

**Hilo, Hawaii
Tuesday, January 15, 2008**

The regular meeting of the Merit Appeals Board, County of Hawai`i, was held in the conference room of the Department of Human Resources, 101 Pauahi Street, Suite 2, Hilo, Hawai`i, on Tuesday, January 15, 2008.

Present:

**Mr. G. Rick Robinson, Chair
Mr. Clifford Kaminaka, Vice Chair
Mr. Joel Cohen, Member
Mr. Michael R. Ben, Director of Personnel
Ms. Diane Noda, Deputy Corporation Counsel
Ms. Velma Y. Menezes, Secretary-Reporter
Ms. Yumi Nakamura, Clerk III**

Excused:

Ms. Kaliko Chun, Member

Absent:

Ms. JoAnne Balberde-Kamalii, Member

Chair Robinson called the meeting to order at 9:42 a.m.

MINUTES OF DECEMBER 18, 2007

MOTION: Vice Chair Kaminaka moved that the minutes of December 18, 2007 be approved as circulated. The motion was seconded by Mr. Cohen and unanimously carried.

NEW BUSINESS

A) Communication No. 07-22, received December 21, 2007, petition of appeal, from Brian F. Jordan, appealing the rejection of his application for Civil Defense Administrator by the Department of Human Resources, Recruitment and Examination Division.

The Board scheduled Mr. Jordan's appeal hearing for February 19, 2008, at the same time as his first appeal (Communication No. 07-19), as both matters were related. Ms. Noda had no objection to holding them simultaneously.

B) Elect Chair and Vice Chair for Calendar Year 2008

MOTION: Mr. Cohen moved to defer the matter until the new members are appointed to the Board. The motion was seconded by Vice Chair Kaminaka and unanimously carried.

DIRECTOR'S REPORT

Mr. Ben reported the following:

1) The department had its budget review. In the supplemental budget, Mr. Ben requested, as his number one priority, another professional position to help the department's EEO/AA person conduct investigations because when the EEO person has to do, it takes away from her other duties and responsibilities. It will also spill over to Labor Relations when certain kinds of investigations need to be done. The position will be a high-level investigator position at a salary of approximately \$60,000.

2) Mr. Ben met with one of the Council aides, as some Council members are showing an interest in supporting Police with its recruitment efforts by having a specific program offering incentives. Mr. Ben advised the aide of certain issues that could arise from such a program.

3) Mr. Ben presented Mr. Kaminaka with a certificate of appreciation from the Mayor.

NEXT MEETING DATE

The next meeting was scheduled for February 19, 2008 at 9:30 a.m., followed by Brian Jordan's appeal hearing at 10:00 a.m.

The meeting recessed at 10:00 a.m.

**Hilo, Hawaii
Tuesday, January 15, 2008**

APPEAL HEARING – RUSSELL C.H. LEE – WERE ANY CIVIL SERVICE LAWS, RULES, OR REGULATIONS VIOLATED WHEN THE HAWAII FIRE DEPARTMENT DENIED APPELLANT’S APPLICATION FOR THE FIRE CAPTAIN INTERNAL RECRUITMENT BECAUSE OF APPELLANT’S FAILURE TO MEET THE MINIMUM REQUIREMENT OF TWO YEARS AS FIRE EQUIPMENT OPERATOR?

Present:

**Mr. G. Rick Robinson, Chair
Mr. Clifford Kaminaka, Vice Chair
Mr. Joel Cohen, Member
Mr. Julian White, Deputy Attorney General
Ms. Yumi Nakamura, Clerk III
Ms. Velma Y. Menezes, Secretary-Reporter**

Others Present:

**Mr. Russell C.H. Lee, Appellant
Ms. Diane A. Noda, Deputy Corporation Counsel
Mr. Darryl J. Oliveira, Fire Chief
Ms. Gabriella Cabanas, Personnel Program Specialist**

Chair Robinson called the hearing to order at 10:11 a.m.

The following witnesses were sworn in and testified:

**Ms. Gabriella Cabanas
Mr. Darryl Oliveira**

The following exhibits were entered into the record:

**Appellant’s Exhibit A - Letter from John Whitman, FEO
Appellant’s Exhibit B - Personnel Order No. 2005-029**

- Employer's Exhibit 1 - Fire Department Internal Recruitment No. 07-06**
- Employer's Exhibit 2 - Fire Department Application Selection Procedures**
- Employer's Exhibit 3 - Candidate X's Application**

Ms. Noda stated that Mr. Lee sets forth two arguments in his appeal. One is that other applicants were granted a time extension; and the second is that other applicants who were away on military leave were given credit for their minimum years as a Fire Equipment Operator.

The County objected to his second argument regarding the military leave credit, as that would be an issue for Mr. Lee to address through his union and through the collective bargaining agreement and the grievance process.

Mr. Lee stated that he spoke with the union and was informed that they would not represent him in a promotional process. Mr. Lee was directed to file an appeal with the Merit Appeals Board. He did try to exhaust other avenues.

Mr. Lee stated the following in his opening statement:

He was unable to take the Fire Captain's exam given on October 31 because he did not have the two years of fire equipment experience.

He was promoted to a Fire Equipment Operator on February 16, 2005. On July 16, 2006, he laterally transferred to a Fire Inspector. Lateral transfers have the same pay rate; it's an SR-21, so a promotion was not involved and there was no loss of an SR-21 status either.

On March 1, 2007, Mr. Lee went back as a Fire Equipment Operator and as of present he is still a Fire Equipment Operator. His initial service was one year and five months; he went through 7-1/2 months as a Fire Inspector, and as of the deadline of the application on September 14, he had 6-1/2 months, so he was short

by two weeks, which is the reason he was given for not having the two years minimum qualification. He understands that point, but he has three reasons why he thinks he should be able to qualify.

The first reason is that an extension was granted to another applicant, John Whitman, until the second week of October; and if Mr. Lee was granted that same extension, he would have his two years at that time.

Secondly, the Honolulu Fire Department uses the SR-21 rating as an SR-21 rating regardless of what position a person is in. So laterally transferring over would still be an SR-21 and that would be two years of rating at an SR-21. Mr. Lee understands that it's a different department, but he believes this is the first time this issue has come up in this department. It hasn't been addressed before.

Lastly, exceptions have been granted for those employees who were in the military who did not have the actual two years as a Fire Equipment Operator. So exceptions can be done. He believes his 7-1/2 months as a Fire Inspector is worth two weeks, or probably more, of experience as a Fire Equipment Operator.

Ms. Noda stated the following in her opening statement:

One of the prerequisites for the Fire Captain position is two years experience as a Fire Equipment Operator. Unfortunately for Mr. Lee he had chosen to make a change within the department to an Inspector's position. He did not get credit for those months when he served as a Fire Inspector.

The other candidate, whom Ms. Noda will address as candidate X, was not granted an extension so that he could qualify. Candidate X's extension was just to renew his medical certification for CDL purposes and not so that he could accumulate time for seniority.

The other persons who were granted exceptions were serving in the military and were on military leave. Although Ms. Noda is objecting to that issue being raised at this point, the Uniform

Services Employment and Reemployment Rights Act, which is referred to as USERRA, says that a person who is on military leave and serving in the Armed Forces cannot be penalized for that service; therefore, they are given their seniority as if they were on the job.

The Fire Department, through their internal recruitment procedure and working in cooperation with the Department of Human Resources, did not violate any civil service laws, rules, or regulations.

In presenting his case, Mr. Lee testified on the exceptions made for John Whitman and those in the military and FRS David Minor's promotion to Fire Equipment Operator. Mr. Lee was cross-examined by Ms. Noda and questioned by the Board. Refer to recording for further testimony.

In presenting the Employer's case, Ms. Noda called upon Ms. Cabanas, who testified on the recruitment process for the Fire Captain position, candidate "X's" application, and the County's policy on applicants on military leave. Ms. Cabanas was cross-examined by Mr. Lee and questioned by the Board. Refer to recording for further testimony.

Ms. Noda called upon Fire Chief Darryl J. Oliveira who testified on candidate "X's" application process, the applicant selection procedures, and the process for applicants on military leave. Fire Chief Oliveira was cross-examined by Mr. Lee and questioned by the Board. Refer to recording for further testimony.

Mr. Lee stated the following in closing:

He believes the main issues have been brought up, addressed, and questioned. There is an overlap of duties that the Inspector does and that a Fire Equipment Operator would do; and 7-1/2 months as a Fire Inspector is worth two weeks as a Fire Equipment Operator. Ms. Lee thinks that should come into play.

Ms. Noda stated the following in closing:

The County of Hawai`i Department of Human Resources and the Hawai`i Fire Department did not violate any civil service rules, regulations, or procedures when it opened and closed the Fire Captain internal recruitment. All procedures were followed. Unfortunately for Mr. Lee the cut-off date is a firm cut-off date with no exceptions since there may be other people who are in similar circumstances as he is and may be just a day or two short of their minimum qualifications. However, for the alleged exceptions that Mr. Lee pointed out, there are provisions in the Fire Department procedure or federal law that provides for a candidate to supplement or provide for the verification of meeting minimum qualifications as in the case of the USERRA federal law regarding persons on military leave so that anyone serving in the Armed Forces and for our country is not penalized during their absence.

The Employer requests that Mr. Lee's appeal be denied.

In rebuttal, Mr. Lee stated that exceptions have been granted. The County admitted making one extension and an exception so with that being said they do have the power to grant exceptions.

The Board entered into deliberations.

Vice Chair Kaminaka stated that after hearing all the facts and testimony, he is going to recommend that Mr. Lee's appeal be denied because he finds no violations of civil service laws or rules.

Mr. Cohen stated that he previously worked in human resources and has worked with public safety including fire and the police department, so he knows how important promotional opportunities are in the Fire Department. However, in listening to the points Mr. Lee was trying to make, he too, cannot approve this appeal. It's been clear that the 7-1/2 months as a Fire Inspector is not equivalent to the Fire Equipment Operator and it would be a bad precedent to set exceptions whether it be one week or two weeks. The exceptions that were made were justified, and he thinks that to make exceptions, particularly when it's such a sensitive situation as promotional opportunities, would be a mistake.

Chair Robinson stated that he can understand why Mr. Lee filed his appeal. The two-week period was so close yet so far. He can understand Chief Oliveira's position about line and staff and can understand that there was an exception granted to candidate "X" for getting in his medical items. As for the others in the military, he understands the USERRA laws and the fact that they give people that latitude to re-enter without losing time for service. He has to agree that there were no violations of civil service laws.

MOTION: Mr. Kaminaka moved to deny Mr. Lee's appeal as there were no violations of civil service laws, rules, or regulations. The motion was seconded by Mr. Cohen and unanimously carried.

The hearing adjourned at 11:34 a.m.

**Hilo, Hawaii
Tuesday, January 15, 2008**

**APPEAL HEARING – HENRY G. SILVA – WERE ANY CIVIL
SERVICE LAWS, RULES, OR REGULATIONS VIOLATED IN THE
QUESTIONS ON THE FIRE CAPTAIN WRITTEN EXAM
ADMINISTERED ON OCTOBER 31, 2007?**

Present:

**Mr. G. Rick Robinson, Chair
Mr. Clifford Kaminaka, Vice Chair
Mr. Joel Cohen, Member
Mr. Julian White, Deputy Attorney General
Ms. Yumi Nakamura, Clerk III
Ms. Velma Y. Menezes, Secretary-Reporter**

Others Present:

**Mr. Henry G. Silva, Appellant
Ms. Diane A. Noda, Deputy Corporation Counsel
Mr. Darryl J. Oliveira, Fire Chief
Ms. Gabriella Cabanas, Personnel Program Specialist
Mr. Ty Medeiros, Fire Department and HFFA
Mr. Gerald Kosaki, Fire Department and HFFA**

Chair Robinson called the hearing to order at 1:07 p.m.

The following witnesses were sworn in and testified:

**Ms. Gabriella Cabanas
Mr. Darryl J. Oliveira**

The following exhibits were entered into the record:

**Employer's Exhibit 1 - Fire Captain Job Description
Employer's Exhibit 2 - Fire Department Application
Selection Procedures**

Employer's Exhibit 3 - Fire Chief's Memorandum No. 2006-022 (4-6-06)

Mr. Silva submitted an amendment to his appeal, which he stated would clarify #8 on his appeal form.

Mr. Silva thanked the Board for hearing his case and stated the following in his opening statement:

He will show today why the ten questions that he's contesting in this appeal should be removed from the Fire Captain's exam. He will present evidence that includes the memorandum sent by the Fire Chief, which clearly states that these questions should not have been included in this exam. The intent of the memoranda can be debated, yet this is not the case at hand. The case is that these ten questions, along with the answers to these ten questions, are not found in the books outlined in the Chief's memo for the testing material.

In proving his case, Mr. Silva requests that these ten questions be omitted from the exam.

Ms. Noda stated the following in her opening statement:

Both the Fire Department and the Department of Human Resources in developing the written examination and executing it with the Fire Captain applicants did not violate any civil service rules, procedures, or policies.

There will be testimony from the County's witnesses that the job and duties of a Fire Captain does indeed include report writing and letter writing; and basic ability in grammar, punctuation, and sentence construction is required as part of that job.

The Fire Chief had issued in 2006 and 2007 a memo listing the books that are in the core library of the department, and those books were available to anyone who wished to use them as study guides. Some of the books in the core library do actually refer to

English grammar and report writing, which will be presented to the Board as part of their evidence.

In presenting his case, Mr. Silva testified on the contents of the Fire Chief's memos as it related to the books in the core library and the questions on the Fire Captain's exam. Mr. Silva was cross-examined by Ms. Noda and questioned by the Board. Refer to recording for further testimony.

In presenting the County's case, Ms. Noda called upon Ms. Cabanas, who testified on the test development process for the Fire Captain written exam and the development of the position description. Ms. Cabanas was cross-examined by Mr. Silva and questioned by the Board.

A recess was called at 1:45 p.m. to allow Ms. Noda time to consult with her client. The hearing reconvened at 1:55 p.m. with the continuation of the Board's questions to Ms. Cabanas. Refer to recording for further proceedings.

Ms. Noda called upon Chief Oliveira, who testified on the position description for Fire Captain, the Fire Department's applicant selection procedures, the memoranda issued on materials in the core library, and the questions in the exam. Chief Oliveira was cross-examined by Mr. Silva and questioned by the Board. Refer to recording for further proceedings.

In closing, Mr. Silva stated the following:

He presented evidence today by way of memo sent by the Fire Chief that clearly outlines where the exam questions would only be derived from. However, this was not the case. There were ten questions in the Fire Captain's exam that were not found in the core library.

The County did argue a number of points, such as ability, intent of the memos, and even materials that should have been studied, as well as training; yet, according to the evidence, this is not the case at hand.

Mr. Silva's original remedy to the appeal request was that these ten questions be removed. The reason that he submitted the amendment was due to the fact that rescoring the exam would jeopardize others that may have already passed this exam.

Mr. Silva thanked the Board, the Fire Chief, Ms. Cabanas, and Ms. Noda for giving him the opportunity to present his case. He stated that he hopes the Board will consider the evidence that he has presented when making its decision.

Ms. Noda stated the following in closing:

The County has not violated any civil service laws, rules, regulations, or procedures in the administration of the written exam for this Fire Captain position.

Exhibit 1, which is the job description for Fire Captain, sets forth in numerous places, although she did only point out one, that clear and concise English language, communication, and use of grammar is an important function. Both witnesses did testify to that. The application selection procedure for the Fire Department does set forth that the Fire Department can indeed request that the Human Resources department administer the written test. Ms. Cabanas explained the procedure that they go through for the written test, so no procedure or regulation or rule has been violated.

Chief Oliveira explained that this current Fire administration has taken steps to improve the written test procedures and consistency so that it is a fair and even playing field for all the applicants and has even provided all the core library materials to the stations. To this administration's credit, he also did yet again, twice in 2006 and then again in 2007, send out a memo to remind all Fire personnel that there is this library for their use and for their advantage in taking the written exam.

While the wording of the most recent 2007 memo may be subject to several different interpretations, nowhere does it say, or should it be expected, that every single answer for every single question on any written exam can be found in those books. Some

things need to be inferred; some things need to be concluded. There were at least two books in the core library that did address the requirement for English usage and grammar.

The County requests that Mr. Silva's appeal be denied.

MOTION: Mr. Kaminaka moved to convene into an executive session to consult with counsel. The motion was seconded by Mr. Cohen and unanimously carried.

The Board convened into an executive session at 2:35 p.m. and reconvened into the hearing at 2:46 p.m.

The Board entered into deliberations.

Mr. Cohen commented that he knows that promotions within the Fire Department are extremely important, and they have people that have been working a long time, who are very dedicated people and are certainly appreciated by the community. In looking at it from a personnel standpoint and how things were handled, he thinks the most important piece of paper is the job specifications which really outlines just the job. What they heard in testimony was that the core of the written examination is a valid examination that reflects the responsibilities that are outlined in the job description. In fact, it's massaged by technical experts, not to write the questions but basically to have some input, which is proper to do a quality job in the examination process.

There are ten questions that are in question that apparently are found in some of those books or at least one of those books, so there is some information there. The bottom line is that he doesn't see any violation of rules or laws. He thinks the County has put together an examination that is fair and reflects the classification.

Vice Chair Kaminaka agreed that he too sees no civil service laws, rules, or regulations that were violated. Perhaps Mr. Silva was caught off guard thinking there were going to be only technical questions, but holding a position of Captain requires assuming some administrative type responsibilities; and it's

critical to be prepared to do those things which is probably why those questions were incorporated in the test.

Vice Chair Kaminaka commended the Fire Chief for the spirit behind the memos, as it was apparent that he was trying to do his very best in getting all of the applicants prepared on a level field. The process, to Vice Chair Kaminaka sounds very fair, and everybody should play by the same rules. He feels Mr. Silva's frustration, but at the same time he cannot see any civil laws or regulations being violated.

Chair Robinson stated that he shares that view as well.

MOTION: Mr. Cohen moved that Mr. Silva's appeal be denied as there were no violations of civil service laws, rules, or regulations. The motion was seconded by Vice Chair Kaminaka and unanimously carried.

ADJOURNMENT

The meeting adjourned at 2:51 p.m.

Respectfully submitted,

Secretary, Civil Service Commission

APPROVED:

**G. Rick Robinson
Chair**

vym