

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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Tracking Number: **E-22-135**

RE: Investigation conducted by the Civil Service Commission (Commission), pursuant to G.L. c. 31, §§ 2(a) and 72-74, regarding the non-selection of Wayne Leduc (Petitioner) for promotion to Deputy Fire Chief in the City of Lawrence (City).

Commissioner: Shawn C. Dooley¹

COMMISSION FINDINGS, ANALYSIS, AND CONCLUSION

I. INVESTIGATIVE AUTHORITY; OUTLINE OF THIS INVESTIGATION

The Commission is responsible for ensuring that employment decisions made by civil service employers are based on “basic merit principles.” The civil service law defines “basic merit principles,” in relevant part, as:

- “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills . . .”;
- “assuring fair treatment of all applicants and employees in all aspects of personnel administration . . . and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens”; and
- “assuring that all employees . . . are protected from arbitrary and capricious actions.”

G.L. c. 31, § 1.

Section 2(a) of Chapter 31 vests the Commission with the power and duty “[t]o conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the Commonwealth.”

In accordance with Section 72 of Chapter 31, the Commission may “investigate all or part of the official and labor services, the work, duties and compensation of the persons employed in such services, the number of persons employed in such services and the titles, ratings and methods of promotion in such services.”

¹ The Commission acknowledges the assistance of Law Fellow Courtney Timmins, Esq., in helping conduct this investigation.

Sections 73 and 74 of Chapter 31 grant the Commission additional authority to address and penalize violations of the civil service law.

Pursuant to that authority, the Commission, following the Petitioner's request, initiated an investigation on February 23, 2023 into the City's non-selection of the Petitioner for promotion to Deputy Fire Chief.

As part of this investigation, the Commission reviewed numerous exhibits provided by the Petitioner and the City. The Commission also conducted interviews of the following individuals who work for the City:

- **John McInnis**, Deputy Fire Chief
- **Brian Moriarty**, Fire Chief
- **Pat Ruiz**, Fire Inspector/Investigator
- **Wayne Leduc**, Fire Captain (Petitioner)
- **Brian DePeña**, Mayor
- **Matthew Nadeau**, Deputy Fire Chief

The Petitioner's request for investigation is based on his contention that Mayor DePeña did not to promote him before the expiration of the eligible list for Deputy Fire Chief because of his opposition to the Mayor's proposed non-civil service Assistant Fire Chief position. The Commission opened an investigation to determine whether the Mayor acted for political reasons in allowing the eligible list to expire, despite a vacancy for Deputy Chief and Chief Moriarty's recommendation to promote the Petitioner to the vacant position.

II. FINDINGS

1. The Mayor is the appointing authority for the Lawrence Fire Department (LFD or Department). Brian DePeña, the Mayor of Lawrence, was the appointing authority at all times relevant to this appeal. He was elected Mayor in November 2021 and took office immediately because he was replacing an interim mayor. (*Stipulation; Testimony of DePeña*)
2. Brian Moriarty is the Chief of the LFD, and served as Chief at all times relevant to this appeal. He was appointed Fire Chief by the City Council in 2015. (*Testimony of Moriarty*)
3. The Petitioner is a Captain in the LFD. He joined the Department as a firefighter in March 2004, then climbed the ranks to Lieutenant in 2012 and Captain in 2016. (*Testimony of Petitioner*)
4. On July 21, 2020, the Petitioner took the promotional exam for Deputy Fire Chief administered by the Massachusetts Human Resources Division (HRD). (*Stipulation*)
5. Based on the exam scores, HRD established an eligible list for Deputy Fire Chief in Lawrence on October 15, 2020. The list contained two candidates ranked in the following order: (1) the Petitioner, and (2) then-Captain Matthew Nadeau. (*Stipulation*)

6. During another firefighter’s temporary absence, the Petitioner served as temporary Deputy Chief from December 27, 2020 to February 14, 2021. The Petitioner then returned to his regular Captain position. (*Testimony of Moriarty*)
7. Not long after Mayor DePeña took office, he tried to create a new appointed position of “Assistant Fire Chief” outside of the civil service system and outside of the agreement between the City and the Lawrence firefighters union, Local 146. According to the job description, the incumbent of the Assistant Chief position would “be appointed by the mayor.”² (*App. Ex. 1; Testimony of McInnis & Moriarty*)
8. Contrary to the provision within the job description that the Assistant Chief position would “be appointed by the mayor,” Mayor DePeña testified that the position would be appointed by the City Council. (*Testimony of DePeña*)
9. The Assistant Fire Chief position would serve as the Chief’s second-in-command and as acting chief when the Chief was absent or away. (*App. Ex. 1; Testimony of DePeña & Moriarty*)
10. The minimum qualifications for the proposed Assistant Fire Chief position did not include any command experience or time served as a ranking officer. The requirements were “(1) Associate’s Degree in Fire Science, Public Administration, Business Administration, or related field; (2) 8 or more years of progressively responsible experience in firefighting, fire prevention, and inspection work; (3) valid Massachusetts Driver’s license; and (4) [several certifications in firefighting, fire inspection, and fire investigation].” (*App. Ex. 1; Resp. Ex. B-C*)
11. Local 146 questioned the “watered down” job description and qualifications that seemed catered to allow one firefighter to be selected over higher-ranked Deputy Chiefs, Captains, and Lieutenants to become Assistant Chief. Union members asserted that it was “absolutely no secret” that the Mayor had proposed the position as a “political favor” for firefighter Pat Ruiz to boost his salary and subsequent pension. (*Resp Ex. B-C; Union Opposition Letter; Testimony of McInnis, Moriarty, & Petitioner*)
12. Mayor DePeña testified that the union had the wrong idea about the proposed position, and it was not true that he wanted firefighter Ruiz to get the position. The Mayor looked at the Petitioner while he made these statements and appeared to be addressing the Petitioner directly. (*Testimony of DePeña*)

² The Commission would be remiss not to note that it appears that the position of Assistant Fire Chief in Lawrence may be subject to the civil service law and rules. See G.L. c. 31, § 51. It may constitute a violation of Chapter 31 for the position to be appointed by the Mayor or the City Council rather than filled through the merit-based process prescribed by the civil service law. See Kukene, et al. v. Amesbury Fire Dep’t, et al., 25 MSCR 346 (2012) (finding that the positions of Deputy Fire Chief and Assistant Fire Chief were illegally appointed by the City of Amesbury and ordering relief under Chapter 310 of the Acts of 1993.)

13. Firefighter Ruiz is a fire inspector and investigator who joined the LFD in 1988. He campaigned for Mayor DePeña, and the Mayor hired Ruiz's wife as his administrative assistant once he took office. (*Testimony of Ruiz*)
14. Firefighter Ruiz met all of the qualifications listed in the proposed job description. (*Testimony of Ruiz*)
15. While there was no command experience or time served as a ranking officer, the fire investigation and prevention requirements narrowed the number of eligible candidates down to approximately 5% of the Department. (*Testimony of McInnis*)
16. Despite the apparently tailored requirements, firefighter Ruiz and Mayor DePeña both maintained that they never spoke to each other about the proposed position. (*Testimony of DePeña & Ruiz*)
17. Chief Moriarty was not consulted about the Assistant Fire Chief position and expressed his opposition to Mayor DePeña and the Mayor's senior advisor on numerous occasions. (*Testimony of Moriarty*)
18. Chief Moriarty tried to work with the Mayor and "change the name [of the position] to just a title of fire marshal rather than a rank, so Ruiz could stay in fire investigation which he was good at and qualified for but he would not have any disciplinary power over rank and file." The Chief "tried to make sure this new position had no supervisory role over operations," and he "tried to protect union membership from somebody who shouldn't be there." (*Testimony of Moriarty*)
19. The Mayor did not accept the chief's suggestions. (*App. Ex. 1; Testimony of Moriarty*)
20. Chief Moriarty spoke about the position at a City Council meeting on March 8, 2022. The Chief was not happy about the Assistant Fire Chief position being created. (*Testimony of Moriarty*)
21. Mayor DePeña testified that Chief Moriarty defended the position because it was necessary. The Mayor also testified that the idea to create an Assistant Fire Chief position came from him **and** the Chief. (*Testimony of DePeña*)
22. Two Deputy Fire Chiefs attended the March City Council meeting, and one of them questioned the qualifications or lack thereof for the proposed Assistant Fire Chief position. (*Resp. Ex. B*)
23. At some point in the spring of 2022, Local 146 meet about forthcoming contract negotiations. The contract with the City would expire in July 2022. It was proposed that in order to get a new contract, the union should agree to add the position of Assistant Fire Chief to the LFD command staff. (*Testimony of McInnis & Petitioner*)

24. The Petitioner spoke out against this proposal at the spring 2022 union meeting. The Petitioner “knew he should have kept his mouth shut at the union meeting, but it really bothered him that he had worked so hard to get promoted and this unqualified person was getting a new position created for him just because he was friends with the Mayor.” The Petitioner testified that firefighter Ruiz had already let others know that he was going to be the next Assistant Fire Chief. (*Testimony of Petitioner*)
25. Other union members also spoke out against the proposal, and the union voted unanimously against it. (*Testimony of McInnis & Petitioner*)
26. Firefighter Ruiz, who does not belong to Local 146 and did not attend the meeting, subsequently learned that the Petitioner had opposed the proposal. (*Testimony of Ruiz*)
27. In a letter to the City Council dated May 12, 2022, Captain Eric Zahn, the president of Local 146, wrote that the union had voted unanimously to oppose the position in the manner it was brought forward. Captain Zahn outlined six reasons for the union’s opposition, summarized in part below:
- “There is no need for this job!”
 - “The Qualifications are completely lacking!”
 - “We have a system in place for promotions!”
 - “This is simply put a POLITICAL FAVOR!”
 - “This borders on UNETHICAL BEHAVIOR!”
 - “SAFETY OF OUR CITIZENS AND OUR MEMBERSHIP IS OF THE UTMOST IMPORTANCE!”

(Union Opposition Letter)

28. At a City Council meeting on May 17, 2022, Captain Zahn read the opposition letter aloud to City Councilors. More than two dozen union members attended in red shirts to protest the new position. (*Resp. Ex. C*)
29. At the May 17, 2022 City Council meeting, Councilors decided to “table” the proposed position. At the June 21, 2023 City Council meeting, Councilors approved the FY 24 budget that was proposed by the Mayor’s office which included funding for the Assistant Fire Chief’s position.³ (*Resp. Ex. C; Testimony of DePeña; Administrative Notice*)
30. Mayor DePeña testified that the Assistant Fire Chief position was necessary, but the City Council was under pressure from the union, and sometimes politics are stronger than the needs of the City. (*Testimony of DePeña*)

³ When asked about the status of the Assistant Fire Chief position, Mayor DePeña testified that the position was under the sole purview of the City Council and he could only make “recommendations or suggestions.” (*Testimony of DePeña; Administrative Notice*)

31. On May 21, 2022, the Petitioner took the promotional exam for Deputy Fire Chief administered by HRD. (*Stipulation*)
32. On August 24, 2022, at Chief Moriarty's request, the City issued Certification No. 06796 to fill a vacancy for Deputy Fire Chief based on a proposed retirement on September 7, 2022. (*Stipulation*)
33. In LFD practice, interviews are not conducted for promotional appointments; rather, promotions are made strictly based on eligible list ranking. Chief Moriarty would normally request a certification from HRD before an expected vacancy, obtain the candidates' signatures, and prepare the promotional paperwork in advance to fill each vacancy as quickly and efficiently as possible. The Chief would then recommend a candidate to the Mayor, and the Mayor would authorize the promotion. (*Testimony of McInnis & Moriarty*)
34. The Petitioner was ranked first on Certification No. 06796, and then-Captain Matthew Nadeau was ranked second. (*Stipulation*)
35. The Petitioner signed Certification No. 06796 as willing to accept the promotional appointment to Deputy Fire Chief. Captain Nadeau signed and hand-wrote "declined," leaving the Petitioner as the only candidate on Certification No. 06796. (*Stipulation*)
36. On August 30, 2022, HRD notified the City that the eligible list established in 2020 would expire after September 14, 2022. A new eligible list would take effect on September 15, 2022, based on the results of the May 2022 promotional exam. The notice stated that **"promotions made off of a current eligible list will be valid only if the selected individuals receive a promotion on or before September 14, 2022."** (Emphasis added). (*Stipulation*)
37. By that point, May 2022 exam scores had already been released and shared, so it was common knowledge among the Department that the four candidates on the upcoming list would be ranked as follows: (1) Captain Nadeau, (2) Captain Zahn, (3) the Petitioner, and (4) Captain Tara Reardon. (*Testimony of McInnis, Moriarty, Nadeau, & Petitioner*)
38. Regarding the top three candidates on the upcoming list, the following facts are relevant:
 - Captain Nadeau did not participate in any of the union's opposition against the proposed Assistant Fire Chief position. Nadeau was not active within the union and had remained "neutral" about the proposed position. Nadeau was also a member of LFD Group 2, which had been the most active group in supporting Mayor DePeña's election campaign. Nadeau held signs for Mayor DePeña during the campaign. (*Testimony of Nadeau*)
 - Unlike Nadeau, the Petitioner vocally opposed the Assistant Fire Chief position and echoed the union's accusation of cronyism. Unlike Nadeau, the Petitioner never held signs for Mayor DePeña or participated in his campaign. Firefighter Ruiz knew of the Petitioner's statements about the Assistant Fire Chief position. Mayor DePeña knew

about the union’s criticism in general but denied knowing anything about the Petitioner opposition to the Fire Chief Chief position until he was up for promotion in September 2022. (*Testimony of DePeña, McInnis, Petitioner, & Ruiz*)

- Captain Zahn, the president of Local 146, was the most vocal of the eligible candidates in his opposition to the proposed Assistant Fire Chief position. Firefighter Ruiz and Mayor DePeña each knew about Zahn’s opposition but denied ever discussing it with one another. (*Union Opposition Letter; Resp. Ex. B-C; Testimony of DePeña & Ruiz*)

39. On September 7, 2022, the day of the retirement and resulting vacancy, Chief Moriarty forwarded Certification No. 06796 to Mayor DePeña along with an authorization form (see ¶ 41) and a letter recommending that the Petitioner be promoted to Deputy Fire Chief. (*Testimony of Moriarty*)

40. Chief Moriarty’s letter to Mayor DePeña stated:

Due to the retirements of [a Deputy Chief] and [a Lieutenant] on September 7th, 2022, we have a permanent Deputy, Captain and 2 Lieutenant spots with the promotions.⁴

I am recommending permanent promotions of Captain Wayne Leduc [the Petitioner] to Deputy Chief, Lt. [redacted] to Captain and FF’s [redacted] to Lieutenant. These members are currently the top on their respective lists.

I recommend making these promotions immediately as delay will cause unnecessary overtime and possible grievance procedures with the possibility of list changes. I would be more than happy to discuss if you would like. I am available at your convenience.

(Emphasis added). (*Resp. Submission*)

41. Along with Certification No. 06796 and his recommendation letter, Chief Moriarty also sent a completed “authorization of employment” form to promote the Petitioner to Deputy Fire Chief. To authorize the promotional appointment, Mayor DePeña needed to sign the form. (*App. Ex. 6; Testimony of Moriarty*)

42. On September 14, 2022, Chief Moriarty met with Mayor DePeña in the Mayor’s office about another matter. At the end of the meeting, Chief Moriarty reiterated his recommendation to promote the Petitioner. Chief Moriarty explained the following to Mayor DePeña: the Chief

⁴ The Deputy Chief vacancy had a ripple effect, creating one opening for Captain (to fill the spot of the Captain promoted to Deputy Chief) and one opening for Lieutenant (to fill the spot of the Lieutenant promoted to Captain). Therefore, the Mayor had to authorize the Deputy Chief promotion before he could authorize the two lower promotions to Captain and Lieutenant. (*Testimony of Moriarty*)

needed to get the form signed because the eligible list was about to expire the following day on September 15, 2022; the Petitioner was ranked first on the list when the vacancy arose; there was no reason not to promote the Petitioner; and “having come up that way,” the Chief felt it was proper for the Petitioner to get the promotion.⁵ (*Testimony of Moriarty*)

43. Chief Moriarty knew the eligible list rankings were going to change on September 15, and he discussed that with Mayor DePeña during their meeting. Chief Moriarty explained to Mayor DePeña that it was important to promote the Petitioner before the list changed, because otherwise the City would face a grievance or appeal due to the date of the vacancy.⁶ (*Testimony of Moriarty*)

44. Mayor DePeña responded, “I’ll think about it.” (*Testimony of Moriarty*)

45. Chief Moriarty also explained that another Deputy Chief would be retiring soon enough, so the subsequent promotion would go to Captain Nadeau (if the Petitioner received the present promotion) or Captain Zahn (if Captain Nadeau received the present promotion). In response, Mayor DePeña allegedly stated that he would never promote Zahn. (*Testimony of Moriarty*)

46. Before the Commission, Mayor DePeña denied stating that he would never promote Zahn. (*Testimony of DePeña*)

47. At 3:34 p.m. on September 14, 2022, Mayor DePeña emailed Chief Moriarty: “After reflecting upon the promotion request about the fighters you mentioned, I am not taking any action at this time.” (*App. Ex. 7*)

48. Mayor DePeña testified that he was simply busy and that is why he did not get around to authorizing the Petitioner’s promotion. The Mayor did not explain why he was so busy or what exactly prevented him from signing the Petitioner’s promotion form at any point from September 7 through September 14, 2022. (*Testimony of DePeña*)

49. On September 15, 2022, HRD established a new eligible list for Deputy Fire Chief in Lawrence. As mentioned above, the rankings on the new list were: (1) Captain Nadeau, (2) Captain Zahn, (3) the Petitioner, and (4) Captain Reardon. (*Stipulation*)

50. Based on the new eligible list, at Chief Moriarty’s request, HRD issued a new Certification for Deputy Fire Chief on September 22, 2022, Certification No. 08321. Captain Nadeau, who was ranked first, signed the Certification as willing to accept the promotional appointment. (*Stipulation*)

⁵ Chief Moriarty clarified to the Commission that the Petitioner and Nadeau were both great firefighters and he had no problems with either of them. If the Chief were the appointing authority, he would have promoted the Petitioner because the Petitioner was number one on the list at the time the vacancy existed and there was no reason not to. (*Testimony of Moriarty*)

⁶ Again, when the Deputy Chief vacancy arose on September 7, 2022, the Petitioner was at the top of the eligible list. That list remained in effect through September 14, 2022. (*Stipulation*)

51. On September 29, Chief Moriarty issued a general order promoting Captain Nadeau to Deputy Chief. The Chief did this pursuant to LFD policy that if a vacancy existed for more than two weeks, he was supposed to fill it with an “acting” appointment. Chief Moriarty always filled acting appointments with the first on the eligible list in effect at that time. (*Resp. Ex. 8; Testimony of Moriarty*)
52. On October 8, 2022, Deputy Chief John McInnis ran into firefighter Ruiz during their regular duties at LFD headquarters. The two began discussing the Deputy Chief promotion. Both individuals agreed that this conversation occurred but disagreed as to specific statements made by firefighter Ruiz. (*Testimony of McInnis & Ruiz*)
53. Firefighter Ruiz testified that he suggested to Deputy Chief McInnis that the Petitioner should have kept his mouth shut about the Assistant Fire Chief position. Ruiz explained to the Commission: “It’s common knowledge among the Department that you should keep your mouth shut when you’re on the list If you’re on the list, everything’s political, so keep your mouth shut if you’re trying to get promoted.” (*Testimony of Ruiz*)
54. Deputy Chief McInnis also testified that firefighter Ruiz said the Petitioner should have kept his mouth shut about the proposed Assistant Chief position. However, McInnis further testified that Ruiz told him the Mayor was not going to promote the Petitioner. The Commission asked Deputy Chief McInnis whether firefighter Ruiz stated how he knew the Mayor was not going to promote the Petitioner. McInnis testified that Ruiz did not state how he knew this, and it could have maybe just been Ruiz’s personal opinion. According to McInnis, Ruiz also stated that he was working something out with the Mayor and that he (Ruiz) was going to be the next Chief of the Department. Ruiz further told McInnis that “the entire union should have kept their mouth shut because [Ruiz] was just going to have the position for three years to boost his retirement and then the union could have done whatever it wanted with the position.” (*Testimony of McInnis*)
55. On October 20, 2022, Mayor DePeña promoted Captain Nadeau to Permanent Deputy Chief, effective retroactively to October 2, 2022. The Mayor also promoted a Captain and two Lieutenants the same day. (*Testimony of DePeña*)
56. The Deputy Chief position was the only one affected by an eligible list expiring. The other positions had no recent changes to their eligible lists. (*Testimony of Petitioner*)

III. ANALYSIS

The Petitioner has argued that Mayor DePeña’s decision not to promote him before the eligible list changed was based, at least in part, on the Petitioner’s opposition to the Mayor’s proposal to create a non-civil service position of Assistant Fire Chief. The City disputed this allegation and maintained that Mayor DePeña’s failure to authorize the Petitioner’s promotion was simply due to the Mayor being busy with other priorities in September 2022.

In Callanan v. Personnel Administrator for the Commonwealth, the Massachusetts Supreme Judicial Court explained that “[t]he civil service system confers only limited rights to those on eligibility lists.” 400 Mass. 597, 601 (1987). The plaintiffs in Callanan were four Boston firefighters eligible for promotion to Lieutenant, and they brought a mandamus action to compel the personnel administrator (HRD) to establish an eligible list for District Fire Chief in Boston. Id. at 597-98. HRD’s “delay in creating the district fire chief list had a ‘ripple effect’ down through the ranks . . . and thus no openings for fire lieutenant were created to which the plaintiffs could be promoted” before their eligible list expired. Id. at 598-99. The Court declined to intervene, emphasizing that, by statute, HRD has substantial discretion over the timeline of eligible lists. Id. at 601-02. Furthermore, “[n]othing in that provision indicates that a court may extend a list to provide the members of the old list consideration for all promotions which might have become available before the list’s statutorily-prescribed expiration.” Id. at 602. The Court concluded that the plaintiffs failed to demonstrate that HRD “acted deliberately or maliciously to delay the establishment of the district fire chief list⁷ in order to injure the plaintiffs.” Id. at 600.

The context of Callanan is important because it is quite distinct from the case at hand. First, in Callanan, HRD permitted a delay in the establishment of an eligible list, which affected numerous people, whereas Mayor DePeña chose to delay effectuating a promotion here, most significantly affecting only one individual. This was not merely an indirect “ripple effect” stemming from promotions to a higher rank, but rather the Mayor’s explicit decision not to authorize the Petitioner’s promotion to Deputy Chief. Finally, while HRD explained that its delay was due to challenges with grading performed by out-of-State volunteers, Mayor DePeña cited general busyness for his delay and failed to offer any specific explanation or evidence.

The case at hand is more comparable to Cuttillo v. Malden, 23 MCSR 48 (2010), in which the Commission found credible evidence showing that the Police Chief held bias against the Appellant due to a previous traffic incident involving the Appellant and the Chief’s daughter. Even though the Appellant’s non-selection for promotion did not constitute a bypass, the Commission concluded that relief was appropriate because the Appellant had been injured due to the deliberate actions of the Police Chief. Here, as in Cuttillo, a preponderance of the evidence suggests that the Mayor acted deliberately to injure the Petitioner by failing to authorize his promotion before the eligible list expired.

I credit the testimony of Deputy Chief McInnis, Chief Moriarty, and the Petitioner. They all testified reliably and consistently, responding to questions in a thorough and forthcoming manner. None of them appeared self-serving or defensive; they were cooperative and freely recalled facts, regardless of whether each fact served a certain narrative, and they admitted when they could not recall something.

On the other hand, I do not credit the testimony of firefighter Ruiz. He was short in his responses, not forthcoming, and quick to deny or dismiss questions. Firefighter Ruiz was outright

⁷ HRD “explained that the reason for the lateness in establishing the district fire chief list was delays in the grading of the essay portion of the examination, which was performed by volunteer, out-of-State fire chiefs. The plaintiffs presented no evidence and ma[d]e no argument that there [was] any other cause for the delay.” Callanan, 400 Mass. at 599 n.3.

hostile toward the Petitioner and other union members, and his responses were clearly intended to portray the union in a negative manner while portraying himself in a positive manner.

Furthermore, I do not credit much of Mayor DePeña's testimony and I do not believe his claim that he did not act deliberately to injure the Petitioner. (See Finding 12) The Mayor made a number of statements that I simply cannot credit because they were refuted by other reliable evidence, both documentary and testimonial:

- (1) I do not credit the Mayor's assertion that the proposed Assistant Fire Chief position was not intended for firefighter Ruiz. The proposed job description listed no command experience or time served as a ranking officer requirement, a highly unusual omission for the position of the Chief's second-in-command and the person in charge of the entire Department in the Chief's absence. Instead, the fire investigation and prevention requirements narrowed the eligible candidates to Ruiz and a small handful of other firefighters. Most revealing is the Mayor's attempt to evade the civil service system—under which the Assistant Chief position would legally fall—by establishing the position “to be appointed by the mayor” rather than through the merit-based process proscribed by Chapter 31. Three credible witnesses, plus most of the union, strongly believed the position was created for Ruiz because of statements made by Ruiz himself around the Department. Finally, Chief Moriarty's testimony that he personally worked with the Mayor in an attempt to change the position to fire marshal, so that Ruiz could stay in fire investigation but not have any supervisory or disciplinary power, further proves the proposed position was meant for firefighter Ruiz.
- (2) I find that the Mayor has been less than forthcoming about his role in the creation of the Assistant Fire Chief position. The Mayor testified that the position was solely under the purview of the City Council, and that as Mayor he could only make “recommendations or suggestions” to the Council. This is belied by the fact that during the month following his testimony, the Mayor included the Assistant Fire Chief position as a line item in his proposed budget for fiscal year 2024. This amounts to more than a mere recommendation or suggestion that the Assistant Fire Chief position become permanent. Mayor DePeña further tried to distance himself from the position by stating that it would be appointed by the City Council. This is plainly contradicted by the job description, which reads: “There is established the position of assistant fire chief in the fire department, **to be appointed by the mayor.**” (Emphasis added). A preponderance of the evidence shows that the Assistant Chief position was created by the Mayor and done in such a manner to evade the civil service system's merit-based requirements pursuant to Chapter 31.
- (3) I do not credit the Mayor's statement that the idea for the Assistant Fire Chief position came from Chief Moriarty as well as the Mayor. Chief Moriarty, whose testimony I strongly credit, explicitly stated that he had not been consulted in advance, that he strongly opposed the position for a number of reasons, and that he expressed as much to the Mayor and his advisor multiple times.

- (4) I do not credit the Mayor’s testimony that Chief Moriarty defended the proposed Assistant Fire Chief position because it was necessary. Again, the Chief testified that he refused to support the position and had numerous heated exchanges about it with the Mayor and his advisor. The notion that the Chief “defended” the position is misleading; he did not support the proposal when he spoke before the City Council, but he did so reluctantly and under pressure from the Mayor. Chief Moriarty did not believe the position was necessary and he made repeated attempts to alter the proposal.
- (5) I do not credit the Mayor’s testimony that he did not tell Chief Moriarty he would never promote Captain Zahn. Chief Moriarty testified credibly, and in great detail, and had absolutely no reason to present such a serious allegation before the Commission—especially about a candidate uninvolved in this appeal. On the other hand, it was in Mayor DePeña’s self-interest to deny such a statement.
- (6) I do not credit the Mayor’s unsupported claim that he was simply too busy to authorize the Petitioner’s promotional appointment in September 2022. It is further undercut by the fact that Mayor DePeña had time to email Chief Moriarty and state that he was declining to act on the promotion at that time. The Mayor could have signed the promotional form, which the Chief had already filled out, in the same amount of time it took to send that email. Moreover, when the Mayor later authorized Nadeau’s promotion to Deputy Chief after the new eligible list took effect, the evidence shows that it was not a time-consuming process. The Mayor did not conduct any interviews, nor did he engage in any type of review process before signing off on the promotional appointment.

I now turn to the arguments presented by the City. First, the City asserted that the Petitioner’s allegation of bias is rebutted by the fact that union members unanimously opposed the Assistant Fire Chief position, not just the Petitioner. I am not persuaded. The union may have unanimously opposed the new position, but only two candidates eligible for promotion to Deputy Chief vocally participated in that opposition: the Petitioner and Captain Zahn. The Mayor declined to sign off on promoting the Petitioner and, within the same week, stated that he would never promote Captain Zahn. Before the Commission, the Mayor testified that the Assistant Fire Chief position was necessary and emphasized that the union was wrong in its perception that the position was meant for firefighter Ruiz. The Mayor looked at the Petitioner while he made those statements and appeared to address the Petitioner directly, rather than myself or counsel. It is probable that the Petitioner and Zahn’s criticism was on the Mayor’s mind when he testified in May 2023, and it is likely that such criticism was on his mind when he acted in September 2022.

The City also sought to rebut the Petitioner’s allegation of bias by pointing out that the Mayor was delayed in authorizing not only the Deputy Chief promotion, but also the promotions of two Lieutenants and one Captain. This argument is similarly unpersuasive. Due to the ripple effect of the highest-ranked Deputy Chief vacancy, the Mayor could not have authorized promotional appointments for two of the three lower positions without first authorizing the promotion to Deputy Chief. Thus, the other promotions are not relevant here because they were not subject to impact by changing eligible lists. The Petitioner was the only promotional

candidate negatively affected by the delay of the appointments until October 2022 after the expiration of the list in September 2022. Therefore, I am unmoved by the fact that other LFD promotions occurred on the same date as the Deputy Chief promotion.

Finally, I draw an adverse inference from the City's failure to comply with the Commission's subpoena during the investigation. After Mayor DePeña failed to appear at his first scheduled interview, citing a personal matter, the Commission issued a subpoena pursuant to G.L. c. 31, § 72. On April 13, 2023, I notified counsel for the City that the Commission was subpoenaing Mayor DePeña to appear before the Commission and also provide correspondence pertaining to this investigation. On April 14, 2023, I served the subpoena via email and the City's counsel accepted service on behalf of Mayor DePeña. The subpoena stated:

You are hereby commanded, in the name of the Commonwealth of Massachusetts, to appear before the Massachusetts Civil Service Commission on the date, time and location noted below . . . to give evidence of what you know relating to the following matter . . . and **you are further required to bring with you the following documents: Any and all correspondence, including electronic communications, from/to the Mayor and/or members of his staff, in regards to the appointment of the Deputy Fire Chief position referenced in this matter.**

(Emphasis added). Mayor DePeña appeared before the Commission on May 16, 2023 as summonsed, but the City failed to submit any of the subpoenaed documents. During the Mayor's appearance, I reminded Counsel for the City that documents had been subpoenaed and the Commission was still awaiting them. To date, the City has neither complied with the Commission's request for documents nor submitted any objection or update pertaining to such request. Under the totality of the circumstances, I draw a negative inference from the City's unwillingness to produce the relevant documents requested.

In light of all credible evidence and the reasonable inferences drawn therefrom, the Mayor's motivations in declining to promote the Petitioner before the eligible list expired are apparent. A preponderance of the evidence supports the following related conclusions: (1) the Mayor was aware of the union's opposition to the proposed Assistant Chief position, particularly the union's criticism that it was a political favor for firefighter Ruiz; (2) the Mayor knew of the Petitioner's role in that criticism and deliberately declined to authorize his promotion before the eligible list changed; and (3) the Mayor chose to wait for the new list to take effect and promote the top-ranked candidate who supported his campaign and refrained from taking part in the union's public criticism.

Accordingly, I find that the Mayor acted deliberately to injure the Petitioner by declining to authorize his promotion to Deputy Fire Chief, despite a vacancy for the position, despite Chief Moriarty's recommendation to promote the Petitioner, and because of the Petitioner's opposition to the Mayor's proposal to create a non-civil service position of Assistant Fire Chief for the express benefit of firefighter Ruiz.

IV. CONCLUSION

For all of the above reasons, I recommend that the Commission order the following relief pursuant to Chapter 310 of the Acts of 1993:

- A. The City shall place the name of the Petitioner, Wayne Leduc, at the top of any current or future certification for promotional appointment to the position of Deputy Fire Chief until he is appointed or bypassed after further consideration consistent with this decision.
- B. Should the City appoint any candidate(s) other than the Petitioner, the appointment of said candidate(s) shall be deemed temporary until such time as the Petitioner has exhausted all due process rights before the Commission, including, but not limited to, a Commission decision on any future bypass appeal by the Petitioner.
- C. Once the Petitioner has received the relief ordered above, the City shall notify the Commission, with a copy to the Petitioner, that said relief has been provided.
- D. This decision shall become effective on August 12, 2023. If, prior to August 12, 2023, the parties, either individually or jointly, wish to petition the Commission for a modification regarding the order of relief, the Commission will review any such request. Otherwise, the relief ordered shall become effective on August 12, 2023. No permanent promotions to Deputy Fire Chief shall be made prior to August 12, 2023.

Civil Service Commission

/s/ Shawn Dooley
Shawn C. Dooley
Commissioner

The Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, and Tivnan, Commissioners) adopted the recommendation of Commissioner Dooley and closed the investigation on July 13, 2023.

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)(l), 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 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:

Joseph L. Sulman, Esq. (for Petitioner)

Ann Marie Noonan, Esq. (for Appointing Authority)

Timothy P. Houten, Esq. (for Appointing Authority)