

**COMMONWEALTH OF MASSACHUSETTS**

CIVIL SERVICE COMMISSION  
One Ashburton Place, Room 503  
Boston, MA 02108  
(617) 979-1900

TRACY BLANCHETTE,  
Appellant

v.

G2-19-050

CITY OF METHUEN,  
Respondent,  
*and*

MATTHEW TULLEY,  
Intervenor

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Cynthia A. Ittleman

**SUMMARY OF DECISION**

In order to rank 13 candidates for promotion to Fire Captain, the City of Methuen chose to create an eligible list using the results of a daylong Assessment Center examination that included four separate written and oral technical assessment components plus a structured interview component. After Tracy Blanchette, one of only three female firefighters in the Fire Department, appeared in second place (ahead of two anticipated promotions) based on the overall Assessment Center scores, her employer relied on a deeply flawed, inherently biased *second* interview, led by the Fire Chief, to bypass Firefighter Blanchette in favor of a male candidate who had for years previously employed the Fire Chief in his private side business and who enjoyed close relations

with several other high-ranking officials who were looking out for his interests. Moreover, Firefighter Blanchette, a college-educated 26-year veteran female firefighter with an unblemished personnel record, lauded statewide as a former firefighter of the year, whose exemplary service includes years of experience as a trainer, as opposed to *none* by the selected male candidate, was eminently qualified for this administrative Fire Captain position, whose duties include organizing many of the training activities of the Fire Department. Due to the City's failure to provide valid reasons for bypassing Firefighter Blanchette and numerous indications that the City's stated bypass reason was pretextual (covering up the favoritism working against her), the Commission is allowing Blanchette's appeal. Because any future vacancies in the Fire Captain position prior to Blanchette's anticipated retirement date are doubtful, the Commission will eschew the more traditional bypass remedy and instead is prepared to order that Firefighter Blanchette be promoted to Fire Captain retroactive to the date of her impermissible bypass and, further, that she be made whole for any lost wages or other benefits. In the alternative, as specified below, the City may elect to create a comparable civil service supervisory position for Blanchette, so long as she receives compensation equal to what she would have received had she been promoted to Captain on February 4, 2019, and is compensated equivalently going forward.

## DECISION

On March 5, 2019, Methuen firefighter Tracy Blanchette (Blanchette) appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 2(b), contesting the decision of the City of Methuen (City) to bypass her for promotion to Captain within the Methuen Fire Department (MFD). On April 22, 2019, I held a pre-hearing conference at the Mercier Center in Lowell, followed by a full hearing in Lowell on June 10, 2019; and then three further hearing dates in Boston on August 22, 2019, and September 18 and 20, 2019.<sup>1</sup> The full hearing was digitally recorded and both parties received a CD of the proceedings.<sup>2</sup> On December 10, 2019, the parties submitted post-hearing briefs. For the reasons set forth herein, the Appellant's appeal has been allowed and a final remedial order shall follow.

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

<sup>2</sup> A stenographic transcript of the digital recordings has been prepared and furnished to the Commission. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with the original transcripts of all on-the-record hearing proceedings to the extent that such party wishes to challenge this Decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

## FINDINGS OF FACT

A total of 42 exhibits were entered into evidence at the hearing.<sup>3</sup> Based on the documents submitted and the testimony of the following witnesses:<sup>4</sup>

### *For the Respondent:*

- Sandra Cunha, retired MFD employee (“Cunha”)
- John Timothy Sheehy, MFD Fire Chief (“Sheehy”)
- Phil DeCologero, former Chief of Staff to former Mayor Zanni (“DeCologero”)
- William Barry, MFD Assistant Chief (“W. Barry”)
- Jill Stackelin, City of Methuen Human Resources employee (“Stackelin”)
- Daniel Donahue, MFD Deputy Chief (“Donahue”)
- Susan Vallera, MFD acting Fire Lieutenant (“Vallera”)
- Anne Randazzo, Director of Human Resources and Assistant City Solicitor, City of Methuen (“Randazzo”)

### *For the Appellant:*

- Tracy Blanchette, MFD Firefighter (“Blanchette”)

### *For the Intervenor:*

- Kevin Barry, MFD Firefighter and union president (“K. Barry”)
- Matthew Tulley, MFD Fire Captain (“Tulley”)

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences drawn therefrom, a preponderance of the evidence establishes the following findings of fact:

### Background Facts

1. The City of Methuen (“City”) is a municipality in northeastern Massachusetts with slightly more than 53,000 residents. [Administrative Notice of 2020 U.S. census data.]
2. As of 2019, its fire department, the MFD, had one chief and one assistant chief, four deputy chiefs, two captains, 16 lieutenants, and 77 privates. A private, also known (and referred to herein)

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<sup>3</sup> The Appellant submitted 17 exhibits (hereinafter cited as “App. Ex. X”), the Respondent submitted 23 exhibits (“Resp. Ex. Y”), and Intervenor Matthew Tulley submitted two exhibits (“Int. Ex. Z”).

<sup>4</sup> Job titles associated with the above witnesses were accurate as of the dates of hearing.

as Firefighter, is the lowest rank in the Methuen Fire Department. All but the Chief and Assistant Chief are unionized employees. [Sheehy testimony.]

3. The two Captain positions are administrative “day staff” positions. They work closely with the Fire Chief *inter alia* on budgeting, IT and other technology, training, personnel development, internal and fire prevention inspections, public education, code enforcement, plan review, and fire/arson investigations. [Resp. Exh. 9; Sheehy testimony; W. Barry testimony.]

4. Most candidates seeking promotion to an MFD captain position come from the lieutenant rank. Firefighters, however, are eligible to compete for promotion to captain when there are not enough lieutenants interested in taking a promotional exam. [Sheehy testimony.]

5. On July 1, 2015, the City promoted Sheehy to the position of interim Fire Chief and then he was made permanent Fire Chief in September of 2015. He was first hired by the MFD, along with Blanchette, in 1993 and previously held the ranks of lieutenant and captain prior to becoming the Fire Chief. He also served as president of the Methuen firefighters union from 2004-2015, and district vice president of the statewide firefighters’ association (IAFF District 4) from 2012-2015. [Tr1@108 and Tr2@123-124<sup>5</sup> (Sheehy testimony)].

6. Also in July of 2015, the City promoted William Barry to the position of Assistant Fire Chief. He has 32 years of tenure with the MFD and held the ranks of lieutenant, captain, and deputy chief prior to becoming Assistant Fire Chief. [W. Barry testimony.]

#### Background on Blanchette

7. Appellant, Tracy Blanchette, a lifelong Methuen resident, is an MFD Firefighter who comes from a firefighting family. Her husband is a veteran firefighter in the neighboring city of Lawrence and her father is a retired Methuen firefighter. [Tr3@312 (Blanchette testimony)].

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<sup>5</sup> References to the hearing transcripts will be denoted as such: TrX@Y (transcript volume X at page Y).

8. Blanchette earned a Fire Science degree from North Shore Community College and a second associates degree in liberal arts. [App. Exh. 1.]

9. After serving for one month as a reserve firefighter, the City appointed Blanchette as a permanent MFD Firefighter on November 16, 1993, approximately twenty-six (26) years before the last day of this hearing. [Id.]

10. When appointed in 1993, Blanchette was the city's first-ever female firefighter, a milestone reported on by the *Eagle Tribune* newspaper. Subsequently, in 2003, she was the first (and remains the only) female firefighter in the City ever to give birth, another milestone reported in the same newspaper. [Id.]

11. Blanchette has an unblemished employment record and has never been subject to formal discipline.<sup>6</sup> [Id.]

12. Blanchette's service has brought significant credit to the City. Earlier in her career, she was personally recruited to become an instructor at the Massachusetts Firefighting Academy in Stow, MA, where, after a lengthy training and certification process, she taught for five years.<sup>7</sup> She is one of only two such instructors in the entire MFD, the other of whom is the Assistant Fire Chief, W. Barry. [Tr3@330-334 (Blanchette).]

13. Blanchette holds several other certifications, including Fire Fighter I/II and EMT. Among such advanced certifications is that of Fire Officer I, a supervisory/management certification

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<sup>6</sup> In his notes in support of the City's bypass decision, Asst. Chief Barry wrote that Appellant has received formal letters of discipline, which are in her personnel file. [Resp. Exh. 13.] That statement is false, as Appellant has never received such discipline, nor does her file contain such letters. See App. Exh. 1 and Tr3@349-350 (Blanchette testimony). Chief Sheehy confirmed this. [Tr2@26 (Sheehy testimony).]

<sup>7</sup> Blanchette earned Fire Instructor I *and* II certifications over 20 years ago. [App. Exh. 1; Tr4@55 (Blanchette).] She began serving as an Instructor at the Massachusetts Firefighting Academy on July 1, 1996, instructing in five recruit training classes per year. [App. Exh. 11.] By contrast, Intervenor Matthew Tulley, promoted instead of Blanchette, did not earn his Fire Instructor I certification until *after* the City bypassed Blanchette for promotion. [Resp. Exh. 22 (Tulley certificate dated April 9, 2019).]

which, at the time of promotion, was not possessed by Intervenor Matthew Tulley—who nonetheless was elevated over Blanchette. [Id.; Tr3@344-347.]

14. Blanchette was named Firefighter of the Year by both state and local organizations for her role in the historic Malden Mills fire in Methuen, a fire event acknowledged by all witnesses as the largest ever to occur in that area. Blanchette’s efforts in rendering aid to dozens of severely burned victims were recognized by the United States Fire Administration as reflective of a new national model for responding to mass casualty events.<sup>8</sup> Blanchette was subsequently invited to speak at the State Fire Academy commencement, and both she and the City received letters of gratitude from state officials applauding her efforts. [Tr3@336-341 (Blanchette testimony); App. Exhs. 3, 13, 14 and 15.]

15. Blanchette’s “extracurricular” contributions to the Methuen Fire Department included: coordinating the adult’s and children’s holiday party for several years, speaking on behalf of the department at numerous community events, participating in High School career days, and making herself available for interviews by media, high school, and college students relative to her being a woman working in the fire service. Recently, she also volunteered to serve as the Fire Department’s liaison to the city’s Health and Wellness committee. [Tr3@ 344-348.]

#### Background on Intervenor Tulley

16. Tulley has been employed by the MFD since July 2, 1996, or for approximately 23 years as of the start of the Commission hearing. He was on the Reserve MFD force for one year prior

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<sup>8</sup> Despite admitting that the Malden Mills fire required the response of some 58 different fire departments, Chief Sheehy consistently refused to acknowledge Blanchette’s efforts, and downplayed the entire event, saying multiple times that it was nothing more than a “medical call” (Tr2@247), or that “she did a pretty good job probably transporting a burn victim” (Tr2@72-73); when asked if he was aware Blanchette received the award from the State Fire Academy, he responded “[i]f you say so” (Tr2@73), and added that he also has the award and “it means nothing to me,” and “well, it’s 20 minutes of a 25-year career, so.” (Tr2@73-74). See App. Exhs. 13, 14 and 15 for a description of the event and the credit given to Appellant.

to his permanent appointment. He has an unblemished disciplinary record. [Resp. Exh. 22.]

17. Tulley has a Bachelor of Science in Sport Management from UMass Amherst and a Fire Science degree from North Shore Community College. [Id.] He also holds several professional certifications, including Fire Fighter I/II and EMT. [Id.]

18. Tulley has been a licensed electrician in MA and NH since 1990. [Tulley testimony; Resp. Exh. 8.] Indeed, he has operated a successful electrical service business the entire time he has been employed as a firefighter. [Tr2@27 (Sheehy).] When his son joined the MFD in approximately 2016, he and his son bid onto the same shift, allowing both of them to have to same day off, and allowing them both to work in Tulley's electrical business together. [Tr3@195-197 (Donahue testimony).] During his time as a firefighter, Tulley has done private electrical work as a master electrician in five states. [Tr4@128 (Tulley testimony).]

19. Tulley's "extracurricular activities" largely have been directed toward side work, including finishing his electrician apprenticeship and attending many night-school classes to obtain his master electrician's license. [Tr4@128-129 (Tulley).] No witness testified as to any awards or fire department recognition bestowed on Tulley. Unlike Blanchette, Tulley was not Fire Officer I certified (a management certification) prior to his promotion to Captain. [Id. @124.]

#### Tulley's Close Relationships with Individuals in a Position to Advance Careers

20. Tulley is related by marriage to Methuen City Councilor James McCarty (who voted in the affirmative on Tulley's promotion to Captain): Tulley's brother is married to McCarty's mother. [Tr2@28 (Sheehy testimony).] Former long-time Methuen Mayor and City Councilor William Manzi is one of Tulley's cousins. [Id.@30.]<sup>9</sup>

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<sup>9</sup> During his direct examination on the first day of testimony, I asked Chief Sheehy to name Methuen firefighters who had family relations working for the City; Sheehy recited only that Matthew Tulley, the intervenor, was related by marriage to City Councilor James McCarty. (Question: Ok, anybody else?"

21. Tulley is very close friends with Deputy Chief Daniel Donahue, who testified as a witness for the City.<sup>10</sup> [Tr3@193 (Donahue).] Donahue stated that he could rely on Tulley for anything. [Id.@194.] Donahue wrote a letter of recommendation for Tulley for the captain's position and told Blanchette following the City's bypass decision that he had wanted Tulley to get the promotion over her ("what do you expect, he's one of my best friends").<sup>11</sup> [Tr3@371 (Blanchette).]

22. Chief Sheehy and Tulley have known each other since they were teenagers; they did not attend the same schools, however, and reportedly were not "close friends" at that time. They began socializing outside of work after Tulley was hired by the MFD. Tulley and Sheehy served in the same firehouse on the same work group for some eight to ten years. [Tr1@224-226 (Sheehy testimony); Tr4@133-135 (Tulley testimony).]

23. Tulley's relationship with Chief Sheehy has been quite close over the years, right up through this hearing. During his testimony, Tulley referred to Chief Sheehy as "Timmy."

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Answer: No.). [Tr1@227 (Sheehy).] Sheehy later admitted that he is well aware that intervenor Matthew Tulley's son, Zach Tulley, is also a Methuen firefighter. [Tr2@28.] Under cross-examination on Day 1 of this hearing, Sheehy admitted that the intervenor's brother, Dan Tulley, is also a City employee. [Tr1@263.] On Day 2, Sheehy admitted that he knew that another of intervenor's brothers, John Tulley, is also a Methuen city employee. [Tr2@28.] Finally, it was not until Day 4 that Sheehy acknowledged, again only under cross-examination, that Deputy Fire Chief Richard Aziz is the brother of then City Councilor and Mayoral candidate Jennifer Kannan. [Tr4@178.] Sheehy held up to me his promotion of Aziz, and the resulting bypass of a higher-scoring male candidate, as an example that he treats males and females equally vis-à-vis promotional bypasses. Sheehy, in his example, failed to mention, however, that Aziz, his chosen candidate, was the brother of a sitting City Councilor when selected over David Toto; nor did he mention that Toto was then soon after promoted himself. Sheehy gave inconsistent reasons for bypassing Toto; on Day 1, he stated that the sole reason for bypass was that Toto had less seniority and supervisory experience than Aziz (Tr1@252). But during his rebuttal testimony on Day 4, Sheehy was certain that the reason for bypass was Toto's allegedly poor interview. [Tr4@167.] The City offered no evidence, including required written notices of bypass, to support Chief Sheehy's varying assertions.

<sup>10</sup> Donahue started working for the MFD one year before Tulley and two years after Blanchette was hired. He was promoted to Lieutenant a mere seven-and-a-half years later. [Tr3@168 (Donahue).]

<sup>11</sup> Donahue once worked for Tulley in the latter's electrician business. [Tr3@197 (Donahue).] Evidence suggests that Donahue recruited Tulley onto his shift in part so that they both would have the same work schedules, including the same holiday schedule and other common days off. [Tr3@195-197 (Donahue).]

[Tr4@150.] Tulley testified that on Day 4 of the hearing, he drove into Boston together with both Chief Sheehy and Assistant Chief Barry. [Tr4@158.]<sup>12</sup> Additionally, Tulley was the one who informally reported to Sheehy the results of the firefighter union's internal vote to table the Chief's request to adopt the assessment center (more on that *infra*) and Sheehy reportedly convinced Tulley to divulge the name of the union member who offered the motion to table. [Tr3@353 (Blanchette); Tr4@151 (Tulley).] Subsequently, Chief Sheehy likely discussed Blanchette's post-bypass discrimination complaint with Tulley. [Tr2@98 (Sheehy) ("I may have told him about it.")]

24. Most significantly, prior to becoming Chief, Sheehy *worked for* Tulley for up to a decade at his electrician business (as did several other male members of the MFD). "[S]ometimes [Sheehy worked for Tulley] a couple of times a week." [Tr1@261 (Sheehy).] Tulley testified that Chief Sheehy started working for him around 2000 or sometime early in that decade. [Tr4@135.] Chief Sheehy believes he last worked for Tulley around 2012 when he was promoted to Captain. [Tr2@31 (Sheehy testimony).]

#### Facts Leading Up to the 2017 Captain Candidates' Assessment Center

25. Sometime in March of 2016, Sheehy approached the MFD firefighters' union to seek its approval to use an assessment center for promotions to the rank of deputy chief. A vacancy in the rank of deputy chief was imminent, HRD was not holding a promotional exam for the rank of deputy for another year, and Sheehy did not want to wait that long to fill the vacancy of such an important position within the fire department. [Sheehy testimony.]

26. That same month, Sheehy attended a union meeting to discuss his proposal for an

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<sup>12</sup> When asked whom he drove to his promotional celebration party, Tulley stated "it's definitely possible" he picked up Chief Sheehy. [Tr4@159.]

assessment center for the rank of deputy chief. During the meeting, Chief Sheehy did not give any notice that there would be a change to previously *pro forma* post-assessment interview practices,<sup>13</sup> and he said nothing about the implementation of a technical, scored interview process. [Tr3@352 (Blanchette).] Sheehy left the meeting and the membership, including Blanchette, discussed the proposal. The membership voted to table the issue until their next meeting and to authorize the Union executive board to ask Sheehy whether an assessment center could be used for *all* superior officer ranks – deputy chief, captain, and lieutenant. [Tr4@59-63 (Blanchette testimony); Tr4@90-91 (K. Barry testimony).]

27. After meeting with the union’s executive board on its counterproposal, Sheehy agreed as to the deputy chief and captain ranks only. [K. Barry testimony.]

28. In April of 2016, at a special Union meeting, the members approved an assessment center for promotions to deputy chief and captain for a three-year trial period. [K. Barry testimony.]

29. The assessment center for deputy chief was conducted and completed in the Spring of 2017, resulting in an eligible list. The City also used an internal interview process in the Spring of 2017 for those deputy chief candidates certified from the eligible list. The City promoted from that same eligible list in 2019—but, in doing so, conducted *new* interviews. [Sheehy testimony.]

#### How the Captain Candidates’ Assessment Center Unfolded

30. On June 28, 2017, Mayor Stephen Zanni (“Mayor Zanni”), then the City’s appointing authority, asked HRD to open the upcoming captain’s promotional process to the ranks of both lieutenant and private.<sup>14</sup> HRD approved this request. [Resp. Exh. 19.]

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<sup>13</sup> Retired MFD Lieutenant Sandra Cunha testified that, prior to her promotion from Firefighter, she had been subjected to “a very, very brief interview.” [Tr1@85.]

<sup>14</sup> Section 59 of G.L. c. 31 requires at least four candidates to register to take any fire department promotional examination. Only two incumbent lieutenants had signed up for the MFD Captain’s exam. Ultimately, nine other privates, besides Blanchette and Tulley, joined those two in participating in the MFD Captain’s promotional assessment center examination. [Resp. Exh. 3] Both Blanchette and Tulley had a

31. In September of 2017, Integrity Testing met with candidates interested in taking the captain's assessment center exam and provided them with an orientation package.<sup>15</sup> [App. Exh. 8.]

32. The captain's assessment center was held over the course of seven or more hours on September 7, 2017, and consisted of five exercises: (1) a Written Knowledge Based Test; (2) an In-Basket Exercise; (3) a Critical Incident Response – Oral Presentation; (4) a Role Play Exercise; and (5) a Structured Interview Exercise. Candidates were identified by randomly-assigned numbers and not their names, to ensure objectivity. All assessors were public safety executives from other communities. [App. Exh. 8; see also Tr3@358-365 (Blanchette testimony).]

33. The written Knowledge Based Test consisted of fifty (50) multiple choice questions based upon the MFD Standard Operating Guide (“SOG”) and MFD Rules and Regulations, provided to the candidates by the MFD in advance of the test. The In-Basket exercise was comprised of candidates receiving a pile of assorted correspondence and having to prioritize and describe how each item should be handled by an MFD captain. The Critical Incident Response exercise required candidates to review three slides relevant to the MFD and provide an opinion as to how the issues raised on the slides should be addressed. There was also a Role Play exercise that required candidates to review a set of general facts and then give a presentation on how such facts should

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prior history of competing unsuccessfully in superior officer examinations. Before participating in the Captain's assessment center in September 2017, Tulley had failed the Lieutenant's exam and, indeed, had never before passed a superior officer examination. [Tr4@159 (Tulley testimony)]. Within her first ten years at the MFD (or by 2003), Blanchette had taken the Lieutenant promotional examination two or three times but never achieved a passing score. These exams were multiple choice (or fill in the “bubble”) exams. Blanchette did not take another promotional exam for 14 years, or until the Captain's assessment center in 2017. [Blanchette testimony.]

<sup>15</sup> The assessment center process, as described in the orientation package, utilized explicit written grading criteria, and detailed explanations of how these criteria applied to candidates' responses were available to the assessors. That is, the process documentation included a specific grading scale, together with explanations as to what performance correlated with certain grades. The process document also included a section detailing computation of final grades, and how particular criteria were weighted. Candidates were assigned random numbers to protect assessors from learning candidates' identities “thereby ensuring the integrity, reliability and fairness of the testing process from start to finish.” [App. Exh. 8.]

be addressed. [Blanchette testimony; App. Exh. 8.]

34. The Structured Interview involved questions about supervisory issues, leadership attributes, the opioid crisis, and long-term MFD goals. [App. Exh. 8 p. 3; Tr3@363 (Blanchette).] Integrity Testing video-recorded these interviews and Methuen HR employee Stackelin observed them all. [Tr3@132, 151 (Stackelin testimony).]

35. Sheehy testified that he played no role in the development or the administration of the assessment centers for the ranks of deputy chief or captain; nor did he play any role in the selection of the assessment center evaluators. [Sheehy testimony.] But Asst. Chief Barry collaborated with Integrity Testing, providing a comprehensive volume of the MFD's rules, regulations, policies, and procedures, in order that the examiners could develop a 50-question written examination grounded in Methuen-specific standard operating guidelines. Assistant Chief Barry also identified specific Methuen locations for the assessors to incorporate into digital fire scenarios (i.e., Barry wanted them to use a specific garden apartment building and triple-decker apartment in its examination). [Tr3@72 (W. Barry)].

36. Approximately six weeks after the Captain's assessment center exam, the promotional Eligible List issued; candidates Michael Fluet and Blanchette were ranked #1 and #2, respectively, and Tulley and Timothy Smith tied for the #3 slot.<sup>16</sup> [Resp. Exhs. 2 (Roster Certification) and 7.] Fluet received a score of 83, Blanchette a score of 82, and Tulley/Smith a score of 81. [Sheehy, Tulley, and Blanchette testimonies.] Blanchette scored higher than Intervenor Tulley on the Structured Interview, Oral Presentation, and Knowledge-Based Test exercises. [Email dated Oct. 4, 2019 from Integrity Testing LLC's Alfred Donovan.]

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<sup>16</sup> Nine other candidates, including MFD union president Kevin Barry, scored below these top four candidates. [Resp. Exh. 7.]

37. Fluet was a lieutenant at the time of the Assessment Center. He was originally hired as a permanent fire fighter alongside Blanchette on November 16, 1993. He had been promoted to the rank of lieutenant on January 25, 2010. [Resp. Exh. 23.]

38. Immediately after the assessment center rankings became known within the MFD, Blanchette began to hear unsupportive comments from her fellow firefighters, including supervisory personnel.<sup>17</sup> For example, one firefighter told her, in front of several others in the firehouse kitchen, “let’s be real, if we called every single other person into this kitchen, everyone would say they want to see Matt [Tulley] get appointed.” [Tr3@ 325-326 (Blanchette).] Appellant received a text message from another firefighter: [“Hey great job, too bad you’re not going to get the position. The chief wants Matt in the position. It’s his best friend. It’s going to be easier to promote Matt to Assistant Chief from Captain than from private.” [Tr3@326 and 388 (Blanchette).]

39. Appellant was told by a Fire Lieutenant that “as long as Matt made it into the top 3, he would be made because he is the Chief’s best friend,” and these appointments were “known” ahead of time. [Tr3@326 (Blanchette).] Appellant testified that it was widely rumored throughout the department that Tulley’s selection was predetermined.

#### Internal Interview Process for Captain Promotion

40. Captain Michael Buote was scheduled to retire around the end of November 2017. [Sheehy testimony.]

41. On November 14, 2017, the City conducted an internal post-assessment center interview of Fluet, Smith, Blanchette, and Tulley. The interview panel consisted of: Sheehy, W. Barry,

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<sup>17</sup> In her testimony, Appellant identified many of the individuals involved. [E.g., Tr3@326 and 388.] She kept contemporaneous notes of these remarks, a fact that she volunteered during her testimony under oath on cross-examination. [Tr3@390-392.]

Randazzo, and DeCologero. [Sheehy testimony.]

42. The MFD has been inconsistent in its past use of interviews in conjunction with promotions. Prior to 2017, Sheehy promoted three lieutenants without relying on any internal interview process. Similarly, Sheehy himself did not have to undergo an internal interview process when he was promoted to captain. [Sheehy testimony.]<sup>18</sup>

43. Until 2017, the promotion process in Methuen was very traditional – typically, the civil service written exam followed, at times, by a brief interview consisting of non-substantive questions (i.e., “tell me about your strengths and weaknesses”). [Tr1@83-85 (Cunha); Tr3@226 and Tr3@352 (Blanchette).] In the past, firefighting-specific technical or rules-based questions had never been posed to finalists.<sup>19</sup> [Id.]

44. The interviews conducted on November 14, 2017, were neither audio- nor video- recorded, despite the City’s capability to do so. [Tr1@236 (Sheehy).] HR Director Randazzo was well aware of civil service procedural recommendations related to promotional interviews, but knowingly decided not to record the interviews in this case. [Tr3@263.]

45. Assistant Chief Barry developed fifteen (15) questions and gave them to Sheehy,

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<sup>18</sup> Sheehy testified inconsistently regarding the City’s requirement that a successful interview serves as the key criterion for promotion. For example, after first advising me that interviews are always required and are always scored and involve substantive questions (Tr1@149), Sheehy stated that he recently promoted three lieutenants without any interview at all. [Tr2@283-284.] Chief Sheehy also stated that he personally was promoted to Captain without any interview (Tr1@149), but later changed that testimony to say that an interview was required for his promotion to Captain, before again reverting and agreeing he had not been interviewed. [Tr2@285 (Sheehy).]

<sup>19</sup> Despite the contrary testimony of all the other witnesses, Chief Sheehy maintained that all prior promotional interviews were substantive, scored interviews, with similar questions as those described in this case. In fact, Sheehy was asked directly by this Commissioner whether past Captain candidates’ interviews included similar substantive questions, and Sheehy responded that they had. [Tr1@145-146, 280.] The evidence of record undercuts Sheehy’s testimony.

Randazzo, and DeCologero on the morning of the interviews.<sup>20</sup> Either technical firefighting knowledge or insider knowledge of the operations of the MFD was necessary to answer adequately almost all of these questions. Sheehy and Barry instructed Randazzo and DeCologero as to what they were looking for in terms of answers to questions that were specific to MFD.<sup>21</sup> [Testimony of Sheehy; W. Barry; Randazzo; and DeCologero]

46. Randazzo has participated in approximately thirty to forty interviews for original MFD fire fighter appointments, and four or five interviews for MFD promotions. [Randazzo testimony.] On cross-examination, however, Randazzo acknowledged that she had no way of judging candidates' responses without being told by the Fire Chief and Asst. Fire Chief what the candidates' responses should be, including with regard to non-fire related questions. When questioned about her ability to give an independent assessment, Randazzo was nonplussed, candidly stating: "I guess I don't understand what the importance is of being independent." [Tr3@267 (Randazzo testimony).]

47. Likewise, DeCologero had no knowledge or experience in the fire service, nor had he any independent knowledge as to what would constitute a very good, good, mediocre, or poor response to any particular question. This was DeCologero's first-ever fire candidates' interview. [Tr2@225 (DeCologero).]

48. Each candidate in the internal interview process for the rank of captain was asked the same fifteen (15) questions and their answers were scored contemporaneously on a scale of one (1) to

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<sup>20</sup> Chief Sheehy instructed Assistant Chief Barry to create the interview questions because he feared being accused of bias, of rigging the system, or of having provided the questions ahead of time to certain candidates. [Tr1@149-150 (Sheehy).]

<sup>21</sup> Once again, Sheehy's testimony differed from the other witnesses—this time when asked who advised the non-fire panelists as to what would be an acceptable answer. Sheehy testified that Asst. Chief Barry advised the panel, while he stayed out of it ("I let Bill handle it.") [Tr1@296-299.] Both Randazzo and DeCologero, however, testified that Chief Sheehy advised them directly as to what constituted an acceptable response to him. [Tr2@335 (DeCologero); Tr3@267 (Randazzo).]

ten (10). At the conclusion of the interviews, the panelists got together and added their scores together for each candidate. A ranking of candidates was developed from these scores. [Resp. Exh. 10; Testimony of Sheehy; W. Barry; Randazzo; and DeCologero.]

49. At the beginning of his interview, Tulley gave the panel a copy of his resume and two letters of recommendation from MFD superiors: Deputy Chief Daniel Donahue and Lieutenant James McLachlan. [Resp. Ex. 18.]

50. Blanchette had not been advised that this type of material would be expected, or even welcomed, at the interview and so she did not bring anything. [Tr4@19 (Blanchette).] She had been led to believe that she would only be asked a few unscored “HR-type” questions. [Tr3@352-353, 367 (Blanchette).]

51. Blanchette’s interview lasted about 20 minutes; other than to make introductions, no panelists spoke other than to take turns reading interview questions verbatim off the list prepared by Ass’t Chief Barry (Resp. Exh. 10). No panelist asked any follow up questions. [Tr3@368-369 (Blanchette).]

52. The panelists’ notes submitted as exhibits by the City are not reliable in determining the candidates’ relative interview performances. As noted, there was no video or audio recording. The panelist-witnesses testified on several occasions that particular notes are without meaning to them, or that they failed to write down what the candidates actually uttered, or that what they did write down could not possibly be accurate.<sup>22</sup> For example, when I asked what a certain note could

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<sup>22</sup> Assistant Chief Barry testified that he had no idea, based on his contemporaneous notes, why he gave certain candidates the points he allotted them. [Tr3@91-93.] *See also* Tr3@37 (acknowledging that his scoring of Blanchette was not accurate); Tr3@43-44 (conceding that he recorded no specific responses by candidates Smith and Fluet to several questions). Additional notes Asst. Chief Barry created at the time of Blanchette’s bypass are not wholly reliable as he concedes they were penned some 14 months after the panelist interviews. [Tr3@86.] Chief Sheehy acknowledged that his scoring of Blanchette on certain items was skewed. [Tr1@163 and Tr1@192.] Panelist DeCologero also conceded that the candidates said many things that were not written down. [Tr2@324.]

mean, Chief Sheehy replied that he was unsure, stating: “if someone gave me that answer, it would be, like, a 2 [out of 10 possible points].” But in fact he awarded Intervenor Tulley 9 out of 10 possible points on that particular question. [Tr1@168-169 (Sheehy).]

53. Chief Sheehy later agreed that his interview notes often did not reflect the candidates’ actual interview responses. [Tr1@236, 273.] He wrote down only some of the candidates’ responses, Tr1@157, and could not always square a note indicating a poor or incorrect response by candidates other than Blanchette with the high marks he gave them.<sup>23</sup> He admitted that his scoring of Blanchette was not accurate. [Tr1@274.] For example, he gave Blanchette a low score on Question 13 “because she didn’t mention life safety,” but he then conceded that she had in fact mentioned that concern. [Tr1@289.] He subtracted points from Blanchette’s item scores for using “buzzwords” in her answers, but then conceded that Tulley did the same thing and yet scored well. [Tr1@171 (Sheehy).]

54. During the Commission hearings, significant testimony was elicited with respect to interview question no. 10, which dealt with a technical aspect of the proper fire hose size needed for a given firefighting scenario.<sup>24</sup> Chief Sheehy, after testifying that all interview questions were read *verbatim* off the sheet submitted as the Respondent’s Exhibit 10, was asked to explain why Anne Randazzo’s notes (Resp. Exh. 15) contained two different answers to Question 10 on candidate Fluet’s grading sheet. Fluet received a perfect score and yet, according to Randazzo’s notes, he answered that hose sizes of *either* 2.5 inches or 1 ¾ inches in diameter would be appropriate. [Tr1@271 (Sheehy).] Blanchette correctly responded that the hose size should be 1

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<sup>23</sup> For example, candidate Smith gave a poor answer to Question 14 but Sheehy could not remember why he scored that response highly. [Tr1@210 (Sheehy).] Likewise, Sheehy’s notes regarding Smith’s response to Question 11 reflect the wrong answer and yet Sheehy gave him a high mark. [Tr1@195.]

<sup>24</sup> Scenario Question #10 asked: “What is the suggested hose line deployment for a room over 50% flame involvement?” [Resp. Exh. 10.]

¾ inches in diameter and yet she received an average score of less than 3.3 out of 10 possible points from the four panelists. [Resp. Exhs. 11, 12, 15, 16.]

55. Chief Sheehy conceded that Question 10 did not specify whether the scenario involved a commercial building or residential building on fire; nor did it identify the type or size of the room ablaze. Sheehy agreed, only after being confronted with Randazzo's notes, that a residential building might well call for the answer given by Blanchette. He also agreed that he failed to record the two different answers given by Fluet. [Tr1@272-273 (Sheehy).] Chief Sheehy's only explanation was "you'd have to ask Bill Barry, they may have said commercial [too]." [Id.]

56. Blanchette was absolutely certain in her testimony that Question 10 was read to her word-for-word as it is written on Exhibit 10 (*i.e.*, with no specification that the scenario entailed a commercial or particularly large building, or exterior firefighting) and I credit her recollection. Blanchette cogently explained the interview scenario to me and the reasons for her response to Question no. 10. She stated, in agreement with another witness, that a 2.5 inch line would never be used inside a building, as such would require too much manpower to maneuver, but rather would only be used to protect outside exposures or in an exterior "Chicago loop," none of which were part of the scenario presented to her. [Tr3@370-371 (Blanchette).]

57. Intervenor Tulley's testimony confirms that Blanchette was improperly scored lower than him on this question. Tulley was given full credit (40 out of a possible 40 points from all four panelists)<sup>25</sup> for specifying a 2.5 inch hose, but he admitted that the correct answer could in fact have been 1¾ inches. [Tr4@152-155.] Tulley was unaware if the question called for an interior action or exterior, but he assumed interior. He agreed he had only ever used a 2.5 inch hose on

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<sup>25</sup> See Respondent's exhibits 11, 12, 15, and 16. Each of the four panelists had up to 10 points to allocate per candidate response.

the exterior of a building, and never inside because, on account of its size, it would be too difficult to maneuver inside. He testified that, in his entire career, he had never used a 2.5 inch hose inside any building, commercial or residential, and that to do so would be very rare. He did not recall any mention by any panelist of the size of the building depicted in the Question 10 scenario. [Id.]

58. Each candidate’s interview performance was recorded with scores (out of a maximum of 150 points per interviewer) as follows:

<u>Candidate</u>	<u>Sheehy</u>	<u>Barry</u>	<u>Randazzo</u>	<u>DeCologero</u>	<u>Total</u>
Tulley	143	144	146	137	570
Fluet	137	136	142	139	554
Smith	134	128	134	134	530
Blanchette	117	124	103	101	445

[Resp. Exhs. 11, 12, 15 and 16.]

59. Randazzo’s and DeCologero’s own score sheets reveal, however, that they both incorrectly tallied up their final scores for Blanchette (*e.g.*, DeCologero’s announced score of 101 for Blanchette should have been 111 points). [Resp Exhs. 15 and 16.]<sup>26</sup>

60. At the conclusion of the four interviews, the panelists quickly added up their scores for each candidate and briefly discussed the candidates’ interview performances. There appears not to have been any meaningful group discussion of the candidates’ work experience or leadership attributes evidenced outside of the interviews. Panelist DeCologero testified that he knew nothing of the candidates’ work histories, disciplinary records, or commendations. [Tr2@310.] Panelist Randazzo testified erroneously that the four candidates included only one lieutenant (but both Fluet and Smith were lieutenants at the time of the interviews) and that she was concerned about the candidates’ lack of management experience (and yet she later voted to promote Private Tulley over Lt. Smith). [Tr3@242.]

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<sup>26</sup> Randazzo also shortchanged candidate Smith in tallying up her final score for him. [Resp. Exh. 15.]

61. The candidates received no notice of the results; in fact, Blanchette was unaware that the interviews were being scored, or how she fared, until her formal bypass more than a year later. [Tr3@436-437 (Blanchette).] Two days after the City Hall interviews, however, Blanchette received an email from Randazzo, stating: “I do want to say that the interview committee was impressed with your background and your service to date.” [App. Exh. 7.]

62. The panelists decided to recommend Fluet to the appointing authority, Mayor Zanni, for promotion to captain because he was a lieutenant and had been in that position for over seven years, was more senior in the MFD than Tulley, had ranked first after the assessment center exercises, and he “gave a decent interview” despite his #2 ranking on that component by the panel. [Sheehy testimony; App. Exh. 6.]

#### December 2017 Promotion of Fluet

63. On November 16, 2017, Randazzo wrote Blanchette stating as follows: “Thank you for interviewing for the position of Captain for the Methuen Fire Department. The City appreciates your interest and desire to serve the City at a higher level and, while the interview committee was impressed with your experience, unfortunately *a candidate above you on the certified civil service list* was selected to fill the position.” [App. Exh. 9 (emphasis supplied).]

64. That same day, Randazzo emailed Blanchette stating, in part: “This is informal notice that after careful consideration, you were not selected to promotion to Captain. As you are aware, Lt. Fluet was in the top position on the civil service list. As such, he was selected to fill the opening.” [App. Exh. 7.]

65. On November 20, 2017, Sheehy’s assistant, Cherie Halloran, wrote to HR employee Jill Stackelin to request to hire one captain to replace Captain Michael Blute who was set to retire on November 30, 2017. In her email, Halloran notes: “Lt. Michael Fluet scored the highest on the

captain's exam." [App. Exh. 6.]

66. On December 4, 2017, Mayor Zanni promoted Fluet. [Resp. Exh. 3.] That same day, the City Council voted to approve Fluet's promotion. [Resp. Exh. 20.]

February 2019 Promotion of Tulley / Bypass of Blanchette

67. In January of 2019, Captain Mike Hamel announced his retirement. [Sheehy testimony.]

68. On January 7, 2019, newly-elected Mayor James Jajuga ("Mayor Jajuga"), authorized a certification from which to promote one fulltime permanent fire captain. [Resp. Exh. 4.]

69. Blanchette (now ranked first on the eligible list after Fluet's promotion), Smith, and Tulley each certified that they were willing to accept the promotion. [Resp. Exh. 5.]

70. The City did not conduct another internal interview but rather relied upon the one conducted 14 months earlier, in November of 2017. Sheehy, Randazzo, and W. Barry had a discussion and decided to recommend promotion of Tulley and to bypass Blanchette, allegedly because of her poor interview performance over a year earlier. Even though, as a lieutenant for some four years at that point, Smith ranked higher than Tulley in the MFD hierarchy, and he had tied with Tulley after the day-long assessment center exercises, the panel recommended Tulley over Smith because of Tulley's modestly better interview performance in November of 2017. [Tr2@143-145 (Sheehy testimony)]

71. On January 10, 2019, Mayor Jajuga wrote to Blanchette stating that "the interview committee did not recommend you for promotional appointment to Captain and you are being bypassed at this time" and that "FF Tulley, who placed below [her] on Certification No. 04669, has been selected and his appointment has been recommended to the Mayor." [Resp. Exh. 17.]

72. Mayor Jajuga went on to list the reasons for selecting Tulley, referring only to his internal interview performance:

- He placed first out of four candidates interviewed with a total score of 570 out of 600;
- He seemed well-spoken and assertive throughout interview;
- His answers to questions were well-articulated and set out the specific information or knowledge that the question was designed to elicit. As an example, in his answer to Question 1 concerning short term challenges facing the Methuen Fire Department, Tulley stated: “lack of experience, training, keeping up EMS, and infrastructure such as maintenance of equipment and ambulances.” He answered other such questions in the same manner providing a list of specific challenges, issues, or problems facing the MFD;
- He articulated knowledge and familiarity with progressive discipline;
- He provided a correct answer to scenario question 10 and all scenario questions which had specific answers that the interview committee was looking for; and
- He articulated a strong understanding of the day-to-day role of the Captain and of the challenges and issues facing the MFD and the overall role a Captain plays in recognizing and working towards a resolution of those issues and challenges.

[Resp. Exh. 17.]

73. As to his decision to bypass Blanchette, Mayor Jajuga similarly referred exclusively to her internal interview performance:

- She placed last on the personal interview with a score [incorrectly tallied] of “445 out of a possible 600”;
- Multiple answers to interview questions “illustrated your failure to understand the question. Your answers were often general and did not address the specific scenario depicted in the question. For example, Question 5 set out a scenario about responding to a commercial location 3 times in one week and asked for the options available to correct this false alarm situation. You replied generally about educating the community and providing information and handouts but did not mention any specific action that could be taken against the property owner, such as fining the property owner for the false alarms”;
- Scenario Question 1 asked the candidate to describe the short-term challenges facing the department in the next 3 to 5 years. “Your first answer was ‘communication’. When asked to elaborate, you suggested disseminating information within the department. This answer was general in nature and did not address the issue raised by the question. While you discussed customer service, you spoke in generalities and not specifics. You failed to cite the specific challenges currently facing the Methuen Fire Department, such as having a young department, the need for equipment replacement, and technological challenges the department currently faces”;
- Scenario Question 7 depicted a scenario that was intended to elicit specific action that you might have given regarding the failure of a Lt. to provide MFIRS reports. “Your initial response indicated that you were not ‘too

familiar' with MFIRS. Again, you failed to recognize the purpose of the question which was to assess how you would approach the Lt. about correcting his action in order to ensure his compliance with the reporting requirement and not about MFIRS”;

- Scenario Question 8 asked what the progressive discipline process was and the role of the captain in that process. “You were unable to name the four steps of progressive discipline and admitted that progressive discipline was ‘unfamiliar’ to you”;
- You provided an incorrect answer to the question regarding the suggested hose line deployment for a room with over 50% flame involvement. You stated “1 and ¾” and the correct answer is “2 and ½ straight stream”;
- “Your performance during the interview illustrated your inability to recognize the short-term challenges facing the Methuen Fire Department and many answers used catch phrases and key words that were not relevant to the question being posed. Many of your answers indicated a lack of understanding of the Captain’s role in recognizing the multitude of issues and challenges facing the department and what was needed to work towards resolving those issues and challenges.”

[Resp. Exh. 17.]

74. Appellant was called into Chief Sheehy’s office in January 2019, to discuss the bypass. Chief Sheehy claims to have been uncomfortable with Blanchette’s allegedly emotional reaction to his telling her she was to be bypassed. He described Blanchette’s behavior to me in a derogatory tone: “she was just barking at me. And Deputy Donahue was in there. He felt some of it. She was barking at him.” [Tr1@253 (Sheehy)].

75. The meeting began initially without Deputy Donahue, whom Chief Sheehy called in only after he told her about the bypass. Prior to Donahue arriving, Sheehy was dismissive of Blanchette, telling her: “You can yell at me, you can be mad, you can even cry if you want.” [Tr3@370-371 (Blanchette)]. Sheehy told her that both he and Asst. Chief Barry thought she did well on several questions and suggested that it was the City Hall employees who were responsible for her low score. [Tr3@438 (Blanchette).]

76. During this meeting, Appellant expressed disappointment that her experience, including

her years as an academy instructor carried no weight in the promotional process.<sup>27</sup> Sheehy was again dismissive, replying, “how many years ago was that?” [Tr3@398 (Blanchette).]

77. Promotions in Methuen must be approved by the City Council before becoming permanent. Tulley’s appointment was scheduled to go before the Council on February 4, 2019. On January 18, 2019, Appellant wrote a formal letter of complaint to the full City Council and its Chief Executive, the Mayor, stating that issues of gender inequity played a role in her promotional bypass, and requesting that the City remedy the injustice. [App. Exh. 4.]

78. The Mayor’s office sent Chief Sheehy a copy of Appellant’s complaint prior to the appointment of Tulley by the Council. [Tr2@96 (Sheehy).] Sheehy initially testified that he did nothing with it. [Id.] Sheehy then added that he might have shared it with the union president. [Id. at 97.] When asked if he forwarded the complaint to anyone, Sheehy stated: “I don’t recall.” [Id.] Sheehy believes he may have told firefighter Tulley about Blanchette’s complaint at that time. [Id. at 98.] But he never discussed Blanchette’s complaint in any detail with Anne Randazzo, the sole female on the interview panel. [Id.]

79. Randazzo was, at all pertinent times, the City’s Director of Human Resources and an Assistant City Solicitor. In 2019, she was listed on the City’s website as the person to contact on matters of employment discrimination based upon, *inter alia*, race, national origin, sex, disability, or age. [App. Exh. 5.]

80. Randazzo learned of Blanchette’s complaint shortly after Tulley’s promotion was announced, when either Chief Sheehy or a City Councilor alerted her. Despite knowing about the

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<sup>27</sup> Testifying before me, Sheehy strongly denied that Blanchette told him about her years of experience as an academy instructor, or that he was aware *at all* of such experience. [Tr4@166.] Once again, however, I find his testimony to be unreliable. During his cross-examination on Day 2, Sheehy stated twice that Blanchette *had* told him about her experience as an academy instructor. [Tr2@19-20.] Sheehy denied that any part of the meeting took place without the presence of Deputy Donahue, Tr4@165, and he denied telling Blanchette “you can cry if you want to” (Tr4@164), but likewise I do not credit his testimony.

complaint, Randazzo, as Methuen’s designated Equal Opportunity Officer, never sought to read it. She never discussed it with the Chief, the Mayor, or anyone else in City Hall—and never undertook her own investigation or referred the complaint to an outside professional to investigate. [Tr3@276-279 (Randazzo).]

81. Randazzo dismissed any duty she or the City may have had to consider Appellant’s complaint, explaining that she thought Appellant could seek her bypass remedy at this Commission and, if she felt discriminated against, could seek a remedy from the EEOC or MCAD, so she did not feel any obligation to investigate.<sup>28</sup> [Id.]

82. On February 2, 2019, Mayor Jajuga formally promoted Tulley (replacing Hamel). [Resp. Exh. 6.] Prior to the City Council confirmation meeting on February 4, 2019, Sheehy made private telephone calls or spoke to each councilor (except Councilor McCarty, to whom Tully is related by marriage)<sup>29</sup> to advocate for Tulley’s promotion and to explain why Blanchette was bypassed (allegedly due to a poor interview). [Tr2@100-103 (Sheehy).]

83. Chief Sheehy then appeared before the City Council on February 4, 2019, to advocate for the promotion of Tulley. [Resp. Exh. 21 (Council minutes).] Councilor McCarty voted on the appointment while making no mention or disclosure of his relationship to Tulley. [Tr2@93-94 (Sheehy).] He did not recuse himself or ask questions about the complaint he had received from Blanchette. [Id. and Resp. Exh. 21.] Neither the council nor the Mayor asked a single question of Chief Sheehy about Blanchette’s complaint. [Id.]

84. On February 4, 2019, the City Council approved Tulley’s promotion. [Resp. Exh. 21.]

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<sup>28</sup> Despite this, Randazzo testified that “it is my job to ensure that there is no bias – that is my function in the city.” [Tr3@259.] And the City’s equal employment opportunity/antidiscrimination policy states that Randazzo’s office “will respond promptly to complaints.” [Resp. Exh. 24 at pg. 2.]

<sup>29</sup> Sheehy claimed that he didn’t call McCarty because he didn’t have his phone number. [Tr2@101.]

### Blanchette's Grievance Under the Union Contract (CBA)

85. In late January or early February of 2019, Blanchette caused a step one grievance to be filed, contesting the City's actions on the grounds of sex discrimination. [Exh. A for identification; Blanchette testimony.] The collective bargaining agreement (CBA) between the City and the union representing MFD firefighters has a specific provision (Art. III, Sec. 2) prohibiting discrimination based on sex. [App. Exh. 10.]

86. Union President Kevin Barry (K. Barry) signed and submitted her grievance to Chief Sheehy. [Blanchette testimony; K. Barry testimony.]

87. In March of 2019, Sheehy denied Blanchette's grievance and the Union timely advanced it on her behalf to step two, *i.e.*, the Mayor's office. The City, however, cancelled a meeting subsequently scheduled to discuss the grievance. [K. Barry testimony.]

88. Director of Human Resources Anne Randazzo took no action on the grievance as she believed Blanchette's remedy was in her civil service appeal or elsewhere. [Tr3@290-291 (Randazzo).] Randazzo told union president Barry that the grievance could not go forward because Blanchette could only appeal to civil service. [Tr4@74 (K. Barry); App. Exh. 17 (6/7/2019 Randazzo to K. Barry email: "this topic is not subject to the grievance procedure as it is controlled by civil Service").] President Barry told Blanchette that the union's attorney agreed with Randazzo. [Tr4@74-75 (K. Barry).] However, upon cross-examination in these proceedings both Randazzo and K. Barry acknowledged that the CBA (and specifically its Article VI, section 5 and Art. XX, sec. 4) does *not* expressly stipulate that an employee alleging gender discrimination must elect between pursuing a bypass appeal before this Commission or advancing a discrimination claim by other means or in another forum; or that the CBA's exclusive remedy provision vesting sole jurisdiction over certain matters in this Commission bars Blanchette's grievance. [Tr3@290-

291 (Randazzo); Tr4@106-107 (K. Barry).]

89. Blanchette asked her union for help repeatedly throughout 2019. On September 11, 2019, Appellant provided a detailed legal and factual justification for her grievance that explained why she believed the CBA permitted her claim to proceed. [App. Exh. 16] Since Blanchette's grievance was filed in January 2019, the union had not requested any documents from the City to investigate the matter, nor sent the matter to arbitration, despite Appellant's requests and its knowledge that it had the right to do so. [Tr4@91 (K. Barry testimony).]<sup>30</sup>

90. As of the post-hearing submissions in this case, in December of 2019, the City and the Union still had not met to discuss Blanchette's grievance.<sup>31</sup>

#### Whether the MFD is a Supportive Environment for Female Employees

91. Despite being a city of over 50,000 people, Methuen has only had four female firefighters in its history. During Chief Sheehy's tenure as head of the MFD and prior to him beginning to testify in this case, the City had hired some 34 new firefighters, and promoted six veteran firefighters. As of the time this appeal was filed, only one of the 34 new hires had been a female, bringing the total number of women currently with the department to three. Of the six firefighters promoted to higher rank, none were female. [Sheehy testimony – e.g., Tr1@120, 258-259;

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<sup>30</sup> Union President Barry testified that he had told Blanchette about a scheduled meeting on her grievance later in September of 2019. On cross-examination, however, K. Barry acknowledged that this statement was incorrect, and that Blanchette had not been told about any such meeting. [Tr4@86 (K. Barry).]

<sup>31</sup> Kevin Barry and Anne Randazzo offered inconsistent testimony about why no grievance meeting had occurred. Randazzo testified that she had no role in stalling the process, stating that she did not know anything about the grievance other than it was filed, and going so far as to suggest the union had deliberately not actively pursued it. [Tr3@289, 304 (Randazzo).] Union president Barry testified that the union *had* pursued the matter but that the *City* cancelled the scheduled meeting in March 2019, and that Randazzo requested via email that the union agree to a postponement. [Tr4@72-74 (Barry).] This was followed up by Randazzo suggesting to Barry that Blanchette could not avail herself of the grievance process at all. [*Id.*; Tr4@22 (Blanchette).] I ordered the City to produce the complete email chain regarding communications between the union and Randazzo relative to the grievance or be subject to adverse factual findings. The City never complied with this document production order. The adverse inference I draw as a result is that Randazzo was not forthcoming regarding her knowledge and involvement in this grievance matter.

Tr3@393 (Blanchette).]

92. Chief Sheehy seemingly does not believe that women are underrepresented in the Methuen Fire Department. When asked if he would consider requesting an all-women's civil service list (a selective certification that may be authorized under the state Personnel Administrator Rules) to address the issue, Sheehy replied, "I don't think we're lacking in the numbers, though," adding as a comparison that other departments also have only 1, 2, 3 or 4 women firefighters. [Tr1@240.] Later stating that he would have to look into a special certification request, Sheehy added: "I didn't even know there was an all-female list where I could grab a few." [Tr1@265.]

93. During his tenure as an executive in charge of the fire department, Chief Sheehy has never sought to increase the number of women in the fire service. [Tr1@266 (Sheehy: "I'm not looking to recruit women.")] He has never done community outreach to solicit female applicants (Tr1@259); he has never promoted the fire service as an occupation open to women at local schools (*id.*); and he has never tried to find out how he could bring in more women. [Tr1@265-267 (Sheehy: "To be honest, I haven't looked into it.")]<sup>32</sup> No female has ever been promoted to the positions of Captain or higher. [Tr2@36 (Sheehy).] The Chief reviews and issues the official rules and regulations of the fire department, and those rules only refer to firefighters as he, him, or men, and make no reference to the female gender. [App. Exh. 3.] Chief Sheehy never sought to update the rules. [Tr2@51 (Sheehy).]

94. During the time period when Chief Sheehy served as union president, women were barred from permanent assignment to night shifts in different stations, including the East End station, due to a lack of bedrooms. Such permanent assignments were reserved for men only. This condition

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<sup>32</sup> The City's equal employment opportunity officer also testified that she has never taken any proactive steps to expand the complement of female firefighters in Methuen. [Tr3@275 (Randazzo).]

was in existence for about the first 20 years of Blanchette’s career, or as recently as approximately 2013. [Tr1@90, 100 (Cunha).] During his tenure as union president, Chief Sheehy never filed a grievance or took any other action to remedy this disparate treatment of female firefighters. [Id. @100-101.]

95. In the recent past, the City has not adhered to civil service law requirements when bypassing female firefighters for promotion. Firefighter Susan Vallera testified about her past attempts to be promoted to the position of lieutenant. According to Deputy Chief Donahue, Vallera is a very good firefighter with no history of discipline. [Tr3@190 (Donahue).] Despite topping the civil service list, and being interviewed for promotion, she was bypassed twice in 2012. [Tr3@190, 212-213 (Donahue, Vallera testimony).] The City never informed Vallera (in writing or otherwise) of the reasons for her bypass and, moreover, never even told her that she was in fact bypassed either time. She only learned about the alleged reasons for bypass while having an informal conversation with (then union president) Sheehy years later. [Tr3@228-230 (Vallera).]

96. Chief Sheehy told Vallera that she had been bypassed on the first occasion because the selected candidate had more experience and on the second occasion because of an allegedly poor interview performance.<sup>33</sup> Prior to her taking the lieutenant’s exam that resulted in the 2019 eligible list, Vallera asked Sheehy whether she should bother taking the exam—to which Sheehy responded with words to the effect of “if she did well on the test then he would not pass her over.”<sup>34</sup>

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<sup>33</sup> Chief Sheehy’s testimony about Vallera’s prior bypasses was unreliable and contradictory. Sheehy first testified that he was unaware of why Vallera had been bypassed. [Tr1@231 (Sheehy: “I said, you did a pretty good job, I don’t know what happened.”).] When re-called as a rebuttal witness, however, Sheehy’s testimony changed, stating that he had been aware that she was bypassed due to seniority issues, and due to an allegedly poor interview. [Tr4@170.]

<sup>34</sup> Under oath in this proceeding, Vallera recounted a conversation she had with Chief Sheehy in 2017, in which Sheehy, in reference to her prior attempts to be promoted, suggested to her that she “got a raw deal last time.” [Tr3@213 (Vallera).] In recounting that same conversation, Deputy Chief Donahue stated that Sheehy assured Vallera that if she passed the test in the future, she would be promoted exactly in order of

[Tr3@213 (Vallera testimony).]

97. The union took no action on Vallera's behalf. Randazzo, as Director of Human Resources and official then in charge of all matters related to civil service procedure, had no idea that Vallera had ever been bypassed. [Tr3@236, 272 (Randazzo).]

98. After the hearing in this appeal got underway in mid-2019, Chief Sheehy finally selected Vallera for promotion. That promotion only came after Blanchette filed her complaint of gender discrimination and then her bypass appeal, and reportedly was decided upon by MFD leadership between Days 2 and 4 of this hearing; however, as of hearing day no. 4, Vallera's promotion had not yet been approved as required by the City Council, and thus she was still in an "acting" position as of the close of her testimony. [Tr3@208 (Vallera).]

99. During Sheehy's tenure as Chief, no women aside from Blanchette and Vallera have been considered for promotion to an officer rank in the MFD. [Sheehy testimony.]

100. Blanchette and Sheehy were part of a larger group of fire recruits hired as privates in 1993. That group of recruits, made of up six men and one woman (Appellant), is depicted in Appellant's Exhibit 2. Five of the six males depicted have been promoted. Appellant remains a private. The lone male candidate not promoted appears to have not sought promotion, as his name has never been on a promotion list. [Tr2@39 (Sheehy).]

101. Blanchette complained at this hearing that co-workers with side businesses – e.g., construction and building related trade companies – have not included her in their work because of a "boys club" mentality within the MFD. [Blanchette testimony.]

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her place on the list, and that the Chief made that assurance without reference to a need for an employment interview. [Tr3@183, 189, 200 (Donahue).] Chief Sheehy disputes the statements of both Vallera and Deputy Donahue. He denied suggesting that Vallera got a raw deal, and states, to the contrary, that she was treated fairly. [Tr4@170 (Sheehy).] Sheehy also disputes telling her she would be selected but rather claims to have told her that she needed to do well on the employment interview. [Tr4@171, 182-183 (Sheehy).] I do not credit the Chief's testimony on these points.

102. While admitting that lots of firefighters work for each other's side businesses, Deputy Donahue was only aware of this benefit being afforded to male firefighters and knew of no female firefighter ever being offered such side-work. [Tr3@205-206 (Donahue).]

### Adverse Inferences

By email dated September 20, 2019, the Commission ordered the City to produce certain relevant documents within two weeks. Failing to comply, the Commission issued another order on October 10, 2019, which included instructions to the City that it shall, by October 18, 2019, indicate in writing why the Commission should not establish facts adverse to the Respondent for failing to comply with the Commission's orders. Specifically, the Commission ordered the production *inter alia* of the following:

1. *the contract signed by the Respondent and Integrity Testing regarding the assessment center in which the Appellant and others participated for the Captain exam; and*
2. *the email message stating that the Respondent needed an extension of time before a meeting could be scheduled concerning the Appellant's allegations relating to her bypass for Captain (including any and all email messages in the email chain).*

The City never complied with the Commission's order to produce responsive documents and nor did it provide any reasons why the Commission should refrain from establishing adverse facts by inference. Accordingly, I draw the following inferences:

- A. I infer that the contract and related documentation between the City and Integrity Testing, LLC reflect no intention on the part of the appointing authority to use post-assessment-center interviews to deviate from the ranked ordering of candidates as they emerged from the day-long assessment center process.
- B. The withheld email chain between the City's Human Resources Director and the firefighters' union representatives would show that HR Director Randazzo never intended to schedule a meeting to discuss Blanchette's grievance or discrimination complaint.

## DISCUSSION

### *Applicable Civil Service Law*

A public employer's authority to bypass a candidate for permanent appointment or promotion to a civil service position derives from G.L. c. 31, § 27, which provides:

If an appointing authority makes an original or promotion appointment from a certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.

An appointing authority's discretion to pick among qualified candidates for civil service appointments who have met the requirements for the position by taking and passing a civil service competitive examination is not absolute and is subject to review by the Commission. *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997) (burden of proving reasonable justification for a bypass lies with the appointing authority). The appointing authority's reasons for "bypassing" a candidate higher on the list in favor of hiring a lower ranked candidate must be "reasonably justified", based on a "thorough review", and supported by a preponderance of the evidence,<sup>35</sup> when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. *See, e.g., Brackett v. Civil Service Comm'n*, 447 Mass. 233, 543 (2006) and cases cited. *See also Mayor of Revere v. Civil Service Comm'n*, 31 Mass. App. Ct. 315, 321 n.11, 326 (1991) ("discretionary acts of public officials . . . must yield to the statutory command that [they] produce 'sound and sufficient' reasons" consistent with basic merit principles and also refrain from arbitrary and capricious actions).

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<sup>35</sup> A "preponderance of the evidence test . . . require[s] the Commission to determine whether, on the basis of the evidence before it, the [appointing authority has] established that the reasons assigned by [it] for the nonselection of [an appellant] were, more probably than not, sound and sufficient." *Mayor of Revere v. Civil Service Commission*, 31 Mass. App. Ct. 315, 321 (1991).

In reviewing a bypass decision, “[t]he commission’s primary concern is to ensure that the appointing authority’s action comports with ‘basic merit principles,’ as defined in G.L. c. 31, § 1.” *Police Dep’t of Boston v. Kavaleski*, 463 Mass. 680, 688 (2012), citing *Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. *E.g.*, *Beverly v. Civil Service Comm’n*, 78 Mass. App. Ct. 182 (2010); *Borelli v. MBTA*, 1 MCSR 6 (1988) (bypass improper if “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons”). When there are overtones of political control or objectives unrelated to neutrally applied public policy, then the occasion is appropriate for intervention by the Commission. *Mayor of Revere v. Civil Serv. Comm’n*, 31 Mass. App. Ct. at 326.

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. *See, e.g.*, *Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001). In the event of a failure of proof, this Commission has the power to reverse the bypass decision. *Id.*; *Commissioners of Civil Service v. Municipal Ct. of the City of Boston*, 359 Mass. 214 (1971) (adequate reasons supported by credible evidence is the key to any bypass affirmance). It is the function of the hearing officer to determine the credibility of evidence presented through witnesses who appear before the Commission. *Covell v. Department of Social Svcs.*, 439 Mass. 766, 787 (2003).

### **ANALYSIS**

Methuen has failed to establish by a preponderance of credible evidence that it had

reasonable justification to promote a male MFD firefighter to Fire Captain from an eligible list created after a comprehensive Assessment Center in which he ranked below the Appellant, a female firefighter with greater experience. Rather, the evidence shows that Methuen's decision was based on the use of a highly subjective and flawed interview process intended to nullify the results of the Assessment Center in order to effectuate a predetermined decision to select a candidate favored by the Fire Chief as a matter of personal, not professional, preference, as well as to not disturb the MFD's male-dominated culture. This selection process was not conducted on a level playing field and violates basic merit principles of civil service law.

Public safety agencies are properly entitled to, and often do, conduct interviews of potential candidates as part of the hiring process, especially in the case of promotional appointments of superior officers. In an appropriate case, a properly documented interview performance objectively ascertainable as subpar may justify bypassing the highest-ranked candidate for one deemed more qualified as the result of the latter's objectively superior interview presentation. *See, e.g., Dorney v. Wakefield Police Dep't.*, 29 MCSR 405 (2016); *Cardona v. City of Holyoke*, 28 MCSR 365 (2015).

Some degree of subjectivity is inherent (and permissible) in any interview procedure, but care must be taken to preserve a "level playing field" and "protect candidates from arbitrary action and undue subjectivity" on the part of the interviewers, considerations that together form the linchpin of the basic merit principle set out in Section 1 of the civil service law. *E.g., Flynn v. Civil Service Comm'n*, 15 Mass. App. Ct. 206, 208, *rev. den.*, 388 Mass. 1105 (1983). Certain factors present in internal promotional interviews have been deemed significantly undermining or even fatal to the process, and as a result have caused the Commission to allow bypass appeals, including where an appointing authority has deviated from its standard promotional practices relative to

specific candidates; where a department chief sits in on an interview and exercises undue influence over the process; where the actual recorded interviews cannot be reconciled with the assessment scoring of the interviewers; or where the interviewers rate similar answers markedly differently. *See, e.g., Connor v. Andover Police Dept.*, 30 MCSR 439 (2017). The Commission gives especially heightened scrutiny to subjective interviews when it appears they have become a means to nullify the results of a duly administered, independent Assessment Center form of examination. *See id.; Daley v. Town of Wilmington*, 28 MCSR (2015), *aff'd sub nom., Town of Wilmington v. Civil Service Comm'n*, Suffolk Sup. Ct. C.A. 2015CV2963 (2016).<sup>36</sup>

In the context of this civil service appeal, in which the City is obliged to show adherence to basic merit principles, the Commission must decide whether the bypass reason given by the City – that Firefighter Blanchette just gave a lousy interview – is both true and was the real motivation for the actions taken. If this reason does not ring true, or is pretextual, then a finding that basic merit principles were violated may be warranted. Personnel decisions that are marked by extraneous influences, favoritism, bias, or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to intervene. *City of Cambridge*, 43 Mass. App. Ct. at 304.

***The City's Flawed Interview Process Undermines its Justification for the Bypass of Blanchette***

This Commission has affirmed that appointing authorities may conduct post-certification interviews, even when the eligible list is established by an assessment center, so long as the

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<sup>36</sup> Courts have also been quite critical of subjective hiring processes, particularly employment interviews not guided by a scoring matrix and pre-set questions. *E.g., Riffelmacher v. Board of Police Comm. of Springfield*, 27 Mass. App. Ct. 159, 162 (1989). In *Riffelmacher*, where Police Commission interviewers reached “no agreement on the subject matter to be covered, nor about the factors to be weighed or their relative importance,” and “questioning proceeded ad lib,” the Appeals Court held that “[s]uch an unbounded procedure is a ready mechanism for discrimination.” *Id.* at 164.

interviews are conducted in good faith, in a fair and transparent manner, and are not held as part of some pre-determined effort to bypass a higher-ranked individual. *Samuel Richesson v. City of Worcester*, 31 MCSR 257 (2018). This Commission, however, has never approved of reliance upon unrecorded post-certification interviews conducted more than 12 months prior to a vacancy as the sole justification to bypass the highest-ranked candidate on a promotional eligibility list.

Here, Methuen's interview process woefully lacked the safeguards needed to ensure a "level playing field" with a reasonable degree of transparency and objectivity and to assure that the decision-making process was the product of the legitimate professional judgment rather than an unduly subjective decision-making process that is so inadequately memorialized as to be incapable of objective *de novo* review on appeal to the Commission. The internal interview process conducted at Methuen City Hall was poorly conceived, poorly performed, and poorly documented. Given how dubious I am of much of Chief Sheehy's testimony concerning the process,<sup>37</sup> the City's evidence is not credible and cannot be relied upon to sustain its burden of proof in this bypass appeal. Due to the appearance of predisposed favoritism on Sheehy's part (given his lengthy friendship and partnership with Tulley, which included some 8-10+ years of Sheehy being hired by Tulley to perform lucrative side work, plus troubling indicia of bias against Blanchette), I conclude that subjectively-determined interview scores from a 14-month-old, 20-minute interview cannot be used to substantiate the bypass of a quality candidate such as Blanchette, who then stood atop the eligible list as determined by independent professionals running a day-long, multi-faceted assessment center featuring a scored, structured interview component.

First, the interview panel process employed by the MFD was inherently slanted in favor of

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<sup>37</sup> I have identified concerns with certain testimony or evidence offered by all three of the interview panelists who initiated the actual bypass decision. *See* footnotes 6, 9, 18, 19, 21, 27, 28, 31, 33, and 34 *supra*.

Sheehy's and Tulley's close working and personal relationship, giving far greater weight to the Chief's personal choice rather than any objective comparison of Tulley's overall professional record to Blanchette's. Objectively speaking, Blanchette's career-long preparation for promotion exceeded Tulley's and should have counteracted any superior performance by Tulley during a 20-minute interview. Blanchette had three additional years of service to Methuen as a full-time firefighter and thus was considerably more senior to Tulley in terms of job tenure. Only Blanchette had secured a Fire Officer I or II certification, which is certification of preparation to serve as a superior officer (Tr3@118, Barry testimony), prior to the interview process. Blanchette had received both state and local recognition in the form of a firefighter-of-the-year award whereas Tulley never gained comparable recognition over his twenty-plus year career as a firefighter. Blanchette also possessed invaluable experience as an instructor at the Massachusetts Fire Academy. No witness testified as to any awards received by Tulley. No witness testified about any of Tulley's extracurricular activities as a firefighter or any special contributions to the MFD.

The evidence showed that Blanchette's professional accomplishments took a back seat to a preference for Tulley formed from personal, not professional, experience. Sheehy and Tulley knew each other long before they both joined the MFD, they served together on the same work group for almost ten years earlier in their careers and, most critically, Sheehy worked for about a decade under Tulley in his private business. Moreover, Chief Sheehy exercised great influence over the other three interview panelists (two of whom had never worked in the fire service), going so far as to advise them at the start of the interview process of the answers he expected to hear based on the questions posed to the candidates.<sup>38</sup> Chief Sheehy appeared conscious that his past

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<sup>38</sup> DeCologero had never before participated in a fire promotional interview, Tr2@254 (DeCologero testimony), and the second nonfirefighter interviewer, Anne Randazzo, testified that she and he were only given a "few minutes" to absorb and discuss desired responses to technical questions before the interviews

history of being employed by Tulley would be grounds for him to recuse himself from the promotional process. He testified: “I didn’t want to be involved in this [promotion] . . . I tried to be hands off with this whole thing. . . . [I]f I were to pick him [Tulley], it’d be bias.” [Tr1@228-229.] But of course Chief Sheehy not only was a key actor in the promotional selection process, he went so far as to affirmatively lobby each city councilor (except for Tulley’s relative) to approve Tulley’s promotion days after learning of Blanchette’s discrimination complaint. I also conclude that Tulley’s enduring friendship with Deputy Chief Donahue and his being related to many people employed by the City, including a sitting city councilor who voted to approve his promotion, contributed to the preference to appoint him over Blanchette.

Second, the findings are replete with examples of how the process was fatally flawed. *See especially* Findings nos. 45-48, 53-54, and 60. The City Hall panel was not independent, nor did they seem at all chagrined that they were not. Half of the panel had little idea about how to judge the candidates’ technical responses, and candidly admitted that they simply did what they were told to do by Chief Sheehy and Asst. Chief Barry. The process lacked objective criteria with, in particular, no grading scale describing what type of responses would receive a given range of scores.<sup>39</sup> The interviews were not recorded<sup>40</sup> and the process was devoid of any accurate record of

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began. [Tr3@214 (Randazzo).] They were unaided by any written criteria for grading answers, model answers, or predetermined scoring sheet. [Tr3@262 (Randazzo).]

<sup>39</sup> This is in stark contrast to the transparent process employed by the Integrity Testing assessment center administrators. *See* Finding nos. 32 (n.15) through 35, *supra*.

<sup>40</sup> Despite the direct involvement and extensive civil service knowledge of Attorney Randazzo, who played an integral role in the interview process, the City Hall interviews were not recorded via audio or video means. The MFD has continued, despite the controversy here, not to record subsequent promotional interviews, despite declarations of the Chief’s intent to do so made during this very hearing. On Day 1, Chief Sheehy testified: “[F]rom now on, if we have interviews, we’re going to record them.” [Tr1@236.] However, ten weeks later Chief Sheehy conceded on cross-examination that two sets of *unrecorded* interviews, for promotions to Deputy Chief and Lieutenant, had occurred in the interim before he re-took the stand. [Tr2@58-61 (Sheehy).]

what actually took place during the interviews. The panelists often did not know the meaning of their own notes, could not discern reasons for particular scores, often differed on what and how questions were phrased, and speculated about responses. Given the unreliability of this interview process, the Commission must closely scrutinize how it unfolded, particularly when the City is setting aside the results of an independently performed, objective assessment center and given the indicia of favoritism and bias present in this case.

Third, despite its contentions to the contrary,<sup>41</sup> the MFD's promotional practices have been disturbingly inconsistent. There is no dispute that with this promotional series in 2017, the MFD used an assessment center for the first time and had never before used subjective interviews to override the judgment of an assessment center. Sheehy himself admitted that the City recently promoted several fire lieutenants without employment interviews at all, and agreed that he personally was promoted to Captain without an interview. Both Vallera and Cunha testified that past interviews were always brief, and consisted only of human resources type questions, such as "tell me your strengths and weaknesses." Neither candidate ever had been apprised that past interviews had been in any way scored.<sup>42</sup> Crucially, the City's decision to bypass Blanchette in reliance upon her interview performance was inconsistent with how the City treated Lt. Fluet's interview prowess during the decision-making process for the prior captain's promotion from the

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<sup>41</sup> The parties dispute the MFD's history of using post-certification employment interviews. Sheehy unequivocally stated before me that the MFD has always used employment interviews, and that they have always included the same core elements – substantive, scored, technical firefighting-related questions. Sheehy's testimony cannot be credited, both due to his own contradictions as well as conflict with other witnesses' more credible testimony.

<sup>42</sup> Only recently did Vallera learn that internal interviews were technical and scored, and she learned that from Blanchette (who only found out when she was bypassed). Blanchette testified that Vallera had earlier told her that any post-assessment-center interview would consist of "just a bunch of HR questions." Blanchette was never informed by City officials that the interview panel would be scoring her interview performance and she was never advised that she should bring with her to the interview a resume or copies of reference letters. [Tr3@352, 367 (Blanchette).] Finally, unlike Blanchette, Vallera was interviewed *twice* for promotion from the same eligible list. Tr3@210-211 (Vallera).

same eligible list. Lt. Fluet did *not* score highest on the City Hall interview scorecard and yet he received the first post-assessment-center promotion to Captain.<sup>43</sup> In a November 20, 2017 email justifying Lt. Fluet's promotion [App. Exh. 6], Chief Sheehy's assistant did not note Lt. Fluet's *second*-place ranking by the interview panelists (see *id.*) and I determine that that is because at that time the City did not view the short internal interviews as being nearly as consequential as the results of the day-long assessment center exercises.

Fourth, in contrast to the compelling evidence of favoritism, bias, undue subjectivity and inconsistent practice, the record contains a dearth of persuasive evidence that Methuen's use of a 14-month-old subjective interview performance to bypass Blanchette was made in good faith and for sound and sufficient reasons—rather than simply as an artifice to nullify the results of the full-day Assessment Center that covered the same ground as the internal interview (more comprehensively than the 20 minute interview conducted by the MFD interview panel).

The Assessment Center was held over the course of seven or more hours on September 7, 2017, and consisted of five exercises: (1) a Written Knowledge Based Test; (2) an In-Basket Exercise; (3) a Critical Incident Response – Oral Presentation; (4) a Role Play Exercise; and (5) a Structured Interview Exercise. The Assessment Center was the product of consultation with the MFD leadership and all of the components incorporated MFD specific topics. Candidates were identified by randomly-assigned numbers and not their names, to ensure objectivity. All assessors

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<sup>43</sup> Other candidates were appropriately given *non-bypass* notifications, Tr2@133 (Sheehy), because the head of the MFD, Chief Sheehy, had previously negotiated with the MFD firefighters' union that promotions to Captain and Deputy Fire Chief would be effectuated using an independent assessment center. Having made an agreement to select the assessment center as the *sole* basis for scoring and ranking candidates on an eligible list for promotion to Fire Captain, as I infer the withheld contract with Integrity Testing LLC would have shown, the City could have been charged with an unfair labor practice under G.L. c. 150E had it substituted in full an alternative selection process after the fact. *In the Matter of: City of Everett and Everett Firefighters, IAFF, Local 143*, 48 MLC 32 (Commonwealth Employment Relations Board August 27, 2021).

were public safety executives from other communities.

For example, the written Knowledge Based Test was comprised of fifty (50) multiple choice questions based upon the MFD Standard Operating Guide (“SOG”) and MFD Rules and Regulations, which were provided to the candidates by the MFD in advance. The In-Basket exercise was comprised of candidates receiving a pile of assorted correspondence and having to prioritize and describe how each item should be handled by an MFD captain. The Critical Incident Response exercise required candidates to review three slides relevant to the MFD and provide an opinion as to how the issues raised on the slides should be addressed. There was also a Role Play exercise that required candidates to review a set of general facts and then give a presentation on how such facts should be addressed. The Structured Interview involved questions about supervisory issues, leadership questions, the opioid crisis, and questions about long-term MFD goals. The Structured Interviews were video-recorded and observed in real-time by a Methuen HR employee. No one testified that this process was deficient in any respect.

Fifth, the record persuasively demonstrated that Blanchette was consistently scored unfairly during the internal interview presided over by Chief Sheehy. One of the clearest examples is the scoring of Question #10, which asked: “What is the suggested hose line deployment for a room over 50% flame involvement?” I do not credit panelist testimony that the panel clarified during Blanchette’s interview that the scenario in this question involved a commercial building. Instead, I credit Blanchette’s testimony that no relevant additional details were offered as this question was posed to her. Accordingly, Blanchette’s answer of a 1 ¾ inch diameter hose, which is the known hose deployment for a residential facility, was not incorrect. And yet the panel scored her as if her answer were wholly erroneous (DeCologero, for example, awarding her zero points out of 10 points possible).

The discussion at hearing surrounding Question No. 10 was significant to me, as it shows that the City persists in asserting that the internal interviews were entirely fair and valid in the face of ample evidence to the contrary. In the beginning of this hearing, Chief Sheehy flatly stated that Appellant used the wrong hose line in response to question no. 10, which he claimed, at least initially, was read as written on Respondent's Exhibit 10. When presented with Randazzo's notes on cross examination, Sheehy begrudgingly amended his answer, and said that a 1 ¾ inch hose line would be an acceptable answer for a residential building. I infer that this changed answer was an attempt at conforming to the revelation noted by Randazzo – that Lt. Fluet gave two answers to the question, one of which matched Appellant's. The Chief agreed that the question did not mention the size or type of building, both of which could impact the answer. Instead, he suggested that perhaps the question was asked differently than is written on Resp. Exh. 10—*i.e.*, perhaps panelists changed the question to indicate a commercial building scenario.

Subsequent to the Chief's attempt at explaining away the discrepancy, the next panelist witnesses, and ultimately the Intervenor, testified that they believe, *perhaps*, that Question 10 was read differently than it was written, and that it *might* have been presented, as Chief Sheehy now thought possible, as a commercial scenario. No such witness, however, could pinpoint how or when or why that change was made, but only that they seem to recall it occurring. Appellant was very clear – no such change was made – the question was read as is written, and she explained exactly why she gave the answer she gave. Of course, the possibility remains that the question was changed for candidates other than Appellant, but the Intervenor's testimony on the underpinnings of the question tends to discredit that theory.

Tulley agreed that there actually could be many different answers to this question. He agreed that the fact that a building was commercial was not determinative – factors instead such

as the size of the building, whether the fire is inside or outside, and the size of the room involved would dictate the appropriateness of responses. Tulley agreed that he thinks the question posed an interior scenario, although that was not specified in the written question. Tulley said that regardless of the type and size of building involved, he has never in his entire career used anything other than a 1 ¾ inch hose line inside of a building – any type of building. He agreed to do otherwise would be very rare, and in fact he has never done so. Like Blanchette, Tulley offered no scenario where a 2.5 inch hose line would be used except on the exterior of a building. Blanchette’s answer was correct, or else the City just posed a bad question; either way, just as regards her prior achievements and successes, the City decisionmakers refused to give her credit. Tulley, by contrast, was awarded 40 points that he probably did not deserve.

In sum, I can remember no other example of the use of a post-Assessment Center promotional process that was as flawed as this one, relying solely on a unrecorded, stale post-certification interviews, with little credibility, conducted more than a year earlier for the purpose of a prior promotional appointment, and in which the evidence permits a convincing inference that the process was manipulated by the Fire Chief to bypass the Appellant because the Chief was predisposed to a favor lower-ranked candidate.<sup>44</sup> For this reason alone, the Appellant’s appeal must be allowed; but there is, in fact, a second reason for the Commission to intervene.

### ***Gender Bias Contributed to a Violation of Basic Merit Principles***

Blanchette asserts that the City discriminated against her based on her gender when it bypassed her and promoted a male, Tulley, to the rank of captain. At the conclusion of this hearing,

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<sup>44</sup> Two final comments about this process: (1) If a municipality has reason to believe that there would be a promotional *bypass* as a result of interviews conducted over one year earlier, it should, as a matter of fundamental fairness, reinterview all of the finalists. (2) If an interview committee accepts a resume and/or a letter of reference from one finalist, it should offer the other finalists an opportunity to submit similar materials for consideration.

she still had an unresolved grievance to such effect pending with the City.<sup>45</sup> I need not, and indeed will not, adjudicate whether Blanchette was the victim of discriminatory acts or inaction made unlawful by G.L. c. 151B, § 4. However, whether Blanchette’s gender factored inappropriately into the promotional process here, whether she has been treated unfairly by her employer on account of her sex, and whether MFD employees have been advanced strictly “on the basis of their relative ability, knowledge and skills” are all key statutory considerations in adjudicating whether Blanchette’s “rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to [her] employment status.” G.L. c. 31, §§ 1 and 2(b).

Our state’s highest court has established that the Commission has a role to play when a tenured civil service employee claims that unlawful discrimination tainted the promotional process, even though such employees typically are free to file claims under G.L. c. 151B with the Massachusetts Commission Against Discrimination or in suits brought in state or federal court.

In *Gerald Alston v. Town of Brookline*, D1-16-170 (April 13, 2017), a case involving an African-American firefighter asserting that the town’s adverse personnel actions against him would not have occurred at all, or would have been much milder, but for his race, the Commission explained:

... the Legislature explicitly charged the Commission with ensuring [civil service employers’] adherence to basic merit principles, which includes assuring fair treatment of public employees in all aspects of personnel administration without regard to various factors, including race. The Court has also stated unequivocally that intervention by the Commission is warranted when objectives unrelated to merit standards (i.e. – race) result in an employee’s termination.

It is not necessary to conclude whether the Town violated the state’s anti-discrimination law to decide this appeal and I have not attempted to do so here. The Commission is not to function as an alternative to MCAD or the Court as an

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<sup>45</sup> I also take administrative notice of both (1) the fact that Blanchette filed suit against the City and Chief Sheehy in Essex Superior Court in November of 2020, asserting claims under G.L. c. 151B; and (2) certain admissions by those defendants in response to Blanchette’s detailed Complaint. *See* Paper nos. 1 and 5 docketed under Civil Action no. 2077CV01109.

adjudicator of the rights of those who have experienced discrimination or retaliation in violation of their civil rights or other laws. However, when a civil service appointing authority commits acts which are fundamentally unfair and fall within the penumbra of the prohibited conduct of those laws, it is appropriate for the Commission to take notice of that misconduct in order to fulfil the statutory mandate to assure “fair treatment” of civil service employees, free from “arbitrary and capricious” acts, “without regard” for an employee’s “race” or other protected status, and “with proper regard” for civil service law and an employee’s “constitutional rights, as citizens.” G.L. c. 31, § 1....

*Id.* at pp. 68-69. In later reviewing the Commission’s *Alston* decision, the Supreme Judicial Court stated that any contention that G.L. c. 151B provides the exclusive remedy for workplace discrimination against tenured civil service employees “oversimplifies” matters. *Town of Brookline v. Alston*, 487 Mass. 278, 293 (2021). The mandate of “fair treatment” in section one of G.L. c. 31 explicitly forbids discrimination on the basis of sex. *See id.* Construing the civil service law in a way that permits this Commission to consider the City's failure to grapple with gender bias, in the course of the Commission's bypass analysis, does not displace or undermine the purpose served by G. L. c. 151B. *Id.* at 296. “The [Commission’s] analysis may overlap with, but remain different from, a determination of discrimination.” *Id.*

Writing about why the pendency of a c. 151B claim before the MCAD does not divest this Commission of jurisdiction to act upon an appeal filed pursuant to G.L. c. 31, § 43, the Superior Court recently observed as follows:

The two agencies have distinct jurisdictions, properly reflected in the scope of their respective statutes, and in this [Civil Service] Commission’s decision. The Supreme Judicial Court has recently made clear that the two statutes may interact, and when they do “we construe statutes to harmonize and not contradict each other.’ . . . The commission’s mandate is to protect civil service employees from termination from employment for reasons that violate basic merit principles. As most relevant here, the commission may determine that an employee has been subject to, and rendered unfit by, racist and retaliatory acts and an arbitrary and capricious response to those acts by the municipality.” *Alston*, 487 Mass. at 293-297, and cases cited.

The focus of this Commission’s Decision was not disparate treatment on the basis of age, disability, or race. Rather, it addressed the presence of personal bias within the workplace based on favoritism or political considerations, a matter over which it holds primary jurisdiction, and which is its fundamental purpose. *Cambridge*, 43 Mass. App. Ct. at 304.

Memorandum of Decision and Order on Cross-Motions for Judgment on the Pleadings in *Town of Rockland v. MA Civil Serv. Comm’n*, Suffolk Super. Ct. no. 2084CV01354 (Oct. 1, 2021) (Roach, J.) at pg. 18. As the Supreme Judicial Court held in *Alston*:

the commission's mandate is to protect civil service employees from [adverse personnel actions taken] for reasons that violate basic merit principles. . . . See *Malloch v. Hanover*, 472 Mass. 783, 799-800 (2015) (promotion and bypass decision tainted by gender bias would violate basic merit principles). . . . [I]n making this determination, the commission has the authority to hear evidence and make findings based on the types of discriminatory and retaliatory statements and actions that are proscribed by G. L. c. 151B.

487 Mass. at 296–97. And in affirming this Commission’s legal analysis in *Alston*, the Supreme Judicial Court repeatedly cited to a case decided under G.L. c. 151B. *Id.* at 297, 303 (citing to *Salvi v. Suffolk County Sheriff's Dep't*, 67 Mass. App. Ct. 596 (2006)).

Here, the predisposition in Tulley’s favor was compounded by Sheehy’s predisposition against Blanchette due to a proven personal and institutional bias against her in which her gender was a contributing factor. The MFD’s leader refuses to acknowledge even the possibility that a gender bias in favor of male firefighters during his tenure as the MFD Chief has contributed to the dearth of female firefighters in the MFD and elsewhere. Chief Sheehy, a 26-year firefighter and former state level IAFF union leader, denied even knowing there is a gender issue in the fire service nationally,<sup>46</sup> although he conceded he had heard Boston had a problem. Regarding Methuen,

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<sup>46</sup> Nationally, only 4.4% of all firefighters in this country are women, according to the U.S. Bureau of Labor Statistics (BLS). BLS labor force statistics are available at <https://www.bls.gov/cps/cpsaat11.htm> (last modified on January 22, 2021) and are derived from monthly surveys of 60,000 U.S. households conducted by the U.S. Census Bureau for the BLS. See [https://www.bls.gov/cps/cps\\_over.htm#faq](https://www.bls.gov/cps/cps_over.htm#faq).

Sheehy thinks the number of women— a total of 3 out of 101 firefighters — is sufficient, because it appears no worse than the female representation in other communities. During Sheehy’s tenure as Chief, he hired approximately 34 firefighters, but only one was a woman.<sup>47</sup> He sees no need to increase the number, to recruit women into the fire service, or to take any proactive steps to encourage more female applicants in Methuen. He has never done so, nor has he even thought about doing so.<sup>48</sup> As is often the case with unconscious biases, some people simply refuse to acknowledge them, no matter how obvious they may appear to others.

Tracy Blanchette was the first female firefighter ever hired by the MFD. Twenty-eight years later, she remains Private Blanchette. In its history, Methuen has never promoted a female to the position of Captain or higher. When this case began, the three women on the department were all ranked privates, two of whom (Appellant and Susan Vallera) had 26 years and 16 years of seniority, respectively. Vallera testified that many male firefighters get promoted in less than 10 years. Methuen presented the testimony of Sandra Cunha, the former fire lieutenant who retired in 2013. At the time of her testimony, she was the only female ever to have been promoted. As it happened, Cunha was promoted by a female Mayor, Sharon Pollard. She recounted tales of differential treatment for women firefighters, including a 20-year bar, ending only recently, on working shifts at certain fire stations due to the unavailability of appropriate bathroom/changing/bedroom facilities for women. Cunha testified that she received support from Chief Sheehy, although that support was limited to his assisting her in obtaining certain benefits when she was leaving her employment. Although she tried to express support for Sheehy, to her

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<sup>47</sup> In the entire history of the MFD, through the first day of hearing in this case, there has only ever been one female superior officer employed by the MFD. [Tr1@120 (Sheehy testimony).]

<sup>48</sup> Remarkably, when advised that he could request a female-only certification list from Civil Service, Sheehy stated that he was unaware that there was an all-female list “where I could grab a few.” [Tr1@265 (Sheehy).]

knowledge, Sheehy, during his more than decade as union leader, never filed a grievance or other action to challenge the bar on women working certain shifts.

Of course, the City did finally promote another women firefighter, Susan Vallera, but it was not until after Blanchette filed this appeal. In fact, this promotion to the lowest rank of supervisory leadership came sometime between Day 1 and Day 4 of this hearing, at which time it was not yet permanent. Discounting the transparent timing of the promotion, the City held up Vallera as an example of how it, in fact, treats women fairly. Unsurprisingly, Vallera, who works closely with both the Intervenor and Deputy Donahue, and who was about to be recommended for promotion by the Chief, testified in support of Sheehy. In doing so, however, she recounted facts that paint a less than flattering portrait of the MFD as an inclusive and equitable employer. Despite being a well-qualified, veteran firefighter with significant seniority, Vallera was bypassed twice after being ranked number one on promotion lists. She was never even given the courtesy of notice that she was bypassed – nothing in writing, and nothing verbally. Even Anne Randazzo, head of Human Resources and the City’s point-person on all civil service matters, testified that she had no idea Vallera was ever bypassed, never mind bypassed twice. Vallera only learned about the bypasses years later, when she heard from Sheehy, then union president. According to Vallera, Sheehy indicated to her that she got a “raw deal.” No grievance was filed, and the union took no action. Sheehy, of course, denies making that statement – he testified that Vallera was treated fairly at all times. Finally, both Vallera and Donahue testified that Sheehy assured her, at this late stage anyway, that she would be promoted exactly in order of her civil service rank (again, Sheehy denies making that statement), which she ultimately was, at least provisionally. Sheehy’s statement detracts from the City’s case that internal interviews are such an integral part of the promotional process as to be indispensable. Deputy Donahue testified (on percipient knowledge)

that, without the benefit of any interview, Sheehy assured Vallera she would be promoted in whatever order she appeared on the civil service list. The City's agenda, now that Appellant had complained of discrimination, evolved toward promoting a woman—just not Blanchette.

But Blanchette has had a remarkable 26+ year career, despite the obvious challenges associated with being the first-ever female firefighter and the first and only firefighter to give birth to children and manage a family while working 24-hour shifts (with a spouse, a Lawrence firefighter, who also works 24-hour shifts). Appellant immediately brought credit to Methuen as soon as she was hired. She undertook the extensive training to become a certified instructor at the State Fire Academy, where she taught for some five years.<sup>49</sup> Blanchette soon received national attention for her groundbreaking efforts in the historic Malden Mills fire in Methuen. She was named Firefighter of the Year by both the State Fire Academy as well as locally in Methuen. Repeatedly, however, Chief Sheehy refused to give credit to her, quite dismissively saying her efforts were simply a medical call, or that she probably helped out a burn victim, and he compared it to his actions performing the Heimlich maneuver on someone at a little league game.<sup>50</sup> Appellant's Exhibit 13 tells the real story of Appellant's heroic efforts at Malden Mills. The situation was a mass casualty, with people "looking like victims of a bombing, severely burned and shocked," some even with their skin hanging off of their arms and faces. In describing the efforts of Blanchette and her co-worker, Jim Garrity (since promoted), the United States Fire Administration used their actions as a model for how medical workers would respond in the future to a mass-casualty catastrophe. Blanchette testified as to her triaging and treating some 30 severely

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<sup>49</sup> Sheehy was dismissive of Blanchette's instructor experience, suggesting he was unaware of it, or that perhaps she was only a support person at the academy who "helped out" with setting things up. [Tr2@19.]

<sup>50</sup> Apparently, Sheehy was named Firefighter of the Year for that incident and not long after was promoted. Sheehy also testified that most of the male firefighters who began in 1993 with Appellant had (1) also received firefighter of the year award and (2) have also been promoted. [Tr2@39, 73-74.]

burned victims, while also helping to suppress the actual historic fire. Blanchette was thanked by State officials in writing, copies of which were sent to her fire Chief at the time. She was asked to be a commencement speaker at the Massachusetts Fire Academy. Still, Chief Sheehy and others were sure to downplay her efforts and the significance of her achievements every chance they could, despite the obvious credit to both her and the City of Methuen.

Furthermore, Blanchette performed admirably in the daylong independent assessment center exercises used by the City to evaluate the candidates for the Captain position, but received zero recognition for this achievement from Chief Sheehy. As documented in App. Exhibit 8, the assessment center was transparent, credible, and had established, merit-based criteria, which it used to rank candidates independently. While the City Hall interview had 15 questions loosely tied to Methuen procedures, the assessment center had a 50-question exam based on Methuen's procedures (on which Blanchette performed better than Tulley), together with a video-recorded oral interview (on which Blanchette was also scored higher than Tulley), and several other intensive exercises evaluated by independent, outside fire executives. Candidates were identified only by numbers, and not names, to ensure fairness. Blanchette performed better than Tulley in Integrity Testing's structured interview exercise and she did better than Fluet in the oral presentation exercise. (See Respondent's post-hearing submission: October 4, 2019 report from Integrity Testing LLC's founding director, Alfred P. Donovan).<sup>51</sup> Lt. Fluet, however, topped the assessment after all five exercises were graded. He was promoted because, according to the City, he was first on the civil service list (with Blanchette falling one point behind). *See id.* and App. Exhs. 7 and 9. When it came time to promote Blanchette, however, things changed.

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<sup>51</sup> Chief Sheehy testified that Integrity Testing had told him they had discarded the individual exercise scores after a 17-day appeal period elapsed. Tr4@192-193. And yet two weeks later Integrity Testing produced that very information through counsel for the City.

The City's position is that it gave absolutely no weight to the assessment center performances other than to use them to establish a list of candidates.<sup>52</sup> That it promoted Lt. Fluet because he was first on the civil service list (but scored only in second place among the City interviewers) cuts against that position. That it did not promote Lt. Smith – who by the panelists' own admissions gave a very similar interview as Tulley, equalled Tulley's final score on the assessment center exercises, and who concededly was entitled to extra consideration because of his years of supervisory experience, further detracts from the credibility of the City witnesses' seemingly *post hoc* reasoning.

Appellant and other witnesses described the mutual back-scratching employment culture available to the male but not the female firefighters of the MFD; that several of the men had private businesses, including Intervenor Tulley, and they regularly provided employment to other male firefighters, but not to the women. Also, when Appellant was ranked among the top candidates by the assessment center, she described, in detail, how others, including supervisors, contacted her and told her things like: "Let's be real, if we called every single person into this kitchen, every one would say they want to see Matt get appointed," or that the selection of Tulley was predetermined and she had no chance at the job. That hardly describes a culture of equality.

Chief Sheehy described his meeting with Blanchette during which he told her she was to be bypassed. Sheehy described Blanchette as "barking at me." Putting aside the demeaning nature of that characterization, Sheehy recounted how Appellant seemed upset that the City was completely disregarding the assessment center, and that she was complaining that promotions were not going by the order of the list. Sheehy stated that the City would never simply go by the order

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<sup>52</sup> Interestingly, despite the fact that Chief Sheehy was the architect and advocate for switching to the assessment center, soon after Blanchette's results became known, the City switched back to the old way of doing things. No more assessment center. [Tr2@34 (Sheehy testimony).]

of the list. I cannot reconcile that testimony with that of Deputy Donahue, who was adamant that Sheehy assured now-Lt. Vallera that she would most definitely be promoted exactly in the order she appeared on the list – and that Sheehy made that assurance without any interview contingency. Vallera’s testimony was consistent with Donahue’s and I credit their version over Sheehy’s. Blanchette’s January 2019 argument to Sheehy mirrored the position Sheehy took with Vallera (as demonstrated by Vallera’s ultimate promotion). For me, that Blanchette’s argument did not carry the day is a weighty indication that she was treated unfairly, in violation of the basic merit principles set forth in G.L. c. 31, § 1, and that instead gender bias fatally undermined the justification for bypass offered by the City.

***Blanchette’s Grievance Is Ignored***

The circumstances of the grievance process demonstrate further that Blanchette was subjected to arbitrary and unfair treatment by the City. It is plainly evident to me that all the contractual and other internal processes normally in place to ensure fair treatment were, in fact, unavailable to her, and instead were actively or passively working against her. Despite no clear right to do so, the City and the MFD firefighters’ union put Appellant’s grievance on ice. The union acquiesced to what amounted to nearly a yearlong stay of the grievance; indeed, by the end of 2019, it had not even met with the City to discuss the matter, nor had it filed for arbitration. The union president blamed the City – stating that Randazzo asked the union to agree to postpone the matter. Ms. Randazzo said the opposite – she claimed that the union never pursued the matter, and that she did not know anything about it other than it was filed. The City was ordered to produce to this Commissioner the email trail between itself and the union, or suffer adverse factual findings. It never complied with my order. I have thus concluded that Randazzo did not testify forthrightly. Moreover, the union never requested a single document from the City to investigate appellant’s

grievance.

Likewise, the City Council never investigated Blanchette's complaint. It approved the promotion of Tulley on February 4, 2019, after receiving Appellant's detailed complaint of gender discrimination. The Council never asked a single question of Chief Sheehy during its meeting and Councilor McCarty voted in favor of Tulley without even mentioning his family relationship with the Intervenor.

HR Director and Assistant Solicitor Anne Randazzo is the City official responsible for investigating complaints of discrimination. She was directly involved in this case. She never even considered looking into the complaint, even though she received a copy from either Chief Sheehy or the Council shortly after it was filed. Randazzo testified that she figured Blanchette could get her remedy from this Commission, or perhaps the MCAD or EEOC, and thus never looked into the matter. In fact, she claims, she never even thought to do so. For that matter, neither did the Mayor, the Chief, the Council, or the Union.

So, against this whole backdrop, the City asks the Commission to agree that it has carried its burden to prove—by credible evidence—that it made its decision to bypass Blanchette after a thorough investigation, and upon sound and sufficient reasons. This record does not even come close to justifying the City's decision.

***INTERIM STEPS TOWARDS RELIEF TO BE GRANTED***

The remedy typically ordered by the Commission when it has determined that a candidate for appointment or promotion has been unlawfully bypassed in violation of civil service law and rules is to require that the candidate be placed at the top of the current and all future certifications for the position so that the candidate receives at least one opportunity for future selection consistent with basic merit principles of civil service law. In an extraordinary case, however, the Commission

has broad discretion to fashion a unique remedy when necessary to ensure that the civil service rights of a tenured employee aggrieved by an unlawful bypass are fully restored. *Mulhern v. Civ. Serv. Comm'n*, 57 Mass. App. Ct. 920, 920 (2003) (“The remedy to be accorded a plaintiff is a matter within the commission's discretion and will rarely be overturned.”), citing *Bielawski v. Personnel Administrator of Div. of Personnel Admn.*, 422 Mass. 459, 464 n.11, 465 (1996). This appeal is a case that calls for such extraordinary relief. The violation of civil service law in this appeal has been shown to be intolerable.

Because *both* Captain positions were filled from this eligible list and, in all likelihood, both Fluet and Tulley will not retire before Blanchette retires,<sup>53</sup> it is unlikely that Appellant will have another opportunity to be promoted to Captain, impacting her retirement income for life. As such, the Commission is constrained to consider, pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, ordering the Appellant to be placed into the Captain position she should have secured in February of 2019. However, the Commission will first offer the City an alternative, provided that it implements the following without appeal or undue delay. The City may choose to create another Captain or similar civil service supervisory position acceptable to Blanchette, so long as the benefits and compensation associated with said position are commensurate with what Blanchette would have earned had she assumed the vacant Captain's position in February of 2019. The City shall then render Blanchette whole by means of making a full backpay differential (Firefighter to Captain salary) payment to her. In order to give the parties time to consider such a potential resolution of this matter, this Decision will not take full effect until January 18, 2022—and, upon request, the Commission will stay for a further thirty (30) days

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<sup>53</sup> Blanchette is less than one month younger than Tulley and she is barely six months older than Fluet. Resp. Exhs. 1, 22-23. Firefighters typically retire at age 55, or after 32 years of service. Tr1@121 (Sheehy testimony). Blanchette will be entitled to a full firefighter pension in a little more than three years from now and there is no indication of a Captain vacancy arising in due course before then.

thereafter its contemplated Order that Blanchette be promoted to Captain. The Commission directs the parties to report back to the undersigned Commissioner within forty-five (45) days, or by January 3, 2022, whether the parties can agree upon an alternative course, as charted above. In the absence of a firm agreement in principle by that date, the Commission will schedule a status conference for the week of January 10, 2022.

The relief the Commission is prepared to order in this case is concededly out of the ordinary. But it is not unprecedented. This Commission has, on occasion, exercised its authority to vacate a promotional process, or even an individual promotion, when significant evidence of bias and irregular interview processes appear in the record. *See, e.g., Jebb v. Chicopee*, 27 MCSR 208 (2014) (Commission vacated appointment of city Police Chief upon finding personal bias against appellant on part of mayor); *Smyth v. Quincy*, 24 MCSR 497 (2011) (Commission vacated appointment of city Fire Chief after finding bias in interview process and panel); *Bertulli v. Town of Milford*, 14 MCSR 151 (2001) (finding grave violations of Chapter 31, the Commission set aside the promotion of a Milford police sergeant to lieutenant after finding there was a personal vendetta against the appellant by the chief which resulted in select board members receiving inadequate information about two finalists for the position); *Sihpol v. Beverly Fire Department*, 12 MCSR 72 (1999) (Commission vacated the appointments of four fire fighters after finding evidence of impermissible age discrimination and noting a process that was fatally flawed by ad hoc questions and extremely limited selection criteria).

Moreover, the relief envisioned here comports with well-established precedent in related public employment law realms. The Commonwealth Employment Relations Board (CERB) and labor arbitrators have ordered remedies equally potent that nonetheless were tailored to the unique

circumstances of cases committed to their jurisdiction.<sup>54</sup> After finding violations of G.L. c. 150E (the public employees labor relations statute), CERB recently ordered that any promotion to Fire Chief within the Everett Fire Department be rescinded, with the department to be headed by an acting Chief pending negotiations with the firefighters union regarding acceptable promotional processes. *In the Matter of: City of Everett and Everett Firefighters, IAFF, Local 143*, 48 MLC 32 (CERB August 27, 2021). *See also Town of Randolph*, 8 MLC 2044, MUP-4589 (April 23, 1982) (rescinding promotion of sergeant who was first on civil service list of officers eligible for promotion, where CERB determined that the town unlawfully failed to consider other officers eligible for promotion). In an unpublished Appeals Court decision issued pursuant to Rule 1:28, the panel upheld an arbitrator's award remedying a bypass for promotion to district fire chief that the arbitrator found violated procedures set forth in the parties' collective bargaining agreement by ordering the promotion of the bypassed individual, thereby supplanting the candidate that the city had appointed. In upholding the award, the court considered, but rejected, the city's contention that the arbitrator's order conflicted with various provisions of civil service law. *City of Worcester v. Local 1009, International Association of Firefighters*, No. 91-P-1240, 32 Mass. App. Ct. 1122, slip. op. at 2 (June 29, 1992).

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<sup>54</sup> For examples of nontraditional remedial orders issued by CERB intended to effectuate the purposes of the public employee labor relations law, *see Massachusetts Department of Transportation*, 43 MLC 67, SUP-14-3576, SUP-14-3640, (H.O. September 8, 2016) *aff'd* 44 MLC 1 (July 31, 2017) (remedying employer's discriminatory failure to consider employee for a promotional position by ordering that interview and selection process be repeated and that selection be made "based on the circumstances that existed at the time of the original application deadline"); *Town of Norwell*, 16 MLC 1575, MUP-6962 (H.O. February 21, 1990) *aff'd* 18 MLC 1263 (January 22, 1992) (as part of remedy for employer's violation of past practice of considering all officers who were on the civil service list in selection process for acting sergeant, ordering town to refrain from rewarding officer for his service as acting sergeant made pursuant to the violation).

## CONCLUSION

For the reasons stated above, the appeal of the Appellant, Tracy Blanchette, CSC No. G2-19-050 will be *allowed*.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

1. The parties shall meet and confer within twenty-one (21) days as to whether a suitable promotion of the Appellant into a civil-service supervisory position with a salary and benefits equivalent to the MFD's incumbent Captains can be agreed upon and arranged with an effective date in early 2022 and whether agreement can be reached on appropriate retroactive compensation to remedy the improper bypass identified in this Decision.
2. Within forty-five (45) days, or by January 3, 2022, the parties shall file (collectively or separately) a statement as to the prospects for resolution of this matter without the need for further Orders or litigation. The parties shall also identify the availability of counsel for a status conference during the week of January 10, 2022.
3. This Decision, with an amended set of remedial Orders, shall become final for purposes of further action under G.L. c. 31, § 44, and G.L. c. 30A, § 14, on January 18, 2022. In the absence of an agreement in principle by then among all parties to resolve fully this dispute, the City shall promote Tracy Blanchette to Methuen Fire Captain, retroactive to the date of her impermissible bypass. The City shall also make Firefighter Blanchette whole for any lost wages or benefits that resulted from her impermissible bypass. The parties' obligations pursuant to the Commission's forthcoming Final Order shall be stayed until February 17, 2022.

Civil Service Commission

/s/ Cynthia Ittleman

Cynthia A. Ittleman  
Commissioner

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 18, 2021.

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)(1), 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 a final agency decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Gary Nolan, Esq. (for Appellant)

James Pender, Esq. (for Respondent)

Leah M. Barrault, Esq. (for Intervenor)

Melissa Thomson, Esq. (HRD)

Regina Caggiano (HRD)