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NO. 68701-8-I

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

CAPTAIN BRUCE NELSON,

Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE
BOARD OF PILOTAGE COMMISSIONS,

Respondents.

RESPONDENTS BRIEF

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I. INTRODUCTION

This Court should affirm the superior court judgment that dismissed Captain Nelson's civil claims. First, the claims are barred by collateral estoppel. Captain Nelson litigated the identical elements of his civil claims in a seven-day administrative hearing virtually indistinguishable from a civil bench trial. The administrative tribunal determined that the Board of Pilotage Commissioners not only acted without an improper motive, but went to great lengths to assist Captain Nelson achieve a pilot's license. These factual findings regarding the Board's motivation bar Captain Nelson's civil discrimination suit. Alternatively, the Court may affirm the trial court's judgment because Captain Nelson failed to raise a genuine issue of material fact that age was a factor in the Board's decision making process.

II. COUNTER STATEMENT OF ISSUES

A. Where a litigant raised a factual issue and had a full and fair opportunity to litigate it in an administrative proceeding, does collateral estoppel prevent re-litigation of decided factual issues? (Assignment of Error 1, 2 & 3).

B. Assuming collateral estoppel does not conclusively foreclose this discrimination suit, where the Board planned to meet a need for new pilots occasioned by a projection of upcoming retirements,

allowed only experienced mariners to apply, all trainees were within 13 years of Captain Nelson's age, and the Board did not employ pilots, did the trial court properly conclude there was no prima facie evidence of age bias?

C. Where Captain Nelson presents stray comments from decision makers unrelated to age or any protected characteristic, should the court affirm the trial court's summary judgment dismissing Captain Nelson's discrimination claims? (Assignments of Error 1 & 3).

D. Where Captain Nelson did not plead a constitutional claim, does not argue it, and Washington law does not recognize it, was the trial court's summary judgment proper? (Assignment of Error 1).

III. STATEMENT OF THE CASE

A. Pilotage In Washington

To protect the Puget Sound, most vessels must have a licensed pilot.¹ Each Puget Sound pilot is a highly qualified mariner and ship handler with extensive local knowledge of some of the most difficult waters in the world.² As required by statute, the number of pilot licenses

¹ RCW 88.16.070 ("every vessel not exempt...is subject to compulsory pilotage."); CP at 307 (ALJ FOF 1).

² CP at 5073, 102:14-103:22; WAC 363-116-120(1); CP 307, (ALJ FOF 2). A note on the record, the fully administrative transcript appears at CP 5017-5419. For unclear reasons, there are two copies of the sixth day with slightly different pagination. The Respondent cites the second version.

is limited to optimize the provision of safe, fully regulated, efficient and competent pilotage.³ For the period of time relevant to the case, 57 licenses were authorized on the Puget Sound.⁴

The Board of Pilotage Commissioners (Board) is charged with determining who is qualified to pilot massive⁵ container and tanker ships on these critical waters.⁶ Reflecting the broad goal of safe piloting, the legislature mandated that the nine person Board be composed of subject matter experts including active pilots, shipping representatives, representatives for environmental concerns, and members of the public “with broad experience related to the maritime industry.”⁷ To further ensure that only qualified pilots are licensed, the Board established a training program managed by an even more specialized Training Evaluation Committee (TEC) composed of three active pilots, a shipping

³ RCW 88.16.035(1)(d) (describing the Board’s authority to fix the number of pilots); CP at 5076-77, 116:19-119:19 (describing the competing safety concerns over the number of pilots).

⁴ CP at 308; CP at 5076, 116:21. The 57 license spots were never full during the relevant period. CP 5077: 120:3-8.

⁵ Purely by way of illustration, if a tanker ship were placed on end next to the Columbia Tower (937 feet tall), the tanker would be three or four stories higher.

⁶ RCW 88.16.035(1)(a)-(b); CP at 5071, 96:16-97:23.

⁷ RCW 88.16.010 (listing required qualifications for Board), CP at 5072, 98:3-101:20 (describing the make-up of the Board). Captain Harry Dudley was the chairman; Norm Davis was the Ecology representative. Captains William Snyder and Pat Hannigan were the pilots. Captain Craig Lee and Vince Addington were shipping representatives. Ole Mackey and Charles Davis were the public members, and Elsie Hulziger was the environmental representative.

representative holding a U.S. Master's license, and a public member of the Board.⁸

Although the Board has regulatory authority to issue licenses, it does not employ Puget Sound pilots.⁹ Each pilot is an independent contractor.¹⁰ The pilots formed an association, the Puget Sound Pilots (PSP), to administer and pay its members.¹¹ The PSP is one of the Board's stakeholders and advocates before the Board.¹²

B. The Board Training Program

Before a trainee can apply to the Board's training program, they must already be a master mariner with a huge body of knowledge.¹³ The Board held periodic written and simulator examinations to verify applicants have the necessary high-level skills to become a pilot.¹⁴ Everyone who passed the examination was placed into a pool of pilot

⁸ CP at 310 (ALJ FOF 13). The statutory and regulatory authorization for the TEC is set out at RCW 88.16.035(1)(b); RCW 88.16.090, WAC 363-116-078(4),(5), (11). In this case, four TEC members, Captain Hannigan, Captain Snyder, Captain Lee, and Mr. Mackey were also Commissioners. Captain Rob Kromann, an active pilot, was the only non-Commissioner.

⁹ CP at 362.

¹⁰ CP at 5027, 36:22-37:5.

¹¹ CP at 362.

¹² CP at 5072, 100:14-101:20 (describing Board's composition); CP at 5075, 111:4-22 (describing the composition of the TEC to avoid "good-old boy" reasoning). *See also.*, CP at 5319, 92:8-94:5 (Explaining the Board did not discuss rest rules, but that the PSP and industry have raised it in debates over the number of pilots.);

¹³ CP at 5073, 103:23-104:25 (describing prerequisites).

¹⁴ CP at 308, WAC 363-116-076 (written), WAC 363-116-077(simulator); CP at 5078, 122:9-123:13

trainees.¹⁵ The Board's goal is to keep enough trainees in the "pipeline" to meet the need for new pilots.¹⁶ Based on projections, the Board invited trainees from the pool as needed, inviting the highest scoring trainee first.¹⁷ The invited trainee must satisfactorily complete a minimum of seven months of additional training before they can be licensed.¹⁸ At the end of the process, the trainee must be capable of safely, independently, and consistently piloting in the Puget Sound.¹⁹

The process for all trainees was the same.²⁰ Each trainee met with the TEC and developed an individualized training program based on the trainee's experience.²¹ Because many trainees had similar backgrounds, many had similar training programs.²² Each program consisted of observation trips in which the trainee observed a licensed pilot and a minimum of 130 trips in which the trainee navigated the ship supervised by a licensed pilot.²³

¹⁵ This is mandated by regulation. WAC 363-116-078(1)-(2)

¹⁶ CP at 5121, 75:4-22.

¹⁷ WAC 363-116-078(4); CP at 308; CP at 5128, 102:22-103:21

¹⁸ CP at 5077, 121:20-24; Former WAC 363-116-078(7) (2005). The WAC was amended in 2008 to require an eight month minimum.

¹⁹ CP at 5129, 108:10-13; CP at 5131, 115:6-10; CP at 5074, 107:9-18.

²⁰ CP at 5081, 134:9-135:25 (explaining the Board uses the same process for each pilot).

²¹ CP at 308 (ALJ FOF 8); CP at 5074, 108:9-18.

²² CP at 1338-39, 20:24-21:11 (explaining that tugboat skippers had one basic program, deep sea captains another, and Ferries Captains yet another. The basic template for each was tweaked for the individual trainee).

²³ CP at 5130, 113:2-19; CP at 5139-40, 149:20-152:6.

On each trip, the supervising pilot evaluated the trainee on a series of skills.²⁴ The supervising pilots assigned a number to each skill, provided comments, and also documented “interventions”—when the supervising pilot took over to prevent damage or stop a dangerous situation from developing.²⁵ The numeric values were not used as grades, but as a method to track trends for each trainee.²⁶ Every month, the TEC discussed each trainee’s performance and made adjustments as necessary.²⁷ At the end of the initial program, the TEC made a recommendation whether to license the trainee.²⁸ If the Board determined more training was necessary, the TEC devised an extension plan designed to address the Board concerns.²⁹ The additional training took the form of additional trips in areas in which the trainee struggled.³⁰

At the end of the initial training program and any extensions, the Board made the ultimate decision on whether a trainee has successfully completed the training program.³¹ The Board has three options: (1) grant

²⁴ CP at 5132, 119:22-121:5.

²⁵ CP at 5136, 135:9-136:24.

²⁶ CP at 311 (ALJ FOF 14).

²⁷ CP at 5074-75, 107:19-110:7; CP at 5132-33, 121:16-123:23; CP at 5142, 158:4-22.

²⁸ WAC 363-116-078(13); CP at 5086-87, 156:13-158:1.

²⁹ CP at 5112, 39:17-40:15.

³⁰ *See eg.* CP at 5361, 53:14-18; CP at 357 (“revisit trips where you had interventions or difficulty”).

³¹ WAC 363-116-078(5).

a license; (2) deny a license; or (3) extend the training.³² In making its determination, the Board considered, at a minimum, performance in the training program, piloting and ship handling, and general seamanship skills, local knowledge, and bridge presence and communication skills.³³ The standard for all trainees was whether the trainee could safely, consistently, and independently pilot.³⁴

C. All Puget Sound Pilots And Trainees Are Experienced, And Older, Mariners

Because the Board requires that its pilots possess significant training, knowledge, and experience before applying for license, all of the Puget Sound Pilots are older; the average age of pilots in 2007 was 55.79 years of age.³⁵ As Captain John Scragg explained, pilots used to be licensed in their 30s, but because the Board required so much experience, it is no longer possible to become a pilot until later in life.³⁶ There is no evidence in this record that anyone believed that pilots in their 50s or 60s were unable to pilot because of their age; their experience is, in fact, what qualified them.³⁷

³² RCW 88.16.090(4), WAC 363-116-080(5).

³³ WAC 363-116-080(5).

³⁴ CP at 5129, 108:10-13; CP at 5131, 115:6-10; CP at 5074, 107:9-18.

³⁵ CP at 370.

³⁶ CP at 2721, 130:20-131:9.

³⁷ CP at 5078, 123:14-124:14 (describing the job of a pilot as being able to adapt to any situation); CP at 5134 128:17-129:14 (Captain Hannigan described his using 28 years of experience).

D. 2005 Pilotage Examination

In the summer of 2005, PSP's President notified the Board that only 50 pilots were available and that the pilot shortage was unsafe.³⁸ The PSP reported that many factors caused the crisis, including the aging of the pilot corps causing retirements and unanticipated medical problems.³⁹ PSP asked the Board to hold an emergency examination to increase the number of trainees in the pool to offset losses from retirements and medical conditions.⁴⁰

The Board authorized an examination to replenish the pool. Commissioner Charles Davis explained that the Board was "extremely anxious in say 2002, 2003, 2005, to get this program, this 2005 program into effect so we could get enough pilots into the system that we wouldn't run into an extreme shortage of pilots."⁴¹ The issue was not, as Commissioner Davis further explained, the age of pilots, but the matter of projected retirements.⁴² Commissioner Mackey related that the "baby boomers, us kids, were coming through... [and] we've got to get new

³⁸ CP at 2893.

³⁹ CP at 2894.

⁴⁰ CP at 2897.

⁴¹ CP at 1366-67, 68:22-69:4.

⁴² CP at 5318, 87:5-10 ("But it wouldn't be a matter of age; it would be a matter of projected retirements."). *See also*, CP at 1533 (noting retirements will deplete the number of pilots and that the acute shortage of pilots, not their age, is the emergency).

pilots into the system.”⁴³ Commissioner Davis also recalled that some PSP pilots over sixty reported that they could not cover for the shortage in numbers.⁴⁴

In November 2005, 18 applicants passed both the written and simulator examination.⁴⁵ In keeping with the Board’s intentional design to find already well experienced mariners, all 18 members of the 2005 class were older than 40 at the time of their licensing decision.⁴⁶ Captain Nelson was rated ninth out of the 18 trainees and was in his early 50s.⁴⁷

E. Performance, Not Age, Determined Success Of 2005 Trainee Class

In the 2005 class, there was an exact correspondence between performance, as measured by the number of interventions, and the Board’s licensing decision. The Board required additional training for every trainee with more than six interventions in their initial training program.⁴⁸

⁴³ CP at 1458, 25:20-24. Commissioner Mackey is over 65 and can still run 3 miles a day. CP at 1458, 25:14-15.

⁴⁴ CP at 1367, (explaining that when there is a shortage, PSP calls off duty pilots to cover for it). The specific pilot was Captain Flavel. CP at 5318, 87:19-88:10.

⁴⁵ CP at 370.

⁴⁶ CP at 1971. Calculating age is complicated because the training program spanned significant time. Captain Nelson was, for example, 51 when he took the examination, 53 when he entered the training program, and 54 when his license was denied. CP at 371 (showing Nelson’s date of birth). Respondent has provided the age of each trainee at the time of the decision, and their respective ages on September 15, 2007, the first licensing decision Captain Nelson alleges was discriminatory to allow an age comparison. Nelson was 13 years older than the youngest trainee and six years younger than the oldest. Please see Appendix (App.) 1 to Respondent’s brief, which appears at CP at 1971.

⁴⁷ CP at 1971.

⁴⁸ CP at 1971

Every trainee who had eight or fewer total interventions was licensed.⁴⁹ Captain Nelson ranked at the bottom of the class in performance with eight interventions in his original training program and 17 interventions overall.⁵⁰

By contrast, the specific age of a trainee did not correlate with licensing. Several younger trainees struggled. Captain 13, who was 40 years old, failed after four extensions and 16 interventions.⁵¹ Determining that 40 year old Captain 1 had inconsistent evaluations and failed to make extra trips to demonstrate his low scores were anomalous, the Board extended his training.⁵² Even after that additional training convinced eight Commissioners, Commissioner Mackey voted against his licensure.⁵³ Captain 18, who was 47 years old, had his program extended after seven interventions.⁵⁴

At the same time, several trainees close to 50 did very well. Captain 15, who was 56 years old, Captain 5, who was 55 years old, Captain 12, who was 51 years old, and Captains 2 and 3, who were both

⁴⁹ *Id.* The three pilots who failed had 16, 17, and 18 total interventions respectively.

⁵⁰ *Id.*

⁵¹ CP 1971. During the administrative proceeding, the Board and Captain Nelson agreed to use numeric identifiers for other trainees. The parties extended that agreement to this civil suit, and much of the record reflects this agreement. During the ALJ hearing, and in some exhibits, however, trainees are described by name. Accordingly, please see App. 2 to Respondent's brief for a table of names with their numeric identifier.

⁵² CP at 1744, Captain Kelly is Captain 1.

⁵³ CP at 4412 (concerning Captain 1).

⁵⁴ CP at 1971.

49 years old, were all licensed after their initial programs.⁵⁵ The combined number of interventions for these five older trainees, nine, was half of Captain Nelson's total of 17 interventions.

F. Captain Nelson Performed Poorly

While Board treated each trainee procedurally the same, the performance of each trainee varied, and Captain Nelson's performance was poor. Captain Nelson's program began on January 2007.⁵⁶ As with all other trainees from the 2005 class, Captain Nelson's initial program required five observation trips and 130 training trips to various ports.⁵⁷ During his initial program, Captain Nelson had eight interventions.⁵⁸ In July 2007, the Board unanimously voted to extend his training.⁵⁹ In his first extension, Captain Nelson had an additional three interventions.⁶⁰ In spite of his inconsistent performance, the TEC's September 2007 recommendation was split with three recommending licensure and two recommending more training.⁶¹

At the September 2007 Board meeting, after extensive discussion, the Board voted to extend Captain Nelson's training by a four-to-three

⁵⁵ *Id.*

⁵⁶ CP at 5137, 141:18-20.

⁵⁷ CP at 346-353

⁵⁸ CP at 1971.

⁵⁹ CP at 5143, 163:3-164:18 *passim*.

⁶⁰ CP at 1971

⁶¹ CP at 5147, 179:10-21.

vote.⁶² Captain Lee voted for more training after Captain Nelson's three interventions in his extension showed inconsistency.⁶³ Captain Lee also thought Captain Nelson had poor scores, had taken time off during an extension, and done the bare minimum of assignments.⁶⁴ In explaining his objection to Captain Nelson taking time off, Captain Lee observed that the 40 year old Captain 1 had not been given the same opportunity late in his training.⁶⁵ Commissioner Mackey concluded, based on the totality of the reports, that the Board had given Captain Nelson enough time.⁶⁶ The interventions were a serious factor to Commissioner Mackey, who explained, "if a State Patrol officer had to grab the steering wheel to keep you from getting into a wreck, they wouldn't give you the license."⁶⁷ Commissioner Vince Addington was primarily concerned with the three interventions in the extension.⁶⁸ Commissioner Norm Davis, the Board's environmental representative, was concerned that the TEC was split and wanted to err on the side of caution.⁶⁹ Captain William Snyder, Captain

⁶² CP at 5088, 164:4-16, Captain Dudley abstained and Commissioner Elsie Hulziger was not present.

⁶³ CP at 5382, 137:19-25 (the three interventions caught his eye immediately)

⁶⁴ CP at 5382, 134:13-135:17. Captain Lee explained his "ready" rating comment was a small slice. CP at 5382, 137:4-6.

⁶⁵ CP at 4758, ("Has [Captain Nelson] been given special consideration that others not such as Capts Triggs and [Captain 1] and could be a cause of litigation.")

⁶⁶ CP at 5355, 26:10-27:10.

⁶⁷ CP at 5356, 30:7-13.

⁶⁸ CP at 119, 28:2-12.

⁶⁹ CP at 110-11, 37:23-38:4.

Pat Hannigan, and Commissioner Charles Davis voted in favor of licensing.⁷⁰

Captain Nelson's performance following the second extension deteriorated until both the TEC and Board were unanimous in denying a license. Captain Hannigan, who had voted in his favor in September 2007, explained that Captain Nelson was not improving, but was getting worse.⁷¹ In October, Captain Nelson had three consecutive interventions, and, both the Board and TEC unanimously recommended additional training.⁷² Aware that Captain Nelson was struggling, the Board's October extension included a number of easy trips to give him a fresh start followed by trips in areas in which he had struggled.⁷³ In December 2007, the TEC and Board again unanimously decided to extend Plaintiff's program.⁷⁴ Captain Nelson became ill with pneumonia, so the Board extended his training program again in January 2008.⁷⁵

Captain Nelson's inadequate performance reached a head in March 2008. On March 1, 2008, Captain Robert Kromann supervised Captain Nelson on an exceptionally poor trip.⁷⁶ That trip, in which Captain Nelson

⁷⁰ CP at 5359, 42:7-17.

⁷¹ CP at 5150, 191: 15-21; *see also* CP at 313 (ALJ FOF 28); CP at 366-369 (listing 25 examples of poor training trips).

⁷² CP at 312 (ALJ FOF 21); CP 5148 184:5-20; 185:2-7.

⁷³ CP at 5149, 188:19-189:16.

⁷⁴ CP at 312-13 (ALJ FOF 23, 24); CP at 5150, 191:15-21.

⁷⁵ CP at 313 (ALJ FOF 26); CP at 5150, 192:22- p.193:21.

⁷⁶ CP at 5377, 114:16-121:19 *passim*.

“came very close to destroying the dock,” caused the TEC members to believe that Plaintiff would “do a dangerous job” and that there was significant risk to the public.⁷⁷

The Board deferred its decision in order to allow Captain Nelson and his attorney to defend his performance.⁷⁸ Following voluminous document requests, Captain Nelson made a presentation to the Board in October 2008.⁷⁹ After hearing Captain Nelson, the TEC maintained its recommendation because Captain Nelson “had significant and repeated difficulty in mastering...fundamental ship handling skills with respect to situational awareness during docking, undocking, and waterway transits; and speed control.”⁸⁰ On December 4, 2008, the Board unanimously voted to deny Plaintiff a license.⁸¹

Nothing suggested that age was a factor in the Board’s decision making process. At no time during the Board’s deliberations did the Board discuss Captain Nelson’s age.⁸² The Board’s Chairman did not even know Captain Nelson’s age.⁸³ Instead, performance dictated the result. Captain Nelson had 17 interventions during his training program.⁸⁴

⁷⁷ CP at 5153, 202:19-203:15; CP at 312, (ALJ FOF 30).

⁷⁸ CP at 314 (ALJ FOF 32).

⁷⁹ *Id.*

⁸⁰ CP at 367.

⁸¹ CP at 314 (ALJ FOF 34).

⁸² CP at 5092, 181:20-24.

⁸³ CP at 5093, 182:21-183:1.

⁸⁴ CP at 1971.

As with the other trainees with close to that number of interventions, the Board denied his license.

Of particular note, Captain Nelson had an identical age comparator. Captain 10, who was invited into the training program with Captain Nelson, was 7 months younger.⁸⁵ Captain 10, like Captain Nelson, had eight interventions in his original training program.⁸⁶ Like Captain Nelson, Captain 10's program was extended in July 2007.⁸⁷ In that first extension, however, Captain 10 had no interventions.⁸⁸ Even though Captain 10 was the same age as Captain Nelson, he was licensed after his first extension.⁸⁹ If the Board made age, rather than performance, a factor, then Captain 10 would not have been licensed.

G. Captain Nelson's Administrative Appeal

Captain Nelson challenged the Board's decision in an administrative proceeding. Captain Nelson conducted extensive written discovery, took 14 depositions,⁹⁰ and had a seven day hearing in front of an Administrative Law Judge (ALJ) at which Captain Nelson presented exhibits, examined witnesses, presented expert testimony, cross examined

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ CP at 5143, 162:10-15.

⁸⁸ CP at 1971

⁸⁹ *Id.*

⁹⁰ CP at 3515-3547.

the Board's witnesses, and made legal argument through his attorney.⁹¹ The ALJ took testimony from 18 witnesses and admitted 65 of Captain Nelson's exhibits.⁹²

The ALJ explicitly described the issues he considered, ruling that the "specifically-enumerated issues identified by [Captain Nelson] in his brief" were before him.⁹³ In relevant part, Captain Nelson enumerated the issues to include "(6) discriminat[ation] on the basis of Captain Nelson's age as a substantial factor in agency actions; and (7) discriminat[ation] on the basis of a 'perceived' disability' as a substantial factor."⁹⁴

The administrative record confirms that Captain Nelson's discrimination theory was actually contested. The ALJ admitted documentary exhibits comparing Captain Nelson's performance with other trainees from his class.⁹⁵ And, in fact, the ALJ denied the Board's motion to strike comparative documentary exhibits.⁹⁶ Although the ALJ excluded oral testimony "called solely for or questioned regarding the performance of other pilot trainees" based on relevance, the ALJ did not limit the "testimony of the members of the Board and of the Training Evaluation

⁹¹ See generally, CP at 5017-5419 (verbatim transcript of the administrative hearing).

⁹² CP at 306-307 (recitals).

⁹³ CP at 5049, 6:20-25.

⁹⁴ CP at 3648.

⁹⁵ CP at 306-7, listing admitted exhibits; See also CP at 3482, index describing exhibits W (CP at 4683), X (CP at 4685), Y (CP at 4689), AA-II (CP at 4703-4801), LL (CP at 4807), and NN (CP at 4817), all of which are comparative.

⁹⁶ CP at 3909.

Committee who made decisions regarding Captain Nelson's licensure."⁹⁷ Taking advantage, Captain Nelson cross-examined both Commissioner Mackey and Commissioner Charles Davis about whether age played a roll in decision making.⁹⁸ Although Captain Nelson now complains about the ALJ's evidentiary rulings, he did consider discrimination to be an issue in his post-hearing argument to the ALJ arguing "Captain Nelson has cited direct evidence of age related factors" such that the Board could not "meet its burden to show a legitimate non-discriminatory reason for his termination."⁹⁹

On August 13, 2010, the ALJ issued an order affirming the Board's decision to deny a pilot license. The ALJ found that "performance throughout his training, including the four extensions, was inconsistent particularly with respect to the critical ship handling elements of speed control, heading control and the use of tugboats."¹⁰⁰ The ALJ also found that the training program met "all the criteria for a reliable and valid assessment of a pilot trainee's performance."¹⁰¹ The ALJ found,

There is no persuasive evidence that the [Captain Nelson] was not trained or evaluated properly. There is certainly no evidence whatsoever of arbitrary or capricious conduct by

⁹⁷ CP at 5049, 8:6-21.

⁹⁸ CP at 5354-55. 23-26 (Mackey); CP at 5369-70, 84-86 (Davis).

⁹⁹ CP at 322

¹⁰⁰ CP at 313 (ALJ, FOF 28). The ALJ's order appears in App. 3 attached to Respondents Br.

¹⁰¹ CP at 315 (ALJ FOF 39).

the Board or the TEC **nor is there evidence of bad motive on their part.** On the contrary, the evidence is clear that the TEC and the Board went to **great lengths and at a considerable time and expense to facilitate the successful completion of the [Captain Nelson]’s training program.**

(Emphasis added).¹⁰² In addition, the ALJ concluded that Mr. Goodenough, Captain Nelson’s expert, was not qualified or experienced and his opinions were not persuasive.¹⁰³

Captain Nelson filed a petition for the Board to review the ALJ’s initial order. In the petition, he continued to argue that the record provided “direct evidence of discriminatory attitudes.”¹⁰⁴ The Board designated one of its members, Charles Adams, as the review officer.¹⁰⁵ Commissioner Adams, though appointed, was not confirmed by the Senate.¹⁰⁶ Although Commissioner Adams was a former Assistant Attorney General, he had no personal involvement with Captain Nelson or the licensing decision, and was appropriately screened.¹⁰⁷

¹⁰² CP at 316, (ALJ COL 6). Although this is labeled as a conclusion, it is a factual finding that something did or did not exist. Factual findings that are mislabeled as conclusions of law are treated as a finding of fact. *State v. Ross*, 141 Wn.2d 304, 309, 4 P.3d 130 (2000).

¹⁰³ CP at 315 (ALJ FOF 40).

¹⁰⁴ CP at 3950-51.

¹⁰⁵ CP at 2360.

¹⁰⁶ CP at 2393, 3107.

¹⁰⁷ CP at 2361.

On December 19, 2011, Commissioner Adams issued the Board's final administrative order.¹⁰⁸ The final order adopted all of the findings from the initial order.¹⁰⁹ The final order also added several findings including that "[Captain Nelson] makes various claims relating to nepotism, age discrimination, and bias, but these claims are not supported by the record in this proceeding."¹¹⁰ The final order is the subject of an action seeking judicial review under the APA, King County Superior Court, Cause No 12-2-02511-8 SEA.

H. Procedural Posture

While the administrative review process was pending, Captain Nelson filed this suit alleging WLAD discrimination claims, termination in violation of public policy, APA claims, and intentional or negligent infliction of distress.¹¹¹ The complaint did not plead any constitutional claims.¹¹²

On October 21, 2011, the Board moved for summary judgment asking the court to dismiss the discrimination claims on collateral estoppel and substantive grounds, to dismiss judicial review under the APA as

¹⁰⁸ CP at 1920-25. The final order appears in App. 3 attached to Respondents Br.

¹⁰⁹ CP at 1921 (adopting the findings).

¹¹⁰ CP at 1923.

¹¹¹ CP at 8-10 (enumerating Plaintiff's claims).

¹¹² CP at 8-10. In his initial summary judgment response, Captain Nelson moved, in a footnote, to add federal and state constitutional claims. CP 965. The court struck the over length brief. CP at 1852. Captain Nelson's subsequent brief omitted the motion to amend. CP at 1865

barred by the still pending administrative proceeding, and to dismiss the negligence and common law employment causes of action.¹¹³ After Captain Nelson asserted that the ALJ and review judge made evidentiary and legal errors, the Board also moved to dismiss any collateral challenges to the administrative decision for lack of subject matter jurisdiction.¹¹⁴

On March 28, 2012, the superior court granted the summary judgment, citing collateral estoppel.¹¹⁵ The court also dismissed the discrimination claims on the merits as the Captain Nelson failed to create an issue of fact.¹¹⁶ The court dismissed Plaintiff's ancillary employment causes of action.¹¹⁷ On the same day, the court granted the Board's motion to dismiss collateral challenges to the administrative decision.¹¹⁸

Captain Nelson made both a motion for reconsideration of the summary judgment and a motion to vacate the summary judgment motion based on alleged discovery violations.¹¹⁹ The superior court denied both motions, repeating its ruling that the irregularities alleged by Captain Nelson must be raised in the administrative appeal.¹²⁰ Captain Nelson

¹¹³ CP at 21-22 (listing issues raised).

¹¹⁴ CP at 2510.

¹¹⁵ CP at 2682. It is significant that the trial court based its reasoning solely on the ALJ's initial order.

¹¹⁶ CP at 2683-86.

¹¹⁷ CP at 2686.

¹¹⁸ CP at 2689.

¹¹⁹ CP at 3001 (Reconsideration); CP at 3175 (Motion to Vacate).

¹²⁰ CP at 3288; CP at 3378-79.

appealed court's summary judgment order and motion for reconsideration.¹²¹

IV. SUMMARY OF ARGUMENT

This Court should affirm the trial court's summary judgment dismissing Captain Nelson's civil discrimination claims. First, the administrative proceeding already resolved his factual contention that that bias motivated the Board's licensing decision. Because Captain Nelson had a full and fair opportunity to litigate the factual issues, collateral estoppel applies, and his subsequent civil suit is barred. The fact that the ALJ may have made legal errors is not relevant, and public policy is satisfied when an administrative tribunal makes factual findings after a fair hearing. Second, even if collateral estoppel did not apply, the record supports dismissal. Captain Nelson fails to present evidence to state a prima facie case let alone generate an issue of fact over whether the Board's non-discriminatory reason, Captain Nelson's poor performance, is pretext. Summary judgment on this alternative ground is appropriate. Third, Captain Nelson did not raise a separate and independent constitutional claim below. Even if he had, that claim is legally deficient and duplicative of his dismissed APA causes of action and barred by res judicata. The court should, therefore, affirm the trial court.

¹²¹ CP at 3404-27.

V. ARGUMENT

A. Standard Of Review

In reviewing summary judgment, the appellate court engages in the same inquiry as the trial court, reviewing legal questions de novo and construing the evidence in the light most favorable to the nonmoving party.¹²² Summary judgment is appropriate if the record demonstrates the absence of material issues of fact.¹²³ A material issue of fact is one upon which the outcome of the litigation depends.¹²⁴ The application of res judicata and collateral estoppel are legal issues reviewed de novo.¹²⁵

Arguments and theories not presented to a trial court are not considered on appeal.¹²⁶ Further, an assignment of error not argued in the Appellant's brief is deemed abandoned.¹²⁷ Here, Captain Nelson did not brief his gender, disability, retaliation, or constitutional claims, and these should be deemed abandoned.

¹²² *Christiansen v. Grant Cy. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

¹²³ *Kirby v. City of Tacoma*, 124 Wn. App. 454, 463, 98 P.3d 827 (2004).

¹²⁴ *Ruff v. King Cy.*, 125 Wn.2d 697, 887 P.2d 886 (1995).

¹²⁵ *Christiansen*, 152 Wn.2d at 305.

¹²⁶ RAP 2.5(a); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860, 884 (1992)

¹²⁷ RAP 10.3(a)(5); *Tegman v. Accident & Med. Investigations, Inc.*, 107 Wn. App. 868, 873-874, 30 P.3d 8 (2001); *Brown v. State*, 94 Wn. App. 7, 13, 972 P.2d 101 (1998)

B. Where Captain Nelson Fully Litigated the Issue Of Discriminatory Motive In An Administrative Hearing, Collateral Estoppel Applies

Collateral estoppel is intended to “prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.”¹²⁸ The Washington Supreme Court explained that:

The public policy of avoiding a duplication of proceedings where the parties had ample incentive and opportunity to litigate an issue indicates that no injustice is done in giving preclusive effect to a decision from the first proceeding, even if, we may have reason to believe the first result was erroneous.¹²⁹

Collateral estoppel is concerned with procedural fairness—that a party had full and fair hearing with the appropriate procedural protections.¹³⁰ Here, Captain Nelson was represented by an attorney, conducted discovery, examined witnesses, presented testimony, had a neutral fact-finder, and has pursued judicial review. He alleges the administrative decision was wrongly decided, and asks leave to re-litigate the issues decided there. The Court should decline to allow Captain Nelson a second hearing on the same issues.

Collateral estoppel bars re-litigation of resolved issues where (1) the issues decided in the earlier proceeding is the same, (2) the earlier proceeding ended with judgment on the merits, (3) the party against whom

¹²⁸ *Christiansen*, 152 Wn.2d at 306.

¹²⁹ *Thompson v. State*, 138 Wn.2d 783, 799, 982 P.2d 601 (1999).

¹³⁰ *Thompson*, 138 Wn.2d at 799-800.

the doctrine applies was a party in the earlier proceeding, and (4) the application of the doctrine does not work an injustice.¹³¹ Captain Nelson contests the identity of issues and injustice elements.

1. Identical Issues Are Raised In Both The Administrative And Civil Actions

In a discrimination suit, a plaintiff's ultimate burden is to prove that an adverse decision was substantially motivated by unlawful discriminatory animus.¹³² To do so, a plaintiff must initially show that his performance was satisfactory and that he was otherwise qualified.¹³³ The administrative order specifically addressed both performance and the Board's motivation, finding that Captain Nelson's performance was poor,¹³⁴ the training program was a valid evaluation tool,¹³⁵ and the Board's lacked unlawful motives.¹³⁶ In fact, the ALJ found the Board was affirmatively motivated to "facilitate the successful completion of the Appellant's program," a finding that eviscerates Captain Nelson's claim of

¹³¹ *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

¹³² *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186-87, 23 P.3d 440 (2001).

¹³³ *Kirby*, 124 Wn. App. at 466; *Domingo v. Boeing Employee's Credit Union*, 124 Wn. App. 71, 86-87, 98 P.3d 1222 (2004).

¹³⁴ CP at 313 (ALJ FOF28) finding that his performance was inconsistent in essential piloting skills.

¹³⁵ CP at 315 (ALJ FOF 39), finding that the Board's training evaluation system is reliable and valid.

¹³⁶ CP at 316 (ALJ COL 6). The ALJ also included a catchall finding, indicating that "[a]rguments not specifically address have been duly considered, but are found to have no merit..." CP at 318.

bias.¹³⁷ And the final order determined, specifically, that Captain Nelson's discrimination claims were not persuasive.¹³⁸ The issues in the administrative hearing are, therefore, identical to issues that would be necessary to pursue this civil suit.

Captain Nelson's claim that discriminatory animus was not litigated is incorrect.¹³⁹ Captain Nelson specified the issues to include the Board's alleged discriminatory animus.¹⁴⁰ Captain Nelson presented both documentary evidence and oral testimony.¹⁴¹ And both his closing legal argument to the ALJ and subsequent petitions for review, he asserted that he proved discriminatory animus in the administrative record.¹⁴² Captain Nelson cannot assert he did not raise discrimination as an issue.

2. Privity And A Final Judgment On The Merits Are Present

Captain Nelson does not raise these elements on appeal and the court should deem them abandoned. But because the issue may be relevant in addressing Plaintiff's argument regarding the alleged invalidity of the review officer's order, Respondent will briefly address it.

¹³⁷ CP at 316 (ALJ COL 6).

¹³⁸ CP at 1923 (RJ FOF 41)

¹³⁹ Appellant's Brief (Appellant's Br.) at 48.

¹⁴⁰ CP at 5049, 6:20-25; CP at 3648.

¹⁴¹ CP at 5049, 8:6-21; CP at 5354. 23-26 (Mackey); CP at 5369-70, 84-86 (Davis).

¹⁴² CP at 322; CP at 3950-51.

Collateral estoppel applied from the ALJ's initial order, although as a practical matter, the reviewing officer had ruled by the time the superior court granted summary judgment. The inquiry into the finality of the judgment does not depend on the title of an order, but on a pragmatic analysis of whether an issue has been decided on the merits.¹⁴³ In an administrative proceeding, finality occurs upon entry of the findings of fact and conclusions of law.¹⁴⁴ The judicial doctrine of repose applies at the beginning of the appellate process, not the end.¹⁴⁵ The review officer's order is part of an appellate process.¹⁴⁶ Here, once the fact finder issued his findings, collateral estoppel attached, and will remain binding until overturned.

¹⁴³ See Phillip Trautmann, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 831 (1985) "If a particular issue has been decided in a proceeding . . . the lack of a technically final judgment should not control."

¹⁴⁴ *Lejeune v. Clallam Cy. Bd. of Comm'rs.*, 64 Wn. App. 257, 265-66, 823 P.2d 1144 (1992); (noting *res judicata* applies when a "non-interlocutory order [is] entered after a quasi-judicial administrative fact-finding hearing.")

¹⁴⁵ *Lejeune*, 64 Wn. App. at 265-266. See also, *Nielson v. Spanaway*, 135 Wn.2d 255, 264, 956 P.2d 312 (1998) ("In this state an appeal does not suspend or negate the *res judicata* or collateral estoppel effects of a judgment entered after trial in a the superior court.").

¹⁴⁶ See RCW 34.05.464, allowing an initial order to become final if not appealed, limiting review to the record below, mandating deference to the fact finder, and allowing "remand" for further proceeding.

3. Application Of Collateral Estoppel Following An Exhaustive Seven Day Administrative Hearing Is Just

Collateral estoppel's justice element turns on whether a litigant had sufficient procedural protections.¹⁴⁷ Here, Captain Nelson had the equivalent of a full civil trial. Where a party received a full and fair opportunity to litigate an issue in front of an impartial tribunal, as here, no injustice is done by applying collateral estoppel.¹⁴⁸

Captain Nelson advances three reasons why the administrative proceeding was unjust, none of which are persuasive. First, he suggests that the ALJ committed legal errors by excluding oral testimony about other trainees and applying the wrong standard of proof.¹⁴⁹ Second, he suggests that the review officer's lack of senate confirmation was procedurally defective.¹⁵⁰ Third, he suggests that applying collateral estoppel would undermine the WLAD's purpose of ending discrimination.¹⁵¹ The court should reject Captain Nelson's arguments.

a. Adverse Evidentiary Rulings to Not Defeat Collateral Estoppel

Captain Nelson argues that ALJ's evidentiary ruling limiting his presentation of oral testimony solely regarding the performance of other

¹⁴⁷ *Thompson*, 138 Wn.2d at 799-800; *Christiansen*, 152 Wn.2d at 309; *Reninger v. Dep't of Corr.*, 79 Wn. App. 623, 635, 901 P.2d 325 (1995) ("courts seek to determine whether parties to the earlier proceeding had a full and fair hearing on the issue.").

¹⁴⁸ *Christiansen*, 152 Wn.2d at 313-14.

¹⁴⁹ Appellant's Br. at 47-48.

¹⁵⁰ Appellant's Br. at 48-49.

¹⁵¹ Appellant's Br. at 49-50

trainees rendered his opportunity to litigate unfair.¹⁵² Even assuming that the ALJ's decision to exclude oral testimony that was "not very probative" was an evidentiary error, collateral estoppel would still apply.¹⁵³

As a matter of law, an adverse evidentiary ruling is insufficient to defeat collateral estoppel.¹⁵⁴ In *Thompson v. State*, the court applied collateral estoppel even where the trial court made a legal error.¹⁵⁵ The *Thompson* court explicitly overruled Washington courts holding a legal error could defeat collateral estoppel.¹⁵⁶ Whether the decision in the earlier proceeding was substantively correct is not a relevant consideration in determining whether collateral estoppel will work an injustice.¹⁵⁷

Captain Nelson relies on *State v. Harris*. In *State v. Harris*, the court reasoned that an adverse evidentiary ruling based on privilege could defeat collateral estoppel.¹⁵⁸ But the *Harris* court's holding was

¹⁵² Appellant's Br. at 48.

¹⁵³ The Respondent does not make this concession. In fact, limiting oral testimony was well within the ALJ's discretion. To have ruled otherwise would have invited 17 mini-trials on the performance of other trainees. Moreover, this collateral attack on an evidentiary ruling is not properly before this Court as it was dismissed by the trial court in an order Captain Nelson has not appealed.

¹⁵⁴ *State v. Cleveland*, 58 Wn. App. 634, 642, 794 P.2d 546 (1990).

¹⁵⁵ *Thompson*, 138 Wn.2d at 799.

¹⁵⁶ *Thompson*, 138 Wn.2d at 796, 798 (expressly overruling *Franklin and Frederick*).

¹⁵⁷ *Christiansen*, 152 Wn.2d at 317.

¹⁵⁸ *State v. Harris*, 78 Wn.2d 894, 901, 480 P.2d 484 (1971). By its own terms, however, *Harris* is inapposite--the *Harris* court specifically stated that where irrelevant evidence is excluded, the "issue is as fully litigated as the proper administrative of justice will allow." *Harris*, 78 Wn.2d at 901. The ALJ explained the evidentiary ruling at issue here in the following way, "the appellant had been fully cautioned that evidence that is

specifically overruled by the United State’s Supreme Court, which held that if the ultimate issue was actually litigated, collateral estoppel applied, “irrespective of whether the jury considered all relevant evidence...”¹⁵⁹ Again, a claim of evidentiary error is not sufficient to defeat collateral estoppel.¹⁶⁰ It would defeat the purpose of repose if the court had to reexamine every evidentiary ruling before applying collateral estoppel. The court should reject Captain Nelson’s argument.

b. The ALJ Applied The Correct Burden of Proof

Captain Nelson’s argument that the ALJ erred by applying the incorrect burden of proof is both incorrect and irrelevant.¹⁶¹ Captain Nelson confuses burden of proof—the preponderance of the evidence—with the legal elements of his claims. A litigant is entitled to relief from the Board’s licensing decision if he proves, by a preponderance, that the Board acted in “an arbitrary or capricious fashion, **or with improper motives.**”¹⁶² The ALJ correctly applied this legal test.¹⁶³ A

not relevant, that is unduly cumulative or burdensome...will be excluded.” CP at 5049, 8:12-21.

¹⁵⁹ *Harris v. Washington*, 404 U.S. 55, 56-57, 92 S. Ct 183, 30 L. Ed. 2d 212 (1971). The overruling was recognized by Washington’s court. *Cleveland*, 58 Wn. App. at 642.

¹⁶⁰ *Thompson*, 138 Wn.2d at 797, Captain Nelson’s reliance on *Seattle-First Nat. Bank v. Kawachi* is also unavailing. The court determined there that the factual issue—the validity of two financial instruments was not actually contested. *Seattle-First Nat. Bank v. Kawachi*, 91 Wn.2d 223, 224-25, 588 P.2d 725 (1978).

¹⁶¹ Appellant’s Br. at 49-50.

¹⁶² *Bock v. State*, 91 Wn.2d 94, 100, 586 P.2d 1173 (1978) (emphasis added).

¹⁶³ CP at 316 (reciting the *Bock* standard).

discrimination theory fits easily within the “improper motive” prong and was actually litigated in the administrative hearing. Had Captain Nelson met his burden to prove the improper motive he alleged—age, gender, or disability discrimination—he would have been entitled to relief. But the ALJ found not only a lack of unlawful motive, but an affirmative motive to assist Captain Nelson.¹⁶⁴

Regardless, as discussed above, even if the ALJ committed a legal error, collateral estoppel applies.¹⁶⁵ Captain Nelson’s remedy for legal error is the pending judicial review, not re-litigating the same issues in a collateral civil suit.

c. Review Judge’s Appointment Is Not Properly Before This Court and Is Irrelevant

Captain Nelson asserts that the Review Judge, Charles Adams, was not confirmed by the senate and that this irregularity should defeat collateral estoppel.¹⁶⁶ The court should reject this argument. First, the trial court dismissed all collateral attacks against the administrative orders, and Nelson does not appeal that order. Second, the issue was not briefed and should be deemed abandoned.

Even if the court reached the merits of this issue, Captain Nelson’s analysis is wrong. A gubernatorial appointee subject to senate

¹⁶⁴ CP at 317.

¹⁶⁵ *Thompson*, 138 Wn.2d at 799.

¹⁶⁶ Appellant’s Br. at 48.

confirmation continues to serve unless rejected, meaning his appointment remained valid pending confirmation.¹⁶⁷ And even if his Commission appointment was invalid, his appointment as a review officer was still valid.¹⁶⁸ Captain Nelson's citation to *In re Application of Puget Sound Pilots*¹⁶⁹ is inapposite. In that case, the court interpreted a former version of the APA addressing delegation and did not address the situation of a putative Commissioner.¹⁷⁰ Moreover, it is not relevant for collateral estoppel purposes. If the final order were void, the initial order remains valid and is equally fatal to his claims.

d. Collateral Estoppel Does Not Undermine Anti-Discrimination Law

Captain Nelson asserts that application of the collateral estoppel doctrine would undermine the purpose of the WLAD to eradicate discrimination. Where an administrative proceeding is involved, the injustice inquiry includes whether (a) the agency acted in within its competence; (b) procedural differences, and (c) public policy

¹⁶⁷ RCW 43.09.92. See *State v. Smith*, 9 Wash. 195, 199-200, 37 P. 294 (1894) (noting that the treasurer of the University of Washington was validly appointed and acted with authority until the Senate rejected him), see also AGO 1973 No. 33 (“It is well settled by now in this state the governor’s act of appointment entitles the appointee to assume office immediately and perform the functions thereof, subject only to the possibility of later divestment by senatorial rejection.”).

¹⁶⁸ The APA limits who may be an presiding officer but allows the appointment of a “person” to be a review officer. Compare RCW 34.05.425(1) with RCW 34.05.464(2).

¹⁶⁹ *In re Application of Puget Sound Pilots*, 63 Wn.2d 142, 385 P.2d 711 (1963)

¹⁷⁰ *Application of Puget Sound Pilot Ass’n*, 63 Wn.2d at 147 (interpreting former RCW 34.04.110).

considerations.¹⁷¹ Here, the administrative tribunal was competent to determine whether the factual issue of the Board's motive, Captain Nelson had full due process equivalent to a civil trial, and Washington's anti-discrimination laws are not prejudiced by allowing discrimination to be litigated in administrative proceedings.

It is well established law that administrative findings may collaterally estop re-litigation of factual issues in discrimination cases. In *Carver v State*, the court specifically held that collateral estoppel "may be applicable to an action brought under our anti-discrimination laws."¹⁷² In *Shoemaker v. City of Bremerton*, an administrative tribunal found that an employment action was not motivated by retaliatory animus.¹⁷³ The court explained that an administrative tribunal is competent to make factual findings about motive.¹⁷⁴ The fact that the parties litigated the factual issue of motive was dispositive.¹⁷⁵ In *Nielson v. Spanaway Gen'l Medical Clinic, Inc.*, the court explained applying collateral estoppel even where constitutional rights are involved is not unjust because "once an issue has been resolved in a prior proceeding, there is no further fact finding

¹⁷¹ *Carver v. State*, 147 Wn. App. 567, 572, 197 P.3d 678 (2008).

¹⁷² *Carver*, 147 Wn. App. at 574.

¹⁷³ *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 506, 745 P.2d 858 (1987).

¹⁷⁴ *Shoemaker*, 109 Wn.2d at 512-13.

¹⁷⁵ *Shoemaker*, 109 Wn.2d at 512. See also, *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 799, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986) (noting federal courts apply collateral estoppel to administrative findings).

function to be performed.”¹⁷⁶ Applied here, where a competent tribunal determined there was no discriminatory motive, there is no statutory WLAD claim to litigate.

As discussed above, there are no substantive procedural differences between Captain Nelson’s administrative hearing and a civil trial. He had an attorney, full discovery, a neutral fact finder who applied the rules of evidence, a seven-day hearing, and recourse to an appeal. This level of process is more than sufficient for collateral estoppel.¹⁷⁷

In fact, the purpose of fighting discrimination is not harmed by giving a party multiple forums in which to assert discrimination.¹⁷⁸ A litigant may decide that the relative speed, lesser expense, or expertise of an administrative forum (like the EEOC, for example) is preferable to a civil trial. Here, if Captain Nelson’s objections had merit, he would have been restored to the training program through the administrative process. As evidenced by his vigorous administrative litigation, Captain Nelson had ample opportunity and incentive to litigate the issue of the Board’s

¹⁷⁶ *Nielson*, 135 Wn.2d at 268 quoting *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 n.23, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979).

¹⁷⁷ *Shoemaker*, 109 Wn.2d at 506 (finding representation by counsel, ability to call and examine witnesses, review documents, and make legal arguments was sufficient).

¹⁷⁸ *Carver* 147 Wn. App. at 572 (rejecting that the legislature intended to preclude use of collateral estoppel by allowing multiple forums).

motive. Having done so, he is bound by the result, and the application of collateral estoppel works no injustice.¹⁷⁹

C. Captain Nelson Fails To Make A Prima Facie Discrimination Case or Create A Material Issue Of Fact On Pretext

Even if the Court does not apply collateral estoppel, it may affirm on the superior court's alternative basis for summary judgment—Captain Nelson's failure to create a material issue of fact. Captain Nelson fails to create an issue of fact that his age played any part in the decision making process let alone that the Board's stated reasons for denial were pretextual. In addition, Captain Nelson's gender, disability, and retaliation claims lack merit.

1. Captain Nelson Fails To Create An Issue Of Fact Regarding Age Discrimination

To survive summary judgment, Captain Nelson must meet his prima facie burden of showing that he is (1) within the statutorily protected group, (2) applied for and was qualified for the license, (3) was performing satisfactory work, and (4) someone outside the protected class was licensed in his place.¹⁸⁰ If Captain Nelson establishes a prima facie case, the Board must then articulate a legitimate non-retaliatory reason, at which point Captain Nelson must create an issue of fact that the stated

¹⁷⁹ *Christiansen*, 152 Wn.2d at 317.

¹⁸⁰ *Kirby*, 124 Wn. App. at 466; *Domingo*, 124 Wn. App. at 86-87.

reason is pretextual.¹⁸¹ Pretext means deceit; Captain Nelson must show that the stated reason is unworthy of belief.¹⁸²

a. Captain Nelson Fails To Make A Prima Facie Case

Here, Captain Nelson fails to meet his prima facie burden on the third and fourth elements—satisfactory performance and differential treatment outside the protected class. Captain Nelson’s poor performance was definitively determined by the ALJ’s findings—he was not qualified to be pilot.¹⁸³ Even if he were qualified, Captain Nelson’s claim also fails as a matter of law because he does not show preferential treatment outside the protected class.

Unlike any other protected class, age is a continuum with ill-defined borders. The plain text of the WLAD defines the protected class as those over the age of 40 and, by its own terms, would not apply where everyone is over 40.¹⁸⁴ The courts have, nonetheless, added a judicial gloss recognizing that a plaintiff can show age discrimination where there is differential treatment of those “significantly younger.”¹⁸⁵

¹⁸¹ *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363-34, 753 P.2d 517 (1988).

¹⁸² *Griffith v. Schnitzer Steel Indus.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005), *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir. 2001).

¹⁸³ CP at 313 (ALJ FOF 28).

¹⁸⁴ RCW 49.44.090(1).

¹⁸⁵ *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996) (“in the age-discrimination context...an inference [of discriminatory intent] cannot be drawn from the replacement of one work with another

In the context of a training program specifically designed to select individuals over 40, and which aimed at replacing Puget Sound pilots retiring in their 60's, no one in the 2005 class was "significantly younger" than Captain Nelson. The court's analysis in *Kirby v. City of Tacoma*¹⁸⁶ is illustrative. In *Kirby*, Tacoma police passed over a 52 year old Lieutenant and promoted a 45 and 42 year old to Captain.¹⁸⁷ Where everyone on the promotion list was in the same age range, 52 to 42, however, the court determined, on summary judgment, that there was no age inference to be drawn and plaintiff failed to meet his prima facie burden.¹⁸⁸ The same reasoning applies here—even if Captain Nelson could show that someone in the 2005 class was treated differently, in this context, it is not evidence of age discrimination. The Board cannot both intentionally select older, experienced mariners and discriminate against them.

Even assuming that the age difference within the 2005 class was significant, Captain Nelson's evidence fails to create a material issue of fact about the Board's motivation. The only evidence Captain Nelson produced that mentions age comes from the Board's decision to hold a 2005 examination. The PSP reported to the Board that its membership

worker insignificantly younger." Washington courts consider federal cases interpreting the ADEA persuasive. *Grimwood*, 110 Wn.2d at 361-62.

¹⁸⁶ *Kirby*, 124 Wn. App. at 98.

¹⁸⁷ *Kirby*, 124 Wn. App. at 462.

¹⁸⁸ *Kirby*, 124 Wn. App. at 466.

was aging, and it needed more pilots to offset retirements and losses from medical disability.¹⁸⁹ In addition, some pilots in their 60's reported that they no longer wanted to cover for the shortage of pilots.¹⁹⁰ Captain Nelson's theory is that the Board preferred a 40 year old trainee because, in theory, he would be around for 10 years longer than 50 year old trainee and would be willing to come in his weeks off.

Captain Nelson's evidence does not, however, establish that the Board either adopted this reasoning or that it is discriminatory. First, most of Captain Nelson's evidence cannot be attributed to the Board.¹⁹¹ The author of the letters he cites, the PSP, is not a decision maker, and its concerns cannot be attributed to the Board. For example, while PSP may have worried about increasing age, the Board's concern was a block of pilots retiring at the same time.¹⁹² The cause of this block of retirees, whether age, illness, or choice, is irrelevant; the Board needed trainees in the pool to meet the projected need.¹⁹³ None of the evidence suggests the Board adopted an agenda to lower the average age of pilots.¹⁹⁴ And, in fact, the first eight pilots licensed from the 2005 class lowered the average

¹⁸⁹ CP at 2893-94.

¹⁹⁰ CP at 1367.

¹⁹¹ See e.g., CP at 2895, 2880, 3060, and 1070. Similarly, forwarding a study on fatigue does not mean that the sender endorses a single section that mentions a study an Australian study on fatigue among older pilots. See CP at 1094.

¹⁹² CP at 1366-67, 1457-58.

¹⁹³ See e.g. CP at 1533 (describing the "acute shortage of pilots" as the emergency).

¹⁹⁴ CP at 5121, 75:5-22

age of PSP pilots from 56 to only 55.79.¹⁹⁵ Most significant, there is no evidence in the record that the Board (or the PSP) considered that older pilots (including those over the average age of 56) were unable or unsafe to pilot.

The only evidence in the record establishes that the Board sought to prepare for an anticipated need to replace future retirees. That is not discriminatory. Where a Board is responsible for maintaining a pool of applicants, asking about and planning for future retirements is not evidence of age bias.¹⁹⁶ As the Ninth Circuit explained, “inquiries into ... retirement plans do not suggest age discrimination...because [the employer] had a legitimate business interest...to plan for its own future.”¹⁹⁷ The Board had a legitimate and statutorily mandated duty to undertake such planning; discharging that duty cannot be evidence of bias.

¹⁹⁵ Compare CP at 1070 with CP at 370. Captains 1 through 8 were licensed by September 2007, CP at 1971 (showing that all eight were younger at licensing than they were in September 2007).

¹⁹⁶ *Hatfield v. Columbia Fed. Sav. Bank*, 68 Wn. App. 817, 825, 846 P.2d 1380 (1993) (inquiry into pension status does not give rise to inference); *Killingsworth v. State Farm Mut. Auto Ins. Co.*, 254 Fed.Appx. 634, 637 (9th Cir, 2007)

¹⁹⁷ *Killingsworth*, 254 Fed. Appx. at 637. See also, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 S. Ct 1701, 123 L. Ed. 2d 338 (1993) (a decision based on pension status did not violate age discrimination laws); *KY Ret. Sys. v. EEOC*, 554 U.S. 135, 143-44, 128 S. Ct. 2361, 171 L.Ed.2d 322 (2008) (explaining how pension and age, though correlated, are distinct.)

Second, Captain Nelson was not an employee, a fact that fatally undermines Captain Nelson's factual theory.¹⁹⁸ The Board does not pay retirement costs or medical benefits, meaning the Board has no financial incentive in whether or when a pilot retires.¹⁹⁹ If Captain Nelson, or any of the other 2005 trainees, only worked for 10 years before retiring, the Board would simply invite the next trainee in its pool. The Board suffers no consequence when a pilot retires because the Board has a "pipeline" of trainees.²⁰⁰ In addition, the Board does not determine how the PSP pilots cover for sick or unavailable pilots.²⁰¹ That is an internal PSP decision. The Board's response to the complaints was not to discriminate against pilots who complained, but to accommodate their request to fill the pilot roster so that pilots did not have to cover for each other. That is not a discriminatory act.

Taking all inferences in Captain Nelson's favor, the statements from actual decision makers might show bias against pilots over the age of

¹⁹⁸ Captain Nelson asserts, without argument, that his monthly stipend made him an employee. Appellant's Br. at 39. The court should deem this argument abandoned. A stipend does not mean a person is an employee. *DeWater v. State*, 130 Wn.2d 128, 140, 921 P.2d 1059 (1996) (holding that a foster parent is not an employee despite receiving direct payments and being subject to regulations). The key factor is whether the employer has control over day to day operations. WAC 162-16-170(5). But the Board does not control pilots or trainee's manner of performance. CP at 362; CP at 5140, 151:9-152:6

¹⁹⁹ CP at 362.

²⁰⁰ CP at 5121, 75:5-22

²⁰¹ CP at 1367, 70-72 (Commissioner Davis explaining that the issue of rest between duty call was an issue for the pilots and operators).

60, not against someone in his early 50s like Captain Nelson. Commissioner Mackey, who was 65, testified that “us kids” were retiring.²⁰² By Captain Nelson’s own reasoning, he was significantly younger than Commissioner Mackey. Commissioner Charles Davis testified that pilots over 60 were reporting that that they could not do extra duty.²⁰³ Where the Board elected Captain Nelson in it training program and gave him multiple second chances, there is no inference based on these comments that the Board was biased against 50 year olds. In fact, Captain Hannigan and Commissioner Davis, two of the three allegedly biased decision-makers Captain Nelson identified, voted for the Captain Nelson’s licensure in September 2007 and would be entitled to the same actor inference.²⁰⁴

Even taking all inferences in Captain Nelson’s favor, the record does not establish a violation of Washington’s age discrimination laws. Showing that the Board foresaw the potential that a block of pilots would retire, then invited a class of experienced applicants, including the Captain Nelson, into a training program to replace them, is insufficient, as a matter of law, to establish age discrimination. Similarly, where every one of the

²⁰² CP at 1458.

²⁰³ CP at 1367.

²⁰⁴ *Griffith*, 128 Wn.App. at 453-454. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 625, 128 P.3d 633 (2006) (applying a strong inference where a supervisor treated an employee favorable in the recent past).

trainees was inside the protected age class (over 40) and the Captain Nelson was younger than most licensed pilots, even if he could show differential treatment, there is no inference to be drawn that age was a motivating factor. Given that the Board had a legitimate non-discriminatory reason for denying a license—his performance—there is no issue of fact for a trier of fact to consider. Summary judgment was appropriate.

b. Plaintiff Fails To Create A Material Dispute That The Board's Non-Discriminatory Reason Was Pretext

Even if Captain Nelson had established a prima facie case, he cannot create an issue of fact that the Board's non-discriminatory reason, performance, was false. Captain Nelson had 17 separate instances in which a supervising pilot had to intervene to stop a dangerous situation.²⁰⁵ In March 2008, during a trip with a TEC member who had recommended him for licensure, Captain Nelson almost destroyed the grain dock at Pier 86 in Seattle.²⁰⁶ On this record, there is no material issue of fact that, by the end of the training program, Captain Nelson was not qualified.

It makes little difference if Captain Nelson shifts the focus to the September 2007 Board meeting in which Captain Hannigan, Captain Snyder, and Commissioner Charles Davis voted in his favor. When

²⁰⁵ CP at 1971.

²⁰⁶ CP at 5377, 114:16-121:19 *passim*.

Captain Nelson's license was extended in September 2007, he had had 11 interventions, including three in his first extension.²⁰⁷ His training was extended, just as the training of every trainee with more than five interventions also had their programs extended.²⁰⁸ Casting other trainees' extensions as "do-overs" and renaming it beneficial treatment does not alter the fact Captain Nelson received the same opportunity as other trainees who struggled.

Balanced against his markedly deficient performance and in the context of training program as described above, the few comments that Captain Nelson presents as discriminatory do not create a material issue of fact as to pretext, especially where the Board never discussed Captain Nelson's age in discussing his license.²⁰⁹ A handful of stray comments not linked to the decision making process are insufficient to create a material issue of fact.²¹⁰

Initially, Mr. Goodenough's testimony is not sufficient to create a material issue of fact. He is not an expert qualified to opine on a pilot's

²⁰⁷ CP at 1971

²⁰⁸ *Id.*

²⁰⁹ CP at 5093, 182:21-183:1.

²¹⁰ *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993) (holding a comment by a direct superior that "[w]e don't necessarily like grey hair" and a vice president's statement that "we don't want unpromotable fifty-year olds around" was not enough to defeat summary judgment.)

qualifications.²¹¹ Captain Nelson’s counsel offered him as an expert on only whether the Board’s training program was “valid, reliable, and properly designed.”²¹² This expertise does not extend to speculation on whether Captain Nelson would or should have been licensed.²¹³

Moreover, none of the comments Captain Nelson introduces from TEC or Board members during his training program are related to age. Captain Nelson argues that the Board considered stress, whether he had enough ready ratings, whether he made enough extra trips while struggling, and whether the Board would have enough people to replace retiring pilots.²¹⁴ None of these are related to Captain Nelson or his age.

Nor is Captain Nelson correct that this reasoning was applying only to him. Captain Lee wrote of 40 year old Captain 1, “One would think that with these types of reviews, [Captain 1], would be taking more trips than the 20 he has logged for June to demonstrate that the low scores he earned were an abnormality.”²¹⁵ Similarly, Commissioner Mackey explained it was the timing of Captain Nelson’s break that was an issue: “If you have an area you are weak on and you have to improve on, you

²¹¹ CP at 315; CP at 1923 (Noting his expertise is in career development, personality assessment, counseling, and bias in the workplace.)

²¹² CP at 5234, 27:18-28:1.

²¹³ See e.g., *Estate of Borden v. State*, 122 Wn. App. 227, 246-47, 95 P.3d 764 (2004) (an expert opinion about what a decision maker would have done goes beyond expertise and is merely speculative).

²¹⁴ Appellant’s Br. at 41-42.

²¹⁵ CP at 1744.

can't be taking time off[,] I don't think."²¹⁶ He further explained that "There is nothing wrong with taking time off. It's knowing when to take time off."²¹⁷ Significantly, Commissioner Mackey voted against licensing both Captain 1 and Captain Nelson.²¹⁸

Captain Nelson's assertion that there was unanimity standard is not supported by this record. The Board expected trainees to have bad trips, and looked for improvement.²¹⁹ And, in fact, the Board gave Captain Nelson five extensions before the Board finally determined that he was not suitable for licensing.²²⁰ That the Board continued to give Captain Nelson multiple opportunities to show improvement conclusively illustrates that unanimity was not required.

The Board was, however, concerned with consistency, and applied that concern to all trainees. Every trainee with six or more interventions was extended.²²¹ Captain Lee, in explaining his rationale for making 40 year old Captain 1 take more trips, for example, explained that "[Captain 1's]...evaluations are not consistent....Some days he does a good job and other days not so good."²²² Captain 10, whose age is indistinguishable

²¹⁶ CP at 5351, 13:13-19.

²¹⁷ CP at 5352: 16:8-16.

²¹⁸ CP at 4412.

²¹⁹ CP at 1967-68; CP at 5153, 202:20-203:15.

²²⁰ CP at 1971; CP at 5153, 202:20-203:15.

²²¹ CP at 1971.

²²² CP at 1744.

from Captain Nelson is the best example.²²³ As with Captain Nelson, he had eight interventions in his program and was extended. He, however, had no interventions in his extension and was licensed in spite of being 52 years old.

In each instance that a trainee struggled, the Board's response was the same; it asked the trainee to repeat trips to demonstrate the problem had been anomalous. For example, after Captains 7 and 8 had interventions, the TEC directed them to repeat the trip where they had interventions.²²⁴ Similarly, in the October 2007 extension, the Board specified that Captain Nelson "revisit the trips where you had interventions or difficulty. . . ."²²⁵ This was in fact, the normal practice.²²⁶ The fact other trainees struggled but were licensed does not create an issue of fact over whether the Board was deceitful when it denied Captain Nelson a license after 17 interventions, including the near destruction of a dock. The difference between the Captain Nelson and his alleged comparators was level of performance, not differential treatment.

²²³ CP at 1971.

²²⁴ CP at 1600 (paragraph 2). In addition, Captain Nelson selectively cites the comment from the intervention. The supervising pilot explained, "I think Captain 8 learned a lot from this experience and I saw improved in his use of the bow tug from the first half of the trip to the second."

²²⁵ CP at 357.

²²⁶ CP at 5361, 53:14-18 ("Normally we would have them repeat the trip.")

As the ALJ astutely found, there is no evidence in this record of a improper motive on the part of the Board. Lacking a genuine issue of material fact, summary judgment is appropriate.

2. Captain Nelson's Gender, Disability, And Retaliation Claims Are Devoid Of Merit

As shown above, summary judgment is appropriate on Captain Nelson's age discrimination claims for multiple reasons. To the extent he intends to claim gender or disability claims on this appeal, those are frivolous. Although Captain Nelson mentions these claims, he does not offer argument, and they should be deemed abandoned.

If this Court reaches the merits of these claims, the court should note first that Captain Nelson testified that he did not believe that gender was basis for the decision making process.²²⁷ And the only thing he could say to support the theory was double hearsay statement from unnamed pilots making a vague assertion that a Captain Jacobs thought he might be a test case.²²⁸ This is insufficient as a matter of law to maintain a gender discrimination claim.

The sole testimony on the issue of disability was that an independent source, Dr. Younger, disqualified Captain Nelson from

²²⁷ CP at 301.

²²⁸ CP at 303-04.

serving under RCW 88.16.090(8).²²⁹ After Dr. Younger cleared him to return to duty without restriction, the Board cleared him.²³⁰ The only email discussing a heart condition indicates that the heart condition had, in fact resolved.²³¹ This is neither a disability nor a perception of one. Summary judgment was appropriate.

Finally, Captain Nelson's retaliation claim lacked any evidentiary support. After the September 2007 extension that Captain Nelson complains was discriminatory, he sent an email complaining about difficulty in scheduling his training trips.²³² Leaving aside the timing issue—that his complaint antedated the alleged discriminatory act—he must show that he was engaging in a protected activity in order to establish a retaliation claim.²³³ The opposition must be to conduct that is arguably a violation of the law.²³⁴ Nothing about Captain Nelson's email suggests that he was opposing age discrimination or that the scheduling difficulties were somehow illegal. Moreover, in the next extension, the Board responded by giving him easier trips and accommodating his

²²⁹ CP at 2819, 40:8-14.

²³⁰ CP at 2820, 41-42.

²³¹ CP at 4895 (“I just spoke with [Captain Nelson] and he just saw the cardiologist. Apparently his heart arrhythmia was from the pneumonia and is now okay.”).

²³² CP at 1168.

²³³ *Kahn .v Salerno*, 90 Wn. App. 110, 130, 951 P.2d 321 (1998).

²³⁴ *Kahn*, 90 Wn. App. at 129.

scheduling issues.²³⁵ Even after that accommodation, Captain Nelson continued to struggle and ultimately almost destroyed a dock some five months later. This factual scenario is insufficient to establish a retaliation claim.

The same analysis from the age discrimination claim applies these alternative claims. The Board had a legitimate non-discriminatory reason for its action. Captain Nelson cannot show that the Board's decision was pretextual and summary judgment is appropriate.

D. Captain Nelson's Constitutional Claims Should Be Dismissed

Although Captain Nelson has not plead or argued a constitutional claim, he identifies it as an issue in his assignments of error and recounts the last century of legal suits against the Board, some of which addressed constitutional challenges.²³⁶ This Court should deem this issue either not properly raised or abandoned.

Even if the issue had been properly raised, summary judgment was proper. Captain Nelson's constitutional claim is identical to his dismissed APA claims. Washington courts do not recognize an independent cause of

²³⁵ CP at 5149, 188:19-189:16.

²³⁶ Appellant's Br. at 2, 3-5, citing *In re Application of Puget Sound Pilots Ass'n*, 63 Wn.2d 142, 385 P.2d 711 (1963); *State ex rel. Sater v. Bd. of Pilotage Comm'rs.*, 198 Wash. 695, 90 P.2d 238 (1939).

action based on violation of the Washington Constitution.²³⁷ Instead, the APA is the exclusive mechanism to challenges to agency actions, including constitutional challenges.²³⁸ Furthermore, the contours of the constitutional right are identical to the rights protected under the APA's prohibition of arbitrary and capricious agency action.²³⁹ Thus, Captain Nelson's "constitutional" cause of action is identical to his APA claims, the dismissal of which he has not appealed.

Had he, those claims would be barred by res judicata.²⁴⁰ Claim preclusion applies where there is a concurrence of identity in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the person against whom the claim is made.²⁴¹ Unlike collateral estoppel, res judicata bars any claim that "*could have and should have been* determined in a prior action."²⁴² Here, because Captain Nelson's constitutional claims are identical to an APA cause of action, res judicata

²³⁷ *Blinka v. Wash. State Bar Ass'n.*, 109 Wn. App. 575, 590, 36 P.3d 1094 (2001).

²³⁸ *Bock*, 91 Wn.2d at 100; RCW 34.05.510 ("this chapter establishes the exclusive means of judicial review of agency action.") RCW 34.05.570 (listing constitutional challenges as allowed under the APA)

²³⁹ *State ex rel Sater*, 198 Wn. at 702 (explaining that the constitution is offended where the Board would "authorize[e] the exercise of arbitrary power.")

²⁴⁰ *Civil Service Comm'n. of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 171, 969 P.2d 474 (1999). (A cause of action is identical where the prosecution of the later case would impair rights established by the earlier case, the evidence is substantially the same, the infringement of the same right is alleged and the actions arise out of the same nucleus of facts.)

²⁴¹ *Civil Service Comm'n. of Kelso*, 137 Wn.2d at 171.

²⁴² *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 330, 941 P.2d 1108 (1997).

applies. Captain Nelson has already litigated and lost whether the Board's training program was arbitrary and capricious.

E. Attorney Fees

Plaintiff requests attorney fees under RAP 18.1 assuming he prevails at trial, citing RCW 49.60.030(2). Because the court should affirm summary judgment, the request should be denied.

VI. CONCLUSION

This Court should affirm the trial court's application of collateral estoppel to bar re-litigation of decided factual issues. In the alternative, this Court should affirm the trial courts ruling that Captain Nelson fails to create a material issue of fact over whether age or any other protected characteristic was a factor in the Board's decision making.

RESPECTFULLY SUBMITTED this 4th day of January, 2013.

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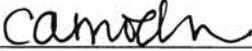
DECLARATION OF SERVICE

I declare that I sent for service a copy of this document on parties
or their counsel of record on the date below as follows:

Mary Ruth Mann
James W. Kytle
Mark W. Rose
Mann & Kytle, PLLC
200 Second Avenue W.
Seattle, WA 98119

I declare under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

Dated this 4th day of January 2013, at Seattle, Washington



COURTNEY AMIDON
Legal Assistant

Appendix 1

Class of 2005 Age Data

| Name | Age on Sept 15 2007 | Training Program | Interventions | Licensed / Age at licensing decision |
|-------------|---------------------|--|---------------------------------------|--------------------------------------|
| Captain #1 | 41.3 years old | Original Program First extension | 5 (Total-6) 1 | Yes / 40.2 |
| Captain #2 | 50.8 years old | Original Program | 3 | Yes / 49.6 |
| Captain #3 | 50.1 years old | Original Program | 1 | Yes / 48.9 |
| Captain #4 | 47.5 years old | Original Program | 0 | Yes / 46.3 |
| Captain #5 | 56.4 years old | Original Program | 5 | Yes / 55.4 |
| Captain #6 | 46.2 years old | Original Program | 1 | Yes / 45.0 |
| Captain #7 | 47.7 years old | Original Program | 2 | Yes / 47.3 |
| Captain #8 | 44.7 years old | Original Program | 5 | Yes / 44.4 |
| Nelson (#9) | 53.0 years old | Jan-July 2007 July-Sept 07 ext. Sept-Oct. 07 ext. Oct.-Dec 07 ext. Dec 07-Jan 08 ext. Jan-April 08 ext. | 8 (Total-17) 3 3 2 0 1 | Denied Dec 2008 / 54.2 |
| Captain #10 | 52.3 years old | Original Program First Extension | 8 (Total-8) 0 | Yes / 52.3 |
| Captain #11 | 39.7 years old | Original Program | 0 | Yes / 40.2 |
| Captain #12 | 51.1 years old | Original Program | 0 | Yes / 51.5 |
| Captain #13 | 40.5 years old | Original Program First Extension Second Extension Third Extension Fourth Extension | 5 (Total-16) 1 5 5 1 | No / 41.6 |
| Captain #14 | 44.8 years old | Original Program First Extension | 0 (Total-0) 0 | Yes / 45.4 |
| Captain #15 | 55.1 years old | Original Program | 0 | Yes / 56.3 |
| Captain #16 | 47.5 years old | Original Program | 0 | Yes / 48.7 |
| Captain #17 | 58.5 years old | Original Program First Extension Second Extension | 11 (Total-18) 6 1 | No / 60.3 |
| Captain #18 | 46.0 years old | Original Program First Extension Second Extension | 6 (Total-7) 0 1 | Yes / 47.8 |

Appendix 2

Numeric Identifier Key

| Name | Numeric Identifier |
|---------------------------|--------------------|
| Captain Pat Kelly | 1 |
| Captain Michael Blake | 2 |
| Captain Jack Bujacich | 3 |
| Captain Ivan Carlson | 4 |
| Captain John Ward | 5 |
| Captain William Sliker | 6 |
| Captain David Grobschmidt | 7 |
| Captain Jostein Kalvoy | 8 |
| Captain Bruce Nelson | 9 |
| Captain Edmund Marmol | 10 |
| Captain Eric Klapperich | 11 |
| Captain Gordon Wildes | 12 |
| Captain Katherine Sweeney | 13 |
| Captain Steve Semler | 14 |
| Captain Jim Hannuksela | 15 |
| Captain George Thoreson | 16 |
| Captain Steven Jones | 17 |
| Captain Larry Seymour | 18 |

Appendix 3



STATE OF WASHINGTON
BOARD OF PILOTAGE COMMISSIONERS

2901 Third Avenue, Suite 500 * Seattle, Washington 98121 * (206) 515-3904 * FAX (206) 515-3905

In Re: Licensing of
CAPTAIN BRUCE NELSON,
Appellant.

OAH Case Docket No 2009-BPC-0001
Review of Initial Order of ALJ Richard J. Roberts and
FINAL ORDER

This matter comes before Board Reviewing Officer Charles F. Adams pursuant to the Petition for Review of Initial Order of ALJ Richard J. Roberts issued in this case on August 13, 2010. The Initial Order upheld the Board of Pilotage Commissioners' December 15, 2008 decision to deny Appellant, Bruce Nelson, a marine pilot license.

Captain Bruce Nelson, the Appellant, appeared and was represented by Mary Ruth Mann, Attorney at Law. The Board of Pilotage Commissioners, the Respondent, appeared through its Chair, Captain Harry Dudley, and was represented by Guy M. Bowman, Assistant Attorney General. Puget Sound Pilots, who petitioned to intervene for limited purposes in the Initial Order proceedings, did not appear in this review proceeding.

This Reviewing Officer is currently serving as a Public Commissioner on the Board of Pilotage Commissioners and was requested by Captain Dudley to be the Board Reviewing Officer in this case. I was appointed to the Board in late September 2009, and thus I was one of the only Commissioners not involved in any of the proceedings relating to the licensure of Captain Nelson. In reviewing the Initial Order, I have reviewed the pleadings, testimony and exhibits presented to Judge Roberts, the Initial Order, and Captain Nelson's Opening and Reply Briefs on Petition for Review and the Board's Brief and Amended Sur Reply in Response to Petition for Review.

FINDINGS OF FACT

In reviewing the Findings of Fact in the Initial Order, due regard is given to Judge Roberts' opportunity to observe the witnesses. RCW 34.05.464(4).

Of the 40 Findings of Fact listed in the Initial Order, Captain Nelson takes exception to all of the Findings except for Findings of Fact 1-2 and 35-38. I have reviewed the Findings of Fact Numbers 1-40 contained in the Initial Order in light of the full record of this proceeding, find them consistent with and supported by this record, and adopt them as my own in the Final Order with the additions described below. The Initial Order is attached as part of this Final Order.

Captain Nelson, during the hearings and in his briefs, has raised a plethora of issues about the failings of the training program, nepotism and bias. These additional findings of fact are intended to address some of those issues.

FINDING OF FACT 3. At the end of FF #3, add the following language:

In accordance with RCW 88.16.010, the Board of Pilotage Commissioners consists of a chairperson, the Director of the Department of Ecology or his designee, and seven members appointed by the Governor, including two Washington State licensed pilots, two shipping representatives, one representative of an environmental organization concerned with marine water and two "public" commissioners concerned with pilotage and marine safety and affairs (but not be a pilot or shipping representative). The stated legislative policy is "to prevent the loss of human lives, loss of property and vessels, and to protect the marine environment of the State..." RCW 88.16.005. Washington's position "as an able competitor for waterborne commerce from other ports..." is also to be protected. The Board is specifically directed to administer a Board-specified training program as well as any additional Board requirements for licensure. It is also directed to determine "from time to time the number of pilots necessary to be licensed...to optimize the operation of a safe, fully regulated, efficient, and competitive pilotage service...". RCW 88.16.035; RCW 88.16.090.

The make-up of the Board is thus designed to maximize safety and protection of the marine environment, while balancing the economic and practical issues of shipping and required pilotage. While shippers are obviously concerned with pilotage costs, they are also very concerned with safety, particularly in light of the huge costs and environmental damage resulting from marine accidents such as the Exxon Valdez and Cosco Busan groundings. Shippers have potential liability for damages to property and the marine environment, even if the pilot is at fault. RCW 88.16.118(2). The Board make-up also helps to eliminate such issues as nepotism and the good-old-boy network of pilots, which have historically arisen in various pilotage districts. Testimony of Captain Dudley, Day 2, Tr. 101.

FINDING OF FACT 4. At the end of FF #4, add the following language:

After September 2007 and for the remainder of Captain Nelson's training program, there were 55 licensed marine pilots with a target level of 57 pilots, a level which was not reached until 2010.

FINDING OF FACT 8. At the end of FF #8, add the following:

In the case of Captain Nelson, his background was with the Washington State Ferry system, which has a different range of operational and shiphandling requirements than those of a deep-sea master or a tug captain. All candidates at this level are expected to be experienced masters, but the training focuses on the specific "nuances" needed by each pilot candidate for licensing. Capt. Dudley, Day 2, Tr. 122-127.

FINDING OF FACT 13. In the second sentence of FF #13, strike the language "who in this case was also a marine pilot in Alaska and ..." and insert the following:

"who in this case also held a First Class Pilot endorsement for Prince Williams Sound, Alaska, and ...".

FINDING OF FACT 14. At the end of FF #14, add the following:

See Capt. Hannigan, Day 3, Tr. 105-212 for the operation of the Training Program and the use of the Trip Report.

FINDING OF FACT 16. Before the last sentence of FF #16, add the following:

See WAC 363-116-078(11).

FINDING OF FACT 19. After the first sentence and before the last sentence in FF #19, add the following:

Captain Kromann was out of the country during this meeting and had previously sent an e-mail to the TEC which was construed as a vote for Captain Nelson's licensing, although Captain Kromann testified that it was not intended as a vote since he did not have all of the up-to-date information and the benefit of the TEC discussion. Capt. Kromann, Day 6, Tr. 105-108. Captain Lee recommended additional training because of inconsistent scores (including three interventions which had occurred during July) and other concerns. Capt. Lee, Day 6, Tr. 126-156; Exhibit 1.

FINDING OF FACT 29. At the end of FF #29, add the following:

On March 6, 2008, Trip 221, a major intervention was required by Capt. Kromann, a very senior pilot and TEC member, to avoid substantial damage to the Pier 86 grain dock and the vessel. Captain Kromann took over the conn and stabilized the vessel after several maneuvers about 30 feet off of the berth. Capt. Kromann, Day 6, Tr. 114-124. This was a relatively easy trip, and at this late date in the training program, this intervention was very serious. The TEC had become very concerned that Capt. Nelson was not improving and that there "was a significant risk to the public for continuing him in the training program." Capt. Hannigan, Day 3, Tr. 202-204.

FINDING OF FACT 39. Before the last sentence in FF #39, insert the following:

Dr. Hertz as part of his professional experience began his work as a licensed industrial psychologist in the California Department of Consumer Affairs supervising the examination programs for 35 boards within the department. He has worked with the San Francisco Pilots since 1990 to develop content for the written and performance exam. He has also worked with the Alaska Marine Pilots and the Southeast Alaska Pilots Association (SEAPA). In addition to vetting the Washington State Board's evaluation and assessment program (which he did not develop), he was involved with the development of the Washington Board of Pilotage simulator exam.

FINDING OF FACT 40. After the first sentence and before the last sentence in FF #40, insert the following:

Mr. Goodenough has never been involved in the development of any assessment program which involved marine pilots. He had reviewed for this case the training/licensing regulations of the Coast Guard and several states, including California, but was only generally familiar with their application. His primary expertise appears to be in the area of career development, personality assessment, counseling, and bias in the workplace issues. See Official Testimony of Expert Witness David Goodenough and testimony of David Goodenough, Day 5, Tr. 10-90.

FINDING OF FACT 41. New Finding.

The Appellant makes various claims relating to nepotism, age discrimination, and bias, but these claims are not supported by the record in this proceeding and are not persuasive.

CONCLUSIONS OF LAW

Of the 7 Conclusions of Law listed in the Initial Order, Appellant Captain Nelson takes exception to Conclusions of Law Numbers 2 through 7. I have reviewed the Conclusions of Law Numbers 1 - 7 contained in the Initial Order in light of the full record of this proceeding and the Findings of Fact in the Initial Order and as supplemented in this Final Order. I find the Conclusions of Law 1 - 7 contained in the Initial Order are consistent with and supported by the record in this proceeding, and I therefore adopt them as my own.

FINAL ORDER

The Board of Pilotage Commissioners' December 15, 2008 decision to deny the Appellant, Captain Bruce Nelson, a Washington State marine pilot license is affirmed.

Dated this 19th day of December, 2011.



Charles F. Adams
Board Reviewing Officer
Washington State Board of Pilotage Commissioners

ATTACHMENT TO
FINAL ORDER

MAILED

AUG 13 2010

OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF PILOTAGE COMMISSIONERS

Office of Administrative Hearings
Spokane

IN THE MATTER OF THE HEARING OF
CAPTAIN BRUCE NELSON,
APPELLANT.

OAH Case Docket No 2009-BPC-0001

INITIAL ORDER

RECEIVED

AUG 16 2010

ATTORNEY GENERAL'S OFFICE
TRANSPORTATION & PUBLIC
CONSTRUCTION DIVISION

RECITALS

A hearing in the above-entitled matter was conducted on March 26 through April 2 and on April 9, 2010, before Richard J. Roberts, Administrative Law Judge, in person at the Board of Pilotage Commissioners office in Seattle, Washington and by telephone. Captain Bruce Nelson, the Appellant, appeared and was represented by Mary Ruth Mann, Attorney at Law. The Board of Pilotage Commissioners, the Respondent, appeared through its Chair, Captain Harry Dudley, and was represented by Guy M. Bowman, Assistant Attorney General. Puget Sound Pilots, Intervenor¹, appeared through Sheryl J. Willert, Attorney at Law. The Appellant presented the testimony of himself, David Goodenough MS, LMHC, and Captains Ivan Carlson, William Sliker, Darrel Kimmerly, John Arnold, Katherine Sweeney, William Snyder, Robert Kromann, Craig Lee, and Commissioners Ole Mackie, Charles Davis, Vince Addington, Norman Davis, and Elsie Hulsizer. The Respondent presented the testimony of Captains Harry Dudley and Patrick Hannigan and Norman R. Hertz, Ph.D. Appellant exhibits

¹The Puget Sound Pilots petitioned to intervene in this case for the limited purpose of seeking a protective order for some of its members and to quash subpoenas that had been served on some of its members. The petition to intervene was granted without objection. The protective order was addressed in part in a ruling on a motion in limine filed by the Respondent. The motion to quash the subpoenas was rendered moot as the subpoenas were withdrawn.

A through Z, AA through UU, WW, XX, FFF, GGG, HHH, JJJ, LLL, MMM and Board exhibits 1, 2, 4 through 8, 16, 18, 20 through 23 and 35 were admitted at the hearing². The record was kept open to receive written closing from the parties. The record closed on May 17, 2010.

FINDING OF FACT

1. Each state requires that every foreign-flagged vessel and every United States-flagged vessel engaged in international travel if traveling in that state's waters must take on a pilot licensed by that state.

2. The Washington Administrative Code (WAC) at 363-116-120 describes the duty of a marine pilot as follows:

"A Washington state licensed marine pilot, under the authority of the master, direct ships into and out of harbors, estuaries, straights, sounds, rivers, lakes, and bays using a specialized knowledge of local conditions including winds, weather, tides, and current. Orders officers and helmsmen by giving course and speed changes and navigates ship to avoid conflicting marine traffic, congested fishing fleets, reefs, outlying shoals and other hazards to shipping; utilizes aids to navigation, such as lighthouses and buoys. Utilizes ships's bridge equipment, including radar, fathometer, speed log, gyro, magnetic compass, whistle or horn and other navigational equipment as needed. Required to use ship's radio equipment in contacting United States Coast Guard vessel traffic system and other ships while ship is in transit. Direct ship's officers, crewmen, and tug captains as necessary, when ships are transiting bridges, narrow waterways, anchoring, docking, and undocking. Must perform duties day or night in all weather conditions, including high winds, fog, mist, rainfall, falling snow and other adverse conditions, as encountered..."

3. In Washington the Board of Pilotage Commissioners is tasked with the training, licensing and regulation of marine pilots. The Board has been given broad authority to prevent the loss of human lives, loss of property and vessels, and to protect the marine environment of the state of Washington.

² A motion to strike certain exhibits from the record was denied. All admitted exhibits were considered to the extent they were relevant and probative of the issues before this Tribunal.

4. The Board determines the number of pilots necessary to service each district. Currently there are 57 licensed marine pilots providing pilotage services in the Puget Sound Pilotage District.

5. The Puget Sound Pilotage District is one of the largest such districts in the United States and stretches from Port Angeles in the Straits of Juan de Fuca in the West to the San Juan Islands and the Straits of Georgia to the north and the Port of Olympia to the south. The district encompasses a maze of waterways and geographic features and is subject to strong tides and currents. In addition to the numerous small ports and marinas the Puget Sound Pilotage District includes the busy commercial ports of Seattle, Tacoma and Olympia.

6. The licensing of a marine pilot is a multi-step process. When the Board determines that additional marine pilots are needed, it screens candidates from amongst a group of individuals who have already demonstrated a high level of experience as sea captains and each must have at least two years as a United States Coast Guard licensed master. Each candidate that is accepted is required to pass a written examination and a simulator evaluation. Upon the successful completion of both, the applicant may be invited to enter a pilot training program which may or may not end in the pilot trainee being licensed as a marine pilot.

7. The goal of the pilot training program is to produce pilots who the Board believes are capable of safely, efficiently consistently piloting ships in a given district without supervision.

8. When a pilot trainee is accepted into the training program, a training program unique to that trainee is developed. The trainee's career experience, experience with tugs, academic background, pilotage experience, and types of vessels served upon are all considered. The

training plan focuses on those areas in which the trainee requires the most training. The training plan is discussed with the trainee so that a common understanding of the focus of the training is understood by all.

9. The Appellant passed the written and simulator exams in 2006.

10. By letter dated November 9, 2006, the Board notified the Appellant that he had been selected to enter the training program for the Puget Sound Pilotage District. He was advised that the training program was designed to be comprehensive, demanding and at times difficult. The training program would include an orientation and a minimum of 130 trips with licensed Puget Sound Pilots over a seven month period. He was further advised that his training would be under the supervision of the Training Evaluation Committee (TEC) which would monitor his progress by reviewing his Pilot Trainee Training Trip Report (Trip Report) forms, the Training Program Trip Requirements Summary, and by direct observation. The TEC would keep the Board advised as to the Appellant's progress. The letter also advised the Appellant that he was encouraged to take trips which were not part of the training program. He was advised about the conditions for his removal from the program should that become necessary. The letter contained the Appellant's personalized training program requirements which listed each trip that would be required of him and the conditions relative to those trips.

11. The Appellant accepted the terms of the training program on November 17, 2006, and was subsequently issued a training license,

12. The Appellant's original training program consisted of 174 trips aboard a variety of ships in the Puget Sound Pilotage District. These trips included five initial observation trips during which he would observe a licensed pilot. These trips were required before taking any

other assigned trips. He was given 10 initial evaluation trips which were to be taken with pilots having at least six months experience. Five of those trips had to be with a Board approved training pilot and two trips with TEC pilot members. The training program also included 12 tug observation trips aboard different types of tugs in different locations. The remaining trips were between various locations within the Pilotage District with specified ships and training pilots. On each trip there was a licensed pilot aboard who had the responsibility of training and or assessing the Appellant's performance. The trips were intended to give the him exposure to a wide variety of ships and conditions that will be encountered as a pilot in that district. The types and number of trips can be adjusted during the course of training to address a trainee's strengths and weaknesses.

13. The training of pilot trainees is supervised by the TEC, the members of which are appointed by the Board for that purpose. During the period in issue the TEC consisted of five members, three of whom were Washington licensed marine pilots, one of which was a Board member, a marine industry representative who holds a minimum U.S. Coast Guard Masters license who in this case was also a marine pilot in Alaska, and a non-pilot member of the public who in this case was a Board Commissioner. The TEC is responsible for conducting initial evaluations, developing training plans, reviewing Trip Reports, keeping the Board advised as to the progress of pilot trainees and making recommendations to the Board regarding the trainee.

14. A critical part of a pilot trainees training is the Trip Report. The Trip Reports have been developed and refined over time with the input of the Board, the TEC, the Puget Sound Pilots, an organization whose members are all licensed marine pilots, and other

professionals. The Trip Reports are essentially a record of each trip made by a pilot trainee. It is completed by the training pilot on each trip. On the Trip Report the training pilot rates the trainee's performance in various tasks in such domains as preparation, navigation, ship handling, and master/pilot/bridge team interface. At the time the Appellant entered the training program the Trip Report used a four-point rating scale with the lowest score being "not effective" and the highest being "highly effective." These scores were not intended to be grades per se but rather a way to track trends (strengths, weaknesses and progress) and focus the training of each trainee. The Trip Report also has a written comment section which can be completed by the training pilot. The training pilots are required to complete the comment section if he or she had to intervene (take control of the ship from the trainee) during a trip in order to prevent injury/damage to persons or property.

15. Board staff creates a spreadsheet from the Trip Reports which is reviewed by the TEC weekly, given to the pilot trainee weekly, and reviewed by the Board monthly.

16. Upon completion of a pilot trainee's training program, the TEC reviews the trainee's record and makes a recommendation to the Board as to whether the trainee is suitable for licensing, not suitable for licensing, or in need of further training. If the recommendation is not unanimous, the TEC provides the Board with a majority and minority recommendation. The Board then votes to either grant a license, deny a license or continue training.

17. During the course of the Appellant's training the Trip Reports were revised and the domains of anchoring, tug escort procedures and special circumstances were added. In addition, the rating scale was increased to seven with the lowest being "very unsatisfactory

performance" and the highest being "superior performance." This is found to be a refinement of the Trip Report but does not invalidate the prior Trip Report evaluations.

18. In July of 2007, the TEC decided the Appellant needed additional training due to inconsistent performance and voted to add certain specific training trips to his training plan.

The additional trips were intended to address specific training issues. The Board accepted the TEC's recommendation and the Appellant's training was extended to September 2007.

19. At a TEC meeting on September 12, 2007, the three Washington marine pilot members of the TEC voted to license the Appellant and the two remaining members recommended additional training. The two recommendations were forwarded to the Board.

20. The Board considered the recommendations and on September 13, 2007, by a vote of four to three, the Board extended the Appellant's training for an additional month. 18 trips were added to his training plan.

21. At a Board meeting on October 29, 2007, the Board voted to extend the Appellant's training for an additional month. Another 18 training trips were added with an additional six trips if the TEC determined the 18 trips were satisfactory.

22. The Appellant had been unable to complete the latest training extension trips in the prescribed time due to a lack of vessels calling in the assigned waterways.

23. At a TEC meeting on December 12, 2007, there was a concern raised that there was a "disconnect" in the Appellant's fundamental ship handling skills. There was also discussion about the Appellant's "lack of situational awareness" and his inability to "process all the necessary information." It was decided that the Board would need to determine if the Appellant's program was "salvageable" through additional training. However because the

Appellant had been unable to complete his assigned training trips, the TEC believed it would be premature to make a recommendation to the Board on his licensure at that time.

24. On December 13, 2007, the Board voted to extend the Appellant's training license for one year in order to allow him to continue training. The TEC was authorized to prescribe up to 15 additional trips to be performed that month.

25. At a meeting on January 9, 2008, the TEC was unanimous in not recommending licensure at that time. It recommended suspending the Appellant's training program and training license during an illness. It also recommended he be allowed to complete his current training requirements and that he be given further training.

26. On January 10, 2008, the Board adopted the TEC's recommendations and authorized the TEC to create another training addendum.

27. On January 17, 2008, the Board approved a training addendum created by the TEC for the Appellant. This addendum extended the Appellant's training through April 6, 2008. The additional trips were to be taken with TEC or other senior pilots.

28. The TEC engaged in an extensive review of all of the Appellant's Trip Reports. From that review the TEC concluded that although the Appellant performed many tasks well, his performance throughout his training, including the four extensions, was inconsistent particularly with respect to the critical ship handling elements of speed control, heading control and the use of tugboats. These skills are essential when docking and undocking a ship. The Trip Reports support the TEC's conclusions. For example, during the training trips which occurred after Trip 80, the training pilots intervened on 11 separate occasions.

29. Early in a trainee's training program interventions are not necessarily expected but are

not a cause for alarm. However as a trainee progresses through his or her training program, interventions become matters of greater concern to the Board.

30. On April 10, 2008, the TEC made a unanimous recommendation to the Board that the Appellant was not suitable for licensing and that his training should be discontinued.

31. The Board elected to defer action on the TEC's recommendation until hearing from the Appellant. By letter dated April 16, 2008, the Board informed the Appellant that a decision on his licensure would be made at the May 2008 meeting at which he was invited to make a presentation to the Board.

32. The Board did not make a decision on the Appellant's licensure at the May 2008 meeting because the Board had been unable to comply with the Appellant's requests for documents. A motion to deny the Appellant a pilot license was made and tabled. What thereafter ensued was a lengthy process by which documents were requested and provided which ultimately prevented the Board from addressing the licensing question until its October 9, 2008, meeting at which the Appellant and his attorney made it presentation to the Board in closed session.

33. At its December 4, 2008, meeting the Board unanimously approved the previously tabled motion to deny the Appellant a pilot license.

34. By letter dated December 15, 2008, the Board formally notified the Appellant of its decision to deny issuance of a license as a Washington State Pilot. In reaching its decision Board had considered the recommendation of the TEC, its own review of the Appellant's Trip Reports as well as the information provided by the Appellant and his attorney. The Board

advised that the Appellant's options to contest the Board's action were set forth in the Washington State Administrative Procedure Act.

35. On December 16, 2008, the Appellant requested an administrative hearing.

36. By letter dated March 12, 2009, the Board requested the appointment of an administrative law judge from this Office.

37. The Honorable Philip D. Noble accepted appointment as the assigned administrative law judge and a pre-hearing conference was held on May 14, 2009.

38. Judge Noble passed away and the case was reassigned to me in September 2009.

39. The pilot training program has been vetted by the Board's Industrial/Organizational Psychology³ and Psychometrics⁴ expert who is of the opinion that the evaluation system used in the program meets all the criteria for a reliable and valid assessment of a pilot trainee's performance. This Tribunal adopts this opinion as its own Finding of Fact.

40. The Appellant's expert witness was neither as qualified nor as experienced as the Board's expert with respect to the questions in issue. His opinions are therefore found to be not as persuasive.

CONCLUSIONS OF LAW

1. There is jurisdiction to hear this matter pursuant to the Revised Code of Washington (RCW) 34.05.425(1)(a).

³ I/O Psychology is the scientific study of the workplace that involves the application of psychological study to all aspects of business including talent management, coaching, assessment, selection, training, organizational development and performance.

⁴ Psychometrics is a subfield of applied psychology which involves the design of psychological tests to measure such psychological attributes of human behavior as knowledge, skills, and abilities to perform a job.

2. The Board is required by RCW 88.16.090 to develop a marine pilot training program and to evaluate a trainee's knowledge and performance at the completion of the program. The Board may then, as it deems appropriate, issue a pilot license, delay the issuance of a pilot license, deny the issuance of a pilot license, or require further training and evaluation. RCW 88.16.090(4). The Board has considerable discretion in carrying out these duties. *State Ex Rel Sater v. State Board of Pilotage Commissioners*, 198 Wn. 695, 700, 90 P.2d 238 (1939).

3. The criteria used by the Board in determining whether to issue or deny a license includes but is not limited to the performance in the training program, piloting and ship handling and general seamanship skills, local knowledge, and bridge presence and communication skills. WAC 363-116-080(5)

4. The Appellant has the burden of proving that the Board acted in an arbitrary or capricious manner or with improper motives when it denied him a pilot license. *Bock v. Pilotage Commissioners*, 91 Wn.2d 94, 100, 586 P. 2d 1173 (1978), citing *Sater*. In order to prevail he must show that the Board's action was the result of a willful and unreasoning decision process in disregard of the facts and circumstances. *Regan v. Dept. of Licensing*, 130 Wn.App. 39, 58-59, 121 P.3d 731 (2005) (citations omitted). Where there is room for two opinions, the action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached. *Id.* In *Heimiller v. Department of Health*, 127 Wn.2d 595, 609-10, 903 P.2d 433 (1995), The court held:

"Action taken after giving respondents ample opportunity to be heard, exercise honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious."

5. The scope of remedies available to the Appellant is also limited. The court has held:

"The court may not substitute its judgment for that of the board, and direct that licenses be issued to appellants, or to any particular person, or that any definite number of pilots be licensed, or fix any definite time and examination shall be held, or prescribe the general conditions under which such examination shall be conducted." *Sater* at 700-701.

6. In this case the Board has exercised its lawful discretion in developing a training program that appears to this Tribunal to be an excellent tool for training and evaluating trainees and providing feedback to the TEC, the Board and the trainee. The system has numerous checks and balances and allows for no single factor or person to be determinative of the outcome. All decisions were ultimately made by a majority of the members of the Board after having received input from the TEC and after having engaged in its own review of the data. There is no persuasive evidence that the Appellant was not trained or evaluated properly. There is certainly no evidence whatsoever of arbitrary or capricious conduct by the Board or the TEC nor is there any evidence of a bad motive on their part. On the contrary, the evidence is clear that the TEC and the Board went to great lengths and at considerable time and expense to facilitate the successful completion of the Appellant's training program. That program was extended four different times during which the Appellant was given training trips to assist him in those areas where he had experienced difficulties. The Board refused to even make a decision on licensure until they heard from the Appellant. The Board was under no obligation to be so solicitous and was obviously trying very hard to assist the Appellant in

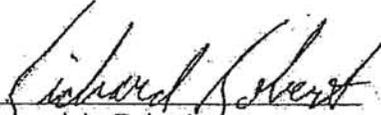
attaining their mutual goal of him receiving a marine pilot license. It is therefore concluded that the Appellant has failed to meet his burden proof.

7. I have considered all the arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect the party's rights

INITIAL ORDER

The Board of Pilotage Commissioner's December 15, 2008 decision to deny the Appellant, Bruce Nelson, a marine pilot license is affirmed.

SERVED on the date of mailing, August 13, 2010.


Richard J. Roberts
Administrative Law Judge
Office of Administrative Hearings

A copy was sent to:

Bruce Nelson, Appellant
Mary Ruth Mann, Appellant Representative
Board of Pilotage Commissioners, Respondent
Guy Bowman, AAG, Respondent Representative

APPEAL RIGHTS

This is an Initial Order. The file, record of proceedings, and exhibits will be forwarded to the Board of Pilotage Commissioners for preparation of a final order.

Pursuant to RCW 34.05.464 and WAC 10-08-211, any party to an adjudicative proceeding may file a petition for review of an Initial Order. The petition for review shall be filed with the agency head within twenty (20) days of the date of service of the initial order. The address for the agency head is:

Harry Dudley, Chairman
Board of Pilotage Commissioners
2911 Second Avenue
Seattle, WA 98121

Copies of the petition must be served upon all other parties or their representatives at the time the petition is filed. The petition for review must specify the portions of the initial decision to which exception is taken and must refer to the evidence of record which is relied upon to support the petition.

Any party may file a reply to a petition for review. The reply shall be filed with the office where the petition for review was filed within 10 days of the date of service of the petition and copies of the reply shall be served upon all other parties or their representatives at the time the reply is filed. A petition for review or reply filed at the address of the Office of Administrative Hearings shall be deemed service upon the agency head. The petition and reply shall be consolidated with the hearing file for presentation to the Board.

CERTIFICATE OF SERVICE

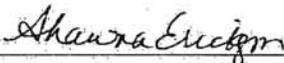
This certifies that a copy of the above Initial Order was served upon the parties or their representatives on August 13, 2010, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

CERTIFICATE OF SERVICE

I certify that I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

| | |
|--|---|
| Guy Bowman PO Box 40113 Olympia, WA 98504-0113 GuyB1@ATG.WA.GOV | Via Email and U.S. Mail ONE COPY |
| Harry Dudley, Chairman Board of Pilotage Commissioners 2901 Third Avenue, First Floor Seattle, WA 98121 | Via Hand-delivery ONE COPY |
| Mary Ruth Mann MANN & KYTLE, PLLC 200 Second Avenue West Seattle, WA 98119 mrmann@mrmannlaw.com | Via Email and U.S. Mail ONE COPY |
| Captain Bruce Nelson c/o Mary Ruth Mann MANN & KYTLE, PLLC 200 Second Avenue West Seattle, WA 98119 | Via U.S. Mail ONE COPY |
| Judge Richard J. Roberts Office of Administrative Hearings 221 N. Wall Street, Suite 540 Spokane, WA 99201-0826 | Via U.S. Mail ONE COPY |

DATED this 19th day of December, 2011.



 Shawna Erickson, Sr. Project Director
 Board of Pilotage Commissioners