

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

### CIVIL SERVICE COMMISSION

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

RE:

JOINT REQUEST FOR RELIEF UNDER CHAPTER 310 OF THE ACTS OF 1993 BY  
MICHAEL J. WYNN & THE CITY OF PITTSFIELD

E-16-111

### DECISION

#### *Procedural Background*

The City of Pittsfield (City) and Michael J. Wynn, the City's Provisional Police Chief (Mr. Wynn), have filed a joint request for relief, asking the Civil Service Commission (Commission), using its authority under Chapter 310 of Acts of 1993, to grant relief that would result in Chief Wynn being designated as the City's permanent Police Chief, with a retroactive civil service seniority date.

The joint request is opposed by certain members of the local police union, including Lt. Jeffrey Bradford (Mr. Bradford), for whom I have granted Intervenor status; and Lt. Michael Grady (Mr. Grady), for whom I have granted Participant Status.

The City's petition, which was later amended to include Chief Wynn as a joint petitioner, was filed with the Commission on June 15, 2016. I held a pre-hearing conference in Pittsfield at the Pittsfield City Hall on August 2, 2016, which was attended by Mr. Wynn, counsel for the City, the City's Mayor; the City's Personnel Director, Mr. Bradford, Mr. Grady, counsel for Messrs. Bradford and Brady, counsel for the state's Human Resources Division and an HRD representative (both via phone), and other members of the local police union.

Both as part of that public pre-hearing, which was digitally recorded, and via a Procedural Order issued shortly after the pre-hearing, I issued a series of orders which included allowing the City, the Intervenor and Participant to submit briefs, which I have now received.

#### *Factual Background*

Based on the statements at the pre-hearing, the documents received; and the briefs submitted by the parties, I find the following to be undisputed, unless otherwise noted:

1. The command staff of the City's Police Department consists of a Police Chief, three (3) Captains and five (5) Lieutenants.

2. On October 30, 1995, Mr. Wynn was appointed by the City as a permanent, full-time Police Officer.
3. On February 10, 2005, Mr. Wynn was promoted to the position of permanent, full-time Police Lieutenant.
4. As of December 1, 2007, the position of Police Chief in Pittsfield was vacant due to the retirement of the City's former Police Chief. There was no eligible list in place for Police Chief at that time.
5. Pursuant to G.L. c. 31, § 15, an appointing authority may make a provisional promotion of a civil service employee in one title to the next higher title if there is no eligible list, or if the list contains the names of less than three persons eligible for and willing to accept appointment (a "short list"). If there is no employee in the next lower title who is qualified for and willing to accept such a provisional promotion, HRD may authorize a provisional promotion of a civil service employee without regard to title upon sound and sufficient reasons that are satisfactory to HRD. Said provisional promotion may not be continued upon the establishment of an eligible list of three persons eligible for and willing to accept promotion to such position.
6. On December 1, 2007, Mr. Wynn, who then held the permanent civil service title of Police Lieutenant, was designated as "Captain in Charge" of the Police Department.
7. On January 23, 2008, Mr. Wynn was promoted to the position of permanent, full-time Police Captain.
8. On January 22, 2009, Mr. Wynn was provisionally promoted to the position of Police Chief. There was no eligible list for Police Chief in Pittsfield at the time of this provisional promotion.
9. On June 25, 2009, Mr. Wynn and Mr. Bradford took and passed the civil service examination for Police Chief.
10. On August 15, 2009, HRD established an eligible list of candidates for Pittsfield Police Chief. Mr. Wynn was ranked first and Mr. Bradford was ranked second. This was considered a "short list" as it contained only two (2) names of eligible candidates.
11. In September 2009, HRD delegated various responsibilities related to the appointment and promotion process to appointing authorities, including the responsibility of creating Certifications from which it could make permanent and/or temporary promotions.
12. On May 12, 2010, HRD sent the City the eligible list for Police Chief, with a reminder that, since delegation, it is the responsibility of the City to create any Certifications from which it could make promotions.

13. The eligible list for Police Chief in Pittsfield expired on June 1, 2012. Under two previous administrations in Pittsfield, the appointing authority (Mayor) took no action to make a permanent promotion to Police Chief and/or request a civil service examination to establish a new eligible list. During that time, the City considered removing the position of Police Chief from civil service. Mr. Wynn has continued to serve as the City's Provisional Police Chief from January 22, 2009 to the present.
14. In January 2016, a new Mayor was elected, representing the third Appointing Authority under whom Mr. Wynn would be serving as provisional Police Chief. The City acknowledges that Mr. Wynn's fiancé was a member of the new Mayor's campaign organization.
15. On June 15, 2016, the City submitted a request, later amended and submitted as a joint request with Chief Wynn, asking the Civil Service Commission (Commission), using its authority under Chapter 310 of Acts of 1993, to grant relief that would result in Chief Wynn being designated as the City's permanent Police Chief, with a retroactive civil service seniority date of January 22, 2009.

### *Analysis*

There are multiple reasons that this joint request should be denied.

First, the request is not timely.

Mr. Wynn, when he was a permanent lieutenant, first assumed the de-facto position of Police Chief on December 1, 2007, when he was designated as the "Captain in Charge" of the City's Police Department. Setting aside whether this 2007 designation violated years of Commission and judicial decisions regarding illegal, acting "out-of-grade" appointments, it occurred nine (9) years ago. After obtaining permanency in the civil service title of Captain, he was then officially provisionally promoted to the position of Police Chief in 2009. If Mr. Wynn believed he was harmed by the City's failure to consider him for promotion to the position of permanent Police Chief, he has had at least seven (7) years to file an appeal with the Commission. He failed to do so until joining the City's request until 2016. Mr. Wynn stated at the pre-hearing conference that he contacted HRD sometime in 2009; inquired about filing an appeal; and was advised that he could file an appeal, but there would be no remedy available to him. Even accepting that this conversation occurred, it only establishes that, as early as 2009, Mr. Wynn believed he was aggrieved and chose not to file an appeal with the Commission.

Any person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or Agency rule. In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party. See 801 CMR 1.01(6)(b) (adopted by the Commission, September 2, 1999.) The Commission embraces the principle that a party coming before the Commission to seek equitable relief, as Mr. Wynn does here, must exercise reasonable diligence in pursuit of that relief. Accordingly, where a person has had actual notice – whether in writing or not – of an action or inaction by HRD or an appointing authority that the

person reasonably knew or should have known was a violation of civil service law or rules, that person cannot sit on those rights indefinitely. Thus, it is a fair requirement that once such a person discovers that he or she has been harmed, he had an obligation to promptly file a claim of appeal, or lose the right to press it. See Pugsley v. City of Boston, 24 MCSR 544 (2011), citing White v. Peabody Constr. Co., Inc., 286 Mass 121 (1980; Day v. Kerkorian, 72 Mass.App.Ct. 1 (2008).

Second, even if the request was timely, it could not be shown that the City violated the civil service law by failing to promote Mr. Wynn as the permanent Police Chief. As explicitly stated in Section 15, an appointing authority may make a provisional promotion when there is no eligible list or when there is a “short list”, which has been the case during the entire period that Mr. Wynn has served as Provisional Police Chief. That turns to the issue of whether the City was required to call for a new civil service examination for Police Chief. Although the civil service law only establishes this requirement regarding provisional *appointments*, the Commission, as recently as 2015, has ruled that appointing authorities making provisional *promotions* to public safety positions must, forthwith, call for an examination for said position. (See Mograss et al v. Department of Correction, 28 MCSR 261 (2015)). In short, had Mr. Wynn filed a timely appeal, the relief likely would have been limited to the question of whether the City should be required to call for an examination for Police Chief, not whether the City should permanently appoint Mr. Wynn as Police Chief, which it was not required to do under the statute.

Third, and more globally, given that the relief, if any, would have been limited to ordering the City to call for a Police Chief examination, the potentially aggrieved person here is not limited to Mr. Wynn, but, rather, any person eligible to sit for the examination.

Fourth, the Commission’s core mission is to ensure fair and impartial treatment of all civil service employees and candidates for civil service positions, with decisions made free of any personal or political bias. I did not learn until after the pre-hearing conference regarding this matter that Mr. Wynn’s fiancé was a member of the campaign organization of the City’s current Mayor, who is jointly requesting the relief here. While there is no evidence to show that the City’s decision to seek the retroactive appointment of Mr. Wynn as the permanent Police Chief is motivated by undisclosed personal or political reasons, I am concerned about the appearance it would create.

### *Conclusion*

For all of the above reasons, the joint request for the Commission to grant relief that would ensure the retroactive promotion of Mr. Wynn as the permanent Police Chief is hereby **denied**.

Further, to ensure clarity, and to avoid the need for further appeals and/or petitions by other persons, there is an anticipation that the City will, forthwith, move forward with calling for a civil service examination for Police Chief.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 8, 2016.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice:

Fernand Dupere, Esq. (for City of Pittsfield)

Chief Michael Wynn

Michael Clancy, Esq. (for Participant and Intervenor)

Mark Detwiler, Esq. (HRD)