

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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Boston, MA 02108
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GARY SMYTH

Appellant

v.

CITY OF QUINCY,

Respondent

CASE NO: G2-10-3

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Gary Smyth, acting pursuant to G.L.c.31, §2(b), duly appealed to the Massachusetts Civil Service Commission (Commission) from a decision of the City of Quincy (Quincy), the Appointing Authority, approved by the Personnel Administrator of the Massachusetts Human Resources Division (HRD), to bypass him for promotion to the position of permanent Fire Chief of the Quincy Fire Department (QFD). A full hearing was held by the Commission at the Quincy Public Library on April 5, April 14 and April 28, 2010, and was digitally recorded. Witnesses were sequestered. Quincy called four witnesses and the Appellant called one witness and testified on his own behalf. Thirty-four (34) exhibits were marked at the hearing and one additional exhibit was received after the hearing and marked PH Exh.35 (exam scores) and PH 36 (HRD letter). The Commission received post-hearing briefs from the parties on June 18, 2010.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of the witnesses (the Appellant; Quincy Mayor Thomas Koch, Quincy Human Resources Director Steven McGrath, Executive Secretary and Chief of Staff James Fatseas, Quincy Fire Chief Joseph Barron and Quincy Fire Lieutenant Michael Granahan) and inferences reasonably drawn from the evidence I find credible, I make the findings of fact set forth below.

The Appellant

1. The Appellant, Gary Smyth, is a Quincy resident who joined the QFD in 1987. At age 20, he was the youngest firefighter appointed to the department. He rose through the ranks in fire suppression, as a Lieutenant in 1998 and Captain in 2002. He achieved the rank of Staff Deputy Chief in September 2005. (*Exh. 31; Testimony of Appellant*)

2. Deputy Chief Smyth has been certified as an Emergency Medical Technician since 1985. In addition, he attended and was certified at the Massachusetts Fire Academy on New Fire Chief Orientation, Incident Command System, Grant Writing, and Carbon Monoxide Laws. He participated in various seminars and courses on subjects such as Incident Command, Structural Firefighting, Terrorism Preparedness, and Nuclear Awareness at the National Incident Management System, the Fire Department of New York, Texas A & M University, and the University of Nevada at Las Vegas, respectively. He has earned college credits toward a Bachelor's Degree in Fire Science from Northeastern University, University of Massachusetts-Boston, Quincy College, and Columbia Southern University (*Exh. 12; Testimony of Appellant*).

3. As Staff Deputy Chief, Smyth supported the Fire Chief in overall management and administration of the QFD (in contrast to the other four Deputy Chiefs, who led the

four fire suppression work groups). As Staff Deputy Chief, Smyth assisted overseeing day-to-day operations of the QFD and its approximately 200 personnel, including the four suppression groups, as well as direct oversight of fire prevention, hazardous materials, training and mechanics. He interfaced with the Quincy City Council on operational and constituent issues. (*Exhs. 12 & 31; Testimony of Appellant & McGrath*)

4. During his tenure, Deputy Chief Smyth researched, drafted, and submitted six grants on behalf of the QFD, all on his own initiative. In 2002. Through his efforts, the QFD obtained a \$415,000 grant from the US Department of Homeland Security to acquire structural fire Personal Protective Equipment (PPE) necessary to bring the QFD into compliance with applicable safety regulations. According to Deputy Chief Smyth, this grant was the largest such award to any fire department in the Commonwealth. In addition, Deputy Chief Smyth worked to procure a 2004 grant of \$325,000 for a diesel powered emergency generator. He also worked to secure grants for carbon monoxide (CO) monitors, additional PPE, and surface water and ice rescue equipment. (*Exhs. 12 & 20; Testimony of Appellant & McGrath*)

5. Deputy Chief Smyth also took a leadership role in training the QFD in the proper use of the surface water and ice water rescue equipment. This was especially important in light of Quincy's lengthy coastline, quarries, and the fact that such equipment and training previously were lacking in this coastal city. (*Testimony of Appellant*)

6. In 2006, Deputy Chief Smyth developed Standard Operating Guidelines (an SOG) to implement an Incident Command System (ICS) for the QFD, had them reviewed for comment by four suppression deputies, and submitted the finished product for review by Chief Pettinelli. The Chief issued the SOG in October, 2006 and ordered

implementation and training of the ICS under Deputy Chief Smyth's supervision, effective January 20, 2007. (*Exhs. 29, 29A & 30; Testimony of Appellant*)

7. The ICS denotes an advanced system to manage a fire scene or other emergency incident "to control personnel, facilities, communications, and equipment during an emergency". The system employs clear lines of authority and common terminology to enable members of different departments – who often assist each other through mutual aid and at major incidents – to organize themselves and communicate with each other quickly and with confidence. Implementation and use of the system are requirements for fire departments to receive federal funding. Quincy's was the last department in the area to adopt and implement an ICS. (*Exh. 29, 29A & 30; Testimony of Appellant*)

8. Quincy pointed out, and I find, that the SOG developed by Deputy Chief Smyth for the ICS drew heavily from the more extensive proprietary ICS Policy and Procedures Manual used by HRD as a resource to be used by fire service personnel to study for promotional exams. Although it is a legitimate question whether copying from this manual was a permitted use, I find nothing presented in the evidence or legal argument by Quincy to conclude that Deputy Chief Smyth's paraphrasing in the SOG from this manual was not a legitimate use of the material. Neither do I find that Deputy Chief Smyth's reliance on the manual detracted from his main contention that he spearheaded the implementation and training within the QFD of this important project, nor that he misrepresented his role in this work in his resume or in his testimony. (*Exhs. 29, 29A & 30; Testimony of Appellant*)

9. Deputy Chief Smyth also spearheaded the creation of the QFD's Rapid Intervention Teams (RIT). Quincy, again, was one of the last departments in the area to

implement an RIT system, in which one company at a fire scene is dedicated with the necessary equipment, training, and readiness to rescue trapped firefighter(s). Deputy Chief Smyth wrote another SOG for the procedure, purchased the necessary equipment, and conducted department-wide training so that every fire scene would have an RIT present. (*Exh. 12; Testimony of Appellant*)

10. Deputy Chief Smyth took responsibility for revising the department's rules and regulations manual, which had not been revised in more than thirty years, and had not been distributed to new hires in approximately twenty years. He completed the project, with Chief Pettinelli's final approval, and copies of the revised manual were distributed to every member of the department in 2006. (*Testimony of Appellant*)

11. In 2007, Deputy Chief Smyth planned and designed, with the collaboration of the QFD's mechanics, a proposal to acquire three new fire engine apparatus (to replace trucks twenty-two years old). He traveled to the manufacturer's premises in North Attleboro, proposed a five-year lease purchase plan which was adopted by the Mayor's office and made a detailed (and widely praised) presentation to the Quincy City Council in June 2007, and obtained the Council's unanimous approval and appropriation of more than one million dollars to undertake the transaction. (*Exh. 12; Testimony of Smyth*)

12. In the Quincy community, Deputy Chief Smyth took an active role in community outreach activities, serving on approximately a dozen neighborhood and municipal committees and working groups, including the Illegal Rooming House Task Force (as a co-creator and QFD representative), the Fire Study Committee, the Local Emergency Planning Committee, and met with the City Council and various neighborhood groups from time to time to address issues and concerns. (*Exh. 12; Testimony of Appellant*)

The Election of Mayor Thomas Koch

13. Thomas Koch became Mayor of the City of Quincy in January 2008, following his victory over the incumbent Mayor William Phelan in the November 2007 municipal election. Mr. Koch had served Quincy in various other capacities over the years, most recently as the Director of the Parks Department, a position he resigned in 2007 to run for Mayor. As Mayor, he assumed the duties of the appointing authority over civil service positions within the QFD. (*Testimony of Mayor Koch*)

14. During his first year in office, Mayor Koch made a number of appointments to boards and commission, and appointed a (non-civil service) Police Chief. He fully knew of the public interest in, and need for the perception of transparency, in the appointment process. He decided to recuse himself from the recommendation of the new Police Chief because his brother-in-law – the ultimately successful candidate – was one of the applicants, and he devolved that process to the recommendation of the Norfolk County Sheriff, although Mayor Koch made the actual appointment. (*Testimony of Mayor Koch*)

15. During the 2007 municipal election, Mayor Koch met with representatives of the Executive Board of the Quincy Firefighters Union, Local 792 (Local 792) for the purpose of seeking a political endorsement. The evidence indicated that Local 792's rapport with the Phelan administration was not good, and the collective bargaining agreement between Quincy and Local 792 had expired, so firefighters then were working without a contract. Local 792 gave its endorsement to Mr. Koch over Mayor Phelan. (*Testimony of Mayor Koch & Chief Barron*)

16. Mayor Koch recalled in his testimony that he found Deputy Chief Joseph Barron, one of the members of the Executive Board at the meeting, to be particularly forthright

and informative. Their interaction during the election cycle meeting was the only specific example that Mayor Koch gave of his personal knowledge of Barron's union activities. He also testified that he knew that Barron supported and contributed to his election as Mayor. (*Testimony of Mayor Koch & Chief Barron*)

17. In his testimony before the Commission, Chief Barron was freely critical of the Mayor Phelan, stating that he [Phelan] had "no respect for our [the QFD's] core mission." (*Testimony Chief Barron*)

18. Deputy Chief Smyth "openly and publicly supported" Mayor Phelan in the 2007 municipal election. (*Testimony of Appellant; Stipulation of Counsel*)

19. Despite being in the minority among Local 792 members over the endorsement of a mayoral candidate, the evidence (including testimony from Mayor Koch) established that Deputy Chief Smyth enjoyed a "great reputation with the men" in the QFD and "good relations with the union", and he was respected by the Local 792 President, Bill Arienti, who described him in a letter as a "firefighter's chief" (as opposed to a "Mayor's chief"). (*Exh.21; Testimony of Appellant, Mayor Koch & McGrath*)

20. Upon assuming office, Mayor Koch appointed his campaign treasurer James Fatseas, a retired investment professional, to the position of Executive Secretary to the Mayor and Chief of Staff. In this capacity Mr. Fatseas served as the Mayor's "budget guy". He was not generally the main liaison to department heads on other matters. Mr. Fatseas had no prior experience with civil service or municipal employment matters. (*Testimony of Mayor Koch & Fatseas*)

21. As Mayor Koch knew, Fatseas and Joseph Barron were school-mates since junior high school and life-long friends. (*Testimony of Mayor Koch, Fatseas & Chief Barron*)

Chief Pettinelli's Decision to Advance His Retirement

22. The QFD Fire Chief at the time of Mayor Koch's election was Thomas Pettinelli. Chief Pettinelli was expected to retire in October 2008, as a result of his enrollment in the so-called Enhanced Longevity Plan (ELP). Quincy had implemented the ELP to enable a fire officer to receive a 10% increase in his pay for three years as an incentive to retire at the end of the three year period. Chief Pettinelli had been receiving ELP incentive pay, along with other officers, including then Deputy Chief McGunagle (who, in fact, also had retired by the time of the hearing before the Commission). Thus, when Mayor Koch took office, it was generally expected that he soon would be appointing a new Fire Chief (and one or more new Deputy Chief(s)). (*Exh 9A-ID; Testimony of Appellant, Mayor Koch & Chief Barron*)

23. At the end of December 2007, Chief Pettinelli suffered an (off-duty) injury. At first, the injury was not known to be serious, but it eventually required surgery and a prolonged absence from work. As a result, in May 2008, Chief Pettinelli informed Mayor Koch that he was advancing his retirement date to July 15, 2008. (*Exh. 14; Testimony of Appellant, Mayor Koch, McGrath & Barron*)

Deputy Chief Smyth Becomes Acting Chief

24. From December 28, 2007 until July 14, 2008, Deputy Chief Smyth filled in for Chief Pettinelli, as a temporary "Acting Chief".¹ Mayor Koch described Deputy Smyth's role during this period as "running the show." Deputy Chief Smyth performed all the

¹ Quincy's use of the term "acting" Chief is a misnomer. Civil service law does not recognize an "acting" status for public safety positions. When a civil service position is filled due to the absence of the permanent incumbent, other than "emergency" appointments for a brief period of time (no more than 60 days), the appointment must be either "temporary" from a civil service list under G.L.c.31,§8, or, if and only if, no suitable list exists, the appointment may be made "provisionally" under G.L.c.31,§15 pending an examination and establishment of a suitable list from which to make a permanent appointment.

duties of Chief, including managing and creating a budget, directing the workforce, meting out discipline, sitting on Quincy's Licensing Board, and attending monthly meetings of the Metro Boston Fire Chiefs Association and Norfolk County Fire Chiefs Association. In May 2008, he was highly praised in letter from the QFD's Local 792 President, Bill Arienti. (*Exhs. 12,16,21,22,23,24,31 & 34; Testimony of Appellant*)

25. The parties offered conflicting evidence as to whether Deputy Chief Smyth's service as a temporary "Acting Chief" during the first half of 2008 was consistent with a normal practice by which the Staff Deputy usually became the "Acting Chief" in the temporary absence of the Chief. According to Deputy Chief Smyth, for as long as the QFD had established the position of Staff Deputy, the Staff Deputy was considered the "ranking" deputy on duty and served as "Acting Chief", as prescribed by Quincy city ordinance. The evidence tends to support this conclusion. The only exception that was pointed out occurred when Chief Pettinelli took a month or two leave to assist with rescue and recovery efforts in the aftermath of Hurricane Katrina, at which time Deputy Chief Barron was designated the "Acting Chief". This situation is equivocal, however, as it appears that there were two vacant Deputy Chief's positions at or around that time, which were not filled (through promotion of then Captains Smyth and Starr) until the week that Chief Pettinelli left for New Orleans. Thus, the appointment of Deputy Chief Barron, in this one instance, does not impeach the credible testimony of the pattern described by Deputy Chief Smyth. (*Exh. 34: Testimony of Appellant & Chief Barron*)

26. In the area of fiscal management, when he assumed the temporary role of "Acting Chief", Deputy Chief Smyth reorganized the fiscal 2008 budget, cleared up outstanding bills and settled disputes with vendors who had become unwilling to do business with the

QFD. Under his management, the QFD finished the fiscal year without any deficit. (*Exh. 31; Testimony of Appellant*)

27. Among the steps he took, Deputy Chief Smyth reviewed the FY2008 budget and identified those line items in which there were surplus funds, and proposed reallocation of those funds to other line items that were running short. In particular, he prepared memoranda which were submitted to and personally approved by newly-elected Mayor Thomas Koch, to transfer surplus funds in the budget to cover the costs of keeping “Rescue 1” in service, which had been forced out of service due to lack of appropriated funds to cover its operation on a full-time basis. This apparatus was a critical piece of equipment needed at incident scenes, and Deputy Chief Smyth’s action demonstrated both strong budget management skills as well as ability to enhance the response capability of the QFD and the members of the department. (*Exhs. 23 & 24; Testimony of Appellant*)

28. In March 2008, Mayor Koch called for a civil service list for Fire Captain without informing “Acting Chief” Smyth in advance. There were 14 captains positions funded in the budget and all those positions were filled. Without conducting any interviews or seeking additional funding from the City Council, Mayor Koch thereafter appointed Lt. Richard Bryan to Captain. Deputy Chief Smyth created a 15th captain’s position for him in the Fire Prevention Bureau, which he managed to arrange by moving money around in the budget to avoid any need for further budget appropriation from the City Council. (*Testimony of Appellant & Mayor Koch*)

29. In addition, Deputy Chief Smyth prepared and presented the QFD department budget for FY2009, to be incorporated in Mayor Koch’s City-wide budget. A new

collective bargaining agreement had been made with the Local 792, with step raises that were to be phased in during FY2009. This circumstance required reassessment of the personal services line items and force strengths, among other items, for which Deputy Chief Smyth was principally responsible. Both Lt. Granahan – the QFD “numbers guy” – and Mr. Fatseas – who was the Mayor’s “budget guy” – as well as Mayor Koch himself, worked directly with Deputy Chief Smyth on the FY2009 budget and saw no criticism or concerns about his work. (*Exhs. 10 & 11; Testimony of Appellant, Mayor Koch, Granahan & Fatseas*).

30. After the Quincy City Council indicated its intention to cut the Mayor’s proposed budget by another five million dollars (\$5 million), Deputy Chief Smyth, along with the Chief of Police and a representative of the School Department, met with the Mayor to devise a proposal to the Council calling for budget cuts that totaled ‘only’ three million dollars. For his part, Deputy Chief Smyth cut an additional \$300,000 from the QFD budget, which he accomplished without loss of core services or jobs. He appeared before the Council to explain these cuts. The Council acceded to the Mayor’s counterproposal. (*Exhs. 10, 11, 21 & 31; Testimony of Appellant, Mayor Koch & Fatseas*)

31. In the area of labor relations, Deputy Chief Smyth prepared a memorandum at Mr. McGrath’s request to set forth the points that he wanted brought to the negotiating table for “strengthening the Chief’s hand” as part of the bargaining that Mayor Koch had reopened for a new collective bargaining agreement with Local 792. Deputy Chief Smyth wrote a “clear and well drafted letter” proposing a change to Article XXIII that would give the Fire Chief greater management rights over the appointment of certain staff positions that were then subject to the “bid” process. This proposal was accepted in

negotiations as to two of the positions he recommended. Mr. McGrath said Deputy Chief Smyth's memo was "well done" and he had no issues with any aspect of Deputy Chief Smyth's handling of this matter. (*Exh. 16: Testimony of Appellant & McGrath*)

Joseph Barron Made "Acting Chief"

32. In January 2008, as a result of a civil service exam for Fire Chief held in 2006, the current list of candidates eligible for appointment as Quincy Fire Chief included Deputy Chief Smyth and Deputy Chief McGunagle (tied for first on the list), followed by (then) Captain Paul Griffin (third place) and Deputy Chief Jeffery Starr (fourth place). Up to that point, Deputy Chief Barron had never taken a Fire Chief's exam and his name did not appear on the current eligible list. (*Exh. 14; Testimony of Barron*)

33. According to Deputy Chief Smyth, the word in the QFD was: "If Koch is Mayor, Barron will get the Chief's job." Smyth also recalled that, in January 2008, Deputy Chief Barron told him specifically: "I think he [Mayor Koch] offered me the job". Deputy Chief Barron testified he made such a statement, but said he was merely joking. Deputy Chief Smyth had also heard, from Local 792 President Ernie Arienti, that Deputy Chief Barron had said, with Chief Pettinelli present, he had been offered the chief's job a dozen times or so between January 2008 and July 2008. (*Testimony of Appellant & Barron*)

34. On another occasion in January 2008, according to Deputy Chief Smyth, Barron told him (and others) that he (Barron) was "being pressured by the administration" to become the next Fire Chief. Chief Barron testified that he had such a conversation, but had said only that he was being "pressured" to take the examination. He testified that the pressure had come from his wife, other firefighting colleagues and his brother, but not

from Mayor Koch, his friend James Fatseas or anyone else in the Koch administration.
(*Testimony of Appellant & Barron*)

35. Deputy Chief Smyth also testified that Deputy Chief Barron made statements directly to him and to other Deputy Chiefs that he [Smyth] will never be offered the position” and “Smyth shouldn’t spend too much money on an attorney” and “my [Barron’s] wife’s friend works in civil service and says the [current] list will die in July”, or words to that effect. Deputy Chief Barron did not deny these statements, save that he “wouldn’t have” said Smyth shouldn’t spend money on an attorney. He admitted that he was told (erroneously) that the 2008 Chief’s list would soon expire from an unnamed source who “works for civil service” [HRD]. (*Testimony of Appellant & Barron*)

36. The testimony and demeanor of the two witnesses leads me to credit the testimony of Deputy Chief Smyth over Chief Barron’s more nuanced versions of these remarks. Had these ambiguous hearsay statements been the only evidence attributing ulterior motives to Mayor Koch or others in his administration, I would not be inclined to give them much weight. However, as reflected elsewhere in this Decision, these remarks are not the only credible evidence that infers a predisposition or on the part of the Koch administration in the process that led to replacing Deputy Chief Smyth as “Acting Chief” and, ultimately, installing Joseph Barron as Chief.

37. In December 2008, prior to leaving office, Mayor Phelan had signed a requisition for a Fire Chief’s departmental examination to be submitted to HRD. Although no direct evidence established when this requisition was submitted, I infer that HRD probably received it in late December 2007 or early January 2008. Deputy Chief Smyth testified that he learned about this exam in early January 2008, while he was checking Chief

Pettinelli's e-mail and found an HRD notice about a Fire Chief's exam to be administered in March 2008. (*Exhs.33 & 34; PH Exh. 36; Testimony of Appellant & Chief Barron*)

38. Neither Deputy Chief Smyth nor, apparently anyone else in the QFD other than Chief Pettinelli, had prior knowledge that such an examination was being arranged. Given the evidence of his good working relationship with Chief Pettinelli, and long service as Staff Deputy, I find this situation perplexing. A Fire Chief's examination entails studying an extensive reading list. Deputy Chief Smyth said he took a year to prepare for the 2006 examination. The eligible list for Chief then in existence would still be in effect when the time came to request a certification to begin the process to select a successor for Chief Pettinelli. Since he was then due to retire in October 2008, and it would normally be expected that the selection process (especially for such a high-level position) would take some time and would begin with a request for a Certification at some time well in advance of his retirement date. No explanation was offered for calling for a new examination and the attendant delay in scoring the exam and establishing a new eligible list. (*Exhs 9-ID & 14; Testimony of Appellant, Chief Barron & Mayor Koch*)

39. In January 2008, according to Deputy Chief Smyth, he received a call on his city-issued cell phone from Mayor Koch's Chief of Staff, James Fatseas, who directed him to send an application to take the newly announced Chief's exam to Deputy Chief James Galvin, an officer then out on injury leave. Deputy Chief Smyth recorded the exact date and time of this call. Mr. Fatseas denies he made such a call, but I do not credit his self-serving testimony on this point over the very credible and detailed recollection by Deputy Chief Smyth of the conversation. (*Testimony of Appellant & Fatseas*)

40. Eventually, no Chief's exam was administered in March 2008 because only three QFD officers (Deputy Chief Barron, Deputy Chief Galvin, and another officer, signed up. HRD administers an examination only when at least four candidates apply. (*Exh. 14; PH Exh. 36; Testimony of Appellant & McGrath*)

41. Deputy Chief Smyth did not sign up to take the test because he was already tied for first place on the current list (with Deputy Chief McGunagle who was poised to retire under the ELP in October 2008) and he was reluctant to take time away from his family to study again on such short notice. Accordingly, the current eligible list (without Deputy Chiefs Barron or Galvin) stayed in effect. (*Exh. 14; Testimony of Appellant; Administrative Notice [www.mass.gov/hrd (Police Chief/Deputy Chief Reading List)]*)

42. On July 14, 2008, the day before Chief Pettinelli's retirement became effective, Mayor Koch installed Deputy Chief Barron as "Acting Chief", effective July 15, 2008. This action was taken without any prior interview or selection process and, according to Deputy Chief Barron, without any advance consultation with him. Mayor Koch stated that his decision was based exclusively on the fact that he understood the prior practice was to appoint the most senior deputy as "Acting Chief", that he had offered the post first to Deputy Chief Galvin, who declined, and Deputy Chief Barron was next in seniority. Simultaneously, Mayor Koch requested a certification from HRD for appointment of a permanent Fire Chief. (*Exh. 14; Testimony of Mayor Koch*)

43. On July 18, 2008, HRD issued Certification 280671 for Fire Chief, containing the first three names in rank order from the current eligible list: Deputy Chiefs McGunagle and Smyth (tied) and Captain Paul Griffin (third). Mayor Koch and Quincy HR Director George McGrath interviewed all three. Quincy Director of Operations, Helen Murphy sat

in on the interviews, but her role was strictly as a note-taker. She asked no questions. (*Exh. 14; Testimony of Appellant, Mayor Koch & McGrath*)

44. Quincy requested and received from HRD two extensions of the deadline, until September 5, 2008, to make an appointment. On or about that date, Deputy Chief McGunagle was offered the position of Fire Chief at a pay of \$145,000 to \$151,000. I note that this offer was approximately \$50,000 more than the base “ordinance” pay of \$101,000 for the Fire Chief, and approximately \$40,000 more than the contract rate of \$112,000 pay that Chief Barron received when he later became Provisional Chief. (*Exh. 14; Testimony of Mayor Koch & McGrath*)

45. On or about September 17, 2008, Quincy requested a third extension of the deadline, which HRD denied on September 19, 2008. HRD also reminded Quincy that civil service law did not authorize any employee to continue to serve as “acting” or provisional Fire Chief, so long as a current eligible list existed. (*Exh. 14*)

46. Thereafter, HRD was informed that Deputy Chief McGunagle had declined to accept the appointment and Quincy requested an additional name from the eligible list for consideration. After HRD received a letter dated October 3, 2008 from Mr. McGunagle stating he had declined to accept the position of Fire Chief “as the compensation did not meet my expectations.” (*Exhs 14 & 19*)

47. HRD then provided Quincy with the name of Deputy Chief Jeffrey Starr, the fourth and final name on the current eligible list. Starr and Smyth had been appointed as Deputy Chiefs on the same date, September 5, 2005. At this point, the Certification included, in order of their scores: Smyth, Griffin and Starr. (*Exhs. 14 & 19*)

34. According to Deputy Chief Smyth, the Chief's position was then offered to Deputy Chief Starr, skipping over the two other candidates ranked higher on the eligible list, including Deputy Chief Smyth, who was then the sole candidate in first place. Quincy claims that Starr was never "offered" the job, but "withdrew" when he learned what the starting pay would be. On November 5, 2008, Starr wrote that he "declined to accept" the position of Fire Chief, which seems more consistent with Deputy Chief Smyth's description. (*Exhs. 14, 18 & 19*)

35. Upon Deputy Chief Starr's withdrawal from consideration, for whatever reasons, the eligible list was exhausted as there were no additional names for HRD to provide to Quincy. With only two names left on the list, this constituted a "short list", which permitted Quincy to elect to appoint one of the two remaining candidates (Deputy Chief Smyth or Captain Griffin), or to decline to select either one, call for a new examination and make a "provisional appointment" until establishment of a new eligible list of at least three names. (*Exhs. 14, 18 & 19*); *See also G.L.c.31, §15 & §27; PAR.09JJ*)

36. Quincy elected the latter. On November 5, 2008, HRD received a request to approve appointment of Joseph Barron as Provisional Fire Chief, effective October 31, 2008. HRD approved the appointment, pending the next regularly scheduled promotional exam for Fire Chief, administered by HRD in March 2009. (*Exhs. 14 & 19; PH Exh. 36*)

37. Also in November 2008, Mayor Koch promoted Captain Paul Griffith to permanent Deputy Chief. There was no permanent vacancy in the Deputy Chief's position at the time. The only unoccupied Deputy Chief's position was that held by Joseph Barron who had been elevated temporarily to Provisional Fire Chief, and who would be entitled to return to his position of permanent Deputy Chief if he was not

appointed permanent Chief after certification of the eligible list from the results of the (yet to be administered) March 2009 promotional examination. (*Testimony of Appellant*)

38. Quincy purported to justify what seems the premature step of permanently, as opposed to temporarily, filling a Deputy Chief's position while the incumbent (Barron) was serving temporarily as provisional Chief, by explaining that another Deputy Chief would soon retire and, thus, if Provisional Chief Barron did not permanent Chief, there would still be a Deputy Chief's position open to which he could return. No examples of similar action were called to the Commission's attention and none come to mind. The details were sketchy about the retirement plans of the other Deputy Chief, whose identity Mayor Koch did not recall. As of the hearing before the Commission, however, it was mentioned that Deputy Chief McGunagle had, in fact, retired and the inference is reasonably drawn that he was the Deputy Chief that Mayor Koch had in mind as expected to retire soon. (*Testimony of Appellant & Mayor Koch*)

39. Deputy Chief Smyth appealed to the Commission, challenging Quincy's appointment of Deputy Chief Barron, first as "Acting Chief" and, then, as Provisional Chief. By decision dated April 2, 2009, the Commission found that Quincy's three and one half month appointment of Deputy Chief Barron as "Acting Chief" had violated the Civil Service Law, because a valid eligible civil service list then existed and one of the officers on that list should have been selected for the "temporary" promotion. The Commission dismissed the appeal, however, on the grounds that the ensuing provisional promotional process which placed Deputy Chief Barron in his then current status of Provisional Chief after exhausting the eligible list, did follow the letter of the law and that subsequent action, in effect, mooted the prior violation. (*Exh. 14*)

40. The Commission acknowledged that Deputy Chief Smyth alleged predisposition against him for having supported Mayor Koch's opponent in the November 2007 election. The Commission noted that, if Deputy Chief Smyth later was bypassed for the pending permanent appointment as Chief, he could revive his charges of predisposition before the Commission in any future appeal. Thus, those issues were not then addressed on the merits. In its Decision, however, the Commission exhorted Quincy to select a permanent Fire Chief through "a transparent selection process to ensure a sense of fair play among all eligible candidates and the public" and "to consider the "exemplary screening and selection methods utilized in other civil service communities" including:

- Use of an outside review panel of current and/or retired Fire Chiefs to conduct initial interviews and make recommendations and observations;
- Public final interviews that are broadcast on the local cable access channel in which each candidate is asked a similar set of questions by the Mayor and other members of his interview panel.

The Commission fully expected that Quincy would "incorporate the Commission's suggestions" in the selection of its permanent Fire Chief. (*Exh. 14*)

41. Immediately after Barron became Provisional Chief, Smyth was reassigned back to Fire Suppression, as Deputy Chief of Group 3. He was never again asked to fill in temporarily as "Acting Chief" during any subsequent absence of Chief Barron. Rather, the duties of "Acting Chief" were given to all other Deputy Chiefs, except Smyth, including newly appointed Deputy Chief Paul Griffin and subsequently appointed Deputy Chief Edward Fenby, although they had less tenure in the job. (*Testimony of Appellant*)

42. On or about July 1, 2009, Quincy entered into a written employment contract with Provisional Chief Joseph Barron to serve as "Acting Chief" at a salary of \$112,000. (*Exh. 17; Testimony of McGrath*)

The 2009 Selection of Permanent Fire Chief

43. Deputy Chief Smyth took and passed the March 2009 Chief's Examination with a score of 81.99 (rounded to "82") on the test. With the addition of experience and education points, his final civil service score was 84. This placed him second on the new eligible list, behind (then) Captain Edward Fenby. (*Exh. 2; PH Exh. 35*)

44. Deputy Chief Barron scored 77.99 (rounded to "78") on the written exam. Experience points and additional points for veteran's status (Coast Guard) yielded a total score of 83. This placed him third, behind Fenby and Smyth. (*Exh. 2; PH Exh.35*)

45. The new eligible list went into effect on August 1, 2009. On August 11, 2009, Quincy requested a certification for Fire Chief and HRD issued Certification No. 290637, which contained three names in the following rank order according to civil service score: (1) Edward Fenby (89); (2) Gary Smyth (84); and Joseph Barron (83). (*Exhs. 1 & 2*)

46. Quincy requested, and HRD approved, an extension of the deadline to return the Certification until September 30, 2009. (*Exhs. 3 & 4*)

47. Mayor Koch was personally acquainted with Deputy Chief Smyth and with Deputy Chief Barron. He did not know Captain Fenby. (*Testimony of Mayor Koch*)

48. Mayor Koch was also fully aware that the process of selecting the new Fire Chief had generated considerable public interest and media attention. By Resolution dated December 1, 2008, the Quincy City Council exhorted the Mayor "in principle and action" to "abide by the Civil Service and union contract rules with regards to filling the position of Fire Chief." (*Exhs 9-ID, 14 & 26; Testimony of Mayor Koch*)

49. Mayor Koch had "perused", but did not "think he ever read" this Commission's decision in the Appellant's prior appeal, which had ruled the installation of Joseph Barron

as “Acting Chief” was unlawful and had urged that Quincy take care to ensure transparency in the ensuing process of selection of a permanent Fire Chief. (*Exhs 9-ID, 14 & 26; Testimony of Mayor Koch*)

50. Mayor Koch testified he did not even give the Commission’s prior Decision any “real consideration”. He did not recall ever having any “in depth discussions” with anyone about it. He said that, after he consulted with Assistant City Solicitor Madden and Quincy HR Director McGrath, he decided not to follow the Commission’s recommendations to use an independent interview panel of current or former Fire Chiefs and hold public interviews that would be covered by the local cable television station. (*Testimony of Mayor Koch & McGrath*)

51. According to Mayor Koch, he was advised, and agreed, that these recommendations may have some force in a town form of government, but were not apt to Quincy, as a “Plan A” form of city government, where the Mayor, solely, was “ultimately accountable” directly to the voters for all his decisions. Mr. McGrath testified that using outside fire chiefs would give Deputy Chief Smyth an unfair “leg up”, since he had endorsements from the Norfolk County Chief’s Association and other outside fire department officials. Former Chief Pettinelli was ruled out because he had an outstanding dispute over compensation time. (*Testimony of Mayor Koch & McGrath*)

52. Instead, private interviews were scheduled with the three candidates for September 15, 2008 before an interview panel comprised of Mayor Koch and Quincy Human Resources Director Steven McGrath (who also sat in on the interviews for Fire Chief a few months earlier) plus Assistant City Solicitor Kevin Madden (who had represented Quincy in Deputy Chief Smyth’s prior appeal to this Commission). Both

McGrath and Madden are Mayoral appointees who serve at the pleasure of the Mayor. (Exhs. 5A, 5B, 5C & 14; *Testimony of Appellant, Mayor Koch, McGrath & Barron*)

53. Prior to the interviews, a list of nine questions was developed to be asked to each candidate. These questions were developed with the assistance of Assistant City Solicitor Madden's brother, who had served as Fire Chief and as Mayor in the Town of Weymouth. The interviews were scheduled one hour apart. There were no established criteria to judge the candidates and no scoring or rating of the candidate's responses at the interview. Mayor Koch permitted the panel to "diverge" from the established questionnaire "if the discussion went that way." (*Testimony of Mayor Koch & McGrath*)

54. In addition to the interviews, Mayor Koch called for and reviewed the personnel files of each candidate. The files were not introduced into evidence. Mayor Koch testified that the only information he recalled gleaning from these files was the tenure and seniority status of each candidate. He also allowed each candidate to submit written supplemental information. (*Testimony of Mayor Koch*)

55. Deputy Chief Smyth submitted an eight-page resume which included a synopsis of his career history, his certifications, community organizations, summary of his role in grant writing, preparing SOGs, training, updating the Rules and Regulations Manual, apparatus acquisitions, firefighter hiring, and budget management. He included a two-page summary of his assessment of the short term, medium term and long term priorities and goals for the QFD. He also attached letters of recommendation from the Norfolk County Fire Chiefs Association, Quincy's Director of Inspectional Services and two prominent Quincy residents and long-time friends of Mayor Koch (including former Quincy Mayor Walter Hannon and business owner Robert Curry), as well as several

letters of commendation from others public safety officials familiar with his past experience. (*Exh. 12; Testimony of Appellant & Mayor Koch*)

56. Captain Fenby submitted a one page resume to the interview panel. (*Exh. 13*)

57. Deputy Chief Barron submitted no resume and no documentation to the interview panel in support of his candidacy. (*Testimony of Barron*)

58. At the interview, no verbatim record was kept. Mayor Koch took no notes. The only record of the interviews introduced in evidence were handwritten notes kept by Mr. McGrath on the interview questionnaire, which even Mr. McGrath had some difficulty deciphering at the hearing before the Commission. Mr. Madden also took notes, but his notes were not placed in evidence. At the time of the hearing before the Commission, neither Mayor Koch nor Mr. McGrath (Mr. Madden did not testify) had a clear or precise recollection of the details of the interviews, even after reference to Mr. McGrath's notes. (*Exhs. 15A,15B & 15 C; Testimony of Mayor Koch & McGrath*)

59. Mr. McGrath's notes contain, in their entirety, the following information about each candidate's answers to the nine questions posed at the interviews:

1. Please give a brief history of your career with the Quincy Fire Department including your various assignments.

BARRON: *suppression, 12 yrs to (illegible) exam, staff president, town/Plymouth*

FENBY: *1987 – G Town 3year 6 mo fire alarm, safe office engine 2 N. Q. 5 year Engine – 7 years, Quincy Point, single engine*

SMYTH: *1987 – HQ, Eng 7 Sq. 88 – (Illegible) Ladder 1, 89/90, HQ 1/91, 2002- CAPT, HQ. Q5*

2. Please describe your education and training.

BARRON: *4 year Coast Guard, Tunnel Rescue Team,*

FENBY: *1987 – Nat'l Guard*

SMYTH: *1987 – Getting Bachelors in Fire Science, NIMS*

3. Considering the condition of the nation's economy and its impact on state aid to our community where do you see that savings can be made in the fire department budget without compromising response time and safety?.

BARRON: *Combine H.N. & G.Town; accident Safety officer, advocate drug testing & light duty*

FENBY: *[No response recorded]*

SMYTH: *\$1 million in staff position, don't fund staff Lt. in safety + HAZ MAT*

LONGEVITY ISSUE: *12 years left G-town & H.N; N Quincy & Squantum*

4. What do you see as the most important capital needs of the fire department?

BARRON: *ladder truck, Dep.Chief vehicle, 8 yrs old; engine Co's in good shape, (illegible) in training, every to every other year*

FENBY: *1 million per year, \$500,000 VEHICLES, \$500,000 to fix stations*

SMYTH: *Suppression: Have 5 new ones now, new ladder truck necessary; old stations, maybe not worth saving; FIRE ALARM DISPATCH; grant money, grant writing background*

5. What do you consider the most pressing training needs for our firefighters?

BARRON: *phase out, certification of firefighter2*

FENBY: *HAZ MAT (illegible) through the City Awareness level, want operational level, should be every day, leadership problem over year from Gorman, Chief 3 yrs and OUT, pre-fire plan, use software better, have town of buildings, medical (illegible)*

SMYTH: *Closer relationship with Boston; Dave Gorman + Lt.*

6. E-911 has been in the news lately, both locally and most recently the Boston Globe reported that a number of communities, south of Quincy, including Brockton were awarded grants to regionalize E-911 service. Do you support regionalizing D-911 service? What are your concerns with the present set up of E-911 in Quincy?

BARRON: *Only a problem with medical calls, collage of equipment not meant to work together. Fire Alarm oversight*

FENBY: *[No response recorded]*

SMYTH: *Fire Dept. Personnel should dispatch Fire Equipment.*

7. Many communities have bargained the work hours for the fire suppression force to 2-24 hour shifts over an eight day period. What are your thoughts and concerns regarding 24-hour shifts?

BARRON: *Not in favor, large periods away, expensive*

FENBY: *Concerning re: Discipline, training, staff leadership no necessary*

SMYTH: *With monitoring, loss of relationship, camaraderie, etc; look at finances Look at Dispatch sick time issue, put whole dept on training in dispatch*

8. Considering the fact that all employees who drive vehicles and/or equipment requiring a CDL are subject to random drug/alcohol testing, what is your position on mandatory drug testing for firefighters?

BARRON: *Want to have all ff on CDL, then they'd have a testing component*

FENBY: *Absolutely in favor*

SMYTH: *As Chief would want it;*

9. What would be your first priority for the next collective bargaining agreement?

BARRON: *Wants light duty + drug testing/bargaining away 24 hour shift. Problem with 4 day w/w, go back to 5 dayWW with stipend. Bookkeeping area revamped*

FENBY: *Concern over health care issue, manpower issue 17-10: physical training*

Would take job

SMYTH: *Check out Fire Alarm OT; SICK TIME LANGUAGE, Fire Rule Book, wants management rites. Light duty issue*

(Exhs. 15A, 15B & 15C; Testimony of McGrath)

60. Mayor Koch testified that Captain Fenby was more interested in becoming a Deputy Chief and would not accept the Chief's position. Accordingly, Mayor Koch gave no further consideration to Captain Fenby's candidacy. *(Testimony of Mayor Koch)*

61. Following the interviews, Mayor Koch said he had about a 30 minute meeting with Messrs. McGrath and Madden. He met with them again for about an hour on September 17, 2008. Mayor Koch said they "compared notes" (although the Mayor had taken no written notes). At the Commission hearing, neither Mayor Koch nor Mr. McGrath had more than a limited present recollection of their meetings. Mr. McGrath thought Deputy Chief Smyth came prepared and interviewed "well", but he did not consider that he had any "input" in the decision of whom to appoint, which was left solely to Mayor Koch. *(Testimony of Mayor Koch & McGrath)*

62. The following week, Mayor Koch selected Joseph Barron over Gary Smyth for permanent Fire Chief, effective September 30, 2009. Mayor Koch testified that each man

was a “strong candidate” but three factors set them apart. First, Barron’s seniority –nine years longer service in the QFD and four years more service as Deputy Chief – was the primary distinguishing factor. Second, Barron’s five years as a member of Local 792’s Executive Board gave Barron an ability to work better with “that side of the table”, i.e., the union, in the matter of labor/management relations. Third, Mayor Koch found Barron’s experience as a Plymouth Town Meeting member and experience in his family’s trolley business demonstrated unique knowledge and experience in the public realm and in handling budgetary matters. Mayor Koch also described Deputy Chief Barron as the more reliable “team player”. (Exhs. 6 & 7; *Testimony of Mayor Koch*)

63. By letter dated September 30, 2009, Mayor Koch submitted the precise written reasons for selection of Joseph Barron to HRD for approval.

- The letter cited Joseph Barron’s long tenure with the QFD and as Deputy Chief (actually erroneously stating that Barron became a Deputy Chief in 1992, rather than 2002) and his “unique and through knowledge of labor and management relations that . . . most sets him apart from the other candidates.”
- Mayor Koch also cited Barron’s “demonstrated commitment to community, evidenced by his service as an elected town meeting member in his hometown . . . and served as an advocate for adequate fire service funding. Again, these are skills that set him apart from the other two candidates.”
- Finally, Mayor Koch wrote that, over the past fiscal year, “I have observed Joseph Barron prepare, and adhere to, a budget . . . during these difficult financial times. He exhibited strong budgeting skills which he indicated were the product of his work as a town meeting member, his operation of a successful family business, and his experience within the department.”

(*Exh. 7*)

64. Mayor Koch stated to HRD that “[a]lthough [Barron] devoted a substantial portion of his career to fire suppression, he has demonstrated exceptional knowledge of all operational aspects of the department, as evidenced by his interview performance and

his work over the past several years.” He touted “Acting Chief” Barron’s command of a July 2008 incident at Fore River Shipyard that had killed an iron worker. (*Exh. 7*)

65. As to Captain Fenby, Mayor Koch wrote, his career was “devoted almost entirely to fire suppression”, which gave him “very limited knowledge of the overall administrative aspects of running a large city fire department.” He wrote that Captain Fenby would be honored to be Fire Chief, but acknowledged that Deputy Chiefs Barron and Smyth had superior training and experience for the job. Captain Fenby said he would be as equally excited to be appointed as a Deputy Fire Chief. (*Exh. 7*)

66. As to Deputy Chief Smyth, Mayor Koch’s letter to HRD stated:

“Deputy Fire Chief Gary Smyth placed second on the promotional exam for fire chief. He is also a 22 year veteran of the Quincy Fire Department moving steadily through the officers’ ranks to his present position as Deputy Fire Chief to which he was promoted in 2005.

“Deputy Smyth worked mainly in fire suppression through the rank of Captain and worked for his first three years as Deputy in administration. During my first six months as mayor, Deputy Smyth served as the de-facto chief during the absence of Chief Pettinelli, due to his administrative position. In 2008, he returned to a position in fire suppression.

“I did not believe that Deputy Smyth demonstrated a strong knowledge and understanding of labor relations when compared to Joseph Barron, which may simply be a product of Barron’s longer experience on the department, work with the union, and service in his town government.

“Clearly Deputy Chief Smyth has a bright future ahead of him. When compared to Joseph Barron, the deciding factors were in the area of experience in labor-management and also his experience and ability to work within the organizational structure of the municipality.”

(*Exh. 7*)

67. Mayor Koch testified at the hearing before the Commission that he was also troubled that Deputy Smyth asked former Mayor Hannon and Quincy business owner Robert Curry – whose long-time friendship with Mayor Koch was “widely known” – to submit written letters of recommendation on Smyth’s behalf, and to supply them with a

copy of a synopsis of his credentials that he had prepared in 2008 on QFD letterhead. Koch said both men had business dealings before the Quincy Licensing Board on which Deputy Chief Smyth served. Mayor Koch testified that Smyth's use of these references raised questions about Smyth's "maturity" for inappropriately "campaigning" for the job of Fire Chief. Mayor Koch said this concern factored into his decision, but, out of graciousness, did not mention that reason in the letter he wrote to HRD. (*Exhs. 7, 12 & 31; Testimony of Mayor Koch*)

68. After hearing all of the evidence on this subject, I do not find any rational basis upon which to criticize Deputy Chief Smyth's solicitation of a recommendation from former Mayor Hannon or Mr. Curry, or the manner in which he openly did so. Neither had any matters before the Licensing Board during the brief time that Deputy Chief Smyth sat on the Board while filling in for Chief Pettinelli. Moreover, Mayor Koch mistook the purported conflict regarding licensing at their business locations (a golf course and a hardware store). Those licenses (for propane tanks) were not issued by the Licensing Board, but by the QFD Fire Prevention Bureau, which was administered through another QFD commanding officer. (*Testimony of Appellant*)

69. Quincy also offered an example of Deputy Chief Smyth's 2008 alleged questionable involvement in a licensing issue at a restaurant at Marina Bay, in which Mayor Hannon also was somehow involved, although Hannon's connection to the transaction was never clearly spelled out. The restaurant was initially denied a permit by the Fire Prevention Bureau to install propane tanks. Deputy Chief Smyth thereafter met at the restaurant with the owner, along with Captain Lyons, the Fire Prevention Bureau commanding officer. Former Mayor Hannon was also present along with Quincy City

Solicitor Timmins. As a result of the meeting, a solution was found to resolve the Fire Prevention Bureau's concerns and allow the tanks to be installed. I find nothing in Deputy Chief Smyth's role in this incident, with the City Solicitor present, to impugn his integrity, judgment or maturity. Rather, the incident speaks favorably about his ability at problem solving and responsiveness to citizen concerns when brought to his attention by the Koch administration. (*Testimony of Appellant*)

Chief Barron's Credentials

70. Neither Quincy nor the Appellant called Chief Barron as a witness during their respective case in chief. Quincy did call him in rebuttal for the limited purpose of disputing the substance of certain statements purporting to show a predisposition by the Koch administration to appoint Barron, attributed to Barron by Deputy Chief Smyth. Counsel for the Appellant was allowed some latitude, however, to develop other lines of inquiry concerning the merits of Chief Barron's credentials. (*Testimony of Chief Barron*)

71. Chief Barron is a Quincy High School graduate and veteran with four years of honorable service in the US Coast Guard. He had 32 years service with the QFD, becoming a Deputy Chief in 2002. He is one of several family members who became QFD firefighters, including his brother who is also still active. He is married with two sons, one in his thirties and a second in his early teens. He presents as a mild-mannered, dignified individual and dedicated senior fire professional. He demurred when asked to predict how long he intended to remain as Fire Chief. (*Testimony of Chief Barron*)

72. The record contains a limited picture of the details of Chief Barron's specific experience prior to becoming Acting Chief. Mr. McGrath's interview notes reference only a sketchy description of his assignments and list only his Coast Guard service and

the “Tunnel Rescue Team” for experience and training. In his testimony to the Commission, he stated that he was two courses short of an Associates’ Degree. (*Exh. 15A: Testimony of Chief Barron*)

73. When asked to describe his involvement in the Quincy firefighters’ Local 792, Chief Barron said there “isn’t a great deal to talk about.” He mentioned his work on committees, particularly one addressing issues concerning the dispatch center operation in 1996. He served five years on the Executive Board from 2002 through 2007, where the duties involved deciding whether disputes should or should not be grieved under the collective bargaining agreement, and keeping abreast of labor/management issues. He was never a member of the bargaining team in collective bargaining, which responsibility principally fell to the union president. (*Testimony of Chief Barron & McGrath*)

74. Chief Barron also described the involvement in his family business – Plymouth Rock Trolley Co – which he ran jointly with his brother. The business owned and operated six trolley-style tourist busses. While the two siblings shared the responsibilities as co-owners, Barron took the lead in most administrative matters, such as budgets and marketing, but, save for mentioning his work with “Destination Plymouth” (a Town of Plymouth program to promote tourism), he offered no specific details of this work. Several years ago, his brother bought him out and, eventually, the business was sold. (*Testimony of Chief Barron*)

75. Chief Barron also mentioned his service as a Plymouth Town Meeting member, which he said was an elected position. He did not elaborate on what the duties of position entailed or provide any tangible examples of his contribution as a town meeting member. (*Testimony of Barron*)

76. In terms of his direct experience working with the QFD budget, evidence was produced that, as “Acting Chief”, Barron ended FY2009 within budget and, as Provisional Chief, prepared the FY2010 budget, the latter being a “level funded” budget that tracked the FY2009 budget compiled by Deputy Chief Smyth. (*Testimony of Appellant, Chief Barron, Mayor Koch, McGrath & Fatseas*)

Deputy Chief Smyth’s Testimony

77. Deputy Chief Smyth presented as a self-confident senior fire professional with well-rounded knowledge in his field of expertise and a distinguished twenty-two year career. He spoke with considerable acumen about many diverse fire service issues, ranging from details about the operational strengths and weakness of the dispatch center to larger “big picture” issues, such as the principles of “fire pre-planning”. He was subjected to some tough cross-examination on sensitive matters and acquitted himself well. I could draw no inference from his demeanor and his consistent, responsive and persuasive testimony that suggested any rationally based indicia of a difference between his level of “maturity” or ability to handle himself in public over that of Chief Barron. In fact, I would say that it was Deputy Chief Smyth who displayed a more consistent demeanor in his testimony as well as a greater passion for his job and pride in his performance. (*Testimony of Appellant and Chief Barron*)

78. Deputy Chief Smyth testified that he also had experience running a private business for over twenty years, a landscape company that continues to run with his brother. Mayor Koch knew of this experience, although it was never highlighted during the selection process for temporary or “Acting Chief”, Provisional Chief or permanent Fire Chief. (*Exhs. 7, 12, 15A, 15C; Testimony of Appellant & Mayor Koch*)

79. I also take note of the distinctly different level of specific recollection of critical events demonstrated by Deputy Chief Smyth, as opposed to the lack of more than a general recollection displayed by nearly all of the witnesses called on Quincy's behalf. While I am mindful that Deputy Chief Smyth has a huge personal stake in the outcome of this matter, I note three examples from the 2009 interview process that illustrate why the evidence has persuaded me, more likely than not, that Deputy Chief Smyth's recollection of specific events is factual and credible and that the Quincy witnesses lack of recollection is more self-serving and less reliable and accurate. (*Testimony of Appellant, Mayor Koch, Chief Barron, McGrath & Fatseas*)

80. First, one of the interview questions asked about the candidate's position on mandatory drug testing for firefighters. According to Mayor Koch, he recalled Deputy Chief Barron being strongly in favor of drug testing and Deputy Chief Smyth less so. This recollection does not appear to be accurate based on the other evidence. In fact, Mr. McGrath's interview notes state that Deputy Chief Smyth was clear: "As Chief, would want it", whereas Barron was actually more nuanced: "want to have all ff on CDL, then they'd have a testing component." (*Exhs. 15A & 15C; Testimony of Mayor Koch*)

81. Deputy Chief Smyth testified with clarity about his recollection of the full and thoughtful answer he gave about drug testing. He noted thankfully, that the QFD did not currently have a drug abuse problem, but that, as Chief, he would favor drug testing, stating that it would need to be a subject of collective bargaining and require gaining the support of Local 792. (*Testimony of Appellant*)

82. I also note that, although the subject of drug testing was one of the six key substantive issues addressed in the interview questions, the matter apparently had not

been a priority of the Koch administration in the 2008 collective bargaining process or otherwise pursued thereafter. (*Testimony of Appellant*)

83. Second, another key substantive issue covered by the interview questions was whether Quincy should change its shift schedule from the traditional work week to a 24-hour shift schedule adopted in other communities. According to Mr. McGrath's notes, Barron's answer was "not in favor, large periods away, expensive" and Smyth's answer was: "With monitoring, loss of relationship, camaraderie, etc; look at finances. Look at Dispatch sick time issue, put whole dept on training in dispatch." Mayor Koch did not testify as to any specific responses to this question. (*Exh. 15C; Testimony of Mayor Koch & McGrath*)

84. Deputy Chief Smyth recalled giving a specific, in depth response to the question. He stated that the presumed advantage of the 24-hour shift system was that it would save overtime costs, but that, historically, other departments which implemented this system found that overtime would eventually begin to build up again. He stated that he was concerned with its effect on departmental camaraderie and the impact on families when firefighters were apart for long periods. He also stated that if such a system were to be implemented, it should be done with a management rights provision to review the results on an annual basis to see if it was meeting the needs of the department. Deputy Chief Smyth recalled clearly that, as to the latter two points, Mayor Koch said he had not thought about the family disruption issue and that the management rights idea was a "good point". Mr. McGrath's notes about the dispatch center seem to have nothing to do with the 24-hour shift question, but, rather, related to prior questions about cost control issues and reform of the dispatch center. (*Exh. 15C; Testimony of Appellant & McGrath*)

85. Third, Mr. McGrath's notes of the interview with Deputy Smyth contained a reference at the end to "ISO Insurance", but Mr. McGrath had no recollection of what was said on that subject or what the reference meant. (*Exh. 15A; Testimony of McGrath*)

86. Deputy Chief Smyth had a clear recollection on the subject. He explained that fire insurance rates are set by community ratings established by ISO, based on an assessment of the municipality's fire protection service. He would aspire as Fire Chief to bring Quincy up to a "1", the highest rating, comparable to the City of Cambridge. He said that achievement would reassure citizens that Quincy was providing the best possible fire protection and service, as well to bringing down the cost of municipal property insurance and private homeowners' and business insurance rates. I found Deputy Chief Smyth's testimony on this subject to be sincere and accurate. (*Testimony of Appellant*)

Tiller Truck & Departmental Layoffs

87. In an effort to distinguish the relative ability of Deputy Chief Smyth and Chief Barron to manage the fire department's assets and the safety of department personnel, the Appellant proffered evidence about the use of a piece of QFD apparatus called the "tiller truck". The tiller truck was a 1970s generation ladder truck that had been taken out of service years ago and stored in an open-air warehouse. When Joseph Barron became "Acting Chief", he ordered the tiller truck into service to be used as a training vehicle but, during a training exercise, the steering column snapped. There were no personnel injuries, but Deputy Chief Smyth was critical of the decision to use the truck at all, and said it would never have happened on his watch. While I find all of these facts to be true, there was no evidence that these circumstances were brought to Mayor Koch's attention at the time and there is no evidence they were raised in any of the interview

sessions. Accordingly, I do not credit the facts about the “tiller truck” in weighing whether or not the Mayor’s decision to pick Deputy Chief Barron over Deputy Chief Smyth was reasonably justified. (*Testimony of Appellant, Chief Barron & Mayor Koch*)

88. Similarly, the Appellant sought to impugn Chief Barron’s management ability by referring to his decision to hire a number of new firefighters (which included some veterans) only to have to layoff firefighters shortly thereafter. Due to the statutory veterans’ preferences, this resulted in the layoff of QFD non-veteran firefighters with more seniority than those recently hired. The evidence on this point, however, was not sufficiently developed to permit me to draw any inference that the initial hiring decisions or the layoffs were not taken in good faith, in the best interest of the department at the time, and in accordance with the letter of the requirements of civil service law. Accordingly, I have not given any weight to his evidence in reaching my conclusion on this appeal. (*Testimony of Appellant & Chief Barron*)

Arienti Job Offer

89. Quincy sought to impeach Deputy Chief Smyth by proffering evidence that he allegedly offered to appoint the union Local 792 president, Bill Arienti, to a position in the Fire Alarm Maintenance Bureau, an allegation that Deputy Chief Smyth denied. Bill Arienti, a long-tenured firefighter, was also an electrician. No motive for him to change his job was suggested. The Fire Alarm Maintenance Bureau, although technically a part of the QFD, was managed by a Superintendent and not staffed by any firefighters. The positions in that Bureau are civil service titles and appointments and require taking and passing a separate civil service examination and placement on an eligible list in rank order of the score achieved. I find it unlikely that Deputy Chief Smyth would have, or

could have, promised such a civil service position to anyone. The clear preponderance of the evidence supports Deputy Chief Smyth in this regard. (*Testimony of Appellant; Administrative Notice [www.mass.gov/hrd (Fire Alarm Examinations)]*)

CONCLUSION

Summary of Conclusion

Applying the applicable standards of civil service law to the facts of this appeal, the preponderance of the credible evidence fails to establish that the reasons asserted by Quincy for bypassing Deputy Chief Smyth and selecting Deputy Chief Barron as permanent Fire Chief pass muster under basic merit principles. Rather, the evidence established that Quincy's decision was predetermined that Deputy Chief Smyth would be bypassed long before, and without any regard to, the candidates' rank order on any civil service Certification list or a fair and impartial evaluation of strengths and weaknesses of the candidates through a reasonably designed, objective process free of political or personal bias, as civil service law requires. Accordingly, the Commission must exercise its discretion in this case to vacate the permanent appointment of Chief Barron, revive the Certification from which he was appointed and require Quincy to make a new appointment of a Permanent Fire Chief from the candidates on that Certification, through a process that ensures no predisposition against Deputy Chief Smyth or bias in favor or against any other candidate, enters into the decision-making process.

Applicable Legal Standard of Review

This appeal involves a bypass of the Appellant for promotion to a permanent civil service position. This process is governed by G.L.c.31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name

appears highest [on the certification] . . . the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

PAR.08(3), promulgated by HRD to implement this statutory requirement, provides:

“A bypass will not be permitted [without] a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed to . . . shall later be admissible as reason for selection or bypass in any proceedings before . . . the Civil Service Commission.

Ordinarily, candidates are selected according to their place on a “certification” which ranks them by competitive written examination scores, administered by HRD, along with certain statutory credits and preferences. In order to deviate from the order, an appointing authority must prove specific reasons – positive or negative, or both – consistent with basic merit principles, to affirmatively justify picking a lower ranked candidate. G.L.c.31,§1,§27. See, e.g., Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist.Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Serv. Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326(1991). See also MacHenry v. Civil Serv. Comm’n, 40 Mass.App.Ct. 632, 635(1995), rev.den.,423 Mass.1106(1996)(HRD review of bypass [now delegated] (and Commission oversight) means not “formally to receive bypass reasons” but to evaluate them “in accordance with [all] basic merit principles”); See also, Stavely v. City of Lowell, 71 Mass.App.Ct. 400,407-408 (2008) (Commission has “broad . . . oversight responsibility)

Candidates are entitled to be adequately, fairly and equivalently considered. Overt political influence is one concern, but it is not the only measure of unjustified decision-making by an appointing authority. The Commission broadly construes its obligations to prohibit the bypass of a more highly ranked candidate whenever it finds “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking,

bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988). See, e.g., Moses v. Town of Winthrop, 21 MCSR 420 (2008) (appellant prove flawed and indistinguishable rationale for bypass); Reilly v. Lawrence Police Department, 13 MCSR 144 (2000) (“To be successful [a bypassed appellant] needs only to show the Appointing Authority’s reasons for selecting another candidate applies (sic) equally to him as well as to rebut any negative reasons given for his bypass”); DiVincenzo v. City of Beverly, 10 MCSR 95 (1997) (“Not only did the Appellant show himself to be well qualified for promotion . . . he showed that the reasons offered by the Appointing Authority were in many instances untrue, apply equally to him, are incapable of substantiation, or are a pretext for other, impermissible reasons”). See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (bypass requires “objectively legitimate reasons”)

The task of the Commission in deciding a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. . . . Reasonable justification in this context means “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. In performing this function:

“[T]he commission does not view a snapshot of what was before the appointing authority . . . *the commission hears evidence and finds facts anew*. . . . [after conducting] ‘a hearing *de novo* upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer’ . . . For the commission, the question is . . . ‘whether, *on the facts found by the commission*, there was reasonable justification for the action taken by the appointing authority’ ”

Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission’s decision to reject proof of appellant’s failed polygraph test and domestic abuse orders by crediting appellant’s exculpatory testimony rebutting that evidence) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to find appointing authority’s justification unreasonable); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (same). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid’d, 8 MCSR 53 (1995) (discussing need for de novo fact finding before a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466 (1996) (same)

The “preponderance of the evidence test” requires the Commission to conclude that an appointing authority established through substantial, credible evidence presented to the Commission that the reasons assigned for the bypass of an appellant were “more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

An appointing authority may rely on information it has obtained through an impartial and reasonably thorough independent review, including allegations of misconduct obtained from third-party sources, as the basis for bypassing a candidate. See City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189 (2010). There must be a

“credible basis for the allegations” that present a “legitimate doubt” about a candidate’s suitability, but the appointing authority is not required “to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct. . . .” Id., 78 Mass.App.Ct. at 189-90. Especially when it comes to an applicant for a sensitive public safety position, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown . . . Absent proof that the [appointing authority] acted unreasonably . . . the commission is bound to defer to the [appointing authority’s] exercise of its judgment” that “it was unwilling to bear the risk” of hiring the candidate for such a sensitive position. Id., 78 Mass.App.Ct. at 190-91. See Town of Reading v. Civil Service Comm’n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914,(2004) (rescript opinion); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct.300, 303-305 (1997); Massachusetts Dep’t of Corrections v. Anderson, Suffolk Sup. Ct. No. 2009SUCV0290 (2010), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008)

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an

agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing) ²

The Selection Process

Quincy correctly asserts that an interview panel may be a legitimate tool for assessment of candidates for civil service appointments and promotions. The Commission has made clear, however, that subjectivity is inherent and permissible in a interview procedure, and care must be taken to preserve a “level playing field” and “protect candidates from arbitrary action and undue subjectivity on the part of the interviewers,” which are core objectives behind basic merit principles of the civil service system. E.g. Flynn v. Civil Serv. Comm’n, 15 Mass. App. Ct. 206, rev. den., 388 Mass. 1105 (1983). The Commission’s decisions have commented on a wide range of interview plans, some which are mostly acceptable and some more seriously problematic. Examples of the former: Monagle v. City of Medford, 23 MCSR 269 (2010); Anthony v. Springfield, 32 MCSR 201 (2010); Gagnon v. Springfield, 23 MCSR 128 (2010); Boardman v. Beverly Fire Dep’t., 11 MCSR 179 (1998). Examples of the latter: Piersak v. Town of Needham, 21 MCSR 605 (2008); Moses v. Town of Winthrop, 21 MCSR 420 (2008); Mainini v. Whitman, 20 MCSR 647, 651 (2007); Belanger v. Ludlow, 20 MCSR 285 (2007); Horvath v. Pembroke, 18 MCSR 212 (2005); Fairbanks v. Oxford, 18 MCSR 167 (2005); Saborin v. Natick, 18 MCSR 79 (2005); Thomas v. Westfield, 13 MCSR 13,

² When reviewing a Commission decision, a court will not “substitute [its] judgment for that of the commission” but is limited to determining if the Commission decision was “supported by substantial evidence” and must “give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . . This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.’ ” Brckett v. Civil Service Comm’n, 447 Mass. 233, 242-42 (2006) and cases cited.

15 (1999); Sihpol v. Beverly Fire Dep't., 12 MCSR 72 (1999); Bannish v. Westfield Fire Dep't., 11 MCSR 157 (1998); Roberts v. Lynn Fire Dep't., 10 MCSR 133 (1997).

Under the circumstances presented by this appeal, Quincy's interview process failed to provide the necessary level of protection against arbitrary action and undue subjectivity that the Commission requires. In fact, the process actually reinforces the conclusion that the decision was predetermined rather than engender confidence that the decision was made fairly and objectively. The Commission has no stake, and takes no position, as to which candidate is the right choice for the position of Quincy Fire Chief or any other civil service position. The Commission does have a vital interest to enforce its core mission to ensure to all candidates that such decisions are fairly and honestly made. Quincy's selection process falls seriously short of the preponderance of evidence required to demonstrate that it has met these goals.

First, the choice of the interview panel, alone, raises substantial doubt as to Quincy's concern for creating a truly objective process. One panel member (Mr. McGrath) selected by Mayor Koch to sit with him also sat on the interview panel that bypassed Deputy Chief Smyth in favor of Deputy Chief Barron in the 2008 process that lead to the prior appeal to this Commission. The other member (Mr. Madden) was the attorney who defended Quincy against Deputy Chief Smyth in that Commission appeal.

Moreover, Quincy concedes that all decisions were made, and always were intended to be made, solely by Mayor Koch himself. Both the other interview panel members were his subordinate (non-civil service) appointees who served at his pleasure. Neither man apparently provided meaningful "input" into Mayor Koch's thought process or decision. Mayor Koch's appointment of Chief Barron to permanent Chief was the fifth such time

Mayor Koch had declined to appoint Deputy Chief Smyth and the third such time in two years that he bypassed Gary Smyth in favor of Joseph Barron.³ In these circumstances, it should come as no surprise that the Commission's eyebrow would be raised by Mayor Koch's summary rejection of the Commission's suggestions to ensure an independent and open selection process for permanent Fire Chief, as proposed in the Commission's Decision in the prior appeal brought by Deputy Chief Smyth.

Quincy's explanation for ignoring the Commission's suggestions is not persuasive. Essentially, Quincy claims that, because Mayor Koch is a Plan A "strong mayor", who personally makes all civil service appointments and who is directly accountable to the voters for his decisions, that, alone, makes him sufficiently accountable for those appointments. In fact, this argument lacks merit. On the one hand, it is unlikely that the outcome of any municipal election would turn on a referendum on the choice of a Fire Chief. On the other hand, to equate accountability for picking a civil service Fire Chief with the electoral process is to completely misunderstand that transparency in civil service appointments is required precisely to insulate those decisions from the influence of politics. While Quincy's logic may apply to the Mayor's non-civil service appointees, it has no place here so long as Quincy remains one of the 62 cities and towns in the Commonwealth who chose to grant their Fire Chiefs the protection of civil service law.

Similarly, Quincy's explanation for rejecting the inclusion of outside fire science experts because it would have given Deputy Chief Smyth an unfair "leg up", also rings hollow. The only input that the interview panel received from anyone with hands-on

³ The four prior decisions include: (1) bypassing Smyth (then first on the eligible list) for Barron as a temporary "Acting Chief" in July 2008 (which the Commission found to have been unlawful); (2) offering Deputy Chief McGunagle the position of permanent Chief in September 2008; (3) again, bypassing Smith (still first on the list) and offering the position of permanent Chief to Deputy Chief Starr, who was forth; (4) appointing Barron provisional Chief (although Smyth then still stood first on the eligible list)

experience in fire science or fire department management was some unspecified, indirect advice that Mr. Madden obtained from his brother. The concern that the rapport developed by Deputy Chief Smyth with members of the Norfolk County Fire Chiefs Association in the six months he met monthly with them, and who endorsed his candidacy, does argue legitimately that those Chiefs should not sit on the interview panel. There is no such similar justification for not soliciting assistance from current or retired Fire Chiefs or District Chiefs in any one of the other 300 cities and towns in the Commonwealth who would have no prior knowledge of any of the candidates.

Second, the decision to conduct all interviews in private and to make no verbatim record, as the Commission had suggested, also is perplexing. The justification provided by Mr. McGrath was the expense of recording the interviews and, as far as covering them on free local public access television, the possible intimidating effect on the candidates and the interview panel. These excuses might carry sway in original appointments of entry-level firefighters and police officers. In the case of the appointment of a Fire Chief, especially, one in which the objectivity of the decision-making process has already been put in question, the Commission respectfully requires a more convincing rationale for choosing a private process of interviews (especially when the panel consists of the Mayor and his subordinates) over a public one. Indeed, what better way than a public meeting to test the “maturity” and experience gained in public appearances at City Council, town meetings and in the diplomacy needed in labor/relations matters, which were cited to be key determining factors that tipped the balance in favor of Joseph Barron?

The absence of a record of the interview process was made even more problematic by the fact that Quincy, on the one hand, could offer only sketchy notes of what was actually

covered, and the two panel members (Mayor Koch and Mr. McGrath) who testified before the Commission had only vague recollections of the interviews. Deputy Chief Smyth's recollection, on the other hand, was much clearer and added considerable credibility to his testimony on that subject as well as on other disputed facts. Mr. McGrath testified that Deputy Chief Smyth interviewed "well" and Deputy Chief Smyth gave credible testimony that his answers to the interview questions were as thoughtful, thorough and responsive as those given by Chief Barron, if not more so.

For example, based on the evidence presented, Deputy Smyth made clear his unequivocal support for drug testing, and recognized the importance of gaining union support through the collective bargaining agreement, as well as having the diplomatic acumen to point out that his support for drug testing did not mean he believed there were any drug abuse problems currently in the QFD. Chief Barron's response, insofar as it is recorded in Mr. McGrath's limited notes, seems to suggest that Barron simply offered the rather naive belief that mandatory testing could be imposed unilaterally by linking it to a requirement that firefighters obtain CDL licenses. By the time of the hearing before the Commission, however, Mayor Koch testified that Deputy Smyth was not strongly in favor of drug testing, having either forgotten what he was told, not fully understood the responses, or ignored them. While it is not necessary to the Commission's conclusion, these circumstances surely justify drawing the adverse inference that, had such a public record of the process been available, it would show little, if anything, that supports the contentions Quincy espoused before this Commission.

Third, Quincy compounded its' failure to make a record of the interview by employing no pre-determined, objective criteria for measuring the performance of each candidate at the interview or for evaluating the candidate's overall credentials.

For example, as to the question about 24-hour shifts, Mayor Koch complimented Deputy Chief Smyth on his response, but there is no record to indicate how, if at all, that response (or, indeed, any interview response from any candidate) was judged to compare to the other responses, or whether or not it even was taken into account or weighed in the decision-making process.

Similarly, Joseph Barron's experience with running an outside business and budgeting was used as a critical distinction between him and Deputy Chief Smyth, apparently not because of any input from the candidates, but solely based on what Mayor Koch remembered of the two men. That highly important criteria, however, was never made known to the candidates. In fact, Deputy Chief Smyth also had experience running an outside business for over twenty years, as well as extensive successful experience directly managing and preparing two QFD budgets, as both Mayor Koch and Mr. McGrath actually knew. Had the high importance of this criteria been made known to the candidates and had they been even asked about their respective experience on this subject, Deputy Chief Smyth may well have carried the day on this point with (an objective) appointing authority.

In sum, with no evaluation criteria, nor any performance scoring system, nor a public record, the interview process was seriously and fatally flawed. In essence, the decision was made entirely by one man (Mayor Koch), based largely on his prior personal knowledge and subjective recollection of the relative strengths of the candidates as to

which, the evidence showed, he partly ignored, overlooked or had forgotten, and, partly, he was mistaken. This action impermissibly crossed the line that defines the degree of honest subjectivity that an appointing authority must show before the Commission can find its decision was reasonably justified under basic merit principles. See. e.g., Piersak v. Town of Needham, 21 MCSR 605 (2008) (Commission concluded that interview process was “flawed” and result predetermined where chief took no notes, used no rating sheets, and did not record interviews in any way)

The Reasons for Bypass

Mayor Koch provided HRD with four positive reasons to justify his choice of Deputy Chief Barron and his bypass of the more highly ranked Deputy Chief Smyth:

- Barron’s long tenure with the QFD and as Deputy Chief
- Barron’s “unique and thorough knowledge of labor and management relations”
- Barron’s “demonstrated commitment to community, evidenced by his service as an elected town meeting member in his hometown . . . and an advocate for adequate fire service funding” and
- Barron’s ability to “prepare, and adhere to, a budget . . . [exhibiting] strong budgeting skills which . . . were the product of his work as a town meeting member, his operation of a successful family business, and his experience within the department.”

Mayor Koch gave no negative reasons for bypassing Deputy Chief Smyth, whom he said “has a bright future ahead of him.” He gave no critique of Smyth’s knowledge or ability to command a fire scene or to manage the day-to-day affairs of the QFD. There was nothing in the stated reasons for bypassing Deputy Chief Smith to question his maturity or good ethical judgment, generally, or his choice of references, specifically. Rather, Mayor Koch stated only two traits in which he said Deputy Chief Barron surpassed him:

“When compared to Joseph Barron, the deciding factors were in the area of experience in labor-management and also his experience and ability to work within the organizational structure of the municipality.”

On all of the substantial credible evidence presented, Quincy failed to establish that these

reasons for distinguishing Barron from Smyth were credible or reasonably justify the decision to appoint Joseph Barron over Gary Smyth to the position of Quincy Fire Chief.

Longevity. Quincy's reliance on Deputy Chief Barron's longer tenure is both factually and legally flawed. Mayor Koch overstated Barron's tenure as Deputy Chief by 10 years in the written statement of reasons he provided. If this were the only factual question, it could be discounted as a scrivener's mistake. The real difference in tenure with the QFD was 30 years for Barron vs. 22 years for Smyth; the real difference in grade was much closer -- seven years as Deputy Chief (Barron) vs. four years as Deputy Chief (Smyth). Thus, while Barron does have seniority in terms of actual length of service, both men served decades with the QFD and many years as a Deputy Chief. Thus, this situation is not one in which, for example, a newly hired firefighter who performed well on the next level promotional exam at the first opportunity (one year in grade) is pitted against a veteran officer who may have developed special knowledge required in the vacancy to be filled. In that case, a reasonable inference might be drawn that the experiential differential that accompanied such longer tenure, ipso facto, was meaningful. Given the dearth of specific evidence here of any such experiential advantage, the force of such an inference is greatly diminished almost to the vanishing point.

Moreover, in 2008, Mayor Koch offered the permanent Chief's job to Jeffrey Starr, whose tenure at Deputy Chief began the same day as Deputy Chief Smyth. Thus, Starr would have had one year less tenure in 2008 when Mayor Koch offered him the Chief's job than did Smyth at the time of the 2009 promotional selection.

Second, Mayor Koch acknowledged that seniority is a factor that is already built into the test score. See, e.g., Duguay v. City of Holyoke, 11 MCSR 306 (1998) ("the

Appointing Authority's major justification for its selection ... was [the appointee's] longevity on the job. Seniority is built into the test score . . . and was thus weighed twice in this matter"); Kastrinakis v. City of Springfield, 7 MCSR 190 (1994) ("seniority was already factored into the examination scoring [established by HRD] as part of the education and experience grade" and added reliance on seniority to distinguish candidates one point apart in score constituted "double weighting" and could not justify bypass); Lamothe v. City of Westfield, 7 MCSR 68 (1994) (length of service conceivably may properly "tip the balance" between closely matched candidates, but relying on years of service and time in grade generally represents "double counting"). Thus, Barron's years of service in the department and in grade had already been factored into the candidate's ranking on the Certification.

Considering all of these facts, the substantial evidence strongly infers that the actual longevity differential between Barron and Smyth was a post-hoc rationalization, and was not the truly bona fide determining factor that "set them apart" in the decision-making process, as Quincy now contends.

Unique labor and management relations expertise. The second paramount reason that allegedly sets Barron apart is his work as a member of Local 792's executive board for five years. Mayor Koch's letter to HRD cites Barron's involvement "in discussions between the union and the department's superior officers on the very issues that the department is facing today." The City entered no competent evidence at hearing to support these statements. In fact, the evidence indicated that the collective bargaining agreement with Local 792 had come to fruition prior to July 1, 2008, and that it was Deputy Chief Smyth who took responsibility for providing input into those negotiations

from management's perspective and incorporating the pay raises that resulted into the FY2009 budget that Deputy Chief Smyth prepared. Chief Barron, himself, described his union involvement as serving "on a couple of committees, not a great deal to talk about." Thus, Barron's purportedly superior level of experience and qualification is not supported by his own testimony.

Thus, while Barron can be credited for not puffing his union credentials, the same cannot be said about Mayor Koch's written statement of reasons. The Commission is not required to accept an appointing authority's unsubstantiated hyperbole about a candidate's credential. See, e.g., Gibbons v. City of Woburn, 21 MCSR 525 (2008) (appointing authority overstated importance of appointee's performance); Beriau v. Worcester Police Dep't, 12 MCSR 33 (1999) (reasoning characterized as "absolutely inadequate and inaccurate").

In contrast to the little evidence Quincy produced to establish its contention that Barron possessed notable expertise in staffing matters or labor relations, Deputy Chief Smyth proffered specific examples of his competence in labor relations: (1) he prepared what Mr. McGrath called a "well drafted" memorandum that proposed contract language eventually incorporated substantially as he proposed into the new collective bargaining agreement; (2) at the interview, without prompting, he remained mindful of the City's collective bargaining obligations, for example, noting that mandatory drug testing would have to be bargained with the union; and (3) he deftly handled employee discipline as "Acting Chief." There was virtually no difference in the responses that the two candidates gave to the specific interview question about collective bargaining issues, each mentioning some common issues and each mentioning issues that the other did not.

Finally, the undisputed evidence was that both men enjoyed a “great reputation with the men” in the QFD and Deputy Chief Smyth produced a glowing endorsement of his leadership written by Local 792 President Arienti.

In sum, the evidence presented two candidates with at least equally comparable credentials and strong positive records on labor/management issues. In fact, the preponderance of the evidence established that Smyth, not Barron, had a far stronger record on this front. Thus, the experience of the two candidates was not proved to be a legitimate distinguishing characteristic that lawfully justified the bypass. See generally, Piersak v. Town of Needham, 21 MCSR 605 (2008); Moses v. Town of Winthrop, 21 MCSR 420 (2008); Reilly v. Lawrence Police Dep’t, 13 MCSR 144 (2000); DiVincenzo v. City of Beverly, 10 MCSR 95 (1997); Lamothe v. City of Westfield, 7 MCSR 68 (1994).

Commitment to community. Mayor Koch’s letter to HRD cited Barron’s service as a town meeting member “in his hometown” where he “advocate[d] for adequate fire service funding”.⁴ No percipient source and little evidence was produced that supported this reason. Mayor Koch did not include “commitment to community” or his role as an “advocate for adequate fire service funding” as one of the “determining factors” in deciding to pick Barron over Smyth. It is inconceivable that could possibly be true.

The evidence presented to the Commission included an impressive list of Smyth’s dedication to serving Quincy. These accomplishments include: (1) service on dozens of community and city organizations; (2) spearheading the procurement of numerous grants

⁴ Unlike Gary Smyth, a life-long Quincy resident, Joseph Barron lived in Plymouth. It is curious that Quincy would tout Barron’s “town meeting” experience in Plymouth, when, at the Commission hearing, Quincy argued that the decision not to conduct public and independent interview process was based, in larger part, on the fact that Quincy’s Plan A form of city government operated in a materially different way than did town form of government.

for the QFD; (3) responsibility for planning and executing the \$1 million purchase of new fire apparatus; (4) bringing long-overdue modern fire service management techniques to Quincy (e.g., ICS, RIT) over the years; (6) working through two budget cycles to manage the QFD within budget while preserving, and in some cases improving (i.e., “Rescue “1” funding) service; and (5) if appointed Chief, promising to make it his priority to achieve ISO’s best municipal fire safety rating, which would bring insurance rates down for Quincy and its residents.

Budgeting skills. No example better illustrates the insufficiency of the evidence presented that purported to distinguish Barron from Smyth than in the area of budgeting. The extensive evidence of Deputy Chief Smyth’s accomplishments in managing QFD’s financial matters, both as Deputy Chief and “Acting Chief”, has already been noted. The only specific example of Deputy Chief Barron’s accomplishments in managing budgets was his role in sticking to the FY2009 budget (that Deputy Chief Smyth had prepared) and submitting an FY2010 “level funded” budget (also based on Deputy Chief Smyth’s FY2009 budget). The only other evidence consisted of Barron’s work with his brother in his family’s trolley company and as a Plymouth Town Meeting member, but no witness with percipient knowledge of this work testified, and the proof of what he actually did in those roles borders is speculative at best. As to the private business experience, there is simply no basis to infer that Barron’s experience in this area was materially different from Smyth’s twenty years of experience running his own company that he, too, co-owned with his brother.

Experience and ability to “work within the organizational structure of the municipality.” Quincy’s letter to HRD did not spell out precisely what experience and

ability it meant or how Deputy Chief Smyth fell short. Mayor Koch testified that Barron was the better “team player”, and that Smyth’s solicitation of references from Messrs. Hannon and Curry demonstrated a lack of “maturity”, but he did not elaborate further. The other evidence presented to the Commission showed Deputy Chief Smyth’s satisfactory (indeed, often laudatory) service with numerous municipal boards, committees and neighborhood groups in which he participated, his responsiveness to City Council members, his impressive professional accomplishments and his unquestioned ability to work effectively with, and command the respect of many Quincy city officials and QFD personnel, from the Chief down to the rank and file. Thus, the preponderance of evidence supports the conclusion that Deputy Chief Smyth is the consummate “team player”, save for his twice challenging the Koch administration through appeals to this Commission and through “openly and publicly” supporting Mayor Koch’s opponent in the 2007 municipal election, neither of which, obviously, are appropriate factors that may enter into Quincy’s decision.

Other Evidence of Predisposition

From the inception of this dispute, the Appellant asserted that Mayor Koch was predisposed against appointing him to succeed Chief Pettinelli. He pointed to numerous statements that purportedly inferred this motivation. Many of the statements proffered, although hearsay, do appear to have sufficient indicia of truth and reliability worthy of some weight. For example, Deputy Chief Smyth testified that Barron said to him, and others, words to the effect that he predicted: “If Koch is elected Mayor, Smyth will never be Chief.” It is entirely plausible for Barron, a contributor to the Koch campaign, to have said that about Smyth, an “open and public” Phelan supporter, during the 2007 election

cycle. The evidence, however, is not persuasive that such statements were based on knowledge obtained from an authoritative source in the Koch campaign, as opposed to merely inferring Barron's own personal state of mind. Accordingly, standing alone, these hearsay remarks would not be probative of Mayor Koch's alleged pre-disposition.

The hearsay evidence aside, there is considerable other direct and circumstantial evidence presented that is conclusive that such a pre-disposition against Deputy Chief Smyth had formed, probably as early as January 2008.

Mayor Koch testified that the transition process with the Phelan administration focused on urgent issues that would face the new regime immediately and the replacement of Chief Pettinelli, who was not due to retire until October 2008, did not receive much attention. By early 2008, however, when Chief Pettinelli's unexpected absence advanced the need to make plans for his successor, the Koch administration embarked on a strategy that would ultimately result in the appointment of Joseph Barron, first as "Acting Chief" in July 2008, then, as Provisional Chief in October, and, finally, permanent Chief in September 2009. In addition to the procedural flaws and problematic deficiencies in the substantive reasons for appointing Chief Barron, already mentioned, several additional noteworthy indicia in the evidence infer a "thumb on the scale" that tipped this process against Deputy Chief Smyth and in favor of Deputy Chief Barron.

Mr. Fatseas, who did not generally intrude in non-financial departmental management issues, but Joseph's Barron's long-time personal friend, took steps to try to ensure that the Chief's exam scheduled for March 2008 would have sufficient applicants to go forward, by directing Smyth to encourage another Deputy Chief, then on injured leave to sign up for the exam. This clearly would have worked to the advantage of Joseph Barron

(who had never taken the exam and was not on the current eligible list for promotion to Chief) and against Deputy Chief Smyth (who then stood first on the list, tied with Deputy Chief McGonugle, who was expected to retire). This effort failed and the March 2008 exam was cancelled.

Then, in May 2008, when Chief Pettinelli confirmed that he was advancing his retirement from October 2008 to July 2008, the appointment of a successor became a front-burner issue. The steps taken thereafter by the Koch administration infer a clear intention to lay a foundation that would result in the appointment of Joseph Barron as Chief, or, at least, someone other than Gary Smyth. Mayor Koch waited until the last day to announce that he was removing Smyth as “Acting Chief” and replacing him (illegally as it turned out) with Barron. The credible evidence established that this appointment was made without any formal process and, even Joseph Barron, did not recall more than one conversation with Mayor Koch about the appointment a day or two before it was made. I also credit the testimony that, initially, there was a general (but mistaken) belief that the current eligible list had, or would soon expire. Quincy knew that it had no authority to continue Barron in the position of “Acting Chief” so long as an eligible list existed.

Once it realized that it had to work with the current eligible list (on which Barron’s name did not appear) to make either a “temporary” or permanent Chief’s appointment,⁵ Quincy then ran the table on that list, offering the job to two other unlikely choices who, not surprisingly, declined – Deputy Chief McGonagle (soon to retire and who would

⁵ So long as Smyth stood first on the eligible list, after Chief Pettinelli retired, Smyth would have been the logical, legally appropriate choice to continue serving as the “temporary” Chief, pursuant to G.L.c.31,§8, pending another examination. See Smyth v. City of Quincy, 22 MCSR 235(2009).

require a significant financial incentive)⁶, and Deputy Starr (lower on the list with the same tenure as Deputy Chief as Smyth and no apparent record of departmental-level management experience). This curious strategy, however, created the “short list”, which enabled Quincy to jettison the Certification and appoint Joseph Barron Provisional Chief until HRD held a new exam and created a new list. When that list came out, Barron appeared last. Within two months, became the permanent Fire Chief.

Finally, in the six months until July 15, 2008, Deputy Chief Smyth had filled in with unquestioned proficiency as “Acting Chief”. He hit the ground running in December 2007. By May 2008, he was fully engaged in the management of the department, having cleaned up the mounting overdue accounts payable, juggled the FY2008 budget, made room for a 15th Captain appointed by Mayor Koch, provided input into the reopened collective bargaining process, prepared the FY2009 budget to incorporate the changes made in the new union agreement, and presented and defended the QFD’s budget before the Quincy City Council, among other things. Until he was made “Acting Chief”, Barron had no recent departmental management experience outside of his fire suppression role, had expressed no interest (at least publically) in becoming Fire Chief, and acceded to the job only after being “pressured” by his family and friends. This scenario betrays the fundamental, common sense maxim: “If ain’t broke, don’t fix it”.

⁶ I am skeptical that Deputy Chief McGunagle was offered as much as \$151,000 to become Chief. In “these difficult financial times”, that would be a very generous salary, well above Quincy’s prescribed “ordinance” pay for Fire Chief. Rather, it seems plausible that, after three years of enhanced pay under the ELP, McGunagle was prepared to retire and further service as Chief would not have been in his plans or financial interest at a salary Quincy actually could approve and later did offer to Deputy Chief Starr and Deputy Chief Barron. The evidence of this hefty “offer” to McGunagle was undisputed, however, and I infer that, indeed, Mayor Koch made it. Taking that assertion as true does not change the conclusion that Quincy probably knew McGunagle would not take the job, or if he did, only for a short time. Either way, the offer was merely a stepping stone to creating another list that enabled Barron’s eventual appointment.

In sum, Quincy supplied no objectively credible reason for taking the circuitous, irrational and financially unnecessary decisions made here, when, at all times, it had a clearly motivated and highly qualified candidate with a “bright future ahead of him” sitting at the top of the current eligible list and serving honorably as the QFD’s department head.

The Remedy

Deputy Chief Smyth has established that he was bypassed for reasons that do not pass muster under the merit principles of the Civil Service Law and that his civil service rights have been prejudiced through no fault of his own. The process employed for appointment of a Quincy Fire Chief was procedurally flawed, pre-disposed against the Appellant, and failed to employ a fair and honest weighing of the relative credentials of the candidates.

The Commission is vested with particularly broad discretion to fashion remedies that restore the civil service rights prejudiced through no fault of an appellant. See, e.g., Thomas v. Civil Service Comm’n, 48 Mass.App.Ct. 446 , rev. den 726 N.E.2d 414 (2000) and cases cited; Dedham v. Dedham Police Ass’n, 46 Mass.App.Ct. 418, 422n.3 (1999). The Commission’s equitable powers derive from St. 1976, c.534, § 1, as amended by St. 1993, c.310, where the Legislature provided:

“[T]he Civil Service Commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said c.31 or any such rule as a condition precedent to the restoration or protection of such rights.”

The Commission generally fashions a prospective remedy that gives a wrongfully bypassed candidate another chance at the next promotional opportunity, and, as warranted, that the appointing authority be orders that the appointing authority refrain from using the same impermissible reasons for bypassing the prevailing appellant, with

retroactive seniority if subsequently appointed. See, e.g., Bielawski v. Personnel Administrator, 422 Mass. 459, 462 (1996) However, when such traditional relief would be inadequate, the Commission has followed a practice to vacate permanent appointments and, should the appointing authority elect to fill the position, order that the appointing authority redo the selection process. See, e.g., Sihpol v. Beverly Fire Dep't, 12 MCSR 75 (1999); Duguay v. City of Holyoke, 11 MCSR 306 (1998). This remedy has been previously applied in cases, similar to this one, in which the appointment involved a high-level permanent public safety appointment, where the opening occurs rarely and the pool of candidates is generally small. See, Valliere v. City of Westfield, CSC Case No. G2-10-223, 24 MCSR --- (2011) (police captain); Sabourin v. Town of Natick, 18 MCSR 79 (2005) (fire chief); Thomas v. City of Westfield, 13 MCSR 13 (1999) (police chief); Lamothe v. City of Westfield, 7 MCSR 68 (1994) (deputy fire chief). See also Carmody v. City of Lynn, 22 MCSR 453 (2009) (Commission acknowledging arbitration award that required a redo of a fire chief's promotion). This form of remedy is appropriate here.

Also in play here is the fact that the decision-maker must, by law, be the Mayor of Quincy, and his predisposition against the Appellant has been established. Thus, the remedy must sufficiently assure that the process will not simply become a repetition that is infected with the Mayor's proven pre-disposition against the Appellant. See, e.g., Valliere v. City of Westfield, CSC Case No. G2-10-223, 24 MCSR --- (2011); Roberts v. Boston Police Dep't, 21 MCSR 536 (2008), aff'd, Suffolk Sup. Ct. C.A. 2008SUCV4775 (2009); Moses v. Town of Winthrop, 21 MCSR 420 (2008). Such a remedy does not usurp the Mayor's authority to appoint a permanent Fire Chief, but, rather, provides the safeguards necessary to assure that the authority is exercised in

accordance with basic merit principles and after equal, full and fair consideration of each candidate.

Accordingly, the appeal of the Appellant, Gary Smyth, is *allowed*. Pursuant to the powers of the Commission granted pursuant to Chapter 310 of the Acts of 1993, and in order to provide adequate and complete equitable relief to the Appellant consistent with this Decision, the Commission orders that Quincy and HRD take the following action:

1. The permanent appointment of Joseph Barron as Quincy Fire Chief, effective September 30, 2008, is vacated.
2. The civil service status of Joseph Barron as Quincy Fire Chief, shall be adjusted from “permanent” to “temporary”, effective retroactively to September 30, 2008.
3. HRD shall forthwith revive the 2008 eligible list for Fire Captain in the Quincy Fire Department for the sole purpose of reactivating Certification No. 290637 so as to allow Quincy to appoint a permanent Fire Chief from the persons whose names appear on that Certification.
4. Upon the reactivation of Certification No. 290637, so long as there remains at least one candidate whose name appears on that Certification willing to accept the position of Fire Chief, Quincy shall forthwith proceed to implement a process for appointment of one of those candidates as permanent Fire Chief in a manner that is consistent with this Decision and in compliance with all the requirements of civil service law and rules.
5. The process for appointment of a Fire Chief from Certification No. 290637 shall not be deemed consistent with this Decision or in compliance with civil service law and rules unless all of the following conditions are met: (a) candidate interviews must be conducted by a panel to be selected and arranged by an independent outside individual or firm that has experience in the review and selection of public safety and/or senior public sector personnel in Massachusetts; (b) neither the outside individual or firm, nor any member of the interview panel shall have any present or prior contractual, employment or familial relationship to the Mayor of Quincy or to any of the candidates; (c) the candidates will be provided, also reasonably in advance of the interview, a description of the criteria by which their credentials and their interview performance will be evaluated; (d) the evaluation criteria shall be established by the independent individual or firm selected to arrange the interviews, and shall contain such procedures and criteria that the outside individual or firm deems appropriate in consideration of a candidate for Fire Chief, provided that Quincy may contribute its input to the independent individual or firm as to any aspect of the interview process, including evaluation criteria, as it deems appropriate, and further provided that any communications between Quincy and the independent individual or firm shall be

disclosed to each of the candidates; (e) the interview panel shall render a written report of the interviews which shall be made available to each of the candidates and to the public; and (f) the written report shall include a specific rating of each candidate's performance in each component or question during the interview, an overall ranking of the candidates, and a description of any unique positive and/or negative qualities or experience noted about any of the candidates.

6. If Quincy bypasses any candidate on Certification No. 290637, Quincy must provide to the bypassed candidate and to HRD a complete written statement of the reasons for the bypass that meet the requirements set forth in G.L.c.31§27 and PAR.8(3).
7. Any bypassed candidate shall have 60 days from the receipt of Quincy's written statement of the reasons to file an appeal with the Commission to challenge the validity of the bypass.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis & Stein, Commissioners; McDowell [absent]) on September 22, 2011.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Betsy Ehernberg, Esq. (for Appellant)
James S. Timmins, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)