid employees of the Police Department . . ."). Finally, the court held that lateral entry officers must test competitively under the Civil Service Commission process and be subject to the same rules and hiring process as other officers. See also discussion at Section 1, page 7.

6.07 This section is designated as optional. Such extensive recordkeeping may only be necessary in the largest of Civil Service Systems. Most jurisdictions should be able to maintain an audit on positions within the classified service without the need for this detailed reporting.

6.09 Reduction in Force Benefits upon Reclassification. In considering whether employees whose job classifications are downgraded are eligible for "reduction in force benefits" (*e.g.*, the option available in lieu of "separation from service", such as bumping less senior employees), the Washington Court of Appeals held that an employee is not "separated from service" unless his employment, and not merely the position, is terminated and therefore downgraded employees are ineligible for such benefits. *Terhar v. Department of Licensing*, 54 Wn. App. 28, 771 P.2d 1180 (1989).

7. APPLICATIONS AND APPLICANTS.

7.01 GENERAL REQUIREMENTS FOR FILING APPLICATIONS.

7.01.01 All applicants for examinations for positions in the classified Civil Service must file a written application on a form prescribed by the Secretary; no one shall be admitted to any examination without having first filed an application on the proper form, giving fully, truthfully, and accurately all information required.

7.01.02 In order to file an application for examination, the applicant must:

(a) Meet the requirements specified in these rules and in the official examination bulletin as of the closing day of the official filing period;

(b) Produce evidence of education, training, experience, or any lawful requirement for a class, as directed by the Secretary.

7.01.03 Time for filing applications:

(a) All applications for examination shall be filed with the Secretary during office hours and within the time limit fixed in the official announcement of the examination, provided that upon written evidence of extenuating circumstances acceptable to the Secretary, late applications may be accepted. Applications received by mail in the office of the Commission must be postmarked on or before the closing date.

(b) The time for filing applications may be extended by the Secretary as the needs of the service require, provided that the examination shall then be re-advertised in the official newspaper.

7.03 APPLICATIONS FOR PROMOTIONAL EXAMINATIONS

7.03.01 An application shall be accepted from any regularly appointed employee in the classes from which promotion is allowed who, in addition to meeting the requirements of Rule 7.01, has the requisite service credit designated in the official bulletin.

7.03.02 When designated in the official bulletin, the Secretary may permit regular employees and probationers to file for and take a promotional examination for delayed eligibility if [on the last day for/within thirty days of/or other appropriate time] accepting applications, they meet lower specified minimum service requirements in the classes from which promotion is allowed.

7.05 SPECIAL REQUIREMENTS.

7.05.01 The Secretary may prescribe such limits and such other specific requirements, physical or otherwise, as in the Secretary's judgment are required by the work to be performed.

7.05.02 When designated on the official bulletins, the Secretary may permit filing by an applicant not more than [one year] under the specified minimum age on an open graded/entrance examination and not more than [two years] under the specified experience on a promotional examination. A successful candidate will have delayed eligibility until the required minimum age or experience is attained.

7.07 CONDITIONAL ADMISSION. If there is reasonable doubt as to whether the applicant meets the minimum requirements, the Secretary may order that the applicant be admitted to the examination on the condition that the particular requirements are met to the satisfaction of the Secretary before the applicant is enrolled on an eligible register.

7.09 REJECTION OF APPLICANT OR ELIGIBLE. The Secretary may reject an applicant for examination, withhold from a register or from certification the name of an eligible, or remove from a register the name of an eligible if the applicant or eligible:

7.09.01 Does not meet the requirements set forth in these rules or in the bulletin announcing the examination;

7.09.02 Is physically or mentally unfit to perform the duties of the position sought;

[OPTIONAL:

7.09.03 Has been convicted of any felony or a misdemeanor involving moral turpitude (*see* Chapter 9.96A RCW)];

7.09.04 Has been dismissed or has resigned in lieu of discharge from any position, public or private, for any cause which would be a cause for dismissal from [City/County] service or has an unsatisfactory record of employment in the [City/County] service or with any other agency or firm;

7.09.05 Has made any material false statement or has attempted any deception or fraud in connection with this or any other Civil Service examination;

7.09.06 Fails to appear for fingerprinting or other investigation as required;

7.09.07 Has assisted in preparing the examination for which application is sought or has in any other manner secured confidential information concerning such examination which might give an unfair advantage over other applicants in the examination;

7.09.08 After notification, did not promptly appear at the time and place designated for the examination;

7.09.09 Has been discharged from the armed forces under dishonorable conditions;

7.09.10 For other material reasons.

See Rule 3.09, "Review and Appeal From Actions or Decisions of the Secretary."

7.11 DEBARMENT FROM EMPLOYMENT.

7.11.01 No one who has been dismissed from the Service for cause involving moral turpitude shall be allowed to again enter the Service, and anyone dismissed for other good cause shall be allowed to again enter the Service only by express consent of the Secretary;

7.11.02 Any applicant for appointment, promotion, reemployment, increase of salary, or other personal advantage, who shall directly or indirectly pay or promise to pay any money or other valuable thing to anyone whatever for or on account of such actual or prospective advantage, shall be ineligible for any further employment in the Civil Service.

7.13 NOTICE OF NON-ACCEPTANCE. Anyone against whom action is taken under Rule 7.09 shall be notified promptly by the Civil Service Department of the reasons therefor by either oral notice at the time of filing the application and/or written notice mailed to the applicant or eligible.

7.15 ADMISSION TO EXAMINATION PENDING APPEAL. The Secretary may admit to the examination anyone whose application was not accepted, pending final disposition of an appeal, such admission to be without prejudice to either the [City/County] or the applicant.

7.17 AMENDMENT OF APPLICATION. The Secretary may permit any applicant, before or after acceptance of the application form, to amend the application or to file an amended application.

7.19 APPLICATIONS NOT RETURNED. All applications when completed and filed become the property of the Commission and thereafter may not be returned to the applicant.

7.21 APPLICATION FEE. [Reserved.]

COMMENTS TO RULE 7: APPLICATIONS AND APPLICANTS

7. GENERAL COMMENTS.

This rule is, for the most part, mechanical and procedural. It may provide useful suggestions if current application procedures are not acceptable. If a current application process is performing satisfactorily, any suggested change should be carefully considered and reviewed.

7.01 Residency requirements may be imposed only upon candidates for the post of Secretary-Chief Examiner. *See*, *e.g.*, RCW 41.08.075; *NAACP v. Town of Harrison [New Jersey]*, 53 Fair Empl. Prac. Cas. (BNA) 1499 (N.J. 1990) (holding that town's requirement that its employees live within town limits violates Title VII of the Civil Rights Act of 1964); AGO 1989 No. 20 (stating that Secretary-Chief Examiner of Civil Service Commission must be either an existing city employee or a city resident).

Physical standards or physical agility requirements are particularly difficult for civil service management. For a case finding minimum height requirements for jail guards to be not job related, *see Dothard v. Rawlinson*, 433 U.S. 321 (1977). And in *Fahn v. Cowlitz County*, 93 Wn.2d 368, 610 P.2d 857 (1980), the Washington Supreme Court addressed an appeal from the Cowlitz County Civil Service Commission. The Commission attempted to defend its requirement that all applicants for the position of deputy sheriff be at least 5'9" tall. While the Court allowed the Commission to assert a bona fide occupational qualification (BFOQ) regarding the height standard, it is now well recognized that such a qualification would not be defensible.

7.03 Rule 7.03 provides for delayed eligibility. This allows a candidate who does not yet qualify, but will qualify during the term of an eligibility register, to take an examination. This rule is particularly useful in those jurisdictions that maintain eligibility registers for periods in excess of one year.

7.09 Rule 7.09 is a standard provision granting the Secretary the authority to reject applicants for examination or eligibles from certification. The standards for the exercise of this authority are set forth in the rule, and an affected party is provided the opportunity to have the Commission review the Secretary's decision.

7.21 While these rules contain no recommendation concerning an application fee, many Civil Service Commissions charge a minimal fee to offset the cost of purchase and administration of examinations.

8. EXAMINATIONS.

8.01 ORDERING EXAMINATIONS. An examination shall be ordered whenever it is deemed to be in the best interest of the [City/County]. The Secretary shall administer examinations as provided by these rules.

8.03 EXAMINATION ANNOUNCEMENT. Public notice of examinations shall be given by the Secretary in the official newspaper and in any other publications which the Secretary may direct at least [_____] days preceding such examination. The official bulletin shall be posted in the Commission's office and distributed to appropriate departments for posting at all employment centers. In addition to the public notice, promotional examination notices shall be posted in the Commission office and in department offices not fewer than [_____] days preceding the examination.

8.05 AMENDMENTS TO ANNOUNCEMENTS. The Secretary may amend any published announcement with appropriate public notice.

8.07 CONTINUOUS EXAMINATIONS. A continuous or periodic examining program may be ordered and administered by the Secretary for any class of positions [for other than promotional examinations]. Filing will be open, applications received, and the examinations administered according to the needs of the service. The names of qualified eligibles resulting from such examinations shall be entered on the eligible register, and certifications for appointments shall be made in the same manner as from any eligible register. Names of eligibles from successive examinations in the same program shall be entered on the eligible register for the class at the appropriate places and determined by final grades. Names may be withheld from certification or removed from such eligible registers in the same manner and for the same reasons as from any eligible register.

8.07.01 NOTICE. Public notice of continuous examinations shall state that the period for filing applications and taking examinations shall remain open until further order and notice. Qualified applicants may take the examination at such times and places as specified in announced schedules which shall be posted in all places and departments where public notice of the examination is or should be posted and, to the extent practicable, shall be included in the Examination Bulletin.

8.07.02 DURATION AND CLOSING. Any open filing and examination period may be closed by order of the Examiner upon giving notice of the order by:

(a) publication at least once in the Official Newspaper; and

(b) posting a copy in the Personnel Division Office at least seven (7) days prior to the date of closing.

8.07.03 To expedite certification and appointment and to maintain security of examination material, no keyed copy of the written test will be provided at any time. The eligible register may be promulgated immediately after the results are obtained.

8.07.04 Except as above provided, the rules applicable to other examinations shall apply to continuous and periodic examinations.

8.09 CHARACTER OF EXAMINATIONS. All examinations shall be competitive, impartial, and practical in their character. They shall be designed to qualify and rank applicants in terms of their relative fitness to perform the duties of the class for which the examination was ordered. An examination shall be deemed to be competitive when applicants are tested as to their relative qualifications and abilities, or when a single applicant is scored against a fixed standard.

8.11 CONTENT OF EXAMINATIONS. Examinations may include written tests, personal qualifications, physical or performance tests, or evaluations of training and experience, interviews, any other suitable evaluation of fitness, or any combination of such tests. Such tests may evaluate education, experience, aptitude, knowledge, skill, physical condition, personal characteristics and other qualifications to determine the relative fitness of the candidates.

ALTERNATIVE I:

8.13 PARTS AND WEIGHTS. Each examination shall contain one or more parts to which percentage weights shall be assigned, which weights shall total 100%. Each part shall be graded independently. This earned grade shall be multiplied by the percentage weight assigned to such part, and the sum of the resulting products shall be called the Examination Grade.

8.15 PASSING GRADES.

8.15.01 The name of an examinee shall not be entered on an eligible register without the examinee having attained a passing grade in the examination as established by the Secretary.

8.15.02 Tests consisting of interviews and evaluation of experience records shall be graded with 100% as the maximum [and with [70%] representing the passing grade for such tests], or other objective standard.

8.15.03 [Except as provided in Rule 8.15.02], the Secretary shall, before identification of papers, authorize a grading schedule for tests with a minimum passing score which represents an acceptable degree of fitness on such subjects for the class of positions.

ALTERNATIVE II:

8.13 PARTS AND WEIGHTS. Each examination shall contain one or more parts to which a raw score, rank order, or percentage weight shall be assigned. One or more of the following options shall be utilized in scoring an examination.

8.13.01 A raw score (actual number of questions answered correctly) shall be the sole indicator of final score of a written examination, unless otherwise determined by the Commission prior to exam administration.

8.13.02 A rank order list shall be the final result of an assessment center or other type of examination approved by the [Secretary/Commission]. The rank ordering shall be determined by the number of points earned in an assessment center. Assessors retained by the Commission shall have the latitude and flexibility of recommending individuals for the promotion in addition to not recommending individuals for promotion, thus not including those individuals on the eligibility list who do not receive recommendations.

8.13.03 A percentage weight shall be determined by multiplying the weight assigned to one or more parts of an examination and the sum of the resulting products, to be called the "weighted average."

8.15 PASSING GRADES.

8.15.01 A final minimum passing score required shall be determined by the Commission [or Secretary if so authorized] prior to any examination in which a raw score is utilized.

8.15.02 Where an examination consists of two or more parts, the Commission may set a minimum score or other standard to be required in any part of such examination, and any applicant who fails to attain such minimum score or standard shall be considered as having failed the entire exam and shall not be entitled to take the balance of the exam. The minimum score or standard required and the part of the exam to which it is applicable shall be stated in the official bulletin or announced at the time of the examination.

[See also separate rule 8.41 for optional procedures regarding multi-part examinations.]

8.17 QUALIFYING GRADE. Where any part or parts of an examination relate to qualifications deemed essential to the proper performance of the duties of the class, the Secretary may determine the minimum qualifying grade for each such part or parts. Failure to attain such grade shall disqualify an examinee, without regard to overall examination grade, and shall disqualify the examinee from

participation or rating on other parts of the examination. [Note: not needed if Alternative II, Section 8.15.02, selected.]

8.19 [Optional:]PROMOTIONAL EXAMINATIONS. Vacancies in the higher positions of a class shall be filled by promotion, whenever practicable in the judgment of the Commission. Upon showing from a department that special training and knowledge gained within a department is essential to the proper filing of the vacancy, the Commission may limit an examination to a promotion within a department only.

8.21 OPEN GRADED EXAMINATIONS. An examination may be advertised as open graded when, in the judgment of the Commission, it is in the best interest of the service.

8.23 VETERANS' CREDIT. Veterans who have passed an examination shall be entitled to credit pursuant to Chapter 41.04 RCW, or other law.

8.25 OTHER CREDIT. Candidates with available preference points authorized by RCW 41.04.012 and approved by the appointing authority. PROMOTIONAL EXAMINATIONS [OPTIONAL]

[*See* Optional Chapter 12.]

OPTION I:

8.27.01 Regular appointed employees in the Civil Service who receive a passing grade on a promotional examination shall have service credit, computed as of the close of filing in accordance with Rule 12. Credit shall be given for a maximum of 20 years' service with a maximum of 10 points computed in the following manner:

(a) 1 point for each full year for the first 4 years of service in excess of the minimum service specified for entrance to the examination;

(b) 1/2 point for each full year of the next 8 years of service; and

(c) 1/4 point for each additional full year of service.

8.27.02 Whenever the Secretary allows applicants below the next lower position to enter a promotional examination, the added point credits for service shall be proportionally reduced when a longer service is required for entrance from the second lower position, subject to the same maximum of 20 years' total extra service.

OPTION II:

8.27.01 Service credit in any promotional examination shall be given for a maximum of 20 years' service with a maximum of 10 points computed in the following manner:

1 to 3 years of service	- no points
after 3 years	- 1/4 point for the next 4 years
next 8 years	- 1/2 point per year
each year beyond	- 1 point per year

8.27.02 No points will be given for a fractional part of a year. Anyone who attains the required minimum grade on a promotional exam will be entitled to the applicable points. Service points will not be awarded to any person not attaining the minimum grade.

8.29 EXAMINATION—PROTEST.

8.29.01 Any protest against the scope, content, or practicality of any part of an examination shall be filed in writing with the examiner within five (5) working days immediately following the administration of such part, or within the time limit specified on the examination instruction sheet.

8.29.02 When a qualifying grade is required on any part of an examination, those who fail to receive the qualifying grade shall be notified and any protest or appeal must be filed in writing within five (5) working days after the notices of results have been mailed.

8.29.03 When a keyed copy is provided, protests against the proposed keyed answers must be filed in writing within three (3) working days or the time limitation specified on the examination instruction sheet. No keyed copy will be provided for inspection on standardized tests or on continuous or periodic examinations.

8.29.04 Any protest against scoring or any allegation of clerical error in the final results of an examination must be filed in writing within five (5) days after the notices of results have been mailed.

8.29.05 All protests filed in accordance with this rule shall be considered by the Examiner and any proper corrections made. If authorized corrections are applicable to other examinees, the corrections shall be made on all examination papers affected.

8.31 CORRECTION OF CLERICAL ERRORS. Any clerical error may be corrected by the Secretary upon discovery at any time during the life of the eligible register,

but no such correction shall affect an appointment made from a certification made prior to the correction.

8.33 EFFECTIVE DATE OF EXAMINATION RESULTS. Results of an examination shall become effective on the date official notice thereof is posted _____ [*e.g.*, on the bulletin board/office of the Civil Service Department].

8.35 REEXAMINATION.

8.35.01 No one shall be reexamined for the same class within six months of the effective date of such examination, unless authorized by the Secretary upon determination that it would be in the best interest of the [City/County].

8.35.02 If an eligible takes a succeeding examination for the same class, the result of such examination shall not nullify any remaining eligibility already established. Eligibility attained by the second examination shall be entered on the register, and the eligibility that will provide the greatest advantage to the eligible shall be used.

8.37 EXAMINATION PAPERS. Examination papers of each eligible shall be kept on file in the office of the Commission until the expiration of eligibility.

8.39 ADDITIONAL EXAMINATION.

8.39.01 Eligibles certified pursuant to Rule 9 shall be subject to medical, physical, or psychological examination and to such other examinations administered by the [Secretary/Department] as authorized and approved by the Commission. Such other examinations include, but are not limited to, background examination and polygraph, provided, however, polygraph examination shall be allowed only for entry-level applicants under RCW 49.44.120 (applicable to law enforcement personnel). Reports of such examination shall be filed with the Commission in the event the findings of the examination recommend that the eligible be rejected. The [Secretary/Commission] shall consider such recommendation, may require further examination, and may order the eligible's name dropped from the eligible register.

8.39.02 The Secretary may designate a limited number of certified eligibles for additional Examination, in order to maintain an ability to certify registers pursuant to Rule 10.

8.39.03 Before the [Civil Service Department/Appointing Authority] refers a [candidate/eligible] for medical (including mental health) examination, a conditional offer of employment must be made.

8.41. MULTI-PART EXAMINATION. Where an examination consists of two or more parts, the Examiner may:

8.41.01 set a minimum score or other qualification to be required in any part of such examination, and any applicant who fails to attain such minimum score shall be considered as having failed in the entire exam and shall not be entitled to take the balance of the exam;

8.41.02 assign weights to each part of the examination, with the examinee's earned examination score equaling the weighted average of the scores on each part;

8.41.03 limit the number to be further considered or tested to a group of the highest scoring applicants, depending on the number of applicants who meet the minimum requirements for a position. For purposes of this section, "highest scoring" means the qualifying or other rating scale (*e.g.*, a bell curve placement) assigned to the exam part

8.41.04 employ all or any of the above options for multi-part examinations in any examination.

[Note, compare Rule 8.41 with alternatives set out at Rules 8.13-8.15.]

8.43 NUMBER OF APPLICANTS—LIMITATIONS. The Secretary may restrict the number of qualified applicants to be examined whenever an examination for a position is likely to attract large numbers of qualified applicants, and when job-related testing processes are prohibitively costly or impractical to administer to all qualified applicants or may have adverse impact on protected groups.

8.43.01 RANDOM SAMPLE. The Secretary may provide for a random sample of qualified applicants to be drawn for an entry level examination by so stating in the Examination Bulletin. Those qualified applicants whose names are not drawn for the initial group to be examined shall be held on file. Should the initial group examined fail to yield an eligibility list of sufficient size to meet the needs for eligibles for that class, or should the list become exhausted before it expires, a sample from the remaining qualified applicants will again be drawn and the examination process repeated.

8.43.03 MULTI-PART EXAMINATIONS. The Secretary may limit eligibility in subsequent exam parts to those scoring highest (or measured by other objective criteria) on a preliminary test or series of tests; provided, however, the number of examinees shall be established before administration of preliminary tests.

COMMENTS TO RULE 8: EXAMINATIONS

8. GENERAL COMMENTS.

A. Commission Discretion in Examinations. In *Stoor v. Seattle*, 44 Wn.2d 405, 409, 267 P.2d 902 (1954), the court stated the following in rejecting a challenge to a Civil Service examination:

> The commission has a wide discretion in the examination of applicants with regard to the manner of performing its duties and exercising its powers.

In *O'Brien v. Civil Service Commission*, 14 Wn. App. 760, 764, 544 P.2d 1254 (1976), the court stated that Commissions have "broad discretion in determining eligibility requirements for promotion, as well as examination content and subject matter." In *O'Brien*, the court reviewed a challenge to a promotional exam. The court found that under Chapter 41.14 RCW (county sheriff civil service), there was no specification that an examination be promotional or original. A promotional exam is limited to current employees. An original exam is open to all persons. The Civil Service Commission was found to have discretionary power to require either type of examination.

B. Commission Must Follow its Rules. Although a Civil Service Commission has broad discretion with respect to examinations, a Civil Service examinee has a fundamental right to have the Civil Service Commission follow its rules and regulations concerning examinations. *See Green v. Cowlitz County Civil Service Comm'n*, 19 Wn. App. 210, 217, 577 P.2d 141 (1978) (exams criticized, but upheld by the court). *See also Casebere v. Civil Service Comm'n*, 21 Wn. App. 73, 584 P.2d 416 (1978). In Casebere, the Clark County Civil Service Commission was criticized as follows:

> The commission did not approve or review in advance either the oral or written examinations, nor did the sheriff make a written request to the commission for certification of the person eligible for promotion to the rank of sergeant following the examination, nor did the commission make such a certification. All of these procedures were required by rule or statute.
>
> In addition, the record shows that the chief examiner followed procedures not provided for in the commission's rules and regulations. He allowed three individuals appointed by himself to conduct and grade the oral examination, he gave the oral examiners copies of the examinees written test scores and prior service evaluations,

> and he made comments, favorable and unfavorable about various examinees to the oral examiners. These unwritten procedures violate RCW 41.14.060(1), which states that the commission must "make suitable rules and regulations" that "provide in detail the manner in which examinations may be held, and . . . promotions . . . shall be made."

Casebere, 21 Wn. App. at 78-79

Of similar effect is the decision in *Simonds v. Kennewick*, 41 Wn. App. 851, 706 P.2d 1080 (1985). There, the court affirmed the invalidation of a civil service examination for the position of lieutenant in the City of Kennewick Fire Department. *Id.* at 856. The court discussed the record demonstrating problems with the exam administration, as follows:

> The fire department admits its supervisory personnel prepared 99 percent of the examination. While the written examination was conducted by the Commission's chief examiner, the fire marshal assisted her in grading the exams. The oral interviews were not conducted according to preset standards, *see Stoor v. Seattle*, 44 Wn.2d 405, 267 P.2d 902 (1954). In fact, there were no preset standards, but instead, the interviews were organized by a fire department officer who also sat in on the interviews and assisted in their administration. The impartial investigation phase of the examination was added by [an] Officer . . . of the fire department. It was conducted by the fire chief who conceded his evaluation of each candidate was not impartial and that favoritism within the department could influence the candidates' grades. This evidence establishes the examination was not impartial as mandated by RCW 41.08.050 and also violated the commission's own rules and regulations. Thus, the commission's conduct was arbitrary and capricious and contrary to law.

Id.

One of the most extreme cases of court review of civil service exam process is found at *Helland v. King County Civil Service*, 84 Wn. 2d 858, 529 P.2d 1058 (1975). In *Helland*, the court reviewed a challenge by certain King County sergeants who contested the results of a lieutenant promotional exam. *Id.* at 859-60. The court actually critiqued the specific question and the answer (multi-choice) that was approved by the commission and its consultant as the correct "key" answer. *Id.* at 863-65. Notwithstanding the fact that the keyed answer was consistent with the background materials for the exam, the court threw out the question and

reversed the determination of the commission. *Id.* The court ruled that the sergeants should receive credit for their answers to the question. *Id.*

E. Model Rule 8 concerning examinations sets forth a broad outline for adoption and conduct of examinations. It does not specify the exam to be given or such details as time, place, or manner of exam administration. Upon department request for an examination, the Commission through its Secretary and staff can then provide for the type of examination to be given, approval of the examination, and authorization to the secretary concerning administration of the examination. Rules of the Commission should not be cluttered with such details. Each exam should be considered independently. As such, Commission authorization of the exam should be left to the time when the exam is needed. Attempting to set standards in rules for the administration of future examinations, results in nothing but problems.

8.29.03 It is a fundamental rule of civil service test scoring that if a passing score is fixed, it must be fixed prior to the administration of the exam. Otherwise, the process is subject to manipulation, i.e., shifting the passing score to favor or disfavor applicants. This is also consistent with the rule that the identification of applicants is not typically known until their grades have been established, except where necessary to provide for integrity of the exam. In *State ex rel. Hearty v. Mullin*, 198 Wash. 99, 100, 87 P.2d 280 (1939), the eligibility list for the City of Seattle auto truck driver class was thrown out. At the time of the exam, the working test portion was to have 60% weight, and experience a 20% weight. *Id.* at 101. Over two months later, the commission changed the weights to working test 40%, and experience 40%. *Id.* A candidate whose standing on the eligible register dropped markedly challenged this practice, and the Supreme Court ruled in his favor. *Id.* The Court recognized a principle underlying civil service to "make free and open the opportunity to enter the public service in accordance with certain tests as to qualification, and not to leave anything to 'whim or caprice of the appointing power.'" *Id.* at 103.

8.39 A. Types of Tests. The Commission may use any kind of valid test. No particular form of test is required. Commonly, the test process consists of a written examination, a test of physical fitness and an oral examination of the candidate. Often the oral exam is conducted by police or fire personnel from a neighboring jurisdiction who are knowledgeable in their fields. Again, all tests should be preapproved by the Commission. In a police department, tests also often include a criminal records check, a background investigation, a psychological examination and polygraph (lie detector) examination.

B. Polygraph Testing. *See*, RCW 49.44.120 (permitting polygraph examinations for law enforcement personnel). *See Stone v. Chelan County*

Sheriff's Department, 110 Wn.2d 806, 812, 756 P.2d 736 (1988) (holding that county had authority to require polygraph test as condition of employment for city employee transferring to sheriff's department, and that applicant's equal protection rights were not violated when asked to retake the examination); *O'Hartigan v. Dept. of Personnel*, 118 Wn.2d 111, 124-25, 821 P.2d 44 (1991) (holding constitutional a polygraph test given to applicants for a word processing position with the State Patrol but ordering the state to establish guidelines ensuring that the polygraph exam would not include indiscriminate and boundless questioning).

C. Drug Testing. Drug testing is permissible for prospective employees at a nuclear power plant, since the significant governmental interest in safety at the plant outweighs the intrusion on the prospective employees. *Alverado v. WPPSS*, 111 Wn.2d 424, 441, 759 P.2d 427 (1988). The *Alverado* court did not discuss the state privacy right, since it ruled that federal law preempted state law in the nuclear industry. Drug testing is also permissible for U.S. Customs Service employee-applicants having a direct involvement in drug interdiction, the carrying of firearms, or the handling of classified materials, since there is a compelling government interest in ensuring that these employees are physically fit and have impeccable integrity and judgment. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 678-70, (1989). Also important to the Court was the fact that employees knew in advance that the test would be required. *Id.* at 672 n.2.

The Washington state Medical **Use** of Marijuana Act does not provide a private cause of action for discharge of an employee or rejection of an applicant who failed a drug screening test. *Roe v. TeleTech Customer Care Mgmt. LLC*, 171 Wn.2d 736, 257 P.3d 586 (2011) .

The Supreme Court has also upheld drug testing of railroad employees in safety sensitive positions after major train accidents. *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 633-33 (1989). Other cases have upheld drug testing, even without suspicion of drug use, for jobs involving public safety. *See*, *e.g.*, *Everett v. Napper*, 632 F. Supp. 1481, 1487 (N.D. Ga. 1986), *aff'd in part*, *rev'd in part*, 833 F.2d 1507 (11th Cir. 1987) (upholding discharge of fire fighter for failing to submit to urinalysis); *Penny v. Kennedy*, 915 F.2d 1065, 1067-68, 5 Indiv. Employ. Rel. Cas. 1290 (6th Cir. 1990) (upholding mandatory urinalysis for fire fighters and police officers, but noting that such a mandatory program must include standards to protect against potential abuse); *Local 194 v. Bridge Commission*, 5 Indiv. Employ. Rel. Cas. 1629 (N.J. Super. Ct. App. Div. 1990) (bridge workers); *American Fed'n of Gov't Employees v. Barr*, 7 Indiv. Employ. Rel. Cas. 823 (N.D. Cal. 1992) (prison employees); *Doe v. City and County of Honolulu*, 6 Indiv. Employ. Rel. Cas. 1406 (Haw. Ct. App. 1991) (fire fighters). Using a similar rationale, courts have invalidated drug testing for employees not posing any danger

to the public. *See*, *e.g.*, *Connally v. Newman*, 6 Indiv. Employ. Rel. Cas. 262 (N.D. Cal. 1990) (personnel workers involved in accidents); *O'Keefe v. Passaic Valley Water Comm'n*, 7 Indiv. Employ. Rel. Cas. 354 (N.J. Super. Ct. 1992) (water meter readers).

See also O'Connor v. Police Comm'rs of Boston, 408 Mass. 324, 329, 557 N.E.2d 1146 (Mass. 1990) (holding constitutional the discharge of a probationary police officer following department's receipt of positive results from a drug screening); *Seelig v. Koehler*, 76 N.Y.2d 87, 96 556 N.Y.S.2d 832 (Ct. App. 1990) (holding that random drug testing of corrections officers did not violate the Fourth Amendment guarantee against unreasonable search and seizure). Drug testing may not be constitutional for all employees; the *Seelig* court cited the paramilitary nature of the employment at issue as a basis for distinguishing the testing program from invalid programs for groups such as teachers. *Id.*

D. Psychological Screening. Psychological screening of applicants may constitute impermissible pre-employment inquiry by unconstitutionally violating an applicant's right to privacy. *Soroka v. Dayton Hudson Corp.*, 6 Int'l Envtl. Rep. (BNA) 1491 (Cal. App. 1991) (holding that psychological screening program which included questions concerning the applicant's religious beliefs and sexual orientation violated applicants' right to privacy under the state constitution).

Requiring a school attendant counselor to submit to a psychiatric evaluation was not sufficiently outrageous and extreme to constitute a tort of outrage. *Albright v. Dept. of Social and Health Services Division of Reconsideration Developmental Disabilities*, 65 Wn. App. 763, 770, 829 P.2d 1114 (1992).

E. Academic, Drug, and Traffic Violation Requirements. The Fifth Circuit has upheld the use of certain eligibility criteria for hiring police officers. *Davis v. City of Dallas*, 777 F.2d 205, 226 (5th Cir. 1985). The court ruled appropriate the requirements that applicants: 1) must have completed 45 semester hours of college credits with at least a "C" average at an accredited college or university, 2) must not have a history of "recent or excessive marijuana usage", and 3) must not have been convicted of more than three "hazardous traffic violations" in the 12 months, nor convicted of more than six such violations in the 24 months preceding the date of application.

F. Disparate Impact of Testing Upon Certain Minority Groups. Several courts have examined tests under claims that they have a disparate impact upon applicants of a certain race. In determining whether an examination has a disparate impact on certain candidates, courts place the burden of showing a "business necessity" on the employer and the ultimate burden of non-persuasion on the plaintiff. *Police Officers v. Columbus*, 54 Fair

Empl. Prac. Cas. (BNA) 276 (6th Cir. 1990) (finding that plaintiff, a black candidate for promotion, did not prove that the exam was not job-related or that some other selection device would serve the employer's legitimate interests and that Uniform Guidelines on Employee Selection do not foreclose the possibility of a content-valid exam based solely on job knowledge). The inquiry in these cases is not whether there is a statistical difference between black and white scores, but whether the test prevented the promotion (or hiring) of black candidates who would otherwise have been promoted (or hired). *Progressive Officers v. Metro Dade County*, 54 Fair Empl. Prac. Cas. (BNA) 1161 (S.D. Fla. 1989). A police department following a practice of assigning black police officers to geographical areas with a predominantly black population does not create disparate impact in the absence of evidence that such assignments affected scores on promotional examinations. *Black Law Enforcement Officers v. Akron*, 54 Fair Empl. Prac. Cas. (BNA) 1560 (6th Cir. 1990).

8.13/8.15 Alternative Provisions. Rules 8.13 and 8.15 provide for alternative approaches to parts, weight and grading of examinations. As indicated, Alternative II is the recommended alternative. No passing grade or percentage is designated. If a raw score is to be determined in the course of certification of an applicant, that raw score is to be adopted prior to administration of the exam. *See* Rule 8.15 (Alternate IIa). Should the second alternative be utilized, Rule 8.17 need not be included. Rule 8.17 contains essentially the same language as provided in Alternative II at 8.15.02.

8.23 Veteran's Credit. Veteran's preference in examination is simply stated in this rule. The rules need not contain applicable provisions of law that are readily available to the applicant. The pertinent provisions of Chapter 41.04 RCW may be attached as an appendix to the rules.

The significant return rights possessed by veterans were emphasized in *Snohomish County v. Nichols*, 47 Wn. App. 550, 736 P.2d 670 (1987). There a deputy sheriff sought reinstatement, back wages, and attorney fees after his return from military duty and the county's refusal to reemploy and the prosecutor's refusal to support the action for reinstatement. *Id.* at 552. In ordering reinstatement, the court found that the Washington State Veterans' Reemployment Rights Act, Chapter 73.16 RCW, provided an absolute right to reemployment, subject to the terms of the statute. *Id.* at 553. The court refused to adopt a "rule of reason" analysis established in federal court decisions interpreting similar federal law. *Id.* at 555-56. Further, the court found that the county prosecutor had an obligation to represent the employee in his action for reemployment, pursuant to RCW 73.16.061. *Id.* at 556-57. As a result of the denial of representation, the employee was also awarded attorney fees. *Id.* at 557.

Information in the federal Uniform Services Employment and Reemployment Act (USERRA) can be found at dol.gov/elaws/vets/userra.

8.25 Reserve Credit. Some Civil Service Commissions provide credit on entry-level exams for individuals serving in a reserve capacity. No recommendation is made concerning this section.

8.26 Examination Preference Points. In 2024, the Washington Legislature substantially expanded the list of preference points that may be available to a candidate. RCW 41.04.012. The list includes:

> (a) Ten percent to a candidate who has obtained full professional proficiency or who is completely fluent as a native speaker in two or more languages other than English;
>
> (b) Five percent to a candidate who has obtained full professional proficiency or who is completely fluent as a native speaker in one language other than English;
>
> (c) Five percent to a candidate with two or more years of professional experience or volunteer experience in the peace corps, AmeriCorps, domestic violence counseling, mental or behavioral health care, homelessness programs, or other social services professions; and
>
> (d) Five percent to a candidate who has obtained an associate of arts or science degree or higher degree.

These points are discretionary with the appointing authority, and may not be aggregated to exceed more than 15%. The points are applied only until the candidate's first appointment to public employment. They may not be used in promotional exams.

The application of these preference points remains subject to interpretation locally, and to be evaluated in subsequent years following experience with the enactment.

8.27 Service Credit. Two alternatives are presented, one originating from former rules used by the City of Seattle and from the City of Renton. Should service credit be afforded in promotional examination, these rules are provided to demonstrate two approaches that have been used.

8.29 New Exams. The broad discretion in administration of exams by a Civil Service Commission has been discussed above. That same discretion has been afforded by Courts to a Commission when it determines to invalidate an exam. In *Cox v. Kern County*, 156 Cal. App. 3d 867, 870 203 Cal. Rptr. 94 (Cal. App. 1984), the court reviewed a Civil Service Board's invalidation of the results of a promotional examination. The board invalidated the exam when it appeared some cheating might have occurred prior to the exam. *Id.* An individual whose test scores had been invalidated brought suit claiming that the board lacked the power to invalidate his test absent a showing that he had cheated. *Id.* Although the Civil Service board did not follow applicable regulations regarding "for cause" removal of individuals from the eligibility list, the action invalidating the entire exam was

proper. *Id.* at 876. The court found that the Civil Service board had inherent authority to protect the integrity of the examination process. *Id.*

8.39.03 Timing of Medical Examinations. The Federal Americans with Disabilities Act ("ADA") prohibits employers from refusing to hire applicants whose disabilities would not prevent them from satisfying the essential functions of the job with reasonable accommodation. The ADA not only bars intentional discrimination but also regulates the sequence of employers' hiring processes. Medical examinations must occur after the employer has made a "real" job offer to an applicant. 42 U.S.C. § 12112(d). In *Leonel v. American Airlines*, 400 F.3d 702, 708 (9th Cir. 2005), the court held that an employer must have either completed all non-medical components of the application process or be able to demonstrate that it could not reasonably have done so before issuing the exam order. *Id.* American Airlines' process provided for a medical exam after the contingent offer of employment. *Id.* at 709. But in addition to the medical component, there were additional non-medical components including background checks, employment verification and criminal history checks. *Id.* Civil service departments and hiring authorities must be mindful of the exposure under the ADA with respect to the sequence of various examinations. The medical (including mental health) portion of an examination should follow all other testing, including background checks, polygraph (if authorized) and other preliminary testing.

8.39/8.43 Additional Examination—Limited Examinees. Because of the volume of applicants for Civil Service positions, Commissions find it necessary to conduct written exams for hundreds of candidates. The number of candidates passing the exam far exceeds the ability of the Commission to test for purposes of certification. Rule 8.39 provides the Commission with the option of delaying such additional exams as medical, physical, polygraph and the like until such time as it is likely that the appointing authority will have positions to fill. Some Commissions designate the register developed as a result of the written exam as a "preliminary register," and the final register then constitutes those employees who not only pass the initial written exam, but necessary subsequent exams as well.

Rule 8.43 provides an example of a process to deal with an unmanageable number of applicants.

9. REGISTERS AND ELIGIBILITY.

9.01 ESTABLISHMENT OF ELIGIBLE REGISTERS. After each examination, an eligible register for the class shall be prepared with the names of successful candidates ranked as follows:

9.01.01 On a promotional register: relative rank shall be determined by the examination rating or grade [plus any additional points for service credit] plus percentage allowed by law for veterans' preference.

9.01.02 On an open entry-level register: relative rank shall be determined by the examination grade, plus allowed preference points.

9.01.03 Priority of time of examination shall not give any preference in rank on the register.

9.01.04 The preference in rank of eligibles having equal final general averages shall be determined as follows, in the order stated:

(a) The one who qualifies for veterans' preference in accordance with Washington state law. Eligibles on a promotional (and not open) register do not so qualify.

(b) When the examination is composed of two or more parts with separate grades, the one who has:

(1) The highest grade on the most heavily weighted part of the examination; if a tie still exists, then the highest grade on the next most heavily weighted part, and so on for as many parts as the examination contains.

(2) The highest grade on the written test if all parts are weighted equally.

(c) When the examination has only one part or the candidates have the same standing under (a) and (b) above:

(1) As between examinees who are [City/County] employees, the one having the greater service credit with the [City/County], regardless of class or department;

(2) If one is a regular or probationary [City/County] employee and the others are not, the regular [City/County] employee has preference.

(d) By lot.

9.01.05 If an applicant is permitted to file for and take an examination for delayed eligibility, and if such applicant is successful in the examination, eligibility shall be held in abeyance until the candidate meets the requirements for eligibility, which must be reported in writing. If otherwise eligible, the candidate's name shall be placed on the register in accordance with the final examination grade. Any such eligibility shall expire with that of other eligibles from the same examination.

9.03 REGISTER PLACEMENT FOLLOWING LAYOFF/OTHER. On layoff, an employee's name shall be placed on the proper eligible register for the class [ranked by seniority/service credit] for one year from the date of such layoff. However, preference in rank shall be given to an employee (notwithstanding civil service standing) who requires a reasonable accommodation under Rule 9.1.5 and in accordance with state and federal law.

9.05 RETURN TO REGISTER AFTER RESIGNATION OR RETIREMENT.

9.05.01 A former employee who resigned or retired may request return of his or her name to the proper open graded eligible register for the class. Such request must be made within one year from the date of resignation or retirement, provided, the Secretary may extend the above time limitation for not to exceed an additional [four (4) years] upon satisfactory showing that such extension would be in the best interest of the [City/County];

9.05.02 Any request for return to register following resignation or retirement must be supported by written recommendation of the former employing department;

9.05.03 A former employee whose eligibility is reinstated under this rule shall be certified according to Civil Service rules. However, the name of such an eligible need be considered only by the department which recommends the return of the name to the register.

9.05.04 The name of a former employee who resigned or retired may not be returned to a promotional register, unless recommended by the head of the former employing department and approved by the Civil Service Commission within one year from the date of resignation or retirement.

9.06 APPOINTMENT WITHOUT EXAMINATION. Except as provided in 9.03, 9.05, and 9.07, any return to the Civil Service shall be by examination only.

9.07 ESTABLISHMENT OF REINSTATEMENT REGISTERS.

9.07.01 The names of regular employees who have been laid off or, when requested in writing by the appointing authority, probationary employees who have been laid off shall be placed upon a reinstatement register for the same class and for the department from which laid off, for a period of one year from the date of layoff;

9.07.02 Upon the request of an appointing authority, the Secretary may approve the certification of anyone on such a reinstatement register as eligible for appointment on an open competitive basis in the department requesting certification.

9.07.03 Anyone on a reinstatement register who becomes a regular employee in another department shall lose reinstatement rights in the former department.

9.07.04 Anyone accepting a permanent appointment in the class from which laid off and in a department other than that from which laid off is not to be certified to the former department unless eligibility for that department is restored.

9.11 AVAILABILITY OF ELIGIBLES.

9.11.01 It shall be the responsibility of an eligible to notify the Civil Service Department in writing immediately of changes in address, telephone number, change of name through marriage or otherwise, or any changes which may affect availability for employment.

9.11.02 The name of an eligible who submits a written statement restricting the eligibility for employment shall be withheld from certifications if the restrictions do not meet the conditions specified for appointment. New written statements may be filed at any time within the duration of an eligible register modifying conditions under which employment would be accepted.

9.13 CANCELLATION OF ELIGIBILITY.

9.13.01 Anyone's name may be removed from an eligible register for failure to pass a required examination or upon receipt of proof of bad character or other unfitness; fraudulent conduct; false statements by the eligible or by others with the eligible's collusion; material physical or mental disability; or other disqualifying factor in connection with any application, examination for, or securing of an appointment. A previous unsatisfactory work record with the [City/County] or dismissal from the service, or dismissal from any position, public or private, for any cause which would be a cause for dismissal from [City/County] service shall be deemed cause for cancellation of eligibility;

9.13.02 Separation from the service will terminate any promotional eligibility;

9.13.03 Upon report of an appointing authority that an eligible has failed to respond to call or has refused to accept employment, the Secretary may strike the eligible's name from the register;

9.13.04 Failure to respond to the canvass of a register within fourteen (14) days from such canvass shall be deemed cause to strike the name of any eligible from the register;

9.13.05 Refusal to accept reemployment in a permanent position shall constitute separation from the service except as provided in Rule 9.07;

9.13.06 Such action contemplated by this rule may also be taken for other material reasons.

9.15 RESTORATION TO OR INCLUSION OF NAMES ON ELIGIBLE REGISTERS.

9.15.01 The name of an eligible which has been removed from a register may be restored upon written request to the Secretary for such restoration. The request must specify the reasons for the requested restoration. The Secretary may approve the request if it is deemed that the evidence submitted justifies such approval.

9.15.02 A current employee who is considered for reassignment may be placed, without further examination, on the eligibility list for any vacant position under the jurisdiction of the appointing authority and for which the employee is qualified.

a. A "vacant" position means that the position is available when the employee asks for a reasonable accommodation or that the employer knows that the position will become available within a reasonable amount of time.

b. An employee is “qualified” for a position if the employee (i) satisfies the requisite skill, experience, education, and other job-related requirements of the position and (ii) can perform the essential functions of the new position, with or without reasonable accommodation. There is no obligation to assist the individual to become qualified.

c. The Commission, in consultation with the appointing authority, may require that the employee pass a medical, physical, psychological, or other examination before the employee returns to work in a classified position.

COMMENTS TO RULE 9: REGISTERS AND ELIGIBILITY

9. GENERAL COMMENTS

Many Commissions will find Rule 9 to be lengthy and cumbersome in light of their present needs. The rule is, however, provided in order that a Commission has exposure to the issues relating to establishment of registers and placement of eligibles on registers.

Rule of 1, Rule of 3 or Other. See discussion under Rule 10.

9.03 The Rules must require that in case of layoffs due to reduction in force or curtailment of expenditures, the employee having the greatest seniority must be rehired first.

One of the more unusual civil service stories reported by the Washington courts involves Amelia Warmus and Josephine Bereiter. Both women successfully passed the City of Seattle civil service examination for the position of "Cook, Class H." The eligibility list created by the test had a two-year limit. In 1925, shortly after taking the test, Bereiter was appointed to the position of Cook in the city hospital. Warmus was originally hired as a "kitchen helper" but later was allowed to perform cook duties as a relief worker. Ten years later, the city hospital was closed and much of the kitchen staff was laid off. Before this transpired, Bereiter actually performed the duties of the kitchen helper and Warmus performed the duties of Cook. Apparently, with the approval of the hospital kitchen supervisor, each after cashing their checks exchanged pay with the other (i.e., Warmus got Bereiter's wages as cook)!

The Seattle Civil Service Commission rejected Warmus's request for civil service standing, and the Supreme Court affirmed the Commission. *State ex rel. Warmus v. Seattle*, 2 Wn.2d 420, 97 P.2d 1095 (1940). Because Warmus had never been appointed as a cook off the eligible register, and the register had expired after its two-year term, she had no civil service standing.

9.13 Removing Names From the Register. During the life of a register, a Department Head may request removal of a name of an eligible register. But, a department head cannot control the register. *Fezzey v. Dodge*, 33 Wn. App. 247, 653 P.2d 1359 (1982). This rule provides the simple procedure for Secretary's management of the register, while maintaining the rights of applicants/eligibles to challenge their wrongful removal from the eligible register.

Federal courts have found that a permanent, non-probationary employee has a protected property interest in a merit-based promotion system and therefore a protected property interest to his or her place on a Civil Service eligibility register. *Harris v. City of Wilmington*, 644 F. Supp. 1483 (D. Del. 1986); *see also Stana v. School District of Pittsburgh*, 775 F.2d 122 (3rd Cir. 1985) (property interest in remaining on eligibility list where local policy created mutual understanding that once on eligibility list, applicant will remain on list for specific

period of time); *Anderson v. City of Philadelphia*, 845 F.2d 1216 (3rd Cir. 1988) (state law and policies determine to what consideration persons on an eligibility list are entitled). However, probationary employees, such as employees recently disciplined, lose all property rights in placement on the promotion register and accordingly can be made ineligible for promotion. *Id.* citing *Dixon v. Mayor and Council of the City of Wilmington*, 514 F.Supp. 250 (D.Del.1981); *Tautfest v. City of Lincoln*, 742 F.2nd 477 (8th Cir. 1984).

9.15 Section 9.15.2 addresses a situation in which a current employee within or outside of civil service is no longer able to perform the functions of a current position, even with reasonable accommodation. This section allows for transfer or reassignment of the employee to the classified service to satisfy applicable federal or state laws that may apply to the situation.

10. CERTIFICATION AND APPOINTMENT.

10.01 GENERAL PROVISIONS. Vacancies in the classified Civil Service shall be filled by reinstatement, promotional appointment, assignment, original appointment, transfer, reduction, or demotion. In the absence of an appropriate register, the Secretary may authorize a temporary or provisional appointment.

10.03 REQUEST FOR CERTIFICATION. Whenever an appointing authority wishes to fill a vacancy, a request for certification shall be submitted to the Secretary. The request shall show the number of positions or vacancies to be filled, the class title, tenure of work to be performed, cause of the vacancy, or if a new position, authority for the appointment and any other details for full description of the position to be filled.

10.05 CERTIFICATION

10.05.01 ELIGIBLE REGISTER. Certification to fill a vacancy shall be made by the Civil Service Department from available registers as provided in this rule:

10.05.02 ORDER OF REINSTATEMENT—ELIGIBLE.

(a) If a vacancy is to be filled from a reinstatement register, the following shall be the order of certification:

(1) Regular employees in the order of their length of service. The regular employee on such register who has the most service credit shall be first reinstated;

(2) Probationers, without regard to length of service. The names of all probationers upon the reinstatement register shall be certified together.

(b) Upon request from the appointing authority, the Secretary may authorize reinstatement out of such regular order upon a showing of efficiency or that such action is for the good of the service, after giving the employees adversely affected an opportunity to be heard.

(c) Nothing in this rule shall prevent the reinstatement of any regular or probationary employee for the purpose of transfer to another department, either for the same class or for voluntary reduction in class, as provided in these rules. *See* Rule 9.15.2.

10.05.03 CERTIFICATION. If a vacancy is to be filled from a promotional or original register, the Secretary shall certify to the appointing authority the names of the _____ [*e.g.*, three, five, other] available eligibles that stand highest on the appropriate register.

10.05.05 MULTIPLE VACANCIES. If two or more vacancies are to be filled from any of the above registers other than the reinstatement register, the name of one additional person shall be certified for each additional position.

10.05.07 ADDITIONAL NAMES. If an appointing authority makes an acceptable showing that any of the eligibles certified are not available or that they do not respond, sufficient additional names shall be furnished to complete the certification.

10.05.09 SPECIAL SKILLS. Where a certification of eligibles with special experience, training, or skills is requested in writing by the appointing authority as being necessary for satisfactory performance in a particular position, and the Secretary determines that the reasons given fully justify the request, a certification may be made of only the highest ranking eligibles who possess the special qualifications.

10.05.11 PRIOR SERVICE. If a temporary vacancy is to be filled from an open or a promotional register, those eligibles with three months of service who are shown on the register as having been laid off within the last twelve (12) months from the department in which the vacancy exists shall be placed in grade order at the head of the list of eligibles for certification according to rule.

10.05.13 APPLICATION/EXAMINATION. The application and the examination papers of a certified eligible shall be available for inspection by the appointing authority.

10.07 DEFERMENT OF CERTIFICATION. The Secretary may grant deferment of certification of an eligible, upon receipt from the eligible, of a written request with satisfactory reason therefor. Such deferment will thereafter prevent certification of such eligible until the next vacancy occurring after the eligible has given written notice of his or her desire to be returned to the register, and such return has been approved by the Secretary.

10.09 DURATION OF CERTIFICATION. Certification shall be in effect for thirty (30) days from its date of issuance. The appointing authority must file a report of any appointment from such certification with the Secretary. Upon request, the Secretary may extend such certification for an additional 30-day period. Expiration of eligibility shall not cancel the validity of a certification.

10.11 REGULAR APPOINTMENT. A regular appointment to fill a vacancy must be made from the names contained on the official certification. The official appointment report shall show the name of the person appointed, the effective date, the salary, the nature or duration of the appointment, and any other information required.

10.13 TEMPORARY APPOINTMENT. Where there is no suitable eligible register from which certification can be made, the Secretary may allow the appointing

authority to make a temporary appointment. A temporary appointment may be made for a period of up to [four (4)] months and may [not] be extended for a longer period. No person shall receive more than one temporary appointment in any 12-month period. All temporary employment in a class shall cease at the earliest possible date and shall not exceed thirty (30) days from date of notice that a proper eligible register for such class is available; provided, an extension may be granted by the Secretary upon satisfactory written showing by the appointing authority, if such extension will not cause the provisional appointment to exceed the [four (4)]-month limitation.

COMMENTS TO RULE 10: CERTIFICATION AND APPOINTMENT

10.01 The right of a municipality to fill vacancies is a discretionary right. The Court of Appeals has held that RCW 41.08.100 gives managers the discretion not to fill vacant positions. *Crippen v. City of Bellevue*, 61 Wn. App. 251, 810 P.2d 50 (1991).

The holding in Crippen was discussed in a footnote in *Matson v. City of Tacoma Civil Service Board*, 75 Wn. App. 370, 376, 880 P.2d 43 (1994). In footnote 8 of *Matson*, the court held that "because the appointing authority in Crippen had not submitted a requisition, the position [in Crippen] was unoccupied, but not a 'vacancy', if described in the terms used by the Tacoma Municipal Code." The court went on to state that, "in this case, then, Crippen stands for the proposition that the City has no obligation to fill an unoccupied position, but not for the proposition that the City has no obligation to fill a 'vacancy.' *Id.* Central to the court's holding in *Matson* was the definition of "vacancy" under the Tacoma Municipal Code (TMC). The TMC defined vacancy as an existing and unoccupied position for which funds were available to fill it and the Personnel Department had received a valid requisition. Further, since a list of eligibles had been established in *Matson*, the Fire Chief was required to fill the "vacancy." Id. *Matson* is an anomalous case, dependent on the specifics of Tacoma's rules. Most jurisdictions will be governed by the *Crippen* rule.

10.05 A. Rule of One, Three, Five . . . Rule 10.05.03 is the rule governing the number of eligibles to be certified to the appointing authority.

In 1978, the Supreme Court approved the use of the "Rule of Three" in *Firefighters v. Walla*, 90 Wn.2d 828, 586 P.2d 479 (1978). The court noted that in adopting 41.08 RCW, the state legislature did not consider the Rule of One to be essential to fire department Civil Service.

> While the statute adopts the "Rule of One" for the statutory system, we do not find the legislature's preference for that provision to be of such overriding concern that it is essential under RCW 41.08. The purpose delineated in *Reynolds v. Kirkland Police Commission*, 62 Wn.2d 720, 384 P.2d 819 (1963) , [see previous discussion in comments to Rule 1] and ascribed to this legislation is substantially accomplished by Walla. As the Court of Appeals said in *Bellingham Firefighters Local 106 v. Bellingham*, 15 Wn. App. 662, 666, 551 P.2d 142 (1976)
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> > "The 'Rule of Three' which has been used by the City of Bellingham since 1904, with the exception of one period for 2 1/2, is a well-established and well-recognized method of carrying out and accomplishing the methods of civil service. If the

> state statute had meant to mandate a 'Rule of One' in every city fire department, it could have said so. The statute does not mandate compliance with the methods used in the statute; rather, it requires substantial accomplishment of its purpose. The statute intended to allow cities and towns a local option as to methods and techniques and as to the many recognized and acceptable methods of setting up a civil service system to substantially accomplish the purpose of civil service."

Firefighters v. Walla, *supra*. RCW 41.14.060(7) was amended in 1979 to provide for the Rule of Three for sheriff's appointments. Under Chapter 41.14 RCW, the Rule of Three is mandated. Under Chapters 41.08 RCW and 41.12 RCW, consistent with the decision in *Firefighters v. Walla* case, cities and towns have a local option with respect to certification of eligibles for appointment.

In 2004, the Washington State Supreme Court approved the use of a "Rule of Five" and possibly up to a "Rule of Seven" in *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 92 P.3d 243 (2004). The court noted that Chapter 41.12 RCW establishes a "prototype" civil service system for cities; however, it does not require strict adherence to its prototype civil service system. Id. at 832. Chapter 41.12 RCW provides that cities and towns are not bound by its application if they have provided for or will provide for civil service in the police department that substantially accomplishes the purpose of the chapter.

In 1978, the City enacted an ordinance which permitted its civil service commission to certify "the names of candidates in the top twenty-five (25) percent of the eligible register, or the top five (5) candidates, whichever number is larger." The court upheld the "rule of five" portion of the ordinance, but severed and struck down the portion allowing the police chief to choose for promotion among the top 25 percent of candidates.

> The City's "rule of five" substantially accomplishes the purposes of Chapter 41.12 RCW. Cities, however, may not enact ordinances that exceed the number the legislature has recognized as accomplishing the purpose of providing for promotions on the basis of merit.

The court cited to RCW 41.06.150(2), the statute applicable to state civil service employees, as its basis for legislative authority. The court held that designation of civil service certification procedures that accomplish the purpose of providing for promotion on the basis of merit is a legislative function, so the court held it would adhere to "the legislature's

benchmark" when considering whether cities' civil service ordinances have accomplished this purpose. *Id.* at 837.

RCW 41.06.150(2) permits "certification of names for vacancies, including departmental promotions, with the number of names equal to six more names than there are vacancies to be filled."

> Like 41.12 RCW, the state employees' civil service statute requires promotion based on merit principles. *Id.* at 836. The legislature obviously believed that certifying more than three names for promotions could accomplish this purpose. *Id.* Since the legislature has concluded that RCW 41.06.150(2) meets the purpose of promoting state employees based on merit principles, the City's 'rule of five' certainly can 'accomplish' this same purpose. *Id.* Thus, we hold that cities will substantially accomplish the purpose of Chapter 41.12 RCW so long as the established civil service system provides for an appointment by certification of no greater than 'six more names than there are vacancies to be filled.' *Id.* at 837.

In striking the "Rule of 25 Percent," portion of the ordinance, the court held that the certification of the top 25 percent afforded too much discretion to the Chief and failed to substantially accomplish the purpose of Chapter 41.12 RCW. *Id.* at 833. The state has now eliminated the "six names" limitation in RCW 41.06.150 (2). Laws OF 2002, Ch. 354, §§ 203, 411. A local government may consider additional flexibility in certifying otherwise eligible candidates for employment. *See, Vahle v. City of Lakewood*, No. 53317-1-II (2020, unpublished).

B. Affirmative Action/Selective Certification. Initiative 200, passed by the voters in 1998 and codified as RCW 49.60.400 eliminated (for the most part) governmental affirmative action in Washington State. The statute provides that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." "State" is defined in the statute as including, but not limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other policies subdivision or governmental instrumentality of or within the state.

The statute does not otherwise affect any lawful classification that (a) is based on sex and is necessary for sexual privacy, or medical or psychological treatment; or (b) is necessary for undercover law enforcement or for film, video, audio, or theatrical casting; or (c) provides for separate athletic teams for each sex. The statute also does not prohibit

actions that must be taken to establish or maintain eligibility for federal programs, if ineligibility would result in a loss of federal funds to the state.

Previously, selective certification authority was found valid. In *Lindsay v. Seattle*, 86 Wn.2d 698, 548 P.2d 320 (1976), the court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.*, permitted affirmative action where necessary to eliminate the continuing effects of past discrimination. In *Maehren v. Seattle*, 92 Wn.2d 480, 599 P.2d 1255 (1979), the court additionally determined that the city's affirmative action plan did not violate equal protection rights guaranteed by the United States or Washington State Constitutions. In both cases, the Court examined and upheld Seattle's Civil Service practice of "selective certification" of qualified minority personnel for a vacant city position. These cases placed the burden upon the governmental entity to demonstrate that the affirmative action plan giving rise to selective certification was "necessary to the accomplishment of a compelling governmental interest" *Maehren*, *supra*, 92 Wn.2d at 491. The cases are of little value after Initiative 200/RCW 49.60.400.

RCW 49.60.400 was discussed in one case involving public education. *Parents Involved in Community Schools v. Seattle School District No. 1*, 149 Wn.2d 660, 72 P.3d 151 (2003). Parents involved the school district's use of race as a factor in a series of "tie breakers" when a school was over subscribed. The Washington State Supreme Court concluded that RCW 41.60.400 prohibits some, but not all, race-cognizant governmental action. However, the court held, "affirmative action programs which advance a less qualified applicant over a more qualified applicant are now impermissible under Washington law." *Id.* at 663.

Prior Washington state law already prohibited discrimination for the bases listed in the statute, so the impact of the statute lies in the definition of the term "preferential treatment." Unfortunately, the statute does not define this term and also does not specify how continued implementation or enforcement of existing laws will be affected. The official ballot stated that the effect of the Initiative would depend on how its provisions were interpreted and applied.

California passed Proposition 209, which is similar to Initiative 200. Aside from a few subtle differences in language, the main difference between the two is that Proposition 209 amended California's Constitution, whereas Initiative 200 is a statutory amendment. Even with that in mind, Washington courts may look to California case law for guidance. A 1998 California Court of Appeals case is on point. In *Kidd v. State of California*, 62 Cal. App. 4th 386, 72 Cal. Rptr. 2d 758 (1998), the court held that the state's practice of "supplemental certification" violated the ban on "preferential treatment" in Proposition 209. Proposition 209 provides that "[t]he state shall not discriminate against, or grant

preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. *Id.* The court held that this clear language, which is the same as RCW 49.60.400, "allows no room for discretionary preferential programs such as supplemental certification." *Id.* at 407. In reaching its conclusion, the court looked at the California Voters' Pamphlet to determine the intent of voters in enacting Proposition 209.

The Washington Voters' Pamphlet describing Initiative 200 contained a statement that the Initiative "does not end all affirmative action programs. It prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant for a public job…" *Parents Involved in Community Schools v. Seattle School District No. 1*, 149 Wn.2d 660 (2003) quoting *State of Washington Voters Pamphlet*, General Election 14 (Nov. 3, 1998) (Statement For I-200).

Employment Outreach. Employment outreach programs, such as targeted recruiting, tend to be viewed differently by courts than the use of factors such as race or sex in employment decisions. For example, the Eleventh Circuit described targeted recruitment efforts as "race-neutral measures." *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557 (11th Cir. 1994). Courts make a distinction between an outreach plan that excludes a particular group from applying and an outreach plan directed at groups that are consistently underrepresented. *See Almonte v. Pierce*, 666 F. Supp. 517 (S.D.N.Y. 1987).

The City of Dayton established the Fire Apprentice Program to address the under-representation of women and minorities in the fire department. The Program offers classroom and occupation training, and participants are selected based on references, the applicant's record of community service, and an essay. An amendment to the Civil Service Board Rules and Regulations allows "preference points" to be added to the firefighter-recruit exam for those who participated in the Program. Plaintiffs argue that the selection for the Program is based on the sex or race of the applicants; therefore, applying "preference points" for applicants who completed the Program would violate Dayton's charter by selecting civil service applicants based on sex or minority status. The trial court held that the amendment allowing "preference points" violates the city charter, but an Ohio appellate court reversed. The Supreme Court of Ohio affirmed the appellate court. *Int'l. Assoc. of Fire Firefighters v. City of Dayton Civil Service Bd.*, 836 N.E. 2d 544 (2005). The Ohio Supreme Court noted that the civil service rules authorize the civil service board to adopt rules to control the appointment of competitive classified service positions. The rules must be based on a competitive exam that measures merit, fitness, efficiency, character, and industry of the applicants. The Ohio Supreme Court found that adding "preference points" does not

vitiate the competitive exam process if the preference measures the appropriate qualifications. The Ohio Supreme Court noted that those who complete the Program are likely to have increased merit, fitness, efficiency, character, and industry; therefore, the "preference points" are not awarded based on sex or race.

But *see Hi-Voltage Wire Works v. City of San Jose*, 24 Cal.4th 537, 12 P.3d 1068 (2000). There, a city program required contractors bidding on city projects to utilize a specified percentage of minority and women subcontractors or to document efforts to include minority and women subcontractors in their bids. The program was found to violate the provision of the State Constitution prohibiting the state and its political subdivisions from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.

Washington State Human Rights Commission ("Commission") regulations state that "employers are encouraged to seek a broad pool of applicants through recruitment efforts." WAC 162-16-290. The regulations state that it is not permissible to express or exercise a hiring preference based on protected status unless the employer has a court order to do so or authorization from the Commission or other governmental agency or unless the employer can prove that the expression is justified by a bona fide occupational qualification. WAC 162-16-290(2) (a-b), quoting WAC 162-16-240.

Special Skills. Courts have generally held that employers may set a qualification for a job requiring knowledge of a particular language so long as it is legitimately relates to the duties of the position. *See Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859 (1991). Washington State Human Rights Commission regulations state that an exception to the rule that an employer may not discriminate on the basis of protected status is if a "bona fide occupational qualification" applies. WAC 162-16-240 under subsection (2) provides the following example: "a 911 emergency response service needs operators who are bilingual in English and Spanish. The job qualification should be spoken language competency, not national origin."

10.11 Rule 10.11 provides that the appointing authority is to make the appointment from the register certified by the Secretary-Chief Examiner. In *Side v. City of Cheney*, 37 Wn. App. 199, 679 P.2d 403 (1984), the court reviewed a police officer's contention that he had been rejected for promotion because of political reasons. In that case, the Cheney Civil Service Commission had certified to the mayor the name of three eligibles, with Officer Side at the top of the list. On the recommendation of the police chief, the mayor appointed the person who occupied the third place on the certification. The court found that the mayor's decision to not promote Side was a non-judicial decision. The appearance of

fairness doctrine could not be applied to the appointment decision. The court further found that the mayor had the right, within legal limits, to appoint any one of the three candidates certified by the Commission. As all candidates were qualified for the position of sergeant, the appointment was approved. That Officer Side had determined to run for mayor against the incumbent prior to the incumbent's appointment decision is only another colorful fact to add to the history of Washington State Civil Service lore!

11. PROBATION.

11.01 PROBATIONARY PERIOD.

11.01.01 After each full-time or part-time permanent appointment from an eligible register, the employee appointed shall serve a complete period of probation before the appointment is deemed complete. The purpose of the probationary period is to provide a trial period during which the department may observe the performance of the probationary employee before civil service status is acquired.

11.01.02 If a probationer transfers in the same class from one department to another, the receiving department may, with the approval of the Secretary, require that a complete probationary period be served in that department.

11.01.03 A regular employee who has been reduced to a lower class where the employee has not had regular standing shall have probationary status in the lower class for ____ months from the date of such reduction.

11.03 LENGTH OF PROBATIONARY PERIOD. The period of probation shall be equivalent to ____ months of full-time service following permanent appointment from an eligible register. Minor absences due to vacations, annual military leave, illnesses, etc. shall not be construed as interrupting the probationary period unless an absence or absences are considered to be excessive to the extent that the Secretary will approve a departmental request for an extension of the probationary period. [For entry-level police and corrections personnel, the probationary period shall commence upon certification from the Washington State Law Enforcement Academy (Criminal Justice Training Commission).]

11.05 INTERRUPTION OF PROBATIONARY PERIOD BY MILITARY SERVICE. A probationer who engages in active military service on an extended basis shall be considered as having an interrupted probationary period. Such employee may continue the probationary period following return from military leave.

11.07 SERVICE IN ANOTHER CLASS. Service in a class or office other than the one to which an eligible is regularly appointed may be credited toward completion of a probationary period if the Secretary has approved the written statement of the appointing authority to the effect that the probationary period may be properly judged based on service in the other class or office.

11.09 REMOVAL OF PROBATIONER.

11.09.01 GROUNDS. The appointing authority, by assigning in writing to the Commission the reasons therefor, may discharge any probationer. Such reasons need not constitute just cause and shall not otherwise be reviewed by the Commission.

11.09.02 PROCEDURE. The department head must file a written statement stating the reasons for the removal with the Secretary prior to the end of the probationary period. Notice must be mailed to or personally served on the employee and proof of notice filed with the Secretary.

11.11 DEMOTION. A probationer may be demoted for inability to perform satisfactorily the duties of the position to which promoted, in accordance with Rule 17.03 on demotion, or may be allowed eligibility for another position in the same class where deemed qualified by the appointing authority, subject to approval by the Commission.

A probationer demoted to a class where no regular standing shall start a new period of probation.

11.13 PROTESTS. Any probationer may file a written protest with the Secretary protesting a termination of probationary status or demotion. All protests must be filed within ten (10) days of notice of the action taken. The Secretary will give due consideration to and take appropriate action on all timely-filed protests. Probationers may appeal a decision of the Secretary to the Commission under Rule 17.

COMMENTS TO RULE 11: PROBATION

11.03 In *Arbogast v. Westport*, 18 Wn. App. 4, 567 P.2d 244 (1977), the court considered a challenge to the City of Westport's one-year probationary period. The employee had challenged the probationary period, arguing that the three- to six-month period prescribed by RCW 41.12.100 [see also 41.08.100] applies. The court noted that Westport justified the longer period on the ground that Westport is a town with seasonally fluctuating population and a probationer's performance during the quieter winter months may not be indicative of performance during the hectic summer months. The court found this to be a valid consideration and held that the one-year period allowed a reasonable period of time for determining the efficiency and competence of the probationer. In so holding, the court cited *Bellingham Firefighters Local 106 v. Bellingham*, [discussed in comments to Rule 10.05].

In setting a probationary period, the Commission should articulate a basis for such a period in excess of six months. In light of the lengthy training requirements required by the State after appointment of a probationer, defense of a one-year probationary period should not be difficult. *See also Roberts v. Clark County Fire Protection District No. 4*, 44 Wn. App. 744, 723 P.2d 488 (1986), where the court upheld a 12-month probationary period established in the regulations of a fire district. This case is also discussed in the comments to Rule 1.

11.09 Cause Not Required. Probation is a traditional element of most personnel or Civil Service systems. In discussing the state's personnel system, the court noted:

> The purpose of probationary employment is to provide a trial period of employment during which the employer may observe the performance of the probationary employee before conferring the rights of permanent status.

Ross v. Social and Health Services, 23 Wn. App. 265, 272, 594 P.2d 1386 (1979). When an employee acquires a position in probationary status, closer scrutiny of job performance should be expected.

> . . . when an employee is certified to fill a permanent position and is placed on probationary status, . . . the expectation arises that such person's performance on the job will be evaluated by her supervisors who will decide during the probationary period whether she should have permanent status conferred upon her.

Ross, supra at 273. It is only upon the employee's satisfactory completion of the probationary period, and attainment of permanent status, that justifiable cause must be shown before suspension or dismissal of the employee.

In *Samuels v. City of Lake Stevens*, 50 Wn. App. 475, 749 P.2d 187, (1988), the court considered the case of Chief Samuel's discharge from the Lake Stevens Police Department. The city claimed his position exempt and that he was not

entitled to a civil service hearing after he was discharged. The court found the exclusion of the position of chief of police violated Chapter 41.12 RCW. However, because the one-year probationary period applied to Samuels as a civil service employee and because Samuels was discharged during the one-year probationary period, he was not entitled to an investigation or a hearing. Samuels was a probationary employee at the time he was fired, therefore he did not possess a property right of continued employment. The court also found Samuel could not maintain an action under Section 1983 of the federal Civil Rights Act of 1964.

12. SERVICE CREDIT. [Service credit is typically set out in collective bargaining agreements. Service credit is not mandatory, otherwise. The following provisions for jurisdictions that may otherwise consider setting service credit as an additional benefit for existing personnel.]

12.01 Service credit in a class for a regular employee shall be computed to cover all service subsequent to regular appointment in that class and shall be applicable in the department in which employed.

12.03 DETERMINATION.

12.03.01 The determination of a regular employee's earned service credit shall be made based on the available payroll, personnel and other records. If payroll records are not available for any particular period, it shall be rebuttably presumed that each regular employee employed during such period, as shown by other records, earned full-service credit in the particular class and department in which employed, for the entire length of such period.

12.03.02 Following the requisite probationary period and upon appointment or reappointment, the seniority and service credit of the employee shall begin anew and be computed without benefit or credit of any prior service except as the Commission may otherwise authorize for the good of the service.

12.04 REQUESTS FOR CONFIRMATION.

12.04.01 REQUESTS. Any regular employee, or an association or union on behalf of such employee, or the head of an employee's department may request a determination of the employee's earned service credit as of a designated date in any specified class and department in which he has served. If the request is made at a reasonable time and interval, and subject to such directives as may be then in effect, the Secretary shall as soon as practicable but within ten (10) days ascertain the requested computation, and shall so notify the requesting employee, association, union or department head in writing.

12.04.02 PROTESTS. If any employee, association, union or department head has cause to object to the computation of the employee's service credit, written protest may be filed with the Secretary setting forth with particularity the reason and basis for his objection. Such protests must be filed within ten (10) days. The Secretary shall give due consideration to all timely-filed protests and take such action as deemed appropriate.

12.05 SERVICE COVERED.

12.05.01 GENERALLY. Once a regular employee acquires regular Civil Service status and regular standing in any given class in a particular department,

the employee shall receive full-service credit for the entire length of time served in such class and department, whether such service is continuous or interrupted.

12.05.02 PROBATIONARY PERIOD. After completion of an original or promotional probationary period, a regular employee shall receive credit for actual service during such period. If a probationer fails to complete satisfactorily the required probationary period and is returned to the former regular class, actual service during such period shall be credited to the former class.

12.05.03 TEMPORARY OR PROVISIONAL APPOINTMENT. If a temporary or provisional appointment is followed by a regular appointment to the same class, such employee shall receive credit in such class for actual, continuous service during the temporary or provisional appointment. A regular employee shall receive service credit in the regular class for the period after the regular appointment, served under a temporary or provisional appointment to another class or department or to an exempt position, if the employee returns to the regular class after the expiration or termination of such service.

12.05.04 ON ASSIGNMENT. A regular employee shall be credited to the regular class for the entire length of time served under an assignment.

12.05.05 LEAVES WITH PAY. A regular employee shall receive full credit for any leave with pay.

12.05.06 LEAVES WITHOUT PAY. No service credit shall be allowed for any time that an employee is an any leave of absence without pay.

12.05.07 SUSPENSION. No service credit shall be allowed while an employee is on a suspension without pay, unless the suspension is modified, reversed or nullified on appeal.

12.06 CHANGE IN CLASS OR DEPARTMENT.

12.06.01 GENERALLY. No service credit earned by a regular employee in any one class and department shall be carried over upon appointment, promotion, reinstatement, transfer, demotion or voluntary reduction to or from another class or department, but such service credit shall be permanently retained in and be credited to the class and department in which it was earned, unless expressly provided by these Rules.

12.06.02 ABOLITION OF CLASS. In the event that a regular employee's former class is abolished or changed, all service credit earned in such class prior to its abolition or change and not lost or forfeited shall be credited to another class in the same department which is substantially similar to, and is neither higher nor lower than, the abolished or changed class.

12.06.03 COMBINATION—COMPUTATION. Whenever the service credit of a regular employee earned in two or more classes, or in the same class in different departments, is to be combined under these Rules, the service credit earned and not lost or forfeited in each such class and department shall be computed separately and shall be added together, and the total sum shall represent the employee's service credit for the particular purpose in question.

12.07 PROMOTION—COMPUTATION OF CREDIT. Upon completion of the probationary period for a promotional position, an employee shall receive credit for all service in the promotional class and particular department, which shall be credited to that class and department. All prior service credit earned in the lower class and department shall be retained by the employee, but such service credit shall be credited only to that latter class and department.

12.08 TRANSFER—COMPUTATION OF CREDIT. A regular employee shall be entitled to retain all service credit earned in any class and department prior to an authorized transfer therefrom, which shall be credited to such former class and department. Service credit earned in the new class or department to which transferred shall be credited to such new class or department, from the effective date of the transfer. If the transfer becomes regular, the required trial period, if any, shall be credited to the new class or department. Otherwise, such trial period as served shall be credited to the former class or department.

12.09 DEMOTION—COMPUTATION OF CREDIT. Upon the involuntary demotion of an employee in accordance with these Rules, all service credit earned in the class and department from which demoted, up to the effective date of the demotion shall be retained by the employee, unless otherwise provided in the demotion order and approved by the Commission. From that time, the employee shall be entitled to such service credit earned in the lower class to which demoted, plus whatever service credit formerly earned in such class and department and not lost or forfeited. Any required trial period, if satisfactorily served, shall be credited to that lower class and department. If not satisfactorily served and demoted again, such trial period as actually served shall be credited to the next lower or other class in which the employee acquires regular standing or, in the event of a layoff, to the class and department from which the employee is laid off.

12.10 VOLUNTARY REDUCTION—COMPUTATION OF CREDIT. Upon the voluntary reduction of a regular employee to a lower class in the same or different department as provided by these Rules, such employee shall retain all earned retention credit in the higher class and department from which reduced, prior to such reduction, if not lost or forfeited.

12.11 REALLOCATION—COMPUTATION OF CREDIT.

12.11.01 SIMILAR CLASSES. If a regular employee's position is reallocated to a different class which is substantially equivalent to the former class, all the

service credit previously earned in the former class and same department and not lost or forfeited shall be credited to the new class. In addition the employee shall receive all service credit subsequently earned in the new class and the same department.

12.11.02 DISSIMILAR CLASSES. If the position is reallocated to a class which is not substantially similar, the service credit earned in the former class shall be credited only to such former class and department.

12.12 LAYOFF—COMPUTATION OF CREDIT. No service credit shall accrue or be allowed during the period in which an employee is laid off, but all service credit earned and not lost or forfeited up to the effective date of the layoff shall be retained by the employee.

12.13 DISCIPLINARY PENALTY. [OPTIONAL] As a disciplinary penalty in lieu of dismissal, demotion or other penalty, or in addition to such penalty, the Commission may by its order, at its discretion, forfeit or deduct all or a designated portion of the service credit that the employee has earned up to the date of the order, in terms of service credit months or years.

12.14 SERVICE CREDIT UPON SEPARATION FROM SERVICE. Upon separation from the service, no credit shall be given or allowed for any prior service or employment up to the time of such separation, and except as otherwise specifically provided by these Rules, service credit shall be forfeited and not be reinstated upon reemployment by the [City/County].

COMMENTS TO RULE 12: SERVICE CREDIT

12. GENERAL COMMENTS.

If service credit is to be afforded, as discussed at Rule 8.27, a basis for determining service credit must be provided in the rules. This set of rules is only one basis for management of service credit. Service credit also becomes relevant to the issues of lay-off, Rule 14, and reinstatement, Rule 9.

The effect of seniority or service credit may also be relevant to transfer of personnel among civil service systems. This issue was addressed by the Attorney General's Office in AGO 1991 No. 27. There, the AG considered the seniority status of a city or town police officer transferred to a county sheriff's office pursuant to RCW 41.14.250-.290. The Attorney General's opinion reviewed the history of the statutes. It then addressed the foundation for the issue – Pacific County civil service rules that granted certain advantages to employees based upon length of service (*e.g.*, service credit in promotional examinations). The opinion concluded that the statute required that upon transfer and qualification of a former city officer into a county department, county seniority dated from the beginning of the officer's employment with the city.

13. TRANSFER—REDUCTION.

13.01 GENERAL. The transfer of an employee shall not constitute a promotion in the service, except as provided in Rule 13.03.04, below.

13.02 INTRA-DEPARTMENTAL TRANSFERS. An appointing authority may transfer an employee from one position to another position in the same class in the same department without prior approval of the Secretary but must report any such transfer to the Civil Service Department within five (5) days of its effective date.

13.03 PROCESS. Transfers may be made upon consent of the department head and with the Secretary's approval as follows:

13.03.01 Transfer in the same class from one department to another; such a transfer may be made concurrent with the appointment of an employee to another class;

13.03.02 Transfer to another class in the same or a different department in case of injury in line of duty either with the [City/County] service or with the armed forces in time of war, resulting in permanent partial disability, where showing is made that the transferee is capable of satisfactorily performing the duties of the new position;

13.03.03 Transfer, in lieu of layoff, may be made with limited standing to a single position in another class in the same or a different department, upon showing that the transferee is capable of satisfactorily performing the duties of the position and that a regular employee or probationer is not displaced. Regular standing in the new class may be attained by the employee only through examination and permanent regular appointment.

13.03.04 Transfer, in lieu of layoff, may be made with limited standing to a single position in another class when such transfer would constitute a promotion or advancement in the service; provided, a showing is made that the transferee is capable of satisfactorily performing the duties of the position and that a regular employee or probationer is not displaced and when transfer in lieu of layoff under Rule 13.03.03 is not practicable. Regular standing in the new class may be attained by the employee only through examination and permanent regular appointment.

13.03.05 The Secretary may approve a transfer under this Rule 13.03 with the consent of the appointing authority of the receiving department only, upon a showing of circumstances justifying such action.

13.04 LIMIT OF RULE. These rules have no authority or effect on positions or departments not subject to the Civil Service. Transfer to or from positions or departments not subject to the Civil Service are unaffected by these rules.

13.05 REDUCTION.

13.05.01 AUTHORIZED. As defined in Rule 4.73, a reduction is the movement of an employee from a higher class to a lower class of employment for reasons other than cause. A reduction may be made only upon an employee's written request, and consistent with these Rules.

13.05.02 APPLICABLE CLASSES. A reduction may be approved for

(a) the next lower or any lower class in the Class Series containing the class from which reduced;

(b) any lower class in which the employee has previously acquired Regular Standing, provided there has been no intervening forfeiture; or

(c) any lower class which is substantially similar to any lower class (in the employee's current class series) in the position classification plan; or

(d) employees seeking return to employment or reemployment from a disability, to a vacant position in another permissible class or department for which the employee qualifies.

13.05.03 PROCEDURE.

(a) A request for reduction must be submitted in writing to the Secretary. The request must include statement of justifiable or satisfactory reason, including a showing that the employee meets the qualifications of the lower class.

(b) The reduction must be approved by the [Personnel Manager] and [the Mayor] [city manager] [head of the department in which the lower class is located], and reported to the Commission.

(c) The reduction shall take effect on the date ordered by the [Commission/Secretary].

13.05.04 EFFECT OF REDUCTION.

(a) Upon the effective date, or following satisfactory completion of any trial period, the reduction shall be complete and the employee shall have Regular Standing in the lower class and department to which reduced.

(b) An employee reduced shall be able to return to the former position only by examination and regular appointment. In the event of a

recovery from disability, an employee reduced in class may be eligible for appointment from a reinstatement register.

13.05.05 REDUCTION AVAILABLE.

(a) By Employee. A voluntary reduction may be sought by an employee for any vacant position in a class under Section 13.05.02.

(b) By Department.

(1) Employees with Standing. Reduction involuntarily of an employee from a higher civil service class to a lower civil service class is governed by Rule 13, Layoff. Return of an employee from an exempt position to a civil service position is governed by Rule 15, Leaves of Absence.

(2) Employees without Standing. When an employee is reduced from an exempt position, the employee may petition in writing the Commission within 10 days of the end of employment in the exempt position for placement on a reinstatement register for a class for which the employee is deemed eligible. In considering the placement of the employee, the Commission may consider the employee's experience, the record of City employment, or such other factors as deemed in the best interest of the System. The Commission's decision shall be deemed permissive and discretionary, and an employee shall have no claim or cause for denial of placement on a reinstatement register.

13.05.06 The [Commission/Secretary] may, in its judgment and discretion, provide in the order granting or approving any reduction that the employee shall serve a designated trial period, not to exceed one (1) month's service from the effective date of the reduction, in the position to which reduced for the sole purpose of satisfying the Commission that employee is capable of satisfactorily performing the functions and duties of such position or class.

Provided, the Commission may for cause shown, at any time during the prescribed trial period, extend, shorten, modify or waive in whole or in part the duration or balance of such period.

COMMENTS TO RULE 13: TRANSFER—REDUCTION

13. GENERAL COMMENTS.

The transfer rule should have little impact on public safety Civil Service Systems. There is little opportunity for transfer between departments. A Civil Service System that has a radio dispatcher classification, with radio dispatchers employed by a police department and by a fire department, may find such a rule useful. An example of the use of this rule outside public safety would be a position that may be found in many departments, such as the position of word processing operator.

The reduction rule may be of benefit in facilitating the continued employment of personnel who are no longer capable of performing in a current position by reason of disability. *See Dean v. Metro (Seattle)*, 104 Wn.2d 627, 708 P.2d 393 (1985) (public employer's obligations to accommodate former employee by providing notice of job opportunities). Additionally, personnel employed in exempt positions, who do not enjoy standing in lower ranks, may be considered for reduction under this rule.

13. Reversion of Probationary Employees. A state merit system employee who was removed from her position during her trial service period and placed in her prior position was reinstated. *Nelson v. Department of Corrections*, 63 Wn. App. 113, 816 P.2d 768 (1991). The court held that only the Department of Personnel, not Corrections, had the right to revert the employee.

14. LAYOFF.

14.01 In a given class in a department, the following shall be the order of layoff:

14.01.01 Provisional appointees;

14.01.02 Temporary or intermittent employees not earning service credit;

14.01.03 Probationers (except as their layoff may be affected by military service during probation);

14.01.04 Regular employees in the order of their length of service, the one with the least service being laid off first.

14.02 LAYOFF OUT OF ORDER. The Secretary may grant permission for layoff out of the regular order, upon showing by the department head of a necessity therefore in the interest of efficient operation of the department, after giving any affected employee or employees an opportunity to be heard.

14.03 REDUCTION IN LIEU OF LAYOFF. At the time of any layoff, a regular employee or a promotional probationer, shall be given an opportunity to accept reduction to the next lower class in a series of classes in his department, or to transfer as provided by Rule 13.03.03,

14.04 TRANSFER IN LIEU OF LAYOFF. An employee so reduced shall be entitled to credit for any previous regular service in the lower class and to other service credit in accordance with Service Credit Rule 12.

COMMENTS TO RULE 14: LAYOFF

14. GENERAL COMMENTS.

A. Contracting Out. The State Supreme Court has held that despite the fact that contracting with a private company to provide custodial services for a new building would result in a clear cost-saving and would not operate to terminate any civil service positions or employees, as a matter of law, the college had no authority to enter into a contract for new services of a type which have regularly and historically been provided, and would continue to be provided, by state civil service employees. Therefore, the court held the contract was void. *Washington Federation of State Employees v. Spokane Community College*, 90 Wn.2d 698, 699-700, 585 P.2d 474 (1978). The holding was codified as part of the state civil service law in 1978. *See also Western Washington University v. Washington Federation of State Employees*, 58 Wn. App. 433, 793 P.2d 989 (1990) (the discharge or layoff of an employee because the work has been contracted out is invalid, even if the contract is with another government agency); *Washington Federation of State Employees v. Dept. of Social and Health Services*, 90 Wn. App. 501, 966 P.2d 322 (1998) (in order to allow privatization of services historically performed and capable of being performed by state civil service employees, the enabling statute and/or relevant civil service law would need to be amended).

The court's analysis in the *Spokane Community College* case was extended to a local government in J*oint Craft Council v. King County*, 76 Wn. App. 18, 881 P.2d 1059 (1994) because the County's civil service statute was comparable to the state civil service law. The court held that when services are "customarily and historically" performed by civil servants, real or anticipated cost savings from use of private entities is not sufficient to show that civil servants cannot provide services. However, the court upheld the County's decision to contract out vehicle maintenance because the County was able to show that it was not practicable for civil servants to provide the services.

In 2002, the State Civil Service law was amended as part of comprehensive civil service reform. The amendments include a provision to allow contracting out of state services and seem to legislatively overrule the *Spokane Community College* case. RCW 41.06.142 (1) provides that "any department, agency or institution of higher education may purchase services, *including services that have been customarily and historically performed by employees in the classified service*." (Emphasis added) The amended statute also provides that contracting out state services is permissible if the agency "determined that the *contract results in savings* or efficiency improvements." RCW 41.06.142(10(e). (Emphasis added)

14. This rule is a traditional "bumping" rule, authorizing tenured employees with seniority to bump employees with less seniority. An example of bumping was discussed in *Greig v. Metzler*, 33 Wn. App. 223, 653 P.2d 1346 (1982). There, a sergeant returning from a non-classified position bumped a tenured sergeant back to a deputy position. Rule 14 uses the term "reduction in lieu of lay-off" rather than "demotion" under such circumstances, since "demotion" is a disciplinary term. *See* Rule 17.03.

Another case discussing bumping is *Thomas v. Dept. of Social and Health Services*, 58 Wn. App. 427, 793 P.2d 466 (1990) (finding that DSHS violated employee's seniority rights by replacing Thomas, rather than a less senior employee, upon the return of the exempt employee to classified service).

15. LEAVES OF ABSENCE.

15.01 DURATION OF LEAVES.

15.01.01 A leave of absence without pay for a period not exceeding _____ [*e.g.*, sixty (60)] consecutive days may be granted by the appointing authority [department head], who shall give notice of such leave to the Commission.

15.01.02 A request for a leave of absence longer than _____ [*e.g.*, sixty (60)] days bearing the favorable recommendation of the employee's department head may be granted by the Secretary, who shall give notice of such leave to the Commission.

15.01.03 No employee shall be given leave to take a position outside the [City/County] service for more than [sixty (60)] days in any calendar year, except where it appears in the best interest of the [City/County].

15.02 CANCELLATION/REVOCATION. Any or all leaves of absence without pay within a department may be cancelled whenever any necessity arises in the good-faith judgment of the department head. A department head may revoke an individual employee's leave without pay if it is found that the employee is using the leave for purposes other than that for which it was granted. Employees may be ordered to return to work immediately or as soon as practicable on written notice from the department head of the cancellation or revocation of leave. A copy of such notice shall be filed with the Secretary.

15.03 OTHER OFFICES [OPTIONAL]

15.03.01 LEAVE TO TAKE [CITY/COUNTY] OFFICES. Whenever a regular employee is appointed or elected to any office of the [City/County] which is exempt from the Civil Service System, including, but not limited to, an office which is the head of a department subject to the System, the Commission shall grant, and such employee must take, a leave of absence from the civil service position, without pay thereof, for the entire length of time that the office is held. Original probationers so appointed may be granted such leaves, depending upon the circumstances of each particular case, or they may be dropped from the service upon assumption of office.

15.03.02 LEAVE TO TAKE OTHER PUBLIC OFFICE. Whenever a regular employee is elected or appointed to a salaried elective office, or is appointed to a salaried appointive office of the State of Washington or of any of its political or municipal subdivisions or corporation other than the [City/County] or of the United States or any of its agencies, commissions, board or departments, the Commission may grant such employee, upon written request a leave of absence without pay for the entire length of time that such office is held, or for such shorter, designated time, and upon such terms and conditions as the Commission may deem proper in the

particular case, consistent with the best interests of the city and the Civil Service System. Original probationers so elected or appointed shall not be granted such leaves but shall be dropped from the service upon assumption of the office.

If a regular employee so elected or appointed fails to file a request for a leave of absence, or if such request is denied, the employee may be separated from the service upon assumption of the elective or appointive office.

15.04 RETURN FROM LEAVE. At the expiration of the authorized leave of absence, a probationer or regular employee shall resume the same class of work with standing and service credit as determined by these rules.

15.05 MILITARY LEAVE. See [City/County] [ordinance/policy] and state and federal law relating thereto.

15.06 FILLING VACANCY. All temporary employment caused by leave of absence shall be made pursuant to Rule 10.

15.07 PROTESTS. All protests to any action pertaining to leaves of absence shall be filed with the Secretary within ten (10) days of notice of such action. The Secretary shall give due consideration to and take appropriate action on all timely-filed protests.

COMMENTS TO RULE 15: LEAVES OF ABSENCE

GENERAL COMMENTS.

A. Family Care Act. In 1988, the state legislature enacted a law requiring employers to allow employees who have children under the age of 18 with a health condition that requires "treatment or supervision" to use the employee's accrued sick leave to care for the child (under certain conditions). In January 2003, changes to 49.12.265 through 49.12.295 took effect, allowing employees with available sick leave or other paid time off to care for sick family members in addition to children under age 18. Family member is defined as child under the age of 18, spouse, parent, parent-in-law, grandparent or a child 18 and older with disabilities. Grandparent-in-law, grandchildren, and siblings are not included. New rules were adopted and became effective January 6, 2003. In July 2005, a further legislative change to the definition of "sick leave" provides that certain disability plans are also included. The updated Family Care Rules became effective June 1, 2006. The Family Care Act applies to all employers regardless of size.

B. Family Leave Act. In 1988, Chapter 49.78 RCW was amended to prohibit any employer from discriminating in its parental leave policies between biological and adoptive parents or between men and women. In 2006 the state legislature amended Chapter 49.78 RCW to include elements identical to the federal Family and Medical Leave Act (FMLA). For example, the change reduced the threshold for employers to qualify from 100 to 50 employees and dropped the requirement for employees to qualify from 1,820 hours to 1,250 hours worked in the past 12 months. Like the FMLA, the Family Leave Act entitles eligible employees to take up to 12 weeks of unpaid job-protected leave in a 12-month period for specific family and medical reasons. In 2017, the state legislature enacted a new family leave law that provides Washington employees with paid family and medical leave (PFML). Under the PFML program, eligible employees are entitled to up to 12 weeks of leave and partial wage replacement for their own serious health condition (medical leave) or for family care (family leave), up to 16 weeks of combined family and medical leave, and up to two additional weeks for certain pregnancy complications. Employees may also take leave for certain qualifying military exigencies. Washington employees are eligible to receive paid leave if they have worked a minimum of 820 hours in Washington during the qualifying period. The 820 hours can be at one job or combined from multiple jobs. Unlike federal FMLA where employees interact directly with their employers to determine eligibility, employees apply directly to the Washington Employment Security Department (ESD) to request leave, and the ESD administers the PFML program and determines employee eligibility.

C. Family Medical Leave Act. ("FMLA") FMLA became effective on August 5, 1993, for most employers. If collective bargaining ("CBA") was in effect

on that date, FMLA became effective on the expiration date of the CBA or February 5, 1994, whichever was earlier. FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons. To be eligible for FMLA benefits, an employee must have worked for the employer for a total of 12 months; have worked at least 1,250 hours over the previous 12 months.

D. Pregnancy Disability Leave. Under the Human Right Commission regulations, a woman is entitled to take unpaid leave for the entire time a woman is sick or temporarily disabled because of pregnancy or childbirth; the leave could include periods before and after child birth. The woman is entitled to the same benefits that the employer offers other employees on temporary disability leave and the woman is entitled to return to the same or similar job after leave. Pregnancy disability leave is in addition to Family Leave. Employers with 8 or more employees are covered by the Human Rights Commission regulations. Beginning January 1, 2020, under Washington's new PFML program, an eligible pregnant employee can receive a combination of up to 12 weeks of medical leave plus an additional 2 weeks for any serious health condition resulting in an incapacity (14 weeks maximum), and/or up to 12 weeks of family leave to care for a qualifying family member. However, the combination of medical and family leave cannot exceed 16 weeks in a 52-week period or 18 weeks in a 52-week period in case of a serious health condition resulting in an incapacity. An eligible employee can also receive up to 12 weeks of family leave for paternity leave or leave for an adoptive parent.

15.05 A. Veteran Reinstatement. A former Sheriff's Department employee has an absolute right to return to employment following U.S. Army Reserve duty. *Snohomish County v. Nichols*, 47 Wn. App. 550, 736 P.2d 670 (1987) (ordering county to reemploy the veteran, and ordering payment of attorneys' fees to the employee). RCW 73.60.060 imposes a duty on the prosecuting attorney of the county to enforce an employee's right to return to employment. However, as the *Nichols* court noted, a Civil Service Commission is limited to the powers and duties authorized by the state. Here, where RCW 41.14 did not authorize the Commission to determine issues under the Veterans Reemployment Rights Act, RCW 73.16, the employee properly brought an independent action in court to establish his rights under the Act.

B. Military Leave. In examining an apparent conflict between RCW 38.40.060 (providing for military leave not exceeding "15 days each calendar year") and the Washington Administrative Code 356-18-130 (providing for military leave not to exceed 15 calendar days), the Court of Appeals ruled that RCW 38.40.060 controlled, and that the statute means that the 15 days leave shall only include work days (not non-work days that fall between work days). *State Employees v. Personnel Board*, 54 Wn. App. 305, 773 P.2d 421 (1989).

The Veterans' Reemployment Rights Act does not limit the length of military service after which a member of the Armed Forces is entitled to reemployment at the prior civilian job. *King v. St. Vincent's Hospital*, 502 U.S. 215, 112 S.Ct. 570 (1991) (ruling that a three-year tour of duty is not unreasonably long).

16. RESIGNATION.

16.01 HOW SUBMITTED. Resignation of any employee from the service shall be made in writing and filed with the Secretary after approval by the [appointing authority/department head].

16.02 WITHDRAWAL OF RESIGNATION. The Secretary may permit the withdrawal of a resignation only upon a written request filed within [three hundred sixty-five (365), *See* Rule 9.05] days from the effective date of the resignation and if such request for withdrawal bears the favorable recommendation of the appointing authority.

16.03 INVOLUNTARY RESIGNATION. Any resignation may be voided and set aside and the employee reinstated or restored to active duty by order of the Commission upon its determination that the resignation was made involuntarily or under duress or coercion, after giving the department head reasonable notice and an opportunity to be heard on the matter. Such action by the Commission may only be taken upon the written petition of the resigned employee filed with the Personnel Manager within ten (10) days from the effective date of the resignation. If no such petition is filed within the ten (10) day limit, a resignation shall be conclusively presumed to have been made voluntarily and without duress or coercion.

16.04 IMPLIED RESIGNATION. The department head may presumptively consider any employee to have impliedly resigned upon finding that such employee has been absent from duty without leave or authorization or has failed to report for duty following the expiration or termination of any suspension for five (5) or more consecutive working days or has quit or "orally resigned" and has been absent from duty for three (3) or more consecutive working days without leave or authorization. An employee will not be determined to have resigned under this rule until five (5) days after proof of service of a written notice by delivery or by registered or certified mail to the employee's last known address as filed with the Personnel Manager. No resignation order shall take effect if, prior thereto, the employee reports for active duty, applies for restoration or reinstatement, or otherwise gives notice to the department head or the Personnel Manager which, in the judgment of the Commission, rebuts the presumption of resignation.

16.05 RETURN TO ELIGIBLE REGISTER FOLLOWING RESIGNATION. (*See* Rule 9.05).

COMMENTS TO RULE 16: RESIGNATION

16. GENERAL COMMENTS.

A. Letters of Reference. A public employer is not required to give positive letters of reference for resigning employees. A government hospital's negative recommendation for an ex-employee, which resulted in the ex-employee's failure to obtain a new position, does not violate the ex-employee's constitutional rights because injury to reputation is not a protectable liberty interest. *Siegert v. Gilley*, 500 U.S. 226, 6 Indiv. Employ. Rel. 704 (1991). However, the common law of defamation will continue to be available to a former employee who contests a former employer's comments.

B. Occasionally questions will arise regarding the obligations of a civil service or human resources department to make recommendations or provide other employment information. The accepted practice is to provide only name, position(s) held, periods of employment and compensation levels. Upon release by the former employee, a civil service department may release such information contained in its files as authorized for release by the former employee. In a case involving one government's lawsuit against another government for failure to provide background information regarding the other government's former employee, *see Richland School District v. Mabton School District*, 111 Wn. App. 377, 45 P.3d 580 (2002). There, the Court of Appeals found that Mabton School District did not owe a duty under common law negligence principles to advise the Richland School District of child molestation charges against a former Mabton School District employee. The Supreme Court denied review of the Court of Appeals' decision at 148 Wn.2d 1002 (2003).

After several years of debate, the legislature in 2005 provided employers with "qualified immunity" from civil and criminal liability when providing reference checks on current and former employees. RCW 4.24.730. The new law presumes an employer is acting in good faith. However, this presumption only applies when the employer discloses information to a prospective employer or employment agency. The law does not protect against disclosures made to any other third party (i.e. the media, a landlord, credit agency, etc.) Moreover, the disclosed information must relate to: (1) the employee's ability to perform his or her job; (2) the diligence, skill, or reliability with which the employee carried out the duties of his or her job; or (3) any illegal or wrongful act committed by the employee when related to the duties of his or her job.

The good faith presumption will only be overcome if the employee can show the employer disclosed information that was knowingly false, deliberately misleading, or made with reckless disregard for the truth.

And the disclosure to a prospective employer cannot be unsolicited – it must be made in response to a specific request. There is no protection if you volunteer information.

RCW 4.24.730 does not mandate employers maintain written records of all disclosures. However, if a commission or personnel agency decides to maintain records, they must be maintained for two years and an employee has a right to inspect the employee's record upon request.

16.03 A. Rule 16 provides an employee with an opportunity to regain rights and privileges which are normally lost upon resignation. *See* 15A Am. Jur. 2d *Civil Service*, at § 62. This provision is optional. If a Commission (or enabling legislation) determines that return after resignation will not be allowed, an employee's timely appeal from a resignation should be reviewed only upon receipt of allegations that the resignation was a result of coercion, fraud, or was otherwise violative of Civil Service policy (i.e., constructive discharge).

B. In *Micone v. Town of Steilacoom Civil Service Commission*, 44 Wn. App. 636, 722 P.2d 1369 (1986), the court reviewed the Town of Steilacoom Civil Service Commission's handling of a resignation hearing. Following the tender and acceptance of his resignation, the Steilacoom Chief of Police requested that the Civil Service Commission set a hearing regarding his resignation. The Chief contended that the resignation was made under duress. Following a Civil Service hearing, the Commission found that the Chief's resignation was voluntary and did not constitute a dismissal. In the alternative, the Commission found that the Chief's request for a hearing was not timely. On review, the court determined that the voluntariness of a resignation is both a question of jurisdiction and a question on the merits. The court found that there was a question of jurisdiction because the Commission was not authorized by Chapter 41.12 RCW to investigate voluntary resignations. However, the court recognized that an involuntary or coerced resignation is equivalent to a discharge and could be made the subject of a hearing as provided for in RCW 41.12.090. The court found that the Chief's request for a hearing was timely, because it was made within 10 days of his separation from service. The court went on to find that the Commission did not act arbitrarily and capriciously or contrary to law in concluding that the Chief voluntarily resigned from his position with the Steilacoom Police Department.

17. DISCIPLINE AND DISCHARGE.

17.01 SUSPENSION.

17.01.01 A department head may suspend a subordinate, with or without pay, for a period not to exceed thirty (30) days for cause.

17.01.02 Any deprivation by a department head of any vacation or other paid leave, compensatory time-off or other privilege involving pay or compensation either directly or indirectly, to which an employee is otherwise entitled under law and these Rules, shall be deemed to be a suspension without pay and shall be subject to the above provisions.

17.03 DEMOTION—DISCHARGE.

17.03.01 The department head may discharge an employee or demote an employee to a lower class for cause. An employee so demoted shall lose all rights to the higher class. If the employee has not had previous standing in the lower class, such demotion shall not displace any other regular employee or any probationer.

17.03.02 The Secretary shall be satisfied as to the ability of such demoted employee to perform the duties of the lower class. The demoted employee may be required to serve a trial period in the class to which demoted, for such time and upon such terms and conditions as the head of the department may provide in the demotion order, for the sole purpose of determining the capability to satisfactorily perform the functions and duties of such class.

17.03.03 Upon the satisfactory completion of the prescribed trial period or upon the effective date of the demotion if no such period is required, the demoted employee shall have the status, rank and standing of the lower class to which demoted, and such class and department shall be deemed to be the employee's regular class and department for purposes of these Rules until an authorized change is made.

17.05 DISCIPLINE—CAUSE—ILLUSTRATED. The following are declared to illustrate adequate causes for discipline; discipline may be made for any other cause:

17.05.01 Incompetency, inefficiency, inattention to, or dereliction of duty;

17.05.02 Dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public or a fellow employee, any other act of omission or Commission tending to injure the public service, or any other willful failure in proper conduct on the part of the employee;

17.05.03 Mental or physical unfitness for the position which the employee holds;

17.05.04 Dishonest, disgraceful, or prejudicial conduct;

17.05.05 Drunkenness or use of intoxicating liquors, narcotics, or any other habit-forming drug, liquid, or preparation to such extent that the use thereof interferes with the efficiency or mental or physical fitness of the employee, or which precludes the employee from properly performing the function and duties of any position under Civil Service;

17.05.06 Conviction of a felony, or a misdemeanor involving moral turpitude;

17.05.07 False or fraudulent statements or fraudulent conduct by an applicant, examinee, eligible, or employee, or such actions by others with his or her collusion;

17.05.08 Willful or intentional violation of any lawful and reasonable regulation, order or direction made or given by a superior officer;

17.05.09 Willful or intentional violation of any of the provisions of these rules.

17.05.10 Any other cause, act or failure to act which, under law or these Rules, or the judgment of the Commission, is grounds for or warrants dismissal, discharge, removal or separation from the service, demotion, suspension, forfeiture of service credit, deprivation of privileges or other disciplinary action.

COMMENTS ON RULE 17: DISCIPLINE AND DISCHARGE

17.01 Any deprivation of compensation may be considered a suspension under this rule. Note, however, that this rule does not address verbal or written warnings, or involuntary administrative leave with pay. Such leave does not impact civil service rights. Some Commission rules discuss these actions in separate provisions.

17.03 Discharge of a Subordinate. "Discharge" is defined at Rule 4.20 to include termination, separation, dismissal or removal. These are phrases found in the disciplinary provisions of the state statutes. *See* RCW 41.08.090, 41.12.090, and 41.14.120.

17.05 Demotion is distinguished from reduction. Demotion is a disciplinary matter, requiring the employer to show cause for the action taken. "Reduction" is defined in Rule 4.73 as "removal from a higher class to a lower class of employment for reasons other than cause." *See* also Rule 14, Layoff.

17.05 Rule 17.05 sets out the general grounds for imposition of discipline. *See* RCW 41.08.080, 41.12.080, and 41.14.110.

Definition of Cause. "Conduct unbecoming a public employee," "conduct prejudicial to good order," or similar charges are frequently contained in governmental personnel manuals and are more frequently cited as "cause" for discipline or discharge of public employees. Employee challenges to the use of such standards have generally been rejected by courts. For example, a discharged fire fighter brought action claiming that the Dallas Fire Department rules of conduct were facially unconstitutional, and unconstitutional as applied, in violation of the First and Fifth Amendments to the U.S. Constitution. The claims were rejected in *McDonald v. Miller*, 596 F.2d 686 (5th Cir. 1979). The court determined that the standards clearly applied to the employee's conduct of possessing stolen property and that he therefore had no standing to challenge the constitutionality of the standards. Similar fire department regulations prohibiting "conduct prejudicial to good order" were found constitutional in *Davis v. Williams*, 617 F.2d 1100 (5th Cir. 1980). *See also Fabio v. Civil Service Commission of Philadelphia*, 414 A.2d 82 (1980); and *Porter v. Civil Service Commission*, 12 Wn. App. 767, 532 P.2d 296 (1975). In *Porter*, a Spokane Water Department employee was discharged following his conviction on two counts of indecent liberties. The notice of discharge cited "misconduct unbecoming a city employee and conduct amounting to disgraceful conduct." Because the discharged employee knew the precise conduct which was the subject of his hearing and the basis for his discharge, the court found that he was "afforded administrative due process" and had no difficulty rejecting the employee's argument that the standard was unconstitutional. See also discussion of "inefficiency" and "insubordination" as standards for discipline, below.

Definition of "Just Cause". In a private sector case determining that a respiratory therapist fired for allegedly molesting a female patient had been fired for just cause, the Washington Supreme Court defined "just cause" as:

> a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for "just cause" is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.

Baldwin v. Sisters of Providence, 112 Wn.2d 127, 769 P.2d 298 (1989).

The definition from *Baldin v. Sisters of Providence*, suggests substantial deference to the appointing authority. It was this deference that perhaps led the Supreme Court to reject a civil service commission decision and uphold a conflicting arbitration ruling in *Kelso Civil Service Commission v. City of Kelso*, 137 Wn.2d 166, 969 P.2d 474 (1999). The court discussed the following with respect to the "for cause" provision found in the civil service statutes.

> There is no suggestion that the Commission applied the "for cause" standard improperly under RCW 41.12.090. Although this court has yet to give a precise definition to this standard, the statute has not previously been interpreted to require the Commission to consider any factors apart from the particular allegation of wrongdoing and the employer's motivation for the disciplinary action. *See Nickerson v. City of Anacortes*, 45 Wn. App. 432, 725 P.2d 1027 (1986) (discharge based on illegal conduct upheld under Civil Service Ordinance absent discussion of other factors such as mitigating circumstances); *Benavides v. Civil Service Comm'n Serv.*, 26 Wn. App. 531, 613 P.2d 807 (1980) (discharge based on incompetence upheld, without discussion of other factors, because no indication of bad faith).

The Supreme Court contrasted what it observed to the Civil Service Commission's evaluation of cause with the standard of "just cause" frequently found in collective bargaining agreements.

> In contrast, the collective bargaining agreement insures that no officer will be disciplined except for "just cause." "Just cause" is a term of art in labor law, and its precise meaning has been established over 30 years of case law. Whether there is just cause for discipline entails more than a valid reason; it involves such elements as procedural fairness, the presence of mitigating circumstances and the appropriateness of the penalty.

Kelso, 137 Wn.2d at 173. The definition of cause in these rules does incorporate the "just cause" provision and does require Commission to give greater scrutiny to the actions of the appointing authority. All elements that go into a determination of just cause should be part of a civil service commission's consideration, including procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty. The Commission should not only find cause for discipline (i.e., that facts supported the imposition of discipline) but also find that there is cause for the level of discipline imposed. The statutes should be noted in this regard as recognizing the authority of the Commission to reverse, modify or even add to the determination of discipline by the appointing authority. *See Pool v. City of Omak*, 36 Wn. App. 844, 678 P.2d 343 (1984) (upholding Commission's increase in discipline). Just cause for removal should demonstrate that there is a "real and substantial relationship between the employee's conduct and the efficient operation of the public service, or, otherwise, legal cause is not present." 15A Am. Jur. 2d *Civil Service*, at § 64. A checklist of cause is found in A. Koven & S. Smith, *Just Cause—The Seven Tests* (2nd Ed. 1992). Those elements include: reasonable notice; reasonable rule; employer investigation; fair and objective investigation; adequate proof of employee conduct; equal treatment; and, reasonable penalty (including consideration of the employee's prior service record). A commission should be satisfied that the appointing authority in presenting a case to the commission has satisfied these steps, and the commission should document its findings and conclusions in a thorough written order.

The definition of cause in Rule 4.16 is important for two reasons. First, it makes clear that the employer (not the court) is the party making the requisite factual determination of just cause. Second, this definition allows consideration of the employer's subjective good faith.

Examples of discharge cases are discussed below.

Obscene Phone Calls. A fire fighter's placement of harassing and obscene phone calls from a city telephone located in a fire captain's office constitutes official misconduct. *Bajis v. City of Dearborn*, 391 N.W.2d 401 (Mich. 1986) (upholding discharge of the fire fighter).

Smoking. A trainee employee who has signed a certificate agreeing not to smoke a cigarette, on or off duty, for a period of one year may be dismissed for smoking during a lunch break. *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir. 1987).

Marijuana Use and Solicitation. A senior dispatcher may be dismissed for attempting to acquire marijuana during a conversation with his co-worker wife over the 911 phone system. *Ostwald v. City of Omaha*, 399 N.W.2d 783 (Neb. 1987).

Drug Use. The presence of illegal drugs in a firefighter's body is sufficient to support termination even if the drug usage was not on work time and if the effects

of the drugs were unnoticeable to co-workers. *Montegue v. City of New Orleans Fire Dep't*, 675 So. 2d 810 (La. Ct. App. 1996) (finding that strong public policy reasons exist for terminating fire fighters who fail random drug tests).

Inefficiency. Inefficiency is a valid reason for employee termination. *Gibson v. City of Auburn*, 50 Wn. App. 661, 748 P.2d 673 (1988) (finding that the term "inefficiency" was not unconstitutionally vague, and that greater specificity of the term would not be practical).

Insubordination. "Insubordination" and "unprofessional conduct" are not unconstitutionally vague terms and may be cause for termination. *Sinnot v. Skagit Valley College*, 49 Wn. App. 878, 746 P.2d 1213 (1987), *citing Arnet v. Kennedy*, 460 U.S. 134 (1974). A police officer refusal to obey a superior's direct order and usage of inappropriate and disrespectful language toward a superior is grounds for termination. The officer's "gross insubordination impaired the efficient and orderly operation of the HANO police service" and is cause for removal. *Ben v. Housing Authority of New Orleans*, 879 So. 2d 803 (La. Ct. App. 2004).

Criminal Activity. An employee's conviction of a crime is "just cause" under a city ordinance and Baldwin to discharge the employee when the ordinance states that conviction of a crime is cause for dismissal. *Hoflin v. City of Ocean Shores*, 121 Wash 2d. 113 (1993); *see also Bolden v. City of New York*, 256 F. Supp. 2d 193 (S.D.N.Y. 2003) (dismissing claim of discrimination after finding that the city's firing of two civil servants following their conviction of tax fraud was justified under the New York Public Officers Law and that their conviction constituted forfeiture of their property rights in their jobs).

Obesity. A court has upheld the suspension of a paramedic for failure to maintain proper levels of physical fitness and to lose two pounds per month as required by the department's mandatory weight control program. *Hegwer v. Board of Civil Service Commissioners*, 5 Cal. App. 4th 1011 (1992). The court rejected the employee's claim that her suspension constituted handicap discrimination.

Disability. The Washington Supreme Court defines disability, as used in the Washington Law Against Discrimination (WLAD), consistently with the definition provided in the federal ADA. A plaintiff may establish that there is a disability if there is "(1) a physical or mental impairment that substantially limits one or more of his major life activities, (2) a record of such an impairment, or (3) is regarded as having such an impairment." *McClarty v. Totem Electric Int'l*, 137 P.3d 844 (2006). This was a change from prior construction of the WLAD that provided a less precise standard of disability.

Alcohol Use. In a case proving the exception to the usual rule that conduct affecting the operation of a department may be the subject of discipline, the Louisiana Appellate Court held that a police department's termination of an officer for drunken and reckless driving was illegal. *Laborde v. Alexandria Municipal Fire and Police Civil Service Board*, 566 So.2d 426 (La. App. 1990).

The court concluded that the city had produced no evidence proving that the officer's conduct was detrimental to the efficient operation of the police department or violated any rules concerning off-duty conduct of an officer. In a subsequent case, the same state's supreme court upheld the dismissal of two police officers drinking on duty. *Shields v. City of Shreveport*, 579 So.2d 961 (La. 1991).

Jewelry. The discipline of police officers for wearing earrings was upheld, where the court found that department regulations were reasonably sufficient to define limits of the expected and prohibited conduct of officers. *Rathert v. Village of Peotone [Illinois]*, 903 F.2d 510 (7th Cir. 1990).

Religious Jewelry. Terminating a librarian for refusing to remove pendant with cross violated the librarian's First Amendment rights under the Free Exercise and Free Speech Clauses. The court found that the "library's policy is based upon nothing more than 'undifferentiated fear of apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.'" *Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608 (2005) (*quoting Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)).

Retaliatory Discipline. Retaliation for an employee's acts does not constitute just cause for discipline. *See*, *e.g.*, *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85 (1st Cir. 2006) (reinstating female police officer after city fired her for filing a claim under Title VII); *Gronowski v. Spencer*, 424 F.3d 285 (2d Cir. 2005) (city violated employee's First Amendment rights when city laid off employee because of her political support of opposing mayoral candidate); *Bell v. Clackamas County*, 341 F.3d 858 (9th Cir. 2003) (termination of employee for complaining of racial comments and profiling to superiors). Retaliation claims frequently arise in the context of employee criticism of the government employer. The First Amendment does protect a public employee's right in certain circumstances to speak as a citizen addressing matters of public concern. *Pickering v. Board of Ed.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Wilson v. State*, 84 Wn. App. 332, 929 P.2d 448 (1996). However, when public employees make statements pursuant to official duties, the employees are not speaking as citizens for First Amendment purposes, "and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410 (No. 04-473, 2006) *reversing Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004). The elements of a prima facie retaliation claim under Title VII of the federal Civil Rights of 1964 are: (1) the employee engaged in a protected activity; (2) the employee suffered an adverse employment decision by the employer; and (3) there was a causal link between the protected activity and the adverse employment decision. *See Villarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002).

If the employee can demonstrate a prima facie case, the burden of production shifts to the defendant employer to demonstrate a legitimate, non-discriminatory

reason for the adverse employment decision. Once it has done so, the burden shifts back to the employee to establish that the reason articulated is a pretext.

Bad Conduct. An officer who leaves his post to check on the safety of his family after his wife reported that their home was threatened by flooding has exhibited conduct warranting discharge, when he does not return to his post within a reasonable time and when he was explicitly denied permission to leave. *Launius v. City of Des Plaines*, 603 N.E. 2d 477 (Ill. 1992). The Illinois Supreme Court concluded that "a police officer does not have the option of performing his duties when he wishes. Plaintiff admitted that as a police officer, it was his primary and sworn duty to protect the lives and property of the citizens of Des Plaines." *Id.* at 488-89.

Negligent Conduct. A court has upheld the termination of an employee for misconduct, when the employee was a bus driver who unawaredly carried her loaded gun to work in her handbag, and the city had a policy prohibiting employees from bringing weapons on board the buses. *Johnson v. Employment Sec. Dept.*, 64 Wn. App. 311, 824 P.2d 505 (1992).

Religious Practices. The Arizona Appellate Court upheld the revocation of a police officer's certificate as a result of his open polygamy, a practice in accordance with his Mormon religious beliefs. *Barlow v. Blackburn*, 798 P.2d 1360 (Ariz. App. 1990).

Policies Applied in Discriminatory Fashion. The Washington Supreme Court has determined that employees may not use a disparate impact analysis (examining whether a protected class is subject to substantial disproportionate impact as a result of the personnel policy) as a basis to challenge an employment practice. *Oliver v. Pacific Northwest Bell*, 106 Wn.2d 675, 724 P.2d 1003 (1986) (reviewing termination of employees for violating policy requiring honest conduct on and off job, when employer reviewed each violation on case-by-case basis).

Defenses to Discrimination Claims. In reviewing the allegedly age-discriminatory termination of a university employee, a court has sustained the termination when there is evidence that the University had a substantial valid reason for termination. *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 753 P.2d 517 (1988) (finding that employer had called job deficiencies to employee's attention in writing over a long period of time, culminating in a warning six months before dismissal that continued substandard performance would result in dismissal). *See also Leong v. Potter*, 347 F.3d 1117 (9th Cir. 2003) (finding that the employer proffered a legitimate non-discriminatory reason for firing a Chinese employee who used obscenities in the work place and could not establish that other, similarly situated employees were treated differently). As another defense, consider whether the relevant statute is applicable to the municipality. For example, the Age Discrimination in Employment Act, applicable to public as well as private employers, is applicable only to employers with twenty or more employees. *EEOC v. Monclova Township*, 920 F.2d 360

(6th Cir. 1990) (holding that the ADEA is applicable to government employers who have over twenty employees).

18. PREDISCIPLINARY HEARING.

18.01 PREDISCIPLINARY HEARING—REQUIRED. A department head shall provide and arrange for a predisciplinary hearing prior to demotion, suspension, or discharge of a subordinate. The hearing under this Rule 18 is not subject to Rule 19, and does not require witnesses, presentation of evidence or other formalities. It is an opportunity for an employee to present to the [department head/appointing authority] the employee's response prior to the decision on discipline.

18.03 PREDISCIPLINARY HEARING—STANDARDS/NOTICE OF DISCIPLINE.

18.03.01 An employee shall be provided, in writing, with a notice of the charge and an explanation of the department's evidence. The employee shall be given an opportunity to respond to the charges, orally or in writing, as to why the department's proposed action should not be taken.

18.03.02 The employee may have legal counsel or union representation present at a predisciplinary hearing.

18.03.03 The department's explanation of the department's evidence at the predisciplinary hearing shall be sufficient to apprise the employee of the basis for the proposed action. This rule, however, shall not be construed to limit the employer at subsequent, post-disciplinary hearing from presenting a more detailed and complete case, including presentation of witnesses and documents not available at the predisciplinary hearing.

18.03.04 Should the appointing authority determine to discipline following the predisciplinary procedure, written notice of discipline shall be given to the employee. Such notice shall include the charges against the employee and a general statement of the evidence supporting the charges.

18.03.05 The Commission shall not consider, on appeal, any basis for disciplinary action not previously presented to an employee.

COMMENTS TO RULE 18: PREDISCIPLINARY HEARINGS

18.01 Right to Pre-Termination Hearing. The U.S. Supreme Court has found that regular civil service employees are guaranteed a pretermination hearing. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed. 2d 494, 105 S. Ct. 1487 (1985). Civil Service employees, who can be discharged only for cause (i.e., tenured), possess a property right to continued employment. *See Ticeson v. Department of Social and Health Services*, 19 Wn. App. 489, 576 P.2d 78 (1978). Such a property interest cannot be deprived without due process of law. *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S. Ct. 2701 (1972).

Loudermill did not require that a pretermination hearing be elaborate. For Civil Service employees, all that is required is notice and an opportunity to respond:

> Here, the pretermination hearing need not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Loudermill, 105 S. Ct. at 1495, cited in *Payne v. Mount,* 41 Wn. App. 627, 634, 705 P.2d 297 (1985).

The Washington Supreme Court reviewed the application of *Punton* and *Loudermill* in *Danielson v. City of Seattle*, 108 Wn.2d 788, 742 P.2d 717 (1987). In *Danielson*, a police officer sought judicial review of his discharge from the Seattle Police Department for events which resulted in his pleading guilty to a felony charge. Prior to his termination, internal investigation officers explained the allegations they were investigating and described the evidence supporting the allegations. The internal investigation officers further told Danielson that criminal charges might be filed. The officers asked Danielson if he desired to make a statement regarding the allegations. Danielson admitted the criminal violations. He was later discharged for violations of provisions of the Seattle Police Department manual. The court found the interview with internal investigation officers satisfied Danielson's pretermination due process rights. The interview served as a check against mistake and gave Danielson notice and opportunity to respond. Further, the existence of a Civil Service post-termination hearing further convinced the court that Danielson's due process rights to continued employment were adequately protected. To the extent that *Punton* suggested that a public agency's failure to follow internal procedural rules, such as those contained in a policy manual, gave rise to a prima facie deprivation of due process, it was overruled in *Danielson*. The court noted that an agency's failure to follow its own rules does not per se violate procedural due process, but

does so only when the agency's rules represent minimal due process requirements. Because Danielson was afforded those minimal due process rights, there was no violation.

Rule 18 goes beyond the requirements of *Loudermill* for a pretermination hearing. The rule provides for a predisciplinary hearing prior to demotion, suspension, or discharge of the subordinate. While a pretermination hearing would satisfy the requirements of constitutional due process, the predisciplinary hearing is recommended as an employment practice that can only benefit the employer, employee, and Civil Service System. Clarification of facts and issues will facilitate communication between the employer and employee and, at a minimum, expedite a subsequent hearing before the Commission.

A court has found that a discharged police officer's right to a hearing regarding his entitlement to disability retirement benefits was not waived by the officer's failure to command a hearing. *Ostlund v. Bobb*, 825 F.2d 1371 (9th Cir. 1987).

An arbitrator has found that a city did not provide an officer his *Loudermill* rights when the pretermination hearing consisted of a meeting with the officer to tell his story and read him his *Miranda* rights. *Shelton Police Guild and City of Shelton*, FMCS No. 89-02362 (involving police officer charged with abuse of office and official misconduct when he cited a driver for following too close, then issued a reckless driving citation when he heard that the driver intended to contest the citation). The arbitrator concluded that the city acted improperly in not confronting the officer with a full slate of allegations, and conducting a criminal investigation and expecting the officer to discuss openly the circumstances of his actions. Similarly, the Third Circuit has held that police officers' due process right to a pretermination hearing was not satisfied by merely advising the officers of a complaint involving their drug use, because this was not sufficient to give them an opportunity to explain or rebut the evidence. *Fraternal Order of Police v. Tucker*, 868 F.2d 74 (3d Cir. 1989). The court held that the city must explain the specifics of the drug allegations and the related evidence in order for the employees to meaningfully respond.

Loudermill gives the right to a hearing prior to the actual discharge, not a hearing of the decision to discharge. *Fuller v. Employment Security Dept. of Wash.*, 52 Wn. App. 603, 762 P.2d 367 (1988). The court ruled that a discharged employee's due process rights were satisfied since the termination was not final until some time after a meeting where she was given an opportunity to explain her conduct in falsifying job placement orders. *See also Gibson v. City of Auburn*, 50 Wn. App. 661, 748 P.2d 673 (1988).

Pre-Hearing Discipline. An employer may suspend an employee with pay before granting notice or a hearing if the employer perceives a significant hazard in keeping the employee on the job, but once the employee's pay is stopped, a hearing is required. *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987) (upholding

termination of employee drug dealer, but remanding to resolve due process claims of lack of hearing of suspension of employee prior to suspension without pay).

Process. The Washington Supreme Court reviewed the process of a State Patrol disciplinary hearing in *Sherman v. Moloney*, 106 Wn.2d 873, 725 P.2d 966 (1986). The employee alleged that the State Patrol Chief violated the appearance of fairness doctrine and was biased, especially in interrogating witnesses. The court summarized the evidence by stating that "although the Chief's conduct during the hearing may not have been exemplary, it does not show bias." *Sherman*, at 884. The language of the court suggests sensitivity to a Commission's involvement in the interrogation of witnesses.

Remedy for Violation of Right to Pretermination Hearing. Termination without a pretermination hearing does not necessarily require employee reinstatement. In *Nickerson v. City of Anacortes*, 45 Wn. App. 432, 725 P.2d 1027 (1986), the court determined that a city's failure to provide a pretermination hearing did not result in an employee's right to reinstatement. The court's conclusion is cited in its entirety as follows:

> Having been terminated without a pretermination hearing, Nickerson's discharge on September 4, 1981, was wrongful. However, at this juncture, Nickerson is entitled to no more than an evidentiary hearing before the superior court on the probable effect of the denial of a pretermination hearing. If the superior court finds and concludes that a pretermination hearing as required by *Loudermill* would, within reasonable probabilities, have prevented his discharge, then he is entitled to reinstatement with back pay and benefits from the date of his termination. If the superior court finds and concludes that a pretermination hearing would not have prevented his ultimate discharge, then Nickerson's remedy is limited to the recovery of such monetary damages, if any, as the court finds were proximately caused by the denial of a pretermination hearing.

Nickerson, at 441.

Similarly, a Civil Service Commission considering an employee's challenge to a department's pretermination process would not necessarily require reinstatement and dismissal of charges, but rather the provision of pretermination rights to the employee before the effective date of the action. A Civil Service Commission would proceed on these grounds on a procedural basis, returning the matter to the department for proper pretermination proceedings prior to review on the merits. If the department chooses not to continue the disciplinary action, no future hearing would be required by the Commission. If the department follows the proper pretermination proceedings and then determines to terminate the employee, the Commission can deal with the post-termination matter on subsequent appeal by the employee.

Appeal of Hearing. In a case involving the termination of a police officer after statements he made to the city council, the officer was informed of his right to appeal the decision of the city's hearing officer (affirming the dismissal) to the state superior court, but did not do so within the statutory filing period. His claim in federal court subsequently was dismissed. *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988).

19. HEARINGS.

19.01 HEARINGS—APPEALS.

19.01.01 Any regular employee who is demoted, suspended or terminated may appeal such action to the Commission.

19.01.02 Any employee who is alleged to be probationary by the disciplining department may only appeal to the Commission issues regarding probationary status and whether the procedures for discharge of probationers, as found in these rules, were properly followed.

19.01.03 Any employee, or department, who is adversely affected by an alleged violation of Civil Service or [City/County] [ordinances/policy] may appeal such violation to the Commission.

19.03 APPEALS—TIME—FORM. A notice of appeal shall be filed at the Commission offices within ten (10) days of the action that is the subject of the appeal. The notice of appeal shall be in writing and include the mailing address and street address where service of process and other papers may be made upon the appellant. The notice of appeal shall also contain a brief description of the facts giving rise to the appeal and a concise statement of the reason for the appeal. [Forms provided by the Commission may be used for such notice but are not required.]

19.05 EXHAUSTION OF ADMINISTRATIVE REMEDIES.

19.05.01 The Secretary may [OPTIONAL: when not inconsistent with the terms of a collective bargaining agreement] direct the employee to exhaust available administrative procedures regarding a disciplinary matter before scheduling the matter for hearing before the Commission.

19.05.02 If the employee exhausts the available administrative procedures and continues to believe that cause has not been shown, the employee may within ten (10) days after the final step of the procedure request the Secretary to return the appeal to the Commission for hearing.

19.07 AUTHORITY OF SECRETARY-CHIEF EXAMINER AND STAFF.

19.07.01 The Secretary-Chief Examiner (or hearing officer for the Commission)shall have the authority to make orders of preliminary matters, including motions for discovery and to compel discovery, continuance, protective orders, and other similar matters. Such orders may be appealed to the Commission. The Secretary-Chief Examiner (or hearing officer) may also conduct pre-hearing settlement conferences (in order to encourage resolution of contested matters) and issue subpoenas for depositions and for hearings.

19.07.02 The Commission may authorize the Commission staff to investigate any reports or appeals relating to the enforcement or application of the Civil Service or those rules which do not involve a disciplinary proceeding. The staff shall report the results of the investigation to the Commission in an open meeting. Based on such report, the Commission shall either dismiss the report or appeal as being without basis or set the matter for a full hearing.

19.07.03 As an aid to investigations authorized by the Commission, the Secretary-Chief Examiner (or hearing officer) may subpoena any documents that would be discoverable for purposes of hearing preparation and may take depositions of any person who may have relevant knowledge. Depositions so taken shall be kept as part of the records of the Commission.

19.07.04 The Commission may direct a hearing officer of its selection to carry out the proceedings, including the activities of the Secretary, under Rule 19.

19.09 APPEALS—INITIAL REVIEW. The Secretary-Chief Examiner shall review all appeals to determine whether the employee has timely filed an appeal and whether the action appealed is a final action. Upon a determination that the appeal is not timely, the Secretary-Chief Examiner shall issue a written order of dismissal with prejudice, setting forth the basis of the dismissal. In the case of an action that is not final, the appeal shall be stayed until such action becomes final. Such orders may be appealed to the Commission.

19.11 APPEALS—NOTICE OF HEARING. Upon receipt of a notice of appeal, the Commission staff shall forward a copy of the notice to other affected parties. As soon as possible thereafter, but in any event within ten (10) days, a scheduling/pre-hearing conference before the Commission shall be set, with each party to be afforded not fewer than ten (10) days' notice of such hearing. Subsequent hearings on the same appeal shall have at least one week's notice unless waived by the parties. All parties may agree to waive the notice provisions and time limits provided by this section. [In counties subject to Chapter 41.14 RCW, the hearing must be held within 30 days of Commission setting of the hearing date. RCW 41.14.120.]

19.13 APPEALS—AUTHORITY OF DEPARTMENT. The exercise of jurisdiction by the Commission over a matter does not preclude the party from withdrawing, modifying or otherwise compromising the matter prior to the matter going to hearing. Upon resolution of a matter prior to hearing, any party may request the dismissal of the matter. A stipulation signed by both parties should be submitted to the Commission prior to a dismissal.

19.15 SERVICE OF PROCESS—PAPERS.

19.15.01 The Commission staff shall cause to be served all orders, notices, and other papers issued by the Commission, together with any other papers

that the Commission is required by these rules to serve. Every other paper shall be served by the party filing the notice, document or paper.

19.15.02 All notices, documents or papers served by either the Commission or a party shall be served upon all counsel of record at the time of such filing and upon parties not represented by counsel. Service of papers shall be by personal service, by registered or certified mail, [electronic mail] or by regular mail with written acknowledgement of such mailing attached to the papers so served. Written acknowledgement shall be by affidavit of the person who mailed the papers or by certificate of any attorney or Secretary-Chief Examiner.

19.15.03 Service upon parties shall be regarded as complete when personal service has been accomplished or by mail (U.S. or inter-city), upon properly stamped and addressed deposit in the mail system.

19.15.04 Papers required to be filed with the Commission shall be deemed filed upon actual receipt of the papers by the Commission staff at the Commission office. All papers except the original appeal notice shall be served with the original and three copies. Briefs and memoranda must be filed with the Commission at least three (3) days prior to any hearing involving matters discussed in such brief or memoranda. Documentary evidence is not required to be filed but, rather, provided at the hearing.

19.15.05 An appellant or petitioner is responsible for notifying the Commission in writing of any change in mailing or street address and telephone number. Failure to so notify the Commission shall constitute a waiver of service and notice under these rules.

19.15.07 The Commission, its Secretary-Chief Examiner or hearing officer may direct that following initial process, service and filings shall be by email or other method.

19.17 DISCOVERY.

19.17.01 Parties to a proceeding are required to provide to each other reasonable access to and discovery of all relevant information concerning the matter before the Commission. Any questions concerning relevancy or access shall be resolved by order of the Secretary.

19.17.02 Upon the failure of any party to comply with an order of the Secretary compelling discovery, the Secretary shall schedule the matter before the Commission for review and determination of appropriate sanctions.

19.19 SUBPOENAS.

19.19.01 Every subpoena shall identify the Commission and the title of the proceedings, if any, and shall command the person to whom it is directed

to attend, at a specified time and place, and give testimony or produce designated books, documents, or things under that person's control.

19.19.02 Upon application of any party or representative, the Secretary shall issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of evidence in such proceeding. The party requesting the subpoena is responsible for having the subpoena properly served. Requests for subpoenas shall be submitted to the Commission offices at least three (3) days prior to the hearing.

19.19.03 Service of subpoena shall be made by serving a copy of the subpoena on the person named therein.

19.19.04 The person serving the subpoena shall make proof of service by filing the subpoena at the Commission office, and if such service has not been acknowledged by the witness, the person serving the subpoena shall make an affidavit of service. Failure to file proof of service does not affect the validity of service.

19.19.05 Upon a motion promptly made by a party or by the person to whom the subpoena is directed, and upon notice to the party on whose behalf the subpoena was issued, the Commission may:

(1) Quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or

(2) Condition denial of a motion to quash or modify upon just and reasonable conditions.

19.21 BURDEN OF PROOF. At any hearing on appeal from a demotion, suspension or termination, the disciplinary authority shall have the burden of showing by a preponderance of the evidence that its action was for cause. At any other hearing, the petitioner or appellant shall have the burden of proof by a preponderance of the evidence.

19.23 EVIDENCE.

19.23.01 Subject to other provisions of these rules, all competent and relevant evidence shall be admissible. In passing upon the admissibility of evidence, the Commission shall consider, but shall not be bound to follow, the rules of evidence (ER) governing civil proceedings in the superior courts of the State of Washington.

19.23.02 A witness in any hearing may be examined orally, under oath or affirmation and shall be subject to cross-examination by opposing parties and the Commission.

19.23.03 When objection is made to the admissibility of evidence, such evidence may be received subject to a later ruling. The Commission may exclude inadmissible evidence and may order cumulative evidence discontinued in its discretion, either with or without objection. A party objecting to the introduction or exclusion of evidence shall state the grounds of such objection at the time such evidence is offered or excluded. No such objection shall be deemed waived by further participation in the hearing.

19.23.04 At any hearing before the Commission when documentary exhibits are to be offered into evidence, copies shall be furnished to the opposing party, to each Commission member and to the Secretary-Chief Examiner.

19.23.05 Parties are encouraged to stipulate to the admissibility of documentary exhibits. To further this end, parties will make request of other parties for such stipulation no later than three (3) days in advance of the hearing, barring unusual circumstances. The party of whom the request is made shall respond no later than one (1) day prior to the hearing.

19.23.06 An employee has the right to appear before the Commission with or without counsel and to be heard in the employee's defense.

19.25 DELIBERATION. The Commission may deliberate in closed (executive) session when taking a disciplinary or other quasi-judicial case under advisement. Deliberations by the Commission shall otherwise be subject to Chapter 42.30 RCW. No person other than the Secretary-Chief Examiner and legal counsel to the Commission shall be present during deliberation. No person shall attempt to convey any information or opinion to the Commission concerning any matter on appeal, other than in open hearing.

19.27 DECISION. In any appeal, the Commission shall issue a decision, including findings of fact, conclusions of law, and an order, to each party or counsel of record for each party. [A decision shall be issued within _____ (___) days of the close of the hearing of an appeal or other proceeding heard only by the Commission. Absent the consent of an appellant to an extension of time, failure to issue a decision within the time prescribed shall result in an appeal being sustained.]

19.29 REMEDIES. The Commission may issue such remedial orders as deemed appropriate.

19.31 RECONSIDERATION. A party may move for reconsideration by the Commission only based on fraud, mistake, or misconception of facts. Such motion must be filed with the Commission within ten (10) days of the decision of the Commission, but a motion for reconsideration shall not extend the time for appealing the Commission's decision for which reconsideration sought. Such motion for reconsideration shall be decided on affidavits, absent special showing that testimony is necessary.

19.33 WAIVER. Upon stipulation of all parties to a proceeding, and upon a showing that the purposes of the rules or ordinances of the [City/County] would be better served, the Commission may waive the requirements of any of these rules.

COMMENTS TO RULE 19: HEARINGS

19.01 A. Probationary Employees. Probationary employees do not possess a property right of continued employment and thus may not maintain an action for lack of pretermination hearing under Section 1983 of the Civil Rights Act. *Samuels v. City of Lake Stevens*, 50 Wn. App. 475, 749 P.2d 187 (1988).

B. Volunteer Employees. A Volunteer Fire Chief is not entitled to a pretermination hearing. *Slaughter v. Snohomish County Fire Protection District No. 20*, 50 Wn. App. 733, 750 P.2d 656 (1988). The court found that the employee's job description, providing that one of the Chief's duties was to "promote, suspend, demote or discharge for due cause," was not a promise to the employee and that his employment was at will. The court also found that the District's decision to discharge the employee was not a violation of the Open Meetings Act, RCW 42.30.060. However, that statute subsequently was amended, and an employer therefore should be sensitive to the application of the open meetings law to a discharge determination.

19.01/19.03 The manner and time for filing of appeals is discussed in RCW 41.08.090, 41.12.090, and 41.14.120. In *Payne v. Mount*, 41 Wn. App. 627, 705 P.2d 297 (1985) the court held that the employee's failure to timely file an appeal with the Commission, and therefore failure to follow the administrative remedies provided by the Commission, precluded judicial review. The court rejected the claim that the employer was responsible to advise the employee of the 10-day time limit for appeal.

19.05 Rule 19.05 attempts to coordinate the administrative hearing process provided by Civil Service with arbitration. This provision must be subjected to scrutiny by individual jurisdictions. *See Kelso Civil Service Commission v. City of Kelso*, 137 Wn.2d 166, 969 P.2d 474 (1999).

Resort to Internal Remedies. Employees' claims must first be presented to the State Personnel Board, before action in a superior court. *Kringel v. DSHS*, 47 Wn. App. 51, 733 P.2d 592 (1987) (dismissing employee's claim to challenge the computation of certain employment benefits due on reinstatement).

19.11 RCW 41.14. 120 prescribes the time constraints for county sheriff civil service appeals (". . . the commission shall within ten days [of an appeal] set a date for a public hearing which will be held within thirty days from the date of receipt.")

19.21 This rule incorporates a common standard in the conduct of Civil Service hearings. Because discipline requires the demonstration of cause, it is the employer's burden to show that the action was taken in good faith for cause. In all other actions, the employee must come forward to demonstrate how

employment actions constituted a violation of the rules of the Civil Service System.

19.23 An employee is entitled to a full hearing before the governing personnel board. *See State ex rel. Perry v. City of Seattle*, 62 Wn.2d 891, 384 P.2d 874 (1963). At such a hearing:

> Competent, substantial evidence should be taken, establishing the violation of specific charges, which must not be frivolous, but support just cause for dismissal. However, the receipt of evidence by Civil Service Commission is not governed by the technical rules of evidence governing court proceedings. The Commission has discretion relative to the admission of evidence.

Kaplan, *The Law of Civil Service* (1958) at 233; *see also Porter v. Civil Service Commission*, 12 Wn. App. 767, 772, 776, 532 P.2d 296 (1975).

19.25 *See* Chapter 366, Laws of 1985, amending RCW 42.30.110, the executive session section of the Open Public Meetings Act concerning executive sessions. As a result of the amendment, deliberations of a Civil Service Commission are subject to the Open Public Meetings Act. Exceptions to the application of the Act are allowed for consideration of disciplinary proceedings, RCW 42.30.110, and that portion of the Commission's proceedings that are quasi-judicial, RCW 42.30.140. Because of the inconsistency in decisional law of the state concerning whether a Civil Service Commission proceeding is quasi-judicial in nature, legal counsel should be consulted before proceeding with an executive session on a matter other than a disciplinary appeal. *See State ex rel. Hood v. State Personnel Board*, 82 Wn.2d 396, 511 P.2d 52 (1973); and *Zoutendyk v. State Patrol*, 95 Wn.2d 693, 628 P.2d 1308 (1981).

19.27 RCW 41.14.120 requires that a county Commission render its decision on appeal within 10 days. Chapter 41.08 and 41.12 RCW do not contain the same provision. Rule 19.27 need not contain a specific time limit for city police and fire Civil Service Commissions, unless otherwise provided by local ordinances.

19.29 Commissions have broad remedial authority. A list of such authority would only result in a potential limitation on that authority. A reference to RCW 41.08.090, 41.12.090, and 41.14.120 can provide additional guidance.

The authority of a Commission is demonstrated by the decision in *Pool v. City of Omak*, 36 Wn. App. 844, 678 P.2d 343 (1984). In that case, Pool appealed the imposition of a five-day suspension and written reprimand to the Omak Civil Service Commission. The Commission, believing the Department's actions to be unduly light, demoted Pool to a probationary status for one year. The court rejected Pool's argument that the Commission had no authority to impose a harsher penalty than that given by the police chief. The Commission's imposition of a stricter penalty was not found to be arbitrary and capricious.

20. RETIREMENT AND DISABILITY.

20.01 RETIREMENT. Employees of the [City/County] who are members of pension fund systems as provided by law shall be retired on account of service or disability in accordance with provisions of law.

20.02 REINSTATEMENT AFTER DISABILITY RETIREMENT.

20.02.01 PROCEDURE. The Secretary shall review any report from a retirement system showing that a former employee who is on disability retirement has regained his health to the extent employable. Upon being satisfied that the employee is physically and mentally competent to perform the duties of the regular class, the Secretary shall:

(a) Order return of the employee to former employment status as if a leave of absence had been granted; or

(b) Place the name on the reinstatement register for an available class and department.

20.02.02 EFFECT. The name of an employee who is employable but not fully recovered shall be placed on the most advantageous reinstatement register for the same department, for an equivalent or lower class comprised of duties the employee is competent to perform, as determined by the Secretary. If such an employee's name is placed on a reinstatement register, service credit acquired before retirement shall be continued. The employee shall be reinstated from such register and transferred or reduced in grade according to rules. Eligibility rights shall not expire as prescribed in case of layoff. Any reinstatement in a class other than that in which last employed shall not result in a promotion.

20.02.03 DISCHARGE FOR CAUSE—EXCEPTION. The provisions of this rule shall not apply in the event an employee is discharged from the service, whether the employee receives a disability retirement.

COMMENTS TO RULE 20: RETIREMENT AND DISABILITY

20. GENERAL COMMENTS.

20.01 The Civil Service System does not incorporate provisions for retirement that are governed by local or state law. Rule 20.01 simply states this limitation. Rule 20.02 may be necessary for implementation in those jurisdictions in which a retirement system is established by municipal authority and when that system provides for re-employment benefits.

Unused Sick Leave as Wages. Cash-out of accumulated sick leave under a government "buy-back" program constitutes wages for purposes of applying RCW 49.48, the State Wages and Hours law. *Naches Valley School District v. Cruzen*, 54 Wn. App. 388, 775 P.2d 960 (1989). This means that a person who successfully sues for a sick leave cash-out may be awarded her attorney's fees, as is done for suit for wages or salary.

Mandatory Social Security. All public sector employees who are not members of a qualifying retirement system have mandatory social security coverage under the state PERS and LEOFF retirement systems.

Officers who have contributed both to LEOFF and the Police Relief Pension Fund are entitled to receive pension benefits from either system. *Fann v. Smith*, 62 Wn. App. 239, 814 P.2d 214 (1991).

20.02 Public safety employees subject to the LEOFF system, Chapter 41.26 RCW, have their reemployment rights granted by operation of law. For example, RCW 41.26.140 provides that upon determination that a disability beneficiary (employee) is no longer incapacitated:

> He shall be restored to duty in the same Civil Service rank, if any, held by the beneficiary at the time of his retirement, or if unable to perform the duties of said rank, then, at his request, in such other like or lesser rank as may be or become available, the duties of which he is then able to perform.

Rule 20.02a(l)(b) provides for the placement of an employee on a reinstatement register if the employee is not able to perform the duties of the rank from which he or she has retired.

In *Dean v. Metro (Seattle)*, 104 Wn.2d 627, 708 P.2d 393 (1985), the Court found a public employer's obligation to continually advise disabled former employees of job opportunities the former employee may be able to perform. The employer's duty of accommodation under the State Law against Discrimination goes beyond the job the employee is no longer able to perform, but extends to other positions of the employer. Maintenance of a disabled worker on a mailing list of employer job postings/announcements is one way to satisfy the employer's obligation under Dean.

21. MISCELLANEOUS.

21.01 REPEALS AND SAVINGS. All matters shall be subject to these rules, and to that extent, all previous Civil Service rules are hereby repealed.

21.03 COMPUTATION OF TIME.

21.03.01 In computing any period of time prescribed or allowed by these rules or by any applicable statute, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a [City/County] legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a [City/County] legal holiday. When the period of time prescribed or allowed is [ten (10)] [OPTION: five (5)] days or less, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

21.03.02 Any period of time except for the stated period of time set forth in Rules 19.03 and 19.11 [and 19.27 in Counties] may be extended by the Secretary-Chief Examiner for no more than fourteen (14) days upon written notice to the Commission and a showing of good cause. The motion for extension of time must be filed with the Commission offices prior to the end of the applicable time period.

21.03.03 The date of notice for purpose of these rules shall be the date on which notice of an action is posted in the Commission's office; (a) as provided in these Rules; (b) is mailed or (c) delivered personally to a party to a proceeding.

21.05 CIVIL SERVICE AND COLLECTIVE BARGAINING.

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW ("Act") provides for collective bargaining agreements between the [city/county] and the labor organization(s) representing employees. The Act, and collective bargaining agreements prevail over these rules in the event of conflict.

COMMENTS TO RULE 21: CIVIL SERVICE AND COLLECTIVE BARGAINING

21. GENERAL COMMENTS

Since 1967 the conflict between civil service and collective bargaining has been the basis for constant turmoil among employees, employee groups, city and county management, state administrative agencies and the courts. Three decades later the conflict has been resolved, with collective bargaining prevailing over civil service. A summary, and discussion of the outcome of this conflict follows.

In 1967, the Public Employees' Collective Bargaining Act (PECBA) was enacted. Chapter 41.56 RCW. An earlier version of the Act had been vetoed by Governor Dan Evans because there had not been a legislative reconciliation with existing civil service laws. The purpose of PECBA is set out in RCW 41.56.010:

> The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

The purpose of PECBA was implemented by requiring public employers and unions of public employees to engage in collective bargaining. In an effort to reconcile that bargaining obligation with civil service, the legislature provided:

> That nothing . . . shall require any public employer to bargain collectively with any bargaining representative concerning any matter which by ordinance, resolution or charter of said public employer has been delegated to any civil service commission or personnel board similar in scope, structure and authority to the board created by chapter 41.06 RCW.

RCW 41.56.100. Similarly, the definition of collective bargaining applied only to wages, hours and working conditions "peculiar to an appropriate bargaining unit." RCW 41.56.030(4). Public employers argued variously that civil service matters were not subject to the bargaining obligation or, because of their broad application, were not peculiar to any group of employees.

In 1980, a court determined that the City of Seattle's charter amendment and resulting uniform personnel (civil service) ordinance was not enacted in violation of PECBA. *City of Seattle v. Auto Sheet Metal Workers*, 27 Wn. App. 669, 620 P.2d 119 (1980), review denied, 95 Wn.2d 1010 (1981). Subsequent decisions of the courts have not supported civil service systems in the face of challenges by public employee unions.

In *Rose v. Erickson*, 106 Wn.2d 420, 721 P.2d 969 (1986), the Supreme Court was asked to decide whether the procedures set forth in Chapter 41.14 RCW,

Civil Service for County Sheriffs, pre-empt the grievance procedures set forth in a collective bargaining agreement.

A deputy sheriff, who had been disciplined by the Spokane County Sheriff's Office, sought to compel the sheriff to follow a grievance procedure established by collective bargaining. The sheriff refused to process the grievance filed by the employee. The sheriff took the position that, despite the collective bargaining agreement, the employee's exclusive right was under Chapter 41.14 RCW.

The Supreme Court rejected the sheriff's position, holding that the provisions of Chapter 41.56 RCW, the Public Employees' Collective Bargaining Act, prevail. The court found that the language of RCW 41.14.080 and RCW 41.56.905 was in conflict. The court further acknowledged that to give effect to the language of each statute would be to distort the other. The court concluded that in the event of conflict between the chapters, the PECBA must prevail over civil service.

During this period, the Public Employment Relations Commission (PERC) ruled regularly against cities and counties on this topic. *See*, *e.g.*, *City of Wenatchee*, PECB-2216 (1986); and *City of Bellevue*, PECB-3156 (1989).

The Washington Supreme Court ruled that in order for a city to be exempt from the requirement of bargaining over issues of wages, hours, or conditions of employment, a civil service commission must be similar in scope, structure and authority to the state personnel board. *City of Yakima v. Int'l Assoc. of Fire Fighters*, 117 Wn.2d 655, 818 P.2d 1076 (1991) (holding that Yakima's Commission is more limited that the State's personnel board, and that the city was required to bargain). The Court narrowly construed the exception to an employer's collective bargaining obligation.

In 1992 the Court ruled on the City of Pasco's argument that the police union's proposal for an optional grievance procedure was not a mandatory bargaining subject. *Pasco v. PERC*, 119 Wn.2d 504, 833 P.2d 381 (1992). Pasco argued that the matter was outside the scope of a mandatory bargaining obligation because the City's grievance process (civil service) was not unique to the police union. The Court agreed with PERC that PECBA must be given the broadest interpretation to support collective bargaining. *Seattle v. Auto Sheet Metal Workers* was overruled to the extent inconsistent with the Supreme Court ruling in Pasco.

Notwithstanding the apparent direction from the courts that collective bargaining prevails over civil service, the Spokane Civil Service Commission thought it could go a different direction. In *City of Spokane v. Spokane Civil Service Commission*, 98 Wn. App. 574, 989 P.2d 1245; rev. denied at 141 Wn.2d 1013 (2000), the court reviewed a process for a police sergeant promotional exam. For many years, the Commission had used a multi-choice exam to determine who should be promoted and made each promotion under the "Rule of One." In 1996, the City of Spokane and the Spokane Police Guild entered into a new collective

bargaining agreement. That agreement included a new procedure for promotions to the rank of sergeant.

> The City and the Guild agreed that an assessment center, a process to further evaluate candidates, should be used to supplement the Commission's testing procedure. The assessment center would evaluate the leadership and supervisory abilities of the top 12 scorers on the civil service exam and determine who was the best qualified patrolman for promotion.

City of Spokane v. Spokane Civil Service Commission, 98 Wn. App. at 577. The Commission elected not to recognize the City and Guild arrangement and chose to follow its traditional procedures. The City and Guild were then forced to sue the Commission. The court reviewed the extensive history of the cases leading to the conclusion that collective bargaining prevailed over civil service. It concluded that the purpose of the Public Employees' Collective Bargaining Act "is not served if the City complies with its obligation to collectively bargain, only to have the Civil Service Commission refuse to abide by the collective bargaining agreement." *Id.*, 98 Wn. App. at 584. The Commission was ordered to abide by the agreement regarding the sergeant promotional exam and process.

The result of these decisions, anticipated by most jurisdictions, will create more of a focus on collective bargaining and less on civil service. Commissions can expect that policies once developed in the public process of commission meetings and debate, will be presented as accomplished acts of the collective bargaining process. Eligibility standards (*e.g.*, time in-grade) for promotion are becoming a common bargaining topic. Similarly, alternative grievance procedures in collective bargaining agreements may reduce further the commission's work. It is not inconceivable, as has happened in some jurisdictions, that the commission's functions will be absorbed within the procedures dictated by a collectively bargained agreement. In such a circumstance, the commission must accept that the policies of merit, tenure, and independent system review are being carried forward by management and labor without commission involvement.

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