COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 7/27/09
Civil Service Commission CS

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

DENNIS CARMODY
and JAMES MCDONALD,
Appellants
v.

CITY OF LYNN,
Respondent

Case Nos.: G2-07-65
G2-07-66

MAJORITY DECISION AFTER REMAND

The Appellants, Dennis Carmody and James McDonald, asserted these appeals pursuant to G.L. c.31, § 2(b) to the Civil Service Commission (Commission) from the decision of the City of Lynn, as Appointing Authority, to bypass them for promotion to the position of Deputy Fire Chief. By Judgment dated January 16, 2009, the Massachusetts Superior Court (Feeley, J.) vacated the Commission's initial Decision (which had dismissed the appeals for lack of jurisdiction), and remanded the appeals to the Commission for "whatever action it deems appropriate" to preserve the Appellants' rights to a review on the merits of their Section 2(b) civil service appeals, pending the outcome of a related arbitration between the City of Lynn and the Appellants' collective bargaining unit. On July 20, 2009, the Commission was presented with a copy of the Award in that related arbitration (a copy of which is attached to this Decision as Exhibit 9).

After review of the Award, the Commission concludes that Award provides the Appellants with all of the relief that might be awarded by the Commission to the Appellants in their Section 2(b) appeals, including an order to conduct a new, unbiased selection process for the position of Deputy Fire Chief which must include both Appellants, and awarding the Appellant Carmody a retroactive pay differential. As there is nothing further by way of relief

that the Commission should grant to either of the Appellants that has not already been ordered by the Award, further proceeding in these appeals would appear to be moot. Accordingly, the Commission concludes that these present appeals should be dismissed.

The Commission understands that the Award has been appealed to Superior Court by the City of Lynn. In the event that such an appeal results in the vacating or modification of the Award, the Commission will entertain a motion to reconsider the dismissal of these appeals, and shall toll the time for filing such a motion to and including 30 days after the judgment of the Superior Court (or appellate court) from the time the pending appeal of he Award becomes final.

Nothing within this Decision is intended to preclude or affect the rights of either of the Appellants to initiate a new by pass appeal to the Commission from their non-selection or bypass following the completion of the selection process ordered by the Award.

Accordingly, for the reasons stated above, the appeals of the Appellants, Dennis Carmody and James McDonald, are hereby ***dismissed, subject to the conditions stated in the Decision.***

Civil Service Commission

Christopher C. Bowman
Chairman

By 3-2 vote of the Civil Service Commission (Bowman, Chairman [AYE]; Henderson {NO], Marquis [AYE], Stein [AYE] and Taylor [NO], Commissioners) on July 23, 2009.

A True Record Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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:
Harold Lichten, Esq.
Neil Rossman, Esq.
Robert Clewell, Esq.
David Grunebaum, Esq.
John Marra. Esq.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place
Boston, MA 02108
(617)-727-2293

DENNIS CARMODY
and **JAMES MCDONALD,**
Appellants,

v.

CITY OF LYNN,
Respondent,

MINORITY DECISION AFTER REMAND NOT ADOPTED

DECISION

This matter, having been remanded by the Superior Court (see McDonald and Carmody v. City of Lynn and Civil Service Commission 07-1613-B (Essex Super. 2009) and this Commission, having by stipulation of the parties, consolidated these two matters for adjudication and, having received various exhibits and heard oral argument by the parties at a hearing on July 20, 2009, and having considered further argument and proposals of the parties at a hearing on July 21, 2009, the Commission hereby determines as follows:

1) The Commission determines that it should adopt the findings of fact and conclusions reached by the Arbitrator with respect to the interview process portion of the promotional procedures at issue with this case. The factual findings are found on page 4-15 of the Arbitrator's award (a copy of which is attached hereto as Exhibit 9) and the conclusions of the Arbitrator relevant to this matter are found on pages 24-30.

2) Based on the findings of the Arbitrator, which the Commission finds to be relevant to the issue before this Commission, the Commission hereby awards the same relief ordered by the Arbitrator at pages 28-30 of the award with the following additional protections designed to insure the integrity and fairness of the process.

3) Current acting Chief Carritte shall play no role whatsoever in the designing or administering of the selection process utilized by the City. In addition, while the City has the right to determine the selection process to be utilized, so long as it is fair and unbiased, should the selection procedure include oral interviews or an assessment

center, there shall be kept a video tape (with audio) of those entire proceedings.

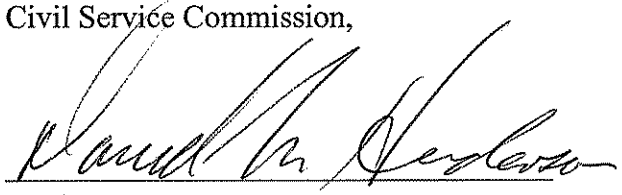
4) In the event that a candidate other than Carritte is selected for the Deputy Chief's position, the Commission will determine at that time whether any c.310 relief is necessary to effectuate the intent of this decision in addition to the remedy ordered here.

5) The basis of the Commission's decision is that the Arbitrator held three days of hearings at which time he took evidence regarding the interview process utilized as part of the selection procedure for the position of Deputy Chief in 2006. The Arbitrator made findings of fact and drew conclusions regarding the lack of fairness of that process and while the Commission understands that the City challenges the Arbitrator's findings in that regard, the Commission believes that it is not appropriate to relitigate that matter here.

6) Accordingly, applying the doctrine of collateral estoppel, as well as the need to conserve judicial and Commission resources, the Commission believes it appropriate to adopt those findings of the Arbitrator as set forth above. The Commission does not believe it appropriate to permit relitigation of an issue which has already been extensively litigated before the Arbitrator.

WHEREFORE, as stated above, the Appellants' appeals on Docket Nos. G2-07-65 and G2-07-66 are ***allowed in part and subject to further action.***

Civil Service Commission,



Daniel M. Henderson,
Commissioner

By vote of 3-2 against, of the Civil Service Commission (Bowman, Chairman -No, Henderson -Yes, Marquis -No, Stein -No and Taylor -Yes, Commissioners); on July 23, 2009.

A true record. Attest:

_____

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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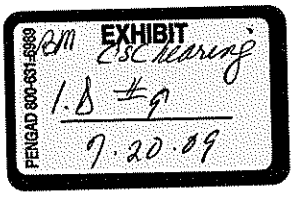
Notice sent to:
Harold Lichten, Atty.
Neil Rossman, Atty.
David Grunebaum, Atty.
John Marra, Atty. HRD

American Arbitration Association
Dispute Resolution Services Worldwide



New England Labor Center

One Center Plaza, Third Floor, Boston, MA 02108
telephone: 617-451-6600 facsimile: 617-451-0763
internet: http://www.adr.org/

June 29, 2009

E. David Wanger, Esq.
Angoff, Goldman, Manning, Wanger & Hynes
45 Bromfield Street, Floor 8
Boston, MA 02108-4106

David F. Grunebaum, Esq.
Tobin, Sullivan, Fay & Grunebaum
60 William Street, Suite 330
Wellesley, MA 02481

Re: 11 390 02483 06
IAFF, Local 739
and
City of Lynn

Grievances: Alteration of substantive promotion process

Dear Parties:

By direction of the Arbitrator, enclosed please find the duly executed Award/Opinion and the bill for services rendered in the above-captioned matter. Please note that when paying the Arbitrator, checks should be prepared and mailed directly to the Arbitrator, not to the American Arbitration Association.

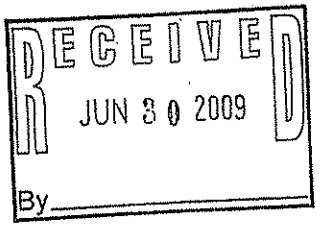
The American Arbitration Association, in its monthly publications ***Summary of Labor Arbitration Awards***, ***Arbitration in the Schools*** and ***Labor Arbitration in Government***, reports arbitration decisions in labor cases. We would like to consider the enclosed case for reporting in a forthcoming issue. Absent an objection within one (1) month from the date of this letter, we will assume that you are agreeable to publication. However, if you wish to object, please send your letter directly to the Publications Dept, AAA, 1633 Broadway, 10th Floor, New York, NY 10019-6708.

Also, please be advised that it is the AAA's policy to retain awarded cases for a maximum period of fifteen (15) months from the date of the transmittal letter. Therefore, please take note that the above referenced case file will be destroyed 15 months from the date of this letter.

Thank you for choosing the American Arbitration Association.

Very truly yours,

Emily Earle
Case Manager
617-695-6019
EarleE@adr.org



Enclosures
cc: Mark L. Irvings, Esq.(Via Email Only)
Matthew Reddy
Edward J. Clancy, Jr.

American Arbitration Association

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

LYNN FIRE FIGHTERS, IAFF, LOCAL 739

and

CITY OF LYNN

AAA Case No. 11 390 02483 06

AWARD OF ARBITRATOR

The City violated the collective bargaining agreement by the manner in which it conducted the selection process for the deputy chief promotion in 2006. Dennis Carmody shall be paid the difference between what he would have earned in salary and benefits had he been appointed deputy as of the day James Carritte was placed in the position, and what Carmody earned as a captain.

A new selection process overseen by the current chief shall be undertaken involving Carmody, McDonald, and Carritte, assuming all three are still interested in the position. If Carmody or McDonald is selected, Carritte shall be removed from the deputy position and the successful candidate's seniority date as deputy shall be retroactive to the date Carritte was originally appointed as deputy.

Mark L. Irvings

Mark L. Irvings
June 25, 2009

In the Matter of the Arbitration between

LYNN FIRE FIGHTERS, IAFF, LOCAL 739

and

CITY OF LYNN

OPINION
AND
AWARD

AAA Case No. 11 390 02483 06

The parties submitted this case to arbitration pursuant to their collective bargaining agreement. Hearings were held on October 19, 2007; June 17, 2008; and February 2, 2009. E. David Wanger, Esq., appeared on behalf of the Union; and David F. Grunebaum, Esq., appeared on behalf of the City. Post-hearing briefs were received from the parties by June 2, 2009.

ISSUE

The parties could not agree on the precise formulation of the issue being submitted to the parties. Based on the arguments of the parties and the entire record, I find the issue to be as follows:

> What shall be the disposition of Joint Exhibit 2, the grievance?

The grievance filed on September 18, 2006, stated:

> The Employer has violated and continues to violate Article I, as well as other relevant provisions of the contract: By unilaterally adopting a new component in the promotion practice (oral interview and evaluation, including participation by persons not members of the Lynn Fire Department) and by related conduct.

RELEVANT CONTRACT PROVISIONS

ARTICLE I
RECOGNITION AND BARGAINING UNIT

The City hereby recognizes the Union as the exclusive bargaining agent for the bargaining unit of all fire fighters employed by the City including Lieutenants, Captains, District Chiefs, Deputy Chief, but excluding the Chief of the Fire Department and further excluding all other employees of the City.

. . .

ARTICLE VI
GRIEVANCE PROCEDURE

. . .

STEP 2

. . .

All participants in the procedures of this Article, including the Arbitrator, shall apply concepts of reasonableness and fairness and be governed by applicable provisions of this Agreement in performance [of] their functions.

ARTICLE XV
TRANSFERS

Section 2

A. When openings occur in the department, other than Chief's Aide or Fire Prevention, the Chief shall exercise his discretion whether to give the senior employee who requests the job the opportunity to fill such opening, and the discretion shall be based upon whether the efficiency and effectiveness of the Fire Department operations will be adversely affected.

B. The department shall post and permit bidding for all newly created jobs. . . The procedure for awarding jobs shall be as follows:

. . .

(3) The chief shall have his discretion to determine in his judgment, [who] is the most qualified to perform the job. His discretion as to whom to award a job

shall be reviewable only for abuse of discretion, or because the decision was arbitrary or capricious.

. . .

Section 4

. . .

Upon the creation of a vacancy, and there is a promotional list, for the appropriate rank, the City shall immediately request the Division of Civil Service to certify the necessary names to fill in any and all such vacancies, and upon receipt of same, shall immediately make the necessary appoint(s). The City shall furnish Local 739 with a true copy of the request to, and reply from, the Division of Civil Service.

ARTICLE XVVII
SAVINGS CLAUSE

Section 1

This agreement has not been designed to violate any Federal, State, County, or Municipal Laws nor shall anything in this agreement be interpreted as diminishing the rights of the employer to determine and prescribe the methods and means by which its operation of the Fire Department shall be conducted, except by those rights limited by this agreement.

Section 2

This agreement shall not be construed to deprive any employees of any benefits or protections granted by laws of the Commonwealth of Massachusetts.

APPENDIX A

Section 2

Where in-grade progression is applicable, it shall be continued in accordance with prior practice.

BACKGROUND

Promotional Positions. In addition to firefighters, the Lynn Fire Department employs lieutenants, captains, district chiefs, and a deputy chief. All these positions are

in the bargaining unit represented by the Union, leaving the fire chief as the only non-Union position. The ranks below deputy chief are largely suppression personnel. Firefighters and lieutenants man apparatus, and captains oversee three to four people in a company. The district chiefs supervise an entire shift of about thirty-five people, hiring for overtime and making disciplinary recommendations.

In contrast, the deputy chief is the second in command in the Department and his job is almost exclusively administrative. Whereas the district chiefs work a rotating forty-two hour schedule, the deputy's regular shift is on days Monday through Friday, but he is effectively on duty on a 24/7 basis. A major responsibility is assisting the chief in the preparation and implementation of the budget, an increasingly complex task in times of financial distress. The deputy accompanies the chief to meetings with the City Council regarding the proposed departmental budget. In recent years, the deputy as been involved in grant writing and implementation. The deputy oversees personnel issues, as well equipment acquisition and maintenance, and consults with the chief in matters of collective bargaining agreement administration, including Step 2 of the grievance procedure. When the chief is out-of-town or otherwise unavailable, the deputy fills in as acting chief in charge of the Department, but unlike other officers who cover for a higher rank, the deputy does not receive out-of-grade pay.

Filling of Vacancies. All positions in the Department are covered by Civil Service, so that when the City wants to fill a vacancy on a permanent basis, it requests a eligibility list from the Human Resources Division (HRD). Individuals who have taken and passed the relevant promotional examination are listed in order of their test scores, and under c.31, §27 of the Civil Service law, an employer is required to hire for a single

vacancy from among the top three people on the list. If a list has less than three names, the employer is not required to promote anyone and can request a new list with additional names. If the top rated person is not selected, the law requires the appointing authority to file a written statement of reasons for the bypass. HRD allows municipal employers to sign a delegation agreement if the employer desires to "incorporate the use of an oral panel component as a weighted, graded component of the examination process." Under that agreement, the employer must agree "to hire a consultant to develop, construct, validate, administer and score the oral panel component." The agreement sets forth the criteria for and characteristics of an oral panel component which must be present if HRD is going to consider the oral panel component when it "determines the passing point for the written examination and which participants achieved a passing score."

Much testimony was offered regarding the history of filling vacancies in Lynn. Civilians being hired for entry level firefighter positions have routinely been interviewed by a panel composed of City Human Resources representatives, and officers and firefighters from the Department. There have been occasions when a chief has decided to bypass the highest ranked candidate on a list and hire one of the other three top-ranked people.

With rare exception since 1941, all vacancies for lieutenant, captain, district chief, and deputy chief have been filled by the top-scoring interested candidate on the Civil Service eligibility list. Until 2006, people were always promoted from the next lowest rank, meaning there was never an instance of a captain being promoted to deputy chief. Candidates were not subjected to interviews or an assessment process. William Curran, a district chief for twenty-four years, who progressed through the ranks, testified that he

was always promoted based on his standing on the eligibility list, without ever being interviewed. Similarly, William Conway, who started in 1964 as a firefighter and retired in 1988 as the acting chief, and was the first deputy chief, was always promoted based on his top position on the eligibility lists, without an interview or assessment process. For the deputy promotion, he was the only person on the certified eligibility list.

The first exception to this pattern of promotions occurred in 1977. Capt. Leo Ryan was bypassed on the eligibility list for district chief, and Lt. Kenneth Bax was bypassed on the eligibility list for captain, solely because they did not meet the residency requirement for promotion recently enacted by the Lynn City Council. The Union grieved both actions and arbitrators in separate cases found the residency requirement, which was inconsistent with a provision of the general laws, violated the collective bargaining agreement, and ordered that the men be promoted retroactively.

In 1989, then Mayor Albert DiVirgilio, bypassed top-ranked Lt. Raymond Pelletier for promotion to captain, appointing two lieutenants who were lower on the Civil Service eligibility list then in effect. Pelletier brought suit in Superior Court alleging that he was bypassed because of his visible activities, both as an individual and as a member of the Union's executive board, in opposition to budget-cutting proposals by the mayor. The complaint alleged the bypass was in violation of the First Amendment of the United States Constitution, 42 U.S.C. §1983, and the Massachusetts Civil Rights Act. The City and Pelletier ultimately negotiated a resolution of the suit, which was accepted by the judge and the Civil Service Commission, under which the City would appoint Pelletier to the next captain vacancy, with a retroactive seniority date of December 8, 1988, but no back pay or other lost fringes.

DiVirgilio testified that as mayor it was his understanding that he had the right to request a list from Civil Service, interview the top three candidates if he chose to do so, and appoint one of them. If he selected other than the top-ranked candidate, he would be required to justify the bypass in writing. DeVirgilio recollected interviewing candidates for the acting and permanent vacancies for fire chief. He stated he always promoted the top-rated person for each vacancies because he found them to be the best qualified. His recollection about this unvarying practice was refreshed when he was shown the papers regarding the Pelletier case.

District Chief Rocco Gecoy testified that he was the sole volunteer for the acting deputy chief position in 2006, and was given the job by Chief Edward Higgins. While he was acting deputy, he spoke with Mayor Patrick McManus about an unrelated matter. Gecoy, who was number two on the eligibility list for deputy, was not interested in occupying the deputy position on a permanent basis. McManus told Gecoy that he could appoint one of the top three candidates on the list. There was no evidence this assertion was ever conveyed to the Union.

The final situation which might arguably be called an exception to the standard procedure of appointing the top-rated person on the eligibility list concerned Higgins. Higgins testified that he had been the top person on the lists when he was promoted to lieutenant, captain, and district chief. He asserted that he had been interviewed for the district chief vacancy, although there was no evidence anyone else on the list was interviewed. In 1999, the City filled the deputy chief position with a temporary appointment and submitted a request for an eligibility list from Civil Service. The list was established in August, 1999, and Higgins was the top scorer. By December, 1999,

the City had failed to appoint Higgins from that list, and Higgins filed a complaint with Civil Service, asserting that the City could not keep a temporary appointment in place after it had requested a list for a permanent appointment. The Union filed a grievance with the city on Higgins's behalf, claiming the City was obligated to appoint Higgins from the certified list. Mayor McManus subsequently appointed Higgins as deputy.

2006 Deputy Selection Process. Higgins was serving as acting chief in 2003 when the eligibility list was certified that had him as the second ranked scorer. After the top candidate withdrew from consideration, Higgins was appointed to the position, following interviews with the mayor.

Sometime in 2005 the position of deputy chief became vacant and a temporary deputy was appointed. A promotional examination open to district chiefs was noticed, but no one signed up. Higgins testified that it was his personal experience that the examination for deputy had not tested him on relevant skills such as contract negotiation and grievance handling, and only had small sections on personnel management and budgeting, the primary responsibilities of the deputy. Higgins participated in the January, 2006 negotiations for a successor collective bargaining agreement. Neither he nor any City representative raised the issue of how he would handle promotions in the future.

HRD published a notice of another promotional examination for the deputy chief position, but this time made both district chiefs and captains eligible to take the test. The notice contained a lengthy recitation of examination subjects, which, in addition to a wide range of fire suppression topics, included

> . . . knowledge of theories, principles, and practices of administration, management, and supervision, including

> training, motivation, discipline, performance evaluation, labor relations . . .

The notice also set forth a reading list which included, beside suppression materials, five chapters in Managing Fire and Rescue Services, published by the International City Management Association; and a book titled The Human Challenge.

Some number of captains took the examination and Higgins learned of the scores a month before the certified list was issued in September 12, 2006. Higgins had spoken with other chiefs who were members of a number of chief organizations to which he belonged, and he had learned that many colleagues used an interview as part of the selection process for deputy or assistant chiefs.

The captains deemed eligible for promotion, and their respective scores, were Dennis Carmody (92), James McDonald (81), and James Carritte (80). Carmody and McDonald were currently line officers, while Carritte had been serving as training officer for two years. Higgins sent the three men letters indicating that he had scheduled interviews for September 26. The Union filed the grievance on September 18 which was identified at the arbitration as Joint Exhibit 2. At some point Carmody questioned why there would be interviews, since he was first on the list. McDonald asked who would be on the interview panel, and Higgins told him he would find out the day of the interview.

Higgins postponed the interviews, and while insisting that he had the right to use such interviews as part of the promotion process, offered to sit down with Union representatives and hear their concerns. The City claims that it offered to bargain with the Union over the use of interviews; the Union maintains the City only offered to bargain over the impact of its decision to interview applicants for promotion. Three

meetings were held, in which Higgins insisted he had the right to conduct interviews, and the Union representatives insisted he was required to promote the top person on the eligibility list. Near the conclusion of the meetings, the City offered to have a District Chief sit on the interview board, but the Union rejected the proposal. The Union's grievance was denied in an October 30 letter from Labor Counsel David Grunebaum which stated the City believed it has the right to conduct interviews with candidates and to have present whomever it wishes. Grunebaum also asserted that notwithstanding its legal position, the City offered to bargain regarding the issue and the Union refused to bargain. The interviews were subsequently rescheduled.

On November 16, the Union filed a demand for arbitration which defined the dispute as the "unilateral alteration of substantive promotion process." The requested remedy was stated as follows:

> Finding of contract violation; cease and desist order; order for rescission of change and for restoration of prior practice; a fully comprehensive make-whole order for unit members impacted by unilateral change; costs; and, such other and further relief as the Arbitrator deems appropriate.

Higgins decided to ask two outside chiefs whom he knew from professional organizations to join him on the interview panel, Robert Donahue from the Massachusetts Port Authority and Frank Giliberti from Medford. Higgins, who had no formal training in job evaluation or constructing an assessment instrument, alone developed a list of twenty questions he intended to ask the three applicants, although he got some input from colleagues and from the acting deputy chief. The questions solicited insights as to why the candidate wanted the position and what relevant training and experience he had, the candidate's vision of the priorities and future direction of the Department, how the

candidate would handle various budgetary and personnel issues, and the willingness of the deputy to be publicly supportive of the chief in dealings with subordinates, the Union, and the City Council. For each question Higgins wrote out the answers he was seeking. The final question and answer related to the promotion selection process:

> 20. If you were selected for this position even though someone else may have scored higher would you accept the job and why/why not?
>
> *If answer is "no" candidate will have clearly indicated his position as old school, pro-union and not management oriented or progressive.*

Space was left under each desired answer for the interviewer to make notes.

Higgins testified that he was familiar with assessment centers, having read about them and spoken to people who had gone through them. To him, an assessment center was a one or two day process in which candidates go through an "in basket" exercise. Using role plays or scenarios, people are required to demonstrate how they would handle various situations, write reports, and draft plans. Scoring is done by a professional panel of assessors, who provide their ratings to the hiring authority. Higgins was clear that he was not seeking to conduct an assessment center, but rather to simply conduct interviews.

Each candidate was interviewed by the panel for one hour on November 20, the panel having been provided with the chief's prepared questions and answers. Higgins sent Mayor Edward Clancy a letter on November 30 in which he strongly recommended the selection of Carritte. Higgins described Carritte's more extensive education – including a Ph.D. in sociology from Boston College – compared with Carmody's bachelor's degree in business from UMass, and McDonald's associate's degree from North Shore Community College; Carritte's greater and more recent fire science

continuing education and certifications; his participation in fire service organizations; and his ability to articulate strong management philosophy, sound personnel approaches, strategic planning for future departmental challenges, and creative problem-solving. In contrast, Higgins described Carmody's interview performance as less confident and decisive, unimaginative, not forward-thinking, and unclear on the management role of the deputy. The assessment of the differing responses was illustrated by the following paragraphs of the chief's letter:

> Some of the interview questions were designed to probe the candidate's perspective of difficult management/labor decisions which would be highly likely for the position of Deputy Fire Chief. For example, a question (#11) concerning enforcing a regulation of the Chief in the face of stated insubordination by a District Chief Captain Carritte answered that he would enforce the regulation and that it would be intolerable for a Chief Officer to disobey the order, while Captain Carmody answered that he would try to find out where the District Chief differed from the chief and would talk to the Chief to see if there was a "middle ground" and only as a last resort did he enforce the order. Any hesitancy to support the Chief and enforce orders cannot be accepted in a Deputy Chief, who would be the 2nd in command of the Department.
>
> During the interview Captain Carritte was completely understanding of how difficult these decisions were but did not hesitate to assume the responsibility and make those decisions. While the other candidate's answers in the interview seemed to be directed more to working within the union contract, and the morale of the firefighters, Captain Carritte's answers demonstrated a broader view of the mission of the Fire Department and a willingness to look outside the established culture of the fire department for solutions.
>
> In the most unsettling answer of the interview, the final question (#20) posed the question would the candidate accept the position even though someone else may have scored higher and Captain Carmody responded "no". A follow up question was asked of him inquiring if he was the

> 2nd person on the list and knew that the 1st person on the list was unqualified or incompetent, for whatever reason, i.e. discipline, sick record, alcohol , etc. would he still take the same position and his response was that he would still not accept. He stated that the promotion should be strictly by the list until some other method was established. I found that answer to be the most troubling answer possible for a candidate seeking the number 2 management position in the Fire Department. A Captain who would accept an incompetent or unqualified person being promoted to the Deputy Chief position is not thinking of the best interests of the Fire Department, the city, or the firefighters he works with.

Higgins rated Carritte as the top candidate, followed by McDonald and Carmody. He included a matrix of twenty factors or attributes, ranging from test scores, to performance on the interview, to management orientation, and assigned ratings from 5 at the highest to 0 at the lowest. Carritte wound up with an 83, McDonald 69, and Carmody 62. Also attached were letters from the two outside chiefs, who suggested the same relative ranking. They both described Carritte in glowing terms, noting his confidence and critical thinking skills. Both referenced McDonald's passion for firefighting, but his lesser confidence. Similarly, both said Carmody was the least confident and most concerned with the morale in the department, which was cast as a negative perspective for a deputy.

On December 8, 2006, Higgins notified the applicants that he had recommended the appointment of Carritte as deputy. The mayor subsequently appointed Carritte to the position and on January 14, 2007, the Union filed a grievance alleging the City had violated the collective bargaining agreement by not promoting according to the ranking on the eligibility list. A demand for arbitration of this grievance was filed on February 26, 2007. The case was separately docketed by the American Arbitration Association, a

different arbitrator was assigned, and a hearing was scheduled. At the second day of hearing in the arbitration of the matter before me, I decided that as part of this case, that I would be ruling on the Union's claim that the City had always promoted in rank order on the Civil Service list and was required to continue doing so.

Contract Proposals. The City introduced a proposal advanced by the Union in 1999 to amend Article I by adding a fourth paragraph, which would have read:

> Practices as to benefits and working conditions enjoyed by employees and not specifically provided for by the terms of this Agreement shall be maintained at the highest level of such practices for the duration of this Agreement (an explicit rendition of an implicit, existing contract guarantee).

The City did not accept the proposal and it was eventually withdrawn.

The Union put forth the initial proposals advanced by the City on July 1, 2008 during negotiations for a successor agreement. The proposals stated in relevant part:

> The following proposals are being made without prejudice to the City's position or interpretation in any presently pending or future dispute, controversy, grievance, arbitration . . .
>
> **II. Working Condition Proposals**
>
> 1. The City and the Union agree that the City may in its sole and unlimited discretion implement any procedures it deems beneficial as part of the promotional process including but not limited to interviews, and/or assessment centers.

This proposal was withdrawn by the City soon after it was proffered.

UNION POSITION

There had existed for almost seventy years an unbroken practice of promoting the highest ranking person on an eligibility list. On the few occasions when a mayor attempted to deviate from the practice, the Union filed a grievance, prohibited practice charge, or court complaint, and in every circumstance the City backed down and promoted the highest scoring officer. In AAA 11-390-01993-99, Arbitrator Gary Altman found whatever management rights the City had reserved were subordinated to the language in Article XV in which the parties agreed to a process for filling vacancies. The only interviews previously held for promotions were *pro forma* meetings in which the successful candidate met the mayor and representatives of the Personnel Department. Such meetings were never used as a supposed assessment tool to determine who would get a promotion. While mayors such as DeVirgilio may have claimed they believed they had the right to choose from among the top three candidates, that they never did shows the existence of the actual practice.

That practice was entirely consistent with c.31, which permits selection from among the top three, but contains a presumption that the top-rated person will normally get the position. It is therefore of no import that c.31 is not among the statutes over which a collective bargaining agreement prevails listed in c.150E, §7(d). Through collective bargaining, as manifested by years of contract administration, the parties solidified the presumption into a binding commitment. The City, by proposing explicit language to give it the right to conduct interviews or assessments for promotions in the most recent negotiations, demonstrated its awareness that the only way to change the practice was through new contract language. Hence, the situation in Lynn is fundamentally different

than in Watertown, where this arbitrator ruled in Watertown Firefighters Association, Local 1347 and Town of Watertown, AAA 11 390 00181 05 (2008), the Town was free to abandon a longstanding past practice of picking the highest ranking officer on the Civil Service list for promotion. That contract contained express language which precluded unwritten practices from limiting reserved management rights.

By promoting Carritte on the basis of a unilaterally implemented assessment process, the City violated the collective bargaining agreement. It is apparent that Higgins grafted the interview panel onto the promotion process for the express purpose of overturning the results of the Civil Service examination. His claim that the examination did not test skills relevant for the deputy chief position was specious, inasmuch as the examination notice lists the very managerial topics, with relevant reading materials, Higgins claimed to inquire about in the interviews. With no expertise in constructing a validated assessment tool, Higgins drafted questions and handpicked like-thinking outside chiefs. Wholly subjective ratings were given for categories which were crafted to favor the less senior Carritte, Higgins's obvious choice, such as how recently fire science courses were taken. Rather than enhance the objective evaluation system created by HRD, and utilized by the parties for almost sixty years, Higgins substituted a highly subjective tool to manipulate the promotion process. Carritte should therefore be removed form the deputy position and Carmody should be retroactively promoted, and compensated for all lost wages, benefits, and contractual entitlements, with interest.

CITY POSITION

Chapter 31, §27 grants to the appointing authority the right to appoint anyone from the top three listed names, and it is not one of the statutes listed in c.150E, §7(d), and therefore overridden by a collective bargaining agreement. In City of Somerville v. Somerville Municipal Employees Association, SJC Docket No. 10089 (2008), the Supreme Judicial Court found that since c.115, §10 gave the mayor the exclusive right to appoint the veteran services director, and that statute is not among the listed statutes in c.150E, provisions in the collective bargaining agreement governing promotions to bargaining unit positions were not applicable. Applying this same rationale to the current situation, even assuming there were a past practice of promoting the highest person on an eligibility list, that practice cannot restrict the City's exercise of its statutory power.

In any event, the Union has not proven the existence of a binding past practice. Whatever has been the experience regarding promotions to lieutenant, captain, and district chief – all suppression positions – there has been no similar pattern regarding promotions to deputy chief. The deputy chief is managerial, and is fundamentally different than the lower ranks. Conway was the first deputy, and he was the only person on the eligibility list, so his selection proves nothing. Higgins in 1999 was the next, and he was ultimately appointed after filing a Civil Service complaint and a grievance, but his and the Union's claim was that the City was obligated to make a permanent appointment, rather than keeping a temporary person in the position. No argument was made that the City was obligated to appoint Higgins because he was the top-ranked person. The Union also never advanced such a claim regarding the bypasses of Bax and Pelletier. Unrefuted evidence was presented that Mayors McManus and DeVirgilio both

believed they had the right to select a deputy from among the top three candidates. Hence, there was no showing of mutual acceptance of a practice consistently applied. Further, never before has there been a case involving a double promotion. Particularly given the managerial nature of the deputy position, it makes sound public policy to enable the chief, rather than the Union, to select the successful candidate from among the top three people on the eligibility list.

The City's position is supported by the express language of the collective bargaining agreement. Article XXVII strongly protects the exercise of management rights, except as those rights are limited by the agreement. The only reference in the agreement to promotion is in Article XV, §4, which merely directs the City to request Civil Service to certify the necessary *names* to fill in any and all vacancies; the use of the plural reinforces the fact that the lists will contain at least three names; the City is entitled under the law to decline to appoint from a short list. The parties did not choose to refer in §4 to following a past practice, in contrast to what they did in Appendix A, §2 . The Union sought a general past practice clause in 1999, but it failed to achieve this benefit. Further, Article XXVII, §2 precludes the construction of the contract to deprive employees of benefits or protections provides by state law. One such benefit is the right of an employee to be promoted from a certified eligibility list if one ranks within the top three. The Union cannot force a waiver of this right through collective bargaining. Finally, the grievance procedure directs the Arbitrator to apply standards of reasonableness and fairness; it would be arbitrary and unreasonable to the chief and the City to ignore everything but the exam score when deciding who should be deputy.

The Union's challenge to the use of an interview in the promotion process ignores the reality that interviews have been a regular part of the process for years. Higgins was interviewed before he was promoted to district chief, and both DeVirgilio and McManus extensively interviewed candidates before appointing them as chief. What Higgins utilized to pick the deputy was not an assessment center, so it was not governed by HRD requirements for such. It was an interview involving a panel, a process the Civil Service Commission has expressly endorsed in Seldon v. Mansfield Police Department, G2-05-172 (February, 2008), where an interview panel recommended the promotion of the second-ranked person on an eligibility list. The Commission wrote:

> Paper and pencil civil service examinations should not be used as the sole determinant when making hiring and promotional decisions, particularly when it concerns appointments as important and sensitive as a police sergeant. While it is appropriate for the Commission to assess whether an interview process is conducted on a level playing field free of political or personal bias, it would be contrary to the concept of basic merit principles, not to mention public safety, for the Commission to discourage public sector employers from exercising their valid discretion via an interview process.
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> In the instant case, the interview process, including the panelists chosen, was above reproach. The recommendation of the four-member panel was unanimous; based on fair and reasonable job-related criteria that indicated that Lawrence Crosman was the preferred candidate. Moreover, the conclusions of the interview panel, reached independently, were consistent with the nine years of observations of Chief O'Neill. The Mansfield Police Department bypassed the Appellant with just cause, providing sound, rationale reasons for its decision and there is no evidence of inappropriate motivations or objectives on the part of the Appointing Authority that would warrant the Commission's intervention.

The City offered to bargain about the interview process, but the Union refused. If anything was lacking, it was due to the Union's intransigence.

OPINION

Contractual and Statutory Framework. The procedures to be followed in making promotions are important working conditions which are frequently addressed in parties' collective bargaining agreement. The parties to this contract made brief reference to promotions in Article XV, §4, only specifying that the City had to request a certified eligibility list from Civil Service, and then immediately appoint from that list. The provision does not specify what procedure, if any, the City must follow once it gets a certified list, and it certainly does not define the standards to be applied in making a promotion decision. The City's argument that the use of the plural, *necessary names*, shows the parties always understood the City would get the three names provided for in c.31, §27, and choose any one of them, is not persuasive. It is not unheard of for the top rated person on a list to decline appointment; in such a case it would be necessary to look to the next rated person, as occurred with Higgins when he sought the promotion to chief. There could also be circumstances where a top-rated applicant had some objective negative attribute, such as a serious disciplinary infraction, which any reasonable person would recognize rendered him unfit to be promoted.

The City is also not correct that an express contract provision, or a past practice, which required the City to promote the top-ranked person on an eligibility list, would conflict with Civil Service law, and therefore be unenforceable under Somerville rationale. As I ruled in the Town of Watertown arbitration over a similar issue,

> . . . Under c.31, §27, an employer must choose from among the top three applicants, and must obtain approval if it is going to bypass the number one person. No statute, regulation, or court decision was cited, however, which bars an employer from agreeing, either by explicit contract provision or binding past practice, that it will always take the top scorer. An employer could implement such an approach and never have to submit any selection to HRD for approval. Hence, enforcing the claimed past practice would not violate Article XIV, Article XXII, §F, or Article XXIV of the collective bargaining agreement. at 12

What was not addressed in Watertown, because that contract did not have a similar provision, was the City's interesting argument that Article XXVII, §2 protects the benefit of the employees who finished second or third on a promotional examination to be considered for a promotion based on more than their score. In light of my finding that an employer agreeing to always select the highest rated employee would not conflict with Civil Service law, I cannot agree that c.31, §27 creates an enforceable right in lower ranked employees to always be considered. Hence, Article XXVII, §2 would not provide the basis for defeating the Union's claim.

The Union's assertion that the City's proffer of a proposal in 2008 – to make explicit the right to incorporate interviews and assessment centers in the promotion process – proves the contract as it existed in 2006 did not allow for such things, is not persuasive. This case was already in the grievance and arbitration procedure, and the City was clearly arguing it already had this right. It is entirely prudent for parties in the midst of a dispute, particularly one based largely on past practice as opposed to express contract language, to seek to clarify the language during negotiations. To do otherwise would mean that if the party lost the arbitration, the interpretation advocated by the other side would be applicable for the duration of the successor contract. This is exactly what

the City did in 2008. In the preface to its proposal, the City explicitly stated that it was being advanced without prejudice to its position in pending proceedings. No inference may therefore be drawn from the fact the City advanced, and then withdrew, the proposal.

Exact Parameters of the Past Practice. It is true that in 1999 the Union unsuccessfully sought the adoption of a broad past practice clause. The same rationale which applies to the City's 2008 proposal applies to the Union's efforts to win specific language. Whether or not the Union was correct in its assertion, the Union clearly set forth its belief in 1999 that its proposal would only make explicit what it believed was already an implicit contractual guarantee.

This is not a case where the Union is seeking to enforce a past practice which is in conflict with specific contract language, nor regarding a topic which is not addressed at all in the collective bargaining agreement. What the claimed past practice does is fill in the gaps in Article XV, §4, which creates certain obligations for the City regarding promotions, but does not set forth a comprehensive scheme. This is a common and regularly accepted use of a past practice. It is also entirely consistent with Article XXVII, §1, which, unlike the relevant contract language in the Watertown collective bargaining agreement, does not proscribe limitations on management rights by unwritten past practices. Rather, it recognizes that the rights of the employer to prescribe the methods and means of operation of the Department are limited *by this agreement.* Since past practice giving meaning to ambiguous or incomplete provisions are part of the agreement, a clear past practice can restrict the prerogatives of the City.

To be binding, a past practice must be unequivocal, mutually recognized, and consistently applied over a reasonable period of time. As it pertains to promotions to lieutenant, captain, and district chief, the procedure of appointing the highest ranking person on the eligibility list certainly meets this test. For almost seventy years, the City has invariably promoted the top scorer to vacancies in these ranks.

There has never been an instance in which the City sought to bypass the first person because it asserted it was free to choose from among the top three, based on some form of an assessment of relative qualifications. The Bax and Ryan bypasses involved an attempt to enforce a unilaterally created residency requirement, and had nothing to do with qualifications. The delay in appointing Higgins, who was the top scorer, involved a dispute over whether the City could keep a temporary appointee, rather than make a permanent appointment. The Pelletier controversy apparently had to do with Union/City tensions, not Pelletier's abilities. In all cases, when the Union challenged the failure to appoint the top-rated person, the City ultimately either was ordered to make the appointment or it agreed to do so. In none of these situations was the issue of whether the City was compelled to appoint the top scorer directly addressed, but the end results were always consistent with the past practice. While various mayors may have harbored personal beliefs that they always retained the right to bypass the top scorer, they never articulated such beliefs to Union representatives. In the face of seventy years of conforming promotions, unstated reservations of rights cannot defeat the finding of a binding past practice.

The same conclusion cannot be reached regarding promotions to the deputy chief position. First, there were only two prior promotions to that rank. One involved

Crowley, who was the only person on the eligibility list. That he got the job proves nothing. The second was Higgins. Arguably his selection was consistent with the practice, but a single promotion does not satisfy the requirement that a practice must be consistently applied over a reasonable period of time. Second, the City is correct that the deputy chief position is very different from those of lieutenants, captains, and district chiefs, so what occurred with promotions to those ranks is not necessarily relevant. The lower officer ranks largely have suppression duties, while the deputy chief is almost exclusively an administrative position, working closely with the chief on budget, policy, and personnel issues. The deputy actually assumes control of the Department in the chief's absence. It would therefore be reasonable that a chief have broader discretion to select the person who is going to be his closest colleague from among the top three candidates. Before that discretion is restricted, in the absence of express contractual language, there must be an unequivocal practice of longstanding. Either there must be a long history of the deputy promotion going to the top scorer on the promotional examination, or there must have been an instance where the City tried to bypass the top scorer and was rebuffed by an arbitrator or judge. Neither of these things occurred, so it cannot be found there exists a binding past practice of promoting the top person on the Civil Service list to the position of deputy chief.

Contractually Infirm Procedure. While Higgins was free to select other than the top scorer, he was not free to engage in a process which was intended to subvert the Civil Service examination results and unfairly manipulate the promotion decision. The City is incorrect in its claim that interviews such as those orchestrated by Higgins have been a regular part of the promotion process for years. At most, even for the non-

bargaining unit position of chief, there has never been a competitive interview procedure, where anyone other than the top-ranked candidate was questioned by the appointing authority. This does not mean Higgins was barred by the contract from instituting some form of oral interview. As is evident from the Seldon decision, the Civil Service Commission does not take the view that an oral component must meet the requirements of an assessment center embodied in the standard delegation agreement. It appears that the delegation agreement need only be executed and followed where a municipality wants the HRD to incorporate the extra-examination assessment ratings into the certified scores set forth on the eligibility list. The Seldon decision endorsed the bypass of the high scorer as a result of an interview which was facially similar to the one which led to Carritte's selection. The decision, however, does not provide the basis for countenancing the bypass of Carmody. Nor does the parties' contract.

The collective bargaining agreement, as implemented by the promotion practice which has existed for years, implicitly requires that the promotion selection process must be fair, reasonable, and not arbitrary. The conclusion is reinforced by the mandate in Article VI, Step 2 that the concepts of reasonableness and fairness shall apply to all provisions of the contract. Although not directly applicable, Article XV, §2.B(3) is instructive. While recognizing that the chief has considerable discretion to determine who is the most qualified to fill a newly created job, that section states the determination is reviewable "for abuse of discretion, or because the decision was arbitrary or capricious." A similar standard applies to the chief's implementation of a promotional procedure.

The Seldon decision cited by the City provides a useful framework for analyzing what occurred in this case. Had Higgins created a process, including guidelines for an oral interview, before the deputy vacancy arose, or at least before the results of the promotional examination were known, one would have more confidence that the interview process was neutral. Instead, Higgins testified that he made the decision to employ an oral interview after the results of the examination became known, but before the list was officially certified. Higgins's claim that an interview was necessary because the promotional examination did not address the managerial aspects of the job was belied by the examination notice, which included topics such as administration and labor relations. Had Higgins sought to implement an assessment center, which really would have tested an applicant's ability to perform the true functions of the deputy, Higgins's motivations would have been beyond reproach. Instead, he drafted general questions which, to a disturbing degree, were designed to test the candidates' personal loyalty and subordination to him, and willingness to do battle with the Union. The question about the appropriateness of bypassing the highest ranking candidate was clearly constructed as a no-win situation for Carmody, rather than a test of capacity to perform as the deputy.

Equally unsettling was the fact that Higgins alone prepared the questions. He selected the people who would be on the interview panel, fellow chiefs who shared his strongly held belief that a chief should be free to bypass the high scorer. Had the panelists truly been independent evaluators, as apparently were the panelists in the Marshfield case, the interview process might not have been defective. Instead, Higgins wrote out the answers he was looking for, including commentary that certain answers would show the candidate was too invested in the Union perspective to serve as an

effective deputy. Just by reading Higgins's questions and answers, and without ever attending the interviews, one could intuit that Higgins had no intention of picking the person who had attained the highest examination score. That the letters from the two outside chiefs used remarkably similar language to describe the various candidates also leads one to question whether they were truly independent evaluators, as opposed to mere witnesses to a foregone conclusion.

The City's claim that any deficiencies in the interview process must be laid at the feet of the Union, because its leadership refused to negotiate, is not cogent. The Union's posture must be judged in light of the totality of the circumstances. Higgins had not raised the idea of using an interview panel at the recently completed negotiations. While he claimed he saw no need to do so since he assumed he already had the right to implement the procedure, a fair inference can be drawn that he did not do so because he did not imagine Carritte would be outscored on the promotional examination by McDonald and Carmody. The Union was clearly reacting to the reality that the notion of an interview was only advanced after the test scores became known, and the offer was only to bargain about the impact of the chief's unilateral decision to utilize interviews. Perhaps the process would have been fairer had a district chief been on the interview panel, although it would have been difficult for a subordinate to challenge the strongly signaled desires of the chief. In any event, it was the City that was ultimately responsible for the integrity of the process its agent employed.

The wholly subjective scoring matrix Higgins devised for rating the candidates further undermined the validity of the interview process. He was faced with the reality that his clearly preferred candidate, the one with the Ph.D., had scored twelve points

lower on the promotional examination than Carmody, a gap which in this arbitrator's experience is unusually large. Carritte even scored lower than McDonald, whose highest level of education was an associate's degree from a community college. To minimize the impact of the test scores, Higgins listed a series of factors the assessment of which were largely without an objective basis. All of this supports the conclusion that the interview and rating process, which had never before been utilized by any chief to evaluate candidates for promotion to any superior rank, was arbitrary and capricious, and designed to produce a predetermined result.

Appropriate Remedy. While it is apparent that the selection of Carritte was invalid because it resulted from a fatally flawed promotion process, it does not follow that Carmody should be awarded the promotion retroactive to the date Carritte occupied the position. Since there is no binding past practice of awarding the deputy promotion to the person with the highest examination score, it cannot be said with certainty that Carmody would have gotten the promotion if a fair selection process had been implemented. Nor is this a case like that of Bax and Ryan, where the City only sought to justify their bypass based on an illegal rationale. Once that rationale was declared improper, the City had no grounds for denying them the promotion, so a retroactive appointment was clearly justified.

In this case, it is not certain whether a selection process which was not arbitrary, capricious, or patently unfair would have resulted in Carmody's selection. In light of the fact that the chief would have had substantial discretion to choose from among the top three candidates, there may have been defensible reasons for selecting someone other than Carmody. It is apparent, however, that Carmody was harmed by being deprived of

the opportunity to fairly compete for the deputy promotion, at a time when he was the top scorer on the promotional examination by a substantial margin. He should therefore be paid the difference between what he would have earned had he been promoted instead of Carritte, and his compensation as a captain. A new selection process overseen by the current chief shall be undertaken involving Carmody, McDonald, and Carritte, assuming all three are still interested in the position. If Carmody or McDonald is selected, Carritte shall be removed from the deputy position[1] and the successful candidate's seniority date as deputy shall be retroactive to the date Carritte was originally appointed.

[1] There was testimony that Carmody was appointed as temporary deputy sometime after Higgins retired in January, 2008, but it was not clear from the record if Carritte vacated the job, or who currently occupies the position.

AWARD

The City violated the collective bargaining agreement by the manner in which it conducted the selection process for the deputy chief promotion in 2006. Dennis Carmody shall be paid the difference between what he would have earned in salary and benefits had he been appointed deputy as of the day James Carritte was placed in the position, and what Carmody earned as a captain.

A new selection process overseen by the current chief shall be undertaken involving Carmody, McDonald, and Carritte, assuming all three are still interested in the position. If Carmody or McDonald is selected, Carritte shall be removed from the deputy position and the successful candidate's seniority date as deputy shall be retroactive to the date Carritte was originally appointed as deputy.

Mark L. Irvings

Mark L. Irvings
Arbitrator

June 25, 2009