

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of : Complaint Filed: May 3, 2019
Mayor Wally Scott :
 : Investigation No. 54
 :

FINAL OPINION AND ORDER

I. PROCEDURAL HISTORY

1. On or about May 4, 2019, Ernest H. Schlegel, a resident of the City of Reading, filed a Charter Board complaint (“Complaint”) against the Mayor of the City of Reading, Wally Scott (“Mayor Scott”).

2. Pursuant to the Charter Board Ordinance, Bill No. 46-2005, *as amended*, (“Ordinance”) the Investigative Officer issued a timely Findings Report upon Mayor Scott.

3. On or about September 30, 2019, Mayor Scott, through counsel, Frederick T. Lachat, III, Esquire, current Acting City Solicitor, requested an evidentiary hearing. *See* Ord. at § V(A)(7). *See also*, Invest. Officer letter dated Sept. 30, 2019.

4. By letter of October 2, 2019, the Board scheduled an evidentiary hearing for November 12, 2019, and an additional hearing date on November 14, 2019.

5. An evidentiary hearing commenced on November 12, 2019, and continued on November 14, 2019.

6. Prior to hearing, Mayor Scott’s outside counsel, Mark J. Merolla, Esquire, asserted objections, which the Board addresses hereafter in this Final Opinion and Order.

II. FINDINGS OF FACT

1. Mayor Scott’s outside counsel, Attorney Merolla, also represents Osmer S. Deming, Esquire (“Deming”). Nov. 12, 2019 N.T. at pp. 13-14.

2. Mayor Scott's conduct in connection with Deming's purported service as the City's Managing Director, as well as Deming's appointment and qualifications, are the central issues in this matter.

3. As set out in the notes of testimony of November 14, 2019, at pp. 12-13, and the Charter, the process for the appointment and approval of Managing Directors is as follows: a) a Mayor will advise City Council through its President or the City Clerk that a candidate for appointment by the Mayor needs an interview by City Council; b) City Council will arrange for the interview, coordinating with the Mayor's office; c) City Council then conducts a confidential interview of the candidate; d) if the City Council will not approve the candidate, the Mayor is notified so that, as an option, the Mayor may withdraw the candidate; or e) if the City Council will approve the candidate, the City Council issues a resolution approving the Mayor's appointment. *See also, Council Policy – Appointment of Directors and Solicitors*, Policy Handbook, as attached to the Complaint.¹

4. Prior to the events at issue here, there have been seven (7) Managing Directors, and City Council has approved each of them by resolution. *See Exhibit IO-3 at Ex. 6.*

5. For example, in May of 2016, Mayor Scott obtained City Council approval of former City Managing Director Glenn Steckman, by a Resolution of Council and by following the process generally outlined herein at the notes of testimony of November 14, 2019, at pp. 12-13. *See Exhibit IO-5, Resolution No. 42-2016, relating to City Council's approval of Mayor Scott's appointment of Glenn Steckman as Managing Director. See also Council Policy – Appointment of Directors and Solicitors*, Policy Handbook, as attached to the Complaint.

¹ Further, as set forth below, the Mayor, for the first 180 days of his term, or from the date of a vacancy in the office of Managing Director, has the appointment power for that office, subject only to approval by City Council. *See Charter Secs. 308(f), 311, 401(a), and 402(a).*

6. Mayor Scott terminated Glenn Steckman as the City's Managing Director in September 2018.

7. Mayor Scott announced by email message that he appointed Deming as "acting" Managing Director, effective October 5, 2018. *See* Exhibit IO-3 at Ex. 5.

8. This announcement also carried in the Reading Eagle's² Saturday, September 22, 2018 edition.³ *See* Exhibit IO-3 at Ex. 12.

9. There is no difference between the use of words "temporary" or "acting"⁴ in connection with a person appointed under Charter Section 401(d), relating to the appointment of a Temporary Managing Director.

10. As Temporary Managing Director, Deming was responsible directly to Mayor Scott. Charter § 406.

11. Deming does not a) possess a Master's degree in public administration, business administration, or its equivalent and b) have at least three (3) years' experience at an executive or administrative level.

² Judicial notice of relevant newspaper articles is proper. *Tilghman v. Commonwealth*, 366 A.2d 966, 967 (Pa. Commw. Ct. 1976); *In re Pub. Info. Concerning the Death of Jack Fuellhart*, 1997 Pa. Dist. & Cnty. Dec. LEXIS 151 (Clarion Ct. Com. Pl. July 3, 1997). As indicated, some of the articles referenced by the Board were submitted as exhibits at hearing. Further, the Board considers in this Final Opinion and Order, to the extent corroborated by other sources of record, the content of certain news articles published by the Reading Eagle. *Raintree Homes v. Birkbeck*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 164 (Monroe Ct. Com. Pl. Sept. 8, 2011).

³ Reading Eagle, *Attorney Named Acting City Manager, Reading Mayor Wally Scott Announces*, September 22, 2018, <https://www.readingeagle.com/news/article/attorney-named-acting-city-manager-reading-mayor-wally-scott-announces> (accessed Dec. 8, 2019).

⁴ *Mukerji v. City of Reading Charter Review Board*, 941 A.2d 102, 105 (Pa. Commw. Ct. 2008) (addressing Charter residency requirement), explains that a mere change to the name of the title to a position does not change the impact of applicable Charter provisions to a certain position, regardless of its title. Applied here, the Charter calls for a Managing Director and for a Temporary Managing Director, not an "acting" Managing Director. For all purposes herein, both "temporary" Managing Director and "acting" Managing Director shall mean the Temporary Managing Director provided for in Charter Sec. 401(d).

12. Deming does not a) possess a Bachelor's degree in public administration, business administration, or its equivalent and b) have at least five (5) years' experience at an executive or administrative level.

13. As a fact, the Board finds that Deming does not possess the requisite Charter-mandated qualifications to serve as the City's Managing Director. *See* Exhibit IO-7, resume of Osmer S. Deming; *see also* Charter § 401.

14. Deming's appointment as Temporary Managing Director ended on or about January 5, 2019, according to Charter Section 401(d).

15. Deming holds himself out as the City's Managing Director.⁵

16. Acting City Solicitor Frederick T. Lachat III, and former Acting City Solicitor A. Elizabeth Kraft, Esquire, both agree that "the acting managing director may only be in his position for 90 days" and that the 90-day limit of Charter Sec. 401(d) cannot be extended. *See* Exhibit Subject-1, p. 1; Exhibit IO-3 at Ex. 14, p. 2.

17. Linda Kelleher ("Kelleher") is the City Clerk, whose duties are set forth in Charter Sec. 225.

18. Kelleher is an officer of the City and serves at the pleasure of City Council and has done so for twenty-three (23) years. *Id.* and Nov. 14, 2019 N.T. at p. 9.

19. As part of her duties as City Clerk, Kelleher receives and distributes correspondence between the City's Administration and the City Council. Nov. 14, 2019 N.T. at p. 9.

⁵ Deming serves to the extent any person could hold that appointed office while being unqualified to do so, without appointment by the Mayor, and without approval by City Council. It is also plausible, but unclear, that Deming may consider himself to be a hold-over Temporary Managing Director that refused to vacate that position upon its natural expiration, as further explained herein.

20. In the context of appointment of a Managing Director, communications regarding interview for the position are sent either via email, personally, or by phone. Nov. 14, 2019 N.T. at p. 13.

21. In connection with Deming's service as Managing Director, at no time prior to April 5, 2019, did Mayor Scott circulate Deming's resume to the City Clerk or to City Council, nor did Mayor Scott notify the City Clerk or City Council that he sought City Council's approval of Deming as Managing Director. *See, e.g.*, Nov. 14, 2019 N.T. at pp. 19-20.

22. Prior to April 5, 2019, Deming never appeared for an interview before City Council at the request of Mayor Scott. *See, e.g.*, Exhibit IO-3 at Ex. 5.

23. Near the passage of 180 days of the City not having a Managing Director, April 5, 2019, and in an effort to fulfill its duties under the Charter, Sec. 401(e), City Council sought information from potential candidates for Managing Director, including Deming. *See, e.g.*, Exhibit IO-3 at Ex. 5.

24. In March 2019, Deming submitted his resume to City Council in connection with City Council's efforts to fill the position of Managing Director in accordance with Charter Sec. 401(e), but did not interview. Nov. 14, 2019 N.T. at pp. 33-34, 71-73. *See also* Exhibit IO-3 at Ex. 5.

25. After April 5, 2019, but before June 15, 2019, City Council issued a media release announcing the commencement of City Council's search for a Managing Director and stating its position regarding the facts surrounding Mayor Scott's attempt to fill the position of Managing Director with Deming. *See* Exhibit IO-3 at Ex. 6.

26. On or about April 30, 2019, Deming announced via a Facebook post that:

“I am pleased to announce that per the City of Reading Home Rule Charter that I am, under law, the Managing Director of the City of Reading. I look forward to continue to work for the good people of the City in this capacity.”

See Exhibit IO-3 at Ex. 7.

27. Deming made a similar statement to the Reading Eagle on or about Tuesday, April 30, 2019.⁶ See Exhibit IO-3 at Ex. 8.

28. In mid-April, 2019, Deming also threatened City Council with “a formal legal challenge” in connection with his alleged appointment and the position of Managing Director. *Id.* See also Nov. 14, 2019 N.T. at 74-77 and Footnote 5.

29. For twenty-three (23) years, under the Charter, City Council has approved various Mayors’ appointments of all Managing Directors by use of a resolution of City Council. See Exhibit IO-3 at Ex. 6.

30. At no time prior to April 5, 2019, did Mayor Scott notify City Council in any writing, including an email, or by any other commonly accepted and utilized official means, including personally, that he had appointed Deming as Managing Director. See Nov. 14, 2019 N.T. at pp. 19-20.

31. At no time prior to April 5, 2019, did Mayor Scott request the approval of City Council of Deming in any writing, including an email, or by any other commonly accepted and utilized official means, including personally. See Exhibit IO-3 at Exs. 5 and 6. See also Nov. 14, 2019 N.T. at pp. 19-20, 38-39.

⁶ Reading Eagle, *Acting Managing Director Osmer S. Deming Threatens Lawsuit*, May 1, 2019, <https://www.readingeagle.com/news/article/reading-council-begins-search-for-managing-director> (accessed Dec. 8, 2019).

32. City Council never adopted a resolution, or any other legislative device, approving Deming to the position of Managing Director. *See* Exhibit IO-3 at Exs. 6 *and* 10. *See also* Nov. 14, 2019 N.T. at pp. 38-39.

33. Mayor Scott, at no time prior to April 5, 2019, or thereafter, placed before City Council the candidacy of Deming and the matter of approving Deming to the position of Managing Director. *See* Exhibit IO-3 at Exs. 5 and 6. *See also* Nov. 14, 2019 N.T. at pp. 19-20, 38-39.

34. It is relevant that other Mayors of the City, like Mayor Scott in his appointment of Glenn Steckman, also sought and obtained City Council's use of the legislative device of a resolution in approving Managing Director appointments and followed City Council's adopted procedure.⁷ *See, e.g.*, Exhibit IO-6 *and* Nov. 14, 2019 N.T. at pp. 15-17.

35. Despite having the authority to do so, pursuant to Charter Section 308(d), (e) and (j), Mayor Scott never placed before City Council as a legislative item, or agenda item, a request for the approval of Deming as Managing Director. Nov. 14, 2019 N.T. at pp. 80-81.

36. There is no record of Mayor Scott placing before City Council the Mayor's alleged appointment of Deming to the position of Managing Director for approval at any time prior to the 180 day period specified in Charter Section 401(d) and which expired on April 5, 2019, or thereafter.

37. There is no evidence that Mayor Scott placed his alleged appointment of Deming to the position of Managing Director before City Council for approval at any time prior to the 180-day period specified in Charter Section 401(d) and which expired on April 5, 2019.

⁷ Charter Sec. 212(a) affords City Council the power to determine its own rules and order of business.

38. City Council's Resolution No. 47-2019, dated April 22, 2019, and the statements contained therein are adopted by the Board in full and are consistent with the other exhibits and testimony presented in this matter. *See* Exhibit IO-10.

39. After the expiration of the applicable 180-day period, Deming appeared for an interview before City Council on July 1, 2019, at the request of City Council and in connection with City Council's interview process to fill the position of Managing Director.⁸ Nov. 14, 2019 N.T. at pp. 35, 59, 70-71.

40. City Council took no action on its interview of Deming on July 1, 2019.

41. Mayor Scott did not, at any time, remove Deming from office as Managing Director.

III. CONCLUSIONS OF THE BOARD

A. Objections of Mayor Scott

Mayor Scott raised two motions to dismiss the proceedings before the Board by written motion, in an undated document delivered to the Board's Solicitor by email on November 5, 2019. Both motions seek the dismissal of this Investigation No. 54, with prejudice. For the following reasons, the Board denies both motions to dismiss.

1. The Board has exclusive original jurisdiction in this matter

Mayor Scott contends that the violations of the City's Charter⁹ alleged against him must be litigated in the Berks County Court of Common Pleas, relying upon the Pennsylvania Constitution, Art. V, Sec. 1.

⁸ Reading Eagle, *Reading City Council Meets in Private About Managing Director Post*, July 1, 2019, <https://www.readingeagle.com/news/article/reading-city-council-meets-in-private-about-managing-director-post> (accessed Dec. 9, 2019).

⁹ And also, presumably, any alleged violations of the City's Administrative Code.

The Board is a validly created quasi-judicial administrative local agency hearing board with limited original jurisdiction over inherently local matters, involving local ordinances, *i.e.*, the Administrative Code and the City's Charter. The matters heard by the Board are not matters arising out of the common law, or equity, are not civil or criminal causes, or within the jurisdiction of the Orphans' Court or family court divisions, are not claims arising under Pennsylvania statutes, or any other jurisdiction's statutes. Inferior local agency hearing boards may be created as authorized by statute, or by a Home Rule Charter. Home Rule itself springs from the Pennsylvania Constitution. *See* Pa. Const., Art. IX, § 2.

A Charter violation should not be heard first in the Court of Common Pleas any more than a zoning variance application, a building code violation, or an H.A.R.B. violation should be heard first in the Court of Common Pleas.

Therefore, this portion of Mayor Scott's motion to dismiss is denied.

2. Mayor Scott's due process rights are protected

Mayor Scott also contends that his "right to due process and fundamental fairness will be violated if the Board exercises jurisdiction based upon a Complaint identical to an action initiated by the Board, and which will be heard at a later date." This objection references matters dehors the record, and for which Mayor Scott offered no evidence whatsoever.

The Board has the authority to commence its own investigations. *See* Charter Amendment I, Section II(b), authorizing the Board to conduct investigations on its own initiative, *and* Section III, Part A, Sub-Part 3, of the City of Reading Charter Board Ordinance, Bill No. 46-2005, *as amended*, authorizing the Board to initiate preliminary investigations on its own motion, through the Investigative Officer, *and further*, Section III, Part A, Sub-Part 7, of the City of Reading Charter Board Ordinance, Bill No. 46-2005, *as amended*, granting the Board all other powers

necessary and appropriate to effectuate the purposes set forth in the said Ordinance and in Charter Amendment I.

However, just as when a third party files a Charter complaint, when the Board initiates its own investigation, the Board does not participate in the determination of jurisdiction, or whether to proceed from a preliminary investigation to a full investigation, or which allegations made in the Charter complaint result in actual violations prosecuted by the Investigative Officer. All of the foregoing matters are the exclusive province of the Investigative Officer. On these self-initiated Board investigations, the Board initiates, and then remains un-involved¹⁰ in the matter until (and if) the Investigative Officer issues a findings report. It is at that time, based on the facts found by the Investigative Officer, or after a hearing requested by the subject, when the Board again enters the process to conduct a hearing if requested and to determine if in fact a violation of the Charter or Administrative Code occurred.

The Board does not direct the actions of the Investigative Officer, nor does the Board determine which claims proceed or are dismissed. That determination is solely in the hands of the Investigative Officer, as is the decision of which subjects are dismissed or proceeded against. The Board later decides the matter on the facts found by the Investigative Officer, following a hearing if requested by the subject. Due process sufficient for these local agency proceedings is afforded by the Charter and its procedures, and has been provided to Mayor Scott. Further, any due process claim made by Mayor Scott regarding some future Board action, and not this Investigation No. 54, is not yet ripe for determination and is only speculative, and must also be denied on that basis.

Therefore, this portion of Mayor Scott's motion to dismiss is also denied.

¹⁰ By ordinance of City Council, Bill No. 30-2015, all Charter Board investigations must undergo mediation. The Board participates in mediation only in connection with investigations that it self-initiates.

B. Questions Before the Board

1. Is it inherent in the application of Charter Section 401(a) and 402(a) to require that the Mayor must make his appointment of a candidate for the office of Managing Director in a manner that affirmatively communicates the appointment to City Council, as a body, and in a manner reasonably calculated to notify City Council of the appointment as would ordinarily be communicated between two branches of government in an official manner?

Answered in the AFFIRMATIVE.

2. If the Mayor did not notify the City Clerk or City Council of his act of making such an appointment, and thus did not communicate same to City Council, as a body, then, is the thirty (30) day period set forth in Charter Section 402(a) triggered?

Answered in the NEGATIVE.

3. Does a Mayor violate the Charter by not making a Charter-compliant appointment of his candidate for the position of Managing Director?

Answered in the AFFIRMATIVE.

4. Was Osmer S. Deming, Esquire, at any time, a candidate qualified to serve as the City's Managing Director as provided by Charter Sec. 401(b)?

Answered in the NEGATIVE.

5. Does the position of Temporary Managing Director cease to exist after the expiration of ninety (90) days from the date of the appointment, under Charter Sec. 401(d)?

Answered in the AFFIRMATIVE.

6. Does a Mayor of the City violate the Charter by permitting a person serving as Temporary Managing Director to continue to serve beyond the Charter-mandated expiration of that position, which is ninety (90) days from appointment and with all rights, privileges, benefits and salary of that position?

Answered in the AFFIRMATIVE.

7. Does a Mayor of the City violate the Charter by permitting an unqualified and unappointed individual to hold himself out in the nominal capacity of Managing Director, and allowing that person to have all rights, privileges, benefits, and salary, of a Managing Director?

Answered in the AFFIRMATIVE.

C. Discussion

1. Charter Amendment I

Overarching Mayor Scott's actions, or inactions, whatever his purpose or intent, is Charter Amendment I, Sec. 1(a), relating to the supremacy of the Charter. This critical amendment to the Charter provides:

Section 1. Supremacy of Charter

a.) Governing law of the City. This Charter is the governing law of the City of Reading. No action or inaction by City Council, the Administration, or any other body created by this Charter shall be taken contrary to it, whether individually or collectively, by ordinance, resolution, practice, executive order or decision, or any other means.

The wording of the Charter, and acts pursuant to it, shall in all cases be strictly construed so as to effectuate its clear intent.

Mayor Scott may not by action, or inaction, proceed contrary to the Charter. It is fundamental that one may not cause to be done indirectly, what one may not cause to be done directly.¹¹ Said another way, and as confirmed by Amendment I of the Charter, whether the cause of a Charter

¹¹ Such a course of conduct is prohibited. *Macallen Co. v. Commonwealth of Massachusetts*, 279 U.S. 620 (1929) (citing the "well established rule" that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation); *Frank M. Fairbank v. United States*, 181 U.S. 283 (1901) (citing the same as a "great principle"); *Harrisburg City Pass. Railway Co. v. City of Harrisburg*, 149 Pa. 465, 24 A. 56 (1892) ("It need hardly be remarked that, if the city of Harrisburg cannot directly prevent the exercise of the rights guaranteed to the [Railway] by its [corporate] charter, it cannot accomplish this in an indirect manner."). See also generally *M. B. Investments v. McMahon*, 903 A.2d 642, 646-47 (Pa. Commw. Ct. 2006), *app. den'd* 2007 WL 621938 (Pa.) (finding option agreement to be a de facto agreement of sale); *Mukerji v. City of Reading Charter Rev. Bd.*, 941 A.2d 102, 104-05 (Pa. Commw. Ct. 2008) (mere change in title does not avoid application of the Charter's residency requirement).

violation is by action, or inaction, or direct or indirect conduct, the Charter is still violated. Action contrary to the Charter is of no effect.¹²

2. **The Mayor under the Charter**

The facts here demonstrate to the Board that, at least with respect to these facts and this situation, the Mayor has let go of the reins of power.

The Mayor is governed by Charter Article III. Mayor Scott is the *elected* executive of the City of Reading. It is in him that the people of Reading invested their *trust* as expressed in the general election of 2015. The Charter vests the “executive, administrative, and law enforcement powers of the City . . .” in the Mayor. Further, the Mayor “*shall control and be accountable for the executive branch of City government . . .*” Charter, Art. III, § 301 (emphasis added). Charter Sec. 308 charges the Mayor with certain powers and duties.

It is mandatory upon the Mayor under Charter Section 308 to:

(a) Execute, enforce, and obey the ordinances of the City and laws of the Commonwealth of Pennsylvania and the United States of America.

* * *

(f) Be responsible for the hiring, with the approval of Council, the City Managing Director.

* * *

(g) Direct and supervise the administration of all departments, offices and agencies of the City, except as otherwise provided by the Charter or by law.

¹² For example, an ordinance that conflicts with the Charter is null, void, and of no effect. *In re Investigation of Reading City Council* (Inv. No. 31, Oct. 27, 2010) at p. 5; *aff’d by Reading City Council v. City of Reading Charter Board*, No. 11-14382 (Berks Ct. Com. Pl. Feb. 17, 2012); *aff’d by Reading City Council v. City of Reading Charter Board*, No. 29 C.D. 2012 (Pa. Commw. Ct. Oct. 23, 2012). Likewise, the mere changing of titles for purposes of evading the Charter’s residency requirement is also of no effect. *Mukerji v. City of Reading Charter Rev. Bd.*, 941 A.2d 102, 104-05 (Pa. Commw. Ct. 2008); *Khokhar v. Charter Board of Reading*, 2010 Pa. Commw. Unpub. LEXIS 78 *; 2010 WL 9512708.

(h) Ensure that all laws, provisions of this Charter and acts of City Council, subject to enforcement by the Managing Director, are faithfully executed by the Managing Director.

* * *

(m) Unless otherwise provided, be responsible for the employment of personnel necessary for the effective operation of City Government.

(n) Perform such other duties and exercise such other powers as stated in this Charter, by law, or ordinance.

As pertinent to this matter, the duties stated above are mandatory, and required by the officeholder of the Office of Mayor of the City of Reading.

Among those important and mandatory duties is the appointment of a Managing Director. Charter § 311. For the first 180 days of his term, or from the date of a vacancy in the office of Managing Director, the Mayor has the appointment power for that office, subject only to approval by City Council. *See* Charter §§ 308(f), 311, 401(a), *and* 402(a). The Managing Director is arguably the most powerful appointed position in City government. For example, the Managing Director serves as the City's Deputy Mayor in the event of the Mayor's temporary absence or temporary disability. The appointment of a Temporary Managing Director may last only for ninety (90) days from the date of the appointment. Charter § 401(d). The position expires and terminates as a matter of law upon the passage of 90 days. After 180 days from the commencement of a Mayor's term, or from a vacancy in the office of Managing Director, the Mayor loses his power to appoint the Managing Director, as that power then passes to City Council. Charter § 401(e).

In stark contrast to the executive power and authority provided to the Mayor under the Charter, Mayor Scott complains that "nobody told him" that he violated the Charter,¹³ of the

¹³ Nov. 14, 2019 N.T. at pp. 95, 96, 112-13, 136.

content of the Charter,¹⁴ or that Deming should be removed.¹⁵ Mayor Scott is uninformed.¹⁶ Mayor Scott testified at the Board’s hearing: “The Charter never came to my thought.” Nov. 14, 2019 N.T. at p. 138:3-5.

It is disturbing to the Board that Mayor Scott testified that he did not know of the Complaint filed against him, Nov. 14, 2019 N.T. at pp. 127-28, when there are significant email and other written communications between the City Legal Department and Mark J. Merolla, Esquire,¹⁷ and the Investigative Officer and the Board’s Solicitor in this matter. In summary, here, Mayor Scott testified under oath that he never saw the Complaint and that “everybody kept it from” him. He testified that the Complaint was never mentioned to him, and that he is aware of nothing in connection with the Complaint, including informal discovery questions sent to the City Law Department from the Investigative Officer. Nov. 14, 2019 N.T. at pp. 127-28.

3. **The Managing Director**

a. Appointment is required.

A Managing Director may *only* occupy that position after: a) being appointed by the Mayor; and b) after the Mayor has obtained the approval of City Council; or c) if City Council does not give its approval within thirty (30) days after an appointment has been made by the Mayor, then after that period of thirty (30) days has expired, a Managing Director’s approval shall become automatic. Charter §§ 401(a) and 402(a). The Mayor’s act of appointing a Managing Director

¹⁴ Nov. 14, 2019 N.T. at pp. 93, 99, 115, 119, 129, 135.

¹⁵ Nov. 14, 2019 N.T. at pp. 93, 103-04, 113.

¹⁶ Nov. 14, 2019 N.T. at pp. 96, 97, 104, 112, 116, 135-36.

¹⁷ Who also represents Deming.

within the meaning of Charter § 401(a) must, minimally, meet the common usage of the word “appoint.”

According to Merriam-Webster,¹⁸ “appoint” means, at definition 1b: *appoint: b: to name officially*. A synonym listed by Merriam-Webster is “designate.” Thus, here, Mayor Scott, in order to cause an appointment within the meaning of the Charter, must name Deming *officially*, or designate him *officially*. Instead, the evidence shows that Mayor Scott, during the first 180 days of the vacancy in that office, ending April 5, 2019, never officially named or designated Deming as his candidate, for City Council approval, for the office of Managing Director.

Without a valid appointment being offered to City Council by Mayor Scott, Deming, or any other person who putatively occupies the office of Temporary Managing Director, could effectively become Managing Director without any further action. How is City Council to approve someone for the office of Managing Director without there being first a valid and Charter-compliant appointment? The thirty (30) day time period set forth in Charter Section 402(a) for City Council to act is not triggered until a Mayor makes such an appointment. A valid appointment is one which is made in a manner that affirmatively communicates the appointment to City Council, as a body, and in a manner reasonably calculated to notify City Council of the appointment as would ordinarily be communicated between two branches of government in an official manner.

A Mayor violates the Charter Secs. 311, 401(a) and 402(a), by not making an “appointment” of his candidate for the position of Managing Director.

¹⁸ The Merriam-Webster.com Dictionary, “*Appoint*,” <https://www.merriam-webster.com/dictionary/appoint> (accessed Dec. 9, 2019).

b. The Mayor must obtain approval from City Council.

Charter Sec. 401(a) requires that the Mayor must obtain City Council's approval of his appointment for the position of Managing Director. Such approval is necessary. However, should City Council not take any action to approve the appointment, within thirty (30) days after receipt of the Mayor's appointment, then that candidate's approval shall be automatic. *Id.* at § 402(a).

A Mayor violates the Charter by not taking steps to obtain the approval of City Council of the Mayor's candidate for the position of Managing Director. Charter Section 402 states that "City Council approval shall be necessary for the hiring of the Managing Director appointed by the Mayor." To obtain the approval of City Council, a Mayor, must, at a minimum, provide City Council with notice of the designation or naming, officially, of the Mayor's candidate for the office of Managing Director. Unless this official appointment occurs, City Council has no obligation to approve, not approve, or take any action whatsoever. City Council's thirty (30) day time limit under Charter Section 402(a) is also not triggered until such time, within the other time limits of the Charter, as Council is presented by the Mayor with an official appointment.

A Mayor violates the Charter, Sections 308(f), 401(a) and 402(a), by not seeking approval of City Council, through official channels, in the ordinary course of governance, for the Mayor's appointment of a Managing Director.

c. A Managing Director must be qualified.

The Charter prescribes the mandatory qualifications for the City's Managing Director. Charter Section 401(b) provides that "[a]ny candidate for Managing Director shall:

- (1) have a Master's degree in public administration, business administration, or its equivalent and have at least three (3) years experience at an executive or administrative level; or
- (2) have a Bachelor's degree in public administration, or its equivalent, and have at least five (5) years of experience at an executive or administrative level.

At no time was Deming a candidate qualified to serve as the City's Managing Director as provided by Charter Sec. 401(b).

A Mayor of the City violates the Charter, Sections 301, 308(a), (f), (m) and (n), and 401(b) by permitting an unqualified individual to serve in the nominal capacity of Managing Director, and allowing that person to have all rights, powers, obligations, privileges, benefits, and salary, of a Managing Director, when in fact, that person is unqualified for the position.

d. A Temporary Managing Director has a defined term of 90 days.

The position of Temporary Managing Director has a definite term, and ceases to exist after the expiration of ninety (90) days from the date of the appointment. Charter Section 401(d) provides:

(d) In the event that the position of Managing Director cannot be filled by the Mayor, the Mayor may appoint a Temporary Managing Director¹⁹ for a period of time not to exceed ninety (90) days. During this period of time, the Mayor shall continue to use all available means to fill the position.

At the end of the ninety (90) day period, the term of the Temporary Managing Director expires automatically.

In this matter, after January 5, 2019, Deming ceased serving as Temporary Managing Director, as the position expired. Serving as Temporary Managing Director is not a silent transition point to serving as the Managing Director. Mayor Scott violated Charter Sections 301, 308(a), (f), (m) and (n), 401(d), and 404, by permitting, and not ending, Deming's continued presence in the position of Temporary Managing Director after January 5, 2019. Mayor Scott is

¹⁹ The appointment of a Temporary Managing Director does not constitute "filling the position" of Managing Director. *In re Charter Art. IV, Relating to the Managing Director* (Adv. Op. 22, Nov. 18, 2010) at 5. Therefore, under any circumstance, even if serving as the Temporary Managing Director, a Mayor must take the additional step within the mandated timeframes of making an appointment as Managing Director, and obtain Charter Section 402(a) approval of City Council, before a Temporary Managing Director could become the Managing Director. None of this occurred in this matter, as the Mayor never made an appointment of Deming as Managing Director.

Deming's superior, with complete executive control of the City, and he failed to exercise his power to remove Deming.

e. Mayor Scott failed to remove Deming.

Charter Section 404 provides a Mayor with the authority to remove the Managing Director from office at any time, without cause. Further, the Mayor is the executive of the City. The Mayor may remove an unqualified, un-appointed, and unapproved, person occupying the office of Managing Director, or a hold-over Temporary Managing Director under the Mayor's general powers under Charter Section 308(m) and (n). Here, Mayor Scott violated the Charter, Sections 308(a), (f) and (n) and 404, by permitting Deming to continue to hold himself out as, and collect the benefits of, the Managing Director of the City.

D. Conclusions of Law

1. The Charter affords a clear process for the appointment and approval process for a Managing Director.

2. Charter Amendment I bars and renders ineffective all attempts to circumvent the provisions of the Charter.

3. The process employed by prior Mayors and City Councils, and by Mayor Scott and City Council in connection with former Managing Director Glenn Steckman per Exhibit IO-5, is Charter compliant, as is City Council's Policy Handbook provisions regarding the appointment of Directors and Solicitor.

4. Mayor Scott did not employ a Charter-compliant process in connection with Deming and the position of Managing Director.

5. The position of Managing Director is critical to the operations of the City. *See* Charter §§ 308(h), (i) and 406.

6. The Managing Director is responsible to the Mayor.
7. The Managing Director serves as the City's Deputy Mayor in the event of the Mayor's temporary absence or temporary disability.
8. To be compliant with Charter Sec. 401(a), a Mayor's act of making the appointment of a candidate for the office of the City's Managing Director must be affirmatively communicated to City Council, as a body, by the Mayor in a manner reasonably calculated to notify City Council of the appointment as would ordinarily be communicated between two branches of government in an official manner.
9. If notice of the Mayor's act of making such an appointment is not so communicated to City Council, as a body, by the Mayor, then, the thirty (30) day period set forth in Charter Section 402(a) is not triggered until such required notice is communicated in a manner reasonably calculated to notify City Council, as a body, of the appointment as would ordinarily be communicated between two branches of government in an official manner.
10. Mayor Scott's alleged appointment of Deming as a candidate for the office of Managing Director was not communicated in a manner reasonably calculated to notify City Council, as a body, of the appointment as would ordinarily be communicated between two branches of government in an official manner.
11. Mayor Scott never made an effective appointment of Deming to the office of Managing Director sufficient to trigger any review, response or approval of Deming by City Council.
12. Mayor Scott's failure to communicate his alleged appointment of Deming to the office of Managing Director, did not trigger the thirty (30) day period set forth in Charter Section 402(a).

13. Likewise, City Council need not interview any candidate for Managing Director during the first 180 days of a Mayor's term, or 180 days from the commencement of a vacancy in the office of Managing Director, until the Mayor makes an appointment sufficient to notify Council, in an official manner as would ordinarily be communicated between two branches of government.

14. Mayor Scott did not appoint Deming within the meaning, spirit and purpose of the Charter, to give City Council an opportunity to approve or not approve the appointment.

15. In connection with the foregoing, a Mayor's failure to make an appointment of a candidate for the office of Managing Director sufficient to trigger an interview by City Council for the purpose of approval, or non-approval of the candidate, violates Charter Sections 308(a), (f), (h), (m) and (n), 311, 401(a) and 402(a).

16. Deming's interview with City Council occurred well after the 180-day period of Charter Section 401(e), at a time when the Mayor no longer had any authority to make an appointment of a Managing Director.

17. At the time of Deming's interview, July 1, 2019, a Managing Director could only be hired by City Council. Charter Section 401(e).

18. City Council did not hire Deming pursuant to Charter Section 401(e).

19. City Council taking no action on its Section 401(e) interview of Deming on July 1, 2019, did not result in an automatic approval or hiring of Deming as provided by Section 402(a) because at that time, July 2019, the Mayor's right to make an appointment had expired and Deming appeared for the interview at the invitation of City Council, during that body's search for a Managing Director.

20. The automatic approval provision of Section 402(a) is not applicable to City Council's interviews of Managing Director candidates under Section 401(e) of the Charter.

21. Further, City Council has no role in interviewing or approving a Temporary Managing Director.

22. Nevertheless, serving as Temporary Managing Director is not the equivalent of being appointed to the position of Managing Director under applicable Charter provisions; however, a properly qualified, properly appointed candidate could be approved by City Council as Managing Director while serving as Temporary Managing Director.

23. A Managing Director must be qualified, and under Charter Section 401(b), must have *at least* the following credentials:

(1) have a Master's degree in public administration, business administration, or its equivalent and have at least three (3) years experience at an executive or administrative level; or

(2) have a Bachelor's degree in public administration, or its equivalent, and have at least five (5) years of experience at an executive or administrative level.

24. Without the aforementioned credentials, a person is not qualified to hold the office of Managing Director.

25. There is no evidence that at any time material to this Investigation No. 54, that Deming was a candidate qualified to serve as the City's Managing Director as provided by Charter Sec. 401(b).

26. The position of Temporary Managing Director ceases to exist after the expiration of ninety (90) days from the date of the appointment, under Charter Sec. 401(d), as that provision is self-executing, and the Charter provides a definite term, with a definite end.

27. A Mayor of the City violates the Charter by permitting an unqualified individual to serve in the nominal capacity of Managing Director, and allowing that person to have all rights, privileges, benefits, and salary, of a Managing Director.

28. Such conduct by the Mayor is a breach of the public trust and violates Charter Amendment I, Sec. 1, and Secs. 308(a), (f) , (g), (h), (m) and (n), 311 and 401.

29. Mayor Scott subjected the City to possible challenges to the validity of the acts of Deming made ostensibly as Managing Director, or as Temporary Managing Director for acts taken after April 5, 2019.

30. A Mayor may remove from office a Managing Director, appointed by the Mayor, at any time, without cause. *See* Charter § 404.

31. Here Mayor Scott did not do so.

32. Although the Charter does not provide for the exact method of appointment and approval of a Managing Director, Charter § 311 does provide sufficient guidance.

33. The very use of the phrase “shall appoint” conveys the necessity of a formal act.

34. Therefore, the Mayor must take requisite action to demonstrate the occurrence of an appointment such that City Council is noticed and may willingly undertake its review of the candidate for purposes of approving or not approving him/her, or intentionally take no action.

35. The City’s Administrative Code, Sec. 5-212 provides that all official actions of City Council shall be taken by ordinance, resolution or motion. *See also* Charter §§ 215 and 224.

36. Kelleher is a qualified witness as to the proceedings of City Council, in that her duties include, but are not limited to, keeping the journal of the proceedings of City Council, taking minutes of all City Council meetings, and service as the secretary to the Council, and she is an officer of the City.

IV. DETERMINATION OF THE BOARD

The Board determines that Mayor Scott:

1. failed to take sufficient action to cause an appointment of Osmer S. Deming, Esquire, as Managing Director of the City of Reading, in violation of Charter Secs. 301, 308(a), (f), (m) and (n), 311, 401(a) and 402(a); and
2. failed to take the steps sufficient under the Charter to obtain approval by City Council for the appointment and hiring of Osmer S. Deming, Esquire, as Managing Director, in violation of Charter Secs. 301, 308(a), (f), (n), 401(a) and 402(a); and
3. permitted a person to occupy the office of Managing Director without observing or honoring the appointment and approval process, in violation of Charter Secs. 301, 308(a), (f), (m) and (n), 311, 401(a) and 402(a); and
4. permitted a person to occupy the office of Managing Director, and to have all rights, privileges, benefits, and salary, of that office where that person, here Osmer S. Deming, Esquire, lacks the qualifications to serve, in violation of Charter Secs. 301, 308(a), (f), (m) and (n), 311, 401(b) and 404;
5. permitted a person appointed as a Temporary Managing Director to continue to serve despite the expiration of the ninety (90) day term for that position, in violation of Charter Secs. 301, 308(a), (f), (m) and (n), 401(d) and 404; and
6. failed to exercise his powers as the executive of the City to remove Deming, in violation of Charter Secs. 301, 308(a), (f), (g), (n) and 404; and
7. by the foregoing conduct, violated Charter Amendment I, Sec. 1(a).

V. PENALTIES IMPOSED

A. Considerations of the Board

The Board's enabling ordinance provides that:

Before the imposition of any penalty (as opposed to restitution or other remedy) the Board shall consider the following factors and address the relevant factors in its Final Order:

- a. The seriousness of the offense,
- b. The substantive effect the offense has on the application of the Charter and its purposes,
- c. Whether the subject of the complaint has had previous decisions entered against him/her by the Board,
- d. The number of violations involved,
- e. Whether the violations were the result of willful or intentional conduct, recklessness, negligence, oversight or mistake,
- f. The consequences of the violation,
- g. Whether or not the conduct of the subject violates any other statute, act or law, and
- h. Any other factors relevant in determining the type and severity of the penalty to be imposed.

See Charter Board Ordinance, Bill No. 46-2005, *as amended*, Section V(B)(2)(a)(i).

B. Penalties Imposed

1. Public Censure and Fine

Based on the above facts, as to the Mayor, the Board determines that public censure²⁰ is the most appropriate penalty, together with an administrative fine of \$1,000.00.²¹ The Board is also empowered to impose up to a \$1,000 fine per violation, *see* Section V(B)(2)(a)(i)(f), and does impose a fine under that authority in the amount of \$1,000.00. The Board will issue the penalty of public censure as provided for in the Ordinance and require payment of the \$1,000 administrative fine and the \$1,000.00 penalty fine within thirty (30) days of the date of the Board's Order attached hereto.

2. Considerations of the Board

Regarding the first factor, the offense is serious in that the Mayor filled perhaps the most important appointive office within City government, the Managing Director, with a temporary candidate un-reviewed and un-approved by City Council and allowed the candidate to serve beyond the period permitted by Charter by nearly (as of the date of this Final Opinion and Order) a year. This conduct also very heavily implicates the second factor in this consideration, as the Mayor's actions are absent of vigilance, or worse, demonstrates a total lack of understanding of applicable Charter provisions and his duties as Mayor. He is the elected executive of the City and

²⁰ Charter Board Ordinance, Section V(B)(2)(a)(i)(b) provides:

b. Public Censure, in compliance with existing personnel practices, collective bargaining agreements and/or statutes, notification to the respondent, the Mayor, the Managing Director, the Director of the Department in which the respondent is employed, if any, and the complainant, if any, and the news media indicating that a violation of the Charter or Administrative Code took place and that the Board strongly disapproves of the public official's or public employee's actions.

²¹ As a penalty, the Board may impose an administrative fine of up to \$1,000 to defray the actual cost and expense of investigating any violation. Charter Board Ordinance, Section V(B)(2)(a)(i)(g).

is responsible for the administration of effective and stable government within the City. The record establishes that not later than January 5, 2019, City leadership has been wrestling with the repercussions of this dispute over filling the position of Managing Director.

Both the third factor and the fourth factor are negative, in that the Mayor does have prior Charter violations²² and this matter demonstrates additional violations by him, as discussed in this Final Opinion and Order. When coupled with Mayor Scott's position as the elected executive of the City, the clear responsibilities of that office defined in the Charter, his repeated admissions that he has no understanding of the Charter, that he has not sought to educate himself on applicable provisions of the Charter, and that he expected others to inform him on procedure and aspects of City governance, the Board finds the Mayor Scott's conduct and inaction in this particular matter untenable as an *elected* leader.

On the fifth factor, the testimony of Mayor Scott, peppered with constant admissions of "knowing nothing," appears to the Board as an effort by him to obfuscate the true facts from City Council or this Board. In government, there must be good faith among those elected and appointed to serve. The City's officers and public officials, including the Mayor, are fiduciaries of the people. Public policy demands that our elected and appointed officials comport themselves with extreme propriety and discretion. Great trust is imposed in them, and they are duty-bound to vindicate such trust. *Greater Fourth St. Assocs. v. Smithfield Twp.*, 816 A.2d 388, 392 (Pa. Commw. Ct. 2003); *Marino v. Zoning Hearing Bd.*, 274 A.2d 221, 225 (Pa. Commw. Ct. 1971). Insofar as this matter is concerned, Mayor Scott has breached the public trust and the various Charter provisions recited herein.

²² See *In re: Investigation of Glenn Steckman and Mayor Wally Scott* (Inv. No. 53, Nov. 12, 2019).

In the Board’s view, Mayor Scott’s conduct can be considered no less than negligent in as much as he is the City’s elected chief executive officer, and his duties, and the Charter provisions regarding the Managing Director are clearly provided for. However, here, the Board finds that more than mere negligence exists. Mayor Scott’s testimony is replete with conscious expressions of deliberately avoiding an understanding of the Charter and related processes integral and critical to governing as Mayor, including the appointment of the Managing Director. Further, the Charter Board issued not less than three advisory opinions²³ regarding the position of Managing Director and Temporary Managing Director. Although City Council reviewed them, and relied upon them, Mayor Scott directly contradicted them.

The facts provide evidence of a form of passive and inactive, as well as intentional, conduct by Mayor Scott. Oversight and mistake, are not applicable in the instant matter. On the one hand, the complete inaction by Mayor Scott, or what appears to the Board as a surrender of his duties as Mayor, constitutes supine negligence. “The expression ‘supine negligence,’ though frequently used . . . is infrequently defined. The term is not to be confused with ‘gross negligence,’ which is negligence of the highest degree. “Supine”, as pointed out in the Oxford Dictionary, carries with it the thought of passiveness and inaction rather than active wrongdoing. It means dereliction and inattentiveness to duty; literally, ‘lying down.’” *Hollins’ Estate*, 29 Pa. D. & C. 307, 317 (Phila. Co. O.C. 1937). However, Mayor Scott also intentionally chose to proceed into the office of Mayor totally uninformed, choosing to rely on his own sense of ‘doing right’ instead of relying on the procedures and parameters set out in the Charter.²⁴

²³ *In re Charter Art. IV, Concerning the Timing of the Appointment of Managing Director Upon Vacancy* (Adv. Op. 21, Nov. 9, 2010); *In re Charter Art. IV, Relating to the Managing Director* (Adv. Op. 22, Nov. 18, 2010); *In Re Charter Art. IV, Relating to the Timing of the Appointment of a Temporary Managing Director* (Adv. Op. 38, Feb. 17, 2016).

²⁴ See Nov. 14, 2019 N.T. at pp. 135, 138:3-5; see also Footnotes 13-16, *supra*.

These factors militate heavily against Mayor Scott.

Addressing the sixth factor, the consequences of Mayor Scott's violations have not abated, meaning, the violations cannot be cured. That is, the time where a person improperly serves in the capacity as a Managing Director cannot be recouped. Here, two matters concern the Board. First, as a result of Mayor Scott's conduct, Deming, a person not qualified to hold the office of Managing Director, took pay and benefits from the City of Reading from January 5, 2019,²⁵ until, at the least, the date of this Final Opinion and Order. Second, and perhaps far more damaging to the City, is that various acts were undertaken by Deming after January 5, 2019, without any qualification, or proper appointment, and after the expiration of the ninety (90) day term of the position of Temporary Managing Director.

Regarding the seventh factor, at this time, the Board is not aware of any facts that demonstrate that the "conduct of the subject violates any other statute, act or law." The Board reserves its right to proceed as needed and as permitted in connection with further investigation or prosecution before any form or tribunal regarding the matters involved in this Investigation No. 54, including the forwarding of this matter to other commissions, boards or authorities.

Finally, addressing the last factor, regarding other factors relevant to the Board in determining the type and severity of the penalty, the Board concludes that the "buck stops" with the Mayor, the elected executive under Charter, Article III. The people of Reading elected Wally Scott to the Office of Mayor, to serve as provided by the Charter and the laws of the City. With that comes his obligation to the people of Reading to inform himself about the governing documents of the City, including the Charter, so that he may effectively govern. The Board weighs

²⁵ From October 5, 2018 until January 5, 2019, Deming appears to have legitimately served as the City's Temporary Managing Director under appointment by Mayor Scott.

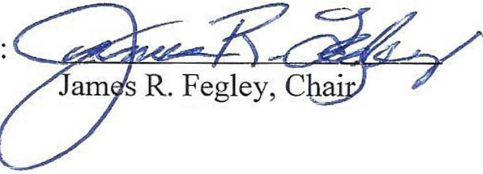
this factor heavily against the Mayor as, in connection with this matter, he failed to execute the duties of the office to which the people of Reading elected him.

VI. ORDER

The Charter Board issues the Order attached hereto as Exhibit "A."

CITY OF READING CHARTER BOARD

By:


James R. Fegley, Chair

Date: December 13, 2019

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of : Complaint Filed: May 3, 2019
 Mayor Wally Scott :
 : Investigation No. 54
 :

ORDER

Honorable Wally Scott, Mayor of the City of Reading

AND NOW, this 13th day of December, 2019, after hearing on November 12 and 14, 2019, before the Charter Board of the City of Reading (“Board”), in connection with the subject, the Mayor of the City of Reading, Wally Scott (“Mayor Scott”), and after considering the evidence before it and the arguments of counsel for Mayor Scott and the Investigative Officer, the Board finds that Mayor Scott, did violate Charter Amendment I, Sec. 1(a) and Charter Sections 301, 308(a), (f), (m) and (n), 311, 401(a), (b) and (d), 402(a) and 404(a), all as more fully set forth in the Board’s Final Opinion and Order entered in this matter, to which this Order is appended as Exhibit “A.” In accordance with the Final Opinion and Order, the following is **ORDERED**:

A. The Mayor shall be publicly censured in accordance with the Charter Board Ordinance, Section V(B)(2)(a)(ii)(b), Bill No. 46-2005, *as amended*.

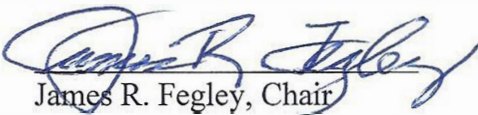
B. The Mayor is fined in the amount of a \$1,000.00 penalty in accordance with the Charter Board Ordinance, Section V(B)(2)(a)(ii)(f), Bill No. 46-2005, *as amended*, payable within thirty (30) days of the date of the date of this Order;

C. The Mayor is fined an administrative fine in the amount of \$1,000.00 to defray the costs of this investigation, in accordance with the Charter Board Ordinance, Section V(B)(2)(a)(ii)(g), Bill No. 46-2005, *as amended*, payable within thirty (30) days of the date of this Order; and

D. Copies of the Charter Board's Final Opinion and Order shall be transmitted to the following:

1. Honorable Wally Scott, Mayor of the City of Reading, and his counsel;
2. Frederick T. Lachat, III, Esquire, Acting City Solicitor;
3. Elizabeth Magovern, Esquire, Investigative Officer;
4. City Council, City of Reading;
5. Complainant, Ernest H. Schlegel, Jr.; and
6. Selected media outlets.

CITY OF READING CHARTER BOARD

By: 
James R. Fegley, Chair