

68701-8

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No. 68701-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CAPTAIN BRUCE NELSON,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE
BOARD OF PILOTAGE COMMISSIONERS,

Defendants/Respondents.

BRIEF OF APPELLANT CAPTAIN BRUCE NELSON

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INTRODUCTION

Captain Bruce Nelson applied to be a Puget Sound Pilot in 2005. He passed the qualifying written test and simulator examination and was ranked number 9 of eighteen successful applicants based on merit. As a result, he was accepted into the Board's pilot trainee program. After Capt. Nelson successfully completed the trainee program, he was not licensed but instead was held in the trainee program on continued extensions. If he had been evaluated and treated as other trainees prior to and after him, he would have been licensed. During extensions, he opposed the different treatment, concerned he was being set up for failure. In April 2008, he was removed from training and finally denied a license in December 2008.

Capt. Nelson sought administrative review. Evidence and issues of different treatment, retaliation, discrimination and age bias were excluded from administrative review, which was still incomplete in 2011. As the statute of limitations approached, this suit was filed alleging civil claims primarily arising under RCW 49.60. Shortly before the scheduled trial date, the trial court granted summary judgment for the Board, including res judicata and collateral estoppel as bases. This appeal followed.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment, dismissing Captain Bruce Nelson's civil suit alleging discrimination, retaliation, and

denial of equal treatment in the Board's maritime pilot trainee program and pilot licensing, in violation of RCW 49.60, *et seq.* and Article I, Section 12 of the Washington State Constitution.

2. The trial court erroneously applied *res judicata* and collateral estoppel in dismissing Capt. Nelson's case.
3. The trial court erred in denying reconsideration of the order that dismissed Capt. Nelson's lawsuit.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does Capt. Nelson raise a genuine issue of material fact as to whether he was treated differently than other pilot trainees? Yes.

(Assignment of error number one and number three)

2. Does Capt. Nelson raise a genuine issue of material fact as to whether age, perceived disability, gender, or opposition to discrimination were "substantial factors" in the Board's different treatment of him? Yes.

(Assignment of error number one and number three)

3. May *res judicata* or collateral estoppel bar a case brought under RCW 49.60, if evidence of disparate treatment was excluded at the behest of the Defendant employer in the administrative proceeding, and issues heard and decided by the ALJ excluded discrimination and retaliation?

No. (Assignment of error number one, number two, and number three)

4. May collateral estoppel preclude a civil suit with no identity of claims, no identity of issues, and procedural irregularities in the prior proceeding, and where the proposed estoppel would cause grave injustice and deny a hearing on the merits? No. (Assignment of error number one, number two and number three)

STATEMENT OF THE CASE¹

A. The Board of Pilotage Commissioners has a long history of discrimination in awarding valuable Puget Sound Pilot licenses.²

Since the agency's inception, the Washington State Board of Pilotage Commissioners ("the Board") has required political, legal, and judicial intervention to prevent the unequal treatment of applicants for pilot licenses. The legislature created the Board in 1935,³ the same year a private organization, the "Puget Sound Pilots" ("PSP"), was created.⁴ The

¹ The record for this appeal of the trial court's summary judgment order is quite long. The duration and complexity of the litigation, which includes both an administrative appeal and a separate civil suit, has resulted in a record of nearly 6,000 pages.

² The U.S. Supreme Court once referred to a study by the Department of Commerce that observed "that membership of pilot associations 'is limited to persons agreeable to those already members, generally relatives and friends of the pilots. Probably in pilotage more than in any other occupation in the United States the male members of a family follow the same work from generation to generation.'" Kotch v. Board of River Pilot Comrs., 330 U.S. 552, 562-63, 67 S.Ct. 910, 91 L.Ed. 1093 (1947).

³ Application of the Puget Sound Pilots, 63 Wn.2d 142, 143, 385 P.2d 711 (1963).

⁴ CP 1865, at fn. 3, citing http://www.pspilots.org/about_history.html. The Puget Sound Pilots organization is "either a partnership or an unincorporated association." Walsh v. Zuissei Kaiun K. K., 606 F.2d 259, 264 (9th Cir. 1979). "The income of the association is derived from fees earned by its pilots. The fees are paid to and pooled by the association. The association deducts all expenses involved; the net remaining is divided equally between the remaining active pilots." Grandy v. Luther, 12 Wn. App. 542, 543, 530 P.2d 679 (1975). Still today, the Puget Sound Pilots include many relatives. CP 1241-42, 3154.

Washington State Supreme Court has found that members of the Board who are Puget Sound Pilots or representatives of the “vessel operators” who hire Pilots “cannot be expected to be impartial or disinterested. ... [T]hey ... sit on the board more as advocates than as judges.”⁵

In 1937, the Board wrote to the Attorney General for “an opinion upon the legality of ... whether or not [the Board] could fix a maximum age limit of fifty (50) years or over for all applicants seeking a State Pilots License” Ops. Att’y Gen. 1937-38, 230-31 (attached at Appendix). The Attorney General responded that the legislature had not (yet) “included a maximum age limit or an age beyond which an applicant is disqualified” *id.* at 232; and that the Board “cannot fix a maximum age limit of fifty [50] years for applicants.” *Id.* at 234.

In 1939, the Washington State Supreme Court reviewed a case in which the Board “excluded ... qualified applicants” and limited pilot licensing to a “selected group of favorites.”⁶ In that case, State ex rel Sater v. Bd. of Pilotage Cmrs., the Court held that a pilotage licensing decision made according to “any officer or set of officers[’] ... own notions in each particular case” violates § 12, of article 1, of the Washington State Constitution, which states that “No law shall be passed granting to any

⁵ Application of the Puget Sound Pilots, 63 Wn.2d at 145.

⁶ State ex rel. Sater v. Bd. of Pilotage Cmrs., 198 Wash. 695, 699, 704, 90 P.2d 238.

citizen... privileges or immunities which, upon the same terms, shall not equally belong to all citizens” 198 Wash. at 702.

The legislature made “sweeping” reforms to the Pilotage Act in 1977, including mandating Senate confirmation of the Governor’s appointments to the Board.⁷ The Washington State Supreme Court wrote that “[t]he comprehensiveness of the changes made [in 1977] indicate[d] a dissatisfaction by the legislature with the [B]oard and its operations.”⁸

In 1978, the Washington State Supreme Court heard another appeal challenging the Board’s system for licensing pilots. In that case, Bock v. State Bd. of Pilotage Cmsrs., the Court indicated that the Board’s grading system for licensing examinations was “flawed by irregularities and ambiguities” and the Court reiterated the holding from Sater, writing that the “[t]he Board ... has a duty to compose, administer and grade its examinations [for pilotage licensing] in a fair and consistent manner.”⁹

In 1981, the legislature fixed an age limit on issuing a pilot’s license to any person aged seventy (**70**) or older, which today remains the age limit for pilots.¹⁰ In 2011, the Board adopted WAC 363-116-086 (“Challenges to Board Actions Concerning Licensing Determinations and Appeal Procedures”), which masks violations of the 1978 standard by

⁷ Luther v. Ray, 91 Wn.2d 566, 567, 588 P.2d 1188 (1979).

⁸ Luther, 91 Wn.2d at 570.

⁹ Bock v. State Bd. of Pilotage Cmsrs., 91 Wn.2d 94, 100, 586 P.2d 1173.

¹⁰ Laws of 1981, ch. 303, § 1; RCW 88.16.090(2)(a)(ii).

prohibiting “[c]omparisons between trainees’ performances in their respective training program ... during any proceeding involved in the review process.” WAC 363-116-086. Presently, Puget Sound Pilots licensed by the Board earn up to \$400,000 a year.¹¹

B. The Board defies legislation which would disclose age bias.

Under the Pilotage Act, the Board must “[f]ile annually with the governor and the chairs of the transportation committees of the senate and house of representatives a report [that] includes ... the ... names, ages, ... and years of service of any person licensed by the board as a Washington state pilot or trainee.” RCW 88.16.035(1)(f). The Board “admits that since 2005, [its annual] report has not included the ages of persons licensed by the Board as a Washington state pilot or trainee.” CP 2826; CP 2843.

Still, Pilotage Commissioner Ole Mackey testified that the “average age” of the pilot corps meant “retirements coming up” and that the Board had “to get new pilots coming into the system, ... because us kids [‘the baby boomers’] are getting old.” CP 1457-58 (at 23:21-24:8, 25:17-24). Pilotage Commissioner Charles Davis testified, “[W]e were all concerned about the average age [‘of the existing licensed pilots’], because we could see a block – a period over a few years where a huge block of pilots would reach retirement age.” CP 1366-67 (at 68:22-69:6).

¹¹ See CP 1055, and 1250-52, showing pilot earnings for 2007 (\$411,398), 2008 (\$404,448), and 2009 (\$373,264).

Capt. John Scraggs, a member of the Puget Sound Pilots who was involved in developing the simulator test exercises for the Board's 2005 qualifying exam, testified that he may have heard discussion related to wanting to have younger pilots in the Puget Sound Pilots.¹²

C. The Board begins training and licensing new pilots, while stereotyping older pilots, as "less able to handle the rigors of being overworked" and needing time off for health issues.

In April 2005, the legislature amended the Pilotage Act to require the Board to "establish a comprehensive training program to assist in the training and evaluation of pilot applicants before licensing." Laws of 2005, Ch. 26, §§ 1-2; RCW 88.16.035(2)(b), RCW 88.16.090(2)(a)(iv).

The Puget Sound Pilots' Executive Director wrote to the Puget Sound Pilots who sit on the Board as Pilotage Commissioners, *inter alia*:

One of our goals in promoting the new plan was to get PSP and its members out of the pilot selection process, except as clear[ly] defined agents of the [Board] in evaluating applicants in the training program. This protects the [PSP] association from charges of favoritism, discrimination, ... etc. ... [as] pilots act[] behind the shield of the [Board]. ...

CP 3060. The Puget Sound Pilots also wrote the Board with a proposed change to the training program, seeking to avoid the potential for "making a 'federal case' out of a negative [training trip] report."¹³

¹² CP 2721 (at 130:8-131:2); and CP 2717 (at 82:23-84:9)

¹³ CP 2898; see also CP 1670 (making the change that Puget Sound Pilots proposed).

In June 2005, the President of the Puget Sound Pilots wrote the Board's chairman that the State's pilots were "understaffed" and "two pilots short" of the number required to operate under the "safe assignment level" then in place. CP 2882. Two months later, the "minutes" of the Board's August 2005 meeting state, in part:

There is currently a severe shortage of pilots in the Puget Sound Pilotage District. It is difficult to predict the full extent of this shortage, but it appears that it will be:

Today through October, 2005	5 pilots short
Oct through March	4.6 pilots short
March until licensing of new pilot	5.6 pilots short

... There are numerous facts ... that have created the current crisis:
...

11. The Puget Sound pilot corps is **aging**. Retirements, anticipated and unanticipated will further deplete the number of pilots before new licenses can be issued. ... [M]edical problems could have impact. Puget Sound Pilots no longer has the flexibility to absorb extra load caused by a temporary medical absence of a pilot.¹⁴

Commissioner Davis testified about discussions among the Board concerning older pilots "not [being] as willing as some of the younger pilots to come back in order to do ... extra duty" and needing "extra time off" to rest and recover. CP 1367 (at 69:24-70:4, 70:23-71:5).

In July 2006, the President of the Puget Sound Pilots responded to the chairman of the Board of Pilotage Commissioners, *inter alia*:

The age and health of the pilot corps indicate ... that a Safe

¹⁴ CP1532-33.

Assignment Level is in need of change.

...
... [O]ur pilot corps has aged. At the end of 1995 when the current Safe Assignment Level was adopted, the average age of our pilot corps was 49. Today it is over **56**. This is a significant factor for two reasons.

- Unfortunately, older pilots tend to be less able to handle the rigors of being overworked and take longer to recover.
- Secondly, older pilots lose more work time to health issues. PSP's medical leave experience is worsening. ...

CP 1068, CP1070. (Emphasis added).

In September 2006, Commissioner Snyder, a Puget Sound Pilot And chairman of the Board's Training Evaluation Committee ("TEC"), sent an email entitled "Fatigue" to the PSP's Executive Director, attaching an article which *inter alia*, cited a study that found "in particular for older pilots[,] ... work load could become irresponsibly high...." CP 1087, 1094.

D. The Board selects Capt. Nelson as #9 of 18 in the 2005 Trainee Class based on validated objective examinations and begins training new pilots to fill a limited number of Pilot Licenses.

In November 2005, the Board's examinations were held. CP 1248. The Board ranked the trainees on a "waiting list" for entry into training in the order of their total combined score on a validated written examination and validated simulator evaluation. Id.¹⁵ Capt. Nelson ranked ninth (9th) among the eighteen (18) successful applicants.¹⁶

¹⁵ See CP 3489; accord Mann Decl., Exh. 30, at pp. 15.

¹⁶ CP 370-71, at ¶¶ 5-6; and CP 1248.

To become a fully licensed pilot, Capt. Nelson and the others qualified applicants were required to work as trainee pilots aboard vessels and to “[s]uccessfully complete[] a board-specified training program.”¹⁷ While in training, each trainee receives a stipend of \$6,000 per month.¹⁸ Commissioner Charles Davis testified that with regard to the pilot training program, “the only requirements that were ever set out for [Capt. Nelson] were to complete a certain number of trips. And so the performance was never set out as a formal requirement.” CP 1362. Without any “formal” performance requirements or standards adopted by administrative rulemaking, the Board maintains that its alleged standard of “successful completion” is met whenever the politically appointed Board members “determine that it should be ‘the collective judgment of the Board ... [that] the standard is met.’”¹⁹

E. Trainees were assigned to a substantially identical template of training trips.

Craig Lee, a Pilotage Commissioner and member of the Board’s Training Evaluation Committee (“TEC”), testified that the training programs the Board assigned to trainees followed “a template. ... [T]here are so many designated ships, you have to do the waterways, there’s so

¹⁷ CP 1396-97 (at 127:10-128:24), quoting RCW 88.16.090(4) and WAC 363-116-078(15)(a).

¹⁸ See, e.g., CP 348; CP 90, at lines 13-17; and CP 166, lines 21-22.

¹⁹ See CP 1370 (86:17-25); CP 1396-97 (at 127:10-128:24).

many designated trips through Guemes Channel and to certain docks and certain routes. So there is a syllabus that they follow....” CP 1340 (at 26:8-13). Board Chairman, Capt. Harry Dudley, similarly testified that the Board “knew that everybody [all trainees], regardless of their background, [were] going to need a certain number of trips in certain waterways.” CP 1273 (at 20:6-8). The program provided for “a minimum of 130 [training] trips with licensed Puget Sound Pilots over a minimum seven-month period.” CP 346. Regulations allowed a maximum of 36 months on stipend for “successful completion.”²⁰

The Board issued Capt. Nelson a training program with a start date of January 1, 2007.²² The program was based on the “template,” giving him the exact same “training trip” requirements as the trainees who ranked seventh (7th), twelfth (12th) and thirteenth (13th).²³ The Board also issued training trip requirements to the trainees ranked eighth (8th) and tenth (10th) on the waiting list that were “identical” to Capt. Nelson’s program “except for the difference in the area selected for their initial evaluation.”²⁴

The other pilot trainees placed on the waiting list based on the Board’s

²⁰ CP 1650; former WAC 363-116-078(8)(a).

²² CP 458.

²³ See CP 2833-34; and compare CP 2957-64 with CP 2931-55. (The same documents were earlier filed by Capt. Nelson at CP 458-65, CP 473-80, CP 466-72.) See also CP 1385 (Capt. “Wildes training [program] is identical to that of Capt. Nelson.”)

²⁴ See CP 2833; and compare CP 2957-64, with CP 2975-82 and CP 2967-74. (The same documents were earlier filed by Capt. Nelson at CP 458-65, CP 442-49, CP 450-57.)

2005 examination “still had basically the same number of [training] trips” with “minor tweaking” based on each trainee’s prior work experience. CP1339 (at 21:6-11), CP 1340 (at 26:9-19).²⁵

All of the trainees worked with the same group of evaluators, licensed pilots known as training or supervising pilots, who documented the trainee’s performance on a “Pilot Trainee Training Trip Report” using numerical ratings (1 to 4, then later 1 to 7),²⁶ adjective ratings (“Ready,” “Above average” “Average” “Below Average”); and narrative comment. See, e.g., CP 1079-83. All of the information regarding a trainee’s performance in training is compiled from all of the training trip reports and made into an “Excel” electronic spreadsheet that is provided to the TEC and the Board.²⁷ “Print-outs” of the individual spreadsheet for each member of the Board’s 2005 class are attached as Exhibits 1 to 18 to the Declaration of Mary Ruth Mann (“Mann Decl.”).²⁸

F. Trainees are successfully rushed to licensing, regardless of taking time off, having low trip ratings, and having problems documented in “notes” by supervising pilots late in their training.

²⁵ See also CP 2384; and compare CP 2957-64, with CP 2985-3000. (The same documents were earlier filed at CP 458-65, CP 498-507 and CP 482-89).

²⁶ CP 5197 (at 108:12-16); see also CP 1177.

²⁷ See, e.g., CP 195-196; CP 170 (121:18-23); CP 1393 (at 17:2-7); CP 1359 (at 32:14-18); CP 1398 (at 179:1-3); CP 1298 (at 64:10-14); CP 1425 (189:13-15).

²⁸ **Mann Decl. is an “unscannable document sent as original to Court of Appeals.”**

Several of the pilot trainees in the 2005 class were seven (7) to fourteen (14) years younger than Capt. Nelson,³⁰ and still had documented problems late in their training. The Board accepted “successful completion” of the assigned trips, and licensed the younger pilots.

1. Comparator Capt. 1 was rated as “below average” after his trainer made an “intervention” on a trip less than two weeks before he was licensed.

On July 13, 2006, after the trainee who ranked 1st on the Board’s waiting list (“Capt. 1”) violated rules by keeping trip evaluation reports,³¹ but completed all of the trips in his initial training program; the Board “determined that [Capt. 1 was] in need of more training and further evaluation.” CP 1558. Capt. 1 was provided “a ship handling seminar conducted by a pilot member of the TEC” and required to complete 20 additional trips beyond his initial program, for further evaluation. *Id.*

The day after the Board “extended” Capt. 1’s training program for further evaluation, TEC member and Commissioner, Capt. Pat Hannigan, wrote the other TEC training pilots about Capt. 1’s training program, stating in part, “The Puget Sound Pilot district needs pilots and ... would love to have [Capt. 1] licensed as soon as practicable.” CP 1075.

³⁰ CP 3444; CP 3447; CP 374; CP 1973.

³¹ CP 1073; see also WAC 363-116-078(13).

Approximately two weeks later, on July 28, 2006, Comparator Capt. 1 made Trip No. 162 as part of his 20 additional trips. His training pilot, Capt. Mayer wrote about Trip No. 162 trip, among other things:

The ship gathered speed ... and it was about half way between the two docks that I became uncomfortable with the ship's increasing speed and the fact that the ship had a slight angle toward the Shell dock. At the time I told Capt. [1] to stop the ship's engine there was no clear sign that he was focusing on the increasing speed or about to give the order to reduce, but was rather looking directly astern at a range he had on the beach. (What I consider a clear sign of speed control concern is either taking visual cues off the water or objects near by, or checking speed instrumentation.) After a short distance, Capt. 1 applied a series of ahead bells... stopping the astern motion about 150 feet past the mark. ...

CP 1083; accord Mann Decl., Exh. 1, at Trip No. 162.

Capt. Mayer wrote about the same training trip of Capt. 1 in an email to the two Puget Sound Pilots³² who sit on the Board and the TEC:

The job was rapidly approaching a speed that, if the ship took a sheer, I would have been hard pressed to check it.... If he had been looking around and outwardly concerning himself with the speed, I might have thought a stop bell was on his lips. ... [H]e was looking at the shore directly astern, 'a range', he said. Don't ask me why when he was no more than two ship lengths from the dock. This was something I might have expected earlier on, perhaps even midway, not now. I have no axe to grind with this guy and was hoping I would not be adding any fuel to the fire and would be writing a good report.

CP 4343.

³² CP 243 (shows recipients Niederhauser, Hannigan, and Kromann as "pilots" on TEC).

For his performance on Trip No. 162, Capt. 1 received scores of “2” on a 4-point scale for “speed control;” “use of power and rudder;” and “quality of approach.” CP 1080-81. On the same trip, Capt. 1 was also marked as having an “intervention needed to prevent damage or to stop a dangerous situation from developing,” CP 1082; and he was rated overall for the trip as “below average.” *Id.*; accord Mann Decl., Exh. 1, at 162.

Less than two (2) weeks later, at the next Board meeting, without any additional training requirements, the TEC gave a “recommendation” in favor of licensing Capt. 1 and the Board issued him a pilot’s license.³³ The objective ratings show that during the last two months of Capt. 1’s initial training program he received 53 ratings of “2” and 16 ratings of “1” on a 4-point scale, and was marked as having three “interventions” by supervising pilots.³⁴ During the 20 training trip “extension” that preceded his licensing, Capt. 1 received an additional 27 ratings of “2” on a 4-point scale and was marked having another “intervention.” *Id.* At the time of licensing, he was 40 years old and the Puget Sound Pilots corps’ average age was over 56.³⁵

2. Capt. 6 had two “below average” ratings shortly before he was licensed.

³³ CP 4412.

³⁴ Mann Decl., Exh. 21. Accord *id.*, Exh. 1.

³⁵ CP 3444; CP 3447; CP 1070.

The trainee who ranked 6th on the Board's waiting list ("Capt. 6") was rated as "BA" (or "below average") on two training trips made within the last 10 days of his training program. The licensed pilot who evaluated the first of these "below average" trips (Trip No. 130), wrote in part:

[T]his trainee's performance during approach and docking was disappointing for this late stage of training. Trainee did not have good control of ship on approach and exhibited a lack of understanding of basic ship handling characteristics. At times tug use was inappropriate and ineffective. Trainee did not follow some specific instructions given before and during docking evolution.

Trainee speaks too quietly, especially during approach and docking. At least twice helmsman asked for a repeat or confirmation of a rudder command. I have spoken to this trainee on prior trips concerning this.

... Once on approach mistakes were made, not recognized and/or corrected appropriately. For example: During turn for a port side to approach at CP, trainee stopped ship's engine with about 25° to go. Vessel swung by the intended course as speed was < 4 kts. Trainee continued to try to steady ship with rudder and then tugs (inappropriately). Trainee is clearly still uncomfortable to a high degree with shiphandling.

Mann Decl., Exh. 6, at "BPC-130"; accord *id.*, Exh. 20B, at BBB2-BBB3.

Six days after Capt. 6 made the above trip, his supervising pilot on Trip No. 136 marked him as "below average" again, writing, *inter alia*:

Trainee is still over dependent on radar, even in close-in piloting situations. ...

Trainee exhibited poor situational awareness and judgment concerning a small vessel overtaking situation approaching the [pilot station]. When turning at R, trainee gave a rudder command

and course while walking out to the bridge wing, with his back to helmsman and RAI. No verification of proper helmsman action.

Trainee is still tentative in his maneuvering of the ship. Possible lack of confidence. Once turned off the berth, ship was accelerated to a speed (9 kts) - marginal for still having tugs alongside.

... [T]rainee seems to be tentative with his handling of ship and tugs. Poor situational awareness exhibited at R and approach to the pilot station....

Mann Decl., Exh. 6, at “BPC-136;” accord *id.*, Exh. 20B, at BBB3.

Five days later, the TEC recommend in favor of licensing Capt. 6, and the Board licensed him. CP 1558. The objective ratings show during his last two months of training, out of a 4-point scale, 169 ratings of “2” and 5 ratings of “1.” Mann Decl., Exh. 21; and *id.*, Exh. 6. At the time of licensing, Capt. 6 was 45 years old and the Puget Sound Pilots corps’ average age was “over 56.”³⁶

3. Capts. 7 and 8 were deemed successful simply by repeating trips for which they had “difficulty” and were not held back; as the Training and Evaluation Committee discussed “manpower needs” and kept its “eye to[ward] licensing [them] ASAP.”

Comparators “Capt. 7” and “Capt. 8” each “had some difficulty” on training trips late in their training, and each was directed to “repeat” a

³⁶ CP 3444; CP 3447; CP 1070.

specific training trip. CP 1600; CP 1109; CP 1111.³⁷ The supervising pilot for Capt. 8 indicated that Yes, an “intervention [was] needed to prevent damage or to stop a dangerous situation from developing?”³⁸ and commented that “[t]here were several occasions where I stepped in and verbally told Capt. [8] what to do. ... We very well might have made contact with the ‘Tilbury barge’ without some coaching.”³⁹

Despite allowing replacement “repeat” trips, the TEC “review[ed] [Capt. 7 and Capt. 8’s] training trips for gaps and missed ports with an eye to licensing them ASAP.” *Id.* The TEC “discussed ... methods and possibilities of getting [them] licensed before the [Board’s] May 23 meeting” before they repeated trips of the ones they had documented difficulty on. CP 1600. As the TEC discussed “licensing them ASAP,” it was also discussing the “manpower needs” for pilots. CP 1758; CP 1601.

Less than two weeks after Capts. 7 and 8 were assigned “repeat” trips, on April 26, 2007, TEC Chairman Capt. Snyder wrote them, “Once you are certain you have made all of your training trips you can kick back and take a well deserved rest. ... I do not know when we will be able to license you. It would be 23 May at the very latest.” CP 1116. The next

³⁷ Capt. Snyder, chairman of the TEC, wrote to Capt. 7, *inter alia*, that “[o]ne recent trip caused us some concern. ... There is a danger in becoming too fixated on radar and electronic charts at the exclusion of visual analysis.” CP 1111.

³⁸ See CP 5775 (at BL6, “Y=Yes (please comment)”; Mann Decl., Exh. 8 at Trip No. 117 (SUM 6 marked “Y”), related to “Intervention” described at CP 5794 (BO124-117).

³⁹ CP 5794; CP 1873, n. 70; Mann Decl., Exh. 8, at 117.

day, April 27, 2007, was the last day either trainee made any training trips,⁴⁰ yet they were licensed without dissent. CP 1564.

It was nearly three weeks after Capt. Snyder's email containing the predetermination of the May licensing of Capt. 7 and Capt. 8 that the Board's administrator first provided those trainees' evaluations to the TEC and Board for review. CP 1123. On May 20, 2007, Capt. Snyder again prejudged their licensing in the "agenda" for the next TEC meeting, stating that "the three main objectives" for the meeting included "Approve [Capt. 7] and [Capt. 8] licensing." CP 1125. The next day, the TEC met and it reviewed the trip evaluation summaries of Capt. 7 and Capt. 8, after which the TEC approved each for licensing. CP 1602. The Board licensed Capt. 7 (then 47 years old) and Capt. 8 (then 44 years old) at its May 23, 2007 meeting. CP 3444; CP 3447; CP 1564.

- G. In September 2007, the three (3) members of the Board's Training and Evaluation Committee ("TEC") who are licensed pilots (Capts. Hannigan, Snyder, and Kromann) find Capt. Nelson has successfully completed training and recommend to the Board that Capt. Nelson be licensed as a pilot.

On September 6, 2007, four members of the Board's Training and Evaluation Committee ("TEC") held a conference call to discuss licensing the 9th person to enter pilot training, Capt. Bruce Nelson. CP 1335. Two of the licensed Puget Sound pilots who sit on the TEC and who are both

⁴⁰ See Mann Decl., Exhs. 7 and 8.

Pilotage Commissioners, Capt. Pat Hannigan and Capt. William Snyder, provided the same opinion, stating, in part:

Captain Nelson is ready for licensing. Evaluation reports from senior pilots have indicated that Capt. Nelson is ready. ... [H]e is doing what is required of him. ... [H]e meets the requirements to be a licensed pilot. ...

CP 1335.

The third member of the TEC who is a licensed Puget Sound Pilot, former Pilotage Commissioner⁴¹ Capt. Rob Kromann, was absent for the TEC's September 6th conference call. However, Capt. Kromann wrote in an email on the same day to all of the TEC members, in part, that "Nelson's evaluations for the last month seem to indicate things have been going reasonably well for him;" and that so long as Capt. Nelson had completed all of the training trips he was assigned, then Capt. Kromann believed that Capt. Nelson "should move on to being licensed." CP 1165.

One week after the TEC conference call and Capt. Kromann's email, the Board received the TEC's recommendation for licensing Capt. Nelson. The "minutes" of the Board's September 13, 2007 meeting state the TEC recommended "3 to 2 in favor of licensing Capt. Nelson." CP 1567. Capt. Kromann tells Capt. Nelson, "I thought we had you licensed back in September." CP 1474 (at 20:4-15).

⁴¹ CP 5322 (at 104:23-105:2).

- H. The two (2) TEC members who are not Puget Sound Pilots or licensed by the Board opposed Capt. Nelson's licensing using different criteria not applied to younger pilots.

During the TEC's September 6, 2007 conference call, Pilotage Commissioners (and non-Pilot TEC members)⁴² Ole Mackey and Craig Lee mentioned one of many pretextual reasons for denying a license to Capt. Nelson, such as "his most recent evaluations were **not unanimous**," CP 1335, where other trainees did not receive unanimous "ready" evaluations and were licensed.⁴³

1. **Commissioner Lee votes against Nelson, citing pretextual factors and age related stereotypes of taking "days off" from piloting, which he relates to "stress," "attitude," or absence of "extra trips."**

Commissioner Lee emailed about licensing Capt. Nelson, that Capt. Nelson "[t]ook 11 days off ... without an assignment (is he stressed out as a trainee?)" CP 1140. Commissioner Lee also wrote in his email that it "[a]ppears [Capt. Nelson] is only doing the bare minimum assignments" and not "doing extra trips" beyond those. *Id.* Those assertions were pretextual as Capt. Nelson "was assigned only 15 trips with [his] July 'extension'" and completed at least 18 trips.⁴⁵ Capt. Nelson

⁴² See CP 1340 (25:1-2); CP 1345 (72:4-7); and CP 1458 (at 26:1).

⁴³ See Mann Decl. Exh. 21; and compare final column of spreadsheets of Capt. Nelson (Mann Decl., Exh. 9) with Capt. 6 (*id.*, Exh. 6), Capt. 1 (*id.*, Exh. 1); and Capt. 18 (*id.*, Exh. 18). See also *id.*, Exh. 20A-20D. Accord *id.*, Exh. 30, at pp. 43, 51.

⁴⁵ CP 509; CP 1474 (at 23:9-13); CP 1439-40 (at 116:24-117:1, 117:19-21).

in fact only took “seven days off, which got misrepresented to 11.”⁴⁶

Commissioner Lee summarized the stereotypic and pretextual reasons by stating, in part:

I don't feel comfortable licensing him this month but also don't know what type of additional specific training to recommend. This could be an 'attitude' which, if so, could be difficult to correct. If stress is the problem how will he cope if licensed?

CP 1140.

Commissioner Hannigan responded to all on the TEC, stating in part:

I have been in fairly constant contact with Capt. Nelson and with the pilots who he is training with.

It was at my suggestion that he took a week off after the end of his seven month training program as I thought that a 'fresh start' for the extra month [of training] would do him good. So it wasn't an issue of him feeling stress. ... [T]hat hiatus in trips is primarily a function of his taking my advice. ...

Capt. Kromann, Snyder and I have also been tracking his progress on his extra trips on an individual basis and trying to debrief each trip with the [training] pilot to really flesh out the details of the experience. ... By and large the reports we are getting back from these pilots [about Capt. Nelson] are quite positive....

CP 1139-40.

Commissioner Lee irrationally objected to a “ Pilot [member of the] TEC suggesting [that] a trainee take time off,” CP 1138-39, despite the fact that younger trainees had taken even more and longer time off

⁴⁶ CP 1495 (at 98:7-9).

between training trips.⁴⁷ Capt. Hannigan firmly responded again that he “wanted the TEC to know ... [he] made this recommendation so that they would not be viewing negatively the days after [Capt. Nelson] completed his initial [training] program when he [was] not rid[ing]” ships. CP 1138.

2. Commissioner Ole Mackey also opposes Capt. Nelson’s licensing based on his having taken “days off,” even though Mackey “realized other people did it.”

Ole Mackey, “a layman representing the public,”⁴⁸ was the only other TEC member opposed to licensing Capt. Nelson in September 2007. CP 1335. Mackey testified that he and Lee “were sitting pretty much in the same place” on the issue of Captain Nelson taking time off. CP 1457 (at 20:18-21:5). Mackey testified, “That’s why we have the process, and it’s built in, so if you can’t handle stress, you shouldn’t be there.” CP 1457 (at 22:24-25) Despite the fact that Pilots have required “rest rules” to assure adequate time off for safety,⁴⁹ Commissioner Mackey stated an unsafe and absurd personal standard presenting a terrifying image of Puget Sound Pilots collapsing from illness and exhaustion at the helm of oil tankers.

Mackey testified that “you’ve got to plow through it. ... I got prostate cancer, and I still had to keep [my] shop running; okay? There was no days off except when ... I physically couldn’t walk. So I apply that

⁴⁷ See Mann Decl., Exh. 24. Accord *id.*, Exh. 1, Exh. 16, Exh. 15, Exh. 8, Exh. 7, Exh. 6, and Exh. 3. See also CP 2731-2732, and CP 1455. CP 3444; CP 3447.

⁴⁸ CP 1332 (at 38:8-10); CP 1338 (at 20:2-5); CP 1458 (at 26:1).

⁴⁹ See CP 1348 (111:23-112:12).

to everybody else, but I'm here and I'm healthy.... ." CP 1457 (at 23); Mackey twice left Swedish Hospital "white as a sheet, I had stints put in, and came to the Pilot Commission meeting right straight out. ... [I]f I can be there out of Swedish Hospital twice, why would I let anybody else off the hook who wants to take time off;"⁵⁰ Nelson was in "boot camp. You can't take time off at boot camp." CP 1328 (at 24:1-2); "I wouldn't take any time off. I'd drop. ... [W]hen I couldn't get up and go anymore, then that's when I would stop." CP 1456 (at 16:5-9); "So that's the rule. ... [Y]ou've got to keep pushing ahead no matter what...." CP 1456 (at 19:12-25).

Commissioner Mackey admitted different treatment under oath: "I realized other people did it, but it's critical in Captain Nelson's position that taking time off may not have been appropriate." CP 1455 (at 12:13-13:1). Comparator Capt. 1 took four breaks between trips of five (5) days or more; as well as one break of 10 days and another break of 13 days.⁵¹

Capt. 6 took eight (8) days off between training trips two weeks prior to his licensing.⁵² Capt. Bujacich testified about having taken several breaks between training trips without anyone from the TEC or the Board

⁵⁰ CP 1332 (at 38:23-39:6); CP 1455 (at 13:7-12).

⁵¹ Mann Decl., Exh. 24; accord *id.*, Exh. 1.

⁵² *Id.*, Exh. 24. Accord *id.*, Exh. 6.

questioning him about his breaks.⁵³ Capt. Bujacich was asked what he understood to be the “expectations of training” after meeting with Mr. Mackey. Capt. Bujacich testified, “[W]e all were given these [i.e., ‘training program[s]’] with the specific routes and trips that we had to do and we all went about them in our own fashion and time frame.”⁵⁴ Capt. Bujacich was asked, “[D]id you know whether you were allowed to take breaks between trips?” He answered, “Yes... We were given a requirement of so many trips per month to train. And everybody, you know, did their own direction, I guess, you could call it.”⁵⁵

The “reasons” for Lee and Mackey opposing licensing Capt. Nelson lacked credibility and singled him out. Commissioner Mackey admits he did not have a “similar standard” for all of the trainees. CP 1329 (at 25:8-26:21). Nor did Commissioner Mackey inform Capt. Nelson about the unique rules he applied to him. (“I expect you to know ... on your own what you need to succeed. ... [Y]ou shouldn’t have to tell him.”) CP 1457 (at 20:10-11).

⁵³ CP 2732.

⁵⁴ *Id.*

⁵⁵ CP 2731 (at 11:21-12:2).

In September the TEC met with Capt. Nelson, during which time Commissioner Mackey stated “he couldn’t recommend [Capt. Nelson] for licensing because ... [‘][Capt. Nelson] didn’t want it bad enough.[’] ...”⁵⁶

I. Capt. Nelson should have been licensed in September 2007, October 2008, January 2008, and/or April 2008.

Expert David Goodenough, MS, LMHC, BCPC, testifies about his review of the Board’s pilot trainee program and the treatment of Captain Nelson.⁵⁹ Goodenough was found qualified by ALJ Richard J. Roberts to render expert opinions. CP 5234 (at 28:2-14). Goodenough testifies to a “reasonable professional certainty” and on a “more probable than not basis,” that “different treatment” in the trainee program cost Captain Nelson his pilot license.⁶⁰

After Mr. Goodenough reviewed numerous sources of information and standards, identified at pages 10 to 11 of his report, he opined that:

If Capt. Nelson had been evaluated and treated as other trainees prior to him and after him in the Training program he would have been licensed in September 2007, October 2008, January 2008, and/or April 2008.

Goodenough also found an absence of adopted standards for the licensing decision:

⁵⁶ CP 1436 (at 97:13-15; 98:4-13); CP 1427 (at 197:11-14).

⁵⁹ Mann Decl., Exh. 30. Although Goodenough’s written testimony was offered and admitted into evidence, the ruling of the ALJ that excluded all testimony regarding “other pilot trainees” was still applied with respect to Mr. Goodenough’s oral testimony. CP 5229 (7:10-9:4).

⁶⁰ Mann Decl., Exh 30, pp. 2-3; CP 5237 (38:9-14); accord CP 3463.

[T]he Board of Pilotage Commission system for training does not have a set or adopted standard for what level of proficiency, whether adjective or numeric, must be attained for a trainee to be licensed i.e., there is no pass or fail standard. Their system does not set a period of time over which a trainee must consistently demonstrate [a set] level of proficiency.

Mann Decl., Exh. 30, at p. 3.

J. After Capt. Nelson objected to being “singled out” for different criteria and treatment, the Board terminated his training, delayed his licensing, approving younger pilots ahead of him, and then denied him a license.

In spite of the TEC recommendation in favor of licensing him, the motion to license Capt. Nelson in September 2007 failed by a single vote. Three (3) votes were cast in favor of licensing, four (4) opposed. CP 1567. If either Lee or Mackey’s votes were different, they would have changed the outcome of the licensing decision.⁶¹ A third Commissioner, Vince Addington, also voted against licensing Capt. Nelson in September 2007 and adopted Lee and Mackey’s pretextual and stereotypic reasoning, that Capt. Nelson took a “break” from training, indicating “there were issues with stress that might be affecting [Capt. Nelson’s] performance.” CP1464-65 (at 95:1-97:1, 99:19) If Addington’s vote had been different, it also would have altered the outcome of the licensing decision.

After Capt. Nelson’s program was completed, he was delayed in month-to-month “extensions” of his training program. CP 509 (at ¶ 2).

⁶¹ CP 1655, showing WAC 363-116-080(2) (“A majority of board members ... shall pass on the issuance of a pilot license.”). Accord CP 1746 (“majority rules’ vote.”)

After the September 13, 2007 Board meeting, the Board failed to provide him with any reason for their decision not to license, nor any indication as to skill areas upon which he needed to improve. CP 1437 (at 104:17-24). Capt. Nelson's "e-mails went unanswered." CP 1471 (at 9:22). The only feedback he received from the TEC during this period was to "[j]ust keep riding." CP 1438 (at 111:20-112:9); CP 1473 (at 19:18-19).

On September 27, 2007, after receiving a telephone call from Pilotage Commissioner Capt. Hannigan, Capt. Nelson wrote to Capt. Hannigan and the other licensed pilots on the TEC (Capts. Snyder and Kromann), in relevant part:

[T]hinking about this morning's phone call from you in regards to a new emphasis on obtaining excess [i.e., 'extra'] training trips in lieu of specific trips has me puzzled. Since the call took place with four days left in the month and I have [already] four trips to make to get to 18, this seems like an unrealistic expectation. ... I can't help but feel that I am being set up for failure.

CP 1168.

After October 5, 2007, Capt. Nelson had no program for weeks and Capt. Snyder "just told [him] to keep riding, and [he] just kept riding."⁶² Capt. Nelson testified, "I was really just trying to figure out what I could do to please these people, so I kept riding."⁶³ Then Capt. Snyder told Capt. Nelson "to keep out of the way of other trainees," who needed

⁶² CP 1440 (at 120:7-17).

⁶³ Id.

training on the same routes as Capt. Nelson and were now passing him toward licensing, their programs given priority.⁶⁴

On October 25, 2007, in an email to fellow TEC members, Captain Hannigan admitted that it appeared the TEC had “initiated the Vicious Circle of failure” and combined it with the “Heisenberg Principle” when it issued Capt. Nelson extensions, “giving him hard trips the first time and even harder trips the second time.” CP 1170. Capt. Hannigan wrote to the TEC that “we need to do something other than just pile extra difficult trips on top of very difficult trips and expect that we will have a beneficial training experience.” CP 1171. Captain Kromann wrote in response, admitting Nelson was “set ... up for failure by assigning [him] the last group of very demanding, hard to get trips.” CP 1170.

On December 27, 2007, Capt. Nelson made two training trips, training trips No. 197 and No. 198.⁶⁵ Capt. Kromann and Commissioner Mackey rode with Capt. Nelson on training trip No. 198.⁶⁶ Capt. Kromann rated trip No. 198 as a “difficult” trip, and that “[a]t this stage of training based on performance on this trip, ... the trainee,” Capt. Nelson, is “A, Ready” (*i.e.*, “Ready to pilot independently”).⁶⁷

⁶⁴ See CP 1472-73 (at 15:12-16:4).

⁶⁵ See Mann Decl., Exh. 9, at 197 and 198.

⁶⁶ *Id.*

⁶⁷ *Id.*; see CP 5803 (“D=Difficult”); CP 5804-05 (giving key for “Ready” rating).

On January 2, 2008, Capt. Nelson writes an email to Capts. Hannigan, Snyder and Kromann entitled “Subject: Lack of training on my part.” Capt. Nelson wrote, “Since my trip with Captain Kromann and Commissioner Mackey, I have pretty much been bed ridden outside of trips to the doctor. ... This has []now lapsed into pneumonia which I’m starting treatment for.”⁶⁸ On January 5, 2008, Capt. Nelson made training trip No. 199 and was rated as “Ready” (“...to pilot independently”).⁶⁹ On January 8, 2008, he made training trip No. 200 and again was rated as “Ready” (“...to pilot independently”), successfully completing his assigned extension.⁷⁰ The TEC meeting “minutes” dated January 9, 2008, unambiguously state that Capt. Nelson had “[c]ompleted [the] trip requirements of the latest addendum to the training program.” CP 1608; CP 3371-72. That same date, Capt. Nelson was declared temporarily “unfit for duty” due to pneumonia. CP 1175. Capt. Nelson was not licensed, based on another clearly false reason. The “minutes” from the Board’s meeting the next day state that Nelson was “unable to complete the training trip requirements given him in December.”⁷¹ The minutes inexplicably state that the TEC recommended Capt. Nelson be allowed to

⁶⁸ CP 1173.

⁶⁹ Mann Decl., Exh. 9, at 199 (far right column: “Ready”).

⁷⁰ Mann Decl., Exh. 9 at 200 (far right column: “Ready Bruce did a fine job.”)

⁷¹ CP 4479; see also CP 1475 (at 25:2-12).

finish the current requirements”⁷² and that the Board authorized the TEC to create additional training trip requirements for Capt. Nelson in the form of still another “addendum” or “extended program.”⁷³

The Board does not determine the medical fitness of a pilot or a trainee, yet it received detailed medical records concerning Capt. Nelson. CP 2819-20 (at 40:19-41:2). There was discussion among the TEC members about “a heart arrhythmia of Capt. Nelson.” CP 1383 (at 79:10-12). On January 30, 2008, the Board received a letter from Dr. Younger that returned Capt. Nelson to duty without restriction which referenced “atrial fibrillation” that could require further evaluation and treatment.⁷⁴

On February 2, 2008, the Board’s staff data entry person wrote to the TEC that “[W]e’ve gone beyond any semblance of a standard training program [for Capt. Nelson]” and suggested that the Board discontinue scoring Capt. Nelson on a 1-4 scale “to see what Capt. Nelson’s scores are compared to the other[] [trainees] who have used the new [1-7 scale training trip report] form.” CP 1177.

During a training trip in February 2008, Pilot TEC member Capt. Kromann tells Capt. Nelson, “I thought we had you licensed back in September.” CP 1474 (at 20:4-15). The February 14, 2008 minutes of the

⁷² CP 4479.

⁷³ Id.

⁷⁴ CP 2820.

Board state, in part, that the TEC reported on the status of Bruce Nelson and other trainees and “[a]ll trainees are continuing to improve.” CP 4484.

However, on March 1, 2008, something had changed. Capt. Nelson was with TEC member Capt. Kromann who set Capt. Nelson up, directing him to land closer and faster, when he needed the planned trajectory and distance to slow the vessel. Capt. Kromann “intervened” for a single maneuver and returned the controls back to Capt. Nelson and then used the trip as an excuse to broadcast an email to the TEC withdrawing his support to license Capt. Nelson. See CP 1448-49 (at 239:22-244:7). Though no vote had been taken by the Board, on March 13 or 14, 2008, Capt. Snyder told Capt. Nelson, you won’t “need to continue training anymore” and “we’re never going to have the votes to license you, so don’t even – if you don’t want to, you don’t have to go.” CP 1449-50 (at 244:8-12; 245:1-10); CP 1475 (at 26:25-27:4). Nelson continued completing training trips through completion of all trips in April 2008.⁷⁵

On March 25, 2008 Puget Sound Pilot Don Mayer sent an email to the TEC’s licensed Pilot members (Capts. Snyder, Hannigan and Kromann), shedding light on the reversal of fortunes for Capt. Nelson, “[W]e have raised this guy up to mediocre. ... Are we going to keep doing this until we can no longer find a reason to say no? If the answer is yes,

⁷⁵ CP 509 (at ¶ 3); CP 1450 (at 246:18-21); and CP 1476-77 (at 35:25-36:7).

then the real question is, should we? What's in it for the group?" CP 3098. Clearly Nelson's ongoing successful completion and improvement during training was becoming a "problem." See *id.*

On Capt. Nelson's final training trip, shortly before his stipend and training were *de facto* terminated by the TEC, Pilotage Commissioner and TEC member, Capt. Pat Hannigan, asked Capt. Nelson, "Why would you want to start this at this stage in your life?" CP 301; CP 511.

On April 16, 2008, Board Chairman Dudley wrote Capt. Nelson, "[t]he TEC reported that, based on review of your training record, it recommended to the Board that you are **not qualified** to be issued a license and that there is no reason to extend your training program any more." CP 534.

K. Three trainees out of a class of 18 were denied licensing; two males over 50 and the first female trainee in history, who also notified the Board of discriminatory treatment.

After receiving notice that his paid training program was being terminated, Capt. Nelson presented his evidence of discrimination to the Board at its October 9, 2008 meeting.⁷⁷ Before the vote on Capt. Nelson, someone wrote and circulated to the Board a document "papering his file" with unfair excerpts of training comments (CP 568-71) – in a way never

⁷⁷ See CP 516 (at ¶ 10); CP 559-560; Mann Decl., pp. 3-4, ¶ 3.

done to other trainees,⁷⁸ except for the unsuccessful female trainee.⁷⁹ The Board did not give Capt. Nelson notice or opportunity to respond to this “secret” memorandum passed around about him.⁸⁰ Shortly thereafter, in December 2008, the Board voted to deny Capt. Nelson a license. CP 579.

Subsequently, the oldest trainee on the 2005 waiting list was also denied licensing. CP 374. He was 60 years old at the time. *Id.* The only trainee on the waiting list under the age of 50 who was denied licensing was the Board’s first and only female pilot trainee, Capt. Katherine Sweeney. Similar to Capt. Nelson, Capt. Sweeney lodged complaints and filed a tort claim with the Board after she was denied issuance of a pilot’s license.⁸¹ She has a pending discrimination lawsuit.⁸²

L. There is an adjudicative appeal regarding the Board’s decisions.

In March/April 2010, the Board held an adjudicative hearing about the licensing of Captain Bruce Nelson. The ALJ stated at the outset that

[Capt. Nelson] puts at issue the entire pilot-training process and, further, raises constitutional issues, the resolution of which may be beyond the authority of this tribunal. ... [T]his Tribunal ... does not find the performance of other pilot trainees to be very probative. ... I am, therefore, excluding ... any ... testimony ... regarding the performance of other pilot trainees. ... [T]he issue

⁷⁸ CP 1361 (at 39:9-25); CP 1362-63 (at 43:24-45:23).

⁷⁹ CP 1203-1205; CP 1052 (at Exh. 41).

⁸⁰ CP 518 (at ¶ 14); CP 574 (at 34:20-35:24).

⁸¹ See CP 511 (at ¶10); CP 1365 (at 58:4-12); CP 3444 (at ¶ 3), and CP 3447 (at “Capt. 13”); CP 3135; CP 2743.

⁸² King Co. Civil Action No. 11-2-36792-4, cited to the trial court at CP 2625, fn. 2.

before me is the licensing of Captain Nelson, and ... the processes involving the other pilot trainees just simply isn't before me. ...

CP 629-630.

This ruling was maintained throughout the adjudicative proceeding. For example, on Day 4 of the proceedings, ALJ Roberts said:

[M]y ruling still stands that I do not want to get into the testing of the other pilots. That issue is not before me. ... There are many, many cases where the attorneys wish to bring in all kinds of collateral issues. ... I understand that [Capt. Nelson's] theory is that he was treated differently than all of the others ... but I'm convinced that the issue before me is Captain Nelson's pilotage training and I'm convinced that that case can be made with the record that we have, without the other pilots, because the issue that I have to decide is whether it was arbitrary and capricious and not whether it was different. ...

CP 1413.

ALJ Roberts made no findings about allegations of discrimination or different treatment of Capt. Nelson. CP 306-318.

M. The Board manipulated the administrative record after Nelson filed a discrimination lawsuit regarding the Board's decisions.

In September 2010, the Board's administrative appeal was not ripe for review to Superior Court, when Capt. Nelson filed a lawsuit for damages under RCW 49.60, just prior to the statute of limitations running

on his claims alleging that the Board in September 2007 failed to license Capt. Nelson under the standards applied to other trainees.⁸³

By September 2011, the Board had still not issued a “final order” for administrative law review by Superior Court. The Board moved for dismissal of Capt. Nelson’s civil discrimination suit, primarily based upon the doctrines of *res judicata* and collateral estoppel.⁸⁴ Capt. Nelson filed his response in opposition to summary judgment, with extensive testimonial and documentary evidence to support his discrimination claims, including evidence of stereotypes circulating among Board members about “older pilots;” discussion among the Board of Capt. Nelson’s heart condition; and evidence showing Capt. Nelson’s performance in training as compared to six younger pilots who were licensed. In December 2011, *after* Capt. Nelson’s response brief opposing the Board’s motion for summary judgment had been filed, the Board’s “designee,” a former Assistant Attorney General for the Board,⁸⁵ strategically issued a “final order” adopting all of the ALJ’s previous findings of fact and conclusions of law but adding a “surgical strike”:

FINDING OF FACT 41. New Finding.

⁸³ The ongoing administrative appeal did not toll the statute of limitations for Capt. Nelson’s discrimination claims. See Milligan v. Thompson, 90 Wn. App. 586, 597-98, 953 P.2d 112 (1998).

⁸⁴ CP 0037.

⁸⁵ CP 2360.

The Appellant makes various claims relating to nepotism, age discrimination, and bias, but these are not supported by the record in this proceeding and are not persuasive.⁸⁶

Capt. Nelson timely filed a petition for review of the Board's "final order" under the Washington Administrative Procedures Act; and alternatively requested writs of review, mandamus and prohibition, arguing that there was no "plain, speedy and adequate remedy at law."⁸⁷ Capt. Nelson's request for extraordinary writs was denied in February 2012.⁸⁸

On March 28, 2012, King County Superior Court Judge Harry McCarthy granted the Board's motion in the current case for summary judgment, finding, *inter alia*, that the doctrines of *res judicata* and collateral estoppel applied, CP 2687; and that that the "final order" strategically issued in December 2011, precluded the civil suit filed in September 2010. *Id.* The Board's "final order" still awaits judicial review.

STANDARD OF REVIEW

The Court reviews orders granting summary judgment *de novo*, engaging in the same inquiry as the trial court.⁸⁹ The Court must view the inferences created by all the evidence, including expert witness testimony,

⁸⁶ CP 1998.

⁸⁷ CP 2050.

⁸⁸ CP 2640; CP 2676-77.

⁸⁹ *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000); *Adams v. City of Spokane*, 136 Wn. App. 363, 365, 149 P.3d 420 (2006).

in the light most favorable to Capt. Nelson, the nonmoving party.⁹⁰ Where there is a genuine issue of material fact, a trial is “absolutely necessary.”⁹¹ “In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.”⁹²

The Court also reviews questions of law, including *res judicata*, collateral estoppel, and a superior court’s jurisdiction *de novo*.⁹⁴

ARGUMENT

A. Capt. Nelson has established admissible evidence of facts that support his claims of discrimination, retaliation and denial of equal treatment in employment and licensing decisions.

Plaintiff meets his burden of production in opposition to summary judgment with admissible direct or circumstantial evidence and inferences therefrom that would allow the factfinder to find unlawful discrimination.⁹⁹

“To establish a prima facie case of ... discrimination due to disparate

⁹⁰ Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352-53, 588 P.2d 1346 (1979).

⁹¹ Jacobsen v. State, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

⁹² Pagnotta v. Beall Trailers of Oregon, Inc., 99 Wn. App. 28, 34, 991 P.2d 728 (2000), quoting J.N. v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994); accord Lamon, 91 Wn.2d at 352.

⁹⁴ Atlantic Case. Ins. Co. v. Oregon Mut. Ins. Co., 137 Wn. App. 296, 302, 153 P.3d 211 (2007); Christensen v. Grant County Hosp., 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

⁹⁹ See Johnson v. DSHS, 80 Wn. App. 212, 227, n. 21, 907 P.2d 1223 (1996) (stating “McDonnell Douglas test need not be used”), citing, e.g., Parsons v. St. Joseph’s Hosp. and Health Care Ctr., 70 Wn. App. 804, 809, 856 P.2d 702 (1993) (“McDonnell Douglas ... should not be viewed as providing a format into which all cases of discrimination must somehow fit.”). Accord Grimwood v. University of Puget Sound, 110 Wn.2d 355, 363, 753 P.2d 517 (1988); Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253-55, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (McDonnell Douglas burden shifting should be used flexibly to meet different fact situations; burden to show prima facie case “is not onerous”).

treatment, ... [Capt. Nelson] must show [the Board] ‘simply treats some people less favorably than others because of their [protected status]’.”¹⁰⁰

Under the Washington Law Against Discrimination, RCW 49.60, *et seq.*:

It is an unfair practice for any employer [t]o refuse to hire ... [t]o discharge or bar ... [or]... [t]o discriminate against any person ... in other terms or conditions of employment because of age, sex, ... or the presence of any ... physical disability.

RCW 49.60.180(1)-(3). The WLAD also bars discrimination for opposing conduct that would violate RCW 49.60 (*i.e.*, retaliation), RCW 49.60.210; and it bars discrimination based on perceived disability or Plaintiff being “regarded as having [a disability].”¹⁰¹

Capt. Nelson was a paid trainee employed with a \$6,000 per month stipend and has protection from discrimination in the licensing processes. Licensing agencies are “places of public accommodation” and it is an unfair practice under RCW 49.60, *et seq.* for such agencies to discriminate on the basis of age or disability in regards to licensing decisions. See, e.g., Svendgard v. State, 122 Wn. App. 670, 95 P.3d 364 (2004) (claim under WLAD for failure to accommodate disability based upon Dept. of Licensing’s revocation of commercial driver’s license as “legally viable

¹⁰⁰ Johnson, 80 Wn. App. at 226, citing Shannon v. Pay ‘N Save Corp., 104 Wn.2d 722, 726, 709 P.2d 799 (1985), quoting Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

¹⁰¹ Townsend v. Walla Walla School Dist., 147 Wn. App. 620, 625, 196 P.3d 748 (2008), citing RCW 49.60.040(a)(iii).

theory”); and RCW 49.60.205, RCW 49.44.090. *See also Sater*, 198 Wash. at 702, citing Const. art. I, § 12; *Bock*, 91 Wn.2d at 100.

The protected status does not have to be the only, or even the primary, reason for the Board’s action.¹⁰² Capt. Nelson need only show admissible evidence that age, perceived disability, gender, or opposition to discrimination, was a “substantial factor” in the Board’s adverse employment, training or licensing decisions.¹⁰³

“[C]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff’s burden.”¹⁰⁴ “Indeed, in discrimination cases it will seldom be otherwise....”¹⁰⁵

No further evidence of discrimination is needed to withstand summary judgment if that evidence raises a genuine issue of material fact regarding the truth of the employer’s proffered reasons, as it does here.¹⁰⁶

[T]o demonstrate ... that an employer’s stated rationale for an employment decision was pretextual -i.e., was ‘unworthy of belief’- the employee-plaintiff must produce evidence from which a trier of fact could infer that the employer’s ‘articulated reasons’ for the employment decision ‘(1) have no basis in fact;

¹⁰² 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.01.01 (5th ed.) (“‘Substantial factor’ means a significant motivating factor [It] does not mean the only factor or the main factor in the challenged act or decision.”)

¹⁰³ *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995); *Allison v. Housing Authority of City of Seattle*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991).

¹⁰⁴ *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), overruled in part on other grounds by *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006).
¹⁰⁵ *deLisle v. FMC Corp.*, 57 Wn. App. 79, 83, 786 P.2d 839 (1990).

¹⁰⁶ *Chuang v. Univ. of Cal. Davis Bd. of Trustees*, 225 F.3d 1115, 1127 (9th Cir.2000), citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147-48, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

(2) were not really motivating factors for the decision; or (3) were not motivating factors in employment decisions for other employees in the same circumstances.’ ...¹⁰⁷

Courts recognize various kinds of evidence of “pretext” to create a question of fact that Defendant “more likely” or “also” acted with a discriminatory or retaliatory motivation. Indicia of pretext are often essentially the discriminatory and retaliatory acts themselves. These include Defendant’s deviation from normal procedures;¹⁰⁸ enhanced scrutiny and building a paper record for discipline;¹⁰⁹ and shifting explanations or *post hoc* justifications for employment actions.¹¹⁰ Courts also consider evidence of an employer’s “denigrating generalizations about age” and “stereotype[s] about the work capacity of ‘older’ workers *relative to* ‘younger’ workers.”¹¹¹ All are present in this record.

1. There is direct evidence of “age” stereotypes applied to Capt. Nelson in the Board’s employment and licensing decisions.

The Board documented its concerns about the “average age” of the pilot corps in 2006, when it was 56 years old, shortly before Capt. Nelson started working as a trainee. CP1070. The “block” of “baby boomers” was

¹⁰⁷ Dumont v. City of Seattle, 148 Wn. App. 850, 867, 200 P.3d 764 (2009), quoting Kirby v. City of Tacoma, 124 Wn. App. 454, 467, 98 P.3d 827 (2004) (emphasis added).

¹⁰⁸ Lyons v. England, 307 F.3d 1092, 1101-02, 1115-16 (9th Cir.2002); Diaz v. Eagle Produce Ltd. Partnership, 521 F.3d 1201 (9th Cir. 2008).

¹⁰⁹ Sellsted v. Washington Mut. Sav. Bank, 69 Wn. App. 852, 861, 851 P.2d 716 (1993).

¹¹⁰ Dumont, 148 Wn. App. at 869; see also Price Waterhouse v. Hopkins, 490 U.S. 228, 252, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

¹¹¹ See, e.g., Kentucky Retirement Systems v. E.E.O.C., 554 U.S. 135, 146-47, 128 S.Ct. 2361, 171 L.Ed.2d 322 (2008); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-612, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

headed toward retirement. CP 1366-67; CP 1458. In 2007, Capt. Nelson was denied a license despite recommendation of the licensed Pilots on the TEC, when the “average age” of the pilot corps was 55.79 years old, and Capt. Nelson was 53 years old. CP 370, CP 374.

Admissible evidence shows stereotyping about “older pilots” – not as willing as younger pilots to do extra duty, CP 1367; “less able to handle the rigors of being overworked and take longer to recover,” CP1070; need “extra time off;” CP 1367; and “lose more work time to health issues.” CP1070. Although Capt. Nelson’s break in training clearly “wasn’t an issue of [Nelson] feeling stress,” CP 1139; stereotypes about older pilots “being less able to handle the rigors of being overworked” were irrationally applied to Capt. Nelson. See CP 1140 (Lee asking if Nelson’s days off are due to “stress” or an “attitude [about extra duty]... difficult to correct”); CP1464-65 (Addington concerned that break in trips suggested there was an issue of “stress”); CP 1327-28; CP 1455-57 (Mackey bothered that Nelson took days off; “You can’t take time off at boot camp;” “if you can’t handle stress, you shouldn’t be there.”)

2. Nelson successfully completed the training Program and was “qualified” to be a pilot.

As of September 6, 2007:

... Captain Nelson is ready for licensing. Evaluation reports from senior pilots have indicated that Capt. Nelson is ready. ... [H]e is

doing what is require[d] of him. In our opinion he meets the requirements to be a licensed pilot.

CP 1335.

3. Nelson was treated differently than “similarly situated” others.

“Proof of different treatment by way of comparator evidence is [also] relevant and admissible but not required, and in many cases is not obtainable.”¹¹² For purposes of comparative analysis under *McDonnell Douglas*, individuals are “similarly situated” when they [1] have similar jobs [i.e., do ‘substantially the same work’]¹¹³ and [2] display similar conduct.”¹¹⁴ “The employees need not be identical, but must be similar in material respects.”¹¹⁵ “[W]hether two employees are similarly situated is ordinarily a question of fact.”¹¹⁶

The pilot trainees in the 2005 examination class performed “substantially the same work,” working under programs that were based on templates with minor tweaking, if not identical. See section E., *supra*, at

¹¹² *Johnson v. Chevron U.S.A.*, 159 Wn. App. 18, 33, 244 P.3d 438 (2010); see also *Teamsters*, 431 U.S. at 335 n. 15 (“Proof of discriminatory motive ... can in some situations be inferred from the mere fact of differences in treatment”).

¹¹³ *Davis v. West One Auto. Group*, 140 Wn. App. 449, 458-59, 166 P.3d 807 (2007); citing *Johnson*, 80 Wn. App. at 227.

¹¹⁴ *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003); accord *Johnson*, 80 Wn. App. at 227-28, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (comparing employees involved in acts “of comparable seriousness”).

¹¹⁵ *Earl v. Nielsen Media Research, Inc.* 658 F.3d 1108, 1114 (9th Cir. 2011), citing *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1157 (9th Cir. 2010)

¹¹⁶ *Earl*, 658 F.3d at 1116, quoting *Beck v. United Food & Commercial Workers Union Local 99*, 506 F.3d 874, 885 n. 5 (9th Cir.2007).

pp. 10-12.¹¹⁷ The Comparators described herein each received numeric and adjective ratings, and/or narrative comments, of “comparable seriousness” to those of Capt. Nelson; describing “similar conduct” to that alleged as the basis for the Board terminating Capt. Nelson’s training and denying him a pilot’s license. See section F, *supra*, at pp. 12-19. Capt. Nelson raises a genuine issue of material fact as to whether Capts. 1, 6, 7, and 8 were “similarly situated” yet treated differently than him. *Id.*

Commissioners Mackey and Lee applied different and pretextual standards to Capt. Nelson. **(1)** That recent evaluations be “unanimous in their opinion that he is ready to pilot independently,” CP 1335, CP 1332 (at 39:25-40:7); which standard was not applied to other trainees who were licensed. See, e.g., CP 1082 (Capt. 1 receiving “intervention” and “below average” rating); Mann Decl., Exh. 6 (Capt. 6 receiving “BA,” or “below average,” ratings and critical comments on Trip No. 130 and 136); CP 1111 (Capt. 7’s “recent trip caused us some concern”); and Mann Decl., Exh. 8 (Capt. 8 receiving “intervention” on at Trip No. 117, described at CP 5794 (BO124-117)). **(2)** The no days off, or “boot camp,” rule that Mackey, Lee, and Addington applied to Capt. Nelson in September 2007, demanding “no days off” or stereotyping them as evidence of inability to

¹¹⁷ Compare CP 458-465 with CP 412-418, CP 397-403, and CP 434-449.

handle stress, was likewise not applied to other trainees. See section H.2., *supra*, at pp. 24-25; and discussion of Capts. 7 and 8, *supra*, at pp. 18-19.

David Goodenough citing his experience and training, government and industry standards, Board records and evaluations of other trainees, testified, “[I]f Capt. Nelson had been evaluated and treated as other trainees prior to him and after him in the Training program he would have been licensed in September 2007, October 2008, January 2008, and/or April 2008.” Mann Decl., Exh. 30, at p. 3. This evidence of disparity and pretext and stereotyping precludes summary judgment.¹¹⁹

B. It is error for the trial court to have applied *res judicata* and collateral estoppel in Capt. Nelson’s discrimination suit.

Neither the doctrine of *res judicata* nor collateral estoppel are intended to deny a litigant his day in court. ... The doctrine of *res judicata* is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation. ... The party asserting either doctrine [i.e., the Board] has the burden of proof to show that the determinative issue was litigated in the former proceedings. ‘The party asserting collateral estoppel [i.e., the Board] has the burden of showing that issues are identical and that they were determined on the merits in the first proceeding.’ ...

Luisi Truck Lines, Inc. v. Washington Util. & Tr. Com’n, 72 Wn.2d 887, 894, 435 P.2d 654 (1967).

1. *Res judicata* should not apply to Capt. Nelson’s claims of discrimination.

¹¹⁹ See, e.g., Pagnotta, 99 Wn. App. at 34, quoting J.N., 74 Wn. App., at 60-61; accord Lamon, 91 Wn.2d at 352.

The Board's administrative hearing "involved the consideration of different evidence and adjudicated the infringement of different rights" than those at issue in the discrimination civil suit.¹²⁰ The ALJ ruled that "the issue that [he] [had] to decide [wa]s whether [the Board's action] was arbitrary and capricious and not whether it was different. ..." CP 1413. The ALJ ruled that he was "not going to get into the training of the other pilots that are not before the Tribunal." CP 1421; CP 1391-92. Thus, the evidence showing different treatment by the Board was not admissible in the administrative proceeding. *Id.* As Capt. Nelson did not have "a full and fair opportunity to present [his] case" in the earlier proceeding and was denied the opportunity to "present[] all [of his] proof in the first case, ... estoppel would be plainly unwarranted."¹²¹ It cannot be said "a matter should have been litigated earlier if, for some reason, it could not have

¹²⁰ Civil Service Com'n of City of Kelso v. City of Kelso, 137 Wn.2d 166, 172, 969 P.2d 474 (1999) (finding that adjudication of whether suspension was "in good faith and for cause," not the same as adjudicating whether suspension was based on "just cause" which would include "whether the employer applied its rules even-handedly").

¹²¹ See Standefer v. U. S., 447 U.S. 10, 23-24, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980), discussed in State v. Cleveland, 58 Wn. App. 634, 642-43, 794 P.2d 546 (1990) (noting how exclusion of evidence in certain cases deprives a party of "a full and fair opportunity to litigate"); see also Civil Service Com'n of City of Kelso, 137 Wn.2d at 172; Christensen, 152 Wn.2d at 307; Nielson v. Spanaway General Medical Clinic, Inc., 135 Wn.2d 255, 262, 956 P.2d 312 (1998); accord Rufener v. Scott, 46 Wn.2d 240, 256, 280 P.2d 253 (1955).

been litigated earlier; thus, res judicata will not operate ... if evidence ... to establish a necessary fact [was not] admissible in the prior proceeding.”¹²²

2. Collateral estoppel cannot apply if the issues are not identical, there is no final judgment, or if doing so would work an “injustice” on Capt. Nelson.

Application of the collateral estoppel “depends on the facts of each case” and should place the “court’s concern with reaching a just result... over the desire for finality.”¹²³ “Collateral estoppel is ... ‘a court-created concept subject to flexible, pragmatic application.’”¹²⁴

Washington follows a stringent four-pronged inquiry which requires affirmative answers to each of the following questions before raising the collateral estoppel flag:

(1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied. ...

Three additional factors must be considered under Washington law before collateral estoppel may be applied to agency findings: (1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations.

Christensen v. Grant Co. Hosp., 152 Wn.2d 299, 307, 96 P.3d 957 (2004).

¹²² Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 330-31, 941 P.2d 1108 (1997).

¹²³ Petcu v. State, 121 Wn. App. 36, 72, 86 P.3d 1234 (2004).

¹²⁴ Petcu, 121 Wn. App. at 71, citing Trautman, “Claim and Issue Preclusion in Civil Litigation in Washington,” 60 Wash. L.Rev. 805, 812–13 (1985).

The issues adjudicated in the prior administrative proceeding are not identical to those in Capt. Nelson's civil suit. The evidence and issues of disparate treatment were excluded from the previous administrative proceeding. Collateral estoppel does not apply if "[n]ot only were claims not adjudicated, but they and the evidence concerning them formed no essential part of the claim at issue" in the prior proceeding.¹²⁵ See State v. Harris, 78 Wn.2d 894, 901, 480 P.2d 484 (1971) (declining to apply collateral estoppel where "relevant, trustworthy and competent evidence of potentially vital weight was kept out of the first trial" and rendered the related issue "not... fully litigated in the first instance"), *rev'd on other grounds*, 404 U.S. 55 (1971). "If there is uncertainty whether a matter was previously litigated, collateral estoppel is inappropriate."¹²⁶

Also, the Board's "final order" and its timing should be considered further evidence of retaliation by the "employer" Defendant, and also "void" and not a "final judgment on the merits." It was issued by Commissioner Adams when he lacked the Senate confirmation required by RCW 88.16.010.¹²⁷ See Jefferson County v. Lakeside Indus., 106 Wn. App. 380, 389, 23 P.3d 542 (2001) (holding that decision for which

¹²⁵ Seattle-First Nat. Bank v. Kawachi, 91 Wn.2d 223, 228, 588 P.2d 725 (1978).

¹²⁶ Mead v. Park Place Properties, 37 Wn. App. 403, 407, 681 P.2d 256 (1984).

¹²⁷ CP 3107; CP 2808; CP 2393-94; CP 2526.

commissioners “lacked authority” was “without legal effect and not a final decision on the merits” for purposes of issue or claim preclusion).¹²⁸

The ALJ applied an “arbitrary and capricious” standard, placing an unduly harsh and unjust burden of proof on Capt. Nelson. CP 1413.

[Collateral estoppel’s] injustice component is generally concerned with procedural ... irregularity. This is consistent with the requirement that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum.¹³⁰

The burden of proof the ALJ applied was unusual for adjudication at the agency level. “[T]he ordinary burden of proof to resolve a dispute in an administrative proceeding [is] preponderance of the evidence (unless otherwise mandated by statute or due process of law),”¹³¹ and “the rigor of the burden [is] placed on the State,” not the licensee.¹³² The standard applied by the ALJ violates the WLAD public policy to “eradicate discrimination.”¹³³ Under the arbitrary and capricious standard, justification of discriminatory acts would be “satisfied by a scintilla.” See

¹²⁸ See also Application of Puget Sound Pilots Association, 63 Wn. 2d at 147-148 (holding that WAPA gives “no basis for suggesting that the duty of adjudication under the Pilotage Act can be subdelegated to someone not a member of the Board of Pilotage Commissioners” and vacating order for rehearing “by a legally constituted Board of Pilotage Commissioners).

¹³⁰ Christensen, 152 Wn.2d at 309.

¹³¹ Thompson v. State, Dept. of Licensing, 138 Wn.2d 783, 797, 982 P.2d 601 (1999), quoted in Nguyen v. State, 99 Wn. App. 96, 102, 994 P.2d 216 (1999), vacated on other grounds, 144 Wn.2d 516 (2001).

¹³² See Hardee v. State, DSHS, 172 Wn.2d 1, 8, 256 P.3d 339 (2011).

¹³³ Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 360, 20 P.3d 921 (2001).

State ex rel. Perry v. City of Seattle, 62 Wn.2d 891, 894, 384 P.2d 874 (1963).

“Manifest injustice in application of collateral estoppel would result where litigant did not have a meaningful opportunity to appeal prior decision.” Thompson v. State, DOL, 138 Wn.2d 783, 795, n. 7, 800, 982 P.2d 601 (1999)

The Board has the “burden of establishing that it would not work an injustice to apply collateral estoppel against” Capt. Nelson on these facts.¹³⁴ This record shows a grave injustice by any reasoned analysis.

APPELLANT REQUESTS ATTORNEYS FEES AND COSTS

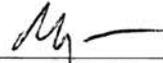
Pursuant to RAP 18.1, Capt. Nelson hereby requests an award of attorney’s fees and costs for this appeal, assuming he prevails at trial.¹³⁵

CONCLUSION

For the reasons stated herein, the case should be remanded for trial.

RESPECTFULLY SUBMITTED this 22 day of October, 2012.

MANN & KYTLE, PLLC

By: 
Mary Ruth Mann, WSBA 9343
James W. Kytile, WSBA 35048
Mark W. Rose WSBA 41916

¹³⁴ Reninger v. Dep’t of Corr., 134 Wn.2d 437, 449, 951 P.2d 782 (1998).

¹³⁵ RCW 49.60.030(2).

APPENDIX:
ATTORNEY GENERAL OPINIONS 1937-38,
pages 230-234

high school districts highly uncertain and unenforceable. *State ex rel. Bell v. Thaanum*, 74 Wash. 58.

No such situation arises when districts within the same union high school district decide to consolidate and we are of the opinion that two or more districts within the same union high school district may consolidate and that unless all of them consolidate, the organization of the union high school district will not be substantially affected.

You ask also the following question:

"School districts A and B are districts of the third class. For the past eight years, school district A has been assessed for taxes, and those taxes when paid were by error in the County Treasurer's office set over to the credit of school district B. There now remains in the fund of school district B a good deal of unused money. Can B district legally pay this to A district?"

This case presents a clear case of misapplication of funds by the county treasurer. No particular harm has been done inasmuch as the district B seems not to have used the money, but this mistake is a mistake in bookkeeping in the treasurer's office and he should correct it.

We can see no particular objection to district B paying this money to district A, but there is no necessity for any payment by the districts, for it is a county treasurer's duty to keep these funds separate and to credit them properly on his books, and if he makes a mistake it is his business to correct it.

G. W. HAMILTON, *Attorney General*.

By W. A. TONER, *Asst. Attorney General*.

Board of Pilotage Commissioners—Qualifications of Applicants for Licenses

Olympia, Wash., November 17, 1937.

Board of Pilotage Commissioners, Smith Tower, Seattle, Washington.

Dear Sirs: We have a communication from Mr. Katona, your secretary, requesting an opinion from this office relative to the right of your board to impose certain age restrictions on applicants for pilot's license. In his letter, Mr. Katona says:

"The Board of Pilotage Commissioners of the State of Washington would like an opinion upon the legality of the Board as to whether or not they

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could fix a maximum age limit of fifty (50) years or over for all applicants seeking a State Pilots License and making this requirement.

"The reason this opinion is requested is of the possibility of fixing a pension system for state licensed pilots."

Primarily the question of pilotage regulation is one of the government of the United States. When the pilotage field is embraced by the navigable waters of the United States, the federal government has original jurisdiction in determining all questions affecting the regulation of pilots. Article 1, section 8 of the federal constitution grants to congress the power:

"To regulate commerce with foreign nations and among the several states and with the Indian tribes."

Any law limiting and restricting the rights of vessel owners to employ and pay pilots is a burden on interstate or foreign commerce as the case may be. On numerous occasions it has been held by the courts that any such action is a regulation of commerce as provided for under section 8.

However, congress has been slow to preempt this field and assume absolute authority therein. When the federal government was first inaugurated by the several states, these states then had pilotage laws and local laws governing the movement of vessels to and from their harbors. Congress recognized the existence of these regulations as legitimate and valid and at the first session of the federal congress an act was passed providing that:

"Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for that purpose." (R. S. 4235—U. S. C. A., Title 46, sec. 211.)

Under authority of this provision our state has enacted pilotage laws. Chapter 18 of the Laws of 1935 makes provision for the creation of a board of pilotage commissioners of the state of Washington and delegates to this board the right to license all pilots operating on Puget sound and adjacent inland waters as defined and bounded therein. Section 8 of this chapter sets out the qualifications required of applicants for pilot's license, to-wit: Such an applicant shall be,

A citizen of the United States,—

Over the age of twenty-five years,

A resident of the state for three years before date of application,

Must possess practicable knowledge of navigation of vessels,—

Knowledge of the conditions of navigation in the waters in which he wishes to pilot,

Good moral character,

Temperate in habits,

Must possess skill and ability necessary to discharge the duties of a pilot, and

Must hold a first class United States license to pilot a vessel on the said waters.

Section 9 in fixing the authority of the board gives it power to make rules and regulations not in conflict with the act and further authorizes the board (subdivision (a)) to establish the qualification of pilots and provide for their examination for licensing; in section (b) the board is directed to provide for the maintenance of efficient and competent pilotage service; section (c) provides for fixing the rates payable to pilots; then section (d) supplements the foregoing with an inclusive clause, to-wit:

"To do such other things as are reasonable, necessary and expedient to insure proper and safe pilotage upon the waters covered by this act
* * *"

The question then arises, are the powers herein delegated broad enough to authorize the establishment of an age limit for pilots,—especially those set out in section (d), to-wit: To do such other things as are reasonable and necessary to insure proper and safe pilotage upon the waters covered.

We note the legislature has named certain qualifications that an applicant must possess. One of these qualifications is that he must be over twenty-five years of age. But the legislature has not included a maximum age limit or an age beyond which an applicant is disqualified. Section 13 of this chapter says that the board shall have power to suspend, withhold or revoke the license of any pilot for certain causes and reasons therein set out. However, this section does not authorize the board to withhold a license or to refuse a license on the ground that the applicant or pilot has passed beyond any certain age.

The pilotage board is a creature of the legislature and can exercise only the powers delegated to it by the legislature. In exercising these powers and in administering its duties as fixed

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by the legislature, the board must comply strictly with the statute. In gauging the authority, the board may exercise in making rules and regulations, Cyc. says that:

"* * * They need not be general or uniform through the state but may be regulated according to local needs. However, the public has no interest in the government of pilots or their boats except so far as it is conducive to the public good, and any rule or set of rules which shall have any other purpose than this, even though they may be made for the benefit of some of the pilots themselves, unless expressly authorized by the provision of the act creating the commission, are without its scope and void." Vol. 30, p. 1611.

Corpus Juris sets out the law governing in such a case as follows:

"Where so empowered by legislative enactment, pilot boards or commissioners may make reasonable and enforceable pilotage regulations not in excess of their statutory authority, which may be effective and binding in respect of acts and conduct of pilots outside of the territorial waters of the promulgating authority." Corpus Juris, Vol. 48, p. 1187.

The board of pilotage cannot extend its regulations beyond the act even to determine the pilot's qualifications. It must determine in each case if the applicant has sufficient knowledge of the movement of the tides, of the signals, of the buoys, and the lights that may be met and encountered in the waters covered by his license and also determine his knowledge of the shoals and bars and other obstructions to navigation. But the statute specifically points out the qualifications required. In these specific qualifications as above set out, we find most of them to constitute facts of which the board must find proof. Then the board is given no further discretion than the determining of these facts. There is the one qualification at least though wherein the board must exercise its discretion. We refer to the requirements that the applicant possesses sufficient skill and ability to discharge his duties as a pilot. We are not able to say, however, that in settling that question, the board may place an age limit beyond which the applicant is barred. Such an arbitrary rule, we think, would be by the courts held invalid. It may be argued that the establishing of an age limit and thereby assuring a pension system would be of great benefit to the state. However, the answer to this argument is indicated in the citation from Cyc. above quoted. The pilotage board is not authorized to make any requirements or regulations except

those that point to the safety of passengers on boats and the crew operating such boats together with their cargoes.

For the reasons above set out, we are of the opinion that your board cannot fix a maximum age limit of fifty years for applicants, or in fact, any maximum age limit.

We have reached this opinion from an analysis of our own pilotage act and the rules of law bearing on such acts. We think we should add, also, that there is another grave objection to the anticipated action of the board in fixing such an age limit. Congress has passed some laws of a general character intended to cover the actions of pilots and the movements of ships within the navigable waters of the United States.

Section 4442 of the revised statutes of United States was first enacted on May 29, 1896, and has been re-enacted several times since. It is now designated as section 214 of title 46, U. S. C. A. It provides for the licensing of pilots by the United States government, as follows:

"Whenever any person claiming to be a skillful pilot of steam vessel offers himself for a license, the inspectors shall make diligent inquiry * * * and if satisfied * * * that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license * * *."

It will be noted that no age limit is specified.

Section 215 of title 46 further provides that no state shall impose upon pilots any obligation to procure a state license in addition to the requirements imposed by the United States or any other regulation which will impede pilots in the performance of their duties as required by the federal act. After a careful reading of these federal statutes, we admit that they may be lacking in sufficient definiteness to cover all questions arising under local pilotage conditions. Still we are inclined to believe that a maximum age limit would be an infringement on the field covered by the federal statute. It sets out a few definite qualifications that an applicant must have but it does not bar any one by reason of the fact that he is past any particular age.

We are inclined to hold and we do so hold such an age limit would be invalid under our state law and also would be a violation of the acts of congress above cited.

G. W. HAMILTON, *Attorney General.*
By BROWDER BROWN, *Asst. Attorney General.*

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Hon. Harry C

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CAPTAIN BRUCE NELSON,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE
BOARD OF PILOTAGE COMMISSIONERS,

Defendants/Respondents.

DECLARATION OF SERVICE

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Mann & Kytte, PLLC
200 Second Ave. W.
Seattle, WA 98119
(206) 587-2700

Attorneys for Appellant
Captain Bruce Nelson

~~STP~~
APR 22 11:3:06

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the Brief of Captain Bruce Nelson and this Declaration of Service to be served via messenger on the following attorneys:

Counsel for Respondents
Tad Robinson O'Neill
John R. Morrone
Assistant Attorneys General
Office of the Attorney General
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

Dated at Seattle, Washington this 22nd day of October 2012.

MANN & KYTLE, PLLC



DANIELLE J. RIEGER, Paralegal