

Rosen – Good Morning my name is Marv Rosen Chair of the Civil Service Board this is the first grievance I will be leading so I will ask for your assistance as needed. I will try to stay on a good timeline try to proceed in a correct manner, however if I'm missing something I would like you to let me know that and we will get it straightened out and move on properly. Just by way of introduction first let me introduce board members, if you would just introduce yourself:

Worthington – I'm Carolyn Worthington

Robinson – I'm Virginia Robinson

Coxie – I'm Alan Coxie

Lynn Moffa – I'm Lynn Moffa

Rosen – Thank You, are there any other introductions? Kelley do you have any introductions this morning?

Dickens – yes, to the board I would like to introduce Tarika Wyche she is a Human Resource staff member and will be serving as your clerk today. I know we have had some rotation, so we are fortunate she could be here.

Rosen – We do have a **forum** today so we are ok to proceed on that basis. I understand the grievance today is with Timothy Fortenberry, represented by John Hunter. Chief Burnette will be speaking on behalf of the Asheville Fire Department. Kelly Whitlock will be the City attorney assisting in presenting the case. In terms of witnesses do you have a list available of who you intend to call this morning? Because at this point we are going to need to know if there are any conflicts of interest within the board or any knowledge within the board that might affect the decision making.

Brison – Mr. Chair it might be helpful that if there is a paper list to hand that out, if they could just name the name of the witnesses so just as you much would in a jury trial, so that the board can decide if they know any of the witnesses, and if they have any biases.

Whitlock – The City has listed in its witness list: Chief Scott Burnette and also listed Kelley Dickens the Human Resources Director, Derrick Swing the Human Services Manager.

Hunter – Chairman the grievant has listed as possible witnesses:

Stephen Burnette, these are all members of the Asheville Fire Department Shane Mackey, Stephen Marlow, Darren McElreath, Casey Silvers, Richard Rauschenbach, Irvin Olsen, Mike Webb, Mike Marshall, and Scott Mullins.

Rosen – As board members do any of you have any awareness of the issues that are being brought before us today? Or any familiarity with any of the witnesses that have been listed in reference today?

Coxie – I have no familiarities with the issues being brought forth today, but having worked with the Asheville Fire Department I know a great percentage of the employees' witnesses, as well as all the City's witnesses. I don't have any issues with fairness.

Robinson – I have also had a working relationship with Mike Marshall

Rosen – Based on that do the parties have issue with the whole board serving?

Whitlock – I have no objection

Hunter – I have no objection

Rosen – To briefly state the functioning of the board we are acting in a quasi-judicial manner. In one sense we are acting both as judge and jury, uniquely we have the ability to ask questions at any point, which makes it a little bit different than a formal legal trial. What we will be attempting today, is the City will be attempting to establish a burden of proof to justify whatever action was taken by the City in regards to Mr. Fortenberry. Our decision will be based on competent material, substantial evidence and the records presented to us today. I would like to move fairly quickly if we can today and be finished by end of day. That would be our objective, but we certainly want each party to have the opportunity to fully state their case so we can make an informed decision. There is apparently a motion to dismiss, before we address that, I think it's important to let Mr. Fortenberry and his attorney make the decision if this is to be an open or closed meeting. Open meeting means that everyone that is here is welcome to attend and listen to everything that is presented. If you request a closed hearing than under North Carolina statutes, the board, the grievant, Human Resources will be the only people that will be able to be in this room. Everyone else would be dismissed and put into another location until they are called as a witness. Do you have a particular preference in regard to an open or closed meeting?

Hunter – We are happy to have it open

Rosen – the City?

Whitlock – No preferences, no objection

Rosen – Ok then the meeting shall be open

Rosen- The next issue for us will be that you have a motion to dismiss

Whitlock – I do chairman

Rosen – Will that be our next step?

Brison – yes, that is correct

Whitlock- thank you, for your convenience I've handed out a two booklets. One that I put the City's exhibit in if we proceed with the hearing, but the other one is entitled motions to dismiss and exhibits. If you have that in front of you, in that is the City's motion to dismiss with the memorandum of law

supporting that. Also each exhibit that I'm going to talk about in the argument. So, you can refer to that when I speak of certain exhibits when I proceed. If you would like me to proceed I certainly will.

Rosen – I believe that will be our next step

Brison – Yes sir, that's correct

Whitlock- thank you, members of the board. Again my name is Kelly Whitlock, City Attorney. I represent the City and Chief Burnette in this matter before you. I know you don't have any background of why you are here today, but we are here today because Mr. Fortenberry who is an Asheville firefighter is grieving the fact that he was not promoted in the 2012 Lieutenant promotional process. He is alleging that certain criteria that were used in the promotional process discriminated against him, and he also claims in his grievance that he made a report about an incident that he heard involved potential sexual harassment with other firefighters. He reported that incident of what he heard in February of 2013. He claims that that reporting was also used against him, that's why he didn't receive the promotion in 2012. The City moves to dismiss Mr. Fortenberry's grievance because the board does not have jurisdiction to hear this matter under the law for two reasons. The first one is that Mr. Fortenberry has failed to file his grievance within the timeline required by the law and City policy and the second reason is this is not a promotion that Mr. Fortenberry is entitled to. For an employee to be entitled to a hearing before this board they have to be denied a promotion that they were entitled to. Pursuant to the Civil Service Act and this is not one of those promotions that Mr. Fortenberry would be entitled to. Just to give you a brief background into this matter the 2012, I know this is confusing because we are in 2013, but the 2012 LT. promotional process was first announced in April of 2012. That announcement was sent to all Fire Engineers and Sr, Firefighters on April 24, 2012. You can actually see that announcement is actually attached to the back of the memorandum of law as exhibit A in your packet. In the announcement it informs the employee that they may be eligible to participate in the promotional process, kind of like a letter of interest that they need to sign and send to Chief. It also informs the employee of the minimum requirements to be eligible for the promotion. It indicates that if you have completed four years as a Sr. Firefighter by 06/30/13, that's the length of time that the promotional eligibility list is valid. Than that employee can participate in the process. The criteria that are used in the Lt. promotional process was sent to all candidates in May and it was also discussed at a kick off meeting on May 08, 2012 the summary of the components that are used in this LT. promotional process are in your exhibit B as in boy. I'm sorry D as in Dog. Notification of the kick off meeting to all of the candidates that was sent is attached in your packet as exhibit E, you can see that. And this was a meeting where all the components was discussed with the candidates and the email that sent the professional credentials workbook was sent to the candidates on May 18 2012 the professional credentials workbook contains several of the components used in the LT promotional process. That was sent on May 18, again on 2012 to the candidates, that's attached as exhibit F and you can see that there. So basically the bottom line is that all of the candidates were aware of the criteria being used in the 2012 Lt promotional process in April and May of 2012. The promotional process was completed in June of 2012 and the scores were than tallied from all the components and the candidates were than ranked based on their scoring. Mr. Fortenberry was ranked 13 out of 18 candidates the rankings were published on July 13, 2012, and you can see that list its exhibit G in your packets. It was published and indicating that the list was good until June 30,

2013. Only 10 vacancies occurred during the entire length of the promotional process, the eligibility list while it was valid. So with Mr. Fortenberry being ranked 13th out of the 18 candidates he was not promoted in the 2012 Lt promotional process. Mr. Fortenberry then filed a grievance on July 11, 2013 claiming that this criteria used in the 2012 Lt. promotional process discriminated against him. It is the City's argument that Mr. Fortenberry has failed to file his grievance within the required timeline, required by the Civil Service Act and City policy and therefore his grievance should be dismissed. First off Mr. Fortenberry in his grievance grieves that the material used in this 2012 promotional process, there is material that only training occurred within the last 5 years that a candidate participated in would be scored. He is also grieving the criteria of where the candidate's last 4 performance evaluations are also evaluated. They are also called PDR's you will probably hear that today, Performance Development Review, but same thing as your annual performance review. He is grieving those to criteria. These criteria, both of them using the training that occurred in the last 5 years and also evaluating a candidate's PDR's have been used since 2005 in every Asheville Fire promotional process including the Lt. promotional process. Mr. Fortenberry has participated in 5 of the promotional processes for Lt. In 2009, 2010, 2011, 2012 and 2013 of which this exact criterion was used. So he has essentially been aware of this since he first started participating in this process in 2005. For the 2012 Lt. promotional process, Mr. Fortenberry knew of this promotional process that was being used in April and May of 2012 when this was all sent out to the candidates and discussed at the kick off meeting. But instead of filing his grievance than which would be appropriate, he choose to participate in the promotional process under those components, received his ranking on July 13, 2012 in which he was ranked 13 out of 18 based on the scoring of those exact criteria, but then wait over a year until July 11, 2013 to file his grievance after this eligibility list expired to claim that this criteria discriminated against him. Mr. Fortenberry also claims in his grievance that by allowing employees to take the test and sit for the promotional test who will meet the 4 year time and grade requirement at any time during the eligibility list also discriminated against him. This was actually implemented allowing the employees to sit and take the test if they meet their time and grade requirement during the life of the eligibility list was implemented in April of 2011 based on a unanimous recommendation by the AFD promotional criteria advisory committee. Which is comprised of Asheville firefighters, again Mr. Fortenberry was aware of allowing employees to sit for the exam since 2011, because he participated in the 2011 promotional process. But he certainly knew about it in the 2012 Lt Promotional process when he received the April announcement which clearly indicates in your exhibit a, that if you meet the minimum requirements of hitting your 4 year time and grade requirement by June 30, 2013 you are allowed to sit and take the promotional test. Again though Mr. Fortenberry choose to participate in the entire promotional process, receive his ranking in July 2012 then wait over a year until July 11, 2013 after the list expired to file his grievance, claiming allowing employees to sit for this test discriminated against him.

I mentioned briefly that Mr. Fortenberry was grieving the claim that he reported an incident of alleged sexual harassment between other firefighters in February 2013 and he claims this was being used against him because he reported this and that's why he was not promoted. However, if you notice the eligibility list was published July 2012 and he reported this matter in February 2013 which was 8 months after the list was published, and that list doesn't change. Your ranking doesn't change, it remains the same. So it's impossible for his reporting of this alleged incident to affect his ability to be promoted

because that ranking did not change from July 2013. If he sincerely believed that this was used against him, the reporting. Then the appropriate time to grieve would have been at the very next promotion made after he reported this. And that next promotion made after February or March whenever he reported this occurred on June 1 2013, but instead Mr. Fortenberry waited until the eligibility list expired before he said this reporting discriminated against him and that's why he wasn't promoted. The Civil Service Act requires that an employee exhaust his or her remedy provided by the grievance procedures established by ordinance or policy of the city before an employee can request a hearing before this board. Pursuant to the City's personnel policy an employee has 15 calendar days from the incident giving rise to the complaint. I've attached a portion of that personnel policy in your packed exhibit J. Both Chief Burnette and the City Manager denied Mr. Fortenberry's grievance based on this required timeline. But they never the less addressed Mr. Fortenberry's complaints, and found that he was treated fairly as a candidate in the 2012 Lt promotional process. If you are interested in seeing their responses Chief Burnette's response is attached as exhibit I and the City Managers response is attached as exhibit L. Mr. Fortenberry's grievance is well passed the 15 days required by the Civil Service Act and City policy based on the incidents and criteria he is grieving and therefore his grievance must be dismissed. Not only is there an issue with the required timeline members of the board there is also issues with the fact that I discussed earlier, that this is not a promotion that Mr. Fortenberry is entitled to, which would entitle him a hearing with this board pursuant to the Civil Service Act. Civil Service law states that an employee is entitled to a hearing before this board if he or she was denied a promotion in which he or she would be entitled to. It is the employee's burden to prove that this is a promotion they are entitled to. The city has two types of promotional processes and the first one is career ladder, also called Career plan progression pursuant to the City's compensation policy and that's attached as exhibit C in your packet in your motion to dismiss. Basically in a career plan progression process or career ladder process, if the employee works for a certain period of time and meets certain requirements that employee is automatically promoted to that position. Just to give example from the City, if a police officer works for 3 years he or she is automatically promoted to Sr. Police Officer automatic, doesn't have to compete for it. Same is true for Captain in the Fire department, if a Lt has worked for 2 years and have certain certifications same thing that employee is automatically promoted to Captain doesn't have to compete, just automatic. So in essence with these career ladder promotions the City is obligated by its compensation policy to promote the employee if they meet the specified requirements and therefore that employee is entitled to a promotion. There is a second type of promotion and that is competitive and performance based. In a competitive process you have multiple candidates who are trying for the same position. In this type of process the employee is only promoted that employee is ranked the highest and a position is available. In a competitive promotional process the city is not obligated under City policy to promote that person and therefore that employee is not entitled to the promotion, they have to compete for it. This promotion that Mr. Fortenberry is grieving about is a competitive based promotion. The promotion to Lt is not automatic and it's not the same as the Capt. Position I discussed earlier. The Asheville Fire Department Standard Operating Guidelines actually spell out this difference, it clearly lays it out. Take a look and flip to Exhibit B as in boy, exhibit b contains the standard operating guidelines for Lt. and behind that documents contains the standard operating guidelines for Capt. I would like for you to first take a look at the guidelines for Lt. which is the first documents, page 5 at the very end of that guideline. it's right before the definitions section, you can see

it states promotional process. I would like for you to flip to the documents after that the standard operating guidelines for Capt. If you go to last page right before definition it states advancement process. So that clearly shows that these two are different, Capt. Process the employee is entitled and Lt. you have a promotional process which is competitive based. The court of appeals finds that this distinction is very important and there is a case called O'Donald vs City of Asheville where the court of appeals addressed this issue whether an employee was entitled to a promotion and the court stated the following which is important. "The outcome of this case turns on the distinction of entitled and eligible the act provides a right to a hearing to the person who is entitled to a promotion, without that entitlement plaintiff has not right to demand a hearing regardless of his qualifications" and the court further held although the employee in the O'Donald case appeared eligible for promotion there was no indication that he was entitled to the promotion and that's the exact same case we have with Mr. Fortenberry. Although he was eligible for promotion and he participated in the process, he had to compete and he was not entitled to that promotion it was not automatic. Therefore the Civil Service law does not allow and permit Mr. Fortenberry a hearing before the board. So because he was entitled to the promotion and he failed to file his grievance within the 15 day required timeline pursuant to policy and Civil Service Act we respectfully ask that the board grant the City's motion to dismiss as required by law. Thank you.

MR- Mr. Hunter

JH- With all due respect Ms. Whitlock in her entire presentation did not mention the most two operative facts that establish that Mr. Fortenberry both filed his grievance in timely manner and was in fact entitled to this promotion. May I approach; this is the documents that Ms. Whitlock referred to as exhibit G. What you have is the actual promotion eligibility list that was established by 2012 promotional testing and review process that is at issue here. And if you look at that it is in order of eligibility and you notice at the top it's Clint Brown and he would be the top candidate for promotion. In fact when there was a vacancy for Lt. Mr. Brown received that promotion. They are then ranked in order as you go down you will see Mr. Fortenberry then ranked in order 13 position, however not everybody is listed the same on this list. There are 4 individuals that have special notation after their name. Rich Rauschenbach is the first one on that list and if you notice it says eligible April 23, 2013. Now this list was established in July 2012 but the 4 individuals on this list aren't even eligible for promotion until April 23, 2013. Now here is what happen during this promotional process of this year, prior to April 23, 2013 Clint Brown was promoted Mike Riley was promoted, Steve Burnette was promoted, Mike Stageman was promoted, Steve Wickham was promoted, John Eldreth was promoted, Nathan Rogers was promoted, Adam Wilson was promoted, Bjorn Larson was promoted all those promotions occurred prior to April 23, 2013. The grievant today Mr. Fortenberry was next on list to receive a promotion and in fact there was one more promotion after 4/23/13 but on 4/23/13 according to the City these 4 individuals became eligible and when the next promotion came up Rich Rauschenbach received that promotion. Had Rich Rauschenbach not received that promotion Timothy J Fortenberry would have received that position. There were no more promotions made after Rich Rauschenbach was promoted on June 1. There was another month of eligibility where it was possible that Mr. Fortenberry or someone else on the list would have been promoted but there were no more vacancies or promotions after that June 1, 2013 promotion. So why

there is a list that says eligible why are the individuals made eligible after 4/23/13 instead of being eligible when the list was established in 2012? What you will hear today if you hear this grievance is that the policy of who can take the test for promotion to Lt. was changed by Chief in 2011. This board had looked at the policy and looked at the process in 2009 and evidently approved of that process. Under the process as approved by this board in 2009 these individuals, Rich Rauschenbach, Patrick Boland, Scott Mullins and Tim Barnwell would not have been allowed to take the test because they would not have been eligible to take the test in 2012 and they would not have been on this list. But because of change that Chief Burnette made in 2011 these 4 individuals were allowed to take test and allowed to become eligible for promotions when they had the requisite number of years during the promotional year. But for that change of policy Rich Rauschenbach would not have been promoted TJ Fortenberry would have been promoted. That is the only thing that prevented my client from receiving the promotion on June 1. Now what we discovered is that change in policy was never submitted to this **board for review or approval**. If you go back and look at the Civil Service law and the procedure and process for this board that change should have been submitted and approved by this board at a minimum, we actually believe should have went to City Council as well but we are not arguing that today. We don't have to because it didn't even make it to this board. So Mr. Fortenberry can show that we was "entitled" to this promotion, no question that he would have received that promotion on June 1 but for this policy change which we alleged will show today is illegal. It's not a lawful policy change it has never been approved by this board, so yes he was entitled. So that takes care of the entitled prong of Ms. Whitlock's argument. Her second point is that Mr. Fortenberry did not file his grievance within 15 days of not receiving the promotion and if you go from the June 1st date when Mr. Rauschenbach received the promotion he did not file within 15 day he filled on July 11th and the promotion occurred on June 1st. But why did he file July 11th, he filed on July 11th in order to file within 15 days of the end of the promotional period that was in process. That ended on 6/30/13. Until 06/30/13 he did not know whether he would be promoted or not. It was possible through the end of that period there would be other promotions and he would possibly receive one. So his injury i/e not being promoted inside the promotional timeframe at issue was not certain until 6/30/13 and if you read the language at the top of Exhibit G that you have in front of you the second sentence makes that clear. This is the City's own language; the following personnel have been placed on the Lt Eligibility list through 06/30/13 as permitted by city policy. Through that date he remained on the eligibility list and could have been promoted. It did not occur as it turned out; it turned out the last promotion was the one that went to Rich Rauschenbach under this policy that we believe is not appropriate and not fully approved. That is the basis for saying that he was entitled to that promotion and that he filed in a timely fashion. If you hear the grievance today we will also show that other components of the criteria that were used specifically the performance evaluation part was not performed within city's policies. Therefore the ranking the points that were assigned to the PDRs were not appropriate for use.

MR- Mr. Hunter I'm going to suggest that we not go there at this point, just stay with the particular arguments with this.

JH- Well there are two other components of this criteria we will challenge in the hearing today. Again those flow from the fact that Mr. Fortenberry filed his grievance within 15 days of the end of the

promotional process, which resulted in him not receiving the promotion. Ms. Whitlock pointed out to you that there is a personnel policy that deals with grievances and she pointed to the section procedures dealing with filing a grievance. It's under exhibit J of Ms. Whitlock's notebook. If you look at section 68 of that grievance policy under step one that's where the 15 days comes in. It says "provided however in the event an informal discussion of the grievance has not taken place an employee shall file his or her grievance within 15 calendar days of the incident or action giving rise to the complaint" we contend that the action was the failure to promote him which was not set or certain until 6/30/13. I think the next sentence explains that it says "on going conditions are not subject to this deadline" until 06/30 this was an ongoing situation. He could have been promoted it did not occur but the failure to promote occurs on 06/30 in order for him to file the grievance. So we respectfully request that you find that he can show he was entitled not speculative, and that he filed timely in that promotional process was ongoing until 06/30 and he challenged it within 15 days of that date.

KW-respectfully disagree with Mr. Hunter's position again. It doesn't matter if you are promoted or not if claiming that the criteria used in this entire promotional process is discriminatory. So then it was discriminatory when it was first implemented, not at the end when you didn't get a promotion. But if you didn't agree with that and we go with Mr. Hunter's agreement that Mr. Fortenberry was entitled to the promotion when Rich Rauschenbach who was number 2 on the list was promoted which was 06/1/2013 Mr. Hunter used his whole argument saying that was the promotion that Mr. Fortenberry should have received on 06/01/2013. If that is the case then the clock should start to run then and he have until 6/15/13 to grieve that? So I would respectfully disagree that he is met any of the timelines no matter which way you look at it. He is will past the timeline. Second his entitlement argument still doesn't disagree with the fact this position is a promotional it process, not an automatic advancement as I pointed out to you in the standard operating guidelines. This promotion is completely different from our ladder promotions are automatic like with the Sr. Police Officer and the Fire Captain. He didn't disagree with that and it didn't change that fact this Lt promotional process is still competitive based and the Civil Service Act requires that that promotion is entitled to that employee before they are allowed to have a hearing before you all so I again say this is not a promotion that Mr. Fortenberry was entitled to and the argument you accept still does not hit the 15 day requirement. So I respectfully ask again that you would grant the City's motion to dismiss.

BH- Mr. Chair I just want one response to that I think it's clear that what is being grieved here is the failure to receive the promotion during this promotional process which was not concluded and unknown if a promotion would be received until 6/30/13. So he did grieve this in applicable time, this idea that it was somehow discretionary on the part of the City versus an automatic promotion. First of all that would mean that no matter how egregious something may be this board can never review a promotion that was based on competitive process and I don't believe that is the position this board wants to take. Secondly the O'Donald decision that the City is referring to if you look at the brief, I know you all have not had a chance to read it. They quote O'Donald as saying "Finally that the court held that the granting of promotions is a discretionary matter, the court would not interfere unless there is a violation of law. We are alleging in this grievance that there is a violation of law. Chief Burnette instituted a policy change

that he did not have the authority to institute on his own without the review of this board. It is a violation of law what occurred in it of itself we have other grounds for questioning the process.

MR- Thank you both for comprehensive presentation my sense is that you both have merit to what was addressed. Unless board members have some other thoughts about it and I'm open to hearing those. My inclination is to put this aside and move on and hear the rest of the case. There is a lot of complexity here and my preference is to hear the entire case. But I'm open to thoughts from anyone on the board. Any questions to what you have been presented with up until this point. I don't know if we have to make a decision at this point in terms of letting the case stop or continue has other objections, pref. is to hear the entire case.

AC – can we deliberate this in open session?

PB- That is up you all, it can be done in closed session under NC statute law NC 123-31811k6 and I'm happy to site that language to you. Then you will come out and announce your decision.

MR- Do we have a suggestions or questions?

LM- on close or open

MR- First on the motion to dismiss should be decided at this point

PB- for the new board members a closed session in this case, is just the board and its attorney. Everyone else is excused.

LM- I do have a reaction to what you said and I think the motion to dismiss should be decided first

MR- Other thoughts?

CW- agree to decide on motion to dismiss

VR- I believe we should go into closed session

PB- The preferred motion would be I agree to go into closed session pursuant to section 143 -318.1186.

PB – All you have to do is say I make that motion

AC- I make the motion we go into closed session pursuant to 143 -318.1186 for purposes of hearing the motion to dismiss

MR- all in favor

Board (all) – I

MR- we will go in closed session

MR- We have returned from closed session. There is a question on the table in the terms to dismiss. We have discussed that and have a motion in regards of that.

AC- Chair at this time I would like to move to deny the motion to dismiss based on timeliness finding the grievance was timely filed however I would move that we hold on the motion to dismiss based entitlement for the hearing of additional evidence.

MR- 2nd to that

VR- I 2nd

MR- we moved and seconded all in favor

Board (All) – I

MR – opposed

MR – Mr. Hunter the City filed a motion to dismiss; did you want to file a formal response to that?

JH- I think in light of your ruling I would only have a response about the legal issue of entitlement. So I think the presentations today will address that issue. I don't see the need.

MR- If all are in agreement we will proceed with the formal hearing, City

KW- Would you like us to proceed with opening statements/

MR- yes that is where we will start

KW- You already have a little background about the case but I think to avoid confusion for the board and Mr. Hunter and I agree that there is no dispute that Mr. Fortenberry's grievance is really about 4 issues with the criteria used in the 2012 promotional process. The first one is he grieves scoring only the training time which a candidate completed within last 5 years discriminated against him, he feels all training should be counted. The second issue he takes is scoring candidates PDR he believes that discriminated against him because they are subjective to direct supervisor. He feels is direct supervisor gives him to low scores. The third issue Mr. Fortenberry states in his grievance by allowing employees to sit through the promotional test if they meet time and grade requirement as a Sr. Firefighter 4 years. They are allowed to take the test if they meet the time and grade requirement during the life of eligibility list. He feels they should not be allowed to take the test, they should meet the time and grade requirement at the time when test date was chosen. Lastly Mr. Fortenberry claims because he reported something he heard about a potential sexual harassment incident between other employees in 2/13 he believes this was used against him in the 2012 Lt promotional process. I think we will all agree these are the 4 issues Mr. Fortenberry outlined in his grievance to Chief Burnette and the City Manager. You will hear testimony form Chief Burnette today that he determined Mr. Fortenberry was not discriminated against and was treated fairly and consistently as a candidate in the 2012 Lt promotional process and he will testify and walk you through why he feels he believes this based on those 4 issues. First with the issue of the scoring of the training time within the last 5 years a candidate as partaken in and second one where the process includes evaluating the last 4 years of PDRs. He will testify these 2 things have been criteria in the Asheville Fire Department promotional process since 2005. It's not just the Lt.

promotional process but all the promotional process. This criteria has not changed since 2005, and has always been the criteria since then. Chief Burnette will tell you he reviewed these criteria, the scoring of the training that occurred in the last 5 years and the evaluation of the PDR's with this board, not this particular make up back in 2009. The board heard review of the promotional process that Chief Burnette uses and this board recommended no changes at that time. Chief Burnette will also testify that the Asheville Fire Department promotional criteria advisory committee, which is comprised of fellow firefighters, also reviews annually all the criteria for every promotional process. The committee did not recommend any changes to the criteria for the 2012 Lt. promotional process and they reviewed those criteria on April 24, 2012 before the process started. Chief Burnette will tell you that if a candidate wants to be promoted to a leadership position it's important for that candidate to have up to date training and that's why they requirement of the last 5 years comes about. There are changes to fire techniques and training they change yearly sometimes not, but it is important for the candidate to be up to date on those techniques. Training someone took 20 years ago may not be relevant and that is why it is not counted. Chief Burnette will tell you that it is imperative for his leaders and in these promotional positions to have relevant and current training. They are fighting fires and saving lives. Additional Chief Burnette will tell you the evaluation of PDRs of a candidate is important it is a typical component of any promotional process, whether it is fire or anywhere in the City or business. Employers want to look at the scoring of the candidates PDRs and this would be the last 4 years. However Chief Burnette will tell you he is the one that gives the final rating. He actually takes into consideration the firefighters own rating of themselves in the PDR, he takes into consideration the company officers of what the rating should be, and the Battalion Chief and then he issues a final rating. This he'll tell you alleviates any complaints that some particular supervisor might score too low. Since he is the final decision maker he takes all of that into consideration. Mr. Fortenberry as I have stated has participated in 5 of the promotional processes including 2013 and in every single promotional process scoring only the training that a candidate has partaken in the last 5 years has been used and an evaluation of the candidates PDRs as well. Mr. Hunter spoke a lot in his motion to dismiss that the second fact is Mr. Fortenberry takes issue with the fact that employees who meet time and grade requirement during the life of the eligibility list are allowed to sit and take the promotional exam. Mr. Fortenberry believes that they shouldn't be allowed to take the exam and be excluded from the process. You will hear from Chief Burnette today he will testify in order to be promoted to Lt. you need to meet that time and grade requirement, the 4 years as a Sr. Firefighter. Prior to 2011, 2011 was when an employee was allowed to sit and take the exam if they were eligible during the life of the eligibility list. Prior to that a candidate could only take the promotional exam if met the time and grade requirement before the test date. This raised a lot of questions of fairness within the department because based on the arbitrary timing, whoever decided the timing of the test candidates would either be helped by what test date was picked or would be hurt, because if the test date was picked as 06/30 and that candidate met their time and grade requirement 07/01 that candidate is entirely excluded from the process and has to wait an entire year until the next promotional process takes place. So Chief Burnette will say there were complaints of fairness and iniquity issues. The Asheville Fire Advisory committee unanimously recommended that this be changed and that employees who are eligible and meet the time and grade requirement at any time during the year are allowed to take that test to alleviate those inequity questions. Therefore if a candidate meets the time and grade requirement at any time during the life of the eligibility process,

they are allowed to take the test. But this does not mean they are promoted. They still have to meet the time and grade requirement. So they are still on the list but they are held there until they meet the time and grade requirement. This new change accomplished consistency and predictability within the Asheville Fire Departments promotional process. It removed that huge inequity I spoke about. This change included more people in the process rather than excluding, which was what was happening. Chief Burnette will testify that this was not brought before the Civil Service Board because the time and grade requirement did not change. These candidates still have to meet that time and grade requirement. Time and grade requirement was reviewed by this board in 2009. They still have to meet the time and grade requirement so they are not promoted until they meet that requirement. Mr. Fortenberry has participated in all of the promotional processes since this occurred in 2011, based on the promotional advisory committee unanimous recommendation. Finally we talked about this in the motion to dismiss, Mr. Fortenberry claims he was discriminated in this promotional process because he reported something he heard about potential sexual harassment with other employees in February 2013. However you will hear from Chief Burnette that the eligibility list was published in July 2012 and never changed, he does not have the ability to change the list. Mr. Fortenberry was 13th he remained 13th of 18 candidates Mr. Fortenberry's accounting came 8 months after that list was published. So it was impossible for the reporting of this alleged incident to have affected his ranking what so ever. So as such Chief Burnette determined that Mr. Fortenberry was not discriminated against in that he was treated fairly as a candidate during this process. The City manager also reviewed this and upheld the Chief's decision as well. Pursuant to Civil Service law this board must determine whether the Chief was justified in denying Mr. Fortenberry promotion to Lt. and I think after hearing all of the evidence you will find that Chief Burnette was justified in his decision. Thank you

MR- Mr. Hunter, opening statement?

JH- We will waive our opening statement and make a concluding statement at the end of the evidence.

MR- City would like to present evidence

KW – yes we would like to call Chief Scott Burnette to the stand

MR- swearing in of Chief Burnette

KW- Will state name for the record

SB- Scott Burnette

KW-and what is your position with the City?

SB – Fire Chief

KW- how long have you been the City's fire chief"

SB- little over 4 years

KW-Can you give the board a brief history of your employment prior to becoming the fire chief 4 years ago?

SB- First full time job out of college was with the City of Asheville Fire Department that was in 1995. Worked here for 18 years

KW- so you moved up the rank to Chief

SB- yes ma'am

KW- are you familiar why we are here today?

SB- yes to hear the grievance of Mr. Fortenberry for his Lt. Promo 2012 being denied

KW- Do you know Mr. Fortenberry

SB – yes, ma'am

KW – and how so

SB- Mr. Fortenberry came to work for Asheville Fire Department in about 2000; I've known him for about 13 years. We worked together on Engine 1 on B shift for about 2 years when I was an engineer and he was a firefighter.

KW- So you testified Mr. Fortenberry is grieving his 2012 Lt. promotional process correct

SB- yes ma'am

KW- Can you tell the board when this first took place

SB- The process started in April of 2012 when all the potential candidates, Sr. Firefighters, Engineers were distributed a letter of interest that the promotional process was beginning. If they were interested they could fill out a form. That is what formally began the process in 2012

KW- Chief let me direct your attention to what is identified in front of you as City's Exhibit A. If I may approach the board I have that.

KW – Can you tell the board what is identified as City's exhibit A?

CSB-this is a letter of interest that was sent to all Sr. Firefighters and Engineers in the Asheville Fire Department about the upcoming Lt. promotional process. It also talks about the department have criteria for participating in the promotional process that had been long established. Also that the criteria had been recently reviewed by the department's promotional criteria advisory committee and that we were seeking to determine who would be qualified to participate and interested. Also letting everyone know that the criteria would be as previously identified during our other processes.

KW- And if a candidate is interested what do they need to do based on this announcement

SB- they need to sign that they do or do not want to participate and return the form by in this case May 3 2012

KW- Are the candidates notified of the minimum requirements for this position

SB- yes, ma'am they are attached are the minimum requirements which include the minimum certification as required and also must complete 4 years as a AFD Sr. Firefighter or hired as of 06/30/2013. We also placed an example just to make sure that it was clear to everyone that if you had the required certifications and were promoted to Sr. Firefighter anytime from January 30, 2009 you will be able to participate.

KW- And you just testified right now that you have to be an AFD Sr. Firefighter or higher as of 06/30/2013. Can you tell the board why that dates?

CSB- the Sr. Firefighter position can be obtained in two years so before someone can compete to be Lt. It's important for our department that they work as a Sr. Firefighter at a minimum before we promote them into that position. The reason for the date 06/30/13 is listed is the only people that would be eligible to participate in that process would be those who would have that minimum requirement that was established by the promotional criteria committee back in 2005, and been reviewed by the Civil Service board and approved. We wanted to make sure everyone had the minimum required time and grade before they were eligible to be promoted. So for that to have occurred they would have had to been promoted to Sr. Firefighter June 30, 2009 or earlier, and that would have their 4 years by 06/30/13, that is when the eligibility list expired.

KW- Can you tell the board what components are involved in the Lt. promotional process

CSB- There is 8 dimensions that are involved. The Lt. Promotion, I tell members in the department all the time that the Co. Officer and the Lt. is the most important position in our fire department so we have an extremely structured process for our Lt. promotion. It is such a critical role in our department it is the frontline, it is the first time leader. It is the crew member that is taking our firefighters in the fires, keeping them safe, bringing them home at the end of the shift. So we have eight different components to make sure we are absolutely selecting the best of the best. So those eight components include: an emergency scene scenario, include presentation, they include interview component. They include a cognitive test, they include human relations, and how well they lead and work along with others. They include an evaluation of the past four evaluations the ranking that I have given that employee based on their performance for the entire 12 months. Also included is a review of their professional credentials, which is what they have done in their fire service career. Included also is the 5 points for fire chief discretion at the boards last meeting I discussed how we use that. It has only been used one time to break a tie, so that component was not used in 2012 Lt. process.

KW- Chief let me direct your attention to what's identified as the City's exhibit B. May I approach the board? can you tell board what this document is?

CSB- this is a breakdown of components within the Lt. process that candidates are measured against. These are the 8 different components that are used. So they we select the best persons as Lt.

KW- does these documents reflect categories you just spoke of

CSB- yes Ma'am

KW- If we could just go through it, the structured interview. Can you go into detail, is there a panel

CSB- yes ma'am we use assessors, we use assessors outside of the Asheville Fire Department so there is no biases. We have a panel and the candidate is asked a number of structured questions and it measures the candidate's ability to present themselves as a leader in our department.

KW- who scores the interview

CSB- the external assessors score the interview process

KW-If you could go to number two the Professional credentials. Can you briefly explain to the board what that component involves?

CSB- the professional credential is like a resume. It captures that firefighter's entire career from the time they were hired and everything they have done with the fire service up to that point. It includes what experience they have. Of the three categories that is one of the big third. Experience is 1/3 of that professional experience. It is critical in being a Lt. so we want to measure what level of experience that candidate has had in their entire career. Someone who has been a firefighter for 20 years is going to have assembled a lot more points than someone that has been in our department for six years so that measures experience. Another component that is measured is what that firefighter has accomplished that includes what training they have done in and outside the fire department. It includes how active they are within the community, what professional associations that are relevant in their field. It involves how active they are in the fire service, any teaching that they have done with other firefighters. Also public speaking to the community, public speaking in the fire department, research papers, articles that have been published. Things like that are what are accounted for in the professional contributions part of that professional credentials. Another part is the firefighter's education, what really has value in this component is all formal education but particular education related to the emergency services.

KW- how is this information compiled. This education experience and professional contributions you testified to

CSB- each candidate is given a template, and that template is a workbook. And the Civil Service Board in 2009, Ms. Robinson and Mr. Rosen I believe you were the only members of this current board back in 2009. The same one you saw in 2009 is the same we use today. It is a template that is used by the candidate to assemble their resume on what they have done in the fire service. So the candidate assembles that and calculates their number of points. What is done after that is that the process manager for the Lt. promotion process validates everything that is in that component? If a firefighter states they have certification and gives themselves credit, they also have to include documentation. A

copy of their certificate or a copy of their transcript. So we validate and make sure everything they are saying is captured in their career is validated in this document. It is also verified by the Human Resources department as a second check.

KW- Let's go to the third component what is emergency scene management and incident reporting, if you could briefly explain that

CSB- Emergency scene management and incident reporting is total 4th of the process that is the biggest weighted component in the process, because we feel it is the most important. The ability for a CO Officer to lead other Firefighters in emergency situations is the most critical thing that we need to measure. So we use external assessors and we give the candidates a scenario and they have to perform in that scenario as a CO Officer would be expected to perform. The incident reporting part is a very small component of that and it is the ability how well can the CO Officer document the incident? It is 2% of the process, in this particular process the 2012 we did not use those 2% so they were not a part of the overall process. We had data elements in the incident report that potentially could be available to other candidates. So in the case someone might have an advantage we decided not to include for any candidate. For two reasons it was such a small component and we had no way to verify yes or no that somebody might have seen those data elements prior to the test. Specifically what occurred a copy of the incident report, after the test, was discovered in one of our fire stations. Likely that was printed in access after the test but since we could not verify that and it was a small chance it could have been seen before the test. We wanted to make it fair to everyone and no one had an unfair advantage so we did not use the 2%.

KW- who scores that portion, the assessor or you?

SB- the emergency scene is done by external assessors. They evaluate the candidate's ability to perform

KW- test category four and five written testing is self explanatory but who scores the test

SB- we use an external vendor for both of those products. As soon as the test are completed they are sealed and sent to the vendor. The vendor evaluates and gives us the scores.

KW- What is the technical presentation category 6

SB- Technical presentation is the ability of the firefighters' technical knowledge and the ability to speak and portray of that knowledge in a presentation format. We give the candidates all the exact same topic and they are required to present on that fire service topic to external assessors. They score how well that person, on technical knowledge and their ability to present.

KW- We talked about the performance review evaluations, who scores the last four years?

SB- The last four evaluations I would like to say the candidate is in complete control of this score because it is based on their performance. It's based on how well they perform during the last year. It is critical for me as Fire Chief that CO Officers that work for the fire department are best of the best they are our top performers. And they are leading our firefighters into harm's way every single day. So as Fire

Chief I want to make sure that our Lts are bringing our firefighters home safely. I want our top performers to be our CO. Officers. So the past four evaluations are based on what I have evaluated using the candidates information they put in their performance evaluation. Also what their supervisors have evaluated. What I assign the candidates over the last four years that is assembled and worth 5% of the promotional process.

KW-How many supervisors give their recommended rating to you?

SB- typically the firefighter's immediate supervisor, the Battalion Chief and the Division Chief will provide their input so I can make the final record.

KW- and that includes all with the firefighter's recommendation

SB- And that's what's most important in that evaluation. The firefighter they are unable to present how well they performed in a year. That's a good indication on how they performed an employee that is able to be a high performer and to discipline that they are a high performer. The candidate typically will enter that information

KW – And you testified the last category, the fire Chief discretion, that was not used in this process?

SB-No that was not used in the 2012 Lt promotional process, It has only been used one time and it was to break a tie in the Fire Marshall's process in 2010.

KW- The multiplier category down there, what is that

SB – that tells the board the percentage of the process that is worth. So if you look at the structured interview that's 15 out of 98 points.

KW- professional credentials and that goes down the list. You testified that incident reporting in category three was not included right.

SB- Yes ma'am

KW- So it does say the total is 105 but since you don't use the Fire Chief's discretion and the other 2 points were kicked out for fairness that gives a total of 98.

CB- 98

KW- Were the candidates notified of this scoring system?

CB – yes, they were notified a number of ways. The first time they were notified was in April 2012 after the promotional advisory committee reviewed this process and recommended that no changes be made. That was sent out to every fire employee and the next time it was sent was at a kick off meeting, our kick off meeting is where distribution of information and frequently not every candidate makes it. So to make sure everyone gets the information it is distributed in the kick off meeting is sent electronically.

KW- Do you know if Mr. Fortenberry was in attendance at the kick off meeting?

CSB- do not know

KW- you don't take attendance

CSB- no typically. There were 26 candidates and trying to make sure every single candidate can be there is impossibility. We have some working, we have firefighters on vacation. What is important is that they get the information. That is why they electronic means of sending that to them is what is most important. They also have the opportunity to come to the kick off meeting get that information. They all get the information electronically

KW- Exhibit B as well

SB- yes ma'am

KW – let me direct your attention to as what has been identified as City's exhibit C. Can you identify exhibit C for the board?

SB- this was an email that was sent to all the candidates that indicated they wanted to participate in the process that it was kicking off and we would have a physical meeting the next evening. The purpose of the meeting was to distribute study material and to go over the process.

KW- did you receive this email

SB-yes I did

KW- was this email sent to Mr. Fortenberry?

SB- yes it was

KW – how do you know that?

SB – his name was included in the distribution list

KW – in the two categories, was there anything else given to the candidates before the process

SB- yes they are sent the template, the professional credentials workbook before the process starts so they can begin assembling their resume.

KW- And when was that sent to the candidates

SB- That was sent the 18th of May 2012

KW – 2012, ok. If I can direct your attention to City's exhibit D if I may approach the board. Can you identify this document for the board?

CSB-This was sent to all the candidates that were interested in participating in the process. It's a copy of the professional credentials workbook. It's what the candidates were asked to used to complete the professional credentials component of the process.

KW- you say that workbook was attached to this email?

SB- yes it was an electronic file attached to the email

KW- let me direct your attention to what is identified as City's exhibit E, if I may approach. Can you identify this document?

SB- this is a professional credentials workbook that was distributed in 2012 Lt promotional process.

KW- and again that was sent May 18?

SB- yes ma'am

KW- you testified earlier that this scores the candidates experience, education, and professional contributions. Is that correct?

SB- Yes ma'am

KW- If you could flip to the first page of experience. How is that scored?

SB – this is 1/3 of the professional credentials process and experience. How this is captured is the number of calendar months that an AFD firefighter has been a firefighter, firefighter Sr, Engineer. That is multiplied the higher the level of experience the higher the weight and the more months someone has been a Sr. Firefighter the more points they get.

KW- Flip to the second page, formal education how is that scored?

SB- this is way to capture someone's credited hours, also degrees they have earned. Emergency service degrees get the candidate more credit in the process than a non service degree. But they both receive credit.

KW- How about the next one, certifications

SB- Certifications is also very similar to the education component. It is a compiling of the certifications someone has obtained in their entire career.

KW- Is there a time limit on these certifications?

SB- There is not; no matter when these certifications are obtained they count. The state of NC recognizes these certifications as to what would be critical to be a Lt. a fire officer. No matter when it was obtained it counts in the process.

KW- Flip to the next page titled professional development, can you explain that one?

SB- This is a listing of training courses that's taken over five years. Certifications capture the training that the firefighter has the entire career. The professional development piece speaks to the relevance of that training. As a company officer it is critical to take our firefighters into emergencies, it's critical they have relevant training. We have a saying at the fire department "You can have 20 years of experience and you

can also have 20 of the same years.” And this captures that exactly. We do not want our Lt. who needs to be the best of the best to not have relevant training. We want to have someone who is extremely involved continuously throughout their career. Not someone who has done a lot of training 15 years ago and then has been non participatory throughout the rest of their career. As you had alluded to earlier the changes in the fire service are exponential. Technology and fire fighting tactics change all the time and it’s critical just as in any industry, it’s critical to stay relevant on those components. So this small slice of this professional contributions workbook is a measure of training that has been done in the last five years. So that we can have a feel of the relevance of that training how up to date that training is.

KW- How about the next one Professional Contributions, what does that involve?

CSB- Professional contributions is how active that firefighter is in the fire service community. Are they teaching other firefighters? Are they speaking at fire service events on fire fighting tactics? Are they speaking in the community about the fire department? Are they doing research projects, are they publishing papers. Have they received service awards for emergency services work? That also is a reflection of their relevance in the fire service. Is this someone who is continuously proving themselves throughout their career, or is it 20 years of the same career experience?

KW- How about the next one active association membership?

SB- It’s important for a leader in our department a Lt. to be active in the fire services. We want them an active member of our association and involved in the networking and the knowledge that is gained by being an active member. And so this measures the candidate’s involvement in the fire service. These are our leaders. These are our frontline, faces of the department. We want them to be the best investment out there in the fire structure, and this measures that.

KW- why last 5 years again?

SB- Relevance is very important. And so we want to measure how relevant that person’s activity in the fire service is. If their activity was 20 years ago that’s extremely important. What we want to measure is: Are they continuously active in the fire service. Are they getting 20 years of experience or are they getting 20 years of the same year of experience.

KW- Lastly Community involvement is the last component of the professional contributions.

SB- As a leader in our community, as a leader in our fire department. It is critical that our Lieutenants are active in our community and this is a measurement how active that person has been in the community.

KW- And again last 5 years are relevant?

SB- yes ma’am we want our leaders to be active in the community today. We want our leaders to be active in the community throughout their entire career. And so this is a measure of that role.

KW – And what’s the last page?

SB- Last page is a compilation of all those categories that we just went through. So a candidate accumulates their total points and then they have a total score, a grand total of the number of points, and then it also tells the candidates what each component accounts for. Experience is 1/3rd. The entire thing is 15% so experience is 5% of that in the entire process. 5% is education, and then the remaining 5% in the professional credentials workbook, is a combination of the certifications of professional development, professional contributions, associations, and community involvements.

KW- so the last 5 pages only make up 5% of that (the process).

CSB- yes that relevance that we spoke of is only a measurement of less than 4%.

KW- okay. And you said, you testified the candidate fills this out and the department verifies it.

CSB- yes that's right. A candidate must attach documentation for everything that they state in their Professional Credentials Workbook and then we verify that to make sure that they do have documented all their experience.

KW – Once the candidate has gone through all of these components here, what happens after that? In this process, once the components you went through in exhibit B have been completed?

CSB- Once that occurs, the scores that are tabulated externally are accumulated and all of the candidates have a final score with each component. We ask our Human Resources department to validate those scores for us. It's a double-check just to make sure we haven't made math errors. Or that there was something that we didn't see. And so our Human Resources assists us, validating that we have scored every candidate, totaled every candidate correctly based on the external assessor scores, and once those are scored, we establish an eligibility list for candidates who have participated in the process and whether or not they would be eligible for a Lieutenant promotion should a vacancy occur. We rank those candidates based on those scores, no other factor is placed in there. It's completely based on their scores. So the top scoring candidate is ranked first, and then we go down from there.

KW-Okay, let me direct your attention to what's identified as City's exhibit F in the email. If I may please approach the board, I'll hand these out at the same time, save some time.

<KW Handing out exhibits>

KW: Can you identify for the board what exhibit that is?

CSB: Exhibit F is the compilation of scores that we just discussed; this is a total of all the ____ of the process for each candidate and a ranking of those candidates and their eligibility list.

KW- And what was Mr. Fortenberry's score on that list.

CSB – 56.09

KW- And is that out of the 98 total that...

CSB- That is correct. That's 56.09 out of 98.

KW – And the first candidate?

CSB: 75.2

KW - Okay. And let's flip to Exhibit G. This is the eligibility list that you ___ back to. What is Mr. Fortenberry's rank on this list?

CSB- Thirteenth on this eligibility list.

KW- Why are there eligibility dates next to four of those candidates listed on the list?

CSB- That is when those candidates meet the minimum requirements to get promoted. They are not eligible to get promoted until they meet those minimum requirements.

KW – If they are not eligible, then why are they on the list? Can you explain that?

CSB – Yes Ma'am. In 2011, the Promotional Criteria Advisory Committee discussed this eligibility and *when* you take a promotional test. Prior to 2011, there was opportunity for inconsistency when we had groups of Fire Fighters become eligible for a test. Prior to 2011, in fact my entire 18 year career, up until that, so that my entire 16 years in the Asheville Fire department, we had an opportunity to be very inconsistent about when we offered a promotional test. As fire chief, I had been asked by groups of employees: "Chief, did you select that date so that this group would be eligible? Did you wait to hold that Lieutenant Promotional test a month so that this group would meet their time?" And then also had employees ask me: "Chief, did you select that date a month before this group is eligible because you didn't want these people promoted?" That was not a good situation. That is not a good situation. Anytime where we are arbitrarily excluding employees from a promotional opportunity is something that I just do not feel comfortable as fire chief, doing. Maximum inclusion in promotional processes is what we all strive for. What IS important is that we meet minimum requirements before we are promoted. Arbitrarily establishing when we administer a test is not what is important as related to minimum requirements. What IS important is that before someone is eligible to be promoted, that they meet those minimum requirements. We've had a long standing minimum requirement for Company Officer, that four (4) years as a Senior Fire Fighter is the minimum. So the shortest time that somebody could work at the Asheville Fire Department to get promoted to Senior Officer is six (6) years. And that doesn't happen in every case, because that means you have to get promoted to Senior Fire Fighter the very first two (2) years that you're there. So that is what is important. That being important, that being what was approved by the Civil Service Board. That being what had been approved year, after year after year by the Promotional Advisory Criteria Committee, that six (6) years, four (4) years as Senior Fire Fighter, is what was most critical as a Minimal Requirement. What we were doing prior to 2011, was arbitrarily and unfairly eliminating candidates who had that time and grade. If I made a determination of when I'm going to establish a promotional test, I could alter by one day and eliminate a complete group of employees, or, I could alter by when I administer that test by one day, include a complete group of employees. That's arbitrary and it's unfair. To address that, in 2011, April of 2011, the Promotional Criteria Advisory Committee discussed an administrative change in how we administer our tests. Not the minimum requirements, which are very ___ important, but administratively, when do we establish that

test? When do we give that test? And rather than me as Fire Chief arbitrarily picking a date, we decided and reviewed with Promotional Criteria Advisory Committee unanimously thought that this was a good idea and recommended it for approval, decided to, since we are doing promotional processes all the time, and the eligibility list lasts a year, let's not arbitrarily exclude a whole group of candidates, or arbitrarily include a whole group of candidates. If you, since this is the portal and rather than offering it once a year, if we are offering them every month or every week, then it wouldn't be an issue. But since we are only offering them once a year, the eligibility list is good for a year, if you miss that eligibility date by one month, by one day, rather than having them wait a complete year and then you've been a Senior Fire Fighter for five (5) years for your very first time that you can test it, administratively, let someone take a test whenever. Because that is not effecting the minimum requirements. And then if they take the test at that time, since that list is worth a year, once they meet their eligibility, then if there is a vacancy, then they can be eligible to be promoted. And so we have four (4) candidates take advantage of that. And they would hit their eligibility dates in April. The test was not given, was not finished until July of 2012. So these candidates went ahead and took the test, knowing that they would not be eligible to be promoted if a vacancy came, they did not have their minimum requirements. So they would not get promoted. After April though, they would be eligible. Had we not made that decision back in 2011, these candidates, their first opportunity to take the Lieutenant's test, they would have been penalized by five (5) months in taking this test. The first time, candidates that they were competing against were taking it for the first time, they had more seniority, they were more senior, they had more experience, but they would be taking a promotional test for the first time with people who were hired after them. And so we decided to fix that in 2011, so that we would be fair, and that our administration of the test would not arbitrarily eliminate employees from participating.

MR- Chief, let me just ask you a question, do all of your eligibility list begin on July first of each year?

CSB- No Sir. They, they begin, when the test is completed. Our Lieutenant's test begins on July 1st typically, and we have since 2008/2009, we have been able to offer a Lieutenant's test every year. So we do it in the Spring, and when the list expires June 30th, we finish the process and we are able to establish on July 1st, establish another list for the entire year. Sometimes because of assessor availability, because of candidate availability, because of unforeseen circumstances, we might be delayed by a number of weeks, this particular process finished up on July 13th is when we actually distributed the list, and so it was almost 2 weeks after the ____ day of July 1st.

MR- But for the Lieutenant's exam, through the past how many years, did the list become viable July 1st, expiring June 30th the following year?

CSB- Seven (7) or eight (8) years, 'round 2005, 2006.

MR – Thank you.

CSB – Yes Sir.

VR- Well I have a question. Why not, just make written in stone, that the annual test for the Lieutenant will be in June of each year, and then everybody is aware, okay, I can't, I won't be eligible until April,

therefore I won't be eligible for this test. And it would be fair to everybody, that... okay, I have to wait for that June, I have to wait for that June, I have to wait for that June, because it's not going to be given until that June.

CSB- That's an excellent question, and one that we discussed with the Promotional Criteria Advisory Committee. The uh, we would love to have, and we discussed this, the Promotional Criteria Advisory Committee back in April 2011, and we would absolutely love to be able to say: "June 1st is when we are going to start the process here. And then we realized that if we had a hard start date for every one of our processes, that we would be setting ourselves up to fail, that we would have unrealistic expectations. That June 1st might fall on a Sunday, or whatever that day, some unforeseen thing, oh wow, this year we had to do June 3rd, or, we might be trying to line up assessors, which we use external assessors because we don't want to use anybody in the fire department to make sure it's not biased, line up assessors, they might not be available. We ran into that very frequently with finding assessors and making sure their schedules matched. And so what would realistically happen, even though we said June 1st is when we are offering the test every single year, one year it might be June 8th. And when that occurs, that it's June 8th, that person that was hired June 3rd, all of a sudden becomes eligible, where if we didn't do that, if we've kept it on June 1st, they wouldn't be able to take the test for another whole year. But since an assessor wasn't available, something arbitrary, and now it's June 8th, that person becomes eligible. And so all these candidates that thought they were competing with a pool of 20, now might be competing with a pool of 30. And that's what we were running into. And so, and it would happen both ways. If because of assessor availability, instead of June 1st we did it on May 25th, then a whole group that was planning on ... "I'm failing to get my opportunity because I've come open June 1st... that Fire Chief he did it on May 25th because he doesn't want me to get promoted." And I was actually getting those questions "did you establish that date, normally we do it in April, did you do it in February this year because you didn't want my group to participate?" Or "Well, we normally do it in April, did you do it in May this year because you wanted that group that got hired behind me..." and so THAT was the arbitrary establishment when I would administer the test, would either arbitrarily include employees or exclude employees every single time.

VR- Well I understand what you are saying about saying "June first" but you could say the 1st Monday in June, or the first Monday in May, or whatever, and if that ended to be June 8th or June 1st, or whatever, then it seems to me that would establish a written in stone date. And secondly, it seems to me that you are going to an external assessor and if you contact them in May and say Okay, of 2013, in June, 1st Monday of June in 2014 we are going to have a test, and we would like you to be our external assessor. And it seems to me that if you did it in advance far enough, you could get assessors. Of course if you wait until the last month, I can understand that. But if you do it, and one of the best ____ for your day, and do it every year at the same time, your assessors would be available and have it on their calendars. Uh, and so until, unless you waited until the last minute when they've already made their plans.

CSB- Yes Ma'am. Absolutely what happens is actually the reverse. Because we do schedule our assessors very far in advance, and get their hotel reservations, and have them scheduled to be here, and what occurs, is they call us and say "Guess what. A week from now, I'm not going to be available because of X, Y or Z." And then we are scrambling and then having to do that. So it actually happens in reverse. Not

that we are not scheduling that far in advance, it's last minute cancellations because of the incredible dynamic nature of the fire service, we're by nature, we respond to emergencies so that things come up at the last minute in the fire service with these external assessors very frequently. And so whereas we thought we had everything scheduled and we could provide that on the first Monday of June, all of a sudden, two weeks, three weeks prior, guess what? I'm not going to be able to be there because my Fire Chief just retired unexpectedly and I put in as Interim Chief, so I can't go out of town. We get those types of things. And so we're scrambling and having to find another assessor, and we say "okay, we thought we were going to be able to do it on June 8th, and since we don't have an assessor available, we're going to have to do it on June 15th. And say so that, your point is extremely well taken. And you know after doing these for six (6) years and having those types of things happening and having employees say "I can't believe you offered that test a week late, that excluded, or that included a whole group behind me," or "I can't believe you offered that test a week early – that kept my whole group from getting hired," and so in trying to make it as equal for everybody – we are not arbitrarily excluding anybody – um, that's why we came up with that ____.

VR- Well it seems kind of irresponsible of your assessors. You put something on your calendar, even the President of the United States puts things on his calendar, and he does them. And so these people are irresponsible in their responsibility.

CSB- And it's true, external assessors, we're very indebted to them because we are not paying them and we're certainly at their mercy and if they have something in their city that occurs, there was assessors that we have used that suffered significant emergencies. We had a tornado that went through our community, and three weeks later, they are not going to be able to be at an assessment. And so, it's not the random: "Oh, we've had something come up" for sure. It's just the unforeseen nature of the emergencies that occur here in fire service.... We want to eliminate all that arbitrariness and just say "Let's not worry about having to rely on the irresponsibility of an external assessor, let's have something that is transparent, that everyone knows about, and also, is fair to everybody, and doesn't arbitrarily exclude somebody from a promotional opportunity.

AC- But doesn't it in fact, when you implement this policy, doesn't it arbitrarily include people that the employee, who has his time and grade already in place, has to compete with? So if now you pool of candidates goes from 22 to 26, doesn't that arbitrarily impact existing employees who do have time and grade?

CSB- No Sir, because they do not become eligible until they have their time and grade. And so this would be no different, there's no requirement on our department, there's no expectation that we do a promotional process every single year. I know some are very familiar with times in our department where we didn't have promotional processes every year, like we do today. And so, what could be done, is instead of doing this every year, I could have waited. I could have said "you know, we've got a whole other hiring group that is going to be eligible in April, it makes no sense to start a process now... I'm going to wait. I'm going to wait." I don't operate that way, I don't operate that way, however, there was a perception by some in our department that, he waited a month, so that those people could be included. Or, he didn't wait a month so that those people were excluded. I actually had those

conversations with Fire employees asking me “did you wait a month, did you wait six (6) months, so your point is correct...

AC- Don’t you agree that this process includes 4 people that would not have otherwise been there?

CSB – Yes Sir. Yes Sir. Only after their oath.

AC- Did you submit this change to the Civil Service Board?

CSB- No Sir. In April 2011, we discussed this in the Promotional Criteria Advisory Committee, and the Civil Service Board is responsible for reviewing and making sure that our minimum requirements to participate in promotional processes are met. The administrative function of the integrated test, is not a burden to the Civil Service Board. It’s not one of the things the minimum promotional requirements that the Civil Service Board oversees. And so just as I have not taken any time that I have delivered the test and a date and presented it to the Civil Service Board “We’re going to do Lieutenant’s test or Engineers test on” whatever date, I have not done that in the fire department, that we have ever taken the administrative parts to the Civil Service Board. What we do take is process structure, percentages as we talked about in our last meeting, and also the minimum requirements. And none of that had changed.

AC- Is that your professional opinion, the opinion of Human Resources, or the opinion of the City Attorney’s office?

CSB – All of the above.

AC – Have you submitted that to the Civil Service Board?

CSB – Uh, no Sir.

VR- In other words, you excluded the Civil Service Board, when you feel that you can change something we’ve done without contacting us.

CSB- Oh no Ma’am. No, not at all. What the Civil Service Board had approved, absolutely nothing has changed.

VR – Yes it has. In 2011. In my opinion.

LM- Well, the pre-2011 date that you used, the date of the test, is that part of something that the civil service board approved?

CSB- I’m sorry ask your question one more time?

LM – Prior to this change in 2011, you used the date of the test?

CSB – No, the dates of the test have never been reviewed by the Civil Service Board, the dates that we’ve used. That’s the, just as, you know, we just had a hiring process, the date that we had that hiring test, hiring process, the actual date that we administer things has not ever been taken to the Civil Service Board.

LM- But what about using that as the date by which you are judging eligibility?

CSB – No

LM – That was not part of something that was presented to the Civil Service Board.

CSB – No Ma'am. The only thing that was presented was the main requirements, you know, the six (6) years. Which that has not changed.

KW- So Chief, this doesn't change time and grade requirement that was approved by the Civil Service Board, that you reviewed with them in 2009?

CSB- Correct.

KW – And, so, for instance, if you look at exhibit G, if Rich Rauschenbach is as number two (2), I know you have a ton of promotions, but wasn't promoted at number two (2) because he wasn't eligible, he didn't meet that time and grade requirement.

CSB- That is correct. That is correct.

KW- When this was implemented in 2011 Chief, how many promotional processes have gone through, have allowed these people to sit with, to take the exam?

CSB- Approximately 30, I'm sorry, you said 2011?

KW- Since 2011, how many promotional processes?

CSB – I'd say ten, approximately 10.

KW-And how many employees have been able to sit, can you guesstimate that number?

CSB- Approximately 20, since 2011.

KW- But again, they were not promoted if they did not meet the time and grade requirement.

CSB – Correct. That is correct.

KW - How are the candidates Chief notified of this, their ranking on there?

CSB – They are sent to the entire department, this is ___ eligibility list. And this is what is posted so that all candidates are informed of where they rank on this list, this is emailed to all of our employees.

KW – And it's valid for how long again?

CSB – Um, one (1) year.

KW – And so this would expire when?

CSB – June thirtieth, 2013.

KW – How many candidates were promoted during the 2012 Lieutenant's promotional process?

SCB- 10

KW-And how many, how were these promotions determined then, can you walk the Board through the entire year of when the promotions occurred?

CSB – Sure. The eligibility list is established, and then we have Forty-Eight Company Officer positions and so if there are no vacancies, then we do not have promotions. In November 2012, we had three (3) vacancies due to retirements. And so the first three (3) who were eligible on this list, got promoted. And that was **Clint Brown, Mike Riley, and Stephen Burnette.**

KW - And Roehenbach was not.

CSB – Correct. Because he had not met the minimum requirement approved by the Civil Service Board.

KW – Okay and then, so there were you three (3) or four (4) candidates promoted?

CSB – Three (3). Three (3) on November First. Initially.

KW – Okay, and then when was the next...

CSB – The next I believe was in December, and I believe we had another three (3) or maybe four (4) in December 2012.

KW – And who then would be promoted during that time?

CSB – That would have been **Mike Stageman, Steve Wickam, John Eldrith and Nathan Rogers.**

KW – Not Patrick Bowland?

CSB – Correct. Because he had not yet met his minimum requirement established by Civil Service Board.

KW – Okay, and then when was the next promotion?

CSB – Next promotions I believe were in January of 2013, and that would have been Adam Wilson and **Joe** Larson.

KW - Okay

CSB - Those were due to retirements also.

KW – Okay, and then when was the next promotion?

CSB – The next promotion was in June first, due to retirement, and that was Rich Rauschenbach because he at this time he had met his minimum requirements.

KW – Because it's June, it's after his time and grade requirements. So he would be back ___ onto the list and would be the next in line. Correct?

CSB – Correct

KW – So he was actually promoted tenth, but was second in the process, due to the time and grade requirement.

CSB – Right.

KW – So the other three (3) candidates here were never promoted because they didn't meet the time and grade.

CSB – That is correct.

KW – and eligibility hadn't been reached. Okay. And obviously, Mr. Fortenberry wasn't promoted at that time, and why wasn't Mr. Fortenberry not promoted?

CSB – He was Thirteenth (13th) on the list and we only had Ten (10) vacancies.

KW – Then how did you first learn that Mr. Fortenberry aggrieved that he wasn't promoted?

CSB – When he filed his grievance in July 2013.

KW – Okay, and I'll have you turn to what has been marked as City's exhibit H, if I may approach the board?

AC- I have a question

CSB – Yes Sir.

AC – Is it fair to state, that if these four (4) candidates were not on this list, that TJ Fortenberry may have been promoted?

CSB-Yes Sir.

CW- I have a question too. The way this process is structured, in allowing those people to become eligible on the dates that they were, does that not allow you to have a pool of higher scoring candidates, which is ideally what you are doing the whole way through.

CSB- yes Ma'am. As we had talked about, the Lieutenant's position, the Company Officer position is the most important position in the Fire Department. They are not like me, that, if I make a mistake, it's an administrative mistake. The Company Officer is going into the fires. They're the ones that are responding to emergencies. And so we certainly want the top performers, the best of the best. And so anything that we can do to make sure that our top performers are in that pool, is a good thing. That being said, we want to make sure that regardless of their performance, we want to make sure that they meet the minimum requirements that have been approved by the Civil Service Board, reviewed by the

Promotional Criteria Advisory Committee, and used by the department for a long time. So if they meet those minimum requirements and are the top performers, it certainly makes sense for our community and our department that we get the best of the best in those positions.

KW- Chief, I'm looking at City's exhibit H here, can you identify this document for the board?

CSB – This is the grievance that was filed by Mr. Fortenberry.

KW- Based on this document, what is your understanding of why Mr. Fortenberry is grieving the fact that he wasn't promoted?

CSB- Mr. Fortenberry was aggrieved his Lieutenant promotion that he was not promoted off of that eligibility list for four (4) reasons. He felt he had been discriminated against due to the use of professional development reviews in the process. He felt that he had been discriminated against due to not being allowed to use training that had occurred greater than five (5) years, and then he felt that he had been discriminated against by allowing those who had not yet met their minimum requirement grade to participate in that process, and he felt that he had been discriminated against due to a report of sexual harassment that he had heard, and passed on, to his supervisor.

KW - Did you meet with Mr. Fortenberry to discuss his grievance?

CSB- Yes Ma'am.

KW- Do you recall when this occurred?

CSB- This would have been in July of 2013.

KW – Okay, and what did you discuss at the meeting?

CSB – We discussed, Mr. Fortenberry brought all of his documentation, and we reviewed all of the concerns that he had about the promotional process, and that he felt that he'd been discriminated against because of those four (4) reasons, and we discussed his grievance and then the process.

KW – You had indicated that Mr. Fortenberry was grieving the fact that training that was, that a candidate only had done in the past five (5) years, discriminated against him. Can you tell the board which component of the process this was involved in?

CSB – The training part that Mr. Fortenberry referenced was in the professional credentials portion of the process.

KW – And is that in Exhibit..., I think that was in Exhibit E that we had talked about earlier? Do you want to flip back to City's Exhibit E the professional...

CSB – Yes Ma'am.

KW – Okay, you said that's under professional development?

CSB – yes, that is correct.

KW – The fifth page of that document?

CSB – yes Ma'am.

KW – This is the one you testified they received this in May of 2012, right?

CSB – yes Ma'am.

KW- How much is the entire workbook worth in this process?

CSB- Fifteen (15) points.

KW- And what is this particular professional development worth in this entire process?

CSB - Less than 1 point.

KW- And how was the training counted again? You had testified to this.

CSB – The uh, any training that had occurred in the last 5 years was counted in here. And that was due to the relevance of the...

KW – Why did... from based on Mr. Fortenberry's grievance in what you read and your discussion of him, why did he feel that was, that that discriminated against him?

CSB- Mr. Fortenberry felt that someone that had been hired after him would have more training than he would.

KW – What did he feel would be a fair scoring of training?

CSB – To be able to use training throughout your entire career.

KW- And why don't you do that, again?

CSB- That is captured in another component – that's captured with experience and it's captured with certifications; this is a measure of the relevance of that training, and as a leader, as the most important position in the Fire Department, we want someone to be continuously training throughout their career.

KW- And is this five (5) year requirement, the only requirement in the professional... in this workbook?

CSB – Yes, it is only in this workbook. And it's also under professional contributions, active association memberships, and community involvement.

KW – But Mr. Fortenberry is okay with that five (5) year time line, it's just the training component...

CSB – yes Ma'am

KW – ...pursuant to his grievance.

VR- I have a question.

CSB – yes Ma'am.

VR – Does the City offer an opportunity for Fire Fighters to continue to receive training at the City's expense.

CSB- yes Ma'am. Yes Ma'am. We actually have the opportunity, our Fire Fighters complete anywhere between 280, which is the minimum requirement, and 500 on-duty, that's completely paid for. So that is up to the Fire Fighter when they are working their 24-hour shift, they can do the minimum, or they can train their entire shift. It is certainly training that we provide to the employee, support heavily, and pay for.

KW- Is it mandatory, or is it up to the employee?

CSB- The minimum training is mandatory, the minimum number of hours. But any training in addition to that is up to the employee and can be done on-duty

KW – you say it can be done on-duty?

CSB – Yes, it is encouraged to be done on-duty and that training can be done whenever, and if it is voluntary, it is not mandatory, and it's completely whenever the employee wants to do it, if they want to do it.

AC- I have a question

CSB – yes Sir.

AC – This is supposed to be a snapshot of a(n) employee's professional development in the last five years, and the mindset is that the last five (5) years shows how progressive or how much effort the employee has put into their career, but what if six (6) years out they had done something significant, like the Chief Officer certification, that is clearly relevant to the job of Lieutenant. How would that be accounted for, and more importantly we've talked today about the fact that we don't want to arbitrarily have screwed somebody by using a date certain, but yet aren't you using a date certain – five (5) years and beyond that?

CSB- yes Sir. It is captured in that first. But it doesn't matter when you earn that. Something that is that significant, no matter when you earn that, you count it. You count it. This is, this is less than 1% of that entire process that just speaks to the relevance of is this someone who has twenty (20) years of experience of just twenty (20) years of the same experience? So if they had that Chief Officer certification, no matter when they got it, they got it their very first day on the Fire Department, or the day before we processed __, it would absolutely count.

KW- Can you point that to the board Chief, where that would count on this, is that on the page before?

CSB – Yes Ma'am.

KW – There's no yearly cutoff for certifications. Is that correct?

CSB – None whatsoever. None whatsoever. Nor is there for education.

KW – nor is there for what?

CSB – For education.

KW – Oh.

CSB – Or experience.

AC – Who grades this professional credentials workbook?

CSB- The candidate does, the candidate assembles and puts in the workbook everything that they have done in their career. And then they provide documentation, and then we validate that, the process manager for the Lieutenant process validates that, and makes sure that everything that candidate has in there... if they listed that they attended a training course, they have to have documentation of that included. So they validate... they've listed this, and yes, they do have documentation, and then it's validated by our Human Resources department to make sure we didn't miss something or make a math error.

AC – Okay.

VR- I have a question.

CSB – Yes Ma'am.

VR – In his statement with regards to his grievance, he states that the retirements that occurred that got the number two (2) candidate promoted, happened in March, and you did not require, you did not promote until May. Were you waiting for a candidate to qualify?

CSB- no Ma'am, and that is not correct. The retirement actually occurred on June the first, the exact same day as the promotion. All ten (10) promotions that were made off of this list, as we do with every one of our promotions, the retirement date is the exact same date that we promote. In every case, without any exception.

KW- Do you determine whenever a person retires...

CSB- no Ma'am.

KW- And was this pursuant, the City sometimes offers early retirements, pursuant to that, or was this a separate retirement?

CSB- yes Ma'am. The June First retirement was related to the retirement incentive program, which is a voluntary program that employees who wanted to participate could do so, and we had one of our employees take advantage of that and retire June first.

KW – So you don't choose the retirement eligibility date.

MR- Chief, prior to this ___'s promotional exam, has the department ever allowed employees to test but not be eligible for promotion until a future date? Is this the first time that this has occurred?

CSB- no Sir, sorry. April of 2011, we made that change. So we have allowed that since this time.

MR- But it is the first time, this exam is the first time that you allowed people to test, not being eligible for promotion until a future date.

CSB – No Sir. In April 2011 was when we did that. We did not have people take advantage of that *with the Lieutenant's process* until the 2012, but we made this change about the same time that the criteria was being established for 2011.

MR – Let me be specific – Is this the first time it ever actually was put into effect? You made that change in 2011, is this the first promotional exam for Lieutenant....

CSB- yes. Because we had an Engineer process in the Fall of 2011, which we had people with the same criteria...

??? (VR?) – (1:26) So you've used this process for other positions, but this is the first Lieutenant's position...

CSB – yes Ma'am.

AC- How many Fire Department employees have been promoted by virtue of this rule that they achieved their time and grade during the promotional process, which otherwise would have been excluded?

CSB – That's a very good question. We've had about twenty (20) to twenty-five (25) people who have participated in this process, and the actual numbers that have been promoted, I would estimate eight (8) to ten (10)?

AC- How many Lieutenants?

CSB- One, two, actually two. And again, that's something that I'd have to actually verify. I know we certainly had one off the 2012 list we may have had one. I think we may have had one off the 2013 list, but I'd have to verify that too.

LM- Chief, when you changed this rule in 2011, you said it was discussed in the employee advisory committee.

CSB – Yes Ma'am.

LM - Can you tell us how many employees are on that committee?

CSB- There's eight (8). And um, four (4) are elected by the membership, and another four (4) are appointed by myself. As we talked in the last Civil Service Board meeting last month, I've always used

those next four as the next four ____ and so the eight (8) were elected by the membership – eight (8) employees that represent our department – they are elected by our department.

LM- And can you tell us what the support was for the change in this rule from these employees, who represented the...

CSB- It was unanimous. We actually took a vote by hand, and it was unanimous that the members of the Promotional Criteria Advisory Committee supported that change.

LM- And do they get any feedback prior to voting on something like this from the employees at large, or do they make the decision and then report back, or how does that work?

CSB- both, when we set the agenda, and the agenda is driven by the department – when people have things that they want to have discussed distributed by their department, and so that agenda is sent to the entire department “this is what we are going to be discussing at the next Promotional Criteria Advisory Committee meeting. ” And also included in that email that attaches the agenda – “If you have opinions, thoughts, concerns, suggestions, on any of these items that we’re discussing, or anything else related to our promotional process, please notify one of your elected committee members, so that... ” and also invites all the members of the department to an open meeting, all the members of the department to come and to provide their suggestions and feedback.

LM- So for this particular rule, it was said that “we’re looking at using, changing what date is used for eligibility.

CSB- yes Ma’am. We placed that on the agenda, and sent that out in advance, and say if you have input, that amongst all the other things, if you have input, (inaudible) suggestions, either talk to one of your elected members or attend the meeting.

LM- Had you had any negative feedback about, aside from this particular grievance where that change in rule may have had an impact on that particular individual, now that we know that after the fact. Was there any opposition to this change in the rule and thought it was unfair or anything like that.

CSB- A lot of discussion in the department. A lot of discussion. I was hearing questions, so many questions from the department, that I went - and we do this quarterly – we call this dayroom discussions, just an opportunity to update the department on everything, and then also most importantly hear from the Fire Fighters on items of concern – I talked with every one of our employees about that – and lots of questions at every one of those meetings. After having a conversation and hearing that feedback, explaining to the people who did have questions the reason for the change was to be more inclusive, and it was not to arbitrarily remove someone else from our process, there were not any complaints or oppositions after we had those meetings.

LM- I guess the more senior Fire Fighters would be more likely to be opposed to ...

CSB- you would think, but surprisingly, there was a lot of support by our senior, more senior Fire Fighters. Some of the concerned were those who were just then getting eligible to be promoted to our

process – they were concerned – they were thinking incorrectly that it would have more people that they would have to compete against. Once they realized that no one could get promoted until they had their eligibility, that normalizes everything. Some of our more senior Fire Fighters, our members of the department, what their concerns and their questions were: “Are we promoting people too early?” And once they got the full information as “absolutely not – we’re not promoting anybody until they meet that minimum requirement” then... “oh well that makes sense and seems to be something that’s fair and more inclusive to the members of the department.” Gee, absolutely, a lot of conversation in the department about that, that administrative change that we made.

KW- I’m going to forward you to what is identified as City’s exhibit K, since the Board seems interested in that (inaudible) see if we have any questions here...

MR – Ms. Whitlock before we get started, I’m going to suggest that we maybe take a 6 or 7 minute break

KW – Sure

MR – and that we come back to this next Exhibit

KW – No problem

MR – so would everyone look at their watch and add 7 minutes to it

MR – Ms. Whitlock would you continue with your...

KW – Please. Alright, if I could direct the board and witnesses’ attention to what’s identified as the City’s Exhibit K, as in Kelly, Chief can you tell the board what this is?

CSB- This is the minutes of the April 5th 2011 Promotional Criteria Advisory Committee meeting.

KW- Okay. And do you, do you know who is on the committee at this time, at April 5th 2011?

CSB- In April 5th, attendance at the meeting: Wes Rogers, Chad Drassen, Herman Olson, Joy Ponder, Captain Jeff Bowen, Shane Mackey.

KW- And are those the Fire Fighters ON the committee, or are those just everybody in attendance that day?

CSB – Those are the ones that are actually on the committee. And there’s three (3) others that were in attendance that weren’t actually on the committee.

KW – And who were they?

CSB – Barry Hendren, Christie Craig and myself

KW – And these are, I’m doing the quick math, there’s only six (6) here, are there, how many are...

CSB – there's eight (8), so there's two (2) members that were not in attendance, and I do not remember who those two (2) members are.

KW – I know the Board is interested in what the Promotional Criteria Advisory Committee is. What is their function?

CSB- Their function is to provide advice to the Fire Chief on promotional processes.

KW – You said advice... is this a rule-making body?

CSB – no Ma'am it isn't, it's an advisory committee.

KW- and it applies to whom again?

CSB – There are eight (8) members of the advisory committee, four (4) are elected by the department members and the other four (4) are appointed by the Fire Chief. However, I have taken those four from the next four (4) highest _____, so all are in essence elected by the membership.

KW – So your appointments to this board are just taken from the election.

CSB – Yes Ma'am.

KW – Okay, and what was discussed at this April 5th 2011 meeting, in particularly relevant to this grievance?

CSB – It was a continuation from our previous meeting at which this was discussed. Eligibility to test during year of meeting during time and grade requirement.

KW – Can you point to the Board where that is located...

CSB – On the second page of the minutes, on number three (3) other items... And we talked about how since we are offering promotional processes annually, at the same time every year, unless they are established for that year, members from taking advantage of a promotional process by one month and then they are eligible for 11 months without their opportunity to test. Talked about our current practice at the time, allowed some to test earlier than others and is based completely on arbitrary decision of when a test is offered. And we had an example that we talked about – some would have to wait six (6) months and nine (9) years to take the Lieutenant, while others would only have to wait six (6) years. It was not fair to our more senior Fire Fighters, having to compete for the first time against people who had just gotten hired, and they had been there a whole year longer, and they were in the same group with the others. So one solution to that would be uh, to grant their eligibility until they have that time and grade. It does not effect the minimal requirements, it only effects the portal for when someone is administratively taking that test. And then we provided an example in the minutes, of one that we talked about. The committee did recommend that change after discussing it two meetings in a row, getting input from the department, voted on that unanimously.

KW - Okay, and were employees then notified of the Promotional Criteria Advisory Committee's unanimous recommendation?

CSB – yes Ma'am, they were notified two ways. The first way was distributing that to uh, every member of the department through the minutes of the promotional criteria and what the recommendation that Promotional Criteria Advisory Committee had made. And then also during discussions in which we went around to all the stations over a three-day period and hit every shift and had this conversation so that everybody could hear what the change was, why the change was occurring, and most importantly hear the feedback from the department – find out “hey is this a good thing before we uh decide to make this final decision.”

KW – Let me direct your attention to what's identified as City's exhibit L... may I approach the board?

AC- Chief, at any point was Exhibit K ever admitted to the Civil Service Board?

CSB – No Sir.

AC – Thank you.

CW- And the reason for that was...

CSB- there was not a change to the minimum requirements, or a change to the compliance of the process. It was an administrative change on when we offered a test, which we had not ever taken to the Civil Service Board of when we had offered this.

CW- So timing has not been a part of the process?

CSB – No Ma'am, timing of when we have offered the process has not.

AC- But isn't this slightly different from when you are offering a test? I mean what you are doing with this policy change is saying who can take that test. Isn't that in fact what's happening here?

CSB- Right.

AC – Is that correct?

CSB - yes Sir. My feel is that we are not changing the eligibility of when someone can get promoted or what requirements they....

AC – You are changing the eligibility of when a person can take the test – is that not correct?

CSB – Yes, when somebody can take the test, yes Sir.

AC – Okay, that's my question.

MR- Chief you uh – I had asked you a question about whether or not the Lieutenant's exam in 2012 was the first time you extended eligibility, and you mentioned that in 2011, the Engineers, that process was

then introduced to the Engineers to take the exam but not be eligible until a future date... was that policy change submitted to the Civil Service Board?

CSB – No Sir, no, that administrative policy was not.

MR – Thank you.

KW- Can you identify for the board what Exhibit L is?

CSB- Exhibit L is an exhibit that I sent to all Fire employees that included the minutes of the April 5th 2011 Promotional Criteria Advisory Committee meeting, and also since it was an important change, I wanted to make sure everybody in the department understood – I spent a lot of time in the text of that email rather than just seeing the minutes that is typical practice, I spent a good amount of time in this email making sure that everyone would understand exactly what this meant. And this was just before the dayroom discussions where after this, and so that everyone in the department knew about this, I was able to get this in front of them beforehand. Promotional Criteria Advisory Committee unanimously agreed that this was a good recommendation for this department, put this in front of every member of our department, and then that allowed me to go in front of everyone during our dayroom discussions and hear the concerns and feedback from everyone in the department about this potential administrative change.

KW- Do you know if any of the Fire Department employees grieved this when it was implemented?

CSB- They did not. No, this process has not been grieved until Mr. Fortenberry's grievance.

KW- Okay and again, I know it's hard to say numbers, but how many promotional processes has this effected?

CSB- Approximately ten (10).

KW- Since its implementation in 2011?

CSB – Yes Ma'am.

KW – Okay, and I know you've told this to the Board but how many employees have sat for the promotional test under this?

CSB- Twenty, twenty-five employees.

KW- And you said how many of those had been promoted you think? I know that's...

CSB- Eight (8), ten (10), I know that's definitely an estimate, I'd have to look at the records.

VR- But you could also say that there had been in the department, after this was implemented and not in 2011, (inaudible) thinks that there was disapproval of this practice.

CSB- Lots of questions, lots of conversations, lots of conversations.

VR- But, so therefore everybody was not on board?

CSB- I can't answer that... I know there was certainly questions to me posed just that – “why are we making this change? This doesn't make sense” and then after having that conversation, the end of that conversation was “oh, okay, that does make sense.” And so yes Ma'am, you are exactly correct in that, just with any change, until there's the ability to have those conversations, which we are able to do throughout the entire department, there's you know certain members, there's different opinions....

AC- Did you not feel the need to have that discussion with the Civil Service Board as well?

CSB- no Sir, and the reason was that my perception of the role of the Civil Service Board was that if we were to change minimum requirements for someone to get promoted or if we were to change components of our process, then that's when the Civil Service Board came into play. The administering of the test, I never have in the past, so I didn't think this was something that the Civil Service Board would have want to...

VR- Well, I agree with administering the test but what you were doing, that... I understand. But you were changing, in effect, who was eligible to take that test. And that's the issue that – I agree with you. We have no right, if you or ___ have a test on Sunday, I mean we have no reason to tell you no you can't do that. But we are talking about the eligibility – who actually can take the test, not when they can take it, and I think that's the issue that I'm having problems with.

AC- And it seems you went to great lengths to make sure everybody in the whole Fire Department and the City was aware of this except for these five people right here – I don't understand that.

CSB- And again, on a daily basis, my role is to lead and manage the Fire Department, and these types of information certainly are distributed to the department daily. And also my role is... if there is a board or a committee that has oversight, it's real important for me to make sure that they are ____ so on a daily basis, I'm making those decisions, and what my litmus test is, my previous practice, and the previous expectations of that board and that, or that committee, whatever that happens to be.

VR- yes, but this board was never informed about it, so you did not know what our expectations were.

CSB-you are exactly correct and I was basing it on the meeting that we had in 2009 in which the board had said “the process you are using is a very fair, and transparent process.” And so to continue that...

VR – And so you changed that in 2011. You arbitrarily changed it in 2011.

AC- you also did so at a time when the Board had reconstituted itself with different people, you only have 2 people from the existing board that were on 2009, and you have brought changes to the Lieutenant's process, to this board and never mentioned that since 2009, even though there are three (3) people on this board who are aware of that.

CSB- the uh, and again, I'm getting really good direction from the board today, but my understanding of the role of the Civil Service Board and what the Civil Service Board wanted to hear were changes to the

minimum requirements for promotion, and changes how the process proceeds. I'm getting good direction today with the Board.

AC- So am I hearing you correctly – you say you made the decision not to bring this to the Civil Service Board?

CSB- yes that is correct.

AC – That'll be my question.

CSB – and I'll base that again, based on you know, the history of what had been taken to the Civil Service Board before, and what the Civil Service Board uh...

VR- I think, I think one of the other things that has me, you say it was an administrative decision. Eligibility to me is not administrative. And that's the issue I've got.

AC – I agree.

CSB- Yah, I definitely agree with that.

VR- And we keep administrative, administrative, and eligibility – it's not administrative to me. Your decisions about your time of your testing and when it's done, that's administrative. Eligibility in my opinion is not.

CSB – And the eligibility, I feel was not changed, because they were eligible at the exact same time. That did not change.

VR – Uh, I'd like to read the 2009 decision because at that time we gave an eligibility that they had to have before they could test. And now you extended, you extended it until the end of the testing period. See, that's the part that I don't understand.

CSB- see what was approved in 2009 was, that six (6) years, that four (4) years as a senior Fire Fighter, before somebody was eligible to be promoted – and so that has not changed.

VR – But you extended it, almost a year for at least four (4) people in the same year. They were not eligible until April of 2013.

CSB- Right, which...

VR – Which you extended the eligibility for them, until the end of the testing, the eligibility list, which was June 30th 2013. You extended the eligibility for those people, and that's extending an eligibility that we did not approve.

CSB – They were not eligible before the six (6) years that ya'll approved. Nothing was extended. You had approved six (6) years and that's exactly when they were eligible to be promoted.

VR- Before they took the test, not during the cycle of the testing.

CSB – With all due respect, that was not discussed in 2009. What was discussed was the minimum... requirements. That's where I had difficulty in understanding that these types of things needed to come before the Civil Service Board, because all that was discussed in 2009 was what are the minimum requirements to be promoted.

VR – Okay, (inaudible: cough, papers shuffling)... what the minimum requirements would be. And then eligibility at the time of the testing. At the time...

CSB – We didn't, we didn't talk about time of the testing – we just talked about the minimum requirements to get promoted. And I apologize it's just...

VR - Well, you just seem to want to leave us out.

CSB – Absolutely not. Absolutely not. It's a balance of what the Board would like to hear, and again, I'm getting very good direction today because I never received direction from the Board on what

VR – Have you come and asked for directions...?

CSB – Yes Ma'am, I was here last month, I did regularly...

VR – And and we are supposed to meet on the first Friday, I mean the first Thursday of every month. And at any time you can add an item to the agenda, anytime.

CSB – That's good. That's really good feedback.

VR – Twelve (12) months out of the year.

CSB – That's good feedback.

VR – And all you have to do is call the HR that month and add an agenda item.

AC- And so I think even in an advisory capacity, even if you're not seeking approval, awareness is an important function because how can we do oversight, and I think our staffing clearly says oversight.

CSB – yah, I agree with that one.

AC – but you didn't in this case.

CSB- no Sir, no Sir. It's something that we, the Fire Department had never done before, and in 2011, I was less than two (2) years as a new Fire Chief, and just like anything in life, you learn an expectation of the Board, just as we're talking about today. So it's very helpful information.

VR- Well if this gentleman had not filed a grievance, we would never had known the difference.

AC – Exactly.

VR – we would have never known because you certainly weren't sharing things with us. Whether that was intentional or just uh... but you were going to share nothing with us. If this gentleman right here had not filed this grievance, we would have never known the difference.

CSB- With all due respect Ms. Robinson, I believe I've shared quite a bit – I was here for an hour...

VR- I'm talking about this item. I'm not talking about other items. I'm talking about this item.

CSB – Understood.

VR – It's like okay, we're going to hide this under the rug.

CSB- Absolutely not. That is, that is the furthest from the truth. That is the furthest from the truth. I hope that my record with the Civil Service Board certainly shows that I am very transparent and certainly anything, and it's uh, can you, you can look at Exhibit L and you can see that this is nothing that was, was hidden from anyone – it was distributed to two-hundred and forty something...

VR- But then why couldn't you have distributed it to five (5) more people...

CSB- it was my ignorance that, I did not realize that what I viewed, and I certainly respect your opinion, but what I viewed as when we are offering the test, not a change to minimum requirements, just as anything... go ahead, I'm sorry.

MR- this may have been a failure of admission um, but you've also referenced, or Ms. Whitlock has referenced two other parties, herself and Human Resources, as being in agreement to not to bring this so you have other consultants available within the City that should also be reviewing this policy change, and should be aware of higher authority to review all changes in terms of promotional practices. Um, so, I don't believe you were intentionally being deceptive, but we didn't have the opportunity to give you feedback because you didn't bring it to us. You have been very open with this committee, and I appreciate that. But this one particular issue, we would not have been aware of, had it not been for Mr. Fortenberry.

CSB- May I clarify one thing?

MR – Certainly.

CSB - Um, certainly I would never disrespect the board by intentionally making a decision, yes or no, that, that was not a conversation, there wasn't an um: "Do I need to take this to the Civil Service Board?" and my answer was no... that, that never occurred. That was not an, so it's not a decision that was made. Um, absolutely, since I didn't think of it, is that my responsibility, my accounting? Sure, sure. But it wasn't that "nah, I don't want to take this to the Civil Service Board" that absolutely... I have never and as ya'll can remember, the only thing in my four (4) years, and then prior to that when the Assistant Fire Chief just looking at you (inaudible), the only thing that had ever been taken to the Civil Service Board was changes to the minimum requirements, and these were the same minimum requirements we

had since 2005, and so, so, so clearly, you know, on my part it was, these were not the types of things you take to the Civil Service Board. My apologies.

KW- I do have a quick, if you could flip and we could go back to what's identified as City's Exhibit I, this may help the board with the 2000 minutes that Ms. Robinson, you were asking about... I had to skip around this, I was trying to keep up with the Board's questions and what they are interested in.

LM? – This is October of what year?

KW – of 2009 Ma'am. The time stamp is on the last page, unfortunately.

KW – Can you identify um, City's Exhibit I for the Board please?

CSB – This is uh, the Civil Service Board minutes from October 6th, 2009.

MR - Can we have a moment to review this please?

KW- Oh sure. If it helps the Board I can direct the discussion of the minutes (inaudible) a couple of minutes... it starts on page 2...

MR - and this year is, this year these minutes are from is...?

KW- 2009. October of 2009.

MR- 2009.

KW – The time stamp is on the last page, I don't know why it comes out that way. That was when the minutes were, I guess, created, or approved. Hard to tell.

MR – Alright, if you would like to proceed...

KW – Okay.

KW- Chief, can you identify Exhibit I for the Board?

CSB – Yes Ma'am, this is the um October 6th, 2009, Civil Service Board minutes.

KW- And did you attend that particular meeting?

CSB – Yes Ma'am.

KW – And why did you?

CSB- The uh, Civil Service Board had asked the Fire department and the Police department, the Chiefs of both departments to come and make a presentation on the promotional processes in their departments.

KW-And did you do so?

CSB – Yes Ma’am.

KW – Can you point to the Board where this occurred in the minutes?

CSB – This is on the second page, item number two (2) discussion of promotional processes.

KW – Is this an exact transcription of what occurred at that meeting? `

CSB- no Ma’am, it appears to be a summary.

KW- And so what in particular did you discuss with the board on that date?

CSB- We discussed each of our promotional processes, specifically the Promotional Advisory Criteria Committee, how that committee was made up, and uh, the function of that committee, and the different mechanisms employees had to express their ideas for improvement in the promotional processes, and the recommendations that the committee makes to the Fire Chief for the process, and then the other thing that we discussed was actual components of each promotional process. We also talked about how none of these components for minimal criteria had changed since 2005, and where the components were rated and where they were scored, and also answered some questions from the Civil Service Board about the promotional process, and how the decisions are made, and was asked about whether or not the Promotional Criteria Advisory Committee had improved communication around the department, which it certainly had, and the committee stated that the Fire Department process was a fair and transparent process.

KW- Did you bring an documents with you, do you recall?

CSB- yes Ma’am, the different components of the professional development review workbooks, the process scoring matrices were brought in for the Board’s review.

KW- And the uh, you said professional development, did that involve the component where training was counted in the last five (5) years? Was the evaluation of PDRs discussed with the Board at that time?

CSB – yes, yes Ma’am.

KW – and you said, and what did the Board decide on that date?

CSB- stated that the Fire Department process was fair and transparent, and recommended no changes.

KW-And did they communicate any other committee review these, this criteria?

CSB – yes the Promotional Criteria Advisory Committee annually reviews to see if they would recommend any changes, and that’s based on input from the department.

KW – When did they review the 2012 Lieutenant’s promotional process?

CSB-April 2011. I’m sorry, April 2012.

KW – Twelve. If I can direct your attention to Exhibit J...

VR- So that was done a year after you arbitrarily changed the requirements?

CSB – The Promotional Criteria Advisory Committee every single year, reviews all the requirements.

KW- Okay, can you identify this document?

CSB- This is the minutes of the April 24 2012 Promotional Criteria Advisory Committee meeting.

KW- Okay, and can you tell the Board who was in attendance at that, that evening?

CSB – Shane Mackey, Herman Olson, Joy Ponder, Stephen Burnette, Wes Rogers, Sparky Rex (? Inaudible), Scott Mullens and Mike Riley, the committee members that were present. Also that were not on the committee were myself, Wayne Hamilton, Kelly Hines, Holly Waltemyer, and we also had two (2) members of the Johnson City Fire Department, who wanted to learn about our promotional processes, that were shadowing us for the day. A number of different times in the Fire Department.

KW - Can you point to the Board where in the minutes the committee reviewed the Lieutenant requirements?

CSB- Item number two (2) Upcoming Promotional Processes, Lieutenant, they reviewed the minimum requirements and the process.

KW- And what was the recommendation?

CSB- The recommendation was for no changes, they also had talked about some improvements that one example, was that the Law-in-Administration class be offered locally every single year, Inspector I, um, the other ways to accomplish the knowledge, skills and abilities obtained by Fire Inspector I in lieu of becoming certified, um, and uh, also looking at (inaudible) and all the processes, were some of the examples of things that were discussed.

KW- Again, I'm speaking of, we talked about the employee sitting for the exam and concentrating on the other parts of his leading score of the evaluation of the PDR and using the training time in the last five (5) years, again, I know again, numbers are hard, but how many promotional processes have those criteria in?

CSB- In, um, minimal requirements that the Promotional Criteria Advisory Committee reviewed in April of 2012, in the 2012 process, has been used in about 30 processes.

KW – Thanks. And how many employees have been promoted using this criteria?

CSB- Using those types of criteria for all of our different promotional processes in which the criteria are the same for evaluation, about 100, 150 people.

KW – Okay and did any employees grieve this criteria once for (inaudible) 2005?

CSB- no Ma'am, not until Mr. Fortenberry's grievance.

KW- And lastly, Mr. Fortenberry claimed in his grievance that a reporting of, you had testified a reporting, something he had heard in early 2013 regarding (inaudible) sexual harassment was used against him in the 2012 promotional process. Were you aware of Mr. Fortenberry's report?

CSB – yes Ma'am.

KW - did involve Mr. Fortenberry at all?

CSB – no Ma'am.

KW- and what did you hear from Mr. Fortenberry? Did Mr. Fortenberry talk to you directly or you just heard from others?

CSB- no, he reported to his immediate supervisor.

RECORDER CUT OFF AT THIS POINT BUT WENT UNNOTICED. ONLY SUMMARY NOTES THAT APPEAR BELOW ARE AVAILABLE UNTIL THE BOARD TOOK A BREAK.

KW- was this fully investigated

CSB- yes, HR and CMO

KW- was he informed of outcome

CSB- no the outcome is a personnel matter and is not shared with the dept. he was not the only that heard the allegation.

KW- did his reporting 2/13 effect chances of promo

CSB- no the elig was est in jul;y 2012

KW- can you influence time of promo

CSB- no

KW- Can yo infulen retire

CSB- no

AC- who was the emp

CSB- jimmy cowan

KW-

CSB- he had been treated fairly as all employees in the promo process.

KW- Exhibit M-

CSB- my response to TF grev

KW -can you para phrase

CSB- I summarized the grievance, and did research, addressed the four different areas he was being graded on/felt he had been treated fairly/did not agree resolution that he be promoted

VR- do you not agree if you did not add the 4 he would have been promoted

CSB- yes ma'am

KW- what was the response toward training

CSB- he felt academy time should not be used/explained that it wasn't/most certs are earned at the beg of the academy/important to know applied to everyone

KW- proff review

CSB- TF had concerns his shift had the lowest rating/addressed it was equitable, along with the candidate that was promoted it was across all 3 three shifts/time and grade, explained all candidates had time of service required/reviewed 2011 change to process/reviewed complaint was grieved was not effected by test 08/05 gave response

KW- then what happened

CSB- he submitted to City Mgr

LM- would it have altered his ranking of five years

CSB- no ma'am. but it was less than 5% of the total score

LM- but not the 5 year service

CSB- no ma'am it would not have affected it

KW-

CSB-Letter from city mgr

KW – did city mgr meet with TF

CSB – yes

KW- were you in the meeting

CSB-yes

KW- and that is Exhibit O

CSB- yes the written response

KW- if found discriminatory?

CSB- 100-150 will be demoted and process would need to be retaken

KW- no further questions

MR- restate the issue of promotion discrimination

CSB – since 2009- 100-150 have been tested using this practice

MR- has anyone grieved on this to your knowledge

CSB- no

VR- is the main issue the eligibility date of testing/ but we would not go back to 2005 it would be 2001

CSB- in that case it would be 20-25

CW- what is the minimum requirement remind me

CSB- 6 years of service to be eligible to be promoted to LT

VR- as long as they meet the required time

CSB- yes but only when they met the requirements

CW- how long would they need to be here

CSB- 6 years and 1 day total

VR- 3 years Sr FF

VR- if someone was eligible on 6/29 with a higher testing would be promo over TF

CSB- yes but we want to ensure that the promo has the highest scores

AC- is timing important

CSB- yes that is why they are not promoted before they met time requirement

MR – further questions

AC- ability to recall if needed

MR- All right, well let's get started. I believe we left with Mr. Hunter, are you to question the Chief?

BH – (inaudible). Turns to CSB: Chief Burnette, can you, you've testified a good bit today about the Criteria Advisory Committee, that Promotional Criteria Advisory Committee for the Fire Department. Do you know, know when that was established?

CSB- 2005

BH- Okay, and do you know why it was established, or under what authority it was established I should say.

CSB- yes Sir. The uh, back in 2005, and this is only from being a member of the department and hearing information that was shared to the department, back in 2005 there were concerns from members of both the Fire department and the Police department about the departments creating minimum requirements that employees were unable to obtain and implementing those core process. So a new certification that was required for a process, and employees not having enough time to earn that certification, so it would eliminate, there were some concerns about unfairly eliminating employees from processes. Due to that, there were some conversations with Senator Martin Nesbit and a local bill was filed to amend the Civil Service law, and through that process, Senator Nesbit and leadership from our Fire Fighter's Association and our Fraternal Order of Police Association came to a recommendation that rather than changing the Civil Service law, there were Nineteen (19) points that needed to be addressed. And those Nineteen (19) points were documented in a letter from, at that time our Assistant City Manager, documented those Nineteen (19) points. And part of those Nineteen (19) points, actually most of those Nineteen (19) points addressed the creation of a Promotional Criteria Advisory Committee. The intent of that Promotional Criteria Advisory Committee was so that employees of the Fire department and Police department could have input into the promotional processes. The um, rather than a Fire Chief or a Police Chief implementing promotional, minimal promotional criteria, the um, this advisory committee was established to give advice to the Fire Chief or the Police Chief. Also in those Nineteen (19) points was how that committee would be structured. Four (4) members would be elected by the employees within that department. The other four (4) were appointed by that department's Chief.

BH- And do you know if any reference to the Criteria Committee was in fact put into the Civil Service law at any point?

CSB- I do not know, but I do not believe that there is any reference to the Promotional Criteria Advisory Committee in the Civil Service Law.

BH-Okay. I'll ask you to the document you have in front of you, right there on the side, I think the very, the top one that is marked Exhibit A, and for the Board's information, you all have a black notebook in front of you I think that has Grievance Documents listed on the front. This would be under, there are tabs and it would be the first document under tab two (2).

PB- Just to advise the Board, so these documents are being given to you all at one time, as opposed to individually, you should only look at that document that is being introduced to you at that time.

BH- And um, Chief do you see the document that, for some reason there is Exhibit A in front of it, and it indicates it's an Act to Revise the Laws related to the Asheville Civil Service Board and its' 2009 session lobby (inaudible).

CSB – yes Sir.

BH – And I'll ask you and ask the Board to flip over to where it's marked, it's really the third page front and back that goes 1, 2, and third page, it's got Fortenberry 125 down at the bottom, or it's got page 9; you see that and there's a section, enumerated sections at the top of that page starts with number one. And if you will look at number one and see if that refers to the Criteria Committee.

CSB – yes Sir. It certainly describes how we utilize the Promotional Criteria Advisory Committee.

BH – Thank you. And do you see the sentence near the end of that subsection one, where it says the Civil Service Board shall... could you just read that sentence please?

CSB- The very last sentence of section one?

BH – It's actually the second to last sentence of section one that starts with: "The Civil Service Board shall..."

CSB – You'd like for me to read that?

BH – yah if you could just...

CSB – Yes Sir. "The Civil Service Board shall have the authority to approve any criteria established in the criteria itself by only to persons promoted or hired after the effective date of the approval. This provision shall not apply to hiring or promotional processes that were initiated prior to the effective date of this act."

BH- Okay. Now you, you see the language there that says "The Civil Service Board shall have the authority to approve any criteria shall apply only to persons promoted or hired after the effective date of this approval."

CSB- yes Sir.

BH- Now in your testimony earlier this morning you indicated that the change in the process that allowed certain Fire Fighters to become eligible to take the test and therefore eligible to be promoted in any given year, that that change was something that went through the Criteria Committee. Correct?

CSB – yes Sir.

BH - And I believe you indicated that in fact the Criteria Committee considered it on at least two (2) occasions prior to adopting?

CSB – yes Sir.

BH – and they voted, I believe you indicated, unanimously to adopt that.

CSB- To recommended it, yes Sir.

BH – and... to recommend it to you.

CSB – yes Sir.

BH – and that action by the Criteria Committee was accepted by you.

CSB – yes Sir. We did implement that change.

BH – And um, but you’ve testified that you did not bring it to this Board for any sort of approval or review, is that correct?

CSB – yes Sir, that is correct.

BH- Now is there any language that you know of that if something is a policy or procedure goes through the Criteria Committee process, is acted on by the Criteria Committee, is recommended to you, and you adopt it and put it into place. Is there any language that you are aware of that would say “that’s not something that needs to come before the Criteria, I mean before the Civil Service Board pursuant to this language?

CSB- no Sir. If I understand you correctly, is there a part of the Civil Service Law that directs me to not take things to the Civil Service Board, is that what you are asking?

BH – Right.

CSB – I’m unaware of that.

BH- Okay. And you see the language there where it says “The Civil Service Board will have the authority to approve any criteria established?

CSB – Yes Sir.

BH – Would you agree with me that this criteria was established via this process?

CSB- yes Sir, and the criteria being the minimum time and grade, four (4) years as a Senior Fire Fighter was established for this, was established back in 2005.

BH – Right. But would you agree with me that the change that went through the Criteria Committee was a change that did not go through this Board?

CSB – Yes Sir, that is correct.

BH- And you, at that time you did not know of any legal reason to not present it to the Board that would direct you to not present it to the Board, is that correct?

CSB – That is correct, because it was not a change to the minimum requirements to be promoted.

BH – Well is there anything in this language we are looking at that limits the review of this Board or the approval function of this Board to minimum requirements?

CSB- Not that I'm aware of.

BH- Is there any rule of this Board or of this City that you are aware of that would limit the role of this Board to "the minimum requirements?"

CSB – I do not know.

BH – I'll ask you to look at.... Well let's talk a little bit about the issue of what you were trying to achieve by changing this criteria in terms of who could take the test. You indicated that there was a problem with arbitrariness in terms of the... when the test date could be set, correct?

CSB – Yes Sir, that was one of the issues.

BH – Now, if an individual, I think you had in one of ... we'll flip back to the.... Identify... I think you still have the ones from the City and I'll just use that one since it's ones in front of us... it's the uh, Advisory Committee Meeting where they approved the...

KW – 2011? K?

BH – K. Yes. K. Um, if we look at the City's Exhibit K, which has already been marked and identified in this process, um, that... there's an actual example of what you're trying to address in these minutes. Is that correct?

CSB – Yes Sir.

BH – under... it's... so the last full paragraph?

CSB – Yes Sir.

BH – Okay and it says "Example: Engineer Jones will have their time and grade on June 1st to take the Lieutenant's test, the test is offered in May. Engineer Jones is allowed to take the test if they meet all the requirements. Engineer Jones is, scores third (3rd) on the list. If three (3) spots are open immediately, he doesn't get promoted, but he becomes eligible on June 1st of that promotional year." Is that correct?

CSB – Yes Sir.

BH – Now... I guess this example that you us, and all the examples that you use, would, is based on the fact that the uh time and grade, June 1st time and grade, for example, is during the one (1) year following the test. Is that correct?

CSB – In this example it's one month.

BH – Yeah, but that, but whatever the date is, in order for the... Jones to take advantage of the new criteria, his anniversary date has to be within the one year period of the taking of the test.

CSB – Yes Sir.

BH – Well what if... in this case you say the test is offered in May, let's say it was offered May 1st. What if his anniversary date was June 1st of not... doesn't fall within the one (1) year, but falls one (1) month after the one year eligibility?

CSB – Right then... at no point in time during the life of that eligibility list would he meet the minimum requirements to get promoted, so there would be no reason for that person to participate in that process, so there would be no eligibility.

BH – Right. And that's because you're still dating everything from the date the test is administered. Correct?

CSB – No Sir. The life of the eligibility list.

BH- Well, the life of the eligibility list is dated from the date in the year that the test is given. If the test is given on May 31st, then the individual can be promoted as long as they have their time and grade by May 30th of the following year. Correct?

CSB- No Sir, it's when the list is established. The test is not one test. There's eight (8) dimensions in the process, and so after all eight (8) dimensions are concluded and everything is summed up and the list is established, from that date, yes Sir, that is when the date is established.

BH – Well, is that but, so that process begins with the testing process?

CSB- No Sir. It begins with the establishment of the eligibility list.

BH – Well, what I'm trying to get at is... so the important date is not the date the test is given, it's the date the eligibility list is established.

CSB – It's actually the date that the eligibility list expires, because that person will have eligibility to get promoted during the life of that eligibility list.

BH- I thought you were trying to address a problem that arose because of when you would pick a date that the test might be given.

CSB – Yes Sir.

BH – So is it your testimony that it's not the date on which the test is given but some other date that would determine a person's eligibility?

CSB- No Sir. The, when the test starts...

BH – Well when you say start, you mean the date the test is given?

CSB – Right, correct. Previously, only those who had their time and grade before it started, even though it could take a month to six (6) weeks, would be eligible to even begin to participate.

BH – Right...

CSB – We would have people that would become eligible during the middle of the process. But they would not be eligible under our previous, how we did the process, even if before the eligibility list was established. They would become eligible but they would be excluded for an entire year because of when I arbitrarily decided to start the process. So understanding your question more clearly now, the important date is when that process is started before. This new procedural change, took away the arbitrary nature of that. As long as somebody met the minimum requirements then they would not be arbitrarily eliminated from a promotional opportunity for an entire year.

BH- Well don't you pick the date on which you start the process? Isn't that a date you pick?

CSB- It absolutely is, which can be arbitrary. And so that was the reason why we did away with that process so it would be fair for everybody. Wasn't determined on an arbitrary date that I picked.

BH- But if you picked the date on which it starts, the employee is going to be eligible for one year, from the time the process starts until the end, for one year.

CSB – Under the old way that we did it, yes Sir. The new way normalizes that and is dependent on when they become eligible.

BH- Well I understand that. But that eligibility has to fall within the one (1) year period that began from the date you started the process.

CSB – Yes Sir.

BH – Okay now bear with me for a sec. If a person's anniversary date, let's say that you started the process on May 30th of 2012. In order to take advantage of the process, the new process that you have in place, their anniversary date has to either be before that, so they've got time and grade the minute you started, or it has to fall within one (1) year from the date you started.

CSB- No Sir. The new process, once the date is established, if they meet their minimum requirements during that year, during that twelve (12) month period of time, then they are eligible to be promoted.

BH – During that year.

CSB – Yes Sir.

BH – But if they meet that minimum requirement two (2) days after that year is over, they are not eligible to test. Correct?

CSB – That is correct, because there's no eligibility potential for them during that time.

BH- But if you had started the process five (5) days later than when you actually did start it, that person who is two days outside the window of... would be there correct?

CSB – Yes and that is exactly the issue because now, they have advantage of the entire three-hundred sixty five (365) days of eligibility that they would have had rather than arbitrarily eliminating them for the entire year. See...

BH – My point is you, by setting a date and running for one day past that date, yes, you are including people who might fall within that one (1) year, but if there's someone whose date fell one day later, they're not included.

CSB- No. Under the new system, as soon as somebody gets the minimum requirement met, they're eligible.

BH – Right.

CSB – They're eligible. What you're (inaudible) is exactly the problems that we had, because we would set a test, and whether we would exclude people and it would include people. And it was based on when I would set a test, and that what makes sense the most is if I became promoted as a Sr. Fire Fighter on June 1st of 2009 and on June 1st of 2013 I met the minimum requirement. I should be eligible to get promoted, if 1) there's a vacancy and 2) I outperform everybody else in the process. But what you're driving is the same exact things we heard from all of our employees for so many years, to uh, "this is unfair based on when you set a date." So we eliminate setting a date.

BH- Well you didn't. You just moved it one (1) year from the date that you picked.

CSB – No Sir. We have continuous processes. We always have an active eligibility list.

BH – Well that would be true whether they could take it then or not. Whether they could take it one (1) month after the date you picked or one (1) month before.

CSB – no Sir, because before, you had to have that time and grade before you could even jump into that portal. That's twelve (12) months long.

BH – That's right. But if that time and grade doesn't occur until let's say, one (1) year and two (2) days after you start the process, they have to wait for the next process.

CSB – No Sir. If their eligibility falls within, they would wait anyway. If their eligibility falls anytime, then they would, they could take the test. You're describing that perfectly, we heard these things from the department...

BH – No no... Chief what I'm saying the only way to avoid arbitrariness in this process is what Board member Robinson said, is to have an established date that everyone knows. If all you're doing is saying the test can start on May 1st or it can start on May 31st, but we'll give you that year, you've just moved that eligibility date by one (1) year. And you've not eliminated any arbitrariness.

CSB- We did exactly what you said, in that we did establish a set-in-stone date in the only way we know possible, and that is when you meet the minimum requirement of having four (4) years as a Senior Fire Fighter, that's a set-in-stone date that we don't have to worry about the arbitrariness of assessor availability or when I'm able to start a process... It's a set-in-stone date that everybody knows about and the biggest thing is that it is fair to everybody because it is the exact same date. It doesn't advantage a group, it doesn't disadvantage a group. Everybody has the exact same opportunity to get promoted based on what's most important, and that is having the minimum requirements of having four (4) years as Senior Fire Fighter.

BH – Okay well I don't think we see it the same way because if someone's eligibility, if someone's anniversary date that gives them the correct time and grade, four (4) years as a Senior Fire Fighter, falls two (2) days... one (1) year and two (2) days after you set the date, they are not eligible during that previous one year period.

CSB – because they haven't met their four (4) years.

BH – That's right, but had you set the time, the test date two (2) or three (3) days later, that person would have been included.

CSB- That's not correct, that's not correct. And I think you don't understand what this normalization means, in that... the test when it's established it does not matter. It does not matter. That's what we fixed. That was a big problem before. But when we establish when we are going to take a test, if you are eligible one (1) year...

BH – ...from the date you establish the test...

CSB – from the date that you establish the test, you're good to go. One (1) year and two (2) days

BH – But if you are one (1) year from...

CSB – When we establish the next one, they are not going to have any eligibility within the life of that anyway, so, however, they are going to have two (2) days where they are not eligible when they take the next one. So it's a much better system. You described perfectly how convoluted our old system was because people would have those questions "but Chief, it makes no sense. If you establish the test here, it's going to exclude a group, if you establish the date here, it's going to include a group." This takes all that away and everything is the same as far as once you get your four (4) years, you have the same eligibility as everyone else in the department, independent of when we offer a test.

BH- I respectfully disagree. You are still tied to the date. It's just one year later, and it remains, based on, your ability to be promoted is based on the date you choose the test, it may be a year, it may be a year later, but if you are not in that year, you wait for the next...

CSB- That is not correct.

BH- Isn't it true that the Criteria Committee voted after one (1) use of this new criteria that we have been discussing, after one use of it for the Lieutenant promotional process. It's only been used once in the Lieutenant promotional process. Correct?

CSB – Right, it was used in the most recent ones.

BH – The one we're discussing here, was 2011... 2012 to 2013.

CSB – yes Sir.

BH – and that was the first time it was used in the Lieutenant promotional process. But isn't it true that following that, your Criteria Committee voted to eliminate that and to go back to the original criteria that was used.

CSB – I do not know that. I've only missed one meeting, and the committee members told me that it was discussed and that it was voted on. But I wasn't present at that meeting. The purpose of those meetings... I was called away at the last minute and rather than...

BH- Okay well let me just stop you.

CSB – Okay.

BH – Who was in ch... have you been told by any members of the Criteria Committee that in 2013 following the process that we're aggrieving here today, that that committee voted to recommend to you to do away with this extra year of eligibility.

CSB – Not in those words, but what I was

BH – What were words were you told?

CSB – what I had been told was that a vote was taken, and the person who was telling me this said "I did not even know what we were voting on."

BH- So were you told that the vote was to remove to, to do away with this new criteria.

CSB - No I was not. I was told that the vote was in reference to the time and grade requirement, and so that obviously is of interest to me as I testified earlier. It's been something that we've discussed in the department since 2011.

BH - So you have not been told by any member of the committee that they voted in 2013 to do away with this new criteria?

CSB- Not in those words, no.

BH- well if not in those words, what words?

CSB- There was clear that a vote was taken in a meeting that I was not present at, in reference to the time and grade. As far as you know exactly what... because the person who was telling me about this,

which was a Promotional Criteria Advisory Committee, told me specifically, "I did not know what we were voting..."

BH- Well did you make any attempt to find out what had been voted on in 2013?

CSB – Yes. We placed that on the agenda for the next meeting to discuss because obviously it didn't...

BH – And did you explain to your Criteria Committee at that meeting that no matter what action the Criteria Committee took, as long as you were Chief that was going to stay in place?

CSB- No Sir. What the exact words I said is that "As long as I was Chief, I would never support something that was unfair to candidates."

BH – Do you not believe this process has been unfair to Mr. Fortenberry?

CSB – I do not. As in my response to his grievance, I do believe that it was pretty fair.

BH- Aren't there minutes kept of the Criteria Committee's meetings...

CSB – yes Sir.

BH – Did your review...

CSB – Meetings that I attend, minutes are kept.

BH – Well if you don't attend, who attends in your place?

CSB – There's only been one meeting and I was called away for an urgent situation at the last minute and rather than have a standing committee that has changed their schedules to meet, I certainly was not going to cancel a meeting for nine (9) people, eight (8) people plus the HR representative, because I got pulled away at the last minute.

BH – With all due respect, that's not the question I asked you. Does someone attend that meeting in your stead when...

CSB- yes, our Assistant Chief David McFee attended that one meeting that I had to get pulled away at the last minute from

BH- And do you know if minutes were kept of that meeting?

CSB- they were not, they were not, not to my knowledge.

BH- So do you know, how many times the Criteria Committee has met, where minutes have not been kept?

CSB – One time.

BH – And it's that meeting.

CSB-yes, it's also the one meeting, I'm the one that keeps the minutes, and that was my error when I got pulled away at the last minute with another contract issue with a local town, it was critical that I be at that meeting, and that's the only meeting that I have not attended, and I'm the one, and so in my haste I certainly should have instructed David McFee to take minutes, but I certainly failed to do that Sir.

BH-Has there been any effort made to have minutes produced so that the committee could approve them one way or another?

CSB- Just a, from my perspective, the purpose as defined in what you had described earlier with that agreement back in 2005 that established the Promotional Criteria Advisory Committee, is the Promotional Criteria Advisory Committee is a non-binding, advisory committee to the Fire Chief. And so information that is decided on and discussed, it is pretty critical that I'm there present at the meeting. And so what was most important to me was to discuss those things and hear from the Promotional Criteria Advisory Committee that is changed with giving me advice firsthand. And so that was, so to answer your question, no Sir, I did not go back and ask someone to try to reproduce from memory minutes that I was not in attendance of.

LM- When was meeting?

CSB- Um, let's see. I can frame it based on the other issue I was dealing with... that's what I'm trying to remember... it was in 2013.

LM- Has there been another meeting of this Committee since then?

CSB- Yes. We met in November and we discussed this issue again...

LM- and?

CSB – and that was when the statements you had asked about that you said that “as long as I was Chief it didn't matter what the Committee...” you know, I'd never say that... as long I'm, as I was Fire Chief something that was unfair to our employees, I can't support. I can't support something that is not fair. And so that is what.

LM – So you're saying that this meeting that you did attend in November, that was after the meeting that Council is talking about, the issue was raised.

CSB – Yes

LM - And there was an opinion voiced that this rule should be...

CSB – Yes Ma'am, I apologize, I see what you're asking. And what the determination the Promotional Criteria Advisory Committee, we have some here that I hope we'll hear from later, their recommendation, their advice to me was “Chief when you explained this, it makes sense. In the department, there's a lot of people that this doesn't make sense to. You need to schedule a time when you go back out again and explain this.” And I reminded the committee that we had done this back in

2011 and in 2012, and then one of the committee members, who is not here today specifically said “well if this... there’s a lot of discussion in the department, so it’s going to be beneficial for you to do again.”

LM – Okay but previously I had asked whether you had heard any voiced any opinions that were negative or questioning this policy, and you had said no.

CSB- No Ma’am. And I apologize, I misunderstood your question. There has not been opposition, and I thought that was the term you had used, there has been, as I testified earlier, there has been a lot of discussion. Each time, as we talk about this, well the end of the discussion is “well that makes sense.”

LM- So your view is that at this November meeting when this issue was raised again, I understand that you are saying at the end of the discussion everyone was in agreement, there was no opposition. But at the beginning of the discussion, there was some questioning of it.

CSB- yes Ma’am. And as I testified earlier, the example I gave, was that our more Senior Fire Fighters were asking “Are we promoting people too early? This doesn’t make sense.” And then after we talked about it and they realized we weren’t, then they were good with the decision. People who were getting ready to take the process, the example that when I testified earlier was, their anxiety was “are there going to be more people that I am going to be competing against.” But once they realized that it normalized everything and everybody was able to get promoted at the same time, and nobody was getting an unfair advantage over anybody else, then that certainly resolved the situation...

LM- I mean we’re drawing real fine lines here, I think my question was just generally you know, is there, was there voicing of some uncertainty or objection about it, and clearly there was.

CSB – Yes Ma’am.

LM – Your, but what you’re telling us is that at the end of the day, your perception of where you all ended up was everybody was fine.

CSB – Yes Ma’am.

LM – And that continues to be your perception that everybody’s fine though, assuming, with the exception of the grievant.

CSB- yes Ma’am. Every single person that has talked to me about this issue, after we have had a conversation, be it in a station meeting, a Promotional Criteria Advisory Committee meeting, at the end of the conversation, it was agreed that this was a good thing. And the best example, at the last Promotional Criteria Advisory Committee meeting was like “Chief, after you explained this, it makes sense that this is a fair process, and you need to do this throughout the department again.”

AC- Everybody but Mr. Fortenberry though, right?

CSB- no uh Mr. Fortenberry’s had this conversation many times with myself.

VR- Well, I have a question, remember I asked you directly “was there opposition or derogatory remarks made about this criteria?” and you said “no,” but you didn’t bother to tell me that there had been a meeting of this Criteria Committee that you did not attend, that had discussed this. So you made a false statement to me.

CSB – No Ma’am. I was not at that meeting.

VR – But you knew about it. That’s the point I think

CSB- But your question, with all due respect, was any derogatory comments, and I was not at that meeting, and I was never (inaudible..) any derogatory comments...

VR – in other words, you’re not going to listen to any of the comments that come back from your Fire Department.

CSB – No Ma’am. You can speak to my department and they will certainly tell you differently, that I am a very open Fire Chief and that of the Fire Chiefs in any of our careers... I’ve got a former union president and a current union president and both have told me that exactly, that I am the most open Fire Chief that they have had in listening to feedback from our department. So I respectfully disagree that I uh absolutely...

VR- So you are open to everybody but the Civil Service Board.

CSB- Ma’am, I am very open to the Civil Service Board. I have never had directions from the Civil Service Board or (inaudible)...

VR – it’s written in the statute right here, that you were supposed to do it. You don’t follow those laws?

CSB – Okay, absolutely I did. And so my ignorance, my ignorance is believing that when it states that criteria, that means criteria, not when I establish a test date. And so I apologize for my ignorance of this law.

VR – and then the City Attorney also didn’t know about this and the HR didn’t know about this, because you told us you had in fact checked with them to ask them if it needed to come to the board.

CSB – No Ma’am. We never had that conversation and I testified to that earlier. I testified to that earlier. They chose, the Board member Coxie had said, had, he even made reference to that I had made the decision, so for clarification I testified earlier that just for clarification, that conversation never happened. I never said “should I take this to the Board?” and then decided no? No! That was due to my ignorance of understanding that this was criteria, when I established the (inaudible, tapers off)

LM- Chief, can I understand what you said a few minutes before that, that you had discussed this change in policy with the grievant, outside the context of this grievance, and that he agreed with this change?

CSB – No, not at all. We had the first conversation in February of 2012 probably, is that when I came up to Station Three to meet with you? and I don't know if I can... anyway, I think it was around February of 2012, but we've had multiple conversations, um, in reference to this.

LM – and did he express opposition to this change at that time?

CSB – He did, and just as we have in the last Promotional Criteria Advisory Committee, he had a number of issues that we worked through. There were... each one of those standing there in the basement of Station Three, we talked about. And then I told him, and even sent myself an email, and made sure that he, that these were the issues that still were outstanding. And so okay, I need to check on this for you and I need to check on this for you. And that was one of the issues that we first talked about, but that wasn't one of the outstanding issues, that he needed me to follow up after our face-to-face meeting.

LM – I'm not sure I am understanding what you are saying.

VR – I don't either.

LM – because what I was asking, I mean that would have been an objection that you were aware of amongst the, your employees... um, and that you didn't reference when I had asked previously, whether you were aware of any employees who objected to it. So I don't know if you are saying now that you and he discussed it, you explained it and you convinced him? Like you were talking about in regards to the others? Or whether you just explained to him why this was a better policy or a fairer policy, and you don't know where he stood after that.

CSB – Yeah, that's most accurate. What he came was about five (5) things, he had about five (5) things he needed to talk to me about, I'm not sure about the exact... and we talked about all of them, a couple of hours at least, there in Station Three talking about those issues, and we talked through every issue, with the exception of about two (2) or three (3), and I need to follow up with him on those other issues. I write them down on my phone and send myself an email so make sure that I followed up on them. And the time and grade issue was not one of the ones on the week, so in my mind, we had resolved that issue, during that conversation.

LM – and this was before the promotion decision that affected him in June.

CSB – No Ma'am. That, that was established in July of 2012. This meeting that he and I had, and I see your question...

LM- No I'm saying when he knew it was actually going to effect him was in June, when this other person, when Rich was promoted over him. So did this conversation happen before June 2013?

CSB – Yes Ma'am. February, February-ish, it may have been in late January.

BH- Chief could I ask you to look at the City's exhibit L that's in front of you, the Board would have a copy of it as well...

CSB – Yes Sir.

BH – This is the email that you sent out in, on May 31st of 2011, in which you purport to explain this new policy to “all Fire employees”. Is that correct?

CSB – Yes Sir.

Bh – The last sentence on the first page says: “It is important to note that this idea did not come from the Criteria Committee; this idea came from Chief Mcfee and was then presented to the committee.” Why was that important?

CSB- It, that was important because members of our department were talking about how we would set up testing, and it would include or exclude people arbitrarily. So that was the topic of discussion and the topic of discussion of the Promotional Criteria Advisory Committee. And so I wanted to make sure that as we walked through this, it was very clear that this was something that came from the Fire department administration. When we have things that come through the Fire Fighters Association, or our Promotional Criteria Advisory Committee, there is a... at times with some, a blanket acceptance. Because it comes from our troops, which speaks to the, how strong our Fire Fighters Association and our Promotional Criteria Advisory Committee is. I wanted to make sure that everyone understood: This is something that we need to scrutinize carefully. This is something that the Fire Department Administration... this is not something that is coming from um, a, our employee association, our Fire Fighters Union. This is not something that is coming from our elected Promotional Criteria Advisory Committee. This is something that Fire Department administration is, has identified to address a solution that people in the department had identified as a problem.

BH- Well so if I understand it correctly, this issue was not something that came from the ranks.

CSB- Yeah correct, I, yes Sir.

BH – It’s something that the Chief’s office brought to the committee.

CSB – The solution, yes. The issue came from the ranks.

BH – Excuse me?

CSB - The issue came from the ranks. The, the ranks of the Fire Department were the ones that were telling me: “Chief, you set this date and that has excluded a group” or “you set this date and it’s included a group.” The solution, this proposed solution is what came from the Fire department administration, and I thought that it was very important for our department to understand that.

BH- Okay. And um, Chief McFee is the individual who brought this to the committee?

CSB – No Sir, I was.

BH – Well, I’m sorry, this idea came from Chief McFee. It was his idea, this was the way to fix the problem.

CSB – Yes. He discussed it with me.

BH – And that is the same Chief McFee who was at this meeting where there was some opposition expressed but no minutes kept?

CSB – We only had at that time one Assistant Chief, so that obviously would be the person who would be running a meeting in my absence.

BH - So it was his idea, it was discussed, and somehow adopted by the committee. There was a Lieutenant process which results in some controversy surrounding the use of it correct?

CSB – Yes Sir.

BH – There was a meeting of the Criteria Committee in which you are not present, but Chief McFee is in your stead. At which something occurs that is critical or negative of the policy as far as you understand, you don't know the exact measure of that. And the same Chief McFee is there, but does not keep minutes.

CSB- Correct, and what's important to note is that Chief McFee is not the decision maker, I am. And that's why it was important that I be at a meeting when something critical occurs, where, where, there's something that a committee is charged with giving me advice, if they have advice to give, I want to make sure that they give me that advice. It's not advice that they give to anybody else in the department. It's... the committee is charged with giving the Fire Chief advice on minimum requirements for promotional opportunities.

BH- Well they advise you on much more than minimal requirements don't they?

CSB- Yes Sir, I expanded that committee to uh, give me advice on everything related to our promotional processes because it's extremely valuable to have an elected body that is providing input into, a, the membership of our department elects representation to give me advice, I absolutely want to hear that advice.

BH – But on this topic, on this issue, your mind's made up.

CSB- No Sir. No sir, my mind's made up on making sure that things are equal and fair for everybody in the process.

BH – Let me ask you to look at Exhibit A from the City, which was the 2012 Memorandum inviting employees to participate in the Lieutenant promotional process. It's Exhibit A in the City's exhibit list. Could you just read that first sentence that says "As you know..."

CSB- "As you know, we have long established criteria for participating in Lieutenant promotional processes.

BH – Okay, let me just ask you to stop right there. That's not accurate as to the process as to the process that is getting ready to be implemented in 2012, correct?

CSB – And I disagree. And I think this is what is inherent in this whole discussion is that, in my opinion – if I may continue – the criteria is: What is established as the minimum criteria of having six (6) years to get promoted. And I think that what, what we’re discussing...

BH- Well doesn't it say for participating in the promotional process?

CSB – Yes Sir.

BH – Now the criteria that is now allowing Rich Rauchenberg and those other three (3) individuals...

CSB – Rauchenbach

BH - Rauchenbach and those other three (3) individuals to participate in the process for 2012-2013, it's never been used before for the Lieutenants. This is the very first time it's going to be used. Correct?

CSB – For Lieutenants. Yes, we used it for them.

BH – Well that's what this is about, correct?

CSB – Yes Sir.

BH – So when you say “As you know, we have long established criteria for participating in the Lieutenant promotional process, that's not a correct statement.

CSB – yeah, and then the second sentence is that “That crite... that established criteria has recently been reviewed by our Promotional Criteria Advisory Committee.

BH – Right and that would be uh... Exhibit J?

CSB – Yes Sir.

BH - April 24th 2012?

CSB – Yes Sir.

BH – and those are the minutes of that meeting where that was reviewed?

CSB – Yes Sir.

BH – Can you point to me, where in the minutes of that meeting it indicates that that process was voted on, or approved, or anything of that nature?

CSB- Not April 24th. It's actually April, uh, the one before that. It's exhibit..... Exhibit K, if you would look at page two (2) of Exhibit K, you can see where the committee corrected this unanimously.

BH – Well what's the date on those minutes?

CSB- April 5th 2011.

BH- But that's a year before this process starts. That's the year it was initially adopted.

CSB – Yes Sir.

BH – So when you say “The established criteria has been recently reviewed by the Promotional Criteria Advisory Committee, you're talking about one year prior to this, when it was adopted?

CSB - No Sir, and I understand your question now, if I could direct your attention to Exhibit... J...

BH – That's one we were just discussing, April 21st 2012, that I asked you to...

CSB – Look at Exhibit J, the upcoming promotional processes, Lieutenant minimum requirements to process, you can see what recommendations that they made because they recommended no other changes or recommendations to the changes that we implemented back in 2011, so...

BH – Well, I'm asking you is there anywhere in this minutes where it's indicated that they approved the process that you are now talking about.

CSB- yes Sir, you can see what they did recommend?

BH – Well, I see something for Fire Inspector? Is that what you are talking about?

CSB – right, right, those are the only changes that they recommended.

BH - ...which means...

CSB - which means that, because every recommended change is documented in these minutes, and so clearly, they didn't recommend changing this other requirement. They were good.

BH – so normally the minutes would show any recommended change by the Criteria Committee.

CSB – yes Sir, yes Sir. And they're also emailed – before they are emailed to the department they're also emailed to the Promotional Criteria Advisory Committee so they can review those to check for any inaccuracies... if they had had recommended going away from this, then surely one of the eight (8) members of that Criteria (Committee) would have brought that to my attention. Uh, they had approved the minutes after their review. Those three (3) things were the only changes that were recommended related to the Lieutenant's process, twelve (12) months after the unanimous recommendation for making this change.

BH- Um, would you look at the exhibit that was... it's the City Manager's decision on this case, Kelly I think you handed that out as well... you were at the City Manager's meeting at which you heard this grievance. Is that correct?

CSB – yes Sir.

BH- And if you look under, it doesn't number them but it's the one, two, the third reason which starts at the bottom of page one (1)... uh, and the reason for the grievance. It says “The newly adopted criteria

that allows an employee to take the promotional test, even though the candidate does not have the years of service necessary to be considered for promotion at the end of the test is arbitrary and capricious, discriminates against those employees who do possess the necessary years at the time of the test. In addition, this promotional criteria was not adopted by the Civil Service Board as required by the applicable provisions of the Asheville Civil Service Act. Absent this discriminatory and legally invalid criteria, the employee would have received the promotion.” And... can you just read the City Manager’s first paragraph where, and the response there so we can all be on the same page?

CSB – yes Sir. “On October 6th 2009, Civil Service Board reviewed the certification requirements, time and grade requirements, and components of the Fire Department’s promotional process. Since that time, the aforementioned criteria have not been altered, nor have additional criteria been added. The Civil Service Law provides for the Civil Service Board to approve promotional criteria in the City’s Fire and Police departments. However, that does not include test administration. This is evident by the complete removal of the Civil Service Board’s administration over testing, in session law 1999-303.”

BH – Okay, and is that a statement you agree with?

CSB – Yes Sir.

BH – So, you don’t believe there was a change made in the criteria following the 2009 approval by this board.

CSB- no sir, honestly I don’t. Honestly, I believe that it was an administration of the test, and not a change to the minimum criteria, because you still had to have six (6) years, four (4) years as a Senior Fire Fighter to get promoted. That had not changed. That minimum requirement to get promoted had not changed. So in my mind, this was making things more equitable in administering the test without changing whatsoever the criteria to get from a...

CW- And according to this, the City Manager agreed with you on that.

CSB – Yes Ma’am.

VR- No, I don’t think he agreed with you. He agreed with the fact that in 2009 it was done. It appears to me that he didn’t know anything about the 2011, uh change.

CSB- It was, it was discussed heavily in that meeting. Mr. Fortenberry and Mr. Hunter were both present and they can, they can verify for that.

?? – second paragraph

CSB – Right, in the second paragraph he actually even has that in his response. “On April 5th 2011 the Promotional Criteria Advisory Committee fully endorsed (inaudible). The promotional test (inaudible, reading to himself quickly) copy of the minutes is enclosed... (inaudible)... was aware...

BH – Well, so it’s your position here today that this board doesn’t have any legal authority to consider anything related to the testing process that the Asheville Fire Department implements.

CSB – No Sir. What you're asking me is that they don't have any authority. Absolutely they have ultimate authority in our promotional processes. My understanding of what the Civil Service Board was oversight was minimum requirements to get promoted. Minimum criteria to get promoted. And the testing administration was removed from Civil Service Law and that was not something that (the) Civil Service Board oversight. It was minimum requirements to get promoted.

BH – And again, you can't point to any language that you know of that restricts this Board to "the minimum necessary for a promotion."

CSB – No Sir, I don't.

VR- But in my opinion, you're playing on words. We have given you a minimum requirement for applying for a promotion, and you overstepped that by increasing it a year. And that in turn, did not come through us at all, and yet you have changed the minimum requirement... without any approval from any of us.

CSB- What... I'm not playing on words Ma'am, I'm playing on experience. Never, in, since 2005, since we've had a Promotional Criteria Advisory Committee, never has test administration been taken to the Civil Service Board. The things that have been taken are the minimum requirements, six (6) years, certifications, things like that. So my error was assuming that this was test administration and not criteria because the criteria to get promoted had not changed.

VR – I agree with you – setting a date, discussing and sending out notices about when it's going to be... that's administrative. Setting the minimum requirements for who can take that test is not administrative to me. You're using the word administrative. I agree with you. I have, I see no reason for us to say "no you can't do that on June 1st, you have to do that on June 15th" or you know, I don't, I don't see looking into that at all. But what I'm saying is that the criteria about the time and grade was extended by a year without our approval.

BH – If I might approach the witness, the next document I'm going to refer to is behind tab seven (7) in my black notebook, and uh, its minutes of the Asheville Civil Service Board meeting for May 4th and it would begin on the page that says Fortenberry 249, behind page seven (7)... And if I might approach... for some reason I don't have an extra copy, so I'm going to ask him to look... everyone else has a copy. It's uh, 249 is where those minutes start... and Chief could you just take a look at that, tell me, do you rec... can you recognize what this document appears to be?

CSB- That would be Asheville Civil Service Board May 4th 2012 minutes.

BH – And I'm going to ask you to flip over to what would begin on Fortenberry 252, which is several pages in, and do you see, it looks like there was a presentation made. Is that correct? Under (inaudible) it says Fire Department or FD promotional...

CSB- Fire Department Promotional Processes and Hiring Company. Yes Sir.

BH – and um, let me ask you to look at those things that were presented and look at the bottom of page 253, which is the next page, and it indicates here, it says “Board approves Senior Specialist Fire Investigator weighting, weighted scoring changes a role play at 20%, and 360 feedback at 0%.”

CSB – Yes Sir.

BH- So, and that’s something that, that’s a change that’s occurring in how a particular test is weighted, is that correct?

CSB – Yes Sir.

BH – Now you brought that to Board to be approved?

CSB – yes Sir. That is, that is how a, that is certainly part of a promotional process that changes the dimensions of that process, it’s not something that’s administrative or arbitrary that, that’s certainly is, it’s part of that either minimum criteria or components of the process and weighing. And actually, just for accuracy that was not me that brought it, it was our representative from Human Resources that brought...

BH – Well don’t you approve everything that comes from your department to this Board?

CSB- Well how that process works, is we have a Human Resources representative that sits in our Promotional Criteria Advisory Committee meeting. And towards the end, they look at, are these recommended changes part of minimum requirements, and so that was likely one of those um, components that went to Civil Service Board because it changed the uh weight, the weight of what each component was how was measured, which is pretty significant.

BH –Well it’s... it’s just like any change you would have made inside this Lieutenant process correct? If you changed the weightings for the promotional process, you haven’t been bringing that to this Board, have you?

CSB – yes Sir, as you just pointed out, we did that for that promotional process, and I can’t remember what you have in front of you, which one it is, is that Senior...?

BH- Senior Specialist Fire Investigator. So it’s your testimony here today is that the weight of a particular element inside a promotional process IS something you would bring to this board. But the fact that four (4) people who would not have been allowed to test are now going to be allowed to test and be promoted would, does not have to come to the board.

CSB- What we have, had done in the past is included or excluded unintentionally, those four (4) people based on when we offered the test. Had we waited...

BH- Well I’m just asking you, you’re saying that the specific weight assigned to a particular test in a promotional process comes before this Board, but the fact that four (4) people that would not be allowed to test because of change of policy are now going to be allowed to test, you don’t believe is sufficient enough to bring before the board.

CSB- No Sir, and the reason why is because we did that unintentionally every single time that we did a test. Every single time we did a test we arbitrarily included people or excluded people based on when we established that... so the question obviously, and this is good direction that I have received today from the Board is, what components to take to the Civil Service Board.

BH- Um, if you could, if the court would look at the last couple of pages on that tab it's Fortenberry 275 and 292, they are a little bit out of order but they are the last two (2) pages... uh, I will tell you that in trying to get the minutes from the Civil Service Board, these are the minutes from the December 6th 2013 meeting... and the full minutes were not ready but Chief would you just um...

CSB – (inaudible)

BH – Well if you just look, this is the agenda for the Advisory Board and if you could read number four (4) please?

CSB- Enter for the Fire Department Promotional Criteria Advisory Committee recommendations, Fire Chief Scott Burnette

BH- you presented these, correct?

CSB – yes Sir.

BH – this is an email, page 275 is an email from Mr. Sween indicating what was considered at that meeting earlier this month, and if you could just read Chief Burnette brought...

CSB –brought forward AFD recommendations from the Promotional Advisory Committee. He discussed the weighting of components for Senior Specialist, Fire Marshall, and Engineer. Both these advised changes were (inaudible).

BH – So is that another example of where the particular weight inside a promotional process is recommended by your committee, is being brought to the Board?

CSB - Yes Sir.

BH – And you believe that's a minimum requirement for the position, for the promotion?

CSB – no Sir, it's part of the process structure. It's how we, it's part of the instruments that we measure to see how...

BH – My question to you is, is it, would you consider the particular weight of a particular part of a test, or a process, the weight assigned within that process to be a minimum criteria for the promotion?

CSB- no Sir. The minimum requirements are what you have to have to get promoted.

BH - Right

CSB- The process components are the structure that we use to measure an applicant, a candidate's performance in that process so that they can be ranked.

BH – Right, so you, but you, had earlier testified that what you believed needed to be brought to this committee were changes to the minimum criteria for being promoted.

CSB – Yes Sir.

BH – And are you now saying the weighing is, these weights would be considered a minimum criteria, or just part of the process?

CSB – No Sir, what I testified to in the beginning was minimum requirements and process structure. That's what, that's what I...

BH – So it's not just minimum requirements that need to come before this board in your mind, it's also something called process structure.

CSB – And that is what I brought to the Civil Service Board, in answering your question earlier, that is what I am familiar in responding to.

BH – So whether someone is eligible to take the test on a certain date, you don't consider it to be part of the process structure.

CSB – What I consider to be part of the minimum requirements and (inaudible) criteria, is whether or not they've had the minimum time and grade to get promoted.

BH – Right. But you don't consider the process to include who can take the test and who can't take the test?

CSB – Not part of the components, not part of the structure components of what we measure. And I'm not sure what word, what word you are wanting to zero in on, but two major things: One, major requirements to get promoted and the other, how we weight and how do we structure the measurement of those candidates.

LM- the minimum, you're saying that the criteria for promotion is the time and grade, which is four (4) years as a Senior, and six... that is what the criteria is. And the question is whether the date on which you evaluate whether they've met that criteria is part of the criteria or the administrative as you've been calling it?

CSB- Right, no Ma'am, and I think, just to help me clarify what I've been trying to say is, the things that we have taken to the Civil Service Board are two, in two packages. One, the minimum requirements to be promoted. And the reason for that is based on the 2005 Nineteen (19) points that established the Promotional Criteria Advisory Committee, and that the issue was coming up with a new criteria that nobody knew about, and then you don't have enough time to earn that certification. And so ninety (90) days was required before changes were made, and they needed to go before the Civil Service Board, those minimum requirements to participate in process, certifications, time and grade... And the other

component that we have taken to the Civil Service Board is when we change the weights or the instruments that we use in that process. Those are the only two things that we have ever taken to the Civil Service Board.

LM- And, I get that distinction. But, so putting aside the weight that you're talking about, we're just looking at the minimum requirement and whether you have changed it, by changing this rule, when was that minimum requirement established, do you know?

CSB- It was established in 2005.

LM – And where, it was established by you and approved by the Board..?

CSB- Honestly, I don't know, I was at the Engineer rank at that time, and so I'm not sure how that, but we haven't made any changes to do that so I'm not sure, so I don't know...

LM – Cuz what I'm getting at is if the minimum requirement at that time said "time and grade six years" but didn't define how you, how you came about it, who initially started calculating time and grade based on the date of the test? Was that a decision by the Board, or was that approved by the Board? Or was that just what you were doing?

CSB- And unfortunately I, I don't know. I know that 2006 when I got promoted to Assistant Chief and became involved in these types of processes, we were already doing it.

LM – That's how you were doing it. Cuz theoretically, a person who uh, who achieved time and grade during that year when they were excluded because you were doing it from the date of the test could have argued what's being argued *now*.

CSB- Yes Ma'am.

LM – They could have argued that this violated the criteria because it didn't take into account that they achieved the time and grade during the one (1) year period. And it was just how you were doing it at that time. And now you are just changing that rule. And the question is "who set that rule to begin with."

CSB – Right, and unfortunately I don't have that answer, and that was argued, it was.... that was argued and that was the reason that we tried to fix this issue because we were hearing from employees that you know, this really isn't fair. I... I've been here longer than these other people and they're taking the promotional test at the very same time that I am. I've been here seven (7) years, and this is the first Lieutenant's test that I've been eligible for, and these newer Fire Fighters that have only been here six (6) are taking it, I've got this whole other twenty (20) people to compete against, and if only you would have set this test date a week earlier..."

LM- I and I understand why you changed it, what I'm trying to get at is the concern that I'm hearing that this was a change that should have, of something that the board approved, and the change was made

without the board approval. And I'm questioning whether the board ever initially approved the way it was done originally.

CSB – I have no knowledge of, of it said Civil Service Board approved the minimum requirements....

VR- Well, we did approve it in Two-thousand...., in October 2009.

??? – Yes

VR – So we did approve it...

LM – The way it was calculated as opposed to...

VR – Yes, the minimum of four (4) years I think... we've got it now but uh, it was minimum of four (4) years and uh, so it was approved in 2009...

LM – but the minimum of four (4) years is not what we're talking about – these people had four (4) years at the time of the promotion.

VR – No, not those four (4) that are on that approval. They only had three (3) at the time of testing.

LM – at the time of the testing, but I'm saying, you approved the minimum of four (4) years...

VR – at the time of testing

CSB – No Ma'am

LM – you're saying you approved it at the time of testing and that's what I'm asking. How do we know that... that's what... ?

VR - there's minutes...

??? (male) – It's in the minutes.

VR – it's in the minutes

LM – and it says it's at the time of testing?

VR – yes. Yes. It's in the minutes. I saw it just, October 2009...

LM – Okay, well maybe you... which page is that?

VR – Fortenberry 169.

KW – I'd like to (inaudible) the board to not look at Fortenberry exhibits not yet introduced.

VR – Well we can look at the City's

LM – we can look at the City's...

BH – City’s exhibit actually

LM – Exhibit I? You want to point to where... did... is there a specific place?

VR – the discussion starts in article two (2) on the second page, and I haven’t gotten all through it yet so...

BH – that, the whole presentation for the Fire department starts out with Ms. Roth – this is from Exhibit I... starts out with Mrs. Roth who was the personnel director at the time stating that: “The promotional process for the Asheville Fire and Rescue has not changed and Chief Burnette will speak to that.” So what...

LM – I appreciate Mr. Hunter testifying here, but...

BH- Well I’ll ask, I’ll ask, I’ll ask Chief Burnette those questions....

LM - But I’d like to point where we pointed to in here...

BH – I’m sorry.

LM – where it indicates that the minimum qualifications are at the time that we took the test.

BH – If I might follow up, let me ask Chief Burnette... Chief Burnette, when the policy was presented, the promotional process was presented to this committee in 2009, did that process include the fact that the only individuals that could sit for the test, and therefore be promoted, uh, excuse me, was... in 2009, the only Fire Fighters that could sit for the test and be promoted during that promotional process, were Fire Fighters who had time and grade at the time of the test?

CSB – No Sir, that was not discussed. The purpose of...

BH – Excuse me. I’m not asking you what was discussed, I’m asking you if that was the process at the time it was presented to this board.

CSB – yes.

BH – Okay. And this Board...

CSB – but that was not the attitude of the Board, just for clarification.

BH – They approved the process in place. Correct?

VR – Yes, that’s what the minutes say.

CSB- (starts to talk, inaudible, cut off by grievant’s attorney)

BH – Chief, I have been very patient at letting you talk a great deal here in this whole process, and I just want you to answer a question. This Board approved the process in place in 2009.

CSB- What the Board stated to me was they thanked me for my excellent summary, and they thought it was a fair and transparent process. There was not a vote taken. So uh approval, disapproval, this was my very first Civil Service Board meeting in 2009, and so I understand the process so...

BH- Chief, please, you were presenting to this Board the process for promotion in place in 2009. Right?

CSB – yes Sir.

BH – Okay and that process in 2009, a Fire Fighter could not sit for the test and could not be promoted unless they had time and grade at the time of the test.

CSB – Yes Sir, that is correct.

BH – You subsequently went through the Criteria Committee process, and changed that.

CSB – That’s right. I did not change the minimum requirement. In 2009 when this was presented to the Board, the purpose of that was to review the Fire department’s promotional processes, and specifically, the Promotional Criteria Advisory Committee and how that Promotional Criteria Advisory Committee was used. My, my explanation to the Board was “that is our opportunity to vet information.” And the Board stated that they thought that was a good and fair process. There was not a asking the Civil Service Board, because we already had that established, and there were no changes as uh, is a minimum of four (4) years as Senior Fire Fighter, six (6) years the minimum requirement for that process.

BH – All right, may I proceed. I’m ready to go, I have two (2) more topics to cover unrelated to this issue.

MR – I’ve had a request for a very brief break, would you agree with...

BH – Yes, that’s fine, I have no problem, I think that would be helpful.

MR – Uh, we’ll return at Three O’clock, which is in seven (7) minutes....

MR – Mr. Hunter if you would like to proceed?

BH – Alright. Chief, one last question on this issue of the criteria, um, there’ve been numbers thrown around today – 150 people who would be affected by, a possible ruling that some part of this criteria was not effect..., should not have been, is not effective or is not legal, then I think you said maybe twenty-five (25) would be affected with just the eligibility of when could test and when you couldn’t? Is that, is that what you’re...

CSB- yes, yes Sir, and those are estimates, I don’t have an exact count...

BH –It’s only been allowed *once* in the Lieutenant process, I know it’s happening, I guess it’s in the ongoing process now, but there’s only one completed process in the Lieutenant process, is that correct?

CSB – Yes Sir. And also Engineer, and also Senior Specialist and Specialist and also... I'm sorry not Senior Specialist, and also Battalion Chief.

BH – Okay, so uh, let's talk about all of that universe for a second... do you know how many person's are like Mr. Fortenberry, who would have received the promotion but for this rule? How many people were affected in that sense?

CSB – Uh, I would estimate um, about twenty (20) to thirty (30) if you look at um, everybody that was on the list below the last person promoted, if you look at just the ones that, and again this is just estimating... maybe ten (10), fifteen (15), twenty (20)?

BH – So there are ten (10) or fifteen (15) people like Mr. Fortenberry, who would have received the next promotion that occurred, but didn't because someone had been allowed to test, and then became eligible during the promotional year.

CSB – That would be my estimate.

BH- And of those people, do you know how many grieved the process?

CSB- none other than Mr. Fortenberry.

BH- Okay, so in terms of individuals in the City, who have gone through this process who have been affected by this, who have preserved their right and grieved it, it's only Mr. Fortenberry, correct?

CSB – Yes Sir.

BH – and could this, could this process be, could it be, if Mr. Fortenberry is the only individual who has complained about this process and brought it up through a grievance, could it be resolved by simply dealing with him?

CSB- I don't believe that that would be a good resolution because, in order if it is determined that we used criteria that was discriminatory, then we discriminated against every candidate. Because it was applied to all candidates. And, an example of the 2012 Lieutenant's promotional processes, where we had four (4) individuals who participated in that process, who were ranked above others, that certainly alters not only that process, but the subsequent process in that the number of vacancies completely change. If Rich Rauchenbach was not promoted, then the person on the next year's eligibility list, then there would have been a vacancy. And so that list would have changed in that different people would have been promoted on that.

BH – Well I guess I, once again I don't really, I'm not following you... the... if Rich Rauchenbach had not been promoted because of your new criteria, Mr. Fortenberry would have been promoted.

CSB – No Sir, there was a total of three (3) people. Mr. Fortenberry was thirteenth. So if Mr. Rauchenbach had not been promoted, also would have impacted the other two (2) people that became eligible...

BH- Well, they were affected by the same rule. They are only on there because you changed the rule. If that rule was not valid in this particular promotional process, the only person who would be affected is Mr. Fortenberry would receive the promotion instead of Mr. Rauchenbach.

CSB – Correct. And...

BH – And when you say there are ten (10) or fifteen (15) people who might be affected, are they in that same position? I don't really, I'm not concerned about how many were below... because you know how many were below the promoted and the employee who got the promotion. But, there were only, do you know if there is anyone in Mr. Fortenberry's position where, but for the rule, that employee would have been promoted? You know, someone who had the time necessary at the time of the test, would have been promoted but for your new criteria.

CSB- I would estimate six (6), seven (7), eight (8)..

BH - Okay

CSB - um, and basically looking at that would just be the number of people who participated, they got promoted because they had taken the test prior to, and they got promoted after they met the eligibility requirements.

BH-Right. So you think it's probably benefitted six (6), seven (7), eight (8) employees, and so therefore there's six (6) or seven (7) other employees who would have had time at, time and grade at the time of the test, who didn't get the promotion.

CSB- Yes Sir, that's just based on the last three (3) years of us doing this procedure and uh, four (4) to five (5) promotional processes per year.

BH- So your best estimate is that in order to deal with this problem, you would have to potentially deal with six (6) to eight (8) promotional, prior promotional... people..

CSB-No Sir, I believe that if we removed candidates from a process, that alters *everybody's* score, in the entire process. Because specifically with the professional credentials. Professional credentials are based upon how competitive each candidate is with each other. So if you remove four (4) candidates from a process, that changes the dynamics of the entire process. And so to fairly address the issue, if we were to reverse this decision, to fairly do that, we would need to do the process again. Because it would be impossible to remove those candidates. And if they had never participated, the scores would be different.

BH- So I didn't understand that. You're saying on the professional credentials this document that was introduced as City's Exhibit L... E...

CSB – Yes Sir.

BH – You are saying that that is somehow not just the, the, the score given is not just based on what the employee writes down?

CSB – no. It's the....

BH – In terms of like the number of hours of professional training they have, the number of certifications that they have?

CSB- Correct. What... the procedure that we, that we have, have done and what was reviewed by the Civil Service Board was since there is um, no limit on points, you have a, a benchmark somewhere. So the only way to do that equitably is to benchmark within the process. You can't benchmark from process to process because experience levels change.

BH- So, how, we are going to talk about professional credentials. How do you actually, because that's one of the things Mr. Fortenberry has grieved about, so how does this actually work, I mean? It's not an objective list, it's not a number arrived at just by looking at what the employee has written down.

CSB- Yes it is an objective list.

BH – It is an objective list.

CSB – Yes Sir.

BH - In other words what the employee puts down is going to, assuming it's correct...

CSB – Yes Sir.

BH - ...is going to determine their what do you call it, grade, score...

CSB – Yes Sir.

BH ...out of this...

CSB – Yes Sir. As compared to the other candidates.

BH- Well is it objective in the sense that what they write down results in a certain score being given to them?

CSB – Yes Sir.

BH – And then is that... how is that dependent on what someone else writes down?

CSB- Someone could, could um, theoretically be in the process, with forty (40) years of experience. They're going to get the absolute maximum as they should, for that. If somebody has forty (40) years of experience, then someone who has ten (10) years of experience, they are four (4) times a higher score in the experience component – they have four (4) times the experience than the person with ten (10) years. And so that person is credited for that. If they're the top scorer, they, they get the maximum amount of points. And there's no, on any of those, there's no maximum limits, there's no ceilings, there's no caps.

BH – But if you just take that individual out, if you take their booklet out, how does that affect another person who is in the process? I, I, I understand that might move them up because someone's been taken out...

CSB – Right.

BH – But it doesn't affect the number of points they're getting on their professional credentials does it?

CSB- Yes Sir, it does. Because they may have a different level of formal education, they may have a different level of training, they have a different level of certifications, they may have a different level of, you know, it removes up and down, candidates in that process.

BH- Right... I really not seeing here. You get twenty-five (25) points if you have a Bachelor's degree.

CSB – Yes Sir.

BH - If you have a bachelor's degree you're gonna get that twenty-five (25) points under formal education regardless as if there's five (5) PhD's in the process. Right?

CSB- And I understand your question now, I appreciate that follow-up. This will be helpful as I explain how that is scored. So if you, if you, if you, um, if I could draw the Board's attention to Exhibit E, which is the professional credentials, 2012... The last page, uh, which is Taub's (?) lets explain to each of the candidates in what we have done in every one of our process since 2005, is the professional credentials component accounts for 15% of total process points. As you can see that 5% for experience, there's, there's nothing that equates that 5% of experience to those points. And so what is the maximum for 5%? That has never been established or there's not a matrix that says: "if you have ten (10) years of experience you get the full five (5) points, if you have five (5) years of experience you get 2.5 points..." We don't have anything like that because if we do that, we are putting ceilings on things that are very important like experience. We don't want to put a ceiling on anything that is as important as experience. So what we do instead, since the purpose of the professional credentials is to measure those candidates, their curriculum vitae, their resume, when they're in a process competing against one another, we measure them against one another. And so if adding up experience points, if someone has forty (40) years of experience and that, let's say thirty (30) years to make it realistic. If somebody has thirty (30) years of experience, then they are going to get the full five (5) points in that, because they have experience than everybody else. And then how we determine everybody else - somebody only had fifteen (15) years, they would get two-and-a-half (2.5) points.

VR- In other words you grade on a curve.

CSB- no Ma'am, we grade against one another.

VR – On a curve. (inaudible)

CSB – that's a curve.

VR – yes that's a curve.

CSB – the uh, the it's completely related to one another's points. So someone who has a PhD, they would get the full five (5) points for experience. And then um, that's assuming that, and then that's, a PhD is really not a good example because it would uh, if someone had an Emergency Services Master's degree, would get more credit than someone that had a PhD. The uh, however, you know your point is, whomever had the most education would get the full five (5) points. Someone who had accumulated half of those credit hours would get the two-and-a-half (2.5). And that's what we've done since 2005, and so, if you take four (4) members out of that, then that will alter the scores of the remaining candidates.

BH- Well the remaining candidates would remain the same in relation to remain, there'd just be fewer people in the curve.

CSB – A good example would be... lets' say that the candidate that you remove has the highest level of training and experience. And they got the full five (5) points... lets use experience cuz that's easiest for math. And they get the full five (5) points because they've been here thirty (30) years, and that's the candidate that you remove. Then what you would do in essence... or lets use a realistic example because if we are talking about removing our people who would get the least amount of points, those are the people who didn't get the full five (5) years. So um, Mr. Fortenberry, who, who for example has at the time of that test I think twelve (12) years of experience. If he were in the middle, and somebody with 20 years was um, at the top, they got the full five points, the Fire Fighter with six (6) years would get half of a point probably, Mr. Fortenberry would get three (3) points. Let's remove those candidates. That then, takes Mr. Fortenberry down to half of a point, because he is now one of the lea.. lower seniority from the people. The more people that are less seniority, the better he gets in that experience. And you can use that same example with education, with training hours, with professional contributions, community involvement, all of those. So that full fifteen (15) percent gets altered if you remove candidates from the process, excuse me.

BH – So the process that you're explaining indicates to me that allowing these individuals to take the test, even though they don't have the time and grade and be promoted, actually is, is pervasive throughout the system. It doesn't just affect the fact that they may be promoted in April after the testing is done in 2012 and they get promoted in April of 2013 or June 1st of 2013. It doesn't, it doesn't just put them into the promotional line up, the fact that they are participating actually effected Mr. Fortenberry's total score!

CSB – Fifteen (15) percent of it, yes Sir. Excellent point, as if you remove those candidates, then that also is going to affect his total score.

BH- So, so the fact that you are allowing them to participate did not just mean there's extra people in the process, it also had the potential of lessening, changing Mr. Fortenberry's score somewhat.

CSB – it it...

BH – Overall score. The overall score that put him thirteenth is a factor of the fact, is a result to some degree, of the fact that you let these other people participate in the process.

CSB- Yes Sir, if they out-performed him in that process.

BH- Right. Okay.... Um, the PDR, the Professional Credentials Process that we were just discussing.... You indicated, I think you indicated that the reason that a large percent of these categories are limited to five (5) years, um going back five (5) years from the time... is it from the time of the test?

CSB- It's not a large percentage, it's only four (4) percent.

BH – of these categories... under professional credentials, if you look at the last page of Exhibit E that you were just looking at...

CSB – Four percent (4%) of those. Yes Sir. Four percent (4%) of the process, is limited by five (5) years and the reason is for relevance,

BH – Okay

CSB – Because we want our leaders in our department to be active in the fire service, we want them to be at the forefront of the fire service, we want them to be continually sharpening the saw, and and um, these are Fire Fighters taking other Fire Fighters into uh, immediately dangerous-to-life-and-health conditions...

BH – because I appreciate...

CSB - ...and they have to be up-to-date on their procedures.

BH – I appreciate that, I appreciate your view point on that, but if you look at the last page of Exhibit E, which is the Professional Credentials section, the third category, the third five (5) percent?

CSB – Yes Sir.

BH – it says: "Certifications, Professional Development, Professional Contributions, Associations, and Community Involvement."

CSB – Yes Sir.

BH – All but one of those is limited by the five (5) year rule. Right?

CSB – Correct.

BH – Certifications can go all the way back.

CSB – Yes Sir.

BH – But the rest, the rest of that category's all ended by the five (5) year rule.

CSB – Yes Sir. A measure of relevance in the fire service.

BH – Right, now, in terms of relevance, you testified earlier that in a particular process where Mr. Fortenberry was involved, no one who received a promotion or who was on the list, had um, been through rookie school in the five (5) years previous to this promotional process. Is that correct?

CSB – Correct. None of the certifications or training hours that they, they got from earning those certifications were uh, involved, and... and how that is measured...

BH – But, but let me ask you, if, if, if, I understand that in this particular case you say you know that... Including Mr. Rauchenbach?

CSB – That is correct, that is correct.

BH – Okay.

CSB – He did, he, he did not include any of his uh, academy hours or certifications. In fact if I could direct the Board to um...

BH – Let, let me ask you, just, just, just a moment, let me ask you a question, what I, what I...

CSB - This is important here, because this actually states that they can't use those, uh, in the certifications. It shows the certifications that they get in written school. And it clearly states that, that those cannot, "do not list any of the following minimum certifications:"

BH – Well that's just the certification process correct?

CSB – Yes Sir.

BH – They're allowed to list their rookie school hours under professional development. Correct?

CSB- No candidate, no, no. Because no candidate would have had to complete that in the previous five (5) years, including Mr. Rauchenbach.

BH- Well what, what I'm saying is... is that it's possible isn't it, for that, for those rookie hours to be counted in that process, isn't it?

CSB- No sir. Because to, to be eligible, even with one (1) day of eligibility, then you would, you would technically have to have five (5) years and one (1) day.

BH- On the day of the promotion! Not on the date you fill out this process! This paperwork!

CSB- No sir, on the day that the eligibility paperwork is established.

BH – No Sir, that is absolutely not true! You, by your previous testimony indicated that this, this, this paperwork is filled out at the start of the promotional process. Correct?

CSB – No. It is, it is completed and turned in at the conclusion of the process.

BH – Well, prior to the establishment of the list.

CSB – But, but, the, the reality is....

BH – Just answer my question. Is it... Are they allowed to list... all of their professional development going back five (5) years from the date this document is completed?

CSB – Yes Sir.

BH – Okay. And this document is completed prior to the establishment of the list. Correct?

CSB – The, the date as you will see is, it actually has the date as the end of the process, which is, which is May 3rd. So that's why it's even listed in there since May 3rd.

BH – May 3rd of Two Thousand... in this case of Two Thousand...

VR – Twelve (12).

BH – Twelve (12).

VR – Right.

CSB –2007. Because it goes back five (5) years.

BH – Right, but that, that's...

CSB – but any (inaudible).. there is no one in the 2012 process that was still in rookie school in May 3rd of 2007.

BH – I understand maybe that's the case, I understand maybe you have looked at that, we don't have those documents in front of us... but the point, your point that no one could count rookie time in this process because they would have to have five (5) years and one (1) day in order to be promoted, that five (5) years and one (1) day, that could be at the end of that promotional year!

CSB – But you're speaking hypothetically. What actually happened in this 2012 process is, there was no one that counted their hours, because everyone had already completed rookie school by that date.

BH- Well, I'm asking you is it possible under the process you set up....

CSB – I would, I would have to do some analysis because I, I, I, the math that I'm thinking of in my head (inaudible) without the benefit of some pape..., and actually looking at people's dates I've got, tells me that that is not possible, but at the same time I'm, I'm not sitting here with a calculator so... (trails off)

BH – It, well would you agree that it's possible, because of the way the process is set up...

CSB – Honestly I don't know, I don't know, without some analysis I don't know.

BH – Well, in fact though, they get the list, they get to list their professional development, their professional contributions, their active association memberships, their community involvement, they get to list all of those going back five (5) years from the May 3rd in this particular instance, right?

CSB – Yes Sir. Yes Sir.

BH - Even though they're not going to actually be promoted until six (6), seven (7), eight(8) months later, is that correct?

CSB – Yes Sir.

BH – So they have, their professional development, their associations, all of those categories, for the individuals you're now allowing to take the test, actually go back more than five (5) years from the date they're promoted. Is that correct?

CSB – No Sir. Because they actually only have, three (3) months of eligibility. That's what normalizes it. And I think where you're getting confused on that is that we're not establishing a date saying that you can take the test at this point, it's good for a year and that's the only time... We're actually normalizing that where you can jump in at any time...

BH – Well let me ask you – Mr. Fortenberry fills this professional credentials booklet out. He's limited to listing those professional development hours, contributions, associations, etc. that extend from five (5) years back from the date he completes this document. Correct?

CSB- Correct. As do all candidates, including the ones that were before, that took it because of this procedure change.

BH – Right. But then they're actually promoted six (6), eight (8) months later. Correct?

CSB – It depends. Only if there is a vacancy, and only if they have met the eligibility minimum requirements to be promoted.

BH – Well I understand that. But Mr. Fortenberry doesn't get to add six (6) months to his five (5) years, uh, if he gets that promotion, he hasn't been allowed to do that...

CSB – No one adds anything, it's all the same. They are all on May 3rd, 2007 is the exact same parameters for that process. No one, no body, this rule change made everything the same for everyone. There's not a six (6) months differential between Mr. Fortenberry and these other candidates. It's the exact same time frame, May 3rd, 2007 until then and then it stops . It stops at the end of eligibility. So actually, they're not counting the six (6) months prior to that, which Mr. Fortenberry does.

BH – I'm sorry, they're not counting the six (6) months that he does get to count?

CSB – Because your argument is that they're not eligible for six (6) months. And so, nothing counts in there? They're not counting any of those hours during that time period.

BH – No not during that time period, but they got to count five (5) years back from May 3rd.

CSB – They start their date on the exact same time. Everybody in that process is from their time May 3rd 2007 to end of date. Nobody gets an extra six (6) months or...

BH – He's eligible on the date of the test, Mr. Fortenberry is. He gets to count five (5) years back from the date of the test. They're not eligible on the date of the test, they don't have the five (5) years necessary, four(4) years necessary, but they get to count the same five (5) years he does. Is that what you're saying?

CSB – Yes Sir. Yes sir. It's all equal, all the same.

BH – Well I guess it depends on your opinion as to equal. Do you agree that this process with professional credentials would put, in terms of the five (5) year limitation, I understand that you can count certificates going all the way back, you can count um, one other category, well just certificates right, going all the way back. Would you agree as to all those other categories, the process you put into place puts a five (5) year employee on the same footing as a fifteen (15) year employee?

CSB – Say it one more time, I'm sorry.

BH – That the process that you've put into place that limits the use going back five (5) years, places a Fire Fighter who's been employed for five (5) years with the department on the same footing with an employee that's been fifteen (15)...

CSB - No Sir. Someone who has been here fifteen (15) years has ten (10) more years experience. Someone who has fifteen (15) years is going to blister a five (5) year employee...

BH – Chief, I'm just asking you as it relates to these categories where you have decided to place...

CSB – No Sir. If you would look, I've got to ask the board to look at Exhibit E also, and you look at active association memberships, which is a good example. A five (5) year employee is not going to be an officer or Board member of hardly any. A fifteen (15) year employee absolutely will. And so, that is what is going to be a difference. Committee member, committee chair. All the associations that we are involved with, the longer that somebody has been there, the more opportunities that they are going to be in those positions for a longer period of time.

BH – So you would say on the active association membership they would not be on the same footing?

CSB – No Sir. I'm saying it's going to be dependent upon each candidate and how active they are in their career as to how they're... the purpose of a promotional process is to select the most qualified, who has the most ability for this very critical and important reason. It's not to put everybody on an equal footing as to fifteen (15) years or five (5) years... let's take away the seniority of a fifteen (15) year veteran and make sure their five (5) years... absolutely not! The purpose of that process is "let's be as inclusive as possible so that we can find out who is going to be our top performers, but at the same make sure that they have the minimum requirements before they get promoted.

BH – Well, my question to you, and I will not belabor the point, is that if you have been an employee for fifteen (15) years that you have been a Fire Fighter and you've been engaged in community activities and you have been engaged in professional development, and you've been actively engaged in memberships, and professional contributions, and you have a five (5) year employee who's done the

same thing, the employee who has been there fifteen (15) years and been engaged in those activities is on the same footing as the employee who's been there five (5) years. And you think that's fair?

CSB – In those categories, yes Sir. Because what it's measuring is relevance in the Fire service. So what we don't want is that fifteen (15) year employee who's not involved in the community, who's not engaged. They might have been fifteen (15) years....

BH – Well if they're not engaged, they can't put it down on the sheet!

CSB – And so we need a way to measure that.

BH – Well, if they listed that, isn't that a way to measure it? They are getting no credit for the ten (10) years of contribution, membership and activity, they've been involved in!

CSB – It's not measuring that. It's measuring relevance in the fire service. And it's not measuring what occurred fifteen (15) years ago. So that's measured in the experience. That is...

BH – So you don't think there's any relevance to service... seven and a half (7.5) years ago?

CSB – Oh absolutely! And that's why it's captured in experience, and that's why it's worth so much more than the relevance. The relevance in (inaudible) is one percent (1%). Experience is five percent (5%). That's what matters most, so that's where that's captured, in experience. This is measuring relevance in the fire service. It's not measuring what they did fifteen (15) years ago. That's measured in another component.

BH – So relevance, if someone had an important training program they went through five (5) years and two (2) months ago, they can't list that, that wouldn't be considered relevant.

CSB – For this process to measure how current and up-to-date, for our Lieutenants, they're taking Fire Fighters into (inaudible) environments, we don't want them to not have (inaudible) training sessions on their own, voluntarily, in over five (5) years. We want them to continuously be sharpening that saw. That's... every profession requires that. Every profession requires that you sharpen the saw continuously with relevant, up-to-date information. If we could rest on our laurels with things that we learned thirty (30), thirty-five (35) years ago, then we would not be serving our community with the exponentially changing, modern, firefighting, tactics, science, everything that changes so rapidly... you have to be sharpening the saw. And the fact that the last five (5) years is used is a template that other fire service organizations use: The Office of State Fire Marshalls, the Center for Public Safety Excellence, they measure relevance also, and they use that five (5) year thing, and that's where that came from.

BH – Did you make any attempt to determine what effect your five (5) year limitation would have on older employees within the department in terms of promotional opportunities?

CSB – Yes Sir. *Especially* after Mr. Fortenberry's grievance. I did several analyses... I'd like to direct the Board to my response to Mr. Fortenberry's on Exhibit M, if you look at the second page.... My apologies, look at the first page. "Training Certifications, Contributions within the Last Five Years Requirement."

Making sure that that had no adverse effect, what we were able to determine is that of the people who are promoted off that list above Mr. Fortenberry, four (4) that were promoted had more time and service than Mr. Fortenberry. That was very comforting to see that, he was very concerned that our process inadvertently impacted our more senior personnel. And we actually promoted four (4) people that had many more years than Mr. Fortenberry. And so whatever impacts may have occurred, certainly allowed these four (4) to perform that people who had been here less. And so that analysis showed us that absolutely did not have any impact on more senior personnel.

BH - What was the total number of promotions...

CSB – Ten (10).

BH – Ten? And did you do an analysis to see, if you had not limited it to five (5) what effect that would have had on the older employees?

CSB – Yes indirectly, indirectly. Because one of the things that Mr. Fortenberry had asked about , if we threw out the professional development review, what would that do? And that was six-tenths (.6) of a point. If he would have gotten outstanding and nobody would have gotten any credit, then it would have been six-tenths (.6) of a point. And so that's five percent (5%) of the process, and so one percent (1%) of the process certainly would have been less than six-tenths (.6). So it would not have had an impact on the rankings (inaudible).

BH – In this instance.

CSB – um

BH – In this particular instance, you looked at this particular promotional process?

CSB – That was our only frame of reference, so we didn't have... looked at...

BH – So you don't believe that limiting a Fire Fighter's ability to list his professional training, his professional development hours in these other categories to the last five (5) years is per say, discriminatory as to older employees, or (inaudible)

CSB – Yes Sir. Because every candidate has that same opportunity. They all have that same number of hours to list and our more senior Fire Fighters are in a much better opportunity to get training, to be involved in the community, and things like that than our brand-new Fire Fighters. So everybody has that same five (5) years. Now our Fire Fighters who do nothing during that five (5) years, whether they're a brand new employee or a thirty (30) year employee they're going to get scored the same.

BH – I, Chief I...

CSB – That has nothing to do, it is completely independent from how long they've been here because they're measured on the same five (5) years. Relevance...

BH – I don't believe anybody....

CSB - ...relevance is what we're measuring. And how much they sharpen the saw in those last five (5) years.

BH – I don't believe there's anybody who would think that a system that would reward an employee who didn't take any training for five (5) years should be promoted over someone who's been actively training for five (5) years. I don't think that's the argument. The argument is, the argument that Mr. Fortenberry has made repeatedly is that by not allowing him credit for training he's had throughout his career, he is being disadvantaged as to someone who shows up for five (5) years and does the same amount of training he does... But, I'm going to move on now to the last topic, which is the PDR process, and ask you to look at the document I just put in front of you, and for the Board's information it's um, tab three (3) in my book. Now Chief, the PDR is essentially a performance review process. Correct?

CSB – Yes Sir.

BH – And is that conducted pursuant to Asheville City policy as it relates to objective and competency **base to proses?** (1:48:44)

CSB – We do not have a performance-based compensation system. So what our performance evaluation is, is an evaluation of that employee's performance in the last twelve (12) months.

BH- Do you follow the City's guidelines as it relates to performance evaluations?

CSB – Yes Sir.

BH – Okay and so if you flip over to page three (3) of that policy, it starts with "Performance Rating, Goals and Objectives" do you see that?

CSB – Yes Sir.

BH – Okay, "All employees shall have goals and objectives and receive regular feedback on performance related to their goals and objectives." Do employees such as Mr. Fortenberry have stated goals and objectives in their performance evaluations?

CSB – Annually, yes they do, and at the conclusion of their performance evaluation the employee themselves list what their goals and objectives are for the following year, and so does their supervisor. So yes Sir, each performance evaluation, their goals and objectives are actually documented in that document what they should be working on that following year.

BH – All right. And it indicates that supervisors should set out these goals and objectives that are specific, measurable, time-phased, and then it says challenging and obtainable. Is that part of the process the Fire Department goes through?

CSB – yes, ideally yes Sir, and that's done at the end, with each performance evaluation those objectives are set up, and the employee does it to for the following year.

BH – All right, and they should include the actual job duties and responsibilities for that position, correct?

CSB – Yes Sir. You used the word should, so absolutely, should, they should include that.

BH – Okay. And if we move down to the... about four (4) sentences up from the bottom of that paragraph where it says “At the end of the evaluation period, employees should be measured against the goals and objectives set at the beginning of the evaluation period, and these results should be summarized, documented and discussed with the employee.” Is that part of your PDR process?

CSB –Excellent word you used again, yes Sir, that should be done. Absolutely.

BH – And then there’s some core competencies that are used in this process, correct? Do you know if those core competencies are currently being used as part of the PDR process?

CSB – No, no Sir, I do not. I know that we do use them, and this is a policy from 2004, and so our professional competencies have been updated. So in looking back at a nine-(9) year old policy, can I say that we have listed the technical, intellectual, interpersonal, customer service, (inaudible – door swinging open) since... it would surprise me if we still had that in our professional review (inaudible).

BH – Okay, may I ask you now to look at the documents that are now in front of you right there, and those are Mr. Fortenberry’s PDRs from 2012 back to Two Thousand... is it Seven (2007)? And for the Board’s information, these are behind tab four (4).

CSB – To answer your question, the core competencies obviously, they are listed, but they have been updated since 2004.

BH- Well, so we’re all on the same page, do you see the first one that says review date of October 2nd of 2012? Is that his first one?

CSB – Yes Sir.

BH – And I can’t remember if the Board’s package starts with the most recent, which is thirteen (13) or if it starts with 2012, so make we’re looking at the one that says “Review date 10/2/2012”, maybe one back. For the purpose of the promotional process that has been challenged here, and I don’t know the answer to this Chief so I’m just asking, would this PDR have been used, would this have been one of the last four (4) years or did this have come after the start of the process?

CSB – it would have been after.

BH – Okay and so it would not have been considered?

CSB – Correct.

BH – Okay so if we go back, the first one that would have been considered would have been 10/2 of 2011, correct?

CSB – Yes Sir.

BH – Okay. So I'm not wanting to confuse the Board, but that's the one we're going to start with is 2011. That, that PDR is roughly, is four (4) pages, correct?

CSB – Yes Sir.

BH – Now can you show me anywhere on that PDR where there is a listing of, go back to the policy...

CSB – The core competencies?

BH – Well before we get to the core competencies, where you can show me a list of goals of objectives, which are set out, so which are specific, measurable, time-phased, challenging and obtainable?

CSB – Yes Sir. If you look on page three (3), it states: "Fire Fighter Fortenberry is changing career path of Company Officer and is testing for same. I feel that it would be beneficial for TJ to continue in his education and supervisory classes, both formal and informal to prepare for future opportunities."

BH – Would you tell us again where you're reading?

CSB – Oh I'm sorry, it's page three (3)... and then also Mr. Fortenberry himself says "I need to take more Officer classes to prepare myself for possible promotion to (inaudible) Lieutenant."

BH – Well what I'm asking you is can you point to established goals and objectives that are specific, measurable, time-phased, challenging and obtainable, listed in this PDR? You read me some language, but can you point me to specific, measurable, time-phased, challenging and obtainable goals and objectives that include job duties, you know, what the policy discusses?

CSB – Yes Sir. And as you correctly read, those should include that and they do include that, Mr. Fortenberry lists the goals and objectives that are measureable, obtainable, challenging, and then his Company Officer also lists objectives that are, goals and objectives that are measureable, obtainable, challenging...

BH – Where are those listed on page three (3)? I don't see that.

CSB – "What area does this Fire Fighter need to work on to improve himself the most to prove himself professionally?" The very last category? Page three (3)?

BH – So it's your position, for the PDR process, that language is an established set of goals and objectives that are specific, measurable, time-phased, challenging and obtainable?

CSB – I don't know what else it would be other than goals and objectives, I mean they're goals and they're objectives that are listed. I don't know what else you would call them.

BH – Well do they include job duties and responsibilities?

CSB – Most definitely. Education and supervisory classes, formal and informal to prepare for future opportunities. As a senior Fire Fighter, you're required to act as a Company Officer and act as an Engineer...

BH – Are these goals and objectives that are set out of the start of the performance year for him?

CSB – Yes Sir, because this is the performance evaluation and so he has these, going forward for his following year, he knows what he himself and his company officer have established as goals and objectives for the upcoming...

BH – So it's your testimony that those two (2) sentences are his entire goals and objectives that are specific, measurable, time-phased, challenging and obtainable that include job duties and responsibilities and include developmental actions?

CSB – Those are his entire goals and objectives that he himself has given himself, and also his immediate supervisor has given him.

BH – Now can you show me where core competencies are used in the PDR for 2011?

CSB – I'll direct you to page 2, item number 2, "Your PDR is comprised using core competencies found in the City of Asheville compensation policy as well as some components of the past AFD PDR. Examples and worksheets of the City of Asheville's core competencies are located at stations and online at competence exams. Use these as guidelines to assign a rank for each competency division commitment components for (inaudible)."

BH – Well, where are these core competencies and the rating that he received for each one?

CSB – That's a hyperlink to those composite...

BH – So is it your testimony that he's been rated on each of those core competencies?

CSB – No sir, his rating is on page 4, if I could direct you to page 4...

BH- Let me ask you to go back, you are saying page 2 or 4 says "Your PDR is comprised using core competencies found in the City of Asheville compensation policy as well as some components from past PDRs." And it says "Use these as guidelines to assign a rating to each competency."

CSB – If I could direct your attention to the first word, it says "your." The audience who is rating this is the candidate, is Mr. Fortenberry. So the question would be to Mr. Fortenberry, as he is developing his professional development review, then he is to use those guidelines and assign a rating to himself for each competency. So I'm not sure where he gets (inaudible) that information.

BH – So it's your testimony that as part of this process, he goes on and assigns himself a score. Does the reviewer assign a score for each core competency?

CSB – No. His reviewer assigns an overall rating.

BH – Each of the reviewer assigns an overall rating,

CSB – Yes Sir.

BH – but does not assign a rating for each competency.

CSB – Correct. And some supervisors may, but what the supervisor is responsible for is the overall rating on the last page.

BH- Which is final overall rating?

CSB – Yes Sir.

BH – So it's your testimony that an employee, does the employee even see this document at the start of the performance year?

CSB – Yes Sir.

BH – And what's in it at the start of the performance year?

CSB – What is in this in the beginning is a shell, a template...

BH –It just says what areas does the Fire Fighter need to work on to most improve himself as a professional?

CSB – Yes Sir.

BH – And how does the Fire Fighter know what areas he is supposed to be working on?

CSB- The performance evaluation that they just completed the day before, because they should be beginning on this ideally the very next day to be looking at their goals and objectives, this is a good example of the one – it has those goals and objectives stated right there – so you're rating there on page 3 the goals and objectives. And he's assigned for himself. I think that's what's most important.

BH-So his whole perf... for instance in 2011, the one we're looking at, his whole rating is going to be based on "I feel it is going to be beneficial to TJ to continue his education and supervisory classes, both formal and informal to prepare for future opportunities."

CSB- No Sir. His whole rating is over the past evaluation period, what has been this Fire Fighter's greatest strength? And the Fire Fighter is tasked with selling himself, to let myself, I've got two-hundred and sixty (260) employees right now, and I'm the one that gets the final rating. And so I know a good deal about all our Fire Fighters performance. However, there's many things that our Fire Fighters can do that I am not even aware of, and their performance evaluation is the time for our Fire Fighters to sell themselves. And so that is what is most important to be used is what does that Fire Fighter document as far as saying that they are outstanding or excellent? When a Fire Fighter has three (3) sentences that talks about their greatest strengths for an entire year, that's helpful information in knowing what did

they do that entire year that was outstanding that was excellent that met expectations or was below expectations.

BH- So the way you use the evaluation process is at the end of the evaluation process, the Fire Fighter is supposed to sell himself in terms of his accomplishments for the year.

CSB- The way that I use the performance evaluation process is not only a compilation, a summary of what they accomplished during the year, but most importantly what they need to work on the next year. It's called a professional development and review. And the professional development of that person is one of the goals and its... certainly, the absolutely outstanding thing that our Asheville Fire Department does every day, and especially our Asheville Fire Fighters do everyday, is our professional development review tool, the best thing, I've had plenty of conversations with Mr. Fortenberry that we need to improve on that, help us improve on that. Just this last weekend we had a conversation, this is exciting to go through this process because one thing that it's going to do is it's going to improve things. And that's, and Mr. Fortenberry certainly agreed. And this is one thing, the professional development review process is certainly something that we need to improve.

BH- But it is your opinion that these four (4) pages meet the requirements of the policies set up by the City of Asheville that we looked up earlier.

CSB- Yes Sir.

BH – Okay

CSB – And I'll be the first to tell you that they meet the minimum.

BH- Okay. Well let's look at the one previous to that. Would you agree that the minimal, your minimal, meeting it minimally is the same in 2010?

CSB- And I, I don't understand your question.

BH – It's the same format. Correct?

CSB – Yes. Yes Sir.

BH – There's not a listing of core competencies, an established set of goals, I mean other than this narrative language you actually see.

CSB – Right and that's captured on the second page, yes Sir.

BH- Now if you look, these two would have been used as part of the PDR process for this promotional process right?

CSB – Yes Sir.

BH – 2009, would it have been used?

CSB – Yes Sir.

BH – Look at 2009. It's a document that is 21-pages long.

CSB – This is not the complete, if you could see 2010, these professional reviews were streamlined as a response to, our department professional development reviews again, we've got uh retired....

BH – Chief if I could just interrupt you for a minute because we're running, we're late in the day. If you look at 2010, doesn't it start with a listing of core competencies for the position?

CSB – Yes Sir. And what we did is we...

BH – And Chief, doesn't it allow each person, who is reviewing this officer, the Fire Fighter, the Officer, the Training Officer, the Battalion Chief to rate this individual based on each of these core competencies?

CSB – Yes and we had to digitize that in 2010, it's all hyperlinked into the first part of the document. So if someone wanted to see their core competencies, these exact same thing,,... in 2010 we streamlined and improved our professional development review process because if you can look, one of the biggest complaints that we had from everyone in our, I shouldn't say everyone that's a (inaudible) term, but many many people in the department was that these professional development reviews for 240 something people was taking way too much time with very little behind them. And so we streamlined this process, digitized those core competencies, and then just had the Fire Fighter, the supervisors place in there, a final recommendation. So rather than grades on every single core competency, because that can be done, one-on-one with the Fire Fighter and the Company Officer.

BH – Well does it happen?

CSB – That I do not know.

BH – Well it's part of the policy that the core competencies be used and that the Fire Fighter be rated on each core competency right?

CSB – Right, and that is, if you could look at the second page...

BH – So my question to you in 2011 and 2010, the ones that don't include it, don't include the core competencies as part of the document itself, did in fact, was Mr. Fortenberry on each of those core competencies by his reviewer?

CSB – That I do not know. We have a policy also that every Fire Fighter wear a seatbelt. I don't know if our Fire Fighters are on a call if they are wearing a seatbelt. it's our expectations certainly. But I don't know the answer to that.

BH – But this is part of your management process.. you don't know if...

CSB – Wearing a seat belt is part of our safety, which is so much more critical than an administrative management process...

BH – but, I'm just confused. You don't know if in 2011, 2010 the PDRs that were done for Mr. Fortenberry that were used in the promotional process included ratings on these core competencies?

CSB – I do not.

BH – And I believe the document that would have been the next one back, 2008 I guess...

CSB – Yes Sir.

BH – ...it does include the core competencies. Right?

CSB – yes, as does the 2009. Right. '10 and '11 we do not.

BH – and so if it...

CSB – because we streamlined that process, we digitized that. Core competencies are online rather than in this document where each person has to fill out an exhausting amount of information, what is most important is - what did the person do well, where they need to improve. That's what the performance evaluation, the big things that we need to do on them. What did they do well make sure we capture that, what did they do well and then what do they need to do to improve.

BH – Well do you think employees understand what they are being evaluated against if this information is not included?

CSB – If I could direct you back to page 2, it clearly states those core competencies are what they're being evaluated on. And they're given clear direction, "Your PDR is comprised using core competencies found in the City of Asheville compensation policy as well as some components from past AFD PDRs. Examples and worksheets for the City of Asheville core competencies are available in the stations." And so, if they follow instructions, and they read that, then yes sir, they do. Do 100% of our employees, are they informed that we are supposed to use that process? I would say that's incorrect, but I don't know (inaudible) measure it.

BH – Well, I mean it's measured in the 2010 document, I mean in the 2008 and 2009 document, correct?

CSB – I don't believe it is because I don't have any way to capture that they read this either, just like I don't have any way to capture whether they read that electronic version.

BH – But I mean, there's been ratings assigned by the Fire Fighter, the Officer, the Battalion Chief for that Fire Fighter in each of these competencies correct? In those documents.

CSB – Yes Sir.

BH – So we, you know it occurred there.

CSB – I know that a rating was assigned, but do I know they were being evaluated based on the core competencies that are located in the City of Asheville compensation policy, I do not know that.

BH – But I mean, they're attached right there. It lists them.

CSB – The City of Asheville compensation policy is not attached.

BH – No no, these core competencies, it's listed, if you look in those ones, it says: This is what the core competency is, these are how you're highly rated, these are how you're poorly rated. So at present time you don't have any idea whether that process was used for these later two (2) PDRs.

CSB – Your question process used?

BH – Yeah, whether core competencies were considered, whether objective goals were used, etc.

CSB- Right, I do not know whether, I do not know if the employee or the employee's immediate supervisor used those. I can only assume that they did so.

BH- Isn't it true that issues such as the ones we've just been discussing as they relate to the PDR process has resulted in you changing the relative weight of the PDR in the promotional process?

CSB- Yes Sir, Mr. Fortenberry actually brought forth that concern, and he was concerned that it had a very high weight in the process and made a recommendation that it be lowered, that the ranking weight be lowered.

BH- And was that brought to this committee prior to the change being made?

CSB- I do not know, honestly I do not know (inaudible)... when we have those process weight components, those are the things we take to the Civil Service Board, so it would surprise me if we did not take that.

BH- When did you make the decision to lower them, based on Mr. Fortenberry's concerns?

CSB- I would estimate, lets see, Mr. Fortenberry has participated in nine (9), ten (10), eleven (11), twelve (12) processes, I would guess 2009, maybe, 2010? Honestly, I don't remember exactly, but...

BH- Would it be an acceptable part of the process for, or is a normal part of the process for a higher-level reviewer to ask a lower-level reviewer to change their rating, or to change their comments about a particular Fire Fighter?

CSB- I know that those conversations happen with everyone. The Fire Fighter has that conversation with their immediate supervisor. Their immediate supervisor has that conversation with that Chief Officer... One thing that's important to note about these final ratings, I'm the one that assigns that final rating and everything that's on this document is used as information for me to make that determination of that final rating.

BH – When you're making this determination, do you go online to see if the individual's utilized the core competencies for the position?

CSB – What I do, is I evaluate everything that that Fire Fighter has documented about themselves, everything that their greatest strengths that they have listed, and also the Company Officer as well, and what they need to work on. Also, I take a look at the number of hours of training, that's a very small component, but if they're very big outliers – somebody had less than the minimum required hours or somebody had just huge amounts of hours but for the most part, the rating process that we use, the burden is on the employee and that really is the chain-of-command supervisor. We have 260 employees and I will be the first to admit I've had this conversation with Mr. Fortenberry many times, and he's had some good suggestions, and we're excited about improvements that we will make going forward, but our professional review process, absolutely could be more robust. And we're, this is one good thing, one of many good things that will be coming out of this grievance hearing, is that we'll be able to make that more robust.

BH – But you believe the process you were using in 2010, 2011, meets the City policy?

CSB – Minimally. Yes Sir.

BH- The position of Lieutenant that Mr. Fortenberry was seeking, what are its' overall responsibilities?

CSB- Safety of their Fire Fighter's crew is number one. Their own safety and the safety of that Fire Fighter.

BH – So does each Lieutenant have a crew?

CSB – Yes Sir.

BH- And what size is it? What's the...

CSB- Anywhere between one (1) and four (4) Fire Fighters are assigned. We have one company that just has one (1) person that's assigned the Company Officer, but all of our other forty-five (45) Company Officer positions, which could be a Lieutenant or a Captain, have anywhere between three (3) and four (4) Fire Fighters assigned to them. So a Lieutenant crew four (4) or five (5).

BH- So would it be unusual to have more than one Company Officer on a truck?

CSB- It would be unusual. We had those situations when we had an overtime situation, or we have just made some recent promotions and we hadn't balanced the shifts yet, sometimes we have more Company Officers, but typically we have one Company Officer... and when we have those situations, overtime situations where a Company Officer on another shift is working overtime or if we have those situations where we just made promotions and we haven't balanced the shift yet, then those Company Officers are not functioning as a Company Officer, they are functioning in that overtime role as a Fire Fighter.

BH- So of the promotions that were made in 2013, this process we've been looking at today, for Lieutenant, do all those individuals who were promoted have their own truck?

CSB- You're talking about the 2012...

BH – Yes the process, the one that was completed the Spring of 2013.

CSB – Yes Sir, they do.

BH – So the individuals, I think there were one, two, three, four, five, six, seven, eight, nine, ten promotions is that correct out of that group?

CSB – Yes Sir.

BH – In terms of those promotions, they're all acting as Company Officers?

CSB – Yes Sir. And we were delayed in that because we had some promotions that were made, and then we had some unforeseen retirements and then we had some vacations that we didn't want to interrupt, and so we had some extra company officers on Mr. Fortenberry's shift – on B shift – for a number of time until they were placed at their own company.

BH- So, and that includes some of the individuals that were part of this ten (10) that were promoted, correct?

CSB – Yes Sir.

BH –And isn't it a fact that...

CSB- Two (2) really.

BH- So isn't it a fact that the last three (3) that were promoted as part of this process just recently got their own truck?

CSB- I know one (1) for sure, Rich Rauchenbach, the um, I don't know, because I know there was another one that was off the 2013 list... what's important is that if we have a vacancy, that we fill that promotion, that we don't hold another promotion waiting on... that would be unfair to someone, there's a vacancy and because of a vacation schedule or an unforeseen shift in responsibilities because of retirements or a light-duty and on-duty injury or something like that, that we say "No, we aren't going to promote you," that would be very unfair.

BH-Just to take...

CSB – Our practices, as soon as there's a vacancy... we have 48 Company Officer positions, as soon as there's a vacancy, we promote on the same day. And that way we don't get into a situation where it's being perceived that we're holding a spot so that somebody does or does not get promoted, and so...

BH – But Mr. Rauchenbach who got the last promotion, he did not begin acting as a Company Officer until the last couple of weeks, correct?

CSB- No, that's not true. Because he was on days, functioning as a company officer for a long period of time in a very important capacity working on a standard of cover analysis, data analysis. So he actually became a company officer fairly soon in that daytime assignment. As far as his assignment to a

Company, yes Sir, that has happened recently, but he had just ended his daytime assignment recently as well.

BH- Do you know the date on which Mr. Rauchenbach received notice of his promotion?

CSB – I do not. I think it was June third, I don't know. His promotion was effective June first. So typically we don't always, we're not always able to, we find out that somebody's retiring and it's effective June first, and then we have to bring somebody in for a letter of offer, then we have to do a drug test, I (inaudible) it all. But I do know his promotion was effective June first, the exact same day as of his promotion. But I do think he was actually notified, it may have been as late as June, I don't know. But it's not a secret, it's not, I mean everybody in our department knows the list is established. And so when there's a retirement, everybody in the entire department knows that somebody's getting promoted. So when we had a retirement that was announced for June first, everybody in the department knows that Hey, the next person on the promotional list is going to be promoted on June first. Then they go a step further and they say: Well this person's an Engineer or maybe they're not an Engineer and then they look at the Engineer list and say "Oh this means an Engineer is getting promoted." A lot of excitement around promotions. And yes sure, people know as soon as they're... we don't keep anything secret. We don't secretly notify somebody of a promotion that's going to or, it's no, there's nothing, it's a process that's published in July, and it doesn't change, and the promotional dates are on the same date as retirement dates, and there's no ability for anybody to do anything funny with it, um, it's a very transparent, effective process that everybody knows about. And so... so in essence...

BH – so you, you don't believe that Mr. Rauchenbach actually received his notice prior to June first?

CSB – And what, define notice. Letter of offer? Because that is, we don't have a notice. We don't notify somebody with anything other than letter of offer. And so the letter of offer I think was June. I'd have to check. But you know, so notice, when he was informed, because he saw a department-wide email or maybe the person that's retiring make an announcement to everybody knows: "Hey June first is his retirement." That's his notification. He knows. Hey, I'm next on the list.

BH- But he wouldn't have received official notification from the department prior to June first.

CSB- No Sir. Letter of offer is what we do. And that's signed by myself, by the candidate, in their personnel file, attached to a personnel action form...

BH- Did you find, did Mr. Fortenberry tell you that Chief McFee approached him concerning the sexual harassment report that Mr. Fortenberry filed with the department?

CSB- Chief McFee and Mr. Fortenberry actually let me know that back in February he approached his lead supervisor and let him know about this alleged sexual harassment involving another employee. And the Chief McFee himself told me, as did Mr. Fortenberry, that they discussed it, Mr. Fortenberry asked Chief McFee to meet with him. He called him and said "can you meet with me about this?" And he said "Absolutely, where would you like to meet?" and Mr. Fortenberry asked him, he was off duty, asked him to come to his part-time employment...

BH- Did Chief McFee say to you that he told Mr. Fortenberry that Mr. Fortenberry should not have reported this to anyone other than his immediate supervisor?

CSB- No. Mr. Fortenberry told me that, that that's what Mr...

BH – Did you ask Chief McFee that?

CSB – Absolutely. And he said that that is not correct. That is not how that occurred.

BH- Did he tell, did you ask Chief McFee if he said to Mr. Fortenberry “Behavior like this is the reason you won't be promoted to Lieutenant?”

CSB- He absolutely did not say that.

BH – Well he told you he didn't say that. Okay.... It would not be required of Mr. Fortenberry that he report an allegation of sexual harassment to his immediate supervisor, he's free to go to anyone in the chain of command. Correct?

CSB – Yes. Yes Sir, including our Human Resources department.

BH- And do you know whom he reported it to?

CSB- He reported it first to his immediate supervisor.

BH – Who is that?

CSB - Captain Mike Williams.

BH – Okay, and then who did he report to after that?

CSB – I'm not sure. It may have been Chief McFee. I was hearing from a number of people in our department these reports, these allegations.

BH- I think I'm finished your Honor, if I could have just a little second.

BH – Has Mr. Fortenberry complained to you about changes to his 2013 PDR, since he's filed this grievance?

CSB- 2013?

BH – Umm hmm.

CSB – No Sir, 2010. He and I just had a conversation the other day that he had asked a question about 2010. The 2013, the reason that we met, was it last week? I think it was last week, maybe it was the week before, TJ had asked if we could do that, and I said I would be more than happy to meet with you on that. The issue that he brought forward was that his immediate supervisor had not completed his

professional development review and had not given him a rating; His immediate supervisor was on light-duty and then on vacation. Towards the end of his evaluation period, it was close to the time when his immediate supervisor was coming off of vacation, off of light duty, to come back on shift. The professional development review that had already been completed by Mr. Fortenberry and had already been completed by the Battalion Chief, um, the Division Chief made a decision to have the Company Officer do the professional development review, being someone that was more familiar and being his immediate supervisor would be more knowledgeable about the goals and objectives that Mr. Fortenberry needed to have going forward, and I supported that decision. The Division Chief talked to me about this before making that decision. When Mr. Fortenberry and I talked a couple of weeks ago, what I had explained to Mr. Fortenberry, is that his contention was that had his immediate supervisor not rated him, he felt that his immediate supervisor had given him a pretty strict rating. And his Battalion Chief had given him a very lenient rating. And had his Company Officer's evaluation not been mixed, then he would have gotten a higher overall rating. But as I explained to Mr. Fortenberry, that overall rating is assigned by myself. And what I use, it's not the Company Officer, it's not the Battalion Chief that gives the final rating, it's the Fire Chief that gives the final rating.

BH – Just so I understand, he was, when you say his Battalion Chief gave him a very lenient rating, you mean he got a very good rating from the Battalion Chief...

CSB – Yeah, outstanding. Yes Sir.

BH – And when the process before, before the process was completed, who required the Company Officer, it was the Company Officer correct? To go back and add a rating at that point?

KW- If I may object, is this 2010?

BH – Oh I'm not sure.

CSB – No this is 2013 that you are talking about.

KW – I guess what would be the relevance of the grievance is a review of PDRs that occurred in the last four (4) years, prior to 2012.

BH- Well I guess, this was involved in the 2010 processes... it was...

CSB- That's right, it was the one that we just had the 2013. That correct TJ?

BH – Well so, so the 2010 is not involved in that grievance?

CSB – Yes Sir it is. But you're referring to the ones from recent 2013.

BH- Yup. But is 2010 involved in that particular grievance?

CSB – Yes Sir.

BH – Okay, how is 2010 involved in that grievance, since it's involved in this promotional process...

CSB – It's part of four PDRs that are part of that five percent (5%), established for...

BH – Is it involved in his current grievance though? Is it involved in, is the 2010 PDR involved in the 2013 PDR in any way? That's what, maybe I was confused at the start.

CSB- No Sir.

BH – Those two (2) were done the same in terms of who had to sign off on them? The 2010 and the 2013?

CSB – I'm sorry, I'm not following you. He had the same supervisor in 2010, 2011, 2012, 2013...

BH – Right and in 2010 was the company officer required to sign off on it? The one that gave him a more, a less beneficial rating?

CSB – Honestly, I couldn't tell you because what, again, the performance evaluation is assigned by me. I'm the one that evaluates every one of our Fire Fighters. So there are times when we have an employee that's not on duty, then we have the next person in the chain of command complete that. If the person is going to be off, you know back soon, sometimes the decision is made so that okay, the next part of the process is "Let's *not* wait until that Company Officer gets back, because then this person is going to have to wait several months to get any feedback on a professional development." I think that those are the weeds of the evaluation in that, the most important parts of that evaluation are the Fire Fighter completing what they have done, what they need to accomplish, and then the final rating is assigned by myself.

BH- Those should be done consistently though right? If it was done one way in 2010, it should be done the same way in 2013.

CSB- With the variables that I mentioned – people being on vacation, people being injured on duty... as hazarding as our occupation is, we consistently have four (4) or five (5) people that are on light duty because they are injured on duty. And so the frequency of that is variable, so it may change.

BH – I appreciate your indulgence on that but there is an issue about his 2013 and it does involve his 2010,

LM – I can't have...

BH - so I just wanted to ask some questions about that to see if they were in some way related. I don't have any other questions for Mr. Burnette.

LM- In 2011, when you changed the decision, time and grade, did you consult with anybody about whether you needed to bring that change to the Civil Service Board?

CSB- No Ma'am, I did not. Now certainly, certainly, it was based on history.

LM – Okay, I just want to know did you?

CSB – No Ma'am, I did not.

LM – Did you consult with the City Attorney?

CSB – No Ma'am, I did not.

LM – No one. HR.

CSB – No Ma'am.

LM – Did you ask, did you raise the issue with yourself and look at it, or you just didn't think about it?

CSB – Honestly, I did not think on the issue, it's just based on history because we never have...

LM – Right, right. I remember you said that, I just want to be clear of your answer.

CSB – That was entirely my error, 100%. No question.

MR – Mr. Hunter, you said you were finished?

BH – I was, yes Your Honor.

MR – Ms. (inaudible)?

KW- Very briefly, Chief you said that what you got, in going off Chairperson's Moffa's questions here... you testified you believe that if there is any change to the minimum requirements or changes to the components of the process, that would be brought before the Civil Service Board. Correct?

CSB- Yes Ma'am. That's historically what we have been, have not been before the Civil Service Board for any other matter other than when we had a certification or something like that, it was a minimum requirement that we wanted to add or remove, which we had not, or the components of a written test that (inaudible) or the weights that were (inaudible), historically that is all we had brought to Civil Service. One exception when the Civil Service Board had asked for a report on the 445 Biltmore Fire. Every other time when I had visited with the Civil Service Board, it was only on those two components, so that certainly was my error in that this was not in the things we had taken to the Civil Service Board before, so it's not something that...

KW- Mr. Hunter testified that what the Board approved in 2009, was that the minimum requirements were to be met at the time that a candidate was to take the test. Then we got an opportunity to look in the minutes to see if that was what the board approved, if it was that the minimum requirements were to be met at the time that a candidate was to take a test. Can you go to Exhibit I please, and the Board as well, and do you recall, can you point anywhere in the minutes where the Board approved a review

that the minimum requirements were to be met at the time a candidate to take a test, and was it your understanding that was the case?

CSB – No Ma'am. We did not discuss that during this meeting.

VR- But is it not true that we discussed that it was to be continued as it had been in the past?

CSB- The only thing that was stated from the Board were... thanking me for the excellent summary and then thinking it was a very transparent process.

VR – As it was. Not as you change it. Not as you changed it in 2011.

CSB – That was the feedback and I don't want to speak to the Board, but the feedback that I got was exactly that: Thank you for the excellent summary and this is a very transparent process.

VR – As it was.

KW- As it was, is the minimum requirements that the person, the candidate has to meet four (4) years as an Asheville Fire Fighter? As it was?

CSB – Yes. There...

KW – Have to meet the four (4) years. To be promoted.

CSB – To be promoted. Correct.

KW – Was it ever said to you in the Board's minutes that it had to be four (4) years at the time the candidate took the test?

CSB – No Ma'am.

KW – Was that ever your understanding? That was never discussed at that meeting.

VR- Excuse me again. Was it not at the time in 2009 when we discussed this, the Fire Department's policy that the candidates had to have four (4) years, prior to applying for promotion.

CSB – Yes Ma'am.

VR – All right. So at the time we voted, we discussed it and thanked you for your service, at that time, the policy was: At the time a candidate applied he must have four (4) years service. At the time.

CSB – With all due respect, we did not bring that up at all.

VR – That is not what I'm saying. It was the policy. And we were agreeing with the policy. At the time.

CSB- Right. But the time and grade wasn't even discussed. And...

VR- But it part of the policy. At the time.

CSB – Yes Ma'am it was. As was the different components that were used, things like that. But that was not discussed at all. There was no discussion about the time and grade. And it's not reflected in the minutes and...

VR – You know, I was here in 2009.

CSB – Yes Ma'am. I understand.

VR - I sat, maybe in this very chair. I don't remember. But I do remember your report. I do not remember all the details, but I do remember thinking that – okay, it's just going to go along as it always has.

CSB – Yes Ma'am. Yes Ma'am.

VR – All right, you are telling me that the four (4) years is not what we approved, or not what we thought was happening.

CSB – You are 100% correct today. My understanding leaving that and yours was that the Board recommended no changes. Yes Ma'am. You're correct. I understand what you are asking.

VR – And therefore, in my mind, okay, if you're gonna apply for promotion, you have to have four (4) year service. At the time.

CSB – Well that was...

VR – And so, then in 2011 you arbitrarily changed that. And without any knowledge. Our knowledge. So the point I'm trying to make, and Ms. Whitlock is trying to say we didn't do it, is the fact that, OK we didn't precisely vote on it, but it was stated that we agreed with the policy as it was. And that was four years at the time of promotion, at the time of applying for promotion.

CSB- With all due respect, we did not talk about, it was not... in the summary... I was called before the Board to provide a summary, and I was thanked for that summary. Uh, it wasn't approval or anything on the policy, and we never, there was no mention whatsoever of time and grade or the number of years in that meeting in 2009. That was something that, and I don't even know when that was established...

VR- But the thing I'm saying is that at the time the report was given, the policy was 4 years.

CSB – Yes Ma'am.

KW- Appreciate your patience Chief Burnette. Thank you so much. One follow-up question, Mr. Hunter spoke about in 2013, there was a meeting where the AFD Promotional Criteria Advisory Committee met to discuss this time and grade requirement if people could sit and take the exam? You testified you had to leave, correct? And that you didn't know what happened...

CSB- For clarification, that was not the purpose of the meeting, that came up at the meeting. It was not on the agenda and that was not the purpose of what was to be discussed, but it was discussed from what was reported to me.

KW – at, so, did you follow-up with the committee about that discussion, the next...

CSB – Yes Ma'am. At the very next, the very next meeting which occurred... I can't even remember the exact... anyway at the very next meeting, we certainly talked about it, since it was discussed, it was important that it had been discussed and um, so yes.

KW – And did the committee make a vote?

CSB – No no, there was not a vote, but we did discuss it and we talked about the reasons for it and how it would impact groups of employees no matter how we set a date, and independent, and this was after Mr. Fortenberry filed his grievance, and so what I shared with the Promotional Criteria Committee was that this was part of an active grievance, and so the Civil Service Board is going to give us direction on this. And so there was not a need to take it there. It wasn't a, today obviously needed to happen before, Civil Service Board obviously superseding any decision I make, there was no point in them giving me advice through a formal vote on something the Civil Service Board had on their agenda to take up at a grievance hearing. So as we talked earlier about...

MR- Chief, a question with... you said that with the Promotional Criteria Advisory Committee, they make recommendations that are non-binding.

CSB – Yes Sir.

MR – How often are their recommendations implemented vs. turned down. That you don't institute?

CSB- I implement 100% of their recommendations. There's not ever been a recommendation that I didn't implement.

MR – So the strength of their recent recommendation or discussion surrounding going back to the previous minimum standards and not flexing it, generally got, I'm not going to be, I won't be an attorney and ask you a leading question... so at this point there is no response that you told them that you'd be looking to us for some further direction.

CSB – Yes Sir.

KW – I have no further questions.

MR – Further questions? So now you have finished your presentation?

KW – No, no more witnesses.

MR – No more witnesses. Mr. Hunter?

BH – Yes Sir.

MR – Would you like to call some witnesses?

BH – Yes.

MR – Thank you Chief.

CSB – Yes Sir. Thank you.

BH- We'd like to call Mr. Stephen Burnette.

MR – Before we swear you in Mr. Burnette, we'll take a short break.

BH – And I will tell the board that I suspect that the following witnesses will be fairly quick. I don't think any of them will be lengthy in any...

KW – Are we finishing up today? I know we have people who are here overtime, hopefully will be at five (5)?

CSB – Technically one (1).

(People talking over each other... "let's do"... "finish"... "I was here until moonlight one night, I can certainly sit through this one" "that's true")

BREAK

—

BH – Name please?

SB-Stephen Burnette.

MR – Stephen Burnette. Do you solemnly swear that the evidence you give to the Civil Service Board and the City of Asheville in this matter is the truth, the whole truth, and nothing but the truth so help you God?

SB – Yes Sir.

MR – Please be seated.

BH – Mr. Burnette, thank you for being here today, and sitting through all of our proceedings. I hopefully will be very brief with you and I know this might be a little bit uncomfortable because I've called you the witness and your Chief is sitting here, so I appreciate the position... Um, what is your current position within the Fire Department?

SB – Um Lieutenant, Engine Eight (8), company... (inaudible)

BH – And how long have you been a Lieutenant?

SB – Since November first of last year.

BH – And have you also served on what we've been discussing as the Criteria Advisory Committee?

SB – Yes Sir. I've been on the committee since 2012.

BH- So you've... is it a yearly appointment or how does it work?

SB – If you're appointed, it's two (2) years. If it's voted on. I'm sorry. If you're voted in it's two (2) years.

BH- So you've served two years.

SB – One year. This is my second year.

BH – So you've served 2012 and 2013.

SB – Yes Sir.

BH- And um, so I guess you were not on the committee in 2011, when the change that we've been discussing was made. Is that correct?

SB – No Sir, I was not.

BH – During 2013, this most recent year that we're in now, did the committee discuss or bring back up the criteria that allows officer that will have enough time in grade at any point during the promotional year to take the test and be considered for promotion.... Did that topic come back up in 2013?

SB- yes Sir.

BH - Do you remember what meeting that was brought up?

SB – Yes Sir, that was brought back up at the meeting that Chief Burnette was out. And Assistant Chief (inaudible) McFee was there.

BH- And just so I'm clear with this, is Chief Mcfee with the department any longer?

SB- No Sir, he's retired.

BH – He retired? Okay. Would this have been after, would this meeting have been after the completion of the 2012-2013 promotional process?

SB – Yes Sir.

BH- And why was it brought up? Do you recall who brought it up, or why it was being discussed?

SB- I don't recall exactly who brought it up, we brought it up to discuss because there was some inquiries from the department and we brought it up to talk about it then.

BH- And by the department you mean from employees with the department?

SB – Yes Sir.

BH – Okay. And at that point, are there any people on that committee? Is that generally required?

SB – Yes Sir.

BH – and uh, at that point during that meeting was there a vote taken by the Criteria Committee?

SB – Yes Sir.

BH – And do you recall what the outcome... was this vote concerning this criteria that allowed a person to what they called “gray in” to the job?

SB – Yes Sir.

BH – And do you recall the outcome of that vote?

SB- The outcome was to go back, do away with that.

BH- So the Criteria Committee as a group voted to do away with it?

SB – Yes Sir.

BH – Do you recall what the vote was in terms of the numbers?

SB- I don’t think it was unanimous but the vote, it was a majority.

BH- Okay. Do you recall if all the individuals were there?

SB – I don’t think all were there.

BH – Do you recall if there was a quorum in terms of the committee?

SB- I’m sorry?

BH – Was there a quorum in terms of the committee, were there more than five (5), five or more?

SB - Yes

BH- And um, Chief McFee was in the Chair of that committee at the time?

SB – Yes Sir.

BH – And do you know, um, did he vote as Chair

SB – No Sir.

BH – He did not vote. Okay. And what did you understand would happen after this vote was taken?

SB- Um, I just assumed that we would go back, we talked about, and I’m assuming that we would go back to the way it was er, would change it back to the way it was previously. But also that uh, I understand that the Chief was not there, so I wasn’t sure what would happen.

BH- Okay. Did anybody write down anything concerning this vote? Did anybody take any minutes?

SB - Not that I'm aware of.

BH- So... Did Chief Burnette ever discuss this vote with you?

SB- You're talking about personally?

BH – You personally. Did he come and ask you about the vote?

SB – Not me personally.

BH- Did you, do you know if he discussed it with anyone personal?

SB- Not that I'm aware of.

BH- Was there a subsequent meeting where Chief Burnette did appear and discuss this issue with the Committee?

SB – Yes Sir.

BH – Was it the next meeting?

SB – Yes Sir.

BH – Did he understand that the Committee had voted to go back to the original criteria?

SB – Yes Sir, it was brought up that we had previously voted on it and, he said that he had heard it, that we had done that, and that he as he stated before, that he was not going to make any changes that would hurt... I can't remember exactly how he put it, but I can't remember exactly what he said, but the (inaudible)

BH – So he indicated that he understood that the committee had voted this way, but that, he has the final decision. Is that correct? Is that your understanding?

SB – Yes.

BH – That he indicated that he would not be changing that decision as it related to this issue?

SB- He asked at the time of the meeting what the concern was, and the concern was brought up that people still didn't understand it, so he went through it and did explain it, and spent a significant amount of time in our meeting doing so. And that was it, we moved on.

BH- Was a vote called at that point by anybody?

SB – Yes Sir.

BH- Okay. Did the Chief offer to have a vote at that point?

SB- No, we didn't have a vote.

BH- Okay. Everyone in the department pretty much knows who gets promoted, correct?

SB – Yes Sir.

BH – And, do you know, I'm just asking you of your personal experience, do you know of any other employee who was in Mr. Fortenberry's position, in other words, an employee who would have received a promotion in the last two (2) years, but didn't because a person was able to take advantage of this new eligibility requirement.

SB- I'm not aware of it.

BH – You're aware of Mr. Fortenberry's situation. Correct?

SB – Yes Sir, I understand the situation we are talking about here today.

BH- But he's the only person in the department that you've heard of that's in that position?

SB – Yes Sir.

BH- As a Lieutenant do you do PDR's?

SB – Yes Sir.

BH- And, do you, have you received any formal training on how to do PDRs?

SB- Just previous experience from my officers that I've had in the past.

BH- Okay. But nothing from the department as a whole?

SB- Not from the department as a whole, but from my former officers. As they do your PDR, they explain how to do those.

BH – Okay. And you've heard the discussion today about PDRs?

SB – Yes Sir.

BH- There was some change made where the core competencies are no longer incorporated into the document? Is that correct?

SB – Yes Sir.

BH – Are they part of the processes still?

SB – Yes Sir.

BH – And how does that work?

SB – A Fire Fighter’s PDR comes up, it is sent out to you via computer, you click on that and the core competencies’ attached to that.

BH – On the computer?

SB – Yes.

BH – So you would fill that out as the Fire Fighter?

SB- I would go over those core competencies with the Fire Fighter.

BH – Okay. So that would be part of the process.

SB – Yes Sir.

BH- Is it documented, do you give each Fire Fighter a rating on each of those core competencies?

SB- The Fire Fighter gives themselves a rating, and you go over those with them.

BH - Okay

SB - And this document, it’s something that (inaudible) ...

BH- Do you, in the previous process, there was a rating assigned by each reviewer for that Fire Fighter for each core competency. Is that done now?

SB- No Sir. I mean the competency is done, but it’s not done on paper. It’s done...

BH – Verbally?

SB – On computer. And verbally. Yes Sir.

BH- But, and, I don’t know the process, this is a little bit of an experience for me too. I’m just trying to understand... for each of those core competencies for that evaluation period, do you assign a rating to that employee? Is it recorded someplace else.

SB – It is recorded.

BH – Okay.

SB – It’s recorded, printed off and sent in with the PDR.

BH – Okay. So you’re saying if there’s a PDR – if you would look at that group in front of you right there, are those the PDRs off the... (inaudible)... yeah, I think it’s those right there, if you look at the most recent one... Are you saying there’d be more to the PDR than those four (4) pages? That are sitting in front of us?

SB – This? No sir, we turn these in, and we turn, and you do the core competencies via the computer. And you (inaudible) that way.

BH- Okay. And then I take it, whomever's the next reviewer would be able to view that paperwork?

SB – Yes Sir.

BH – Nothing further for this witness.

MR – Just two (2) questions. What is the date of the first meeting where Chief McFee was leading the meeting, do you...

SB- I don't recall Sir.

MR- Was it in February, was it March?

SB- I think it was in April.

MR- You think it was in April.

SB- Yes, I think so.

MR – and then the most recent one?

SB – the most recent one was.. last month?

MR - ...November... Okay. Thank you.

SB – Yes Sir.

MR – Anyone else?

KW- I just have to ask you a few questions. I'm sorry, I know you want to get out of here.

SB – That's no problem.

KW – Lieutenant Burnette, I didn't hear when you were on the promotional committee, the Promotional Criteria Advisory Committee.

SB-2012 and 2013.

KW- Okay. Are you still on it?

SB – Yes Ma'am.

KW – And you, so you were on it on April 21st of 2012, when the committee reviewed all of the minimum criteria for the Lieutenant promotional process?

SB – Mmm hmm.

KW – Okay. And at that time, the committee recommended no changes to the criteria. Is that correct?

SW- yes Ma'am.

KW- Was that a unanimous vote, do you recall?

SB- I don't think that we voted on it. I think it was more or less "does anybody have any recommendations for changes." If there's no recommendations for any changes we don't vote on it.

KW – And there weren't any recommendations brought up on April 21st 2012 for the 2012 promotional process. Correct?

SB – Not that I'm aware of.

KW – Okay. And did you participate? You indicated that you were promoted November 2012. So were you also a participant in the promotional process in 2012 for the Lieutenant?

SB – Yes Ma'am.

KW – So you were one of the first to be promoted.

SB – I think I was fourth on the list, promoted third.

KW – Okay. And why were you promoted third?

SB- Lieutenant Rauchenbauch now, he was not eligible.

KW – Okay, so you were moved up because he didn't meet his time and grade, so you were promoted. Okay so 2012 promotional criteria that you heard about all day today, using only the training for the last five (5) years, that applied to you also, correct?

SB – Yes Ma'am.

KW – Do you feel that's a fair criteria?

SB – Uh, we have brought that up in the criteria meeting to allow it to go back further than five (5) years. Uh, I feel like, you know, my personal opinion, I think we should take the five (5) years off.

KW – Take five (5) years off? But has it been officially recommended by the committee yet, has it?

SB- I think it's on the agenda to talk about.

KW- Okay.

SB –But I think that we had recommended we do away with the five (5) years (inaudible).

KW –Okay. But at the time in 2012 when you looked at this promotional process in 2012, there were no recommended changes to be made. Correct?

SB- April 2012 there was no recommended changes.

KW- So this was all after the fact of this promotional process, you and Mr. Fortenberry went through. Is that right?

SB- Correct.

KW – And also then, evaluating your last four (4) PDRs was also criteria that was used for you as well, right?

SB – Yes Ma'am.

KW- And allowing other employees to sit for the exam also applied to this 2012 promotional process...

SB – Yes Ma'am.

KW – Okay. Did you feel the 2012 promotional process was fair?

SB – I felt I knew all the, yup, I knew everything going into the process.

KW – So were you told about all the components prior to participating in it?

SB – Yes Ma'am.

KW – Okay. So you didn't feel it was unfair or discriminatory.

SB- No.

KW- You indicated Lieutenant Burnette in April, that in the unfortunate meeting where Chief Burnette was called away unexpectedly in April, that you felt like a vote was taken?

SB- Yes a vote was taken.

KW- And a majority of the people said that to do away with letting the employees...

SB – That is correct

KW – ...take the test. Okay. If there was a unanimous..., if there was a vote for that, do you know why it was discussed at the next meeting?

SB- It was brought up by committee members. We had taken a vote and we wanted to discuss it again.

KW- Do you know why you wanted to discuss it again? I know you testified people didn't understand what happened, they knew the Chief wasn't there. So was it certain that there was a vote taken, or you wanted to discuss it further?

SB- It was certain that there was a vote taken, and we wanted to see what the outcome was going to be, whether that vote was going to stand or if we needed to talk about it further.

KW- Okay, and so that occurred when?

SB – The following meeting.

KW – I just want to... the following meeting, you, it was your understanding that you were going to say that you voted on it but you wanted to know where that stood. Because the Chief was gone?

SB – Correct. Because the Chief was gone, and it was brought up that we had some committee members that wasn't there, and they were like, you know, we understand that this went on at the last meeting and we would like to know where we are standing on this, and that is how it was brought up.

KW – Did the Chief tell you at that time about the Civil Service Board and that he would get direction from them?

SB – He did talk about the Civil Service Board.

KW – Okay, and just to hold off... then testify to that?

SB – Yes Ma'am. I'm sorry. He said he didn't want to make any changes to it now because there was a grievance going on that he couldn't talk about, that he needed to hold off until this process was over.

KW – And do you feel that... because... you participated in the 2012 promotional process that it should be invalidated?

SB – Do I feel like the 2012 process should be???? No Ma'am.

(Everybody laughing)

KW – I figured. I just had to ask. Probably something you're concerned about. All right. Lets... for your PDRs, you said that core competencies are still used in all PDRs. Correct? That hasn't changed.

SB – Yes Ma'am.

KW – Okay. That's all the questions I have. Thank you.

AC- I have one question. I want to make sure I understand you correctly, you were on the Promotional Advisory Board 2012-2013, correct?

SB – Yes Sir.

AC – And you were up for promotion for Lieutenant during that same time in 2012?

SB – Yes Sir.

AC – Do you believe that it is an appropriate, fair process for a candidate, who is sitting up for promotion to also be on the board that determines the criteria for that..

SB- No Sir, I don't.

AC – That'd be all my questions.

BH- I just have one follow-up. To one follow-up to that, and one that I was going to ask before that... now you had your time and grade when you took the test for this 2012-2013 period, so the change in the policy was actually adverse to you, wasn't it.

SB – Yes Sir.

BH – Were there any members of the committee who benefited from the policy, i.e. would not have been able to be promoted, except for the change in policy. Do you know?

SB- I wasn't on the 2011, and that's when the changes were made. At that time, I don't know. I'm not sure. I mean it could have been at that time? The 2012? I mean, I myself was on there, and I think... then maybe. I'd have to look at the list.

BH- But you don't know if, you raise a good point. You don't know if 2011, when the change was made, whether people voted for it who might have benefitted from it.

SB- Yes Sir, I'm not sure who had voted for it and who didn't.

BH-And the question I was going to ask you as a follow-up, you said that there has been some discussion of getting rid of the five (5) year shelf life, you call it.

SB – Yes Sir.

BH – I had a discussion with Chief Burnette about whether or not someone who would be allowed to count their rookie, their training hours they got in their rookie school as part of their professional development, professional hours... Is it your understanding that that's available for a Fire Fighter to use as part of their professional development?

SB – The training?

BH – Yeah, the rookie school training, those actual training hours?

SB- If it falls within the five (5) years, I assumed that it would be.

BH- Correct. And is it one (1) point for every hour? Do you know in terms of how it's scored in that workbook?

SB – I can't remember how it's scored.

BH – Nothing more.

KW- Just have two (2) because Mr. Hunter alluded to this... we do have the names from 2011, I don't know if Lieutenant Burnette can tell us if any of these people benefitted from it or not, I'd rather just

clear it up. But, Wes Rogers was on that committee, who voted unanimously on it, had he benefitted from it?

SB – I don't think. I think you would have to take the promotional list and the candidate list from that year, and see who was on that committee, and just look and see how much time they had in to see who had benefitted from it. I mean if you take all the promotional lists of everybody that got promoted that year and changes that were made, and take the list of everyone that got promoted, you could see who benefitted from it. I mean, I'd have to see, I'd have to see dates. I'm not going to sit here and speculate.

KW – I see what you're saying. You said that you were on the committee, and you were going to be taking the 2012 promotional process, but you didn't vote to make any changes, even though that, allowing more people to take the test would be adverse to you. Isn't that correct?

SB – That is correct. But we vote, the changes that we make in 2012 would not take effect until 2013. So you'd be voting on the changes for the following promotional process.

KW – So the whole point of you being conflicted out of voting on a promotional process on 2012 that you were a part of in 2012 is not true because you're voting in the year ahead.

SB – I wasn't affected because they voted to change this in 2011. I was on the committee in 2012. So they voted for my process, the change for my process. So that wouldn't have affected me, unless we voted on a change in the process in 2012, and I failed the process and retook the process in 2013, then I would have voted on something that would have affected me personally.

KW – So I just want to make sure. You did not vote on your own promotional process then.

SB – No Ma'am.

KW – Okay.

LM- I have a question. You serve on this employee committee. Is your role to represent, to voice opinions, who represent your fellow employees?

SB- Yes Ma'am.

LM – And you also said that at the one meeting that the Chief was not there and a vote was taken, and I think you voted in favor of changing...

SB – Yes Ma'am

LM - ...back to the original, pre-2011 rule.

SB – Yes Ma'am

LM – Was that, was your vote based on discussions you had had with other employees, or was it just your personal view of what it should be, or what was it based on?

SB – Both my personal opinion was that I think the more time you have experience wise, the better. And people I spoke with and people who voiced their opinions to me.

MR – Any follow-up questions? All right, thank you.

SB – Yes Sir.

MR – Another witness?

BH- Herman Olson.

PB? - I think the Board wants to ask, pardon me, if any witnesses who have testified can be excused...

BH – I'm certainly okay with that.

PB – They don't have to be excused, but it's often customary to ask if a witness can be excused.

MR – If there are any witnesses that have appeared and you would like to leave, you are welcome to do that, or you are welcome to stay, except for....

(Laughing... "understood, understood.")

MR – Thank you. Mr. Olson.

HO – Yes.

MR – Do you solemnly swear that the evidence that you give to the Civil Service Board and the City of Asheville in this matter is the truth, the whole truth, and nothing but the truth so help you God?

HO – I do.

MR – Thank you.

BH – Mr. Olson, just tell us what your current position is with the department.

HO- I'm an Engineer, which is a driver, I'm Engine 7 on C shift.

BH- And how long have you been with the department?

HO – Twenty (20) years.

BH – And in addition to your being an Engineer and a driver, are you, have you served on the Criteria Advisory Committee...

HO-Yes.

BH - ... we've been discussing? And how long have you served on it? Tell us what your times that you've...

HO – I believe it's been the last three (3) times we've had votes, the first time I was one of the appointees, that was from one (1) time and the last two (2) times I was elected, and those are for two (2) year terms.

BH- So you served uh, you are in the process of serving five (5) years, so this will be your fifth year...

HO- I believe so, yes.

BH- And were you present in 2013, when the vote when Officer Burnette discussed was taken?

HO- Actually I was not. And I think that is the only meeting that I missed, I was having knee surgery on that day.

BH – And, so you weren't there to participate in the vote that occurred then.

HO – No I was not.

BH – Were you... did anyone tell you about the vote after it occurred?

KW- objection, hearsay unless they are here to testify.

BP – If you want to rule in favor of the objection, you say "sustained." If you want to rule against the objection, you say "overruled."

MR – My question would be... part of his responsibility on his committee is to shake out input from other employees and to get their feedback about that meeting. It seems to be the typical way that he would get additional information. So based on that, what are your thoughts about me overruling your objection?

KW – Well, I guess it's still considered hearsay, I understand your point, but we don't know exactly what that person... what was the purpose of the question since the (inaudible) person who was there, testified what the vote was, what is the purpose of asking this (inaudible) who was there?

BH – I may be able to clear that up. I simply wanted to know, maybe I'll ask the question this way, and it will all (inaudible). Did you subsequently... you were not there for the vote. Did you subsequently learn that a vote had been taken.

HO – Yes.

BH- And, without going into who told you or anything like that, how did you learn I guess I should say.

HO- um, one of the members on the board called me, because they knew that I wasn't at the meeting, and they knew that was a concern for not only us on the board, but everybody in the department.

BH- Okay. And did you subsequently attend the meeting where it was, where that vote was discussed?

HO- Did I attend the next meeting?

BH – Yes Sir.

HO – Yes. The next two (2) meetings.

BH – At that meeting, was that vote discussed?

HO – Yes.

BH – And was Chief Burnette at that next meeting?

HO-yes

BH- And just in your own words, tell us what happened in terms of that, the fact that a vote had been taken. Was there any follow-up by the committee on that? Was there any follow-up by Chief Burnette on that vote?

HO- Yes, quite a bit, in fact I asked quite a bit of questions since I was not there. The whole issue was discussed again, everything from what the vote was, to why there was a vote, why people voted the way that they did. As Lieutenant Burnette said, one of our jobs and our most important jobs is to represent the rest of the department, not just our own opinions, and there's been lots of discussion about it and since it's been changed, we discussed it at length, eventually it was tabled, and no vote was taken. If I'm not mistaken, the only time a vote is taken on any matter is if Chief Burnette calls for a vote. I'm not sure if that's correct or not. But...

BH- Has that been your experience?

HO – Yes.

BH – When you say one of your roles on the committee, I don't remember exactly how you said it, um, to express concerns from the department, correct, from employees you represent...

HO – Yes.

BH – ...so this policy has been something that other employees have come to you about?

HO – Yes.

BH – What has been the concerns that have been expressed to you?

KW- Again, objection.

LM- Again, I ask... Hearsay?

KW – Yes.

LM – There's expressions ... (inaudible) is hearsay?

KW – It's my understanding he said "what did they say to him?"

LM – What concerns were raised here?

?? – ...in his role as a Criteria Committee member

HO- Am I allowed to answer that? The concerns were...

MR- over-ruled

HO – ...much of which has already been stated. People being allowed to take a test that they are not supposedly eligible for, based on the history of the test and procedure in the department, a number of issues regarding how long someone should be in their position before they test for this position in its' importance, obviously there are some people on one side and some people on the other side, and with me being a representative for C shift, pretty much all of them talk to myself or the other representative about it. And in our meeting of those concerns as far as I'm aware of were brought from everybody at the meeting, both positive and negative.

BH- You've been with department twenty (20) years?

HO- Yes Sir.

BH- The previous policy, the existing policy that was there, that was changed in 2011, do you know how long that had been in existence based on your experience?

HO- It had always been that you had to have time and grade by the time of the test, ever since I've been there. I don't know how much before that.

BH- So you were there in two-thousand... this was changed in 2011...

HO – Correct.

BH - and you had been there, you're twenty (20) years now...

HO – January 31st will be twenty (20) years.

BH - I'm trying to figure out how many years that would have, again, in your own experience prior to 2011. When did you come on with the department?

HO – January 31st 1994.

BH- So at least since 1994 this has been the consistent policy within the Asheville Police Department.

HO – As far as I'm aware. Yes.

BH – I mean the Fire Department, I'm sorry. Now, you said that the issue was tabled at this subsequent meeting. Did the Chief express any opinion whether an opinion should be made or not made at this point?

HO- Pretty much our meetings are open to opinions, we pretty much have them, I think everybody there expressed an opinion, it finally got to a point because of this proceeding, no matter if there was a vote taken, a vote not taken, what our opinion was or his opinion, nothing would be done until after this meeting, so we pretty much moved on at that point.

BH – All right, thank you.

LM- You were, what is your opinion about the change. Did you vote for it or against it in 2011?

HO- Both. I initially voted against it, and then for a variety of meetings at that same meeting I changed and voted for it,

LM – So there were multiple votes at that meeting in 2011?

HO – No. We just discussed it a number of times. And we took a vote, and it was six (6) to one (1), and I said eventually before the end of the meeting, you know, I'd make it unanimous. And basically I did that was, Chief Burnette explains the rule, very well, my reason for voting against it other than personally not believing in it was that what everybody told me. Was what they wanted.

LM – Everybody meaning?

HO– Everybody that discussed the situation with me throughout the department. Most everybody I should say.

LM – Not just the people at that meeting.

HO- Exactly. Exactly. Not just the people in the meeting. Not just the people I had talked to. And there were a number of reasons for that. Some of them are because typically Fire Fighters say "that's the way it always was, we don't want to change." Other reasons were because we don't want more people in the pool. The people that are for it are people who would obviously have to wait another year before they would get to take the test. To be quite honest with you, the vote was six (6) to one (1), it really didn't matter what my vote was. It was going to be passed anyway, but I did vote against it initially. And then I believe I told Chief Burnette to make it unanimous. If I am recalling things correctly. And that's the only time when I voted on the issue. I was not at the other meeting where they voted.

KW- I'm sorry. Mr. Olson, were you subpoenaed to testify here today?

HO- Yes.

KW – You received a subpoena?

HO – I didn't receive one, I was told I was subpoenaed.

KW- You were told you were subpoenaed? By whom?

HO- Um, Mr. Fortenberry.

KW – Do you have a copy of that? Um, you don't have a copy of a subpoena. You were just told that you were subpoenaed to be here today.

HO – Right.

KW - Do you feel like you are voluntarily here...?

HO – Yes I do.

KW - ...or under subpoena?

HO – I had originally asked him if I could attend this meeting, and I asked Chief Burnette if I could attend this meeting, and he checked with HR, who told Chief Burnette to pass it on to me that it was up to the complainant on whether or not I could attend. Voluntarily or not.

KW – But to testify?

HO – No. As an observer.

KW – You wanted to be here as an observer.

HO – Correct.

KW – You believe you are under subpoena to testify today.

HO – Yes, that was what I was told.

KW- Did you speak with Mr. Hunter or Mr. Fortenberry about testifying, besides that you are under subpoena?

HO- I did not speak with Mr. Hunter, I spoke with Mr. Fortenberry and asked him when and where.

KW – Did they indicate to you that only the Civil Service Board can issue subpoenas for witnesses?

HO – No.

KW- And how long have you known Mr. Fortenberry?

HO – Pretty much since he came on to the department. I'm not really sure how long that was.

KW – Now I just want to make sure real quickly, you were there in 2011 and you said you switched your vote to approve, to be a more inclusive process.

HO – Correct.

KW- In the 2013 meeting that you didn't attend, this is past the 2012 promotional process that had been approved...

HO – Correct.

KW - by the Promotional Criteria Advisory Committee, so this is after the fact. Correct?

HO – Correct.

LM- Mr. Olson? Is it your general impression that this is a controversial issue amongst in general...

HO – Very much so.

LM - ...within the department? it's your, you have no doubt that it's controversial? There's strong opinions on both sides...

HO – Yes Ma'am.

LM - ... and it's fairly split. I don't know if equally.

HO – I have no idea how it's split.

LM - ... but there is a split of an opinion.

HO – I only know from the people who talk to me. Most of them are from my shift, some of them are from other shifts, so I mean, the numbers (inaudible), but I don't keep track of that.

LM – But you hear both sides.

HO – Oh yes.

BH- Mr. Chairman, I do have one more question that... Mr. Olson, it's not a huge department, people know who has been promoted. Are you aware of any other individual who is in Mr. Fortenberry's position? I.e. would have received a promotion, would have received that next promotion, but did not because of the policy change that had been made.

HO- I'm aware, I believe that it has occurred, I do know by name, who it has affected and who it has not.

BH – No further questions.

AO- Mr. Olson, are you aware of anybody that has a concern about this change because it was not submitted to the Civil Service Board?

HO- Yes, that has been mentioned to me, numerous times, actually I believe it was in our last meeting or the meeting before that, that we discussed what should be brought to the Civil Service Board and what should not be, because I was not aware of what that was.

AO – That’s all my questions.

MR- So you are beginning to receive an education in your committee about what our role is, or what the department’s responsibilities are in regard to bringing policy, procedures, promotional issues to the Civil Service Board?

HO- Yes, I believe Chief Burnette mentioned to the HR representative the items that were going to be brought, and then I think I’m the one that asked the question is there any section in the policy that says what has to be brought and what doesn’t.

MR- And what answer did you receive?

HO- That there were minimum requirements and changes to minimum requirements, and additions or deletions, and changes to the process of the test itself. That’s what I believe we were told. If my memory is correct.

CW- I have one question. In 2011, when it was determined that this would be the new process, was there any discussion about, about it being brought before this Board at that time?

HO – No. Not that I recall.

MR – Thank you Mr. Olson.

BH- Uh, I’d like to call Mr. Mike Marshall.

MR – Mr. Marshall, do you solemnly swear that the information you give the Civil Service Board and the City of Asheville is the truth, the whole truth, and nothing but the truth so help you God?

MM – I do.

MR – Thank you, please be seated.

BH- Mr. Marshall, I notice you’re not in uniform today. Is... are you currently a member of the Asheville Fire Department?

MM- No, I’m not.

BH- Are you retired from that department?

MM- Yes, I retired in 2005, after thirty (30) years and seven (7) months of service.

BH- And what was your highest rank?

MM – Captain.

BH – And after you retired, have you remained involved with Asheville Fire Department matters?

MM- Yes I was on the Board of Directors with the Asheville Fire Fighters Association since 1992, I was, the last ten (10) years my involvement, I served as President of that organization.

BH – When did that tenure end?

MM - May '12. 2012.

BH- Thank you. And were in that role at the time the change we're discussing in terms of the criteria was made.

MM – I was.

BH – But first let me ask you, during your entire experience with the department, which goes back to when? 1980....

MM- 1974.

BH – Can you make any comment as to what the policy and practice of the department had been in terms of whether or not you had to have time and grade in order to take the promotional test?

MM – Yes. You did have to have time and grade.

BH- So, that goes back to your time in '74. Is that correct?

MM – As far back as I can remember.

BH- Okay. And were you aware of the fact that a change was being made in 2011?

MM – I was not. I think it was an oversight, or just the fact that nobody participated in that process, that wasn't actually eligible. The first year I don't think anybody, Scott you can correct me if I'm wrong, but I don't think anybody actually participated, that was, out of that.

BH – So you're saying it just didn't come up because there wasn't an issue.

MM- It just didn't come up because there wasn't an issue. Exactly.

BH- Well prior to that point, prior to the change being made in 2011, were you involved in any discussions in your role with the Association as to that change being made?

MM- No. I was not.

BH- Were you consulted in any fashion?

MM – No.

BH – Was it a topic that you think, that was of interest to your membership?

MM-Yes Sir, of course it was.

BH- You've heard Officer Olson, and I think Mr. Burnette as well, but certainly Mr. Olson this was a topic, this has been a topic of some controversy within the department.

MM – Sure it has. I mean I get a lot of feedback. Sure.

BH – And, excuse my ignorance, is that... what is the role of the Association, with the department?

MM- Our role is to make sure that things such as safety, benefits, pay, to have a working relationship with the Chief and administration, to try to work together for the benefit of the employee.

BH – Does that include the promotional process?

MM- Yes.

BH- So, were you surprised to find out that the policy of this magnitude would change without consultation with the Association?

MM- Very much so.

BH – Did you ever have an opportunity to express that to Chief Burnette?

MM – No. Because in the next process, which was the 2012 process, I wasn't in that role of President anymore. I would have, I'm certain, that I would have made some comment... kicking and screaming.

BH- Who replaced you or succeeded you as the... is it President?

MM- Yes. Scott Mullins.

BH- And is he, and that would have been in Two-thousand...

MM –Twelve ('12).

BH – Is that the same Scott Mullins that received a promotion during the 2012 process?

MM – I don't think he has, I think...

BH – I'm just trying to check those names here...

MM- No, I don't think he was promoted, I think he was involved, I think he did take the test. I think there was involvement there.

BH- Did not receive the promotion.

MM – Exactly.

BH – I'm going to ask an opinion question, and I'm sure there is going to be an objection, so I'll just ask it and we'll go from there. First of all, do you have an opinion in your role as the former long-term President of the Association as to what should be brought to the Civil Service Board, in terms of the promotional process?

KW- I object.

MR – Can you say that differently, based on his promotional experience?

BH- Right. Based on your experience, both as a long-time Officer in the department and as a President of the Fire Fighter's Association?

MM- I have a strong opinion.

BH – What would that opinion be?

MM – Um, to use Chief Burnettes' own words – he was ignorant of the fact that reporting these changes to the Board, but ignorance doesn't make it excusable. Bottom line is we heard about procedures, PDRs, and we've heard about a lot of things, the bottom line is, this was illegal. Against Civil Service Law. And he's not the first one. I think he was ignorant. I don't think there is any malice in his heart when this was changed. But I've seen four (4) Chiefs come through the Fire Department, and they all, at one time or another, were remiss in Civil Service Law. And we've always called them on it, just like this is a very big call, I'm sure Chief Burnette will think about it much more. But the point we need to remember is this is not the Civil Service suggestions, this is Civil Service Law. And I think it was done (inaudible.)

LM- Why wasn't a challenge made in 2011, somehow, when the change was made instead of waiting until now 2013 when all these promotions have happened and, it just seems wrong that we are raising this now, when this change happened and you all knew about it back in 2011?

MM- I didn't know about it. I wasn't aware of... and that year.. and I don't think I was made aware because there was nobody who participated that wasn't eligible in that process. So it wasn't an issue that year. So I wasn't aware.

LM- Current employees would have been. It would have been announced to them...

MM – It would have, yes.

LM - ... at the time that it happened?

MM – Yes, but it was never brought to my attention. Until it happened.

LM- And your role was the President of the Association. Retired.

MM – Yes.

LM – But if it were controversial, none of your membership would have raised it with you?

MM- It wasn't controversy until the next it happened, until somebody was actually going to be promoted in that fashion, in a fashion that they were not eligible to test for that position. So when it became a reality, then it became a controversy. But at that time, it was never an issue.

LM- But it would have been clear to anybody at the time, what the issue would have been when it did happen. It's not like the effect was unexpected.

MM – Exactly. Right. Exactly.

LM – You're just saying that nobody really paid attention until...

MM – I don't think anybody really did. I don't think anybody really expected it happening to be honest with you, but it did happen and it was, again, when I first heard about it, when I first heard that this happened and this individual was probably going to be promoted, the first thing that went through my mind was: "This is in violation of Civil Service Law."

KD – Mr. Chair, if we could take a quick break, we need to change over our clerks. Tari has a personal matter and so Ashely will be joining us in a few minutes.

MR – Okay, lets' take a quick break.

MR – Are we ready to resume?

BH – Yes, just a few more questions for Mr. Marshall. Marshall, do you consider this change, the change of who is actually allowed to sit for the test and be promoted during a promotional year. In your experience, is that a fundamental change in the promotional process?

MM – Certainly it is.

BH – And would you think it would be more fundamental than say, how much, whether a particular component of a promotional process or the testing process was given five percent (5%) vs. ten percent (10%) inside the promotional process?

MM – I don't think so much as that, as I do, I don't think, you can ask these men in the back of the room, I don't really think you are ready to be an officer in six (6) years, and I certainly don't think you should shorten that.

BH – So it, it goes to that issue.

MM – To me.

BH – Are you familiar with this limitation of only being able to use certain training hours and certain other credentials for the past five (5) years?

MM – Somewhat, I guess, I guess that's about to change too, but somewhat.

BH – Do you know when that change occurred?

MM – I don't, no. I'm not familiar....

BH – Based on your experience, do you think that process fairly represents longer term employees?

MM – No it doesn't. It does not.

BH – Do you have any direct knowledge as to whether or not the individuals who, all of the individuals who were promoted in this 2012-2013 process, once they were promoted, immediately began to act in Lieutenant or Company Officer capacity. What do you know about that?

MM – From what, from the knowledge that I have, some of those people weren't assigned to a position, I know, I know as of two (2), three (3) weeks ago, you had two (2) Lieutenants ride on the back of a truck.

BH – As part of, were they Lieutenants from this 2012-2013...

MM – From the '12 – 2012 promotion, one was from the most recent promotion. There were two (2) Lieutenants riding on the back of a truck, and had a Captain in the Officer seat of that same truck. And that was within the last two (2) to three (3) weeks.

BH – So based on your experience, both in the department and within the Association, is there any reason Lieutenant, Officer Fortenberry couldn't be promoted to Lieutenant at this time? Today?

MM – If we are going by that standard, by what we've just seen in the last year, then no I don't see no reason why he shouldn't have been.

BH – No more.

KW – No questions

MR – Anyone else on the Board?

BH – In deference to the fact that it's 5:30, and if I call my next witness, we'd be here another two (2) or three (3) hours, I think we will rest our case at that point. That's what I think would recur in terms of the time that it takes. The grievant rests.

MR - I believe we are ready for closing arguments?

Pat – You need to ask if there's any rebuttal witness, I'm sorry, evidence by the City, and then any (inaudible) rebuttal if there is... (inaudible).

KW – There is not.

MR – Nothing further from the City.

Pat – I think you need to clarify with Mr. Hunter what Exhibits he wants to introduce for the record.

BH – I think everything I used was already in the record with the exception of these loose documents here. The grievant would like to have entered the PDRs from Mr. Fortenberry for 2011, 2010, 2009 and 2008; those are the ones we asked the Chief to testify. The other exhibit would be the session law of 2009, the session law that contains the Civil Service Law and the City's policy on objective and competency-based appraisals.

LM – Do you think you could kind of do it by telling me which exhibits... one (1) through seven (7), like you know which one's are not, or which ones are...

BH – That's a good point. Under our Tab 1, we introduced the session law which was marked as Exhibit A under Tab 1. There is a previous version of the session law but it was not discussed under that tab.

LM – Is that Fortenberry 123 through 127?

BH – 127 correct.

LM – So that's Tab 2.

BH – Is it Tab 2? I'm sorry yes, Tab 2.

LM – Okay, and that's the 2009 session.

BH – And then under Tab 3, we did introduce the City of Asheville policy related to Appraisals (Fortenberry 139-155); and then under the text tab, Tab 4, we introduced Fortenberry PDR 111- would be the last one of 2008... yeah, for some reason, those numbers go backwards... 65 – 111. 111 is 2011, then it goes backwards to the 2008 one. I think it would be the last page of that exhibit, which is 85.

Pat – I think it would be Fortenberry 65 to Fortenberry 114...

BH – No Fortenberry 114 is not included. So it's 111 – 85. I think that is all we introduced that was not previously introduced by the City.

MR – Any objections

KW – No Sir.

MR – As granted, those items will be placed in as evidence.

MR – Do you have any exhibits that you would like to submit as evidence?

KW – I believe I submitted Exhibits A through O, but, yeah, I could be completely wrong... If I could submit into evidence Exhibits A through O, if there aren't any objections?

BH – No, no objections.

MR – I believe, unless there are any other comments, we are ready for closing arguments.

KW –Do I go last? I can't remember...

Pat – Let's see, in the case where the grievant did not have an opening, they get to close. So that means you go first.

KW – All right, I'll go quickly, because obviously it's been a very long day, but, I think that the sexual (inaudible) issue has become moot over the course of the day, so I'll just focus on using the training during the last 5 years component, the evaluation of the PDRs and allowing employees to take test if they are eligible at any time during the life of the eligibility list. I think the two first criteria the training time and the PDRs is quite simple; I think that's been in place since 2005. It's, it has brought to the board to you with two (2) members on it, reviewed it back then in 2009 and didn't recommend any changes to it. I think that the AFD Promotional Criteria Advisory Committee also reviewed these items from the 2012 promotional process and recommended no changes at that time as well. The PDRs is the same situation... and due to the subjective nature, I believe the Chief testified here that he is the final rating but you also, he takes into consideration many different evaluators in that process, including the Fire Fighter himself, he fills it out. So I really don't think there's any issue with the PDRs'. I'd like to talk some more, and I know this is the focus of the Board about allowing employees to sit for the promotional test if they meet the time and grade requirement at any time during the life of the eligibility list– again, I would say that this was not a change in the time and grade requirement, this was just a time when a person could sit and take the test. It didn't mean they were promoted without meeting that time and grade requirement. This was unanimously approved by the Promotional Criteria Advisory Committee that we heard, I know there has been talk about changes in 2013, but that really has not been relevant in, not relevant to what occurred to the 2012 promotional process. Mr. Fortenberry has known about this criteria since its' implementation, he's been involved since 2009, 2010, 2011, 2012 and currently 2013. I think that also, when we're talking about employees allowing to sit to take the exam if they are eligible any time during the life of the eligibility list, this was sent to all Fire employees via email and was also discussed at a committee where members could come and speak about it. This wasn't hidden, there was no intent from Chief Burnette, and I can tell you that from the bottom of my heart, that he wouldn't try, he's not trying to hide anything. This was open, and it's unfortunate that we waited until now, to bring this forward because promotional processes have used this change, and may in fact impact twenty (20) to twenty-five (25) employees. We would ask based on this, I think that goes back to the argument of the timeline and the required timeline, and how long it's taken someone to grieve this actual change and these criteria, so we would respectfully ask that you uphold Chief Burnette's decision, that Mr. Fortenberry was not discriminated against when he was not promoted, and also the City Manger, also reviewed and found the same. Thank you.

MR – Thank you

BH – I'd like to thank the board for being here today, for going through this, being as long as it has been, and I'd like to also thank everyone who testified that I called. It's always the difficult thing to call non-

grievants to testify and I appreciate that. I will address the issue of the change in the promotional criteria that was made in that directly resulted in Mr. Fortenberry not being promoted during the promotional process that he is currently grieving. I don't think there's any doubt that Chief Burnette himself said that there's no doubt that had that policy not been in place 2012 - 2013, that Mr. Fortenberry would be a Lieutenant now. He would have gotten the 10th promotion, he was next in line and would have gotten the tenth promotion. So the only reason we're sitting here today is because the criteria was changed to allow individuals, who previously would not have been allowed to take the test and be promoted, given their time and grade, that was changed to allow them to take the exam. And what was changed? The policy and practice and process of the department, going back at least as long as 1974, we've learned today, so thirty (30), forty (40) years of policy and practice was changed by Chief Burnette and, evidently was changed without any discussion with Human Resources, without any discussion with the City Attorney's office, it was changed without any discussion about that fundamental change with this Board, and it appears he changed it simply on his own volition. And for some reason wants this Board to believe that the change was not controversial and was not an issue within the department. And I think that representation has been put to rest very clearly. The law is very clear cut on this matter, and I've had Chief Burnette take a look at the law. It indicates that this Criteria Advisory Committee is to be set up, this is the Civil Service Law, and that any criteria developed by that Board, and that is going to be implemented by the Chief is to be approved by the Civil Service Board. It's one of the fundamental activities of the Civil Service Board, is to oversee promotional processes in the Police Department and the Fire Department. And if you look at the various minutes of the Civil Service Board that were actually introduced today, what you will see is that there is extensive discussions about promotional processes, for both the Fire Department and the Civil Service Board... And the Police Department. But for some reason, Chief Burnette wants us to believe that this didn't need to come before the Board. I think he realizes he is mistaken in that, but as Mr. Marshall said, that doesn't change the fact that it was a fundamental alteration of the promotional process, that was not reviewed or approved by any way by the Board. Chief Burnette talked about the fact that well "In 2009, you didn't really look at that aspect of our process. It's not in your minutes." Interestingly, the fact that the five (5) year shelf-life PDR, which they say goes back to 2005, it was in... the process that you looked at in 2009, they want you to say that it was okay and it was approved, but they don't want you to view a more fundamental change as being in this same category. So my legal argument is very simple: This change was required to be brought to the board, it was never brought to the Board, and the statute is very clear cut.... It says: "The Civil Service Board shall have the authority to approve any criteria established, and the criteria shall apply only to persons promoted after the effective date of the approval." Just the black and white of the statute indicates that change really should not have been effective until after it was approved by this Board. And it really is not legally effective as we sit here today. Chief Burnette's explanation as to why he didn't bring it to the board sort of shifted... at first it was because the only thing that was brought to the board was the minimum criteria to be promoted. Now that language doesn't appear anywhere, in any statute, any rule, any regulation that says that is all that has to be brought here, it has not been the practice of the Fire Department or the Police Department, that that's all that's brought here. But when I asked him to look at some of the things he directly had brought to the Board, having to do with weightings within various testing procedures, it was "Oh well, it's more than just the minimum criteria, it's also something called the process content of the promotional process." I

would submit even under his own definition, there is nothing more fundamental in terms of the process content than who is eligible to take a test and be promoted. That's the whole point of the process. So I just don't think it's credible or believable to believe that this should not have been approved by this Board. And of course, that is given resonance and given additional force that it remains a very controversial policy within the department. If you read the minutes where it was approved in 2011, it says it was unanimous. Yes it was unanimous, but only after at least one (1) person changed their vote to make it unanimous. We know that as soon as this promotional process that's being challenged today was over with, that same Criteria Committee voted to do away with it. And for some reason, because there were no minutes kept, there were... I don't know exactly what the reason was, nothing ever came of that vote. The Chief simply failed to act on that. He tabled it at his next meeting, and was not forthcoming with the fact that his own Criteria Committee had decided after experiencing it for two (2) years, to change it. And again, I don't understand why he would not have been forthcoming with this committee or Board about that. But it is controversial. That's why this Board exists, is to deal with those kinds of issues, and approve or not approve these kinds of policies, and you were not given that change prior to this hearing. Mr. Fortenberry also challenged the fact that a portion of the testing process limits him, limits the professional credentials he can bring to bear in the process to those from five (5) years previous to the promotional process. The Chief indicated "well, this is all about relevance," and that's fine, I understand that. But I ask you: Is it really fair to judge a fifteen (15)... in Mr. Fortenberry's case a twelve (12) year employee on same basis that you apply to a five-year employee in the promotional process. You know, you have a career, and you build through that whole career. And who you are when you take, when you're promoted has to reflect every bit of that career, good and bad! If you've got a big disciplinary problem that was more than five (5) years ago, and the Chief's aware of it, it's going to have an effect on how he promotes you. So the whole process, the whole career is at issue. And for some reason for a significant portion of that component, you're equated with somebody who might just be out of rookie school in the last couple of years. And in fact, we believe that it is quite possible, that the rookie school hours could be, would be counted. And those are huge vs. someone in Mr. Fortenberry's position who doesn't have, who can't, doesn't have the same opportunity to spend that many hours in training as you do in rookie school. It is not fair. It is discriminatory towards longer-term employees. Is it a huge difference in terms of the weighting? It's not huge, but sometimes these promotional decisions are, if you look at the promotional list, the grading goes to the hundredth of a point! That's how fine it can be, you're the next person, so it could absolutely, even that four percent (4%) can make a real difference if you are looking at a hundredth of a point between them. And, if you look at section sixty-six (66) in the personnel policy, this is just what a grievance can be. It says: "A grievance is defined as a complaint or dispute of an employee related to his or her employment." And it can cover the following things: Unfair interpretation or application of policies governing personnel practices; Unfair or discriminatory supervisory practices and any other grievance related to employment." That's why he included that in his grievance. It's unfair on its face, to say you can only count five (5) years, when you've been there twelve (12) years and you're being judged on the same level. And someone has been there much less time. The DPR (PDR)... I got a little bit of an education here, so I'll admit that. It was my understanding prior to our testimony today that the DPR (PDR) process was changed, the evaluation process was changed three (3) years ago in 2010... where core competencies were not looked at. I think a lot of us here have a background in personnel work and management, and to say that that 2010 and

2011 four(4) page document had anything related to: “All employees shall have goals and activities and receive regular , the goals are specific, measurable, time-phased, and challenging...” they’re just not there, in that document. Now it appears that the core competencies may still be part of the document. Not part of what is available evidently, but what is available online. And if that’s the case, that helps this situation a little bit. But the point on the DPR (PDR) is that half of the ones that were used, that used four (4) years, half of the ones that were used didn’t even appear to be consistent with City’s Policy, again. And to the Chief’s credit, I’ll say, he says this is minimally appropriate, this is minimally adequate. Well my point would be again, is it appropriate to use a minimally adequate process, if it can effect somebody’s tenth or one hundredth point on the promotional process? We think that needs to be looked at and addressed as well. Finally, there’s been a concern that if this Board were to rule in this one (1) grievance, that Mr. Fortenberry was denied a promotion to which he would otherwise be entitled, that’s all he can bring, that’s all he can bring to this Board if you look at the language: “Was he denied a promotion to which he is otherwise entitled?” The City wants to paint this devastating picture of what’s gonna happen if you say in this one grievance that he was denied the promotion, that somehow it is going to invalidate all these previous ones. I don’t know, the city may have to deal with that. But that’s not what you’re being asked to decide today. You’re being asked: “Was he denied a promotion that he was otherwise entitled to?” And it just seems clear on its’ face that if that change in the criteria was never legally approved, that he was denied the promotion to which he was otherwise entitled. I asked some questions about where current Lieutenants are, because I didn’t want the board to have the impression that well, there are X number of Lieutenants positions, and they all have a specific truck and they all have a specific number, yeah, that’s not the way it is. There are Lieutenants who are getting in the Lieutenant position and getting the Lieutenant pay, who haven’t been fitted in to the organizational command structure exactly correct. That’s completely possible for the City to do, with Mr. Fortenberry, and for that to be worked out. It is not an apocalyptic situation if ya’ll rule today that Mr. Fortenberry was denied a promotion. Now the City may want to look at other issues. They’re certainly working hard to say that Mr. Fortenberry grievance is untimely, I’m sure everybody else’s is untimely because they didn’t even file at any point near the end of the promotional process. So I don’t really think that’s a legal issue that we have to worry about. You can do right by Mr. Fortenberry, without causing, other than saying this policy needs to be looked at by this Board, appropriately, before it’s used again, and that would be a good thing. That’s what should happen. Other than that, I don’t think that any horrible consequences flow from ruling in Mr. Fortenberry’s favor today. So we ask you to do that... that would be the legally correct thing to do, it would also be the right thing to do for Mr. Fortenberry, a 12-year veteran of the department.

MR – Thank you – thank you. At this point, I’ve got to move that we go into Closed Session based on General Statue 143.31811A6)

Pat – Reads the general statute

MR – All in favor?

Board: Ayi.

Pat – I'm sorry, the chair can't make the motion, so we need somebody else to move the motion.

VR – I so move

AC – Second

MR – All in favor

Yes all in favor

Alan – Move to open session

AC – Second

All in favor

Marv – Well first of all, let me just thank all of you for your time today, it's nice to watch this process unfold and to give employees and management the opportunity to state their case. We appreciate that you've done so in a relatively succinct way for a fairly complex case. Thank you. If you would like to make a motion, we'll announce our findings.

Alan Coxie:

On behalf of the CSB, I hereby make a motion to deny the City's motion to dismiss the grievance of TJ Fortenberry on the basis that he was denied a promotion of which he's entitled to by virtue of the Board's second motion on the merits.

That second motion on the merits is as follows: I hereby move that the City was not justified in the application of the 2012 Lieutenant promotional process to TJ Fortenberry due to the failure of the City to have the Civil Service Board approve the 2011 change in the promotional criteria, about when the "time in grade" applied for employees to apply for the promotion and the application of the 2012 process to Fortenberry is hereby rescinded.

But we hold the City was justified in the manner that the PDR's were completed and used in the 2012 Lieutenant promotional process and we hold the City was justified in the use of the 5-year lookback criteria, but the Civil Service Board recommends that that criteria be reviewed by the Promotional Criteria Committee and that review be reported back to the Civil Service Board and finally, the Board finds that the City's decision in the application of the 2012 Lieutenant promotional process to Fortenberry was not affected by the by the sexual harassment claim as the promotional list created on July 1st 2012 and the sexual harassment claim was reported on February 2013.

Those are the motions of the Board.

Virginia Robinson: I second that motion.

Marv Rosen: All those in favor?

All say Aye (passes unanimously)

Marv Rosen: Opposed?

(Silence)

Patsy Brison – and Mr. Chair, if we could talk a little bit about the process, to prepare the written orders is a ten (10) day time period, and the law is not clear about how you apply when there is holiday season, and when the attorneys for the party would be available to agree on a certain date due to the holidays. Ten (10) days from today would be December 27th, and some of, Mr. Rosen and I are going to be out of town some of that time period, I don't know... what plans other folks may have, but I intend to prepare a draft to submit to the board members this week, and to get their comments back as soon as they can, and then to share it with Ms. Whitlock and Mr. Hunter before the Chair signs the order. So, if we look at the calendar and see if we can agree to the Friday after New Years, I know that is a little bit longer but...

KW – I would have no objection to that

Patsy Brison – Would that work for you Mr. Hunter?

BH – Yeah, I think so, I haven't had a chance to talk to Mr. Fortenberry about it, so in other words, we would just agree that the ten (10) day period would just be extended...

Patsy Brison??? – to January the third. And I would send it to you guys for commentary before that, I don't know what your travel plans, vacation plans, holiday schedule... and if that's not a good date and you want to suggest another date, I just know that we have a crunch time here... so...

BH – I don't think we have an issue, it's just extended by six (6) days. Right? Just whatever happens after that would start on the third instead of...

Pat – Yeah, I just think we'd have a clock run, starts run from when the decision is out of (inaudible)... about running until you get a copy of the decision...

BH – I guess the only concern I have, I just want to be clear that's something the parties can agree to extend... I know there's something...

Pat – The law says, you shall do it within ten (10) days, but I... I don't see why the interpretation is ten (10) business days, as opposed to ten (10) calendar days, I think the fallback... it's been awhile since I've looked at the law, but I think its fallback is its calendar days unless it says business days, I'm just trying to remember what North Carolina law says... but I think that if these are the folks that would complain about it so I think that if we agree... in this particular case... just a suggestion.

BH – I do not have a problem with it, I do want to look at the (inaudible) because I know that there are some things that could happen after that potentially and I do not want to effect... you know, the... I

don't think we would be appealing but it is a fairly short appeal time and I don't think it runs from the... it's the date the written decision is delivered. Right? Not ten (10) days from today's date...

Pat – Yeah, we don't want to create an issue there... and maybe we could agree on the record as to... the um... lets' see, by reaching its' decisions, the Board shall, the Board shall write immediately to inform the City Clerk and the member requesting the hearing of the Board's decision. But in ten days of the receipt of notice, of the decision of the Board, either party may appeal to the Superior Court division of the General Court Justice for Buncombe County for trial (inaudible). The appeal shall be effective on filing with the court of the Superior Court to petition for trial in Superior Court.

KW – In Huskey it's the written receipt. So when you get the written receipt by the Board, that's when your clock starts.

BH – I think that as long as we can have as part of the stipulation that the ten (10) day window doesn't start ten (10) days from today but starts ten (10) days from written notice...

KW – In Huskey vs. the City of Asheville, the Court of Appeals answered that very question.

KD – And the Civil Service Law does say within ten (10) days within receipt of the notice of the decision of the Board that either party may appeal to the decision of the Superior Court. So...

BH – Well, I didn't look at that Husky case, and in that case, it's a Superior Court judge ruled that it's ten days from the date it was announced. And the Court of Appeals repeals and overturns that and says it's within ten (10) days of written notice. So just as long as we all agree it's with receipt of written notice, then...

Pat – All right. Looks like we have agreement on that then, we'll have the written decision entered by the Board on Jan 3rd and the ten (10) days runs from receipt of that decision.

BH – I have just a procedural question for the board, I'm never clear on this... If you all can guide, give me your guidance, and if not I understand that as well. If your order becomes effective and there's no appeal, and it becomes effective, do you have any continuing role in overseeing that order, or how does that work? In other words, if we believe the city isn't appropriately is implementing the order, do we come back here? Or where do we go?

Marv – I'm going to let our attorney respond to my response, but I believe we do not have any legal obligation under the Civil Service Act to continue to monitor the City's actions once we render a decision.

Pat – I think that is correct. There is some investigatory power within Civil Service Law, and if that applies, that could be seen as a way of monitoring a previous decision, but I think that's a whole separate authority. And with regard to whether anything would be done in the future, if an order of the board is not appealed by the City, there maybe, there exists the possibility that there may be a new grievance. So... Those are the two (2) things that I know of. I can't think of anything else.

AC – That’s my understanding

BH – So there could be a grievance based on an employee believing that an order of the board is not being properly implemented...

Pat – No, not creating a new provision in the Civil Service Law for which a grievance can be filed. What I’m saying is that there exists the possibility that if the City failed to follow an order of the Board, it might create an opportunity under the Civil Service Law for an employee to file a grievance, that met this test of the Civil Service Law.

BH – Okay. I’ll take a look at that.

Pat – A possibility.

Marv – Okay, any other comments? I’d so move to adjourn.

VR – I second that.

All approved