

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RE:

Tracking Number: I-18-151

Request by: Massachusetts Fallen Heroes and Ten (10) Registered Voters to Investigate the City of Lynn and the state's Human Resources Division (HRD) regarding the City of Lynn's request for a Selective EMT-Paramedic Certification

Appearance for Petitioners:

Patrick Bryant, Esq.
Pyle Rome
2 Liberty Square, 10th Floor
Boston, MA 02109

Appearance for Human Resources Division:

Melinda Willis, Esq.
Deputy General Counsel
Human Resources Division
One Ashburton Place: Room 211
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Appearance for City of Lynn:

John P. Slattery, Esq.
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Commissioner:

Christopher C. Bowman

RESPONSE TO REQUEST FOR INVESTIGATION

1. On August 23, 2018, the Massachusetts Fallen Heroes, pursuant to G.L. c. 31, § 2(a), filed a request for investigation with the Civil Service Commission (Commission), asking the Commission to open an investigation regarding the City of Lynn (City)'s request for a Selective EMT-Paramedic Certification.¹
2. The Petition, as filed, stated in part that the use of the Selective Certification "... appears to be intended to discriminate against veterans, particularly ones with disabilities."
3. On September 11, 2018, I held a show cause conference at the offices of the Commission to provide the Petitioners with the opportunity to show cause why the Commission should open an investigation regarding this matter. The show cause conference was attended by: counsel

¹ The Petitioner was later amended to include Ten (10) Registered Voters.

for the Petitioners, counsel for HRD, counsel for the City and representatives of the City's Fire Department and the local firefighters union.

4. As part of the show cause conference, the City provided documentation showing that all disabled veterans and veterans who signed the Certifications (the "Selective" and "Non-Selective") involved in the most recent hiring cycle were being considered for appointment.
5. At the conclusion of the Show Cause Conference, I gave the Petitioners the opportunity to submit Position Statements regarding whether the Commission should initiate an investigation.
6. Position Statements were received and carefully reviewed by the Commission.

Applicable Civil Service Law and Rules & Final Response

G.L. c. 31, § 2(a) allows the Commission to conduct investigations. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen's Association et al v. Civ. Serv. Comm'n, No. 2006-4617, Suffolk Superior Court (2007). See also Erickson v. Civ. Serv. Comm'n & others, No. 2013-00639-D, Suffolk Superior Court (2014). The Commission exercises this discretion, however, "sparingly". See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011).

After careful review and consideration of the entire record in this matter, including the submissions of the Petitioners and the City, the Commission has concluded that an investigation is not warranted and has opted not to exercise its discretion to initiate such an investigation under G.L. c. 31, § 2(a).

To ensure transparency, the position statements reviewed by the Commission are attached to this response.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 8, 2018.

Notice to:
Patrick Bryant, Esq. (for Petitioners)
John P. Slattery, Esq. (for City of Lynn)
Melinda Willis, Esq. (for HRD)

PETITIONERS

September 14, 2018

VIA EMAIL ONLY

Christopher Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
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David B. Rome
Betsy Ehrenberg
Terence E. Coles
Katherine D. Shea
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Tod A. Cochran
Leah M. Barrault
Patrick N. Bryant
Ian O. Russell
James Hykel
Jillian M. Ryan
Mark Macchi

Warren H. Pyle, Retired

Re: Massachusetts Fallen Heroes, et al.¹ v. City of Lynn and Human Resources
Division
Docketing No. I-18-151

Dear Commissioner Bowman

The Commission should open an investigation into the Lynn Fire Department's request for a Selective EMT-Paramedic Certification list because the Department has repeatedly provided misinformation to the Human Resources Division (HRD), the Department lacks any reasonable basis to pursue an EMT Paramedic-Specific certification as the Department has twenty-seven active EMT-Paramedics for one ambulance and six more will not upgrade the service, and the reasons provided at the Show Cause Hearing lack any reasonable or mathematical basis. The Department's selective certification lists have the intent or effect of discriminating against veterans, including disabled veterans. The reasons provided by the Department, including at the Show Cause Hearing, are false and/or wildly unsubstantiated. Where the request for selective certification is wholly unjustified, the Department's motive is irrelevant, whether that motive is animus toward veterans or the fire union, a desire to benefit non-veterans on the list, a good faith mistake or rank incompetence. The absence of any identified, aggrieved veteran should not inure to the benefit of the Department. To not investigate the improper requests for selective certification lists here, the Commission would be signaling to employers that they may disregard the law and provide false information to HRD without suffering any consequences, provided that no specific veteran is injured.

The factual basis for an investigation is as follows:

1. The Lynn Fire Department has about 161 fire fighters, excluding the Deputy Chief and Chief. There are, to our knowledge, twenty-nine fire fighters currently certified as

¹ We hereby add Mike O'Connor, 67 Grant Road, Lynn, MA 01901 as a registered voter seeking an investigation.

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paramedics, including: one Deputy Chief, two Captains, seven Lieutenants and nineteen Fire Fighters. (See O'Connor Affidavit). Two of these firefighters, the Deputy Chief and the Lieutenant EMS Coordinator do not work as paramedics. As such, the Department has only twenty-seven paramedics available to provide ALS services.

2. Currently, five Lynn fire fighters are in school to become paramedics and about to graduate. In other words, the Department eventually will have thirty-two active paramedics.
3. The Department currently has three ambulances in operation. While all have passed inspection, two of the ambulances are estimated to be more than ten years old.
4. The Department has operated only one ambulance at a time.
5. The lone ambulance in operation is staffed by two paramedics at all times. All paramedics, except for the Deputy Chief and the EMS Coordinator, staff the ambulance on a rotating basis for about two months a year each.
6. The collective bargaining agreement does not require any paramedic, not hired as a paramedic, to maintain status as a paramedic for their entire employment. However, fire fighters who obtain paramedic certification by attending courses paid for by the City must pay back the City certain costs of their education if their certification lapses before five years. (See Attachment A, at page 30).
7. The City and the Department have never not communicated any plans about adding an ambulance into service beyond the one in existence.
8. Moreover, the City and the Department have not, in the past year, proposed an increase to the number of certified EMT-paramedics or expressed any frustration with the number of certified paramedics.
9. It has been known since at least April 2017 about plans to close Lynn's Union Hospital in 2019. The City and the Department have never expressed a concern about the impact of the closure on life support services provided by the Fire Department.
10. The Department's initial request dated June 29, 2018, for an EMT-Basic selective certification list to hire ten fire fighters included false information.
11. The request claimed that the Department operates eleven EMS first response vehicles and one ALS ambulance. The Department's application stated: "We currently operate

one ambulance." (See June Request provided at hearing). The Department does not operate eleven EMS first response vehicles.

12. Matt Reddy, a Lynn Fire Fighter, former Lynn Fire President, and current District Vice President for the Professional Fire Fighters of Massachusetts, informed the City that the application included inaccurate information about the number of EMS vehicles being operated and, moreover, that an EMT-certification list is harmful to veterans (See Attachment B, Letter and Email from Leah Barrault to City attorney John Slattery), as more than a dozen veterans would be bypassed.
13. The Department subsequently withdrew the June 28 request.
14. Based on information and belief, the Department blamed the Union and Matt Reddy for the withdrawal of this request and the delay in hiring. (Attachment B).
15. The City subsequently received a multi-million dollar federal SAFER grant to hire twenty additional fire fighters. <https://www.itemlive.com/2018/08/05/3-5-million-grant-will-allow-lynn-hire-20-new-firefighters/>
16. The City then sought another selective certification list, this time to hire six EMT-Paramedics. Only four veterans were listed on the requisition list. (See Request and Requisition provided at hearing). The Department simultaneously sought a non-selective list to hire fourteen fire fighters.
17. As with the June request, this request contained false information. Whereas the Department's initial application claimed it operated just one ambulance, the Department's new application implied that the Department has three ambulances in operation.
18. The Department has never operated more than one ambulance at a time. Moreover, given the relative age of the vehicles, it would be difficult for the Department to operate all three ALS Ambulances simultaneously because of the likelihood that one will be out of service.
19. In light of the Department's request claiming three ambulances in service, Local 739 asked Chief Stephen Archer during contract negotiations about the Department's plans to staff a second ambulance. President Mike O'Connor asked about the Department's plans because Local 739 would demand about to bargain the terms and conditions and the impacts of the terms and conditions if the Chief decided or was contemplating adding ambulances in service.

20. Chief Archer replied that there were no plans to add an ambulance into service beyond the one currently used. His denial of any plans was emphatic and left no room for error or doubt. This exchange was heard by the entire Local bargaining team.
21. The Request for Investigation was filed August 23, 2018. The deadline for applicants to sign the requisition lists was August 24, 2018.

I. The Reasons Provided by the Department for EMT-Paramedic Selective Certification Are False and Unsubstantiated, Therefore Providing No Reasonable Justification to Seek or Approve Such a Selective List.

A fire department seeking to hire additional personnel must request an original appointment list of fire fighters. As an exception to this general rule, a fire department may seek a selective certification for EMT-type fire fighters under limited circumstances – namely the department must have staffing below a 20:1 ratio for the type of life support services being provided or the department seeks to provide For a Basic Life Support (BLS) service, the ratio is twenty EMTs at least at the basic level for each BLS vehicle, and for Advanced Life Support (ALS) service, the ratio is the same: twenty EMT paramedics per ALS vehicle. The Department claimed that the request for EMT-Paramedic Selective Certification has reasonable justification because the Department actually has three ambulances with fewer than sixty paramedics, the Department wants to have flexibility to add two of those three ambulances into service, and the Department desires to provide enhanced ALS services in light of the planned closure of Union Hospital. These reasons are false and unsupported by the evidence. Frankly, the Department's numbers do not add up.

In assessing the Department's reasons, the Commission initially should be mindful that the two requests for EMT selective certification lists both included undeniably false information. In other words, both requests for an extraordinary measure of a selective list were not justified. First, the request misrepresented the number of EMS first response vehicles operated by the Department but admitted that the Department operates only one licensed ALS ambulance. After the Union notified the Department of this error and also of the negative impact on veterans, the Department withdrew the request. The second request then claimed, contrary to the first request, that the Department operates three licensed ALS ambulances.

The Department's citation of three ambulances to justify a selective certification list is not credible and true only in a technical sense. The Department has had three ambulances for several years and yet consistently operates just one at a time. The Department did not recently acquire or upgrade any ambulances. As such, there is no change to the status quo in the ambulance operations to justify a selective certification list. Plus, the Department cannot functionally operate three ambulances simultaneously, given the propensity of one to breakdown. Much as the Department needs to have a reserve of paramedics to accommodate

vacation and sick leave usage, the Department also needs to have at least one vehicle in reserve.

Next, the Department's numbers do not add up, as six additional paramedics will not enable the Department to upgrade its ALS ambulance. The Department must have 20 paramedics per ALS ambulance. The Department currently has 29 firefighter EMT-paramedics, only 27 of which are active, as the Department admitted in its second selective certification request. Even assuming the five firefighters currently enrolled in paramedic school receive their certification and the Department hires an additional six EMT-paramedics, the Department will have just 38 active EMT-paramedics. That amount is insufficient to staff a second ambulance. (The Department also claimed during the hearing that the current lists will the last time for the foreseeable future it will be able to hire fire fighters).

The Department's claim about officers and attrition of paramedics also is contrary to basic math and the purported desire to staff more ALS ambulances. The Department's claim that only thirteen EMT paramedics are "mandated" is false and irrelevant. Fire fighters who obtain EMT paramedic certification through financial support of the Department are not mandated to maintain certification for any period of time; they merely are required to reimburse the City for education and expense if the certification is relinquished within five years. The Department also provided no evidence of the rate or number of fire fighter/EMT-paramedics who allow their certification to lapse, before or after five years. Plus, this argument is directly contrary to the purported desire to increase the number of ambulances in operation. A desire to replenish paramedics is justified to continue existing operations; it cannot justify a desire to increase ALS operations.

The illusory distinction between actual and "mandated" paramedics does not justify a selective certification list. The Department's request for selective certification did not address this fictional demarcation. And there is no evidence that HRD would provide any material significance to this distinction between actual and mandated paramedics, had the Department made such a change.

Even if one granted credence to the Department's claim that the number of mandated paramedics is a legitimate factor for HRD to consider and if we further assume that the City may force, without bargaining, that new hires maintain EMT-paramedic certification as a condition of employment, the Department's numbers still do not add up. The City claimed that it has thirteen mandated EMT paramedics and seeks to hire six additional EMT-paramedics – nineteen is less than the threshold for just one ambulance. Even if you add in the five EMT-paramedics scheduled to graduate, the City still can operate just one ambulance.

And, as noted above, the Department's request for six additional paramedics will not enable the City to enhance or increase the existing number of ALS apparatus in service.

Furthermore, the Department's claims that certain personnel, including ranking officers, are not assigned to the ambulance is just plain false. All but two paramedics, regardless of rank, staff the ambulance on a rotating basis that amounts to two months each year. The Department has never expressed any plans or desire to change this arrangement.

The Department defends its selective certification to retain the flexibility to increase ambulances in service. As noted above, this is contrary to the purported desire to replenish the ranks of paramedics after certain paramedics are no longer mandated to continue in that role. Regardless, this claim about increasing ambulances, if true, would have justified an initial request by the Department to hire thirteen EMT-Paramedics. But, instead, the Department sought to hire only EMT-Basics, which casts strong doubt on the legitimacy and integrity of the Department's newfound desire to increase the number of EMT-Paramedics on staff.

During recent negotiations with the Union over a new collective bargaining agreement, the Chief specifically denied any plans to increase the number of ambulances in operation. The Chief cannot have it both ways – telling the Union he is not going to increase ambulances in service and telling the Commission that he is going to, or least desires to.

Finally, the closure of Union Hospital does not justify the Department's request. The City has known about the closure for years and has never mentioned plans to alter its ALS offerings until it responded to this petition.

II. The Case Cited by the Human Resources Division, *Welch v. Winchester*, Does Not Support the Department's Claim It Had Reasonable Justification to Request an EMT Paramedic Selective Certification, or HRD's Approval of the Request.

In *Welch v. Winchester*, G1 04 283 (July 17, 2008), the Town of Winchester sought an EMT Paramedic selective certification list in June 2000, as the Town had been seeking to upgrade from BLS to ALS service. The Town had only one EMT Paramedic at the time it requested the list. The Town needed at least eight EMT Paramedics to operate ALS. The Town received a license in April 2001 to upgrade the ALS service by July 24, 2002. Town committees endorsed this measure in April 2002. However, the Town did not start providing ALS services until December 2004 and the Union did not agree to the service, via interest arbitration, until February 2005. The Town planned to reach the necessary level of paramedics through attrition – replacing retiring fire fighters with EMT paramedics, rather than increasing the number of fire fighters on staff. The Commission ruled that a gradual plan to achieve a stated goal of upgrading to an ALS system was reasonable, the Town was justified in seeking EMT Paramedics, and HRD was justified in approving the Town's request.

The Commission handily rejected the Appellant's claim that the Town could not request a selective certification list for EMT Paramedics until a) the Board voted to fund ALS services; and b) the Union agreed to ALS services.

The Town had a right to anticipate the upgrade to ALS level service, despite ongoing Union negotiations and/or recommendations on how specifically to implement the upgrade from any boards or committees, and made a reasonable decision to gradually replace departing firefighters with EMT Paramedic certified firefighters. The Town made this decision to avoid increasing the overall firefighter complement, which would have required additional funding, or laying off existing firefighters and replacing them with EMT Paramedic certified firefighters. Because the gradual nature of the process would take time, the Town initiated the process immediately so as not to unduly delay the public safety and financial benefits of the service to its residents.

Id.

The instant matter is dramatically unlike the *Welch* case. Here, petitioners are not making the formalist argument that the Lynn Fire Department could not request an EMT-Paramedic selective certification until the legislative body (City Council) funded additional ALS service and until the City had satisfied all collective bargaining obligations about its plans. Rather, we are merely contending that the City has no genuine plans or desires to increase paramedic services that withstand scrutiny. Had the Lynn Fire Department genuine plans to upgrade the ALS services provided by the City – had the Department provided actual or draft plans, for instance – a selective certification list might be justified here. That is not the case.

Unlike the *Welch* case, the City here is not seeking to upgrade from BLS to ALS, which requires a dramatic increase in operations. Moreover, the City also is not even seeking to upgrade the number of ambulances in operations. While the *Welch* case does not require formal adoption of City plans in order to request selective certification, it requires more than unsubstantiated daydreaming. The Department presented no plans, outlines, sketches or proposed chronologies to justify hiring additional EMT paramedics. The reasons cited by the Department, as shown above, are contradictory and unsubstantiated.

The Department has not offered anything other than a post-hoc rationalization and a vague desire to merely, perhaps, possibly add an ambulance into service at some indeterminate time. Again, the numbers do not add up. The addition of six EMT paramedics will not allow the Department to upgrade or increase ALS services whatsoever. To cite the *Welch* case to the circumstances here is to effectively remove any requirement that an employer have any legitimate basis to upgrade services. The *Welch* case involved a genuine effort to dramatically improve life support services in a community and actions by the

employer consistent with those plans. Here, the Department has offered nothing other than wishful thinking that does not add up.

Also unlike *Welch*, the City is not taking an incrementalist approach to staffing an ALS service by hiring only EMT paramedics. Ironically, the Lynn Fire Department's purported desire to increase ALS services might have more credence if it sought for all twenty new fire fighters to be paramedics, as that would enable it to staff a second ALS ambulance, while making strides toward staffing a third. Contrary to the thoughtful and purposeful actions in *Welch*, the City's request for a mere six EMT paramedics is just inexplicable.

III. The Department's Motive in Requesting Unjustified Selective Certifications Is Irrelevant

It may be that the Department's decision to seek an unjustified selective certification lists was motivated by a bias against veterans or the statutory preference for veterans. It may be that the Department's second request was sparked by anger at the Union's successful objection to the initial request and how the Union's defense of veterans exposed the Department's mishap. It may be that the Department's unjustified requests for selective certification was motivated by a desire to help non-veterans on the lists. It also may be that the Department's request was motivated by a good faith, albeit erroneous, desire to hire more EMT-paramedics. Where the Department however has provided false and unjustified reasons for selective certifications, the Commission should not limit an investigation only where there is evidence of improper motive.

Where a party provides reasons that are pretextual or unsubstantiated, the decision maker is allowed to infer that the actual reasons are improper. See, e.g., *Scarlett v. City of Boston*, 93 Mass. App. Ct. 593 (2018) (employee need only present evidence from which a reasonable jury could infer that the rationales advanced by the employer were not the real reasons for the adverse employment action). Such an inference would be reasonable here where there was a vociferous objection to the first request based upon the impact of selective certification on candidates' veterans' status and the Department specifically requested a second selective certification list that also discriminated against veterans, and said request contradicted claims in the first request. The selective certification list for six EMT-Paramedics included just four veterans.

Regardless of the Department's actual motive, the Commission should initiate an investigation into such a brazen violation of basic merit principles where the impact on a protected class, disabled veterans and non-disabled veterans, is significant.

IV. The Purely Coincidental Lack of An Aggrieved Veteran Should Not Deter the Commission from Enforcing Selective Certification Requirements

At the time this request was filed, August 23, 2018, the deadline for applicants willing to accept an appointment had not elapsed (August 24). Even if we had access to the lists by August 23, petitioners had no reason to know how many veterans would sign the list. That we now know every veteran who signed the list will be considered for appointment is purely a coincidence and not an excuse for the Department to evade compliance with the law.²

A demurral on an investigation also would be arbitrary, and simultaneously permissive toward employer chicanery. Where an employer takes a position that necessarily discriminates against veterans, the principle of “no harm / no foul” should have no force. It also leaves compliance, and a sense of justice and basic merit principles, open to too many happenstances.

Let's assume fifteen veterans signed up for a list for fourteen vacancies, meaning that one of them would not receive due consideration for appointment. To contend that an investigation should be conducted there, but not when just thirteen veterans sign up, is simply arbitrary. Such a distinction encourages employers to ignore the law so long as no protected class is harmed or to take a risk that no one will be. For instance, the request for two separate lists here – just six EMT-paramedics and fourteen fire fighters may have been based on a calculation that all interested veterans will be considered.³

The Commission's declination of an investigation also cannot be justified on grounds of conservation of resources, given the likelihood of this situation to recur and the cost of groups to enforce compliance with the law. Where an employer makes a selective certification that is unjustified and where veterans are likely to be impacted, it is most effective to register a prompt protest and complaint, especially in light of the Thornton decision.

Here, the Mass Fallen Heroes objected in a timely fashion to the list because it had a reasonable basis to believe that veterans would not receive due consideration for hire. It takes time to schedule even a Show Cause Hearing. The organization and likeminded individuals therefore face the prospect of filing timely requests for investigation that may or may not

² The Commission should not assume that, had the Department requested a proper list for fire fighters, the number of veteran respondents would have remained the same. There are at least three veterans who were ranked outside the top fourteen and they may have felt their candidacy would not be considered so they decided not to sign.

³ This also ignores that the Department's selective certification harmed non-veterans. The Department's selective certification enabled it to grant higher consideration to several non-veteran paramedics who may not have been considered if the Department had used a non-selective List. We do not know the scores of the non-veteran paramedics or the scores of others on the fire fighter list.

proceed based upon intervening events before the Show Cause hearing. If, per chance, the number of responding veterans is less than the number of vacancies, then efforts to enforce the law are for naught. If groups and individuals wait to see whether the number of vacancies ultimately exceed the number of veterans who sign the list, then any petition may be too late. Plus the Commission misses an opportunity to provide clear guidance to employers about when requesting selective certifications is inappropriate.

V. Conclusion

The Commission should conduct an investigation into the Department's request for six EMT-Paramedics and compel the Department to establish how it had plans, prior to June 2018, to upgrade and improve ALS services, and to explain how the hiring of just six EMT-paramedics will enable the Department to improve ALS offerings, let alone continue the status quo. The Commission should direct the Department to produce all memos, plans, guidelines and electronic communications about staffing of the ambulance.

Sincerely,


Patrick N. Bryant

cc: John Slattery

CITY OF LYNN

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Request for Investigation against
the City of Lynn & Human Resources
Division by Petitioner:

- Massachusetts Fallen Heroes

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

Tracking Number: I-18-151

**RE: ORDER TO SHOW CAUSE REGARDING PETITIONER'S REQUEST
FOR THE CIVIL SERVICE COMMISSION TO CONDUCT AN
INVESTIGATION UNDER G.L. c. 31, § 2(a)**

POSITION STATEMENT OF THE CITY OF LYNN

Now comes the City of Lynn, Massachusetts ("City") and submits its Position Statement in Opposition to the Request for Investigation of Massachusetts Fallen Heroes, Inc.¹ ("Petitioner").

I. STATEMENT OF FACTS

1. On or about August 6, 2018, the City received a Safer Grant that permitted the hiring of 20 additional Paramedics, EMTs and/or Firefighters. *Exhibit 1 –CFO Bertino Affidavit.*
2. The Safer Grant provides full funding for all 20 positions. *Exhibit 1- CFO Bertino Affidavit.*

¹ Despite Atty. Bryant assigning the City an animus against the Union as a reason for the Paramedic Requisition, the Union has not joined in this action.

3. The City is in grim financial straits. Special Legislation allowed the State to loan money to the City to help the City meet its FY 2019 obligations. *Exhibit 1-CFO Bertino Affidavit.*
4. Without the SAFER Grant, the City cannot afford to hire any Paramedics (“Medics”), EMTs or Firefighters. *Exhibit 1-CFO Bertino Affidavit.*
5. The SAFER Grant mandates that all hires funded under its auspices must be employed within six months of the date of the award. *Exhibit 2- Chief Archer Affidavit.*
6. On August 14, 2018, the City requested a Selective Paramedic List from HRD. *Exhibit 3- Attested Copy of Requisition No. 05739.*
7. On August 14, 2018, the City requested a Non-Selective Firefighter List from HRD. *Exhibit 4- Attested Copy of Requisition No. 05740 .*
8. Each veteran who signed the Firefighter List is ranked within the top 14 positions. *Exhibit 4-Attested Copy of Requisition No. 05740.*
9. Every veteran who signed the Firefighter List will receive due consideration for appointment. *Exhibit 4-Attested Copy of Requisition No. 05740.*²
10. The first four entries on the Paramedic List are veterans. *Exhibit 3-Attested Copy of Requisition No. 05739.*³
11. There are only 2 Lynn Residents on the Statewide Paramedic List. The first is ranked around number 30, the second around number 134. Neither could have

² Mr. Bryant’s suggestion that other veterans may have applied if the basic FF list had been 20 instead of 14 is factually unsupported and the rankest speculation and conjecture.

³ Mr. Bryant’s suggestion that the City was motivated by a desire to help non-veterans is factually unsupported and nothing but speculation and conjecture.

reasonably been expected to be reached on a Paramedic list for 6 vacancies.⁴ *Exhibit 2- Chief Archer Affidavit.*

12. Since at least 2013, Captain Zukas has suggested the need for more paramedics to address the balance between mandated and non-mandated medics, lessen burnout and improve morale. *Exh. 5- Captain Zukas Affidavit.*

13. The Lynn Fire Department ("Department") currently operates with 28 Stipend Medics.⁵ *Exh. 2- Chief Archer Affidavit.*

14. Of the 28 Medics, two don't work a rotation, leaving only 26 Medics available to work the Medic Truck. *Exh. 2- Chief Archer Affidavit.*⁶

15. Of the 26 available Medics, 7 are Officers, leaving only 19 Firefighter Medics. Two of those FF-Medics⁷ are likely to be promoted to the rank of Lieutenant, leaving only 17 FF-Medics. It is safer and more efficient and economical for Officer Paramedics to stay with their assigned apparatus. If an Officer has to do a 3 month rotation on the medic truck, it leaves that Engine or Ladder Truck without proper supervision and requires other Officers to fill the vacancy. *Exh. 2- Chief Archer Affidavit.*

16. Of the 26 available Medics, only half (13) are mandated Medics. A mandated Medic must maintain his/her Medic License as a condition of his employment. A non-mandated medic may give up his/her license after 5 years without penalty. *Exh. 2- Chief Archer Affidavit.*

⁴ Mr. Bryant's suggestion that the City was motivated by a desire to manipulate the list to reach Lynn residents is factually unsupported and simply wrong.

⁵ Licensed Medics Thorpe and Whitten do not work the Medic Truck and do not receive the Stipend.

⁶ Licensed Medics McBride and Patterson do not work a Medic Truck rotation.

⁷ FF Stacy Borjeson and FF Joel Abreu.

17. Having only 13 Mandated Medics is problematic. The Department would not be able to operate the Medic Truck with only 13 Medics if the non-mandated Medics dropped their licensure. *Exh. 2-Chief Archer Affidavit.*

18. Medic burnout is a factor in the City's decision to seek 6 Medics. Over time, in addition to Whitten, Thorpe, McBride and Patterson, who do not work as Medics, 10 other medics have quit the Department. *Exh. 2-Chief Archer Affidavit.*

19. The average age of current Medics is a factor in the City's decision to seek 6 mandated Medics. The average age of a Department Medic is 43 years old. One Medic is within 2 years of mandatory retirement age and four others are within 5 years of minimum retirement age. *Exh. 2-Chief Archer Affidavit.*

20. The City's growing EMS Response now comprises 60% to 70% of its call volume. *Exh. 5- Captain Zukas Affidavit*

21. The City averages 25 ambulance runs per day. *Exh. 5-Captain Zukas Affidavit.*

22. The September 2019 closing of Union Hospital, the last remaining hospital in Lynn, is a factor in the City's decision to seek 6 mandated Medics. In his 2017 Annual Report, Captain Zukas suggests the closing of Union Hospital will severely impact the Lynn Fire Department's ambulance operations, creating delays in response time and availability on clearing a medical transport and thereby reducing the effective emergency medical services the Department, as currently constituted, shall be able to provide to the citizens of Lynn. His remedial solution was to hire more mandated Medics. *Exh. 5-Captain Zukas Affidavit.*

23. Having more mandated Medics will allow the Department the ability to expand its EMS to meet the growing needs of Lynn's residents. Medics are the highest level of

EMS available. Unlike EMTs and First Responders, Medics can work on all Department apparatus. *Exh. 2- Chief Archer Affidavit.*

24. The ability to staff and run a second or third ALS Ambulance is part of Chief Archer's longer term service vision for the Department. Chief Archer was appointed to his position in January, 2018. In July, 2018, Chief Archer formed an EMS Committee tasked with improving the Department's EMS service. The Committee is to consider, among other things, the running a second or third ALS Ambulance. *Exh. 2-Chief Archer Affidavit.*

25. The Department currently has 17 permanent assignment vacancies due to attrition and prior hiring freezes. Six (6) of those permanent assignment vacancies are on Medic 1, the Department's ALS Ambulance. *Exh. 2- Chief Archer Affidavit.*

26. Captain Zukas inclusion of all 3 Ambulances on the Paramedic Requisition rather than just the 1 Ambulance as listed on the withdrawn 10 EMT Firefighter List was due to clarifications received from HRD between the filing of the 2 requisitions. *Exh. 5- Captain Zukas Affidavit.*

27. The June, 2018 request for 10 EMTs was made in anticipation of the SAFER Grant being approved, which left up to an additional 10 positions to be filled by a Selective Paramedic List. *Exh. 2- Chief Archer Affidavit.*⁸

⁸ The City voluntarily withdrew the 10 EMT Requisition several weeks prior to its August 14th requisitions for the Selective Paramedic List and the Non-Selective FF List. Attorney Barrault's self-serving letter to the contrary, Chief Archer did not issue any email or correspondence detailing any reason for the voluntary withdrawal of the 10 EMT Requisition nor did the Union file a Request for Investigation or seek a declaratory judgment. *Exh.2- Chief Archer.*

28. Prior to submission of its Medic and Firefighter Requisitions, the Department was informed by HRD that all OEMS licensed ambulances, whether or not in service, were entitled to be counted for purposes of the number of Medics that could be requisitioned.

Exh. 5-Captain Zukas Affidavit.

29. Prior to submission of its Medic and Firefighter Requisitions, the Department was informed by HRD that it was entitled to 20 Medics per OEMS licensed Ambulance. *Exh.*

5-Captain Zukas Affidavit.

30. The Department has 3 Ambulances inspected and licensed by Executive Office of Emergency Medical Services (“OEMS”). *Exh. 5- Captain Zukas Affidavit.*

31. The Department makes, and always has made, every effort to keep all 3 Ambulances maintained and available for service. *Exh. 2- Chief Archer Affidavit.*

32. There is nothing in the Collective Bargaining Agreement between the City and Local 739 which prevents the City from seeking a Selective Paramedic List.⁹

II. ISSUE PRESENTED

Was the City’s simultaneous requests for a Selective Paramedic List (‘Medic List’) and a Non-Selective Firefighter List (‘FF List’) a deliberate and purposeful attempt to exclude veterans?

III. STANDARD OF LAW

A Request for Investigation should not be granted absent identification of an “aggrieved person”. See, *Thornton v. Town of Andover and HRD*, E-11-288 (May 16, 2013)(absent an actual grievant, asserted misinformation does not justify Commission intervention; absent a showing that someone’s civil service rights have been abridged, the

⁹ See, Atty. Bryant’s Letter, CBA Attachment

Commission should not conduct a best practices evaluation). An “aggrieved party” is someone on the certified list who would otherwise be reached but for the City’s action. *See, Puglsey v. BPD (Decision)*, 29 MSCR 119 (2016). Where there is no aggrieved party, the issue is moot. *See, Micciche v. City of Brockton (Decision)*, 30 MSCR 461 (2017); *Underwood v. Lowell Public Schools (Order of Dismissal)*, 30 MSCR 146 (2017). In the absence of such standing, the Commission should deny the request. *See, Gately v. Department of State Police (Order of Dismissal)*, 28 MSCR 294 (2015); *Mason v. DOC (Order of Dismissal)*, 28 MSCR 202 (2015); *Grace v. HRD (Order of Dismissal)*, 28 MSCR 181 (2015); *Sanchez v. Springfield Fire Department*, 28 MSCR 120 (2015).

The Commission should not initiate an investigation where, as in the case at bar, there is no credible evidence that the simultaneous requisitions for the Medic List and Non-Selective Firefighter List were motivated by any personal or political bias. *See, Lorthe v. Boston Police Department and HRD*, 28 MSCR 55 (2015); *Maier v. Civil Service Commission (Response to Request for Investigation)*, 29 MSCR 591 (2016); *Fernandes v. DOR (Decision on Respondent’s Motion to Dismiss)*, 27 MSCR 133 (2014)(Investigation by the Commission is not warranted where there is no evidence that the selection process was affected by bias or other unlawful motives).

IV. ARGUMENT

A. Mootness

At the hearing conducted on September 11, 2018, the City moved that the Request for Investigation be denied on the grounds that the Petitioner lacked standing to challenge the August, 2018 Medic and FF Requisitions, i.e., that it had failed to produce 10 supportive registered voters and had failed to identify any aggrieved party. *See, M.G.L.c.*

31, § 2(a).¹⁰ Commissioner Bowman inquired of Attorney Bryant whether he intended to move forward with the Request.¹¹ Attorney Bryant responded that he needed time to decide. Commissioner Bowman advised Attorney Bryant that he had until September 18, 2018, to advise whether his client wanted to press forward with its Request. Although Attorney Bryant's notification of September 14, 2018 identified a 10th registered voter, despite the additional time, he again was unable to identify any "aggrieved party".

Absent an actual aggrieved party, the Commission should not conduct an investigation. *Thornton*, Id. at 5; *See, Pugsley v. BPD (Decision)*, 29 MSCR 119 (2016). Without an aggrieved party, Petitioner's request is moot. *See, Micciche v. City of Brockton*, 30 MSCR 461 (2017); *Underwood v. Lowell Public Schools*, 30 MSCR 146 (2017); *Kelly v. City of Boston*, 29 MSCR 176 (2016)(where no aggrieved party, issue is moot). In the case at bar, every veteran who desired appointment as a Firefighter signed for that position on the Non-Selective FF List. Attorney Bryant's speculation that other veterans may have applied if the Non-Selective FF List was for 20 vacancies instead of 14 vacancies is without basis in fact. To the contrary, each veteran who signed the Firefighter List is ranked within the top 14 positions and will receive due consideration for appointment.

B. No Personal Or Political Bias Or Other Unlawful Motive

Attorney Bryant's Position Statement is long on speculation and short on facts. He offers no evidence of any personal or political bias against veterans or any other improper motive. Recognizing the dearth of any supporting evidence for his position, he

¹⁰ See, City's Motion/Memorandum to Dismiss with Exhibits filed on September 4, 2018.

¹¹ See, City's Motion/Memorandum to Dismiss with Exhibits filed on September 4, 2018. The 6th name on the list (Shane Bulger) submitted by Attorney Bryant to satisfy the statutory requirement is not a registered voter.

argues that evidence of bias and improper motive is not required.¹² Case law is to the contrary. *See, Maher v. Civil Service Commission*, 29 MSCR 591 (2016)(CSC declines to open investigation into revocation of an old list where no evidence of personal bias); *Jones v. Civil Service Commission*, 29 MSCR 561 (2016)(CSC declines to open investigation into claims that Boston Public Schools created non-civil service positions where no evidence of personal or political bias); *Defelice v. City of Quincy*, 28 MSCR 291 (2015)(CSC declines request for investigation where the City's decision was free of any personal or political bias).

In this case, there is no demonstrated bias against veterans. Every veteran on the FF List who wanted the position signed the list. There is no evidence to the contrary. Every veteran who signed the 14 vacancy FF List is within the top 14 rankings. There is no evidence of the City acting contrary to basic merit principles, i.e., every veteran who signed the list shall receive consideration for appointment. No veteran has been or is being excluded. No veteran is aggrieved.

The City's need for more medics is genuine. Contrary to Attorney Bryant's suppositions, the need is long-standing and documented. For at least the last five (5) years, Captain Zukas has stressed the need for more medics to address the imbalance between mandated and non-mandated medics, to address burnout and to improve morale. For at least the last five years, Captain Zukas has stressed the need for more medics to handle the growing EMS call volume. The City has four non-mandated medics who no longer work the ALS Ambulance. The City has two more non-mandated medics who will shortly become Officers. The City has lost 10 medics over the years. Non-mandated

¹² See, Attorney Bryant's Position Statement, Page 8.

medics have expressed frustration with the job. Non-mandated medics may drop their medic certification after 5 years without consequence. With only 13 mandated medics, the City cannot effectively staff even one ALS Ambulance. Recently, Chief Archer was prevented from staffing a second ALS ambulance to cover the North Shore Veteran's Appreciation Parade because he was unable to get two medics to work over-time to man the ambulance.

Contrary to Attorney Bryant's uninformed claim, the Department's concern over the impact the closing of Union Hospital will have on the Department is not a recent contrivance. In his 2017 EMS Division Report, Captain Zukas specifically notes that: (i) the Union Hospital closing will be the "biggest change in health care that the City has experienced since ... 1997"; (ii) the hospital's closing will "severely affect our operations in a very negative way"; (iii) "our ambulances will be out of service for much longer periods of time"; (iv) "we are no way prepared for" the fallout from the hospital's closing; and (iv) "this closing will impact Lynn Fire ... ambulance operations".

In July, 2018, Chief Archer formed an EMS Committee tasked with improving the Department's EMS service, including considering running a second or third ALS Ambulance given the closing of Union Hospital. Having more mandated Medics will allow the Department the ability to expand its EMS to address the consequences of losing Lynn Hospital and the growing needs of Lynn's residents. Medics are the highest level of EMS available and, unlike EMTs and First Responders, Medics can work on all Department apparatus.

C. HRD Policy Permits Lynn To Hire Minimum Of 60 Paramedics

State law mandates that municipalities serve as the provider of Emergency Medical Services (EMS) in their respective community. *Thornton v. Town of Andover and HRD*, E-11-288 (May 16, 2013). In Lynn, this responsibility rests with the Fire Department. *Thornton* recognized that the hiring of EMTs, or in this case Medics, serves an important public need and that approval of Special Certifications to meet this need is a long standing HRD policy. *Id.* *Thornton* recognizes as much, acknowledging, as did HRD at the September 11th conference, that HRD's policy of 20 medics per ambulance is simply that, a policy. It is not a regulation. It is a minimum staffing policy subject to change in the future. *Id.* at 5. Further, there is no HRD rule that requires all 3 ambulances be in simultaneous service. Here, the City has a fleet of three (3) OEMS inspected and licensed ambulances. According to HRD's long standing rules, the City is entitled to seek, at a minimum, 60 paramedics to staff its ambulances.

Further, the City's request, as represented by HRD at the conference, is consistent with the *Welch* precedent. *Welch v. Winchester*, G1 04 283 (July 17, 2008). In *Welch*, the Commission ruled that a gradual increase of paramedics for the purpose of upgrading an ALS Ambulance Service is reasonable. *Id.* Here, the City seeks an additional six (6) mandated paramedics who will assure that the City always has sufficient medics to staff at least one ALS Ambulance. Coupled with the expectation of adding five additional non-mandated medic-firefighters who are currently seeking certification, the Chief will have the option of staffing a second ALS Ambulance when needed.¹³ As in *Welch*, the

¹³ Not that the Union is a party to this action, but the relevant CBA already provides for the operation of an ALS Ambulance Service. There is nothing in the CBA that prevents the City from gradually growing its mandated medic force.

City has been financially unable to earlier address its paramedic needs. In order to meet its financial obligations for FY 2019 and 2020, the City had to borrow money from the state to address significant structural deficits. Special legislation was required to allow the state to provide the loan. Without the SAFER funding, the City cannot hire any firefighters, medics or not. There is a 6 month limitation in which all hired under the SAFER Grant must be actively employed. Any interruption in the current process jeopardizes the SAFER Grant funding. If the City must start the hiring process anew, it is likely to bump up against the 6 month deadline.

D. No Misinformation

The gravamen of Petitioner's emergent request for investigation is that "the City's request for a selective list "appears to be intended to discriminate against veterans" and that the City provided misinformation in support of that request.¹⁴ Petitioner asserts that the Medic Request cited 3 ambulances when it should have cited only 1. This is the only asserted "misinformation" by Petitioner vis-à-vis the Medic List. Petitioner does not assert any misinformation in the Non-Selective Firefighter request.¹⁵ Though Petitioner spends most of its rhetoric on information contained in the earlier filed EMT FF List, that request was withdrawn and is immaterial to its current challenge. There is no misinformation in the Paramedic Requisition. The City of Lynn operates 3 OEMS inspected and licensed ambulances. Per Captain Zukas' conversation with HRD prior to

¹⁴ See, Attorney Bryant's August 23, 2018 Letter.

¹⁵ Though Petitioner spends a lot of ink on asserted misinformation contained in the June, 2018 EMT-FF list, that list was voluntarily withdrawn by the City and is immaterial to Petitioner's current challenge. Further, as appears in Captain Zukas' affidavit, all Lynn Fire Department apparatus fit HRD's definition of an EFR vehicle. The only reason that such might not have qualified if challenged is because the City had not paid the fee necessary to designate the apparatus as EFRs.

completion of the Medic Request and consistent with *Welch*, all 3 ambulances are countable for medic request purposes.¹⁶ The City may gradually increase its medic numbers in anticipation of increasing its ALS service over time. *Welch v. Winchester*, G1 04 283 (July 17, 2008).

With respect to Petitioner's current challenge, the case of *Thornton v. Town of Andover and HRD*, E-11-288 (May 16, 2013) is instructive. There, as here, the gist of the challenge to a Special Certification was "that HRD received misinformation about the existing strength of [Andover Fire Department's] qualified EMT force, and had correct information been supplied, or had HRD been more diligent in its review, the Special Certification would not have passed muster under HRD's standards." *Id. at 5. Thornton* held that "the 20:1 ratio was merely a policy, not a regulatory requirement, that is subject to change in the future", *Id. at 5*, that absent an actual grievant, asserted misinformation does not justify Commission intervention, *Id. at 5*, and, that "absent a showing that someone's civil service rights have been abridged, the Commission is not in a position to conduct a best practices evaluation", *Id. at 5*. Under a *Thornton* analysis, Lynn stands in a superior position to the Andover Fire Department. Lynn's information as to the number of OEMS licensed ambulances in its fleet is correct and, like Thornton, there is no actual grievant who's civil service rights have been abridged.

V. CONCLUSION

The City's requests for a Selective Paramedic List and a Non-Selective Firefighter List were genuinely motivated by a desire to enhance its ALS Ambulance Service to address a growing community need. The City did not deliberately, purposely or by

¹⁶ See Argument 3D above.

happenstance exclude or discriminate against veterans. There is no actual aggrieved veteran claiming a violation of his Civil Service Rights. The Commission should deny the request for investigation.

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By its attorneys,

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