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**THE CIVIL SERVICE COMMISSION  
OF SALT LAKE CITY**

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**IN RE: MARTHA ELLIS**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, DECISION  
AND ORDER OF THE CIVIL SERVICE  
COMMISSION**

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Petitioner Martha Ellis (“Ellis”) appealed her May 3, 2016, demotion from Battalion Chief to the next lower rank of Captain with the Salt Lake City Fire Department (the “Department” or “SLCFD”). This demotion decision was communicated to Ellis by means of a letter from SLCFD Assistant Chief Robert McMicken (“McMicken” or “Assistant Chief McMicken”). Ellis’ appeal of McMicken’s demotion decision came before the Salt Lake City Civil Service Commission (the “Commission”) for a two-day hearing on February 1 and 2, 2017. Ellis was present and was represented by her legal counsel, Jaqualin Friend Peterson. The Department’s representative, McMicken, was present and the Department was represented by its counsel, John Delaney and Jonathan Pappasideras. Various witnesses were called by the parties, who offered testimony under direct and cross examination, and exhibits were offered by the parties and made part of the record.

During the hearing, Ellis moved to vacate the Department’s decision to demote Ellis (the “Motion to Vacate”), based on her argument that, contrary to Utah law, the demotion decision was made by McMicken instead of by the Department Fire Chief, Brian Dale (“Chief Dale”), and any delegation by Chief Dale to McMicken of the authority to demote Ellis was unlawful. The Commission asked the parties to brief the Motion to Vacate post hearing. Once the briefing by the parties was completed, the Commission heard oral argument on the Motion to Vacate from the parties’ respective attorneys, on April 6, 2017.

Thereafter, the Commission met at two duly noticed public meetings, where the Commission went into closed session to deliberate and to consider the testimony offered at the hearing, the exhibits that were submitted during the hearing, the exhibits that were stipulated to as admitted before the hearing, the parties' memoranda on the Motion to Vacate, and the arguments and statements of the parties' respective attorneys. Each of the Commission members carefully reviewed the transcripts of the hearing and the exhibits that were admitted into the record in this matter.

On May 18, 2017, at a duly-noticed public meeting of the Commission, the Commission voted unanimously to overturn and reverse the demotion of Ellis, and to find in favor of Ellis on her appeal, based on the grounds orally stated and summarized by the Commission at this meeting. The Commission then directed its attorney to prepare a draft decision and order setting forth the Commission's reasoning, findings, conclusions and basis for its decision in this matter, in accordance with the Commission's discussions with its attorney during the Commission's deliberation meetings, which draft the Commission would then review, finalize and issue as its final written Decision and Order in this matter.

The Commission has now considered the draft Decision and Order prepared by its attorney, including the proposed Findings of Fact and Conclusions of Law thereto, and hereby issues its Decision and Order in this matter. The Commission will first analyze and set forth its reasoning for granting the Motion to Vacate. Second, the Commission will set forth its ruling in favor of Ellis on the merits of this appeal by: (1) stating the standard of review it applied in ruling on this appeal on the merits; (2) stating the facts and legal conclusions on which it relied in ruling in favor of Ellis on the merits; and (3) stating its order on this appeal.

### **THE MOTION TO VACATE**

In the Motion to Vacate, Ellis argues that under applicable Utah law, as well as the Salt

Lake City Civil Service Commission Rules and Regulations (the “CSC Rules”), a decision to demote must be made by Chief Dale, the SLCFD Chief. Further, Ellis argues that any attempt by Chief Dale to delegate that decision to McMicken is contrary to Utah law and, therefore, invalid. As a result, Ellis argues that her demotion decision was unlawful and should be overturned. On May 18, 2017, the Commission voted unanimously to grant the Motion to Vacate based on the following grounds.

First, the relevant Utah statutes, and Utah case law interpreting those statutes, as well as the applicable laws and ordinances of Salt Lake City and the CSC Rules, all provide that it is the department head or chief of a public safety department who has the authority to make the type of disciplinary decision which is at issue in this appeal. For example, the applicable Utah state statute expressly provides that the department head is responsible for discipline. The statute providing such authority is titled “Suspension or discharge by department head” and states that “all persons in the classified civil service may be suspended . . . or removed from office or employment *by the head of the department.*” Utah Code Ann. § 10-3-1012(1) (emphasis added).

Specifically, Section 10-3-1012 states

All persons in the classified civil service may be suspended as provided in Section 10-3-912, or *removed from office* or employment *by the head of the department* for misconduct, incompetency, failure to perform his [or her] duties, or failure to observe properly the rules of the department, but subject to appeal by the suspended or discharged person to the civil service commission . . . which shall fully hear and determine the matter.

Utah Code Ann. § 10-3-1012 (emphasis added);<sup>1</sup> *see also id.* § 10-3-912 (“*The chief of each department may at any time suspend any subordinate officers . . .*” (emphasis added)). It further provides that decisions from the civil service commission “shall be certified to the head of the

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<sup>1</sup> Pursuant to this provision, it is also the “head of the department” that is identified both as the person (or figure) to whom the findings and decision of the Civil Service Commission are issued and the person (or figure) who must immediately enforce it. *See id.* at § 10-3-1012(4).

department *from whose order the appeal is taken.*” *Id.* § 10-3-1012(4) (emphasis added).<sup>2</sup>

Significantly, “removal of office” has been defined by the CSC Rules to include permanent demotion, “in that the person subject to such demotion has been effectively removed from a previously held office.” *See* SLC CSC Rule 5-1-3.

Numerous Utah cases also allude to the fact that the authority to make these types of disciplinary decisions for public safety municipal employees resides in the department head, which in this case was Chief Dale. For example, an older case provides that, “The duties of police officers are very definitely prescribed and fixed by law. *A police officer is responsible only to the head of his department, to whom has been given the power of his appointment and removal from office.*” *Roe v. Lundstrom*, 57 P.2d 1128, 1131 (Utah 1936) (emphasis added). The Utah Supreme Court has also stated that “the legislature contemplated giving the Civil Service Commission power to hear appeals *only when persons in the classified civil service had been removed from their office or employment by the head of the department . . . .*” *Piercey v. Civil Serv. Comm’n of Salt Lake City*, 208 P.2d 1123, 1125-26 (Utah 1949) (emphasis added). More recent cases have similarly operated under the assumption that it is the department head who is making the disciplinary decision. *See, e.g., Lucas v. Murray City Civil Serv. Comm’n*, 949 P.2d 746, 761 (Utah Ct. App. 1997) (“[W]e acknowledge that discipline imposed for employee misconduct is within the sound discretion *of the Chief.*” (emphasis added)); *Salt Lake City Corp. v. Salt Lake City Civil Serv. Comm’n*, 908 P.2d 871, 875-76 (Utah Ct. App. 1995) (“The statute therefore restricts the

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<sup>2</sup> Further, § 10-3-910 states as follows: “The administration of the police and fire departments shall consist of a chief of the department and such officers, members, employees and agents as the board of commissioners may by ordinance prescribe, and the board of commissioners shall appoint the heads of such departments.” Utah Code Ann. § 10-3-910. In addition, regarding disciplinary suspensions, the term “chief” is expressly used: “*The chief of each department* may at any time suspend any subordinate officers, members, employees, or agents employed therein when in his judgment the good of the service demands it . . . .” Since suspensions of a specific duration (three days, or 24 work hours, or more) are treated the same as a demotion or termination for purposes of an employee’s right of appeal to the Commission, the legislature’s use of the phrase “department chief” is instructive and consistent with conclusion that the authority for these types of disciplinary decisions is vested in the Fire Chief.

Commission to a simple thumbs up or thumbs down *on the Chief's suspension and termination decisions.*" (emphasis added)). In fact, the standard of review provided for the civil service commission expressly includes the question, "do the facts support the charges *made by the department head.*" *Kelly v. Salt Lake City Civil Serv. Comm'n*, 2000 UT App 235, ¶ 16, 8 P.3d 1048 (emphasis added); *see also Huemiller v. Ogden Civil Serv. Comm'n*, 2004 UT App 375, ¶ 4, 101 P.3d 394 ("The Chief must have the ability to manage and direct his officers, and is in the best position to know whether their actions merit discipline.").

The Salt Lake City Laws and City Ordinances (the "City Laws") and the CSC Rules similarly refer to the department head as the person having disciplinary authority to make the types of decisions that are appealable to the Commission. The City Laws vest the appointing power (which is also associated with disciplinary authority) in the chief of the fire department. City Laws at 2.08.070. The CSC Rules provide that "[t]he basic responsibility for maintaining and administering discipline belongs to the department Chief." CSC Rules at 5-1-1.<sup>3</sup> In addition, CSC Rule 6-4-5(10) provides that "[t]he Commission only has the authority to uphold or reverse *the department head's decision* in disciplinary appeals." *Id.*

Overall, the foregoing authority supports the conclusion that it is the department head who has the sole authority to impose the type of discipline that is appealable to a civil service commission.

The question, however, is whether Chief Dale delegated this disciplinary authority to McMicken and, if so, whether such a delegation was lawful. As to the first question, while

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<sup>3</sup> Moreover, it is the "department Chief" who must make reports to the Commission concerning, among other things, "[e]very suspension, without pay, greater than three (3) days or twenty-four (24) work hours . . . [e]very demotion . . . [e]very termination, separation and resignation." CSC Rule 1-4-2. Further, the "department Chief" only is responsible for many other decisions impacting civil service employment, including temporary appointments [*id.* at CSC Rule 2-6-2], termination of probationary employees [*id.* at Rule 3-2-2], leaves of absence [*id.* at CSC Rule 3-4-1], and selection for promotions [*id.* at CSC Rule 4-2-13].

McMicken repeatedly asserted that he alone made the decision to demote, he also testified that he was given that authority by Chief Dale. As a result, based on McMicken's testimony it appears that Chief Dale may have delegated this disciplinary authority to McMicken. It should be noted, however, that no written document evidences or establishes such a delegation of authority from Chief Dale, and the sole evidentiary basis for such a delegation is McMicken's testimony, which is somewhat inconsistent on this point, that he acted with Chief Dale's approval.<sup>4</sup>

For example, with respect to the Pre-determination Hearing Notice, McMicken testified that the two levels of authority above him, Deputy Chief Lieb and Chief Dale "*played a small role.*" Transcript ("Tr."), Day 1 at 35-36 (emphasis added). This consisted of McMicken consulting with Deputy Chief Lieb and Chief Dale, laying out the facts, providing his recommendation and that he then issued the Pre-determination Hearing Notice with their approval. *Id.* When asked whether Deputy Chief Lieb or Chief Dale made the decision to issue this Notice, McMicken responded, "No, I made that decision." *Id.*

Later, when McMicken was asked whether Deputy Chief Lieb and Chief Dale played a role in his decision to demote Ellis, McMicken stated that they "played a small role" where McMicken informed them of his course of action and the relevant events, made a recommendation for demotion and, "with approval I carried out the demotion." *Id.* at 43. McMicken was then asked, "So it was your decision to demote [Battalion Chief] Ellis?" McMicken responded. "That's correct." *Id.*

During cross-examination of McMicken the following exchange took place:

Q: Aren't you putting forward, basically, an impression that your decision to demote her is being approved by your chain of command?

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<sup>4</sup> Significantly, the first page of the Notice of the Demotion Decision is on Chief Dale's stationary, but this Notice was addressed to Ellis from McMicken, with copies sent to Paige Christensen, HR Consultant, and to Ellis' personnel file. Chief Dale was not even copied on the Notice of Decision and McMicken signed the Notice as "Supervisor/Manager."

A: *No. Well, it's approved per my direction and my request, but I'm the one who did the demotion.*

*Id.* at 16 (emphasis added).

Commissioner Hose also questioned McMicken on his disciplinary authority. McMicken explained it was given to him by Fire Chief Dale.

Q: Chief, in our previous hearings, the Fire Chief – the top level Fire Chief has always been in and done the discipline. So we've seen his signature –

A: Uh-huh

Q: on the demotion or suspension letters, whatever they were, that we have seen. And so how did that change? Was that a policy change on Dale's – Chief Dale's part or – because I haven't – we haven't seen this before at this level having that authority. So help us with that a little bit.

A: I think it's at the purview of each Fire Chief on how they want to handle their administration.

Q: Okay.

A: And a little history on that, remember – I think we – some of us remember we used to have the Chief, two Deputies, and no Assistants. And we went through kind of a transformation in the Fire Department hierarchy where we at one point had a Chief, two Deputies, and two Assistant Chiefs. And now we are at the point where we have a Chief, one Deputy, and two Assistant Chiefs. So I think it would be, suffice to say, it's up to each Chief to decide how they want to do certain aspects of discipline. *And in this aspect, I was granted the authority by the Chief to handle the discipline.*

*Id.* at 172-173 (emphasis added).

Later, McMicken explained that Chief Dale verbally “empowered” him to discipline Ms. Ellis. *Id.* at 174-175; *see also id.* at 171-172 and 176.

Regardless, the Commission does not find it necessary to resolve the factual dispute of whether such a delegation of authority actually took place because, ultimately, the Commission has determined that even if such a delegation did take place, it was contrary to the applicable law for the reasons set forth below. Initially, it should be noted that nothing in the Utah statutory

Municipal Code, the SLC Laws or the CSC Rules expressly provide that this disciplinary authority may be delegated. Similarly, no Utah cases have addressed this issue and, there is no case that has sanctioned such a delegation of disciplinary authority. Significantly, not only is the Commission unaware of a single Utah appellate decision where the issue of a chief delegating disciplinary authority was addressed, but it is also unaware of any Utah appellate decisions addressing discipline of a public safety officer by anyone other than the fire chief or police chief. Given the state of Utah's law, as described above, the Commission does not see itself as the body that should, for the first time in Utah, conclude that Utah law allows a delegation of disciplinary authority, particularly where there is no guidance from the Utah appellate courts on this issue. Rather, the Commission has determined that it should strictly apply the governing law, which, as detailed above, vests such disciplinary authority solely in the department head or chief of the SLCFD, who is Chief Dale.

The Commission is aware that case law in other states has, on occasion sanctioned such a delegation of disciplinary authority. Obviously, such authority is not binding on the Commission, and, in some of these cases, courts were dealing with statutes, laws and rules that are different from those governing the Commission, some of which, unlike Utah's, expressly provided for such a delegation of disciplinary authority. The Commission did review *Santa Clara Cnty. Correctional Peace Officers' Ass'n v. Cnty of Santa Clara*, 2011 WL 100530, at \*6 (Cal. Ct. App.), where the court dealt directly with the issue here and stated as follows:

[A]ppellants assert that case law reflects a general public policy against the delegation of decisions concerning public employee discipline. As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. Under normal circumstances and absent statutory provisions to the contrary the dismissal of employees involves the exercise of judgment or discretion. For that reason, such decisions ordinarily are not delegable. Moreover, public employee discipline generally must be undertaken in strict compliance with established procedures.

Absent contrary written authority, no substituted or delegated procedure [is] legally permissible.

*Id.* (internal citations and quotation marks omitted). The Commission agrees and has determined that it will require the SLCFD to strictly comply with the governing laws and rules.<sup>5</sup>

Finally, the Department has argued that the Commission does not have jurisdiction to grant or even resolve the Motion to Vacate. The Commission disagrees. Utah's statutory scheme delegates to the civil service commission the power to "make all necessary rules and regulations to carry out the purposes of this part and for examinations, appointments and promotions." Utah Code Ann. § 10-3-1006. The Commission concludes that this authority certainly gives the Commission the authority to consider whether the Department's disciplinary action complied with not only Utah State statute and the CSC Rules that it has promulgated under Utah's statutory scheme, but also the provisions of the Municipal Code. Of course, if delegation is prohibited by Utah's statutory scheme, which is what the Commission has determined, the decision has already been made by the legislature, and the Commission can "make a determination relative to the discharge," as contemplated by the statutory scheme and the CSC Rules.<sup>6</sup> CSC Rules at 6-1-0. Based on the foregoing the Commission grants the Motion to Vacate, which is a separate and independent basis for overturning Ellis' demotion, and separate from its ruling on the merits below.

The Commission now addresses the merits of Ellis' demotion and sets forth its findings of fact and conclusions of law, after first stating the standard of review it used in deciding this appeal.

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<sup>5</sup> In addition, the Commission is aware that some courts in other jurisdictions have recognized that a delegation of disciplinary authority is not only appropriate where the chief has a conflict of interest in making the decision, but is required to ensure that the employee is afforded fair treatment. However, the Department has at no point alleged that such a conflict of interest exists in this case and, therefore, that exception is inapplicable here.

<sup>6</sup> Contrary to the Department's assertion, the Commission's ruling on the Motion to Vacate does not constitute a modification or remand of the demotion decision; rather it is simply a "thumbs up or thumbs down" on the demotion.

## STANDARD OF REVIEW

Pursuant to Utah Code section 10-3-1012, a civil service employee may appeal a discharge to the Commission, “which shall fully hear and determine the matter.” Utah Code Ann. § 10-3-1012(2). In doing so, the Commission is to make two inquiries: “(1) do the facts support the charges made by the department head, and if so, (2) do the charges warrant the sanction imposed.” *Ogden City Corp. v. Harmon*, 2005 UT App 274, ¶ 10, 116 P.3d 973 (*Harmon I*). In evaluating these two questions, the Commission must consider whether substantial evidence supports the disciplinary decision. *Huemiller v. Ogden Civil Serv. Comm’n*, 2004 UT App 375, ¶ 2, 101 P.3d 394. Substantial evidence is that quantum and quantity of relevant evidence that is adequate to convince a reasonable mind to support a conclusion; it is more than a mere scintilla of evidence but something less than the weight of the evidence. *See Lucas v. Murray City Civil Serv. Comm’n*, 949 P.2d 746, 758 (Utah Ct. App. 1997) (internal citations and quotations omitted).

In determining whether the sanction is warranted, the Commission must affirm the sanction if it is (1) appropriate to the offense and (2) consistent with previous sanctions imposed by the Department. *Harmon I*, 2005 UT App 274, ¶ 16.

In balancing the proportionality of the punishment to the offense, the Commission may give weight to the following considerations: (1) whether the violation is directly related to the employee’s official duties and has significantly impeded his ability to carry out those duties; (2) whether the offense was of a type that adversely affects the public confidence in the department; (3) whether the offense undermines the morale and effectiveness of the department; or (4) whether the offense was committed willfully or knowingly, rather than negligently or inadvertently. *Id.* at ¶ 18. The Commission can also consider the employee’s service record and the strength of the evidence of misconduct. *Id.* Moreover, “a series of violations accompanied by apparently ineffective progressive discipline may support termination.” *Id.* (internal citation omitted). *See*

*also Hollenbach v. Salt Lake City Civil Serv. Comm'n*, 2015 UT App 116, ¶ 23, 349 P.3d 791. In weighing the punishment against the offense, the Commission is required to give deference to the police chief's choice of punishment because, as the head of the department, he is in a position to balance the competing concerns in pursuing a particular disciplinary action. *Ogden City Corp. v. Harmon*, 2007 UT App 336, ¶ 6, 171 P.3d 474 (*Harmon II*); *see also Huemiller*, 2004 UT App 375, ¶ 4. Given the degree of deference afforded to the police chief's determination, the Commission may reverse the chief's choice of discipline as unduly excessive only when the punishment is clearly disproportionate to the offense, and exceeds the bounds of reasonableness and rationality. *Harmon I*, 2005 UT App 274, ¶ 17.

In determining whether the sanction is consistent, the Commission should consider whether the termination was "consistent with the treatment of other officers for similar or more egregious conduct." *Nelson v. Orem City*, 2012 UT App 147, ¶ 27, 278 P.3d 1089. The employee carries the burden of showing disparity of treatment between himself and other similarly situated employees. *Id.* The employee should provide "detailed information pertinent to a determination of whether the circumstances (not just the actions) of other office sanctions were similar." *Phillips v. South Jordan City*, 2013 UT App 183, ¶ 18, 307 P.3d 659; *Perez v. South Jordan City*, 2014 UT App 31, ¶ 30, 320 P.3d 42 ("[D]isciplined employee must do more than show that other employees received lighter punishments for similar offenses[.]" identifying employees "with similar discipline histories and service time, for example[.]").

### **FINDINGS OF FACT**

The Commission makes the following findings of fact based on the evidence presented at the hearing, and/or in the record, in this matter.

### **Ellis' Employment and Educational Background.**

1. Ellis has been an employee of the SLCFD for 22 years, having been hired in 1995. Tr. Day 2, Vol. 1 at 89-90; Ex 81 (Doc. Nos. ME751-758).
2. She was hired as a firefighter and, after completing her apprenticeship, she became an engineer (driver and operator) of firefighting trucks and apparatus, and held that position until 2002. Tr. Day 2, Vol. 1 at 91-92; Ex. 81 (Doc. Nos. ME751-758).
3. During this time, Ellis was the five-time Women's World Champion in the Firefighter Combat Challenge, and she was the world record holder for the Firefighter Combat Challenge for eight years. Tr. Day 2, Vol. 1 at 91; Ex. 81 (Doc. Nos. ME751-758).
4. From 2002 to 2004, Ellis was a Media/Technician/Documentation Unit Leader. From 2004 to 2005, she was a Captain and Manager of the SLCFD Aircraft Rescue Firefighter Training Center. She then served as the Salt Lake City International Airport Fire Marshal from 2005 to 2009. From 2009 to 2014, she was the Fire Marshal and Fire Prevention Bureau Division Chief, and from 2006 to 2011 she was the Fitness Editor and a columnist for Fire Rescue Magazine, an internationally circulated fire service publication. Ex. 81 (Doc. Nos. ME751-758).
5. In 2014, Ellis served as the Division Chief for Emergency Management, Intelligence Coordinator and Logistics, which was the position she held at the time she was demoted from Battalion Chief to Captain in 2016. *Id.*
6. Ellis has an impressive educational background. She obtained a Bachelors of Animal Science degree from Colorado State University in 1987. She obtained an Associate of Fire Science degree from Utah Valley University in 2005. In 2009, she was awarded a graduate certificate in Conflict Resolution and Mediation from the University of Utah, where she also was awarded a Master Mediator Award. *Id.*; Tr. Day 2, Vol. 1 at 91-92

7. In 2012, Ellis was awarded a fellowship to the Harvard Kennedy School of Governance for senior executives in state and local government, which was an “amazing opportunity” for her to collaborate with an incredible group of people. Ex. 81 (Doc. Nos. ME751-758); Tr. Day 2, Vol. 1 at 106-107.

8. Ellis then attended the Naval Postgraduate School’s program in Homeland Security and Defense Center in Monterey, California, and, in 2014, she was awarded a Masters of Arts in National Security Studies. Ex. 81 (Doc. Nos. ME751-758); Tr. Day 2, Vol. 1 at 99-100.

9. Over the course of her career, Ellis has been involved in a variety of organizations where she has served the community, including her service as a member of the Board of Directors of the Girl Scouts of Utah and the TAG Ranch for kids, and she has served on the Advisory Board for the Salvation Army. She has also received numerous awards, including the Salt Lake City Fire Chief’s Recognition Medal and its Certificate of Merit, as well as SLCFD’s Golden Spanner Award. Ex. 81 (Doc. Nos. ME751-758).

10. Based on the record, as well as Ellis’ testimony and demeanor, the Commission found that Ellis was a highly motivated, articulate, engaged and energetic fire service professional, who is passionate about her career as a fire fighter. The Commission also specifically finds that she is a credible witness.

**Prior Discipline.**

11. In 2014, when Ellis took the position of Division Chief of the Logistics Division, she reported to McMicken who was an Assistant Chief. McMicken reported to Deputy Chief Lieb, who reported to Chief Dale. Tr. Day 2, Vol. 1 at 108-109; Tr. Day 1 at 35.

12. Prior to assuming this position, Ellis had not received any formal discipline. She had received various write-ups but she was informed by Chief Dale that these write-ups did not constitute formal discipline.<sup>7</sup> Tr. Day 2, Vol. 1 at 108-109.

13. McMicken issued a written warning to Ellis on February 6, 2014, and McMicken subsequently issued a two-day suspension without pay to Ellis on June 4, 2015. *Id.*; Ex. 24 (Doc. Nos. ME116-123).

**Demotion of Ellis.**

14. Ellis was provided a pre-determination letter dated March 16, 2016 (the “Pre-determination Letter”), which advised her, among other things, that McMicken was considering “disciplinary intervention in response to actions on [Ellis’] part which appear to be a violation of policy and/or expectations related to the successful performance of [her] job duties.” Doc. Nos. ME129-135. The Pre-determination Letter provided an outline of the allegations and issues that would be addressed and advised Ellis that a Pre-determination hearing has been scheduled to provide her with an opportunity to respond to these allegations. *Id.*

15. The Pre-determination hearing occurred on April 11, 2016, and Ellis was represented by legal counsel. At this hearing, Ellis, with the assistance of her legal counsel, addressed each of the allegations set forth in the Pre-determination Letter. The hearing lasted approximately a little less than 2 hours.

16. By letter dated May 3, 2016, McMicken issued his Notice of Decision (the “Notice of Decision”), wherein he demoted Ellis to the rank of Captain and outlined the reasons and basis for his decision. Doc. Nos. ME136-144.

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<sup>7</sup> Specifically, SLCFD asserts that Ellis received 14 prior “Coaching and Counseling sessions or Verbal Warnings” while a Division Chief. Notice of Decision, Doc. No. ME143.

17. In the Notice of Decision, McMicken alleged that Ellis had engaged in a “pattern of performance which falls below his expectations and which raised concerns about Ellis’ “ability to effectively manage and perform [her] job duties.” McMicken then outlined four categories of performance problems: (1) an apparent lack of engagement with her current assignment; (2) a lack of ownership of her job responsibilities; (3) an inability or unwillingness to follow instructions; and (4) a lack of respect for her chain of command. Doc. No. ME136.

18. McMicken then provided seven specific examples of Ellis’ alleged lack of performance upon which he drew the conclusions set forth in the prior paragraph, as follows (Doc. Nos. ME136-139):

a. First was Ellis’ alleged failure to move forward with the project for expanding the incident command system (“ICS”), including her failure to obtain appropriate input in the manner that McMicken requested. *Id.*

b. Second was the fact that Ellis’ arrived late to the January 26, 2016 Captains Triennial Meeting. *Id.*

c. Third, McMicken alleged that Ellis had failed to gather appropriate budgetary information from her captains and then synthesize the information she gathered so she could present it to McMicken. Instead, McMicken alleges that Ellis had the captains appear at and make most of the presentations offered at the meeting. *Id.*

d. Fourth, Ellis allegedly failed to take the lead in moving the Engineer Task Book forward and complete this project and, instead, she relied on others to perform her functions as the Division Chief. *Id.*

e. Fifth, Ellis made a presentation regarding the Fire Intelligence Liaison Officer (“FILO”) program at the Utah State Fire Chiefs Association

Winter Conference in St. George, without providing McMicken with prior notice that she was going to give a presentation and without the SLCFD's prior approval.

*Id.*

f. Sixth, Ellis allegedly failed to follow McMicken's directive regarding how he wanted her to maintain her Outlook Calendar, so he could determine where she was if she was not present. *Id.*

g. Seventh, McMicken alleged that Ellis' staff was unable to contact her between Thursday, October 15, 2015 and Saturday, October 17, 2015. *Id.*

19. McMicken determined that each of the allegations against Ellis were sustained and that they constituted a violation of the following policies (*id.* at 136-142):

a. SLCFD General Rules: "The purpose of supervisory positions is to ensure that the mission, manner, goals, and directives of the Chief are carried out in an efficient, effective, and safe manner." *Id.* at 142.

b. Salt Lake City Policy 3.02.10 (Supervisor Standards and Responsibilities 1.2): "A supervisor ensures the work of the City is accomplished and that each employee she or he supervises succeeds in the workplace." *Id.*

c. Salt Lake City Policy 3.02.01 (Standards of Conduct 1.3): "During work hours, City employees will devote their whole time, attention, and efforts to City business." *Id.*

d. Salt Lake City Policy 3.02.09 (Courteous and Respectful Behavior 1.1): "All City employees should conduct themselves in a manner that will not disrupt the workplace, undermine the authority of management, impair close working relationships, offend the public or otherwise impede the effective operation of City government." *Id.*

20. Ellis filed a timely appeal of the demotion decision.

## **Analysis of the Seven Incidents.**

21. The Commission makes the following findings of fact regarding the seven incidents upon which McMicken based his decision to demote Ellis.

### **Incident 1: Expanding the Incident Command System (“ICS”).**

22. The first incident cited by McMicken as a basis for his decision to demote Ellis related to her alleged deficient performance in handling the ICS expansion project. McMicken alleges that, over an approximate two-month period from January to March of 2016, Ellis failed to follow his directive to meet personally with or call senior SLCFD personnel to get their input regarding expansion of the ICS, which caused the project to lose momentum. Specifically, McMicken alleged the following:

During a staff meeting in January 2016, [Battalion Chief]<sup>8</sup> Ellis addressed senior SLCFD personnel on the topic of expanding the . . . ICS. Shortly thereafter, [Battalion Chief] Ellis emailed these senior SLCFD personnel requesting input on the topics [Battalion Chief] Ellis had presented at that meeting. On several occasions between the January staff meeting and a similar meeting scheduled for March 9, 2016, A.C. McMicken had instructed [Battalion Chief] Ellis to meet with the senior SLCFD personnel in person or to call or email them in order to get the requested input prior to their March 9, 2016 staff meeting.

On March 7, 2016, two days before the scheduled meeting, [Battalion Chief] Ellis emailed A.C. McMicken informing him that she had only received input from three of the senior SLCFD personnel. A.C. McMicken responded to this email inquiring whether [Battalion Chief] Ellis had attempted to personally meet with the senior SLCFD personnel or had called them directly, as previously instructed, and reminding her of the critical importance of acquiring information prior to staff meetings in order to move the process forward. [Battalion Chief] Ellis responded, stating, among other things, “Chief [McMicken], there are not enough hours in the day to seek each chief out one on one. That would be very inefficient.”

[Battalion Chief] Ellis’ failure to obtain the necessary information over an approximate two-month period of time, not only caused the project to lose momentum, it also demonstrated to A.C. McMicken, among other things,

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<sup>8</sup> In its filings and throughout the hearing, the Department and McMicken referred to Ellis as “Captain Ellis,” which was the rank to which she was demoted. Of course, she held the rank of Battalion Chief during the relevant time period when she was allegedly failing to perform.

[Battalion Chief] Ellis' lack of necessary leadership skills to effectively manage and move projects forward.

SLCFD's Statement of Facts in its Pre-Hearing Filing to the Commission; *see also*, Notice of Decision, Doc. Nos. ME136-137.

23. The Commission disagrees with McMicken's allegations regarding this issue and finds that these allegations were not supported by substantial evidence. Rather, the evidence shows that Ellis was very involved in working on this project and that she was gathering the necessary information from appropriate persons within the time frames set by McMicken.

24. At the outset, the Commission notes that the expansion of the ICS was a complex project that would require months to complete.

25. For example, on August 18, 2015, Matt Taylor, who was heavily involved in the ICS project, sent an email to Ellis, indicating some of his projects had stalled, but that recently he was able to move forward with the expanding ICS project, but requested that he be given "a few more months" to get this project "to a better place before handing [it] over." Doc. No. ME395. As a result, Ellis requested that Taylor be granted a six-month temporary assignment within his current role as Emergency Manager. *Id.* McMicken denied this request.

26. On September 9, 2015, after attending a number of planning meetings, Ellis conducted a workshop as head of logistics regarding expanding the ICS project, working with Brady George (who was over Training), Matt Taylor, who was the Fire Department Emergency Manager, and Eric Witt, as the City's Emergency Management representative. Tr. Day 2, Vol. 2 at 66-69.

27. Subsequently, on September 22, 2015, a meeting was held to discuss the preparation of an after-action report regarding the September 9 workshop. McMicken accepted the invite to

this meeting but failed to attend.<sup>9</sup> Chief McCarty and Eric Witt also were unable to attend this meeting. Ellis did meet with Brady George and Matt Taylor, and the three of them worked over the next few weeks to prepare this after-action report. *Id.* at 74-75.

28. Ultimately, the after-action report was distributed to the Battalion Chiefs on November 5, 2015, as the report was delayed because Matt Taylor was in the midst of transitioning out of his position as the SLCFD Emergency Manager, and Ellis was required to train a new captain and had limited time due to her other job responsibilities. *Id.* at 77.

29. Prior to sending out the after-action report to the Battalion Chiefs, Ellis sent it to McMicken on November 2, 2015 to get his input before it was finalized. McMicken responded that he did not have further input and that Ellis should proceed because she knew what she was doing. *Id.* at 79.

30. In a meeting held on November 25, 2015, with McMicken, which Ellis recorded, there was discussion about holding a following up workshop regarding expanding ICS on December 9. Ellis noted that the November meeting had been cancelled and she was concerned whether there would be time to conduct this given the fact that training was already scheduled for the December meeting. Ellis then suggested that, at the December meeting, she would give a brief synopsis of the findings and this would be after everyone would have had an opportunity to read the after-action report, and then she proposed holding another workshop in January to focus on the command and control and the roles and responsibilities that would be fulfilled. McMicken responded that it was like eating a pizza, one piece at a time, and he recognized that “it takes months” to complete this project. *Id.* at 85-87.

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<sup>9</sup> The record shows that McMicken failed to attend or arrived late to a number of meetings regarding the expanding ICS project and emergency management. Doc. No. ME394.

31. In early December of 2015, Ellis gave a brief presentation regarding this project at the Chief's meeting, and told the Battalion Chiefs that she would begin working with them early next year to build the components that they had identified as problematic in expanding the ICS. *Id.* at 79.

32. At the January staff meeting, Ellis distributed (either before or at the meeting) a synopsis regarding where this project was and discussed it with the Battalion Chiefs, a couple of whom thanked her for putting the synopsis together and refocusing them on this project. *Id.* at 88; Doc. Nos. ME427-428.

33. On Thursday, January 21, 2016, McMicken sent Ellis an email at 4:39 p.m., wherein he said, "I would like to see the Chiefs' reply to you prior to the next staff meeting (you may have to call or email directly if you do not received feedback in a timely fashion)." *Id.* at 88; Doc. No. ME412.

34. The day before receiving this email from McMicken, Ellis had sent the Battalion Chiefs a document identifying the issues that would be discussed in February. *Id.* at 88-89; Doc. No. ME413.

35. In any event, Ellis understood from McMicken's January 21 email that McMicken gave Ellis the option of calling or emailing the Battalion Chiefs. Tr. Day 2, Vol. 2 at 89; Doc. No. ME412.

36. Ellis was out of the office on Friday, January 22. On the next business day, Monday, January 25, at 8:25 a.m., Ellis sent an email to the Battalion Chiefs asking the Chiefs to reply to her request for information. Tr. Day 2, Vol. 2 at 92; Doc. No. ME413.

37. On February 3, 2016, Ellis and McMicken had a further discussion where McMicken asked Ellis to prepare a laminated check sheet to be available in either the incident command posts and in the command vehicles, which a commander could use to make assignments.

The check sheet was to list the immediate priorities that the commander should consider.

McMicken told Ellis that she needed to prepare this draft check sheet, “whether it is next month, two months, three months,” and then provide it to them at a staff meeting. Tr. Day 2, Vol. 2 at 94-95.

38. At this February 3 meeting, McMicken also expressed frustration to Ellis about the difficulty in getting the Battalion Chiefs to communicate with Ellis and provide input to the ICS project and he stated, “That’s why I said email them, call them, try to engage them to get them . . . to say something about ICS . . . .” *Id.* at 183-185. Ellis then responded that she would reach out to the Battalion Chiefs on their individual shifts and, “if nothing else, I’ll schedule little meetings two on two.” *Id.* at 184-185.

39. The February staff meeting scheduled for February 10 was subsequently cancelled by Chief Dale. Tr. Day 1, at 203; Doc. No. ME414.

40. Within approximately a month of Ellis’ February 3 meeting with McMicken, however, Ellis had prepared an initial draft of the check sheet that McMicken asked her to prepare, which included blanks for the Chiefs to fill in items that they thought needed to be covered, and Ellis emailed it out on March 7, and she also distributed this draft check sheet at the March staff meeting on March 9, (which was the next staff meeting held following the January staff meeting). Doc. Nos. ME424-425. Ellis understood that she had one to three months to accomplish this task, per McMicken’s instructions. Tr. Day 2, Vol. 2. at 96, 99-100.

41. On March 7, 2016, two days before the scheduled staff meeting, Ellis emailed McMicken informing him that she had only received input from three of the chiefs. McMicken responded to this email inquiring whether Ellis had attempted to personally meet with the senior SLCFD personnel or had called them directly. Doc. No. ME417. Ellis responded the next day, and stated, “Chief [McMicken], there are not enough hours in the day to seek each chief out one

on one. That would be very inefficient.” *Id.* Ellis then informed McMicken that she was creating a basic worksheet for tomorrow’s staff meeting, and that she and Battalion Chief George had reviewed Deputy Chief Lieb’s and Chief Baldwin’s comments regarding the worksheet, which she felt were “very helpful.” *Id.*

42. At the March 9 staff meeting Ellis received responses and feedback from some Battalion Chiefs, but seven days later, on March 16, before she could complete this draft, she was escorted from the building and put on administrative leave. Tr. Day 2, Vol. 2 at 101.

43. During the six weeks between the February 3 meeting with McMicken and the March 16 day on which she was placed on administrative leave, Ellis had not conducted any two on two meetings with Battalion Chiefs. *Id.* at 186.

44. The record, however, establishes that Ellis did not refuse to meet with the Battalion Chiefs and, in fact, she met personally with and had discussions with a number of them, including, Battalion Chief George, Battalion Chief Thomas and Battalion Chief Paulson, among others. *Id.* at 102.

45. Chief Brady George, who was over Training, testified that he was heavily involved in the project for expanding ICS, and he testified at length about his involvement and the fact that this “was a really big project for us, and so it was going to be something that was going to take quite some time. I anticipated probably several years to actually bring us to where we thought we should be or at least have a good functional plan in place that was moving forward.” Tr. Day 2, Vol. 1 at 16.

46. Battalion Chief George testified at length about the work Ellis did on this project, and he stated that he personally discussed his input on this project with Ellis, and he stated that Ellis followed up with a “series of emails” once the after-action report was distributed, and that Ellis was “very engaged in this project.” *Id.* at 18-19.

47. The foregoing facts establish that Ellis was engaged, working on, and managing the ICS project over a period of several months. More importantly, in November 2015, McMicken told Ellis that this project would require months, and he analogized it to eating a pizza, piece by piece. In January, McMicken advised Ellis to seek input by either meeting with *or* emailing the Battalion Chiefs, and he reaffirmed in the February 3 meeting that he had given her the option of emailing or calling the Battalion Chiefs. Contrary to the evidence, McMicken alleges that he indicated to Ellis on several occasions that she “should either meet with the chiefs directly or call them in order to ensure that you received this critical information prior to the March staff meeting.” Doc No. ME136. This assertion is inconsistent with McMicken’s January 21 email and his recorded statements to her on February 3. Doc. No. ME412; Tr. Day 2, Vol. 2 at 184.

48. Ellis sent several emails and had three staff meetings wherein she sought input. Finally, in February, McMicken asked Ellis to prepare a draft check sheet, and told her to get this done within one to three months, which is another indication that McMicken informed Ellis that he knew this project would take months to accomplish. Ellis distributed an initial draft of this check sheet by email on March 7, and discussed it with the Battalion Chiefs at the March 9 staff meeting. Finally, the record establishes that Ellis also met with and discussed the project with a number of Battalion Chiefs as instructed.

49. Accordingly, the Commission finds that McMicken’s allegations regarding Ellis’ lack of performance regarding the ICS project are not supported by substantial evidence. The Commission is particularly troubled by the fact that in taped conversations, McMicken is directly telling Ellis that this project will require months to accomplish, and he gives her up to three months to accomplish one part of this project, and then, a month later, he criticizes her for not talking personally to the Battalion Chiefs, despite the fact that he had expressly told her that she could either meet with or email the Battalion Chiefs, and then nine days later he serves her with the Pre-

determination Letter. It appears to the Commission that McMicken was looking for reasons to discipline Ellis.

**Incident 2: Late Arrival to the January 26, 2016 Captains Triennial Meeting.**

50. The second incident upon which McMicken's demotion decision relies is his allegation that Ellis failed to put this three-day Captains Triennial Meeting on her calendar, that she arrived late to the first day of this meeting (which started at 10:30 a.m.), and that she was ill-prepared for the meeting. Specifically, McMicken alleged the following:

On January 26, 2016, the SLCFD held its first of three scheduled Captains Triennial meetings. These meetings are very important to the SLCFD as they only occur three times per year, and at which all Division Chiefs (including [Battalion Chief] Ellis) are required to attend and speak on behalf of their respective divisions. If a Division Chief is going to be absent for any of this three-day conference, they must inform their direct report in advance of their intended absence.

On January 26, 2016, as of approximately 10:30 a.m. on the first day of the Captains Triennial meetings, [Battalion Chief] Ellis was not present and had not informed A.C. McMicken, [Battalion Chief] Ellis' direct report, of an intended absence. Sometime after 10:30 a.m., [Battalion Chief] Ellis arrived at the meeting and was ill prepared for the presentation.

Admitting she was late to the Captains Triennial meeting, [Battalion Chief] Ellis further admitted she had failed to schedule the meeting on her calendar. These actions demonstrated to A.C. McMicken an inability on [Battalion Chief] C Ellis' part to appropriately manage her calendar and her time, a lack of engagement in SLCFD activities, and a lack of leadership required by a Division Chief.

SLCFD's Statement of Facts in its Pre-Hearing Filing to the Commission; *see also*, Notice of Decision, Doc. No. ME137.

51. The record shows that, on the morning of January 26, 2016, Ellis had a 9:00 a.m. meeting scheduled with Captain Archuleta, and that there was a Construction Meeting scheduled for 10:00 a.m., that Captain Kochevar was supposed to handle. Tr. Day 2, Vol. 2 at 102-103.

52. However, at 6:30 a.m. that morning, Ellis received a text from Captain Kochevar that his child was ill and that he would not be in for the day. As a result, Ellis's "first thought" was that she would have to cover the Construction Meeting in place of Captain Kochevar. *Id.*

53. However, before Ellis could arrive for her meeting with Archuleta, the car she was driving was struck by another vehicle. It was snowing that morning and the roads were icy, which contributed to this accident. *Id.* at 106.

54. Ellis immediately notified dispatch of the auto accident so dispatch could push the notification that she was in an auto accident to everyone that was on the notification list, which she understood included Assistant Chief McMicken. *Id.* at 107.

55. When Ellis did not hear back from McMicken, she sent McMicken an email informing him that she had been involved in a fender-bender that morning. *Id.* at 108-109; Doc. No. ME434.

56. Ellis then made it to the Construction Meeting at 10:00 a.m., which she handled in place of Captain Kochevar, after which she was asked if she was attending the Triennial Captains Meeting. Ellis recognized that she had failed to put this meeting on her calendar and it had slipped her mind, so she went directly to the Triennial Captains meeting. *Tr. Day 2, Vol. 2* at 110-112.

57. If it had not been for accident that morning, she would have made it to the office by 8:00 a.m. whereupon she would have been informed about the Triennial Captains Meeting, which would have presumably enabled her to arrive to that meeting on time. *Id.* at 110.

58. Ellis was prepared to present at the Triennial Captains Meeting, and McMicken had already made the presentation on Facilities by the time she arrived, though she went on to give a presentation regarding two new tiller trucks that the Department was acquiring, as well as the fact that the Department had saved \$50,000 on these trucks, and she also briefed those in attendance about a trip they were taking to Appleton for the prebuild of a hazardous materials rig. *Id.* at 112.

59. Ellis went on to make presentations over the next few days at the other Triennial Captains Meetings. *Id.* at 112-113.

60. After the initial meeting on January 26, McMicken made no comment whatsoever to Ellis about the fact that she was late, or the nature of her presentation. *Id.*

61. Battalion Chief George had also failed to put this Triennial Captains Meeting on his calendar and he arrived at the meeting late, like Ellis, though he did arrive in time to make his entire presentation. Tr., Day 2, Vol. 1, 26-27. Battalion Chief George received no discipline for the fact that he had failed to calendar this meeting, or for his late arrival to the meeting. *Id.*

62. Based on this record, the Commission finds that these allegations of Ellis' lack of performance are not supported by substantial evidence. Ellis was trying to cover two meetings the morning of January 26, including a Construction Meeting that Captain Kochevar was unavailable at the last minute to cover because he had to stay home with a sick child. Nonetheless, it is likely that Ellis would have still attended the Triennial Captains Meeting on time if the car she was driving had not been struck that morning by another vehicle. Ellis called dispatch regarding the notification and understood that notification would be passed on to McMicken. Nonetheless, Ellis also personally informed McMicken of the accident by email. Accordingly, the allegation that McMicken was not informed of the issues that caused Ellis to be late is not accurate.

63. Again, the Commission is troubled by McMicken's reliance on this event as a basis for discipline. Ellis did fail to put this on her calendar, but the fact that she was late appears to have been inadvertent, and occasioned by the unforeseen circumstances she had to deal with that morning. This entire incident appears trivial in nature, as demonstrated by the fact that Battalion Chief George also failed to put this meeting on his calendar and he was also late to the meeting, but received no discipline whatsoever.

64. Also, it is significant, that McMicken made no mention to Ellis after the meeting regarding the fact that she was late, or the fact that she was allegedly ill-prepared for the presentations she gave that day and at the subsequent Triennial Captains Meeting, all of which suggest that it was not conduct that merited formal discipline.

65. There is also nothing in the record that would suggest that Ellis had a pattern of being late to such meetings, or that she was late to any other such meetings following this incident.

66. Based on the entire record, the Commission finds that this incident does not demonstrate a lack of engagement on the part of Ellis, contrary to McMicken's allegation. In sum, the record regarding this incident indicates to the Commission that Assistant Chief McMicken was searching for reasons to discipline Ellis.

### **Incident 3: Reliance on Captains to Provide Information at Budgetary Meeting.**

67. The third incident upon which McMicken relied to support his decision to demote Ellis is his allegation that he expected Ellis to gather and synthesize budgetary information from the captains that report to her, and then present that information at a January 12, 2016 meeting with him. Instead, Ellis obtained permission to have her captains attend the meeting, where they, instead of Ellis, presented information on the budgetary topics related to an assignment McMicken allegedly gave Ellis regarding the Engineering Task Book. Specifically, McMicken alleged the following:

On or about January 12, 2016, A.C. McMicken had scheduled an afternoon meeting with [Battalion Chief] Ellis concerning budgetary issues relating to the Logistics division, the division over which [Battalion Chief] Ellis was responsible. As the Division Chief over Logistics, [Battalion Chief] Ellis had responsibility for, among other things, periodic discussions regarding budget or other matters of divisional responsibility. Early that morning, [Battalion Chief] Ellis approached A.C. McMicken and requested that certain other SLCFD captains attend this meeting so, as claimed by [Battalion Chief] Ellis, they could learn the process. These captains were direct reports of Chief Ellis. A.C. McMicken agreed to this request expecting that [Battalion Chief] Ellis would have gathered the necessary information from her staff, synthesized that

information, and would then clearly present that information from an administrative perspective at the meeting.

At the afternoon budget meeting, however, [Battalion Chief] Ellis' two captains presented for the majority of the hour-long meeting, not [Battalion Chief] Ellis. A.C. McMicken thus concluded, among other things, that these captains were not invited to this meeting to learn the process, as claimed by [Battalion Chief] Ellis, but were instead invited to present on the budgetary topics in [Battalion Chief] Ellis' stead.

SLCFD's Statement of Facts in its Pre-Hearing Filing to the Commission; *see also*, Notice of Decision, Doc. Nos. ME137-138.

68. At the outset, it should be noted that Brittany Blair, who is the Department's accountant, testified that Ellis was very involved in the budget process, went to substantial effort to understand the budgetary issues over which the Logistics chief had responsibility, and that Ellis asked her lots of questions. Tr. Day 2, Vol. 1 at 44-49.

69. Ms. Blair also testified that she deals with captains regarding the budget and that captains routinely attend budget meetings. *Id.* at 46-50; Ex 34, Doc. Nos. ME452-477.

70. Ellis provided documentation of the many budget meetings she attended, demonstrating how engaged she was in this process. Tr. Day 2, Vol. 2 at 121; Ex. 34 (Doc. Nos. ME452-477).

71. For example, Ellis met almost every morning around 8:00 a.m. with Captain Kochevar, one of the Captains who reported to her, and these meetings frequently included discussion of budgetary issues. Tr. Day 2, Vol. 2 at 122.

72. Similarly, Ellis met frequently with another Captain who reported to her, Captain Archuleta, whose office was next to Ellis', and they would frequently discuss budget issues, and go over financial worksheets. *Id.* at 123.

73. The record reflects that Ellis attended multiple meetings over several months regarding the budget for the year in question, beginning in August 4, 2015 and continuing through

February 25, 2016, and that her captains attended some of these meetings but not all. *Id.* at 121-127. For example, the transcript of the November 25, 2015 meeting shows that this was a comprehensive budget meeting between McMicken and Ellis with no captains in attendance.

74. Ellis was off for most of the month of December, and requested McMicken to allow her time to confer with her brand-new Captains about the budget and McMicken agreed to push that meeting to January. Tr. Day 2, Vol. 2 at 79-80.

75. Regarding the January 12, 2016 meeting in question, Ellis asked permission from McMicken to have Captains Archuleta and Kochevar attend this meeting because it would be a good learning experience for them. Tr. Day 1 at 84.

76. Ellis testified that she participated in the meeting and that it was not her intent to only have the captains present information. She further testified that the meeting was a dialogue where the four persons in attendance all participated, and that McMicken asked questions directly to the captains. Tr. Day 2, Vol. 2 at 128-129.

77. Significantly, Battalion Chief George testified that he gives the captains under him significant latitude regarding the budget, because it helps them grow and develop the skill set needed to handle a budget, and that he would meet with his captains to discuss any larger budget item that came up. Tr. Day 2, Vol. 1 at 28-29. Battalion Chief George also testified that it was good to have captains closely involved with the budgeting because they are so much closer to the work than he is as a chief, and the captains know better what the needs are, so it was easier for him to rely on them regarding budgetary issues. *Id.*

78. McMicken testified that he thought Ellis was relying too heavily on the captains and allowing them to present instead of having her gather the information and report it. Nonetheless, the fact remains that the captains are closer to the budgetary issues as Battalion Chief George testified, and that it is not uncommon for chiefs to rely on their captains regarding budgetary issues.

Further, it is not clear from the record that McMicken clearly articulated his expectation to Ellis that he wanted her to present at the meeting. This may be evidence of a misunderstanding or a lack of communication. Further, McMicken testified that Ellis did not present information at the meeting whereas Ellis testified that she did. The Commission finds Ellis' testimony on this point more credible.

79. It is particularly telling that following the meeting, McMicken did not communicate his concerns or criticisms to Ellis and, instead, waited a couple of months (from January until March) before springing this alleged lack of performance on Ellis in the Pre-determination Letter. While the Commission is not convinced that Ellis' conduct in this matter constitutes a lack of performance, as opposed to a different management style, at a minimum, it appears that this would have been a perfect opportunity for McMicken to engage in coaching and counselling with Ellis wherein he could articulate clearly his expectations prior to engaging in formal discipline, which the record reflects (as discussed below) is the process that the SLCFD advocates.

80. The record also does not show that McMicken was deprived of any information, rather it appears, at most, that the information was presented in a manner contrary to what McMicken expected.

81. In short, the Commission finds that this is another example of McMicken attempting to build a case to discipline Ellis, instead of trying to coach and counsel a dedicated employee on how she can improve her performance.

82. Based on the foregoing, the Commission finds that this charge is not supported by substantial evidence.

#### **Incident 4: Engineer Task Book.**

83. The fourth incident relied on by McMicken in deciding to demote Ellis related to an assignment McMicken allegedly gave Ellis regarding the Engineering Task Book. Specifically, in the Notice of Decision, McMicken alleged the following:

In January 2016, McMicken had a lengthy discussion with Ellis regarding issues relating to the Engineer Task Book. This discussion included important topics and issues relating to McMicken's understanding that ninety-five percent (95%) of SLCFD engineer staff were out of compliance with the mandatory recertification process time-line, Ellis' role as the Division Chief over the Engineer Committee (an important committee that develops quarterly training, researches and develops policies, and engages in other tasks in order to ensure that SLCFD's objectives are being adequately addressed and projects remain under control), McMicken's expectations of project management concerning this committee, and the scope of Ellis' responsibilities as they related to this committee.

These sentiments were reiterated to Ellis in an email dated January 20, 2016, wherein McMicken stated, "I am requesting you perform a complete review of this process to ensure our training requirements can be met, and our Engineers receive a quality program for recertification. I would like to discuss your findings and recommendations at our next Logistics meeting scheduled for February 3, 2016."

In response to McMicken's January 20, 2016 email, Ellis responded by saying "I'll see what I can find out. Between Brady [George] and I, we'll hopefully be able to come up with something that will support the policy and satisfy the administration." Based on this response, McMicken concluded, among other things, that Ellis was again relying on others to complete assigned functions as a Division Chief, something that is unacceptable, and further demonstrating the lack of ability to demonstrate an administrative perspective or take ownership for her division.

SLCFD's Statement of Facts in its Pre-Hearing Filing to the Commission; *see also*, Notice of Decision, Doc. No. ME138.

84. The focus of this allegation is that Ellis' *response* to McMicken's January 20 email caused McMicken to conclude that Ellis was relying on others to complete her assigned function as a Division Chief and that her response demonstrated a lack of ability to take ownership for her division.

85. Significantly, McMicken does *not* allege that Ellis failed to fulfill her assignment regarding the Engineer Task Book, or that the problems related to the Engineer Task Book were not addressed and corrected in a timely manner. Moreover, there is nothing in the record to suggest that McMicken went to Ellis and explained his concerns regarding the nature of her response, or that he coached and counselled her on what she needed to do. Instead, two months later, he appears to raise his concerns about her response to him regarding this project for the first time in the Pre-determination Letter.

86. As discussed below, the record establishes that Ellis proceeded to do significant work on the Engineer Task Book, that she raised McMicken's concerns regarding the Engineer Task Book to the Engineer Committee, that the project appears to have been completed in a relatively short period of time, and that a program was developed whereby the Department could achieve all the skills that were within the Engineer Task Book within the allotted time frame.

87. Battalion Chief George provided an excellent overview of the issues related to the Engineer Task Book. *See gen. Tr. Day 2, Vol. 1 at 19-26.* Battalion Chief George had served as the SLCFD Division Chief over training during the time period in question. *Id.* at 15. He explained that previously the Department did specialty certification training through a program entitled Core Plus. *Id.* at 19-20.

88. Based on various struggles that the Department experienced with the Core Plus program, Battalion Chief George met with Deputy Chief Lieb and was given the direction to move away from Core Plus and to develop a new program. *Id.* at 20. Battalion Chief George was heavily involved in the drafting and adoption of the new policy, and was specifically responsible for Water Rescue, Heavy Rescue, HazMat and Engineer certification training, and he worked with different oversight groups to create the specialty Task Books for these specialties, including, the Engineer Task Book. *Id.* at 20-21.

89. The Engineer Task Book that was created followed the NFPA 1002, which is the professional qualification standard for apparatus operators with regards to the different types of apparatus used by the Department, such as water tenders, auxiliary apparatus, aerial apparatus and pumpers, and the national standards were combined and contrasted to the state standards, and the result was an Engineer Task Book that Battalion Chief George asserted was adopted by the Department in approximately 2014. *Id.* at 21-22.

90. When Battalion Chief George drafted the Engineer Task Book that was adopted in 2014, he sent the draft to McMicken, who at the time was the Battalion Chief over the Logistics and Apparatus Division, and McMicken made substantial edits to the draft of the Engineer Task Book, which Battalion Chief George chose not to implement because he could not coincide them with the applicable national and state standards. *Id.* at 23-24. It was this draft, as originally written by Battalion Chief George, which was then adopted by the Engineer Committee. *Id.* at 24.

91. Approximately a year later, questions were raised regarding the implementation of the Engineer Task Book, based on concerns regarding whether it was working, and whether the actual hours of training that were being recorded for specific skill groups for engineers were being completed in a timely fashion and in accordance with standard operating procedures. *Id.* at 24-25.

92. It was at this point that Battalion Chief Ellis became involved and Battalion Chief George met with her several times, as well as the Engineer Committee, and ultimately, they outlined a program where the Department could achieve all the skills that were within the Engineer Task Book within the time frame allotted and the program was subsequently implemented and is currently moving forward and being used by the Department. *Id.* at 25-26.

93. Significantly, Battalion Chief George testified that this process was accomplished in a relatively short time period, within a matter of weeks, based on the full court press of those involved, and he stated that, as part of this process he met several times with Ellis and Captain

Archuleta and with a Paul Candace, who helped draft most of the diagrams that are in the Engineer Task Book, to make sure the dimensions matched both the national and the state requirements so that the Department was maintaining appropriate compliance. *Id.* at 26.

94. Battalion Chief George also testified that, even though he was not a member of the Engineer Committee, he was responsible for oversight regarding the Engineer Task Book, as well as for developing the Engineer Task Book, pursuant to Department policy 07-02. *Id.* at 31, 35-36.

95. Nowhere in his testimony was Battalion Chief George critical of Ellis' performance with respect to the Engineer Task Book, and from his testimony, it appears that the Engineer Task Book was appropriately and successfully revised in a short period of time, and that the Department was still using the revised Engineer Task Book approximately a year later.

96. Ellis confirms that she first received an email from McMicken regarding the Engineer Task Book on January 5 or 6, 2016, while she was in southern Utah, and that this was the first "inkling" she had that there were issues regarding the Engineer Task Book. Tr. Day 2, Vol. 2 at 130-131. She subsequently met with McMicken on January 14 to discuss this project. *Id.* Prior to this time frame, McMicken's discussions with Ellis had never led her to believe that the Engineer Task Book was a pending project that had not yet been completed. *Id.* at 132.

97. In the meeting in January, Assistant Chief McMicken made some comments to the effect that she "had direct oversight and responsibility for the outcome, decisions and recommendations of the Engineer Committee," and Ellis testified that she was not sure whether this was her place based on the Memorandum of Understanding with the Union (the "MOU"), so she researched the issue and discussed it with Jeff Vaughn, who was with the Union, and she read the applicable policies. *Id.*

98. A few days later, Ellis received McMicken's January 20 email wherein he instructed her to do a complete review of the process related to the Engineer Task Book to ensure our

training requirements can be met, and our Engineers receive a quality program for recertification.” *Id.* at 135.

99. Because the Engineer Task Book set forth the training that engineers were to receive, and because Battalion Chief George was over training, Ellis immediately reached out to Battalion Chief George and she had a meeting with the Engineer Committee, where she discovered that the dispute was over the edits to the Engineer Task Book that then Battalion Chief McMicken had made in 2014, which Battalion Chief George and the Committee had subsequently rejected. *Id.* at 135-137.

100. Ellis testified that the biggest point of contention to getting the Engineer Task Book completed were McMicken’s edits that the Committee had previously rejected and which were not in the Engineer Task Book that was sent to McMicken in January 2016. *Id.* at 137.

101. As a result, in a meeting on February 2, 2016, Ellis went through the Engineer Task Book line by line with the Engineer Committee and Battalion Chief George and discussed every single edit suggested by McMicken and there was complete agreement by the entire Engineer Committee that every item that McMicken had struck from the Engineer Task Book should be retained. *Id.* at 137-138.

102. Ellis had a follow-up meeting with the Engineer Committee on February 3. *Id.* at 148. Later that day Ellis reported what had happened to McMicken and provided her impression, analysis and synthesis of the status of the Engineer Task Book, and that the Engineer Task Book has now been approved by the Engineer Committee, and she provided her suggestions for how the training of engineers as set forth in the Engineer Task Book can be made more efficient and completed within the three-year time frame. *Id.* at 138-142. Thus, Ellis made this report to McMicken on the deadline he had given her.

103. Ellis subsequently got Operations involved in a meeting on February 17 and had a final meeting with the Engineer Committee on March 2 to solidify things and, as a result, the project was essentially completed within a matter of weeks. *Id.* at 148-149.

104. Given the testimony of Ellis, which is fully supported by the testimony of Battalion Chief George, the Commission concludes that Ellis performed the assignment that McMicken gave her and this work resulted in an Engineer Task Book that was approved by the Engineer Committee in a relatively short period of time, and that the Department was still using this Engineer Task Book as of the date that this appeal hearing took place, approximately one year later. Accordingly, the Commission finds that the allegation against Ellis regarding the Engineer Task Book is not sustained, and is not supported by substantial evidence. As a result, this alleged incident does not provide a basis for McMicken's decision to demote Ellis.

**Incident 5: Ellis' Unauthorized FILO Presentation.**

105. The fifth incident cited by McMicken to support his decision to demote Ellis is his allegation that Ellis made an unauthorized presentation regarding her proposed Fire Intelligence Liaison Officer ("FILO") program to a Utah State Fire Chiefs Association Meeting in St. George, Utah, in early January 2016. Specifically, McMicken alleged the following:

[Battalion Chief] Ellis was granted SLCFD business leave to attend the Utah State Fire Chiefs Association Winter Conference scheduled for early January 2016. At that conference, [Battalion Chief] Ellis spoke to an audience of statewide fire officials on the topic of a Fire Intelligence Liaison Officer program. However, this "program" had not been vetted, adopted, or authorized by the SLCFD.

In addition, [Battalion Chief] Ellis had never discussed or informed A.C. McMicken, her direct supervisor, of her intent to present this "program" at this conference, thus clearly violating the chain of command.

Because [Battalion Chief] Ellis was on paid SLCFD business leave at the time she made this presentation, she was a representative of SLCFD; yet her presentation at this conference had not been approved by the SLCFD and thus had the potential to create the erroneous impression to a statewide audience that the SLCFD was pursuing a course of action that it was not.

SLCFD's Statement of Facts in its Pre-Hearing Filing to the Commission; *see also*, Notice of Decision, Doc. Nos. ME138-139.

106. Ellis was very involved in the concept of having an intelligence liaison officer who would liaison with other agencies to share intelligence information. Tr. Day 2, Vol. 1 at 66, 99-102. In fact, the concept of having an intelligence liaison officer was at the core of the post-graduate degree work that she did at the Naval Postgraduate School. Tr. Day 2, Vol. 2 at 152.

107. On April 8, 2015, McMicken told Ellis that he liked the FILO program, and that even if the county or the state had a hang-up that slows down the program's progression he wanted her to continue her progression with the FILO program and let them catch up. Tr. Day 1 at 309-313. McMicken also told Ellis that he wanted to get the FILO program for the citizens of Salt Lake City, and if the other agencies want to jump on this program that we will be more than happy to help them out and help them get this program. *Id.* at 313-316.

108. Once Ellis received this directive from McMicken to not let the state or the county slow her down on this project, she shared with McMicken information related to a number of meetings and presentations that Ellis had made regarding the fire intelligence liaison officer program, including presentations to the State Information Analysis Center ("SIAC") Board (which included the Utah Public Safety Commissioner and other law enforcement representatives), the presentation that she had made in the fall of 2015 to the State Chiefs, and a presentation she had made in Ogden at the Safety Summit. Tr. Day 2, Vol. 2 at 155-156.

109. McMicken did not discipline or counsel Ellis for making any of these presentations, nor did he tell her that she had to get his prior approval before making any public statements regarding FILO.

110. McMicken admits that Ellis had previously informed McMicken that she had given FILO presentations. Tr. Day 1 at 299-300.

111. For example, Ellis informed McMicken after the fact that she had made a FILO presentation at a SIAC meeting in Park City on October 5, 2015, and McMicken testified that he did not recall telling her on that occasion that she needed to let him know every time she was making a FILO presentation. *Id.* at 300-301; *see also* Doc. No. ME512.

112. Ellis did speak to the Utah State Fire Chiefs Association Winter Conference held in St. George, Utah, on January 6, 2016. *Tr. Day 2, Vol. 2* at 149, 210.

113. Ellis' husband made a video of what she said, though he started the video shortly after Ellis began speaking. *Id.* at 149-151.

114. The parties have stipulated that the video failed to record the opening statement made by Ellis on this occasion, and that Ellis stated in her opening sentence, the following, "Hello, my name is Martha Ellis. I am with the Salt Lake City Fire Department." *Id.* at 150.

115. The parties also stipulated that Ellis spoke for 5 minutes and 30 seconds. *Id.* at 155.

116. Ellis was on department leave and being paid by the Department when she made this presentation and she did not obtain McMicken's approval prior to making it. *Id.* at 210-211.

117. Ellis, however, did not expressly state at the January 6 meeting that she was speaking on behalf of the SLCFD, and she was not wearing her SLCFD uniform when she spoke. *Id.* at 225-226.

118. When she walked up to make her statements on January 6, Ellis walked right past Deputy Chief Lieb, who never said anything to her either before or after she made her brief presentation. *Id.* at 155.

119. In making the presentation, Ellis did not think she was representing SLCFD, rather she was providing information that came out of her work with SIAC, which was being driven by the Commissioner of Public Safety for the State of Utah. *Id.* at 153-154.

120. In March 2016, two months after making the FILO presentation that is the subject of this incident, McMicken actually asked Ellis to make a presentation regarding FILO to SLCFD chiefs, and Ellis did make such a presentation. Tr. Day 1 at 305; *see also* SLC159-161.

121. The Commission finds that Ellis was not formally speaking on behalf of the SLCFD when she made the statements in question. Significantly, Ellis had no reason to believe that the statements she made on January 6, required prior approval from McMicken, or that she had done anything wrong in making the presentation. This is particularly true based on McMicken's prior directive to Ellis to move this program forward and the fact that he did not reprimand her when he told her after the fact that she had made FILO presentations, which she told him about on a number of occasions.

122. Further, the Department failed to demonstrate or even articulate how Ellis statements harmed or damaged the Department in any way.

123. The Commission is troubled by the fact that McMicken made no comments to Ellis immediately after he was informed about her statements on January 6, 2016, and, instead, brings this incident up over two months later as some type of wrong-doing that would justify demoting her.

124. Accordingly, the Commission finds that the Department has failed to establish by substantial evidence any wrongdoing on the part of Ellis with respect to this incident, and the allegations are not substantiated. Again, these allegations appear to the Commission to be an attempt to manufacture misconduct and alleged failure of performance to justify the disciplinary action, when there were no performance issues.

**Incident 6: Ellis' Use of Outlook Calendar.**

125. The sixth incident relied on by McMicken as grounds for demoting Ellis is his allegation that Ellis failed to follow his directive regarding her use of her Outlook Calendar and her

failure to provide adequate information on her calendar regarding her whereabouts, as well as her use of acronyms in her calendar entries. Specifically, McMicken alleged the following:

When a Division Chief, [Battalion Chief] Ellis had significant managerial responsibilities within SLCFD. [Battalion Chief] Ellis' presence within the SLCFD was an important component of SLCFD's success and also afforded clear communication between A.C. McMicken's office, administrative staff, and [Battalion Chief] Ellis' Logistics Division. Because of the importance of this, A.C. McMicken had requested on several occasions that [Battalion Chief] Ellis provide accurate information on her Outlook calendar so that she could be located, if needed. The information requested included things such as a description of the appointment and location information. After being requested to do this, however, [Battalion Chief] Ellis' Outlook entries did not contain the requested information, but instead often had unclear and vague entries.

SLCFD's Statement of Facts in its Pre-Hearing Filing to the Commission; *see also*, Notice of Decision, Doc. No. ME139.

126. Sara Bohe served as an Office Facilitator in the Department, and provided support to administrative personnel. Tr. Day 2, Vol. 1 at 78. When Ellis served as the Division Chief for Emergency Management, Intelligence Coordinator and Logistics (the position from which she was demoted), Ms. Bohe reported to Ellis and provided support to Ellis, including handling calendaring for Ellis. *Id.* at 79, 86.

127. In approximately January 2015, shortly after Ellis moved up to the fourth floor as a Division Chief, McMicken told Ms. Bohe not to use acronyms on Ellis' calendar, and to let McMicken know if there were any events that showed up on Ellis' calendar that were abbreviated. *Id.* at 79. Bohe testified that McMicken's instructions put her in an "awkward" and "really uncomfortable position," because she reported directly to Ellis and it put her in the middle between Ellis and McMicken. *Id.*

128. At the same time, McMicken also instructed Ms. Bohe to report to him any time Ellis came or left the building, what time Ellis arrived in the morning, what times Ellis left throughout the day, and what time Ellis left for the day, and was essentially required to report and

track all of Ellis' comings and goings in and out of the office. *Id.* at 80. Again, she felt these instructions, where she was tracking and reporting on her supervisor, put her in an uncomfortable position. *Id.*

129. Finally, Ms. Bohe testified that, on probably a daily basis, McMicken would ask her where Ellis was or what Ellis was doing, and he did so with direct questions, such as, "Has your boss been in today?" or, "Where is your boss?" or, "What time did your boss leave yesterday?" *Id.* at 81-82.

130. Based on the very troubling testimony of Ms. Bohe, the Commission finds that McMicken, almost from the outset of the time that Ellis became a Division Chief, was monitoring her in a way that singled her out and that indicated he was looking for reasons to discipline her.

131. The instructions that McMicken gave Bohe are not indicative of a supervisor who is supporting his subordinate and attempting to make sure his subordinate is successful; rather it is indicative of a supervisor who is looking for ways to discipline his subordinate.

132. Moreover, contrary to the way Ellis was singled out and treated, Battalion Chief George confirmed that he has never been told by his superiors that he cannot use acronyms or abbreviations in his calendar. *Id.* at 27-28.

133. Ellis did use her Outlook Calendar to remind her of things she needed to do that day, so a notation on her calendar may have been a reminder as opposed to a reference to a meeting or some type of appointment that took her out of the office. *Tr. Day 2, Vol. 2* at 158.

134. She also testified that McMicken's instructions to her that she was not allowed to use acronyms on entries to her calendar was the first time she had ever heard in her career of such a prohibition, so the instruction confused her. Regardless, she tried to make sure that she did not use acronyms on her calendar entries from that point forward. *Id.* at 160-161.

135. Ellis testified that she had one or two conversations about her Outlook Calendar with McMicken, but understood she and McMicken had clarity and resolution of this issue and what was expected of her, and that she was praised at the end of November 2015 for making improvements. *Id.* at 54.

136. The record does not establish that there were any issues after November 2015 regarding the requirement that McMicken made of Ellis alone not to use acronyms. The Commission was very troubled by the fact that this issue was identified as grounds to support Ellis' demotion because Ellis appears to have resolved this issue, which the Commission sees as a very minor performance issue, and because the evidence leads the Commission to conclude that McMicken was singling Ellis out and "reaching" to find grounds to support the demotion decision.

137. Based on the foregoing findings, the Commission finds that the Department has failed to establish by substantial evidence any wrongdoing on Ellis' part with respect to incident 6, and it finds that the Department's allegations regarding this incident are not substantiated. Further these allegations appear to be very minor in nature and nothing that would support a demotion of Ellis.

**Incident 7: Ellis' Unavailability from October 15 to 17, 2015.**

138. The seventh and final incident cited by McMicken to support his decision to demote Ellis is his allegation that Ellis was unavailable from October 15 to October 17, 2015. Specifically, McMicken alleged the following:

Between Thursday, October 15, 2015 and Saturday, October 17, 2015, [Battalion Chief] Ellis was unable to be contacted by her staff, then Deputy Chief Lieb, or A.C. McMicken. Numerous unsuccessful attempts were made to locate [Battalion Chief] Ellis or to ascertain her whereabouts through telephone calls, and text messages. Although [Battalion Chief] Ellis explained that this occurred because her telephone was on vibrate and in her briefcase, A.C. McMicken's expectation was that as then a Division Chief, [Battalion Chief] Ellis was to perform the duties and responsibilities of her position, which at least included being responsive to staff and superior officers in a timely manner.

SLCFD's Statement of Facts in its Pre-Hearing Filing to the Commission; *see also* Notice of Decision, Doc. No. ME139.

139. Ellis detailed in an email exactly what happened with respect to this incident. *See* Doc. No. ME566. In the email Ellis explains that although she missed the calls on her Department issued cell phone, she was in the office and could have been reached if Tyler Burningham (a subordinate officer) had contacted McMicken or anyone else on the fourth floor before she went to lunch at noon. *Id.* Ellis also told McMicken in the email that the issue had been remedied because she had given Tyler alternate phone numbers to contact her. *Id.*

140. On October 15, 2015, Ellis was doing training at the state administration building, and during her training on that day, she fielded a number of calls from Chief Mellor, from Cristal VanDongen and from Tyler Burningham, regarding the issue about which Tyler had contacted McMicken. Tr. Day 2, Vol. 2 at 162-163. Moreover, Ellis believes that she also communicated with Tyler on October 16, 2016. *Id.* at 169.

141. In fact, Ellis sent an email to McMicken and others on October 15 at 10:38 a.m., informing them that she would be in training that day. Doc. No. ME567; Tr. Day 1 at 334-337. She sent another email to McMicken that same day at 4:53 p.m., which discussed the very issues about which Tyler was trying to contact Ellis. *Id.*

142. Ellis did have her phone on vibrate and the phone was in her briefcase, so she was not aware of the texts and calls from McMicken and Deputy Chief Lieb on Friday, October 16, informing her that Tyler needed to speak to her. This appears to be an inadvertent mistake on her part, and she discussed it with McMicken and felt the problem was resolved.

143. It is undisputed that McMicken texted Ellis on October 16 at 12:06 p.m., and she also texted McMicken on October 17 at 11:11 a.m. in response to his text. Significantly, however,

when McMicken texted her on October 16, he just informed her to contact Tyler, and he did not request that Ellis respond directly to McMicken. *Id.* at 220.

144. Moreover, McMicken concedes that Ellis did have contact with Tyler on Thursday, October 15, and that she communicated with McMicken on October 17, so to allege that she was unavailable from October 15 to October 17 is not true and not substantiated. Tr. Day 1 at 335-339; Doc No. SLCC176; Doc. No. ME570.

145. Ellis believed this issue had been resolved, and there had been no further issues regarding her availability since this incident in October of 2015. Tr. Day 2, Vol. 2 at 54.

146. Certainly, McMicken had a right to raise concerns about Ellis' alleged unavailability with her directly, which he did contemporaneous to this incident. There is no indication that this was a recurring problem with Ellis, or that it happened again, after McMicken discussed the issue with her in October of 2015. Ellis fully explained what had happened and explained why she did not answer McMicken's texts and calls on Friday, October 16. Despite the fact that this incident was fully resolved at that time, and even though there do not appear to be further incidents of this type of problem after October 2015, McMicken chose to make an issue of this incident in the Pre-determination letter that he delivered to Ellis six months later.

147. Based on the foregoing, the Commission finds that the allegations regarding this incident were not supported by substantial evidence, and that they certainly did not justify a demotion of Ellis.

### **Additional Summary Findings**

148. Because the Commission finds that the Department's allegations of Ellis' lack of performance or misconduct with respect to the seven incidents in question, McMicken's general conclusions drawn from the seven incidents, and the alleged policy violations by Ellis were not

supported by substantial evidence, it necessarily follows that the discipline imposed was not appropriate to the alleged offenses.

149. Accordingly, based on the foregoing findings, the Commission specifically finds that the Department failed to offer substantial evidence that Ellis was not engaged with respect to her job and position in the Department, that she lacked ownership of her job responsibilities, that she demonstrated an inability or unwillingness to follow instructions, or that she demonstrated a lack of respect for the chain of command.

150. The Commission further finds that the Department failed to establish by substantial evidence that Ellis violated any of the policies in question.

151. With respect to the *Harmon* factors, the Commission finds that: (1) while the alleged violations related to Ellis' official duties, they did not significantly impede her ability to carry out those duties; (2) the alleged offenses were not of a type that adversely affected the public confidence in the Department; (3) the alleged offenses did not undermine the morale and effectiveness of the Department; and (4) Ellis did not commit any alleged offenses willfully or knowingly.

152. The Commission can also consider the employee's service record and the strength of the evidence of misconduct. The Commission expressly finds that Ellis has an outstanding service record that further supports its determination that the demotion was unjustified.

153. With respect to the deference that the Commission is required to give the chief's choice of discipline under *Harmon I and II* and *Huemiller*, here, of course, it does not appear that Chief Dale made the decision to demote Ellis as McMicken repeatedly testified that he made this decision. At most Chief Dale approved of the demotion. Regardless, the Commission finds, based on the findings set forth above, that the discipline imposed on Ellis was unduly excessive and clearly disproportionate to the alleged offenses, and that it exceeded the bounds of reasonableness

and rationality. Specifically, the discipline was not proportional given the nature of the alleged offenses and the fact that the Commission finds that they were not substantiated.

154. The Commission also notes that there was evidence in the record that two witnesses were informed by Captain Kochevar that he had heard that the decision had been made to demote Ellis before she had even had her Pre-determination hearing. Specifically, Cristal VanDongen testified that, before Ellis' Pre-determination hearing, Captain Kochevar personally told her that he had just come from a meeting with McMicken and that "he had it from a very high source that [Ellis] was going to be demoted . . . ." Tr. Day 2, Vol. 2 at 33, 35.

155. Similarly, Brittany Blair testified that Captain Kochevar told her, after Ellis was placed on administrative leave, that he had heard that Ellis was going to be demoted. Ms. Blair asked Kochevar how he knew that because Ellis had not even had her Pre-determination hearing. Kochevar responded that that was he had heard, but did not disclose who had told him this. Tr. Day 2, Vol. 1 at 53-55.

156. While this testimony is hearsay and the Commission did not make a finding as to the truthfulness of these alleged statements, it is troubling that two witnesses would report such statements.

157. More significantly, the Commission finds that the way Ellis was disciplined did not appear to follow the process that the Department has stressed should be followed, at least as the Department's HR Specialist and Chief Dale had explained this process to Ellis.

158. Specifically, Ellis had previously supervised a Captain Riddle who had engaged in a blatant display of insubordination in late 2012, wherein Captain Riddle had been "incredibly rude and aggressive" with Ellis. Tr. Day 2, Vol. 1 at 116-117. She discussed this with then Fire Chief Cook, and was told that because of a cardiac problem that Riddle had, the Department had no place

else to put Captain Riddle, and that she would have to “cowgirl up” and deal with him. *Id.* at 115-116.

159. In February of 2014, Ellis testified that she had been told by Jennifer Sykes, who is the HR Specialist for the Department, that Ellis could not issue a written warning to Captain Riddle, one of her subordinates, for repeated insubordinate conduct, despite the fact that he had received prior warnings. Instead, she needed to go through additional coaching and counseling, wherein she needed to set expectations before any written warning was issued. Tr. Day 2, Vol.2 at 42-44.

160. The Department’s commitment to this type of coaching and counselling process prior to any formal discipline was further emphasized in a meeting Ellis attended for Division Chiefs with Chief Dale the following month, in March 2014, where HR Specialist Jennifer Sykes was also in attendance. At this meeting, Chief Dale emphasized that Division Chiefs needed to follow a process where they used coaching and counselling to improve performance issues, as a means of taking care of the welfare of employees, and give employees every opportunity to correct behavior before pulling the trigger on formal disciplinary action, such as a written warning, unless there was a threshold met of violence, theft or other similar behavior. *Id.* at 47-52. Ellis came away from this meeting believing that there was a process in place where she had an obligation to protect the efficiency of the organization while also protecting employees. *Id.* at 52.

161. Significantly, Ellis testified that when it came to her demotion, she had not received the type of coaching and counselling that Chief Dale said should be followed. *Id.* at 52-53.

162. Based on its findings as set forth above, and because it finds that the charges are not supported by substantial evidence, and therefore that the demotion decision fails on the merits, the Commission does not find it necessary to address the issue of whether the sanction is “consistent

with the treatment of other officers for similar or more egregious conduct.” *Nelson v. Orem City*, 2012 UT App 147, ¶ 27, 278 P.3d 1089.

163. Any findings of fact herein that are found to be a conclusion of law shall be deemed a conclusion of law.

### **CONCLUSIONS OF LAW**

1. The Commission concludes that the evidence in this case and the above findings of fact establish that the facts do not support the charges asserted against Ellis or that she violated the four policies in question.

2. The Commission concludes that the evidence in this case and the above findings of fact establish that the charges were not supported by substantial evidence.

3. The Commission concludes that the evidence in this case and the above findings of fact establish that the sanction imposed against Ellis was not proportional to the alleged offenses.

4. The Commission has fully considered the relevant factors articulated in *Harmon* and its progeny, including Ellis’ overall service record, her educational background, her commendations and achievements, and concludes that this evidence supports its conclusion that the demotion was not justified or proportional.

5. The Commission concludes that it was Assistant Chief McMicken who made the decision to demote Ellis and he is not the Fire Chief/Department Head. Regardless after giving appropriate deference to McMicken’s decision, which he alleges was approved by Chief Dale, and based on the evidence in this case, the demotion decision was unduly excessive and/or clearly disproportionate to the alleged offenses, such that the discipline in question exceeded the bounds of reasonableness and rationality.

6. Any conclusions of law herein that are found to be a finding of fact shall be deemed to be a finding of fact.

**ORDER**

It is hereby ordered that the Department's demotion of Ellis is REVERSED effective the same date as her demotion. It is further ordered that Ellis is hereby restored to the same rank, seniority, and rate of pay to which he was entitled at the time of her demotion.

DATED this 1<sup>st</sup> day of November, 2017.

SALT LAKE CITY CIVIL SERVICE  
COMMISSION:

*Tina K. Hose*

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Commissioner Tina Hose  
Chairperson of the Salt Lake City Civil Service  
Commission