

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

JAMES McDONALD,  
Appellant

v.

G2-07-66

CITY OF LYNN,  
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

**DECISION ON APPELLANT'S REQUEST FOR RELIEF UNDER  
CHAPTER 310 OF THE ACTS OF 1993**

The Appellant, James E. McDonald (hereinafter "Appellant" or "McDonald") is asking the Civil Service Commission (hereinafter "Commission") to "re-activate certification number 260950 for the position of permanent full-time Deputy Fire Chief in Lynn, and order the City of Lynn to offer the position of Deputy Lieutenant<sup>1</sup> to the original candidates, in the order of certification." A chronology of events is as follows:

## *CHRONOLOGY OF EVENTS*

1. On March 18, 2006, the Appellant, then a permanent Fire Captain, took and passed a promotional civil service examination for the position of Deputy Fire Chief in Lynn. (Announcement #7037).
2. On August 1, 2006, the state's Human Resources Division (hereinafter "HRD") created an "eligible list" of candidates for the position of Deputy Fire Chief in Lynn. PAR.07(2)
3. Six (6) names appeared on the 2006 eligible list in the following order: 1) Dennis J. Carmody; 2) James E. McDonald; 3) James Carritte; 4) Daniel J. Lozzi; 5) William F. Murray; 6) Timothy R. Collier.
4. Whenever an appointing authority seeks to fill a civil service position, HRD, if a suitable eligible list exists, "certifies" the names standing highest on such list in order of their place on such list, except as otherwise provided by law or civil service rule. PAR.08(1)
5. On September 1, 2006, HRD forwarded Certification No. 260950 to the City to fill one (1) permanent Deputy Fire Chief vacancy.
6. When names have been certified to an appointing authority under PAR.08 and the number of appointments or promotional appointments actually to be made is  $n$ , the appointing authority may appoint only from among the first  $2n + 1$  persons named in the certification. Applied here, the City was limited to appointing from the first three (3) persons named in the certification: 1) Carmody; 2) McDonald; and 3) Carritte. PAR.09(1)

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<sup>1</sup> It would appear that the Appellant's reference to "Deputy Lieutenant" is a scrivener's error and that he meant to request that the City of Lynn offer the position of "Deputy Fire Chief" to the original candidates,

7. A three (3)-member interview panel, comprised of the City's then-Fire Chief, the Chief of the Massport Fire Department and the Fire Chief in Medford, interviewed Carmody, McDonald and Carritte. The panel recommended the third-ranked candidate, Carritte, to then-Mayor (Mayor Clancy), who serves as the Appointing Authority.
8. A "bypass" occurs when an Appointing Authority selects "a person or person whose name or names, by reason of score, merit preference status, court decree, decision on appeal from a court or administrative agency, or legislative mandate appear lower on a Certification than a person or persons who are not appointed and whose names appear higher on said certification." PAR.02
9. Upon determining that any candidate on a Certification is to be bypassed ... an Appointing Authority shall, immediately upon making such determination, send to [HRD] in writing, [1] a full and complete statement of the reasons or reasons for bypassing a person or persons more highly ranked [negative reasons], or [2] of the reasons for selecting another person or persons, lower in score or preference category [positive reasons]. PAR.08 (3)<sup>2</sup>
10. On January 5, 2007, the City submitted both positive reasons for selecting Carritte and negative reasons for not selecting Carmody, the first ranked candidate, or McDonald, the second-ranked candidate, to HRD.

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in the order of certification. (See Page 2 of Appellant's Petition for 310 Relief).

<sup>2</sup> As of September 1, 2009, due to budgetary constraints, HRD has delegated the responsibility of ensuring sound and sufficient reasons to the individual cities and towns. Bypassed candidates, however, maintain their right of appeal to the Civil Service Commission. See Letter from Paul D. Dietl, Chief Human Res. Officer, HRD, to Mun. Appointing Auths., Human Res. Divs., Fire Chiefs, and Police Chiefs (Aug. 7, 2009), available at [http://www.mass.gov/Eoaf/docs/hrd/cs/information/cs\\_aug\\_7\\_2009.doc](http://www.mass.gov/Eoaf/docs/hrd/cs/information/cs_aug_7_2009.doc). Since these selections occurred prior to September 1, 2009, however, the pre-existing process of first forwarding bypass reasons to HRD was followed here.

11. On January 10, 2007, HRD notified the City as well as Carmody and McDonald, that they had accepted the reasons for bypassing them and approved the selection of Carritte as permanent Deputy Fire Chief.
12. On February 1, 2007, Carmody filed a bypass appeal with the Commission. (G.L. c. 31, § 2(b))
13. On February 5, 2007, McDonald filed a bypass appeal with the Commission. (Id)
14. On February 26, 2007, Local 739 I.A.F.F. Lynn Firefighters filed a demand for arbitration with the City concerning a grievance that the City had failed to follow the past practice of promoting individuals in strict accordance with the Certification issued by HRD. Here, that would have resulted in the appointment of Carmody, the first-ranked candidate on the Certification.
15. On July 26, 2007, the Commission dismissed the appeals of Carmody and McDonald after concluding that the Commission had no jurisdiction to hear their appeals since the same matter was the subject of arbitration. (G.L. c. 150E, §8) (Carmody and McDonald v. City of Lynn, G2-07-65 & G2-07-66 (2007))
16. On August 28, 2007, Carmody and McDonald appealed the Commission's dismissal order to Essex Superior Court.
17. In January 2008, while the Superior Court appeal and the arbitration matter were pending, then-Fire Chief Higgins retired. There was no eligible list in place at the time for the position of Fire Chief in Lynn.
18. An appointing authority may, with the approval of HRD, make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no

suitable eligible list, or if the list contains the names of less than three persons eligible for and willing to accept employment, or if an eligible list has been established as a result of a competitive examination for an original appointment and the appointing authority requests that the position be filled by a departmental promotional examination or pursuant to section eight. G.L. c. 31, § 15

19. On or around January 2008, Carritte was provisionally promoted to the position of Fire Chief and Carmody was provisionally promoted to the position of Deputy Fire Chief.<sup>3</sup>
20. Written examinations for permanent Fire Chief are traditionally administered by HRD in March of each year. Preparation for such examinations, including a lengthy suggested reading list, is extensive and typically requires months of preparation. Thus, had the City properly called for a written examination for the position of permanent Fire Chief at the time of Higgins' retirement, the examination would likely have been conducted in March 2009.
21. On January 16, 2009, the Superior Court, ruling in favor of Carmody and McDonald, ordered the Commission to reinstate the plaintiffs' bypass appeal. Ruling in favor of the plaintiffs, the Court wrote: "Although both the arbitration and the Commission appeals concern the promotion appointment decision of the City, each raise and address different issues. The arbitrator is being asked to decide, regardless of the merits of the candidates qualifications, whether they City can bypass the number one candidate on the certification list. The Commission was being asked, assuming the City's right to select any candidate from the certification list, to review the merits of

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<sup>3</sup> Although it appears that Carmody's provisional promotion was improper and the City should have appointed him as a "temporary" Deputy Fire Chief, it has no bearing on the outcome of this request.

the City's decision to appoint the third candidate over Carmody and McDonald. If the arbitrator was going to decide the merits / qualifications issue, then G.L. c.150E, § 8, might well preclude an appeal to the Commission. But that is not the case here. Plaintiffs sought to have the Commission decide an issue that will not be reached by the arbitrator, and the court views § 8 as establishing an exclusive procedure only for those issues that will be subject to binding arbitration." (Carmody and McDonald v. City of Lynn and Civil Service Comm'n, No. 07-1604 and No. 07-1613, Essex Superior Court (2009).

22. On January 29, 2009, pursuant to the Essex Superior Court order, the Commission reinstated the bypass appeals of Carmody and McDonald.
23. On March 4, 2009, the Deputy Fire Chief eligible list in the City of Lynn was revoked by HRD.
24. On June 29, 2009, the arbitrator ruled that the City was not required to select the first ranked candidate on the Certification but had the discretion to review and select from among the top three candidates on the Certification. Contrary to what was anticipated by the Superior Court, the arbitrator also reviewed the merits of the City's decision to appoint the third-ranked candidate over Carmody and McDonald. The arbitrator, concluding that the review process was "arbitrary and capricious, and designed to produce a pre-determined result", ordered in part that a new selection process be conducted. If Carmody or McDonald were selected as a result of this new review process, Carritte would be removed from the Deputy Fire Chief position and the successful candidate's seniority date as deputy would be retroactive to the date

Carritte was originally appointed. (IAFF, Local 739 v. City of Lynn, AAA# 11 390 02483 06 (2009))

25. Shortly after June 29, 2009, the City appealed the Arbitrator's Award.
26. On July 21, 2009, the Commission conducted a status conference regarding the pending bypass appeals of Carmody and McDonald.
27. On July 27, 2009, a majority of the Commission concluded that the Arbitrator's Award provided Carmody and McDonald with all of the relief that might be awarded to them by the Commission and dismissed their bypass appeals. The Commission also ordered that, in the event that the City's appeal of the Arbitrator's Award was successful, it would entertain a motion to reconsider its dismissal and it tolled the time for filing such a motion up to and including 30 days after any court judgment regarding the Arbitrator's Award.
28. From June 2009 to November 2009, it appears that the City did not take any steps to implement the Arbitrator's Award, which was pending judicial review.
29. On November 3, 2009, incumbent Mayor Clancy was defeated by Judith Flannagan Kennedy. Clancy's term would expire on January 4, 2010.
30. On November 18, 2009, the City posted an examination announcement for the position of permanent Fire Chief for December 9, 2009. The examination would be administered as an "assessment center". An Assessment Center is a method of selection that emphasizes performance in simulated job situations. While HRD typically administers written civil service examinations, it delegates the responsibility of creating and conducting the Assessment Center-type examinations, after reviewing the assessment center proposal, to cities and towns.

31. On November 24, 2009, Carmody and McDonald filed an “emergency appeal”, asking the Commission to investigate Mayor Clancy’s decision to fill the permanent Fire Chief position. Both Carmody and McDonald argued that the time frame provided no opportunity for reasonable study time for the candidates. They argued that the process was a “sham” geared toward a pre-determined result of appointing Carritte as the permanent Fire Chief prior to Mayor Clancy’s departure. Carmody and McDonald argued that conducting the Fire Chief selection process prior to re-doing the Deputy Fire Chief process was “putting the cart before the horse” because eligibility to sit for the Fire Chief examination was likely to be limited to those holding the title of permanent Deputy Fire Chief and permanent District Fire Chief. Thus, according to Carmody and McDonald, it would be impossible to determine who was eligible to sit for the Fire Chief examination prior to finalizing the Deputy Fire Chief appointment.
32. On December 7, 2009, the Commission held a pre-hearing conference regarding Carmody and McDonald’s request for investigation. IAFF Local 739’s Motion to Intervene was denied, but the union was granted Participant status. At the outset of the pre-hearing, HRD notified the Commission that it was now requiring the City to delay the Assessment Center examination for Fire Chief until the selection process for the Deputy Chief position was completed. The City informed the Commission that it had initiated a new review and selection process for the Deputy Fire Chief position and that interviews were scheduled for December 17, 2009.
33. On December 10, 2009, the Commission issued an Interim Order ordering the following: 1) consistent with the HRD directive, the City was not to continue with



the selection process of a permanent Fire Chief until the selection process for Deputy Fire Chief was completed; 2) the City could move forward with the review and selection process for the Deputy Fire Chief position;<sup>4</sup> 3) should either Carmody or McDonald be bypassed by Carritte, the Commission would accept and allow an emergency motion for an expedited hearing to determine if there was reasonable justification for the bypass; and 4) if the City attempted to “fast-track” the appointment of a permanent Fire Chief prior to Mayor Clancy’s term expiring, the Commission would intervene.

34. On December 17, 2009, MMA Consulting Group conducted an Oral Panel interview for the position of Deputy Fire Chief, and interviewed Carmody, McDonald and Carritte individually. The panel deemed Carmody and Carritte “well qualified”, but stated that Carmody’s interview was somewhat stronger than Carritte’s and ranked Carmody first and Carritte second. McDonald was deemed “qualified” and ranked third by the interview panel.

35. On December 24, 2009, MMA Consulting forwarded its results to Mayor Clancy.

36. On December 30, 2009, Mayor Clancy informed HRD that he was selecting Carritte as the permanent Deputy Fire Chief and submitted positive reasons to justify the bypass.

37. On January 4, 2010, Judith Flannagan Kennedy was sworn in as Lynn’s new Mayor.

38. On January 5, 2010, Carmody and McDonald, prior to a determination by HRD regarding whether the reasons submitted by Mayor Clancy were sound and sufficient,

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<sup>4</sup> At the pre-hearing conference, Carmody, McDonald and IAFF Local 739 asked the Commission to prevent then-Mayor Clancy from moving forward with the Deputy Fire Chief selection process and allow the incoming Mayor to select the candidate.

sought an expedited bypass hearing as referenced in the Commission's December 10, 2009 Interim Order.

39. On January 6, 2010, the Commission scheduled a pre-hearing conference for January 11, 2010.
40. At the January 11, 2010 pre-hearing conference, counsel for the City, Carmody and McDonald and their respective counsel, counsel for HRD, counsel for the local union and Carritte, appeared. Counsel for the City stated that no final decisions had been made by the newly-elected Mayor and that the City would be asking HRD to postpone its review of the positive reasons sent by Mayor Clancy in support of Carritte's appointment.
41. On January 11, 2010, the Commission scheduled a full hearing regarding Carmody v. City of Lynn, G2-07-65 for February 12, 2010. This hearing would only take place if HRD reviewed the positive reasons submitted by former Mayor Clancy in support of Carritte's appointment and deemed them to be sound and sufficient. McDonald's appeal was not scheduled for a hearing as he was the second-ranked candidate and Carmody was first.
42. On January 12, 2010, the City formally requested that HRD extend the time period to review the selection / bypass reasons for the position of Deputy Fire Chief.
43. On January 14, 2010, HRD notified the Commission that they had approved the City's request and extended the time for review until January 28, 2010.
44. On January 27, 2010, the Commission received an email communication from the City with an attached "Settlement Agreement". The City stated that the agreement

was intended to resolve the pending civil service cases involving the Deputy Fire Chief position. The parties requested a status conference to review the agreement.

45. On January 29, 2010, the Commission issued a Notice of Status Conference for Friday, February 12, 2010 at 10:00 A.M. at Lynn City Hall. The notice was posted on the Commission's website, the Lynn City Clerk's office and the Lynn Fire Department headquarters.
46. February 8, 2010 was the deadline for any eligible individuals to sign up for the most recent Deputy Fire Chief promotional examination. No individuals from the Lynn Fire Department signed up for the examination. The next written examination will not be administered until March 2011.
47. At the February 12, 2010 status conference, counsel for the City, counsel for HRD, Carmody and McDonald, and the local union appeared. Carritte represented himself and several other members of the Lynn Fire Department who had a stake in the outcome of this matter attended as well. Mayor Kennedy Flannagan was present for parts of the status conference. The status conference was digitally recorded and a CD of the proceeding is retained by the Commission.
48. The parties then proceeded to review the proposed 12-paragraph settlement agreement which, in its draft form, sought relief from the Commission<sup>5</sup> under Chapter 310 of the Acts of 1993 to implement certain provisions of the agreement.
49. At the status conference, Carritte indicated that he had filed for retirement. However, he indicated that he would withdraw his retirement application if either the Commission or the Superior Court ruled that the Arbitrator had overstepped his

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<sup>5</sup> Although the Settlement Agreement sought "310 Relief" from HRD, there is no dispute that only the Commission has the statutory authority to grant relief under Chapter 310 of the Acts of 1993.

authority by requiring his appointment as permanent Deputy Fire Chief to be vacated if he was not appointed as Deputy Fire Chief after the selection process was redone. After learning that the City would be withdrawing its appeal in Superior Court and that the Commission had no jurisdiction to vacate an Arbitrator's Award, Carritte stated that he would proceed with this retirement.<sup>6</sup>

50. Chapter 310 of the Acts of 1993 ("Chapter 310") states:

"If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration of such rights."

51. Paragraphs 1 -3 of the proposed agreement stated that the City would notify HRD that it was rescinding its decision to appoint Carritte, the third-ranked candidate on the Certification, as permanent Deputy Fire Chief and, instead, was appointing Carmody, the first-ranked candidate.

52. All parties agreed that no action from the Commission was necessary for the City to take the steps outlined in Paragraphs 1 – 3. As Carmody was ranked first on the Certification, there would be no bypass of any candidates and bypass reasons need not be submitted to HRD.

53. Although no action is required by the Commission regarding the decision to appoint Carmody instead of Carritte as permanent Deputy Fire Chief, I asked counsel for the City to outline how the City made this decision. He indicated that Carmody's

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<sup>6</sup> It is undisputed that Mr. Carritte has now officially retired from the Lynn Fire Department. Mr. Carritte displayed an admiral degree of professionalism and grace throughout these proceedings. Notwithstanding

standing on the civil service Certification, in addition to the fact that Carmody was ranked highest by the independent interview panel, were critical factors in the City's decision.

54. Paragraphs 4 and 5 of the agreement stated that Carmody would "decline" a provisional promotion to the position of Fire Chief and the City would "retain discretion" to appoint a provisional Fire Chief. Counsel for the City stated that these paragraphs were drafted prior to Carritte announcing his retirement and were intended to allow Carritte to maintain his position as Provisional Fire Chief until such time as the City selected a permanent Fire Chief. Carritte's retirement would make these paragraphs moot.

55. Paragraph 6 said that the City would contract with a consultant to facilitate an Assessment Center examination for the position of permanent Fire Chief. All parties agreed that no action was required by the Commission in this regard.

56. Paragraph 7 said that the following individuals would be eligible to take the examination for permanent Fire Chief: John Barry, Robert Bourgeois, Dennis Carmody, James Carritte and James McDonald. As referenced above, Carritte has now retired. After a discussion between all parties, it was apparent that: 1) the individuals listed would be eligible to sit for the Fire Chief examination without any order from the Commission; and 2) this paragraph could potentially exclude individuals who may otherwise be eligible to sit for the permanent Fire Chief examination, including some Captains who were in attendance at the meeting. Those captains each indicated that they would not want to be excluded from consideration if

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the adversarial nature of the instant matter, I am hopeful that his decades of public service will be recognized with the proper degree of dignity and respect.

they would otherwise be eligible for consideration. Counsel for the local union indicated that he would not want to see these Captains excluded from consideration. There was general agreement that if the Commission were to allow relief under Paragraph 7, it should be clarified that this provision should not limit any individuals from sitting for a further Chief's examination that would be otherwise eligible.

57. Paragraph 8 stated: "The parties shall immediately request that [the Commission]<sup>7</sup> provide '310' relief for the remaining candidates on the original Deputy Fire Chief list; James McDonald and James Carritte, for purposes of certification as Deputy Fire Chief."

58. As referenced in Finding 3, six (6) names appeared on the 2006 eligible list in the following order: 1) Dennis J. Carmody; 2) James E. McDonald; 3) James Carritte; 4) Daniel J. Lozzi; 5) William F. Murray; 6) Timothy R. Collier. Based on the discussion at the status conference, it appeared that McDonald was seeking to have the Commission reactive this eligible list and have a Certification generated that would be used to fill the Deputy Fire Chief position if and when Carmody is selected as permanent Fire Chief sometime in the future. This apparently assumes that the City would not conduct a new examination for Deputy Fire Chief if a vacancy should occur in the future. Rather, they would agree to rely on the 2006 eligible list. Thus, only the top 3 individuals on the 2006 eligible list would be eligible for consideration and no other individuals would be able to sit for a new examination if and when a

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<sup>7</sup> The parties again erroneously referred to HRD, instead of the Commission, in regard to order "310 Relief". All parties agreed that they intended to reference the Commission.

vacancy occurs for permanent Deputy Fire Chief if the Commission the relief requested in Paragraph 8.<sup>8</sup>

59. Paragraph 9 said that if Carmody was chosen as the next permanent Fire Chief, then the City would choose from the revived list referenced in Paragraph 8 of the agreement.
60. Paragraph 10 said that if Carmody was not chosen as the next permanent Fire Chief, then all other provisional appointments would be rescinded, including McDonald's provisional appointment as Deputy Fire Chief.
61. Paragraph 11 said that the City would withdraw its appeal of the Arbitrator's Award.
62. Paragraphs 12 and 13 said that Carmody and McDonald would withdraw their bypass appeals with the Commission and Paragraph 14 indicated that the agreement would not be precedent-setting.
63. At the conclusion of the status conference, counsel for the Union and the City indicated that, if 310 relief is still necessary to facilitate the actions contemplated in the agreement, they would ask the Commission to consider granting 310 relief with the clarification that the names listed in Paragraphs 7 and 8 should be construed as meaning "including, but not limited to...". It was agreed that the City would move forward on those matters referenced in the agreement that did not require relief from the Commission. McDonald was granted the opportunity to submit a post-hearing brief regarding the relief being sought in Paragraphs 8 and 9. Carmody said he would

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<sup>8</sup> As referenced in more detail later in the chronology of events, McDonald subsequently submitted a written request to the Commission seeking relief which appears to significantly differ from what was discussed at the status conference. In his written submission, McDonald is seeking to have the Certification reactivated and that the City of Lynn be ordered to offer the position of Deputy Lieutenant (which I presume to mean Deputy Fire Chief) to the original candidates, in the order of certification.

be withdrawing his bypass appeal with the Commission upon the City appointing him as the Deputy Fire Chief.

64. In March 2010, Carmody was appointed as permanent Deputy Fire Chief.

65. On March 24, 2010, McDonald submitted a post-hearing brief to the Commission.

Although McDonald's post-hearing brief seeks Commission approval of the settlement agreement, the brief itself proposes relief that differs from that outlined in the settlement agreement. Specifically, the post-hearing brief asks the Commission to 1) reactive Certification No. 260950 (as opposed to the eligible list); 2) order the City to offer the position of Deputy Lieutenant (presumed to mean Deputy Fire Chief) to the original candidates, in the order of Certification (in which McDonald's name appears first). In the alternative, McDonald seeks to move forward with his 2007 bypass appeal.

66. On March 26, 2010, Carmody withdrew his bypass appeal with the Commission.

67. In June 2010, the City will conduct an Assessment Center examination for the position of permanent Fire Chief. Any decision regarding an examination for Deputy Fire Chief will depend on whether a vacancy develops in the event that Carritte is promoted from permanent Deputy Fire Chief to permanent Fire Chief.

#### *APPELLANT McDONALD'S ARGUMENT IN FAVOR OF 310 RELIEF*

McDonald's argument in favor of 310 Relief appears to be two-fold. First, McDonald argues that the Commission should show deference to the parties' negotiated agreement that "voluntarily ends a hard-fought battle". More substantively, McDonald argues that he is an aggrieved person and that the relief sought "restores the aggrieved parties to where they would have been had the City complied with the civil service laws." Should



the Commission not grant the 310 Relief requested by McDonald, he argues that he should be able to move forward with his 2007 bypass appeal because “he remains an Appellant who was aggrieved by [HRD’s] decision to permit the City to appoint a candidate below his name from Certification number 260950.”

### *CONCLUSION*

Albeit a long and protracted process, the facts regarding these two appeals are straightforward. In 2007, the City promoted the third-ranked candidate on a civil service Certification to the position of Deputy Fire Chief. In doing so, they bypassed the first-ranked (Carmody) and second-ranked (McDonald) candidates.

An arbitrator subsequently determined that the selection process was arbitrary and capricious and was designed to reach a pre-determined result. The arbitrator granted the parties relief and ordered the process to be re-done. Ultimately, the process was concluded with the selection of the first-ranked candidate (Carmody) being selected as permanent Deputy Fire Chief in 2010. As Carmody was the first-ranked candidate, no candidates were bypassed. Carmody has now withdrawn his bypass appeal with the Commission and there is currently no vacancy for the position of permanent Deputy Fire Chief in Lynn.

McDonald, who was not bypassed as part of the new selection process ordered by the Arbitrator, argues that, as a result of this protracted process, he is an aggrieved person who should be granted “310 Relief” by the Commission. The exact relief sought is unclear given the inconsistency between the proposed settlement agreement and McDonald’s post-hearing brief. For the sake of this decision, I rely on the language

contained in the settlement agreement and the clarifications made as part of the digitally-recorded status conference.

The Commission regularly encourages parties to reach mutual agreements as an alternative to a full evidentiary hearing. However, when those settlement agreements require the Commission to exercise its extraordinary “310 Relief” powers, it is incumbent upon the Commission to determine if such relief is fair, reasonable, based on basic merit principles and warranted under the facts presented. See Geary v. Salem, 19 MCSR 435, 400 (2006) (Commission refused to implement settlement agreement and grant 310 relief because it was unclear how the Appellant had been aggrieved); See also Bulger v. Quincy, 21 MCSR 189, 190 (2008) (Commission refused to implement settlement agreement and grant 310 relief because relief request would be other candidates at an unfair disadvantage); See also Cutillo and Kelley v. Malden (CSC Case Nos. E-09-254 and E-09-255) (2010) (Commission refused to implement part of settlement agreement and grant 310 relief to Kelley as he had not shown he was an aggrieved person).

Here, the Commission appropriately convened a status conference to determine what impact the requested 310 Relief would have on all stakeholders, including those not referenced in the settlement agreement. It was quickly apparent that individuals not referenced in the settlement agreement, including several Captains in attendance, would be potentially impacted by the relief requested. Further, as part of the Commission’s further review, the parties agreed that parts of the agreement, even if approved by the Commission, needed modification. Finally, also as a result of the Commission’s further review, it was agreed that several parts of the agreement did not require any action by the Commission. For example, appointing Carmody as permanent Deputy Fire Chief

required no action by the Commission. Thus, without any agreement or relief from the Commission, Carmody has now been appointed to that position and has withdrawn his appeal to the Commission. These examples illustrate McDonald's failed logic that the Commission should grant 310 relief solely because it is mutually requested by the parties. Such action – or inaction – by the Commission would be an abdication of our core duties and responsibilities.

McDonald's second argument for granting 310 relief is that the relief sought restores McDonald to where he would have been had the City complied with the civil service laws. In his post-hearing brief, McDonald offers scant support for this argument. While not stated in the brief, it appears that McDonald is asking the Commission to accept the following set of assumptions:

- If Carmody, instead of Carritte, had been appointed as permanent Deputy Fire Chief on January 10, 2007, Carmody would have eventually been promoted to the position of Fire Chief, assuming he took and passed the Chief's examination *and* scored among the three highest candidates after the retirement of Chief Higgins in January 2008 *and* the City decided not to bypass him.
- As a result of Carmody's hypothetical promotion to Chief, a vacancy would have been created in the position of Deputy Fire Chief and this vacancy would have occurred before the expiration of the Deputy Fire Chief eligible list.

Reality must intrude here. First, the permanent Chief's position has yet to even be filled and there is no guarantee that Carmody will be among the top three scoring candidates to fill the position, let alone be ranked first. Further, even if the Commission were to engage in the series of speculative and retroactive hypotheticals proposed by

McDonald, there is no assurance, particularly given the fact that civil service examinations are only administered annually, that the City would have been able to fill a hypothetical permanent Deputy Fire Chief vacancy prior to the expiration of the eligible list upon which McDonald's name appeared. Even if it were possible, this type of speculative harm is far from the type of actual harm that Appellants must show to be deemed aggrieved.

The applicable jurisdictional requirements of Chapter 31 are clear. Section 2(b) requires that a petitioner show that he is a person who has been "aggrieved" by a "decision, action, or failure to act by the administrator ..." and requires that he show that his rights "were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status." Further, the statute clearly and explicitly expounds, "No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status .... Any person appealing a decision, action or failure to act of the administrator shall file a copy of the allegations ... with the administrator ... Said allegations shall clearly state the basis of the aggrieved person's appeal, and make specific references to the provisions of this chapter or the rules of the department or basic merit principles promulgated thereunder which are alleged to have been violated, together with an explanation of how the person has been harmed." (emphasis added)

McDonald is not a person "aggrieved" because the statute requires that aggrieved persons

show that the person has already “been harmed.” Using the past tense, it is clear that the Legislature intended the statute to apply in cases where the harm has already occurred. Indeed, the Legislature appears to have determined that this principle is so important that it repeated and expanded upon it in the same section, stating that the appeal must show how the person’s rights had already been “abridged, denied, or prejudiced in such a manner as to cause actual harm.” It is not enough to speculate that he may be harmed at some time in the future.

Further, a candidate whose name is not reached for promotion or appointment has no recourse but to take the next examination. See Callanan v. Personnel Adm’r for the Commonwealth, 400 Mass 597, 601 (1987). (“The system the Legislature created, in which eligibility lists expire and are replaced by new lists, involves the risk that positions might become available immediately after the expiration of an old list or immediately before the establishment of a new list. The overall pattern of the statute does not justify expectations that certain positions will become available during the period of a single list.”)

Finally, the relief as proposed in Paragraphs 8 and 9, would prevent the City from even having a new examination for the position of Deputy Fire Chief (assuming a vacancy occurs), thus excluding several Captains, some of whom attended the status conference, from being fairly considered. This is the same type of inappropriate, result-driven decision-making process that McDonald and Carmody argued against in their initial appeals. A change in administrations does not alter the need to adhere to a fair, open, merit-based review process that is not tainted by a perception that the outcome is a foregone conclusion. Thus, Paragraphs 8 and 9 of the proposed agreement, should not be

allowed. If a future vacancy occurs in the position of permanent Deputy Fire Chief, the City should comply with the normal provisions of the civil service law and rules by calling for an examination and establishing a new eligible list from which a Certification would be requisitioned. The City will then be able to consider the three (3) top-ranked candidates on the Certification willing to accept appointment.

The Appellant's alternative argument, that his bypass appeal should move forward if the Commission does not grant the relief sought here, also fails. As a result of the new review process, the City chose Carmody, the first-ranked candidate. Thus, there is no bypass and McDonald has no standing to bring a bypass appeal before the Commission.

This decision results in paragraphs 8 and 9 of the proposed settlement agreement being denied and all other paragraphs being deemed moot or unnecessary with the exception of paragraph 7, regarding which individuals are eligible to sit for an anticipated Chief's examination. After a careful review of the hearing, it does not appear that any of the individuals referenced in Paragraph 7 would need an order from the Commission to be deemed eligible to sit for the Chief's examination. If this is not the case, and any of the individuals listed in Paragraph 7 believe they are being wrongfully deemed ineligible to sit for the Chief's examination, they may file a motion to reconsider this decision, which is to be posted in the City Clerk's office and conspicuously in the Fire Department headquarters.

For all of the above reasons, the petition for 310 Relief is denied and McDonald's appeal under Docket No. G2-07-66 is dismissed. Further, the Commission's

investigation of the overall review and selection process, under Docket No. I-09-412, is hereby closed as no further action is warranted at this time.

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Christopher C. Bowman  
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on April 8, 2010.

A true Copy. Attest:

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Commissioner  
Civil Service Commission

Attachment

Notice to:  
David F. Grunebaum, Esq. (for Appointing Authority)  
Robert H. Clewell, Esq. (for Appellant Carmody)  
Timothy Belcher, Esq. (for Appellant McDonald)  
Martha O'Connor, Esq. (HRD)

The City is ordered to post this decision in the City Clerk's Office and the Fire Department headquarters.