

December 1, 2008

TO: Edward E. Younglove, III
Younglove Lyman & Coker, P.L.L.C

FROM: Teresa Parsons
Director's Review Program Supervisor

SUBJECT: Albert (Bert) M. Loomis v. Department of Fish & Wildlife (WDFW)
Director's Review Request No. RULE-08-005

On October 30, 2008, I conducted a Director's review telephone conference regarding Mr. Loomis's allegations that WDFW violated civil service laws and rules. Besides you and Mr. Loomis, the following individuals participated in the telephone conference on behalf of WDFW: Art Irving, Acting Human Resources (HR) Director at the time of the alleged rule violations; Cindy Lerch, Current HR Director; Dan Budd, Lands Division and Real Estate Manager; and Gil Hodgson, Assistant Attorney General.

Nature of Alleged Violation

On July 28, 2008, Mr. Loomis filed a request for a Director's review alleging WDFW violated WAC 357-16-125; 357-16-130; 357-16-190; RCW 41.06.150; and 41.06.010. Specifically, Mr. Loomis alleged violations relating to WDFW offering and the former HR Director accepting a Property & Acquisition Specialist 6 position previously advertised as a job opening under recruitment #917-08 (Exhibit 1).

Both parties subsequently provided information indicating Penny Warren, the former HR Director, had been appointed to the Property & Acquisition Specialist 6 (PAS 6) position, effective August 1, 2008 (Exhibits 4-d and 5). The PAS 6 position has the working title of Westside Lands Supervisor.

Based on a September 4, 2008 memorandum in which WDFW indicated Ms. Warren filled the PAS 6 position through a voluntary demotion (Exhibit 5), I asked for clarification about whether or not Ms. Warren's position had been covered by the civil service rules at the time of appointment (Exhibit 7). In response, WDFW indicated Ms. Warren had been in an exempt position at the time of the appointment but had previously

held permanent status in classified service (Exhibit 9). In response to a request by Mr. Loomis, WDFW provided Ms. Warren's employment history (Exhibit 10).

In an email dated October 3, 2008, I outlined the following findings, based on information in the record as of that date and the applicable civil service laws and rules (Exhibit 11):

1. RCW 41.06.010 establishes a system of personnel administration for the state that governs, in part, the appointment, promotion, transfer, layoff, recruitment, and retention of civil service employees.
2. RCW 41.06.150 provides that the Director of the Department of Personnel shall adopt rules consistent with the purposes and provisions of Chapter 41.06 RCW.
3. Chapter 357-16 WAC provides rules regarding recruitment, assessment, and certification.
4. The action prompting Mr. Loomis's alleged law and rule violations is the appointment of Penny Warren to a Property & Acquisition Specialist 6 position.
5. Chapter 357-19 WAC provides rules regarding appointment and reemployment.
6. Ms. Warren was in an exempt position not covered by civil service rules at the time of her appointment.
7. Ms. Warren's employment history indicates she held previous status in several classified service positions, including WMS positions.

WAC 357-04-030 addresses the return of an exempt employee to classified service as follows:

As required by RCW [41.06.070](#)(3), any employee having permanent status in a classified position who accepts an appointment in an exempt position has the right to return to classified service in accordance with WAC [357-19-195](#), [357-19-200](#), and [357-19-205](#). As long as the employee was not terminated from the exempt position for gross misconduct or malfeasance, the employee has the right to return to the highest class of position in which he/she previously held permanent status or to a position of similar nature and salary.

WAC 357-58-450 addresses the return of an exempt employee to a WMS position within classified service.

In a follow-up email dated October 6, 2008, I asked the parties to address the following points in their written arguments (Exhibit 11):

1. Did Ms. Warren return from an exempt position to a WMS position prior to taking a voluntary demotion?
2. If so, was the voluntary demotion done in concert with the rules?

Background

Mr. Loomis has worked for WDFW in Real Estate Services within the Wildlife Program as a Property & Acquisition Specialist 3 (PAS 3) for approximately eight years. Mr. Loomis's position reports to the Westside Lands Supervisor (PAS 6) position. In January 2008, Mr. Loomis's former supervisor retired from the Westside Lands Supervisor position, and WDFW subsequently recruited for the position under recruitment #917-08. Mr. Loomis did not apply for the position, and all of the applicants were external candidates. Dan Budd, Lands Division and Real Estate Manager and Mr. Loomis's second-line supervisor, did not find any suitable candidates for the position and ended the recruitment effort.

In the meantime, it is undisputed that Mr. Budd asked Mr. Loomis to take on some duties related to property management issues and to attend regional meetings in the place of his former supervisor. It is also undisputed that Mr. Budd retained the higher level and supervisory responsibilities assigned to the Westside Lands Supervisor position.

After ending the recruitment, Mr. Budd met with HR staff and WDFW managers, including the Lands Division Manager, Regional Director, and Wildlife Program Assistant Director to discuss the desired skill set and competencies for the Westside Lands Supervisor position. Mr. Budd also asked for input from the Eastside Lands Supervisor and the employees directly reporting to the Westside Lands Supervisor position, including Mr. Loomis.

WDFW acknowledges that Mr. Budd encouraged Mr. Loomis, as well as other direct reports, to apply when the recruitment for the Westside Lands Supervisor (PAS 6) position reopened. However, WDFW asserts management decided not to republish the recruitment. In May 2008, Ms. Warren expressed interest in the position and management determined she met the competencies most desired for the position.

On June 15, 2008, Mr. Loomis learned from Mr. Budd that WDFW intended to appoint Ms. Warren to the Westside Lands Supervisor (PAS 6) position. On July 28, 2008, Mr. Loomis filed a request for a Director's review, alleging WDFW's actions violated civil service laws and rules. After seeking clarification about the timeliness of Mr. Loomis's request, both parties provided information about Ms. Warren's appointment to the Westside Lands Supervisor (PAS 6) position, effective August 1, 2008 (Exhibits 4-d and 5). Mr. Loomis resubmitted his request for a Director's review, also addressing the timeliness of his request, on August 19 and 26, 2008, respectively (Exhibits 3 and 4). In

an email dated September 26, 2008, I determined Mr. Loomis's request had been timely filed (Exhibit 7).

Summary of Mr. Loomis's Argument

Generally, Mr. Loomis alleges Ms. Warren's appointment to the Westside Lands Supervisor (PAS 6) position was not made in accordance with the civil service rules. Although he originally cited several rules asserting WDFW violated in Chapter 357-16 WAC, Mr. Loomis asserts Ms. Warren's placement in the Westside Lands Supervisor (PAS 6) position is the basis for the alleged rule violations. While Mr. Loomis acknowledges he did not apply for the position under recruitment #917-08, he asserts his second-line supervisor, Mr. Budd, encouraged him to apply when the recruitment reopened. Mr. Loomis contends Mr. Budd knew he intended to apply for the position, and Mr. Loomis believes he has the highest seniority of any PAS in the state. Mr. Loomis further contends that based on the scope of the Westside Lands Supervisor (PAS 6) position, as he now understands it, he would have applied had the recruitment been republished.

Mr. Loomis contends that he has standing to file this request for a Director's review and argues he has been adversely affected as a result of Ms. Warren's appointment to the Westside Lands Supervisor (PAS 6) position. Specifically, Mr. Loomis asserts that he reports directly to the Westside Lands Supervisor (PAS 6) position and that an opening for the position creates a promotional opportunity for him. Mr. Loomis further asserts that he performed some of the duties assigned to the position when his former supervisor retired. As such, Mr. Loomis argues he was adversely affected by a lost promotional opportunity when the position was not filled in accordance with the civil service rules.

Specifically, Mr. Loomis argues that Ms. Warren's appointment to the Westside Lands Supervisor (PAS 6) position was not made in accordance with RCW 41.06.070(3) and WAC 357-19-195 because she never previously held status as a PAS 6. As a result, Mr. Loomis contends WDFW did not comply with the civil service law/rule regarding an exempt employee's return to the highest class of position or position of similar nature and salary. Mr. Loomis asserts the highest class of position held by Ms. Warren was a WMS 3 position in the human resources field, which he argues is not fundamentally similar to a PAS 6 position concerning real estate. Mr. Loomis contends the position objective for Ms. Warren's exempt position as HR Director describes managing a comprehensive human resource management program (Exhibit 17-e). By contrast, Mr. Loomis argues the position objective for the PAS 6 position of Westside Lands Supervisor discusses providing real estate expertise to agency program personnel (Exhibit 17-c). Therefore, Mr. Loomis contends these two positions are fundamentally distinct in nature.

Mr. Loomis asserts that based on the record, it is clear Ms. Warren did not return to a WMS position prior to taking the Westside Lands Supervisor (PAS 6) position or return to a position of similar nature and salary. For those reasons, Mr. Loomis argues the rules

regarding voluntary demotion are not applicable. As a remedy, Mr. Loomis asserts Ms. Warren should vacate the position and WDFW should fill the position in accordance with the rules.

Summary of WDFW's Argument

WDFW contends Mr. Loomis lacks standing to request a Director's review. WDFW asserts Mr. Loomis's request for a Director's review is based on alleged violations of the rules governing the recruitment and certification process. WDFW asserts Mr. Loomis did not apply under the recruitment for the position at issue and therefore, does not have standing to allege violations surrounding this recruitment. WDFW further asserts no rule violations occurred simply because the agency decided not to reopen the prior recruitment. Further, WDFW asserts Mr. Loomis does not have standing to allege violations of the rules regarding appointment or the laws/rules regarding the return of an exempt employee to classified service. Instead, WDFW asserts Ms. Warren, as the individual returning from an exempt position to classified service and appointed to the PAS 6 position, would be the one with standing to allege any violations of the related laws/rules. Similarly, WDFW contends an individual's position directly impacted as a result of Ms. Warren's return to classified service, such as an employee bumped from a position, may have standing to file an alleged violation. WDFW, however, argues Mr. Loomis's position was not adversely affected as a result of Ms. Warren's appointment to the Westside Lands Supervisor (PAS 6) position. Additionally, WDFW argues there is no law or rule that requires the position be filled through recruitment rather than appointment. WDFW argues Mr. Loomis does not have standing to appeal the agency's actions and has not met his burden of proving the agency violated any laws or rules.

Aside from the issue of standing, WDFW argues Ms. Warren's appointment to the Westside Lands Supervisor (PAS 6) position reflects a reasonable attempt by the agency to meet business needs and the rights of Ms. Warren without displacing employees in other positions. After canceling recruitment #917-08, WDFW asserts Mr. Budd met with WDFW managers and HR to identify desired competencies. Rather than focus on technical real estate qualifications, which WDFW asserts were largely covered by those reporting to the Westside Lands Supervisor (PAS 6) position, WDFW asserts the focus for the position shifted to leadership abilities. Based on Ms. Warren's competencies and her knowledge about agency programs, WDFW considered Ms. Warren a good fit for the position. WDFW contends the decision to appoint Ms. Warren was not taken lightly and made after much discussion about the position's needs. Therefore, WDFW takes exception to Mr. Loomis's characterization that the agency believes all managerial positions are comparable. In this case, WDFW contends the competencies most desired for the position included managerial and supervisory experience, as well as effective communication and negotiation skills, organizational structure, and knowledge of agency programs, policies, and the political climate.

WDFW argues the desired competencies, as identified in the Westside Lands Supervisor (PAS 6) Position Description (Exhibit 17-c) are similar in nature to those identified in the Position Description for HR Director (Exhibit 14). WDFW asserts Ms. Warren previously held the position of HR Director, most recently an Exempt Management 3 (EMS 3) position but previously a Washington Management Service 3 (WMS 3) position. Additionally, WDFW asserts the Westside Lands Supervisor (PAS 6) position had previously been a WMS position and still retains managerial duties. WDFW further argues that the salary for a PAS 6 falls within the salary range of a WMS Band 3 position. Therefore, WDFW argues Ms. Warren returned from an exempt position to a position of similar nature and salary to the highest level previously held in classified service according to RCW [41.06.070](#)(3) and WAC 357-19-195.

As a final point, WDFW contends that returning Ms. Warren to a WMS 3 position prior to accepting her voluntary demotion under WAC 357-58-215 would have resulted in the same outcome. WDFW asserts the end result was placement of an employee who met the needs of the position without displacing other employees. WDFW asserts Mr. Loomis had an opportunity to apply for the position under recruitment #917-08 and did not apply. WDFW argues Mr. Loomis's position was not jeopardized and asserts that even if a technical violation occurred, Mr. Loomis was not adversely affected. Therefore, WDFW argues Mr. Loomis's claim should be dismissed.

Issue of Standing

RCW 41.06.170(2) provides, in part, the following:

. . . any employee who is adversely affected by a violation of the state civil service law, chapter [41.06](#) RCW, or rules adopted under it, shall have the right to appeal . . .

The Director's review is the first step in the appeal process (WAC 357-49-017).

WAC 357-49-010(4) also provides an employee the right to request a Director's review of an alleged civil service law or rule violation, consistent with the statute.

Based on the circumstances unique to this case, I find Mr. Loomis has standing to request a Director's review. Mr. Loomis is a classified employee who has a statutory right to allege he has been adversely affected by a violation of civil service laws and rules.

Director's Determination and Rationale

Mr. Loomis has not met his burden of proving WDFW violated WAC 357-16-125; 357-16-130; or 357-16-190. There is no evidence to support WDFW violated any rules regarding recruitment or certification. Furthermore, there is no obligation for a state employer to recruit for a position. The personnel administration system governed by RCW 41.06.010 provides other avenues for state employers to fill a position, including

appointment. An appointment to a position in classified service, however, must be made in accordance with Chapter 41.06 RCW and Chapter 357-19 WAC. In this case, Mr. Loomis has proven that Ms. Warren's appointment to the Westside Lands Supervisor (PAS 6) position was not made in accordance with the civil service laws and rules. Any appointment into classified service that violates civil service laws and rules has the potential to adversely affect other classified employees.

Ms. Warren was in a position exempt from civil service laws and rules when WDFW appointed her to the classified service PAS 6 position with the working title of Westside Lands Supervisor. When an exempt employee returns to classified service, RCW 41.06.070(3) and WAC 357-19-195 require that the employee return "to the highest class of position in which he/she previously held permanent status or to a position of similar nature and salary." Based on Ms. Warren's work history, the highest class of position she previously held permanent status in was an HR Manager in WMS Band 3. When considering whether this position was similar in nature to the PAS 6 position, I reviewed past decisions by the former Personnel Appeals Board (PAB) that addressed the concept of "similar in nature."

In Geiger v. Dep't of Corrections, PAB No. V87-74 (1987), the highest class previously held by the Appellant was Correctional Camp Superintendent. When the Appellant was removed from his exempt position, the Correctional Camp Superintendent class had been abolished. When considering classified positions similar in nature to the Correctional Camp Superintendent, the PAB considered the Community Corrections Facility Administrator, Classification and Treatment Chief, and Correctional Captain classes. In comparing those classes to the Camp Superintendent, the PAB looked at the class definitions, beginning with the Camp Superintendent definition, which read:

Plans, organizes, administers and evaluates the custody and rehabilitation programs at an adult honor camp.

The PAB also considered the typical duties for the Correctional Camp Superintendent, which included *planning, evaluating, and supervising a comprehensive program for custody and rehabilitation of residents.*

In Geiger, the PAB concluded the above definition and typical duties were similar in nature to the Community Corrections Facility Administrator, in part, because both classes involved *planning, supervising and evaluating programs for custody and rehabilitation of residents.*

Additionally, in Geiger, the PAB found the Correctional Captain class, defined as "Direct[ing] security programs at adult correctional institution" was not similar in nature or salary to the Correctional Camp Superintendent class. Likewise, the PAB did not find the Classification and Treatment Chief, defined as "Direct[ing] classification and treatment program in Division of Adult Corrections" to be similar in nature. In

particular, the PAB found the Classification and Treatment Chief duties involving "serving as consultant to the classification and treatment staff at a reformatory or penitentiary . . ." were not similar to the typical duties of the Camp Superintendent class.

Subsequent PAB decisions support looking at the major duties of a position when considering whether or not two positions are similar in nature. In Smith v. Dep't of Social and Health Services, PAB No. V94-119 (1996), the PAB found "it is appropriate to consider CQs [Classification Questionnaires] for individual positions as well as class specifications." The Position Description Form replaced the Classification Questionnaire. While, the PAB concluded an "Appellant's duties do not have to be the same duties that Appellant performed prior to his [or her] leaving classified service," the duties "must be consistent with the classification and salary level of the . . . position [he or she] left" Galbraith v. Dep't of Financial Institutions, PAB No. RULE-96-0049 (1997).

WDFW asserts Ms. Warren's HR Director, EMS 3 position had previously been a WMS 3 position. The Position Description for the HR Director position, though described as an EMS 3, states, in part, that the position objective is to manage the development and administration of a comprehensive human resource management program. The duties described in the essential functions include planning, leading, organizing, and controlling the work performed by the HR Office and directing and overseeing human resource operations (Exhibit 17-e).

The Position Description for the PAS 6 position within Washington General Service (WGS) describes the position objective, in part, as providing real estate expertise to agency program personnel; negotiating real estate transactions on behalf of the agency; providing support on real estate transactions; strategizing and problem solving real property issues; and preparing legal documents on real estate transactions (Exhibit 17-c). In addition, the PAS 6 definition states, in part, that positions supervise property tax auditors and/or appraisers involved in state-mandated programs, including those dealing with real property. Some positions supervise lands agents and habitat technicians involved in developing, coordinating, and monitoring property acquisition, appraisal, and property management activities. Typical work duties include conducting department real estate program of acquisition, exchange, disposal of lands and buildings, as well as writing proposals, selecting real estate appraisals, and other real estate related duties (Exhibit 1-b).

In Geiger, the PAB found that duties pertaining to the same general subject matter of programs in Adult Corrections were not similar in nature, when the specific duties were not comparable. In Galbraith, the PAB later concluded that the duties needed to be consistent with the prior classification and salary level, though not exact. In this case, the duties assigned to Ms. Warren's HR Manager position, which was the highest class of position she held in classified service as a WMS 3, are substantially different from those described by the PAS 6, WGS position. Even when considering the broader competencies of managing, supervising, communicating effectively, negotiating, and

providing organizational leadership, the primary duties of a PAS 6 differ from that of an HR Manager. Therefore, I conclude the two positions are not similar in nature.

In regard to WDFW's argument that returning Ms. Warren to a WMS 3 position prior to accepting her voluntary demotion under WAC 357-58-215 would have resulted in the same outcome, I agree the end result may have been the same. However, it does not negate the fact the appointment was a violation of the rules. As such, the direct appointment of Ms. Warren to the PAS 6 position from the exempt position is invalid.

Ms. Warren has yet to be properly returned from exempt to classified service. While WDFW is under no obligation to recruit for the vacant PAS 6 position, any future recruitment or appointment must be in accordance with the civil service laws and rules.

Appeal Rights

WAC 357-49-018 provides that either party may appeal the results of the Director's review to the Personnel Resources Board (board) by filing written exceptions to the Director's determination in accordance with Chapter 357-52 WAC.

WAC 357-52-015 states that an appeal must be received in writing at the office of the board within thirty (30) calendar days after service of the Director's determination.

The address for the Personnel Resources Board is 2828 Capitol Blvd., P.O. Box 40911, Olympia, Washington, 98504-0911.

If no further action is taken, the Director's determination becomes final.

c: Bert Loomis
Art Irving, Acting HR Director, WDFW
Gil Hodgson, AAG

Enclosure: List of Exhibits