

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

DAVID D. BEAUREGARD,
Appellant

v.

G2-19-100

CITY OF CHICOPEE,
Respondent

Appearance for Appellant:

Thomas A. Kenefick, III, Esq.
73 Chestnut Street
Springfield, MA 01103

Appearance for Respondent:

Thomas John Rooke, Esq.
Assistant City Solicitor
City of Chicopee
Chicopee Law Department
17 Springfield Street
Chicopee, MA 01013

Commissioner:

Christopher C. Bowman

DECISION

On April 19, 2019, the Appellant, David D. Beauregard (Appellant or Deputy Beauregard), pursuant to G.L. c.31, §2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Chicopee (Respondent or City) to bypass him for promotional appointment to the position of Fire Chief in the City's Fire Department (Department). On May 8, 2019, I held a pre-hearing conference at the State Office Building in Springfield, Massachusetts. I held a full hearing at same location over the course of two days on July 24, 2019

and September 25, 2019.¹ The full hearing was digitally recorded and copies of the recordings were provided to the parties. The parties used those recordings to have a written transcript prepared which will serve as the official record of the hearing. The parties submitted post-hearing briefs on December 20, 2019 (Appellant) and December 23, 2019 (Respondent).

FINDINGS OF FACT

The Appellant submitted forty-five (45) exhibits (1 - 45) and the Respondent submitted fifteen (15) exhibits (R1 - R15).

Called by the City:

- Richard Kos, Mayor at the time of bypass, City of Chicopee;

Called by the Appellant:

- Evelyn Rivera-Riffenburg, Former City of Chicopee HR Director;
- John Fitzgerald, Assistant City Solicitor;
- Marshall Moriarty, City Solicitor;
- Dean Desmarais, Former Fire Chief;
- Mark Kosiorek, Fire Prevention Inspector;
- Richard Merchant, current City of Chicopee HR Director;
- David Beauregard, Appellant

and taking administrative notice of all matters filed in the case, pertinent statutes, case law, rules regulations, policies, and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. Chicopee is a city of approximately twenty-three square miles with a population of approximately 55,000 people located in Hampden County in Western Massachusetts.
<https://www.census.gov/quickfacts/fact/table/chicopeecitymassachusetts,US/PST045219>
2. The Appellant is a resident of Chicopee; has been married for thirty-three years and has one

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

child. After graduating from Chicopee High School, he joined the United States Navy and spent six years as an avionics technician working on the flight deck of an aircraft carrier and served during combat operations in the Middle East. After September 11, 2001, the Appellant enlisted in the Navy Reserve and served as an Intelligence Specialist from 2002 to 2005. From 2005 to 2008, the Appellant served in the Air Force Reserve, also as an Intelligence Specialist. (Testimony of Appellant; Exhibit 42)

3. The Appellant received numerous awards and certifications while serving in the military. (Testimony of Appellant; Exhibit 42)
4. The Appellant has completed sixty credits of college courses at Westfield State University. (Testimony of Appellant)
5. In 1994, the Appellant was appointed as a permanent, full-time firefighter in the City's Fire Department. He was promoted to lieutenant in 2000; fire captain in 2007; and Deputy Fire Chief / Executive Officer in 2017. (Testimony of Appellant; Exhibit 42)
6. During his tenure at the Fire Department, the Appellant has served as a Training & Security Officer; an instructor at the Massachusetts Firefighting Academy; and a member of the Western Massachusetts Technical Rescue Team. (Exhibit 42)
7. The Appellant has numerous certifications including certification as a Fire Officer I, II and III. (Testimony of Appellant; Exhibit 42)
8. The Appellant has received numerous awards during his firefighting career, including a Firefighter of the Year Citation for Meritorious Conduct in 2018. (Testimony of Appellant; Exhibit 42)
9. In 2016, the Appellant took the civil service examination for Fire Chief and received a score of 92, placing him first on the eligible list for Westfield Fire Chief. (Stipulated Fact)

10. During a previous hiring cycle in 2016, the City bypassed the Appellant for promotional appointment to Fire Chief, opting to promote Dean Desmarais as Fire Chief. (Testimony of Chief Desmarais)
11. The Appellant did not contest the bypass in 2016, as he concluded that Desmarais, who had served as Deputy Chief / Executive Officer, was more qualified for the position. (Testimony of Appellant)
12. The Appellant was subsequently promoted to Deputy Fire Chief in 2017 and was designated by Desmarais to serve as Executive Officer of the Department. In the absence of the Fire Chief (i.e. – when the Chief was on vacation, etc.), the Appellant, as the Executive Officer, was responsible for the day-to-day operations of the Department. (Testimony of Chief Desmarais and Appellant)
13. The Appellant, Desmarais and their respective spouses, have become friends. (Testimony of Chief Desmarais)
14. Months prior to his retirement in March 2019, Desmarais, on multiple occasions, encouraged the City’s Mayor (Richard Kos) to promote the Appellant to the position of Fire Chief. (Testimony of Mayor Kos)
15. Richard Kos served as the City’s Mayor from 1997 to 2004 and then from 2014 to 2020. He chose not to seek re-election in 2019. Relevant to this appeal, Kos was the City’s Mayor (and Appointing Authority) when the Appellant was bypassed for promotion to Fire Chief in 2016 and 2019. (Testimony of Mayor Kos)
16. During the 2016 promotional process, Mayor Kos used an “enhanced interview process” in which Fire Chiefs from other communities participated in the selection process. The Appellant, after his interview in 2016, was rated poorly by the Panel, including in the area of

communication. (Testimony of Mayor Kos)

17. Since 2016, the Appellant has enrolled in training programs to address the deficiencies cited by the Panel, including a training program administered by the University of Maryland.

(Testimony of Appellant)

18. At the time that Desmarais announced his plan to retire as Fire Chief in 2019, the eligible list for Fire Chief, established on September 20, 2016, was still active. While eligible lists typically expire two years after the establishment date, they are routinely extended to a date (on the first of the month) equal to three years after the date of the examination if no subsequent examination has been given. Applied here, the eligible list for Chicopee Fire Chief was set to expire on May 1, 2019. (Testimony of Merchant)

19. At the time that Desmarais announced his pending retirement in 2019, there were four names on the eligible list for Chicopee Fire Chief. The City, using the authority delegated by the state's Human Resources Division (HRD) to all civil service communities, created a Certification with the names of the top three candidates on the eligible list. Two candidates, including the Appellant, signed the Certification as willing to accept appointment. The third candidate on the Certification notified the City that he was not willing to accept the appointment. (Testimony of Merchant and Riffenburg)

20. The City's then-Human Resources Director mistakenly believed that the City was not permitted to consider the next candidate (then-Captain Stamborski) on the eligible list. Thus, the Mayor was presented with only *two* candidates to consider for promotional appointment, even though the statutory "2N+1" formula allowed for consideration of the top *three* candidates *willing to accept appointment*. (Testimony of Merchant)

21. On February 19, 2019, the Appellant and the second-ranked candidate were interviewed by

Mayor Kos and this then-HR Director for consideration of promotion to Fire Chief.

(Testimony of Mayor Kos and Riffenburg)

22. During his testimony before the Commission, the Appellant stated that: “ ... I do have a halting way of speaking. It’s a stutter ... but in the past, you know, I articulate and I get my point across. People understand what I’m saying, and it is what it is.” (Testimony of Appellant)
23. During the interview on February 19, 2019, both the Appellant and the second-ranked candidate were asked identical questions that were presented to them during the 2016 interview of Fire Chief, with three additional questions being asked during the February 19, 2019 interview. (Testimony of Mayor Kos)
24. Mayor Kos was looking to promote a fire chief who had a vision for the future of the Chicopee Fire Department and energy in a way that would move the department forward and take the opportunity to make this department more robust and deal with many of the issues, as well as current situations, whether it be manpower and how to allocate them and how to operate the fire and ambulance services and what creativity he could incorporate into the consolidation of services. Mayor Kos was looking for a fire chief who had a vision for consolidation of services, or making it more efficient and cost-saving, but not only maintaining the services, but enhancing the services. Mayor Kos wanted to know what vision the candidates had for the department and what goals they had to improve the department. (Testimony of Mayor Kos)
25. While Mayor Kos found the Appellant’s answers to be consistent with those of a person who had been on the job for a long time, he was concerned that, when he (Mayor Kos) delved into these questions further, the Appellant just “paused” and at one point, gave no response. After the interviews, Mayor Kos opined to the HR Director that the Appellant’s interview was a

“dud”. (Testimony of Mayor Kos)

26. Specifically, Mayor Kos concluded that the Appellant was unable to express or articulate any insights or vision he had for the fire department; that he did not have any innovative ideas about implementing change within the fire department; and that he did not express any level of energy or level of interaction. The Mayor had similar concerns regarding the second-ranked candidate. (Testimony of Mayor Kos)

27. The City’s then-Human Resources Director also participated in the interview of the Appellant. She (the HR Director) had worked with the Appellant over the past couple of years in his capacity as Executive Officer and, *based on her observations during those years*, she believed the Appellant was qualified for the position of Fire Chief and she shared that opinion with the Mayor. (Testimony of Riffenburg)

28. The HR Director, however, also found the Appellant’s interview performance to be poor. She observed that there were many long pauses (up to what felt like 20 seconds) between answers; some of the questions were not answered fully; and some of the Appellant’s answers required additional questions to get a more complete answer. (Testimony of Riffenburg)

29. Several days after the interview with the Appellant, the HR Director was at the Fire Department Headquarters and meeting with the Chief and his deputies, for her regular bi-weekly meetings. After the meeting, the Appellant asked to speak with her in his office. The Appellant then stated he was unhappy with his performance during the interview. He then stated that if he had to hire himself based on that interview, he wouldn’t hire himself. (Testimony of Riffenburg)

30. Mayor Kos, based on his prior experience, had concluded that a candidate’s interview performance was not always predictive of how they would perform in the position. He cited

the example of a candidate for DPW head that had not performed well during her interview, but, ultimately, had proven to be a strong DPW head for the City. (Testimony of Mayor Kos)

31. In the case of the DPW head, Mayor Kos, based on the candidate's interview performance, first appointed that candidate as an "acting" or "temporary" agency head, followed by a permanent appointment after a period of successful performance by the candidate on the job. (Testimony of Mayor Kos)
32. Rather than letting the current eligible list expire, and calling for a new examination, Mayor Kos decided that he wanted to appoint the Appellant as a "temporary" Fire Chief; provide the Appellant with a list of duties to be accomplished during this temporary period; and then assess whether the Appellant should be appointed as a "permanent" Fire Chief prior to the expiration of the eligible list on May 1, 2019. (Testimony of Mayor Kos and Merchant)
33. During this same period of time, the City's Human Resources Director took a position with another community and Mayor Kos retained the services of someone who had served the City in that capacity in the past. Mayor Kos asked the (new) Human Resources Director and the City Solicitor to confirm that a temporary appointment was permitted. The HR Director, after consulting with the state's Human Resources Division (HRD), and the City Solicitor both advised the Mayor that a temporary appointment was permitted under the civil service law. (Testimony of Mayor Kos, Moriarty and Merchant)
34. After being offered the position of "temporary" Fire Chief by the Mayor, the Appellant consulted with then-Chief Desmarais, who had been strongly advocating for the Appellant's appointment and a local attorney familiar with civil service law. Based on his conversations with the attorney and Desmarais, the Appellant concluded that a temporary appointment, in these particular circumstances, was "illegal". He subsequently conveyed his opinion that the

appointment was not permitted under the civil service law to the City Solicitor and the City's HR Director; told them that he would be "impugning his integrity" if he accepted a temporary appointment; and declined the temporary appointment. (Testimony of Appellant)

35. On March 12, 2019, the same day that Desmarais was set to retire, the Appellant attended a meeting with the City Solicitor and Human Resources Director at which time he (the Appellant) reiterated his opinion that a "temporary" appointment was not permitted under civil service law. Relevant to this appeal, there was also a discussion regarding the continuity of operations at the Fire Department, given that Desmarais would no longer be Fire Chief as of the close of business that day (March 12th). (Testimony of Appellant, Merchant and Moriarty)
36. The Appellant, the HR Director and the City Solicitor have somewhat different recollections of what was said regarding the issuance of certificates pending the appointment of a (permanent or temporary) Fire Chief. (Testimony of Moriarty, Merchant and Appellant) Based on a careful review of testimony at the hearing; a review of the transcript of their testimony; and the relevant exhibits, including the hand-written contemporaneous notes taken by the HR Director, I find the following. The Appellant, at this meeting, stated that he, as the Department's Executive Officer, would be responsible for the day-to-day operations of the Fire Department in the Chief's absence, *except for permitting issues*. The Appellant did not explicitly reference "smoke detector" inspection certificates, which must be issued by the City's Fire Department prior to any real estate closing; and he did not state that the 15-20 certificates issued weekly would be put in limbo.
37. The Appellant spoke with the State Fire Marshall's office the next day and confirmed that the City would need to ask the Fire Marshall to designate someone other than Desmarais to sign-off on these certificates. He failed to communicate this information to Town Officials

(Mayor, City Solicitor, HR Director) and directed the City's fire inspectors to stop issuing smoke detector inspection certificates forthwith. (Testimony of Appellant)

38. On Friday, March 15, 2019, the Mayor was at a bishop's luncheon when he received a phone call from the head of the Greater Springfield Realtors. He advised the Mayor there were not going to be any smoke detector inspection certificates issued until there is a fire chief appointed. (Testimony of Mayor Kos)

39. The Mayor informed the Law Department of this phone call and later learned that the City needed someone designated by the State Fire Marshal. Later that day, the State Fire Marshal granted a "Delegation of Authority" to the Mayor granting him the authority to delegate the responsibility of issuing smoke detector inspection certificates to members of the Chicopee Fire Department. Subsequently, Mayor Kos delegated that authority to fire prevention officers assigned to do smoke detector certificate inspections and the 10-15 certificates that were in limbo were issued. (Testimony of Mayor Kos and Exhibit R13)

40. On March 28, 2019, the Mayor issued the Appellant a written reprimand for the Appellant's failure to notify him of the need to obtain a change in delegated authority from the State Fire Marshall to ensure a continuity of services (issuance of smoke detector inspection certificates). (Exhibit R14)

41. Sometime after March 12, 2019, Mayor Kos learned from his new Human Resources Director that there was another candidate on the eligible list who: a) had not been notified of the vacancy; b) had not been given the opportunity to sign the Certification as willing to accept appointment to Fire Chief; and, thus, c) had not been considered for appointment by the Mayor. That person was Captain Daniel Stamborski. Captain Stamborski was contacted by the HR Department and he expressed an interest in being interviewed for the position of fire chief.

He then presented to the HR Department and signed the Certification. (Testimony of Mayor Kos)

42. On March 14, 2019, Captain Stamborski submitted a cover letter to the HR Director, along with his resume, for consideration and review in anticipation of his upcoming interview for the fire chief position. (Exhibit R3)
43. Captain Stamborski was appointed as a fire fighter in Chicopee in 1997, promoted to lieutenant in 2007 and promoted to captain in 2010. In addition, he is the broker/owner of a real estate business since 2012 and he has been a licensed realtor since 1997. During the period of 2002 through 2007, he was a manager for a local business overseeing building development of homes in Chicopee and responsible for contractor supervision, sub-contracting, budget management, scheduling and overall project and financial management for the company. He has taken over forty-six courses at the Massachusetts Fire Academy and is certified as an EMT, 911 dispatcher and a certified scuba diver. He received three certificates of recognition in 2011, 2012 and 2014 for saving a human life and other awards. (Exhibit R3)
44. In addition to Captain Stamborski's resume attached to the cover letter dated March 14, 2019, he attached an additional document citing eighteen separate bullets to address the immediate department needs, short-term goals and long-term goals. (Exhibit R3)
45. On March 20, 2019, Stamborski was interviewed by Mayor Kos in the presence of the new HR Director. Mayor Kos described the interviews between the Appellant and Stamborski as "day and night". The Mayor found that the difference was the energy level and the thought processes that went on during the interview with Stamborski. The Mayor found that there was no hesitation or pauses in Stamborski's responses; he answered all of the questions without hesitation; his answers were thoughtful and directly related to the vision and goals for the

department. (Testimony of Mayor Kos)

46. On April 2, 2019, the City notified HRD that it was appointing Stamborski as Temporary Fire Chief. (Exhibit 34)
47. The Mayor, via the Human Resources Director, gave Stamborski the same duties to complete that he had intended on giving to the Appellant. Stamborski completed those tasks and both the Mayor and HR Director were impressed with his performance. (Testimony of Merchant)
48. Mayor Kos appointed Stamborski as permanent Fire Chief on April 29, 2019, just prior to the expiration of the eligible list. (Stipulated Fact)
49. By letter dated May 10, 2019, the Mayor notified the Appellant that he had been bypassed for promotional appointment including: a) the Appellant's poor interview performance, including his ability to articulate his vision for the Fire Department; b) Stamborski's superior interview performance, including his inability to articulate a vision for the Fire Department; and c) the Appellant's failure to ensure a continuity of services in the Fire Department and failing to notify the Mayor about the issues related to the interruption of smoke detector inspection certificates. (Exhibit R15)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass.256, 259 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel

administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, § 1.

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge at 304. Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions (City of Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 824-826 (2006) and ensuring that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. Beverly. The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited.

Parties’ Arguments

The City argues that the Appellant’s inability to fully answer questions at the interview; his inability to articulate a vision for the Fire Department at that interview; and his failure to notify the Mayor about the interruption of services at the Fire Department, before and after they occurred, justified the Mayor’s decision to bypass him in favor of Stamborski, a lower-ranked candidate who performed well at the interview and articulated a clear vision for the Fire Department.

Further, the City argues that Stamborski’s strong performance during his temporary

appointment, which the Appellant declined, justified the Mayor's decision to appoint Stamborski as the permanent Fire Chief.

The Appellant argues that the Mayor's decision to bypass him for promotional appointment was the result of the Mayor's personal bias against him based on the Mayor's mistaken belief that the Appellant acted deliberately to embarrass the Mayor in regard to the interruption of smoke detector inspection certificates. The Appellant argues that the Mayor's decision to issue a written reprimand for this incident was a pretext for bypassing him for promotional appointment.

Further, the Appellant argues that the Mayor's decision to make a temporary appointment was not consistent with the civil service law and that the Appellant's rightful objection to this unlawful action created another impermissible reason for bypass.

Finally, the Appellant argues that the Mayor's conclusion regarding his poor interview performance is inconsistent with the Appellant's testimony and demeanor at the hearing before the Commission as well as the Appellant's presentation skills at prior City Council and other meetings and his ability to serve as an effective trainer / instructor.

Analysis

I carefully considered all of the witness testimony throughout the two days of hearing conducted at the Springfield State Building. I reviewed the testimony again by reading the transcripts. I reviewed all of the exhibits, the stipulated facts and the post-hearing briefs submitted by the parties. To ensure clarity, I have not overlooked any of the witness testimony, proposed findings or arguments. In those instances where I did not include all or parts of the testimony of a witness in my findings, I did so not by omission, but rather, because I did not find the testimony relevant and/or I did not credit that portion of his/her testimony.

A central question here is whether Mayor Kos, who served as the Appointing Authority at the

time of this promotional appointment, had a personal bias against the Appellant. As referenced above, the Appellant argues that the Mayor developed a bias against him when the Mayor, according to the Appellant, mistakenly believed that the Appellant was trying to embarrass him by disrupting the City's permitting process, which in turn would hold up real estate closings in Chicopee. Although it is clear that Mayor Kos was angered by what he believed was the failure of the Appellant to inform him about the disruption to the permitting process, that occurred almost one month *after* Mayor Kos had already concluded that he was dissatisfied with the Appellant's interview (on February 19th) and well *after* he had told his then-Human Resources Director that he was hesitant to appoint either of the two candidates then under consideration to the position of Fire Chief.

Based on the credible testimony of Mayor Kos, he (Mayor Kos) was taken aback by the Appellant's poor performance during the interview, in part because the majority of questions posed to the Appellant were the same questions asked of the Appellant when he sought promotion to Fire Chief approximately three years earlier. Further, the Mayor was troubled by the Appellant's inability to articulate a vision for the Department's future. In short, the Mayor's reservations about the Appellant's ability to serve as Fire Chief began well before the turn of events involving the smoke detector inspection certificates.

That turns to the Appellant's argument that his interview performance could not possibly have been the proverbial train wreck recounted by the Mayor. Although, regrettably, that interview was not recorded, I did hear testimony from the City's then-Human Resources Director, who also participated in the interview. Importantly, the HR Director had a good working relationship with the Appellant; she believed that the Appellant was qualified to serve as Fire Chief; and she communicated that opinion directly to the Mayor. Even she, however, concluded

that the Appellant's interview was poor and that he was unable to provide complete answers to standard questions. Finally, although the Appellant now describes the interview as more of an "interrogation" by the Mayor, the Appellant himself acknowledges that, if based solely on his interview performance in February 2019, he would not be in favor of his promotion if he was the Appointing Authority.

Finally, in relation to the Appellant's interview, I did consider whether the Mayor's unvarnished – and unkind – description of the Appellant's demeanor during the interview was evidence of a personal bias against the Appellant. I credit the Appellant's candid testimony that he is challenged by a stutter that results in a temporary loss of words, or long pauses. I also credit the former Fire Chief's testimony that certain perceived or actual facial expressions by the Appellant are attributable to medical issues, making the Mayor's comments in this regard all the more regrettable. Based on the entirety of the Mayor Kos's testimony, however, I concluded that the Mayor's primary concern was the Appellant's overall inability to provide complete answers and/or articulate a vision for the future of the Fire Department, as opposed to the Appellant's demeanor or pauses between answers.

Next, the Appellant argues that the Mayor's decision to bypass him was impermissibly based on the Appellant's decision to challenge the Mayor's legal authority to make a "temporary appointment" prior to making a final decision regarding a "permanent" appointment. That issue is somewhat of a red herring here. First, the issue ultimately before the Commission is not whether the Mayor was permitted to make a *temporary* promotional appointment under the civil service law, but, rather, whether he had reasonable justification to bypass the Appellant for the position of *permanent* Fire Chief. As the decision-making process was still underway, the Appellant got himself lost in the issue of whether the civil service law, in these circumstances,

permitted the use of a temporary appointment. I don't credit the Appellant's testimony that he, as he also stated to City officials at the time, was concerned that accepting a temporary appointment would "impugn his integrity". Rather, it is clear that the Appellant, focused on obtaining appointment as permanent Fire Chief at the time, believed it would be advantageous to him if he could show that the Mayor was not permitted to make a temporary appointment. The Appellant was apparently emboldened after purportedly obtaining advice from the Fire Chief at the time and a local attorney stating that the Mayor, based on the facts presented by the Appellant, was prohibited from making a temporary appointment. To the extent that it is relevant, albeit indirectly, to this appeal, the law is far from definitive on this issue and highly contextual, dependent in part on the motives of the Appointing Authority.

In Somerville & another v. Somerville Municipal Employees Association, 20 Mass. App. Ct. 594 (1985), the Appeals Court stated in part that "... the law vests considerable authority in the 'appointing authority', who retains the sole power to decide whether to fill vacancies on either a permanent or temporary basis, citing Kenney v. McDonough, 315 Mass. 689, 693 (1994). While some parties have argued that the Court's decision in Somerville stands for the proposition that Appointing Authorities have the sole authority to deem a vacancy as permanent or temporary, the decision, read in the proper context, does not support that conclusion. Rather, when read in the proper context, it is clear that the Court in Somerville was stating that an Appointing Authority has the sole power to decide whether to *fill* vacancies, regardless of whether the vacancy in question is permanent or temporary. Put another way, the Court was clarifying that the civil service law does not require that every vacant civil service position be filled by the Appointing Authority.

In Lee and O'Connor v. City of Springfield, 17 MCSR 157 (2004), the Appellants challenged the City's decision to retain temporary employees over permanent employees. As part of its

decision allowing the Appellants' appeals, the Commission stated: "Appointing authorities may use temporary appointments in limited circumstances for certain employees who: (1) serve for a specified period of time; or (2) serve for the duration of a temporary vacancy² ... Temporary and provisional appointments are the exceptions to the civil service laws; yet the Appointing Authority had made eight times as many temporary or provisional appointments as it had made permanent appointments." The Commission's decision went on to state that: "While this need may have existed for some of the temporary appointments, it is doubtful that it existed for all thirteen of the temporary employees, who remained employed ... The Appointing Authority's preference of making temporary appointments, instead of permanent appointments, is not in accord with the civil service laws, and the Commission does not approve of the Appointing Authority's actions." The Commission's decision in Lee and O'Connor confirms that the permissibility of temporary appointments is fact-specific, as opposed to formulaic and/or definitive.

Applied here, I must decide whether the Mayor's decision to make a temporary appointment to the position of Fire Chief, prior to making a permanent appointment, was an attempt to circumvent the civil service law and/or prevent the Appellant from becoming the permanent Fire Chief. A preponderance of the evidence proves otherwise. Having concluded that the two candidates under consideration for Fire Chief at the time may not be suitable candidates, the Mayor had the option of letting the eligible list expire within several weeks and calling for a new examination. Once the eligible list expired, and until such time as a new list was established, the Mayor would have been free to appoint a Provisional Fire Chief, choosing from any member of the Fire Department, or even looking outside the Department for a Provisional Fire Chief. Instead,

² "Temporary vacancy" is not defined under G.L. c. 31, s. 1.

leaving open the possibility that the Appellant's poor interview performance was not reflective of how he would perform as Fire Chief, the Mayor decided to offer the Appellant a temporary appointment. Although it did not involve a civil service position, the Mayor pursued a similar course of action regarding the appointment of a DPW Director, ultimately making the temporary appointment permanent after the candidate, who had not performed well during an interview, acquitted herself after a short period of time in the position. Having concluded that the Mayor's decision was not based on ulterior motives (i.e. – an attempt to prevent the Appellant from becoming the permanent Fire Chief), the Mayor's decision to offer to appoint the Appellant as a "temporary" Fire Chief for a short, specified period of time was not a violation of the civil service law or rules. The Appellant's inability to see the proverbial forest through the trees at the time, or even now, caused him to decline an opportunity that may well have resulted in this permanent appointment as Fire Chief several weeks later.

That turns to the issue of the smoke detector inspection certificates. The Appellant is a model citizen. He served with distinction in the military on multiple occasions, including re-enlisting shortly after the attack on our country on September 11, 2001. He has dedicated his life to public service, including over twenty-five years in the City's Fire Department, where he has earned multiple commendations; obtained many certifications; and worked his way up from firefighter to Deputy Fire Chief. He is also a strong part of the community, having volunteered in several capacities. He is a proud father and has been married to his wife, who was present for every hour of the two-day hearing, for over thirty years. Here, however, in regard to the issuance of smoke detector inspection certificates, he made an uncharacteristically poor judgment.

The Appellant was intimately familiar with the nuanced process regarding the issuance of these certificates and he understood that any hiccup in the process would have an immediate,

disruptive impact on real estate closings. At the time, the Fire Department was completing 15-20 smoke detector inspections weekly. After completion, the fire inspector would go online and verify that the property met the state and local requirements, automatically triggering the issuance of a certificate that is required prior to any real estate closing. For approximately three years, those certificates contained the automated signature of former Chief Desmarais. The Appellant (and Desmarais) knew this would need to be addressed to ensure continuity in the certification process. Rather than alerting City officials of this, the Appellant, during a meeting with the City Solicitor and Human Resources Director, made a vague reference to permits, stating that, until a new Fire Chief was appointed, he (the Appellant), as the Executive Officer, would be in charge of the day-to-day operations of the Department, with the exception of permitting. Apparently, the Appellant believed that this vague reference would be just enough to show that he had alerted City officials when the inevitable turmoil started. That is precisely what happened, as real estate brokers became aware of the inability to complete real estate closings at the Registry of Deeds. One of those real estate brokers contacted Desmarais on his cell phone, apparently unaware that his retirement had taken effect a day earlier. Desmarais, on vacation in Florida, suggested that no permits would be issued until a new Chief was appointed, and directed the broker to call the Mayor. By this time, the Appellant, who had still not explicitly alerted City officials of the chaotic situation, was contacting the State Fire Marshall's Office. I listened carefully to the Appellant's testimony regarding his communication with the State Fire Marshall's Office. The Appellant was not attempting to facilitate a quick resolution to this matter. Rather, the purpose of the call was to confirm that, given the Fire Chief's retirement, no certificates could be issued at that time. The fact that the Appellant, at the time, failed to tell the Mayor about his communication with the State Fire Marshall's Office, only confirms that the Appellant was putting his own self

interest over the best interests of the citizens of Chicopee. After carefully reviewing all of the testimony, I infer that the Appellant erroneously believed that the need to resolve this chaotic situation would force the Mayor's hand in regard to appointing him as a permanent Fire Chief. It was a serious error in judgment by the Appellant. It is also a valid reason for bypassing the Appellant for appointment as permanent Fire Chief.

Finally, the preponderance of the evidence supports the positive reasons put forth by the City regarding the selected candidate, Mr. Stamborski. Once notified that he should have been given the opportunity to sign the Certification for Fire Chief, Mr. Stamborski responded enthusiastically and took the interview process seriously, preparing a written outline of his vision for the Department along with a list of short term and long term goals. He expounded on those points during an interview with the Fire Chief and new Human Resources Director where he was asked the same questions posed to the Appellant during his interview. While the Appellant suggested that Mr. Stamborski may have been prompted to prepare the written outline by some heads-up by the Human Resources Director, the preponderance of the evidence does not support that assertion. Both the Mayor and the Human Resources Director were genuinely impressed by Stamborski's enthusiasm, his ability to provide thoughtful answers and his overall vision for the Department. Ultimately, the Mayor offered Stamborski the same temporary appointment that the Appellant had declined. Mr. Stamborski accepted, successfully completed the assignments that had been originally planned to be assigned to the Appellant and was made permanent Fire Chief one day prior to the expiration of the eligible list.

In summary, the decision to bypass the Appellant for promotional appointment was not based on any personal or political bias. Rather, the preponderance of the evidence shows that the City relied on valid reasons to bypass the Appellant including: a) the Appellant's poor interview

performance in which he was unable to provide complete answers or articulate a vision for the Fire Department; b) the Appellant's error in judgement that caused the interruption of smoke detector inspection certificates; and c) Mr. Stamoski's strong interview performance and ability to articulate a vision for the Department, as well as the successful completion of duties during a permissible temporary appointment, which the Appellant had declined to accept.

For all of the above reasons, the Appellant's appeal under Docket No. G2-19-100 is *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 9, 2020.

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 this order or 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 this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in the Superior Court, the plaintiff, or his/her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass.R.Civ.P. 4 (d).

Notice to:
Thomas A. Kenefick, III, Esq. (for Appellant)
Thomas John Rooke, Esq. (for Appointing Authority)