COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

BOSTON POLICE COMMISSIONER DENNIS WHITE,

Plaintiff,

v.

CITY OF BOSTON AND ACTING MAYOR KIM JANEY,

Defendants.

E-FILED 5/19/2021

Civil Action No. 2184CV01138

COMMISSIONER DENNIS WHITE'S MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Commissioner Dennis White respectfully submits this memorandum in support of his motion for preliminary injunction for two purposes: 1) to demonstrate that Commissioner White has a right to a trial-like hearing to protect his constitutional property and liberty interests, as well as his statutory rights, and that the hearing should take place before this Court; and 2) Acting Mayor Janey's reasons to terminate Commissioner White do not satisfy the "cause" requirement and are deficient as a matter of law.

I. As a matter of due process, Commissioner White is entitled to a trial-like hearing to protect his constitutional and statutory rights.

Acting Mayor Janey violated Commissioner White's constitutional rights by depriving him of his property interest in the position of Police Commissioner, and his liberty interest in his good name and reputation without providing him with a constitutionally mandated hearing. "The requirements of procedural due process apply . . . to the deprivation of interests encompassed by

the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972); *see Higgins v. Town of Concord*, 246 F. Supp. 3d 502, 513 (D. Mass. 2017).

Commissioner White had a property interest in his position because, by statute, the Mayor's appointment of the Boston Police Commissioner is for a term of five years and the Mayor may terminate the Commissioner only for cause after notice and hearing. Acts 1962, ch. 322 § 7 ("the Removal Statute"). A plaintiff sufficiently alleges facts supporting "an inference that the plaintiff had a protected property interest in [his] employment" where the law provides that the "employee could only be removed 'for cause.'" *Higgins*, 246 F. Supp. 3d at 514. "Where a law requires cause for removal, an employee acquires a property interest in continued employment." *Id.; see Wojcik v. Massachusetts State Lottery Comm'n*, 300 F.3d 92, 102 (1st Cir. 2002) (plaintiff had protected property interest in continued employment where collective bargaining agreement between Lottery Commission and Union provided that covered employees could not be terminated "without just cause"). *Cf. Stetson v. Bd. of Selectmen of Carlisle*, 369 Mass. 755, 759-60 (1976) (small-town police officer governed by G.L. c. 41 § 97 had no property interest in job where he could be discharged at town selectmen's pleasure, unlike officers in large municipalities governed by § 97A who could only be discharged for cause after a hearing). Therefore, because Commissioner White could by statute only be terminated "for cause," he had a constitutionally protected property interest in his job.

Next, the Acting Mayor and City violated Commissioner White's liberty interest in his good name and reputation where, in connection with his termination, they publicized the entirety of the City's 19-page investigative report, which is based on unidentified witnesses providing

mostly, if not entirely, inadmissible hearsay information. The report, which was sent to the media and detailed in multiple front-page Boston Globe articles and in every other major Boston media outlet the next day, alleges Commissioner White committed domestic violence more than 20 years ago -- allegations which Commissioner White vehemently denies. This has caused Commissioner White extraordinary reputational harm.

As a result, Commissioner White's liberty interest has been violated and he has a right to a hearing. *See Fontana v. Comm'r of Metro. Dist. Comm'n*, 34 Mass. App. Ct. 63, 67 (1993) ("A liberty interest arises where . . . a public employee is discharged because of stigmatizing charges alleged by the employee to be false and which are disseminated to the public or are likely to be communicated to prospective employers."). "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Roth*, 408 U.S. at 573 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

"[W]here a public-sector employer creates and disseminates a false and defamatory impression about an employee in connection with the employee's discharge . . ., the Constitution's due process protections require the employer to provide the employee with an opportunity to dispute the defamatory allegations." *Wojcik*, 300 F.3d at 103; *see Stetson*, 369 Mass. at 762 ("We think dismissal because of immoral, illegal conduct, such as adultery, entitle the employee to notice of the reasons for his discharge and a hearing on them, if those charges have been or are likely to be disseminated either to members of the public or to prospective employers."). The constitutional right to a hearing arises under these circumstances because the employer "impose[s] on [the employee] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573. "[T]o be deprived

not only of present government employment but of future opportunity . . . is no small injury." *Id.* at 574 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185 (1951)).

What kind of hearing is required? "If the plaintiff establishes that he has a constitutional right to a hearing, he should have notice of the specific charges, an opportunity to present witnesses, and, barring special considerations, an opportunity to cross-examine those who charge him with any wrongdoing on which the [employer] relied in discharging him." *Stetson*, 369 Mass. at 764 n.14; *see Fontana*, 34 Mass. App. Ct. at 67 (recommending a hearing that conforms to the process endorsed in *Stetson* 369 Mass at 764 n. 14); *Beitzell v. Jeffrey*, 643 F.2d 870, 879 (1st Cir. 1981) (plaintiff provided adequate hearing where had lawyer present and was offered opportunity to present, and to cross-examine, witnesses); *Thomas v. Town of Salisbury*, 134 F. Supp. 3d 633, 649 (D. Mass. 2015). Here, Commissioner White is entitled to such a trial-like hearing, especially because of the egregious reputational harm that has been caused to him, which if left untested will permanently destroy his reputation and professional opportunities that would otherwise have been available to him.

Commissioner White is also entitled to this hearing *prior to termination.* The Removal Statute expressly provides that a hearing must occur where the Mayor has the burden to prove "cause" to remove him. Similarly, because he has a constitutionally protected property interest in his position as Commissioner, he has a right to a pretermination hearing. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (due process requires a pretermination hearing when a person has property interest in employment). The Supreme Court has also stated that "[b]efore a person is deprived of a protected interest [including a liberty interest], he must be afforded opportunity for some kind of a hearing …." *Roth*, 408 U.S. at 570 n.7. "The fundamental requirement of due process is notice and the opportunity to be heard 'at a

meaningful time and in a meaningful manner.'" *Gillespie v. City of Northampton*, 460 Mass. 148, 156 (2011) (quoting *Matthews v. Eldredge*, 380 U.S. 545, 552 (1965)). *See In re Atl. Pipe Corp.*, 304 F.3d 135, 147 (1st Cir. 2002) ("[I]t is trite but often true that justice delayed is justice denied.").

Where reputational harm is at stake, as it is here, Massachusetts courts recognize that an immediate hearing may be necessary to prevent irreparable harm. *See, e.g., Hanover Ins. Co. v. Sutton*, 46 Mass. App. Ct. 153, 159-60 & n.12 (1999) ("immediate hearing [was] necessary to prevent the irreparable harm that the lawsuit [would] cause to IPI's business and reputation if left pending"). Other courts, in the context of a name-clearing hearing, have similarly found that months-long delay violates due process. *See Mogel v. Renfrow*, No. 07-20616-CIV, 2008 WL 11333236, at *3 (S.D. Fla. Feb. 26, 2008) (six-month delay in name-clearing hearing presents actionable due process claim); *Aviles-Valdez v. Umatilla Cty.*, No. 2:16-CV-00332-SU, 2019 WL 2440091, at *6 (D. Or. Feb. 8, 2019), *report and recommendation adopted*, No. 2:16-CV-00332-SU, 2019 WL 2437449 (D. Or. June 11, 2019) (same); *Perrault v. Marana Unified Sch. Dist. Bd. of Governors*, No. CV-17-00002, 2018 WL 2670622, at *4 (D. Ariz. Apr. 10, 2018) (name-clearing hearing eight months after request was not "an opportunity to be heard at a meaningful time and in a meaningful manner").

Here, the deprivation of Commissioner White's liberty interest has already occurred, and the hearing should happen as soon as reasonably possible. Otherwise, the reputational harm becomes permanent. While the public currently is focused on the damaging investigator's report which the City released last Friday, the effectiveness of a name-clearing hearing will dissipate quickly as the public will inevitably lose interest if the hearing is delayed for months. Accordingly, the required hearing with witnesses and cross-examination should happen

promptly. *See Loudermill*, 470 U.S. at 547 ("[a]t some point, a delay in the post-termination hearing would become a constitutional violation"); *accord Schroeder v. Chicago*, 927 F.2d 957, 960 (7th Cir.1991) ("[A]t some point delay must ripen into deprivation, because otherwise a suit alleging deprivation would be forever premature") (Posner, J.); *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir.1989); *Givens v. United States Railroad Retirement Bd.*, 720 F.2d 196, 201 (D.C.Cir.1983), *cert. denied*, 469 U.S. 870 (1984); *Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 490 (3d Cir.1980).

A prompt hearing will ensure that Commissioner White's rights, both constitutional and statutory, are meaningfully protected. A prompt hearing will also serve the public's interest, and even if there were a short delay, the City and Acting Mayor cannot reasonably contend it would cause any meaningful harm. The Boston Police Department is currently operating under the guidance of an acting Commissioner and there is no evidence that the BPD is not able to fulfill its policing obligations under the current acting Commissioner. Further, the Acting Mayor is not entitled to appoint a new permanent Commissioner; only a duly elected Mayor may make permanent appointments. *See* G.L. c. 39, sec. 5 ("The person upon whom such duties devolve shall be called 'acting mayor' and shall possess the powers of mayor only in matters not admitting of delay, and shall not make permanent appointments.") Therefore, there is no prejudice to the City if the hearing concerning Commissioner White occurs promptly, but not immediately.

Finally, the hearing should occur before this Court to ensure due process and the protection of Commissioner White's constitutional and statutory rights. There is no adjudicative body or other body at the City to oversee such a hearing. And, there is no other body where such a hearing could constitutionally occur. Certainly the Acting Mayor and the City have already

demonstrated they cannot be entrusted to provide due process, as they have already demonstrated a total lack of regard for Commissioner White's rights and have pursued a rigid march toward a predetermined result: terminating Commissioner White. Most glaringly, the Acting Mayor had already made up her mind prior to the performative "hearing" she scheduled on Friday afternoon. The Acting Mayor told Superintendent Nora Baston ("Baston") two days earlier, on Wednesday, May 12, that she was going to appoint Baston as the new BPD Commissioner and that Baston should be at City Hall on Friday at 3:00 p.m. for the announcement. Affidavit of Boston Police Commissioner Dennis White ("White Aff."), ¶ 38. A hearing with a predetermined outcome fails to satisfy Commissioner White's right to due process. *See D'Angelo v. Winter*, 403 F. App'x 181, 182 (9th Cir. 2010) (unpublished) ("A hearing with a predetermined outcome does not satisfy due process."); *Levesque v. Town of Vernon*, 341 F. Supp. 2d 126, 134 (D. Conn. 2004) (denying motion for summary judgment because the plaintiff "may be able to show that the result of the pretermination hearing was pre-ordained."); *Wagner v. City of Memphis*, 971 F. Supp. 308, 318–19 (W.D. Tenn. 1997) ("... when the evidence establishes that the outcome of a municipal employee's pre-termination hearing has been predetermined regardless of the proof presented, the concerns and goals of the pre-termination hearing as set forth in Loudermill have not been met.").[1]

Accordingly, this Court should conduct the hearing to ensure due process.

[1] The Acting Mayor also deprived Commissioner White of his right to notice. The Acting Mayor provided him notice on Friday at 10:00 a.m. that she would be terminating him after a purported "hearing" at 3:00 p.m. *See* White Aff., ¶36. The City did not provide the basis for the termination until 10:48 a.m. Four hours' notice before a termination "hearing" is not adequate notice. *See, e.g., Samuel v. Holmes*, 138 F.3d 173, 178 (5th Cir. 1998) (plaintiff's constitutional rights violated where not notified that he was to be terminated until twenty minutes before termination proceedings). In addition, Defendants did not provide to Plaintiff the basis for the termination – the investigator's report – until Friday, May 14 even though Plaintiff repeatedly asked for a copy for over two weeks. *Id.*, ¶ 39.

II. The City and Acting Mayor lack "cause" to terminate Commissioner White.

Chapter 322, Section 7, of the Acts of 1962 (the "Removal Statute") provides that the Mayor of Boston who seeks to remove the Commissioner may only do so for "cause." The purpose of the Removal Statute is to insulate the BPD Commissioner from the political preferences of Boston Mayors and to ensure the BPD can operate with a degree of independence. Here, the City and Acting Mayor have not, and cannot, demonstrate "cause" to terminate Commissioner White.

In her May 14 letter, the Acting Mayor cites four reasons to terminate Commissioner White. *See* White Aff., Exh. C. As discussed below, each is legally and factually baseless even on the current underdeveloped record. With the appropriate trial-like hearing, Commissioner White will be able to further demonstrate that the City and Acting Mayor lack the required "cause" to terminate him.

1. The allegations of domestic violence in 1993 and 1999 were known to the City when Commissioner White was appointed and thus cannot be "cause" to terminate him, and the allegations are false.

First, Acting Mayor Janey stated that her intent to terminate Commissioner White resulted from "the information contained in the independent investigation regarding complaints of domestic violence and abuse filed in 1993 involving your then-niece-by-marriage and in 1999 involving your then-wife, and your responses thereto." Exh. C, p. 1.

This reason is facially deficient. Commissioner White was appointed Commissioner by Mayor Martin Walsh and the City on February 1, 2021. The City and Mayor were aware of Commissioner White's IA records and knew of the allegations of domestic violence made against him in 1993 and 1999. *See* Affidavit of William G. Gross ("Gross Aff."), ¶¶ 7-9; White Aff., ¶¶ 7 & 8. The City cannot claim they have cause to terminate the Commissioner when the underlying facts were known to the City when the City appointed him. The City appointed him

because the City determined he was qualified and that these allegations from 1993 and 1999 did not disqualify him. The City cannot now claim the opposite. *See Velasquez v. City of Colorado Springs*, No. 77-C-38, 1980 WL 244, at *5 (D. Colo. Apr. 21, 1980) (in wrongful termination action, court rejected police department's "irrational and inconsistent" rationale to terminate officer for lack of "moral character" due to prior criminal record because plaintiff was hired despite his known record).

Moreover, the evidence supports Commissioner White that he did not, in fact, engage in domestic violence or wrongdoing in the 1993 and 1999 incidents.

a. Commissioner White never threatened to shoot Sybil White as she alleged in 1999.

With respect to Sybil White's allegation that Dennis White threatened to shoot her and her friend in 1999, it is demonstrably false. *See* White Aff., ¶¶ 19-29. By 1998, their marriage had been coming apart for several years. *Id.*, ¶ 21. They owned a house in Dorchester but lived separately. *Id.* That said, Dennis[2] still cared about Sybil and was upset because he had reason to believe that she was in a relationship with another Boston Police Officer. *Id.*, ¶ 21.

In the summer of 1998, Dennis observed Sybil driving to meet the other man at his house. *Id.*, ¶ 22. She parked in front of his house and he came out of the house to meet her. *Id.* He went back inside when he saw Dennis there. *Id.* Dennis asked Sybil, "What are we doing here with our marriage?" *Id.* Dennis asked if the marriage was permanently over. *Id.* She did not answer, got into the car, and drove away. *Id.* Dennis was upset and hurt. *Id.*

About 3-4 months later, in December 1998, Dennis was driving through Dorchester on patrol with Officer Wayne Hester, and saw Linda Figueroa in her car. *Id.* at 24. Linda was a family friend at the time. *Id.* Dennis had not seen her in a long while and got out of the police

[2] Because Sybil White and Dennis White had the same last name at the time which appears in the records, their first names will be used in this section to identify them solely for clarity and convenience. It is not meant disrespectfully.

cruiser and had a friendly conversation with her. *Id.* The conversation turned to Sybil and this other man. Dennis told Sybil about what had happened 3-4 months earlier. *Id.* Then he said to Linda, when it happened he felt so upset he could have shot both of them. *Id.* But he told her he was done with the marriage and was moving on. *Id.* He made this statement only to express his feelings -- how upset and hurt he had been several months before when the incident happened -- and not as a threat or to convey a threat to Sybil. *Id.* The conversation was calm and friendly with Linda and she ended it by asking if Dennis wanted to come for dinner that night. *Id.* Clearly, Linda did not view Dennis' statement as a threat, and it was not a threat. *Id.*

Dennis subsequently learned that 4 months later, in April 1999, Linda mentioned to Sybil what he had said. *Id.*, ¶ 25. If Linda actually thought Dennis was threatening to shoot Sybil, who was her friend, she would not have waited 4 months to tell her about the statement. *Id.*

Sybil apparently did not view it as a threat either. *Id.*, ¶ 26. After learning of the statement from Linda, Sybil waited 3 weeks before she went to the police and the court. *Id.* In fact, she did not report it until May 4, 1999, when Dennis finally told her to get a lawyer because he was divorcing her. *Id.* Sybil immediately exploded in anger making an expletive laced phone call to Dennis while he was on duty which was witnessed by a police officer and reduced to a report. *Id.* That police report is attached to Sgt. Det. Mary-Ann Riva's affidavit. *Id.* That same evening she went to the police and made the false report that Dennis threatened to shoot her and her male friend 3 weeks earlier. *Id.* The statement was false. *Id.* Dennis did not threaten to shoot her and her friend, and the conversation Dennis had with Linda happened five months earlier, not three weeks earlier. *Id.*

Sybil made that false statement to a police officer and then to the court as part of the process of seeking a restraining order against Dennis. *Id.*, ¶ 27. The reason she made the

statement was because she was angry at him and wanted to gain an advantage in the divorce and custody proceedings. *Id.* As soon as Dennis agreed to assume all the financial obligations for their house and to pay for their daughter Brittany's private education, which he agreed to do by June 1999, Sybil dropped the restraining order. *Id.* Dennis was not a threat to her. *Id.* She was looking for a financial advantage in the divorce and she got it. *Id.* With her agreement, the Court vacated the restraining order, and Dennis moved back into their home and lived there with her and the children until their divorce was finalized in 2001, 1 ½ years later. *Id.*

Further, the lead domestic violence investigator, Sgt. Det. Mary-Ann Riva, who spoke to all the witnesses to these events, concluded:

> In my view, based on my experience as a domestic violence detective, Sybil White was angry and upset about the divorce which Dennis White had initiated and her statements were made in that context. In my experience as a domestic violence detective, it is not uncommon for incorrect statements to be made by one partner against another during a divorce proceeding. That is not always the case, but it is sometimes the case. It was my opinion that Sybil White's request for a restraining order was motivated out of her being upset and angry, not because there was a real threat that Dennis White would commit violence against her. Sybil White voluntarily vacated the restraining order against Dennis White on June 23, 1999, more than ten months before it was scheduled to expire. In my view, based on my experience and investigation, Dennis White did not make a threat to commit violence on Sybil White, and did not present a threat of violence to her.

See Affidavit of Mary-Ann Riva ("Riva Aff."), ¶¶ 15-16. [3]

b. Commissioner White acted in appropriate self-defense and did not engage in domestic violence against his niece-by-marriage who attacked him in 1993.

With respect to the allegation of domestic violence in 1993 involving Dennis White's niece-by-marriage, he acted in appropriate self-defense against an attack against him. *See* White Aff., ¶ 30. At the time, Dennis and Sybil had offered Sybil's 19-year old niece a place to stay

[3] In the investigator's report, there are other allegations that Dennis physically abused Sybil. Dennis White states under oath, they are all false. White Aff., ¶ 29. In fact, Sybil stated in her report to the police officer on May 4, 1999, there had been "**no physical abuse**" in her relationship with Dennis. *See* Riva Aff. (attaching police report dated May 4, 1999). As an officer, she was and is duty-bound to tell the truth especially in the context of a court proceeding such as a restraining order application which she had begun.

because she was having some sort of difficulty at home with her family.[4] *Id.* She stayed with them for several months. *Id.* When she was leaving, she refused to return the house key and was swearing repeatedly at Dennis in front of his young children and two other young relatives who were with him. *Id.* Dennis took her by the arm and escorted her down a few steps and outside the house. *Id.* She continued to swear at him and to refuse to return the house key. *Id.* She then physically attacked Dennis, hitting him in the chest and at some point attacking and kicking his left knee which was seriously injured. *Id.* In fact, he was on injured leave due to his knee injury, which was so severe that it kept him out of active duty for several years and nearly cost him his police department career. *Id.* He felt very concerned when his niece attacked his knee with a kick and he reacted in self-defense by swatting her away with a swing of his arm. *Id.* He did not strike her with a fist. *Id.* His hand was open. *Id.* That ended her attack. *Id.* She threw the house key on the ground and left, threatening that she would come back with her friends. *Id.* Her assault on Dennis was witnessed by a neighbor who confirmed that Dennis responded only after she kicked him in the injured knee. *Id.* Dennis reported the incident immediately to the police. *Id.* Later, he took out a complaint on her and she took out a complaint on him. The court dismissed both complaints. *Id.*

Dennis White did not commit the crime of domestic violence in either of these incidents. For these reasons, neither of these incidents, which happened 20-30 years ago and were known to the BPD and the City, constitute cause to remove him as Commissioner. A trial-like hearing will allow Commissioner White to further demonstrate the lack of merit to these allegations and to clear his name.

[4] Dennis and Sybil had room in their house and therefore allowed various family members to stay when they were having hard times.

2. Commissioner White cooperated in the investigation.

The Acting Mayor's second reason to terminate Commissioner White is his alleged "lack of cooperation and judgment during [the City's] investigation." *See* Exh. C, p. 1. Commissioner White, however, cooperated in the investigation. *See* White Aff., ¶¶ 32-34. He sat for a full interview by the investigator. *Id.*, ¶ 33. He answered all her questions truthfully and the interview only stopped when the investigator exhausted her questions. *Id.* He did not end the interview, the investigator did. *Id.*

On the advice of counsel, he did not answer the following questions: an initial question about what if any medications he was currently taking, and questions about his private sexual activities with consenting adults over the last thirty years or so. *Id.*, ¶ 34. He did not answer the medications question because that is private health information, but he did agree to answer a follow-up question about whether he was on any medications that would interfere with his ability to answer the investigator's questions truthfully during the interview. *Id.* He responded there were none. *Id.* As for his personal sex life with other consenting adults, including his wife, that is harassing and not relevant to an inquiry about whether he committed domestic violence.

At the end of the interview, which lasted more than an hour, the investigator said she did not know if she would see Commissioner White again, which he took to mean the interview was concluded. *Id.*, ¶ 34. Later, she asked for a second follow-up interview. *Id.* Acting Mayor Janey never told Commissioner White he had to sit for a second, follow-up interview. *Id.* However, he agreed to answer the investigator's follow-up questions if she would put them in writing. *Id.* The investigator declined to provide her follow-up questions in writing. *Id.*

As for documents, Commissioner White provided the only document that he was required to provide, which was authorization for his CORI report.[5] *Id.*, ¶ 32. The Acting Mayor faults Commissioner White because he refused to provide certain documentary information at the beginning of the investigation. *See* Exh. C. However, the investigator's request for that documentary information, including tax returns and authorization for credit history, was outside the scope of the investigation, as the City itself defined the investigation. *See* White Aff., Exhs. A and B.

3. Commissioner White's few visits to his BPD office were appropriate.

The Acting Mayor's third reason to terminate Commissioner White stems from his appearing at his office while on administrative leave for the Zoom interview with the investigator and "at other times." *See* Exh. C, p. 2. The Acting Mayor concludes that this "raised the potential for confusion" and "may have intimidated witnesses who were asked to participate in the independent investigation." *Id.* First, the Acting Mayor never told Commissioner White he could not visit the office while on administrative leave, even though she personally spoke to him by Zoom in early April while he was in his office. *See* White Aff., ¶ 43.

Further, he only visited his office four times since he was placed on administrative leave more than 100 days ago, and each had an appropriate purpose. *Id.* As discussed, in early April he appeared for a Zoom meeting with Acting Mayor Janey from his office with his attorney present to discuss the Commissioner's status and the investigation. *Id.* He could not conduct the call at his house with his attorney present because his wife is very immune compromised due to a serious health issue, and he also needed to obtain copies of documents. *Id.* He subsequently appeared at his office for the Zoom interview with the investigator for the same reason. *Id.* On another occasion, he came to the office to retrieve a file from his computer that the Command

[5] He has no criminal record, which the CORI report demonstrated.

Staff wanted to use. *Id.* It was the form he had been using as Chief of Staff to track diversity and inclusion statistics in BPD employment matters. *Id.* The Command Staff needed the statistics for a City Council hearing and they wanted to use the form as the model for tracking such data going forward. *Id.*

The fourth time he came to the office was again to retrieve a document the Command Staff wanted from his computer. *Id.* As Chief of Staff, he had kept track of the assignment of new cars within the police department. *Id.* There were new cars arriving that he had already allocated as Chief of Staff and they wanted to rely on his allocation for these cars, and they wanted to use the form as a template for the allocation of new car orders in the future. *Id.* On each of these four occasions, he went directly into the secure garage and elevator that takes him directly to the floor where his office is, and he left the same way. *Id.* Therefore, he had very minimal contact with anyone at the BPD during these visits. *Id.* There was no intent to confuse or intimidate anyone, and there is no evidence that anyone was confused or intimidated. He was never instructed by anyone at City Hall that during his administrative leave he was not to enter BPD headquarters or access his computer. *Id.*

4. Commissioner White remained appropriately silent during the investigation, and his not speaking publicly about matters relating to his status or the investigation is not a basis to remove him.

As a fourth reason for termination, the Acting Mayor stated: "At no time during the investigation into the earlier domestic violence allegations did you express any appreciation for the importance of domestic violence concerns to the public or how it might affect the public's perception of how it might affect the ability of the BPD to respond to incidents of domestic violence…." *Id.*, ¶ 44. Commissioner White was on administrative leave during the investigation and did not believe he had authority to speak publicly on the matters under

investigation or that it would be appropriate to do so. *Id.* He certainly was unaware that the Acting Mayor expected him to speak publicly on this issue or any matter concerning the investigation. *Id.* It seems illogical to terminate him for not speaking out, while simultaneously terminating him for visiting the office on a few occasions. If the Acting Mayor believes visiting the office could cause confusion and intimidate, it is fair to imagine if he had spoken out publicly about issues relating to the investigation he might be criticized even more harshly for causing confusion and seeking to intimidate witnesses.

Significantly too, Commissioner White had a legal right under the First Amendment not to speak on public issues and cannot be terminated for his decision to remain silent. *See Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796–97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.")

The Supreme Court has recognized that a citizen who is employed by the government is in fact still a citizen, and therefore still afforded some First Amendment rights in their capacity as private citizens. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Thus, it was well within Commissioner White's

First Amendment right to decide not to speak about the public issue of domestic violence during the City's investigation, and it would be unlawful to terminate him for not doing so.

Conclusion

For the reasons stated here and in Commissioner White's motion for preliminary injunction and supporting documents and affidavits, the Court should allow his motion for a preliminary injunction and enter his proposed revised order, which is submitted herewith.

Respectfully submitted,
BOSTON POLICE COMMISSIONER DENNIS WHITE,

By his attorneys,

Nicholas B. Carter (BBO No. 561147)
Tara D. Dunn (BBO No. 699329)
TODD & WELD, LLP
One Federal Street, 27th Floor
Boston, MA 02110
Tel: (617) 720-2626
Email: ncarter@toddweld.com
tdunn@toddweld.com

Dated: May 19, 2021