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Promotional Rights and Procedures Part One: Vacancies

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This is the first of a four-part article on the law of promotions in public safety agencies.

❖ Introduction

[Intermediate ranks](#) between entry-level employees and the police or fire chief (or sheriff) can be established by one or more methods:

1. A state statute
 2. A local ordinance;
 3. A rule or regulation of a Civil Service Board or Commission;
 4. A budget appropriation;
 5. An agency’s Table of Organization;
 6. A Bargaining Agreement or Memorandum of Understanding; and/or
 7. A [recognized past practice](#).
- In the case of sheriffs where the office is enshrined in the state constitution, there may be fewer impediments to the creation or abandonment of intermediate ranks, or to a decision to enlarge or reduce the number of deputies holding various ranks.

Typically, public safety agencies in the United States have emulated military ranks, but without the multiple gradations in rank associated with the military (seven grades of sergeant, two grades of lieutenant, and five grades of warrant officers).

Many fire departments have opted for different ranks, such as lieutenant, captain and battalion chief, which have status and pay-grade equivalents to sergeant, lieutenant and captain in police departments.

❖ **Components of the promotional process**

Whether established by law or regulation, promotional procedures should be transparent. For example, Illinois enacted a [Fire Department Promotion Act](#) in 2003. [1] It established comprehensive promotional procedures with the following attributes:

1. Each component of the promotional test shall be scored on a scale of 100 points. The component scores shall then be reduced by the weighting factor assigned to the component on the test and the scores of all components shall be added to produce a total score based on a scale of 100 points. [50 ILCS 742/5]
2. The appointing authority must administer a promotion process in accordance with the Promotion Act, including minimum eligibility requirements, publication of every component of the testing and evaluation procedures, and the appointing authority will provide a separate promotional examination for each rank filled by promotion [50 ILCS 742/15];
3. Management must list the factors to determine a person's position on the preliminary promotion list [50 ILCS 742/20];
4. All aspects of the promotion process must be monitored by two impartial persons appointed by the exclusive bargaining agent and may be monitored by two impartial persons selected by the appointing authority [50 ILCS 742/25];
5. The weight given to any component in a test is set at the discretion of management, provided that the weight is subject to modification by the terms of any collective-bargaining agreement in effect; however, the provisions of this section do not apply if inconsistent with a provision in a collective-bargaining agreement [50 ILCS 742/30];

6. The material in a written examination must be pertinent to the rank for which the examination is given and each employer must maintain reading and study materials for its current written examination and the reading list of the last two written examinations [50 ILCS 742/35];
7. Seniority points may be based only on service in the affected department as of the date of the written examination and the seniority list shall be posted before the written examination is given and before the preliminary promotion list is compiled; the weight of seniority.

In public safety agencies, promotional procedures for first-level supervisors typically provide for a written exam, an oral exam, and credits for seniority. For the higher ranks, management often uses an assessment center approach. [1] A psychological fitness evaluation is sometimes required, along with a review of credit ratings.

❖ Promotions as a “property right”

Generally speaking, the courts are not the proper forum to review managerial decisions. As noted in a case involving an FBI employee who was denied a promotion, management may not have acted with complete propriety, but the Constitution does not require a public employer to act correctly, fairly or reasonably. “Not every error, mistake, perceived unfairness or slight made by a public employer rises to the level of a constitutional case meriting judicial review by a federal court.” *Tao v. Sessions*, 808 F.Supp. 24 (D.D.C. 1992); rev’d other grounds, 27 F.3d 635 (D.C. Cir. 1994).

Similarly, a federal court in New Jersey rejected a police captain’s civil rights suit complaining that the chief appointed as his deputy, another captain who was a close friend — alleging personal favoritism and nepotism. The court said the plaintiff’s success on a promotional exam did not entitle him to be appointed deputy chief because he lacked a legally-cognizable property right to be promoted. *Pollock v. Ocean City*, 968 F.Supp. 187 (D.N.J. 1997).

The Ninth Circuit refused to recognize a legally-enforceable “property right” to a promotion. LAPD sergeants who were passed over in favor of candidates with little or no supervisory experience lacked redress. [*Nunez v. Los Angeles*](#), #97-55139, 147 F.3d 867, 1998 U.S. App. Lexis 11720 (9th Cir.).

❖ Duty to fill vacancies

Unions and persons who score high on an eligibility list sometimes challenge a failure to fill a vacancy in state court. State judges resist forcing department heads to make promotions. Federal courts offer fewer opportunities for promotional candidates.

The Seventh Circuit has held that if no employee is promoted during the relevant time period, a failure-to-promote claim must fail because the claimant cannot argue that he was treated differently than anyone else.

The panel wrote that “the police chief is free to eliminate a position instead of promoting an officer into it; he had done just that a few months earlier in order to redistribute departmental funding.” [Jones v. City of Springfield](#), #08-2085, 554 F.3d 669, 2009 U.S. App. Lexis 1874 (7th Cir. 2009) affirming 540 F.Supp.2d 1023 (C.D. Ill. 2008).

In some states, an aggrieved party can bring an action in [Mandamus](#), to force management to fill vacancies. However, courts are reluctant to order management to fill vacancies in superior ranks. As explained by the a Missouri appellate court:

“A court may issue the extraordinary relief of mandamus to compel the performance of a ministerial duty but not to compel the performance of a discretionary duty.

“A ministerial act is an act that the law directs the official to perform upon a given set of facts, independent of what the officer may think of the propriety or impropriety of doing the act in a particular case. A discretionary act is one requiring the exercise of reason in determining how or whether the act should be done.”

The panel found that a fire chief had the discretion whether or not to make promotions to vacant command positions. The panel stated:

“It promotes economy and effectiveness in the personnel services rendered to the City by allowing appointing authorities to decide whether filling available positions would be in the best interest of the department and the City.”

[State ex rel. Killingsworth v. George](#), #ED85262, 168 S.W.3d 621, 2005 Mo. App. Lexis 831; review denied, 2005 Mo. Lexis 316.

It is another matter when the mayor or manager orders a department head to fill vacancies

from an eligibility list, but the chief declines to do so.

A black fire chief in St. Louis was ordered by the mayor to fill 28 vacancies; there had been no promotions in the fire dept. for the last five years. The public safety director warned the fire chief that he would be demoted if he failed to comply.

The chief refused to fill the vacancies and was demoted. He then resigned and filed an appeal, claiming racial bias. The Civil Service Commission rejected his appeal, and a three-judge appellate court confirmed the demotion, writing:

“Appellant refused to promote based on his own belief that the test was flawed. But the charter’s framework for hiring and promotions gives no weight to an appointing authority’s personal opinion of the eligibility test. ...

“Appellant thus had no legitimate legal or managerial reason to refuse to carry out the director’s order to promote from the list of candidates who passed that test.”

The panel found that the city had a legitimate, non-discriminatory reason to take disciplinary action:

“The record contains sufficient competent evidence from which the Commission could have found that Appellant was demoted for defying orders and was not constructively discharged.”

[George v. Civil Service Cmsn. of St. Louis](#), #ED93873, 2010 Mo. App. Lexis 915, 109 FEP Cases (BNA) 1435. Following the chief’s demotion and retirement, the challenged examination was upheld by a federal district court and an appeals panel. [2]

The discretion of whether to fill vacancies, using the results of an exam challenged as biased, was a decision for the mayor and not the fire chief.

❖ **Temporary, provisional or acting promotions**

Rather than seeking a judicial order to compel promotions, various New York City Fire Dept. captains sought to end the a practice of assigning captains for long periods of time to duty as battalion chiefs without appointments as battalion chiefs and without the salary for the higher grade.

The trial court entered an order, enjoining the commissioner from assigning captains as

battalion chiefs for extended, non-emergency periods. The state's highest court affirmed, 6-to-0. [O'Reilly v. Grumet](#), 308 N.Y. 351, 126 N.E.2d 275 (1955).

Thirty years later, an appellate panel addressed a similar problem. The Fire Commissioner did not fill the position of Chief of the Department under the civil service system. Instead, he elevated a Deputy Chief as Acting Chief, without resort to competitive selection. The appellate panel wrote:

“The movement of a Fire Department employee to the post of Chief of the Department is obviously a promotion, since it is evident that the latter position involves not only an increase in salary but a significant advance in professional responsibility and prestige. ...

“Respondents would have thereby transformed a permanent civil service position into provisional employment, enabling the Fire Commissioner to do legitimately that which the law has heretofore precluded.

“Respondents may not circumvent the legal imperatives merely by endeavoring to abolish a title and designate an employee in a subordinate position to perform its former duties.”

[Joyce v. Ortiz](#), 487 N.Y.S.2d 746 (A.D. 1985)

An appellate court in Pennsylvania also invalidated “temporary” promotions, holding that the Philadelphia Police Dept. Commissioner should have ordered competitive examinations. [F.O.P. Lodge 5 v. City of Philadelphia](#), 590 A.2d 384 (Pa.Cmwlt. 1991).

❖ Summary

1. Ranks can be created by many different methods, or a multiple of ways.
2. Statutes or civil service rules often establish specific promotional procedures.
3. Promotions are not a legally-recognized property right.
4. Both state and federal courts have resisted ordering chiefs to fill vacancies.
5. Courts have intervened to prevent chiefs from making long-term acting appointments.

❖ References

Notes:

1. “An Assessment Center consists of a standardized evaluation of behavior based on

multiple evaluations including: job-related simulations, interviews, and/or psychological tests. Job Simulations are used to evaluate candidates on behaviors relevant to the most critical aspects (or competencies) of the job.

“Several trained observers and techniques are used. Judgments about behavior are made and recorded. These judgments are pooled in a meeting among the assessors or by an averaging process. In discussion among assessors, comprehensive accounts of behavior, often including ratings, are pooled. The discussion results in evaluations of the performance of the assesseees on the dimensions or other variables.” HR Guide to the Internet: Personnel Selection: Methods: Assessment Centers.

<http://www.hr-guide.com/>

2. The content of the promotional exam had been contested by the [Firefighters Institute for Racial Equality](#) (FIRE). In May 2007, the District Court found the test to be valid, and the Eighth Circuit affirmed. [Stewart v. City of St. Louis](#), # 07-2548, 532 F.3d 939 (8th Cir. 2008), affirming 2007 U.S. Dist. Lexis 75342, 2007 WL 2611633 (E.D. Mo.)

Articles: (Chronological)

1. Perceived Fairness of Promotion Procedures: Identification of Justice Rules and Consequences for Job Attitudes, 4 (3) Intern. Journal of Selection and Assessment 129–138 (July 1996).
2. Estimation of the Adverse Impact of a Police Promotion Examination, 34 (3) Personnel Psychology 503–510 (Sep. 1981).
3. Police Promotional Procedures in Fifteen Jurisdictions, 2 (3) Public Personnel Management 167-170, NCJ 010570, Intern. Personnel Management Assn. (May 1973).
4. Guidelines For Police Performance Appraisal, Promotion and Placement Procedures, National Institute of Law Enforcement and Criminal Justice, [NCJ 010330](#) (1973).

Model Policy:

[Model Policy: Career Development](#), Virginia Department of Criminal Justice Services.

➔ Part Two of this article will address problems associated with the grading of candidates.

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