STEVEN ACHORD, ET AL.	*	**NO. 2018-CA-0635**
VERSUS	*	**COURT OF APPEAL**
DEPARTMENT OF FIRE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CITY CIVIL SERVICE COMMISSION ORLEANS
NO. 8593 C\W 8602-8628, 8630-8643, 8646-8648, 8655

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JUDGE SANDRA CABRINA JENKINS

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(Court composed of Judge Roland L. Belsome,
Judge Sandra Cabrina Jenkins, Judge Paula A. Brown)

BELSOME, J., CONCURS WITH REASONS

Louis L. Robein, III
Christina L. Carroll
ROBEIN URANN SPENCER PICARD & CANGEMI, APLC
2540 Severn Avenue, Suite 400
Metairie, LA 70002

COUNSEL FOR PLAINTIFFS/APPELLANTS

Cherrell S. Taplin, Senior Deputy City Attorney
Sunni LeBeouf, City Attorney
Elizabeth S. Robins, Deputy City Attorney
William Goforth, Assistant City Attorney
1300 Perdido Street
City Hall - Suite 5E03
New Orleans, LA 70112

COUNSEL FOR DEFENDANT/APPELLEE

**AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED WITH INSTRUCTIONS**

DECEMBER 27, 2018

This expedited appeal arises from protests filed with the Civil Service Department by 47 New Orleans firefighters ("Firefighters") who were denied promotion to the position of fire captain by the superintendent of the New Orleans Fire Department ("NOFD"), Timothy McConnell ("Supt. McConnell"). The Firefighters appeal the New Orleans Civil Service Commission's (the "Commission") May 24, 2018 "Investigatory Findings and Order," which found that the NOFD's promotional scheme violated the Louisiana Constitution, yet declared that it had no power to remedy this violation by ordering the NOFD to promote the qualified Firefighters who were passed over for promotion. For the reasons that follow, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

In 2014, the Commission voted to adopt a package of rule amendments submitted by the City of New Orleans ("City") under its "Great Place to Work Initiative" ("GPTWI"). One of the goals of GPTWI was to "eliminate the falsely objective rankings based on exams" and "allow managers to interview all the Civil

Service Department certified eligible candidates and hire the best qualified one." An important part of the GPTWI was amendments to Civil Service Rule VI, which governs the hiring and promotion process.

On April 20, 2016, the Civil Service Department sent Supt. McConnell a final ranked list of eligible candidates for the position of fire captain. On July 26, 2016, Supt. McConnell approved new promotional procedures for the fire captain position ("ADM-27"). ADM-27 identified 15 factors that would guide the NOFD's promotional decisions, and called for a promotional committee to interview candidates.

In late September and early October 2016, Supt. McConnell promoted 41 NOFD employees to fill vacancies for the position of fire captain. Thereafter, the Firefighters who were passed over for promotion filed protests with the Civil Service Department, alleging that they were improperly denied promotions because Supt. McConnell's appointments were based on political favoritism rather than merit, in violation of La. Const. art. X, § 7.

Hearing Examiner Jay Ginsberg held a four-day evidentiary hearing on the protests, and then issued a report concluding that the NOFD had complied with Civil Service rules in the promotion process. Thereafter, Civil Service Personnel Director Lisa Hudson, under her investigative authority,[1] reviewed the Hearing Examiner's report, the employees' appeal forms, the Commission's rules, the Louisiana Constitution, hearing transcripts, hearing exhibits, and the attorneys'

[1] *See* La. R.S. 33:2399(A)(5).

post-hearing briefs. On November 30, 2017, the Personnel Director issued a 36-page report in which she identified 15 protesters who were improperly denied promotions because the NOFD selected candidates for promotion using a procedure that was not merit-based, in violation of Civil Service rules and the Louisiana Constitution. In her November 30, 2017 Order, the Personnel Director ordered the 15 protesters promoted to fire captain retroactive to September 2016. She concluded that the remaining 32 protesters were not entitled to a promotion. The Personnel Director also found that those firefighters who were unconstitutionally promoted to fire captain should remain in their positions.

On December 14, 2017, the NOFD filed a "Notice of Appeal" of the Personnel Director's decision, asking the Commission to investigate the protests and review the Personnel Director's report. On December 15, 2017, the Firefighters filed a Motion to Dismiss the NOFD's Notice of Appeal on the grounds that Civil Service Rule VI, Section 6.1 does not authorize the NOFD to appeal the Personnel Director's decision. The NOFD filed an opposition to the Motion to Dismiss in which it argued that it was not seeking to appeal under Rule VI, Section 6.1, but that it was invoking the Commission's broad constitutional mandate under La. Const. art. X, § 10(B) to investigate any violations of Commission rules and Article X of the Constitution.

On May 24, 2018, the Commission released its "Investigatory Findings and Order," in which it found that the protesters established a *prima facie* case that the

NOFD's promotional decisions were not merit-based or competitive, in violation of La. Const. art. X, § 7, which provides as follows:

> Permanent appointments and promotions in the classified state and city service shall be made only after certification by the appropriate department of civil service under a general system based upon merit, efficiency, fitness, and length of service, as ascertained by examination which, so far as practical, shall be competitive.

The Commission, however, also concluded that it did not have the authority to order the NOFD to make these promotions, stating that its power was limited to ensuring that when the NOFD does make a promotion, it does so in a manner consistent with the Civil Service rules and Article X of the Constitution. The Firefighters filed a timely Notice of Appeal to this Court, which the Commission granted.

DISCUSSION

Standard of Review

A commission's factual findings in a civil service case are governed by the manifest error or clearly erroneous standard. *Russell v. Mosquito Control Bd.*, 06-0346, p. 7 (La. App. 4 Cir. 9/27/06), 941 So.2d 634, 639 (citing *Banks v. New Orleans Police Dept.*, 01-0859, p. 3 (La. App. 4 Cir. 9/25/02), 829 So.2d 511, 513-14). This Court also accords great deference to mixed questions of fact and law under the manifest error standard of review. *Id*. When the Commission's decision involves legal issues such as jurisdiction, procedure, and interpretation of laws or regulations, "appellate courts give no special weight to the findings of the trial

court, but exercise their constitutional duty to review questions of law and render judgment on the record." *Id*.

Assignments of Error

The Firefighters list three assignments of error:

- The Commission failed to enforce the decision of the Personnel Director, as required by its own rules.
- The Commission's failure to remedy the NOFD's constitutional violations is arbitrary and capricious.
- The Commission's failure to remedy the NOFD's non-merit based promotion decisions results in a violation of substantive due process.

The Commission Violated Its Own Rules.

The Firefighters contend that the Commission erred by considering the NOFD's appeal of the Personnel Director's decision, in violation of Rule VI, Section 6.1 of the Civil Service Rules. According to the Firefighters, in Section 6.1, the Commission delegated investigation and decision-making authority solely to the Personnel Director, so that the Commission lacked jurisdiction.

The Commission's broad rule-making powers are granted by the Louisiana Constitution:

> Each commission is vested with broad and general rulemaking and subpoena powers for the administration and regulation of the classified service, including the power to adopt rules for regulating employment, promotion, demotion, suspension, reduction in pay, removal, certification, qualifications, political activities, employment conditions, compensation and disbursements to employees, and other personnel matters and transactions; to adopt a uniform . . . classification plan; . . . and generally to accomplish the objectives and purposes of the merit system of civil service as herein established. . . .

La. Const. art. X, § 10(A)(1).

Pursuant to its rule-making authority over promotions, in 2014, the Commission amended Rule VI, Section 6.1 of the Civil Service Rules to give the Personnel Director the authority to specially hear and decide protests over improper denials of promotions:

> 6.1 If any qualified candidate or employee, whose name appears on a verified appointment or promotional list, believes that his appointment, allocation or promotion has been improperly denied, he may protest the denial of such by presenting such forms or documents as the Director may prescribe. The Director, or any person designated by him, may hold special hearings to determine the facts of each case and the Director shall make his decision on the basis of the written statements and forms presented by the employee and on the facts brought out in the hearing. **The *employee* shall have the right to appeal to the Commission if dissatisfied with the action of the Director.** (Emphasis added.)

The Firefighters argue that because only employees have the right to appeal promotion decisions, Section 6.1 does not authorize the NOFD to appeal the Personnel Director's action to the Commission.

The NOFD concedes that Section 6.1 does not authorize the NOFD to appeal the Personnel Director's decision.[2] The NOFD points out, however, that La. Const. art. X, § 10(B) grants the Commission the discretionary power to "investigate violations [of Article X] and the rules, statutes, or ordinances adopted pursuant hereto." According to the NOFD, the Commission properly exercised its constitutional authority to investigate the Firefighters' protests that the NOFD's promotions were not merit-based and competitive, as required by La. Const. art. X, § 7. We agree. Although the NOFD filed a self-styled "Notice of Appeal" from

[2] La. Const. art. X, § 8 and art. X, § 12 set forth the full extent of the Commission's power to hear appeals. These provisions do not authorize the Commission to hear appeals challenging promotional decisions unless the appellant has alleged discrimination based on the appellant's political or religious beliefs, sex, or race.

the Personnel Director's decision, it expressly invoked the Commission's investigatory authority conferred on it by La. Const. art. X, § 10(B). In this matter, the Personnel Director issued an explicit finding that the NOFD applied Civil Service Rules in an unconstitutional manner. We agree with the Commission that such a finding may have wide-ranging implications and appointments across the City's Civil Service System. As a result, we affirm that part of the Commission's May 24, 2018 Order concluding that it was properly exercising its investigatory authority into alleged violations of the Louisiana Constitution.

The Commission's Failure to Provide a Remedy Is Arbitrary and Capricious.

The Firefighters contend that even though both the Personnel Director and the Commission determined that Supt. McConnell's promotional decisions were not competitive or merit-based, the Commission refused to provide a remedy to the candidates who should have been promoted, thereby failing to exercise its constitutional duty of ensuring merit-based promotions. According to the Firefighters, the Commission's failure to order the NOFD to promote the qualified applicants who were denied promotion in violation of La. Const. art. X, § 7 was arbitrary and capricious.

The NOFD argues that "the Commission does not have the authority to compel the appointing authority to make a specific promotion." According to the NOFD, the Commission's power is limited to ensuring that when an appointing authority does make a promotion, it does so in a manner that is consistent with the Rules and Article X of the Louisiana Constitution.

"[W]hen reviewing procedural decisions and questions of law, which fall within the Court's traditional plenary function," such as here, a court of appeal is not limited to arbitrary and capricious standards. *Orazio v. City of New Orleans*, 12-0423, p. 3 (La. App. 4 Cir. 1/16/13), 108 So.3d 284, 287. We must decide, therefore, without giving any special weight to the findings of the Commission, whether it erred in concluding that it had no authority to order the NOFD to make promotions to fire captain in order to remedy its violations of the Constitution's requirement of merit-based promotions.

First, we will examine the objectives and functions of the civil service system. One of its objectives is to "select and promote public employees competitively on the basis of merit, fitness and qualifications." *New Orleans Firefighters Ass'n Local 632, AFL-CIO v. City of New Orleans*, 590 So.2d 1172, 1174-75 (La. App. 4th Cir. 1991). "[T]he primary function of state and city civil service commissions in Louisiana is to 'see to it that the rank and file of state and city employees are selected competitively on the basis of merit, free from political influence.'" *Id.* at 1175 (quoting 3 *Projet of a Constitution for the State of Louisiana* 501 (1954)). Under the Constitution, the Commission is vested with "broad powers" for the administration and regulation of the classified service to generally "accomplish the objectives and purposes of the merit system of civil service." La. Const. art. X, § 10(A)(1). "Thus, a city civil service commission has the exclusive power to adopt rules regulating the classified service in the areas specifically enumerated in Section 10(A)(1), and the city governing authority

cannot constitutionally infringe on the commission's exercise of this power." *New Orleans Firefighters*, 590 So.2d at 1175. This Court has declared that the drafters of La. Const. art. X, § 10(A)(1) intended that it "should be construed liberally in favor of fulfilling the goals of civil service." *Id.*

Here, the Commission found that the NOFD applied the Commission's promotional rules in an unconstitutional manner, which undermined the efficacy and integrity of the merit-based system. Civil service rules are intended to protect public employees rather than to deprive them of rights. *Cummings v. Harahan Mun. Fire & Police Civil Serv. Bd.*, 590 So.2d 1359, 1363 (La. App. 5th Cir. 1991). Accordingly, we find that the Commission's broad powers extend to those necessary to effectuate the important objectives of safeguarding merit selection and promotion, and protecting public employees from political influence. The power of the Commission to promote firefighters who were otherwise qualified for the position of fire captain, but who were unconstitutionally denied promotions for non-merit-based reasons, is essential to the competitive selection and promotion of public employees on the basis of merit, fitness and qualifications.

The NOFD relies on the Commission's May 24, 2018 Investigatory Findings and Order, in which it stated that the "Personnel Director's suggestion that the Commission mandate the promotion of numerous employees to Fire Captain is an untenable one" because "appointing authorities have no 'mandatory duty to promote,'" citing *Blake v. Giarrusso*, 263 So.2d 392 (La. App. 4th Cir. 1972). *Blake* is distinguishable. *Blake* did not involve a finding that the appointing authority unconstitutionally denied promotions. The *Blake* Court merely held that

the superintendent of police had discretion in determining whether to fill vacancies, and that lieutenants who were on the eligibility list could not compel the superintendent promote them. *Id*. at 394 (citing *Sewell v. New Orleans Police Dept*., 221 So.2d 621 (La. 4th Cir. 1969)).

The NOFD and the Commission also rely on *In the Matter of Bua v. Dept. of Police*, 04-0564 (La. App. 4 Cir. 2/2/05), 894 So.2d 1214; and *Lechler v. City Civil Serv. Comm'm for the Parish of Orleans*, 357 So.2d 41 (La. App. 4th Cir. 1978). In *Bua*, the civil service commission found that the NOPD violated civil service rules by requiring police sergeants to perform the duties of lieutenants without receiving additional compensation. Although the commission granted the sergeants back pay, it decided that it could not order the NOPD to promote the sergeants to lieutenant because the eligibility list had expired. *Bua*, 04-0564, p. 13, 894 So.2d at 1221. According to this Court, because the eligibility list was out-dated, "[o]rdering the NOPD to make such promotions now, even retroactively, would be nonsensical and virtually impossible to implement." *Id*. Implicit in *Bua* is the Court's acknowledgement that, if the eligibility list had not been expired -- so that the promotions would be possible to implement -- the Commission could have invoked its authority to order the promotion of firefighters who were unconstitutionally denied a promotion. *See also Scott v. Dept. of Civil Serv*., 93-1839 (La. App. 4 Cir. 5/17/94), 637 So.2d 1166, 1168 (expiration of promotion list during pendency of proceedings before civil service commission rendered administrative challenge to police promotion decision based on list moot, where no injunctive relief had been sought to prevent list's expiration).

Likewise, in *Lechler*, although the police superintendent illegally promoted patrolmen to the rank of sergeant, the Court found that it could not afford an

"adequate remedy" to the plaintiffs who were passed over for promotion because it was "powerless to revive the promotion list which expired over two years ago." *Lechler*, 357 So.2d at 44.

The NOFD does not dispute that the promotion list is currently in effect.[3] Unlike *Bua*, *Lechler*, and *Scott*, there is no impediment to the Commission's authority to order the NOFD to promote those firefighters on the list who were qualified but were unconstitutionally denied promotion to fire captain. Accordingly, we reverse that part of the Commission's May 24, 2018 Order denying a remedy to the qualified protesters. We instruct the Commission to order the NOFD to promote those qualified applicants for fire captain who were passed over for promotion for non-merit-based reasons, in violation of La. Const. art. X, § 7.

The Commission's Failure to Provide a Remedy Violates Due Process

Because we find that the Commission erred in concluding that it had no authority to provide a remedy for those firefighters who were unlawfully passed over for promotion, we pretermit discussion of the Firefighters' contention that the Commission's failure to provide a remedy violates due process.

CONCLUSION

For the foregoing reasons, we affirm that part of the Commission's May 24, 2018 Order finding that it properly exercised its constitutional authority to investigate the Firefighters' protests that the NOFD's promotions were not merit-based and competitive, as required by La. Const. art. X, § 7. We reverse that part

[3] Under Commission Rule V, Section 5.2, "[t]he Personnel Director shall determine at the time any promotion list or employment list is established, the period during which the list shall remain in force, which shall not be less than three months nor more than three years at the discretion of the Personnel Director, in cooperation with the affected appointing authorities."

of the Commission's May 24, 2018 Order finding that it did not have the authority to order the NOFD to promote qualified firefighters to the position of fire captain after they were denied promotion in violation of the Louisiana Constitution. We remand this matter with the instruction that the Commission remedy the constitutional violations by ordering the promotion of the qualified applicants in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS