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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 13-1250-A
consolidated with
NO. 13-1256-A

BOSTON POLICE DEPARTMENT

vs.

CIVIL SERVICE COMMISSION & others[1]
(and a consolidated case[2])

Notice Sent 10.22.14 AS AAG JR AHS SGR NET HGL LOHGL (MDJ)

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

These consolidated actions seek review of a decision of the Civil Service Commission regarding termination of ten police officers based on hair tests for cocaine. The Commission ruled that the Boston Police Department lacked just cause to terminate the officers based solely on hair tests, but that the Department nevertheless proved just cause for discharge of four of the ten, Officers Thompson, Bridgeman, Bridgeforth and Guity. Before the Court are the parties' cross motions for judgment on the pleadings. After hearing, for the reasons that will be explained, the Court will affirm the Commission's decision as to each of the discharges, but modify the Commission's decision as to the remedy to be provided to the six officers the

[1] Richard Beckers, Ronnie Jones, Jacqueline McGowan, Shawn Harris, Walter Washington, and George Downing.

[2] Thompson v. Civil Service Commission, Suffolk Superior Court, Civil No. 13-1256.

Commission ordered reinstated.

BACKGROUND

The Department first adopted a substance abuse policy in 1986. The original policy, codified as Rule 111, provided for zero-tolerance of drug use among Department personnel, with enforcement based on random urinalysis. The Supreme Judicial Court's decision in *Guiney* v. *Police Commissioner of Boston*, 411 Mass. 328 (1991), required the Department to abandon the practice of random urinalysis, limiting authority for urine testing to instances of reasonable suspicion.

In connection with collective bargaining beginning in 1996, the Department conducted extensive research regarding hair testing methods provided by various private companies. The Department concluded, and apparently persuaded the union, that the proprietary method offered by a company known as Psychemedics, Inc., would provide a reliable test of whether an officer had ingested illicit drugs. After extensive negotiations, the Department and the union reached agreement on a revised version of Rule 111, which was incorporated into the collective bargaining agreement effective as of January of 1999. The new Rule 111 included the following provisions:

> I. INTRODUCTION
> The Department will not tolerate any drug or alcohol use which could affect an Officer's job performance. . . .
>
> IV. PROHIBITED CONDUCT
> The following conduct by sworn personnel is prohibited:
> A. Unauthorized use, possession, . . . of a controlled substance, illegally used drug, . . . on Department property, on Department business, in Department supplied vehicles, in vehicles being used for Department purposes, or during working hours;
> . . . .

D. Possession, use, manufacture, distribution, dispensation or sale of illegally-used drugs or controlled substances while off duty . . . .

V. TESTING

Sworn personnel of the Boston Police Department will be tested for drugs and/or alcohol under the following circumstances:

. . . .

G. Annual Drug Testing (Hair) - This provision only applies to those bargaining units that have agreed to such testing.

In a joint desire to achieve and maintain a work force that is 100% drug free and in further recognition that the Department has not yet achieved such goal, the parties agree that all sworn personnel shall be subject to an annual drug test to be conducted through a fair, reasonable, and objective hair analysis testing system. Each Officer shall submit to an annual test on or within thirty (30) calendar days of each Officer's birthday. The Department shall schedule each examination and so notify each Officer as far in advance as practicable. Hair testing does not contemplate or include testing for alcohol.

The Department agrees that it will establish and adhere to written collection and testing procedures for hair samples. These procedures shall be fair and reasonable so as to ensure the accuracy and integrity of the test and process. These written procedures will be appended to this Rule and become incorporated thereto. The union, should it so request, shall meet with the Department in order to discuss issues relative to the collection and testing process. Nothing contained herein alters the current policy as it relates to other drug/alcohol testing, procedures, or requirements.

VI. CONSEQUENCES OF A POSITIVE TEST

ILLICIT DRUGS

Sworn personnel who receive a verified positive test result for illicit drugs will be subject to termination. However, where the Officer's only violation is a positive test for illicit drug use and it is the Officer's first offense, the Commissioner shall offer voluntary submission to the following alternative program:

– up to a 45 day suspension without pay,
– execution of a Rehabilitation Agreement and submission to treatment/rehabilitation,
– placement in an administrative position and suspension of weapon carrying privileges upon return to work following suspension until certified by the treatment provider to be recovering and able to safely carry weapons, and
– submission to follow-up testing as described in section V(B) above.

Note that failure to comply with the terms of the Rehabilitation Agreement either during or after the suspension period would constitute a separate violation of this

policy and shall result in a recommendation of termination.

> VII. CONSEQUENCES OF VIOLATION OF THE POLICY
> Any violation of the Substance Abuse Policy shall lead to disciplinary action up to and including termination. The severity of the action chosen will depend on the circumstances of each case. . . .

As required by Rule 111, and after consultation with the union, the Department promulgated procedures for implementation of the hair testing program, which the Department incorporated into the Rule as Appendix D. Among the procedures established is a so-called "cut-off" level designed to distinguish between the presence of drugs in a hair sample resulting from voluntary ingestion and the presence of drugs in a hair sample resulting from external or environmental contamination. The procedures also include so-called "safety net" testing, such that an officer who tests positive is entitled to a second test "under the same or more stringent conditions." The procedures also provide for oversight by the Department's Medical Review Officer (MRO), including the opportunity of an officer who tests positive to meet with the MRO to provide information that might supply an alternate medical explanation. Between 1999 and 2006, the Department conducted approximately 17,000 hair drug tests pursuant to Rule 111 and the collective bargaining agreement. Of these approximately 87-98 tests were positive.

Each of the ten officers involved in these consolidated cases, Preston Thompson, Richard Beckers, Ronnie Jones, Jacqueline McGowan, Oscar Bridgeman, Shawn Harris, Walter Washington, William Bridgeforth, George Downing, and Rudy Guity, tested positive for cocaine at some time between 2001 and 2006. In each instance, either the violation was not the officer's first or the officer refused to agree to a rehabilitation plan; accordingly, pursuant to Rule 111, the Department issued a notice of termination. The language of the termination notices varied

slightly, but each referred to violations of Department rules and policies, including "Rule 102, § 35 (Conformance to laws)" and "Rule 111 (Substance Abuse)," as well as "toxicology testing which revealed positive levels of cocaine." After a hearing before the Department's disciplinary officer, the Department terminated each of the ten officers.

The ten officers appealed their terminations to the Commission pursuant to G. L. c. 31, §§ 41-43, claiming that the hair tests relied on by the Department were insufficient to prove "just cause" for termination. The Commission consolidated the appeals, and conducted an evidentiary hearing over eighteen days between October 21, 2010, and February 4, 2011. The Commission received 202 exhibits, including published reports of scientific research, and heard oral testimony from five expert witnesses, as well as from each of the officers and other fact witnesses called by both sides.

On February 28, 2013, the Commission issued an extraordinarily comprehensive, detailed, and thoughtful 132-page decision. The decision correctly recites the applicable law, including the Department's burden to prove just cause for termination by a preponderance of the evidence. The decision describes in fine detail, and analyzes and evaluates, all of the evidence by which the Department attempted to meet its burden as to each officer, as well as the opposing evidence offered by the officers.

The Department's primary effort to meet its burden was by evidence of the hair test results. The Department's position, in accord with Rule 111, was (and remains) that a positive hair test result above the cut-off level is enough to establish conclusively that the officer had ingested cocaine. Thus, the primary focus of the hearing before the Commission was on the reliability of the hair testing performed by Psychemedics, particularly its capacity to distinguish

between voluntary ingestion and environmental exposure. After thorough review of the evidence on that topic, including careful analysis and evaluation of the expert testimony and scientific literature, the Commission concluded that the hair testing methodology was not sufficiently reliable that a positive test above the cut-off level, standing alone, in the face of the officer's credible denial, would suffice to establish ingestion by a preponderance of the evidence. The Commission commented that the hair testing program "is an appropriate tool to enforce [the substance abuse] policy," but that "a positive hair test does not provide the 100% irrefutable evidence of drug ingestion that the BPD and (and the police union) believed it did when the policy permitting such testing was negotiated and implemented."

The Commission found that "[h]air testing for drugs . . . has not achieved general acceptance within the scientific or law enforcement communities." It noted particularly that no uniform, nationally approved standards for hair testing exist, so that positive or negative test reports depend on different standards used by different laboratories at different times. The Commission further noted that the FBI Laboratory had recently suspended hair testing of law enforcement personnel pending further study. The Commission concluded:

> [U]nder basic merit principles and "just cause" standards of the Civil Service Law (G.L.c.31, §§1, 41-43) applicable to all tenured public employees, a BPD police officer's hair test that is reported as positive may be used for the purpose of determining whether or not an officer had used illicit drugs. A reported positive test result, however, is not necessarily conclusive of ingestion and, depending on the preponderance of evidence in a particular case, may or may not justify termination or other appropriate discipline of a tenured BPD officer.

Put differently, the Commission concluded, hair test results do not "meet the standard of reliability necessary to be routinely used as the sole grounds to terminate a tenured public employee under just cause standards governing civil service employees under Massachusetts

law" (emphasis in original).

The Commission did not stop there, however. Recognizing that "the essence" of the alleged misconduct was ingestion of cocaine, not receiving a positive hair test result, the Commission gave the parties full opportunity to present evidence, in addition to the hair test results, on the question of whether each of the ten officers had ingested cocaine. Based on the evidence received, the Commission found that the Department had met its burden of proof by a preponderance of the evidence as to four of the officers, but not as to the other six. The Commission found the following with respect to each of the individual officers in issue.

Preston Thompson: Thompson had a positive hair test on June 14, 2001, at nearly three times the cut-off level. The test occurred at a time when he had been on medical leave for several months after having served as a dispatcher for the past eight years. A safety net test, taken on June 29, 2001, again showed positive results at similar levels. Thompson did not seek or obtain independent testing. A test conducted on Thompson in 2000 had shown positive results, but was reported as negative after a negative safety net test. Thompson had never worked in the drug control unit or the evidence unit. He acknowledged having used cocaine prior to his police career, but denied having done so at any time during his police service. In discussion with the MRO he offered no theory of environmental exposure. Thompson declined to sign a settlement agreement, and was discharged in August of 2001. The Commission found just cause for his discharge.

Richard Beckers: Beckers had a positive hair test on April 2, 2002. He was not scheduled to be tested on that date, but did so while at police headquarters for another purpose. The level found was such that, had the test been performed six months earlier, prior to the date

Psychemedics made a change in the level of one metabolite that it would treat as a positive result, Psychemedics would have reported the result as negative. On April 18, 2002, immediately after he learned that the test was positive, Beckers went to his private physician, who performed tests of hair, blood, and urine, with negative results.[3] The hearing officer gave these results "no weight" because "the methodology used was not provided." Beckers also had a safety net test on April 22, 2002, with a positive result. On April 23, 2002, however, Beckers went to an independent laboratory for another hair test; the laboratory sent the sample to Psychemedics, which processed it as an "initial screen" and reported the result as negative. Beckers had never worked in the drug control unit or the evidence unit, and offered the MRO no theory of environmental exposure. Beckers declined to sign a settlement agreement, and was discharged in August of 2002. He applied for unemployment benefits, which the Department of Employment and Training (DET) granted after an evidentiary hearing. The Police Department did not seek judicial review of that decision.

At the hearing before the Commission, Beckers offered theories of environmental contamination including instruments used by his barber; a hair straightening treatment; and drug arrests. The hearing officer found these theories "theoretically plausible," but "not supported by specific and scientifically sound expert testimony," and therefore gave them no weight. Beckers could not recall any drug arrests, or having drugs in his cruiser in the year prior to the 2002 test. A test in a prior year had shown evidence of cocaine below the cut-off level, and accordingly had been reported as negative. Beckers persistently denied using cocaine or being in the presence of

[3]Cocaine remains in hair longer than in blood or urine, so that hair tests identify usage or exposure further back in time than blood or urine tests.

its use. The hearing officer "found no sign of prevarication that would discredit this testimony," and treated his "persistence at exoneration" as supporting his credibility. The Commission concluded that the preponderance of the evidence supported Beckers's denial of drug use, so that the Department had not proved just cause for his discharge.

Ronnie Jones: Jones had a positive hair test on March 14, 2002, although the level found was "just barely" above the cut-off, and "within 2% of being declared negative." On March 26, Jones had a negative urine test through his personal physician, but a safety net hair test conducted on March 27, 2002, was positive. On that same date Jones had a hair test performed at an independent laboratory, which sent the sample to Psychemedics; Psychemedics reported the result as negative. Jones declined to sign a settlement agreement, and was discharged in August of 2002. Jones sought unemployment benefits, which DET denied; the Appeals Court ultimately affirmed that decision.

Jones offered the MRO no specific theory of environmental exposure, but his police career had included assignment to a unit that supported drug raids. He was married to a former Boston Police officer who had completed a rehabilitation program after testing positive for cocaine. He denied ingesting cocaine or having come into contact with it being consumed by others. The hearing officer "perceive[d] no reason to doubt his testimony, which largely held up on stiff cross-examination," and also viewed his submission to independent hair testing as significant to his credibility. The Commission rejected the Department's contention that Jones's marriage to a known drug user was evidence of his own use, and concluded that the Department had not proved just cause for Jones's discharge.

Jacqueline McGowan: McGowan had a hair test on August 20, 2002, which was

reported to the MRO as positive on August 29, 2002, although the expert witnesses before the hearing officer disputed whether the results met the cut off level. McGowan had a safety net test on September 6, 2002, which Psychemedics reported as negative, despite some ambiguity in the results. A second safety net test, conducted on September 27, 2002, generated results that Psychemedics reported as negative as to a portion of the hair sample designated as "new growth," but positive as to a portion designated as "old growth," although the positive result depended on a change in the cut off level that Psychemedics had recently adopted, and that changed again a few years later. McGowan offered the MRO no specific theory of environmental exposure. She had not worked in the drug control unit or the evidence unit recently, although her fifteen-year career had included a six-month stint in the drug control unit. McGowan was discharged on October of 2002.

McGowan acknowledged having used cocaine during a period between about 1997 or 1998 and September of 1999, when she had a positive hair test. On that occasion she signed a settlement agreement, served a 45-day suspension, entered a rehabilitation program, and submitted to random urine tests for three years, all of which were negative. The hearing officer found that "her candor about her prior drug history and her unflinching demeanor when affirming her subsequent rehabilitation gave her testimony the ring of truth." The Commission concluded that the Department had failed to prove just cause for her discharge by a preponderance of the evidence.

Oscar Bridgeman: Bridgeman had a positive hair test on October 2, 2002, at levels well above the cut-off. He offered the MRO no specific theory of environmental exposure. He had never worked in the drug control unit or the evidence unit, although he had been assigned during

the last several years of his employment to a vehicle used to transport prisoners. On October 9, 2002, Bridgeman had urine and blood tests through his private physician, with negative results. However, a safety net hair test performed on October 15, 2002, again generated positive results. He sought an independent hair test, but the independent laboratory deemed his hair too short for testing. Bridgeman was discharged the same month.

Bridgeman had tested positive for cocaine in 2001, and signed a settlement agreement, under which he served a 45-day suspension, completed a treatment program, and was subject to random urine testing, with consistently negative results. In his testimony before the Commission, Bridgeman denied ever having used cocaine, despite his contrary admission in the settlement agreement in 2001 and in treatment, as reflected in records; he attributed his admission in the settlement agreement to "personal issues" and a desire for treatment of alcohol abuse and depression, and denied recollection of any statements made in treatment.

Bridgeman testified at the Commission hearing that he believed his positive tests in 2002 arose from a habit of putting drugs confiscated from suspects in his pocket, where he would also keep cookies for snacks. The hearing officer discredited this explanation, finding it "incredible that any BPD officer would be so cavalier about securing contraband in such a manner as would violate BPD procedures for handling physical evidence and could clearly compromise a criminal investigation." The hearing officer found it "doubly incredible" that Bridgeman "would persist in such an unprofessional practice after testing positive for cocaine in 2001 and while subsequently dealing with his own admitted substance abuse issues." The Commission found that "his prevarication, taken together with his 2002 hair test results, established by a preponderance of evidence that he did ingest cocaine and that the BPD had just cause to

terminate his employment."

Shawn Harris: Harris had a military background prior to his police service, and wore his hair in a military cut. Accordingly, his test on December 4, 2002, used a sample of chest hair. The test was reported as positive, as was a safety net test conducted on December 17, 2002, but the results of both tests were at levels that would have been reported as negative under the thresholds in effect until late 2001. Independent blood and urine tests conducted on December 18, 2002, were negative. He attempted to obtain an independent hair test on December 19, 2002, but the laboratory deemed the hair sample too small to test. A second effort at independent hair testing occurred on January 2, 2003, by a different method from that used by Psychomedics; the reported result was "none detected," which, according to the information provided by the laboratory, could have various meanings. Harris offered no specific theory of environmental exposure. He had never worked in the drug control unit or the evidence unit, and he made a practice of wearing a bullet-proof T-shirt while on duty. He refused to sign a settlement agreement, and was discharged in April of 2003.

The hearing officer found Harris's testimony credible, noting that he testified "crisply and responsively." The hearing officer noted his military background, which included regular urine testing; his receipt of a prestigious statewide award; and his persistent pursuit of independent testing. On the other side, the hearing officer noted that chest hair would be less susceptible than head hair to external contamination, and that the positive test results were consistent with each other. Overall, the Commission concluded, the positive test "weighed against his credible testimony and consistent denial of drug use, as well as the other evidence of his exemplary character, fails to establish by a preponderance of evidence that the BPD had just cause to

terminate his employment."

Walter Washington: Washington, who kept his head hair short, had a test performed on chest hair on September 26, 2002, with a result reported as positive, although the same result would have been reported as negative under cut-off thresholds in effect until late 2001, and under thresholds adopted in 2004. A safety net test, also of chest hair, was conducted on October 9, 2002, and again reported as positive, although the results showed wide variation from the initial test, and would have been reported as negative under thresholds in effect after 2007. Washington obtained blood, urine, and hair testing through his private physician on October 10, 2002. The blood and urine tests were negative; Pyschemedics tested the hair sample and reported it as negative, although some evidence of cocaine metabolites appeared. Washington offered no specific theory of environmental exposure. He had never worked in the drug control unit or the evidence unit. He refused to sign a settlement agreement, and was discharged in April of 2003. The hearing officer characterized Washington's test results as "a classic illustration of the effect of the shifting landscape and a lack of uniformity in testing protocols that, in this case, made the unfortunate difference between an officer's continued employment and his termination, a result that is unacceptable under merit principles." The Commission found that the Department had failed to prove just cause for his discharge.

William Bridgeforth: Bridgeforth had a positive test, conducted on underarm hair, on April 24, 2003. A safety net test, also on underarm hair, was conducted on May 6, 2003, and was again positive. The levels resulting from these tests were consistent with each other, and were more than twice the cut off levels. A urine test conducted through Bridgeforth's private physician was negative. A hair test through an independent laboratory on May 13, 2003, was

reported as negative, although the laboratory did not disclose the specific results or cut-off levels. Bridgeforth was discharged in September, 2003.

Bridgeforth did not offer the MRO any specific exposure theory, although he lived in an apartment building where known drug users resided. He had a brief assignment to the drug control unit in around 1990, but otherwise had worked as a patrol officer. In 2002, he had a positive hair test, as well as a positive independent test. At that time he signed a settlement agreement, accepting a 45 day suspension, rehabilitation, and random urine testing. His urine tests were negative through April 2003. Bridgeforth sought and received unemployment benefits after his termination in 2003; the Department did not attend the DET hearing, and did not appeal the decision.

At the hearing before the Commission, Bridgeforth testified that he had never used cocaine, and that he was "totally shocked" to learn of his positive tests in 2002; he claimed that he had signed the settlement agreement so as to keep his job and fulfill his obligation to support eight children. He offered various explanations for his positive test results based on powder he had observed and smelled in his cruiser and at parties. The hearing officer determined that this testimony "did not hold up on cross-examination as a likely source of external contamination. Since he had previously tested positive, he was more aware, and said he did not 'touch anything he shouldn't touch or brush off anything he shouldn't brush off.'" The hearing officer credited Bridgeforth's testimony regarding his neighbors' use of cocaine, but weighed that testimony against the fact that Bridgeforth's positive tests were performed on underarm hair, a location unlikely to be subject to environmental contamination. The hearing officer also weighed Bridgeforth's admission after the 2002 test. Overall, the Commission concluded, the Department

met its burden of proof by a preponderance of the evidence of just cause to discharge Bridgeforth.

George Downing: Downing had a test of nape hair on May 7, 2003, with results just above the cut-off levels. Downing also had a safety net test of head hair on May 16, 2003, which was reported positive, but similarly just above the cut-off levels. These results would have been reported as negative under cut-off levels in effect in 2001. He had a test of head hair through an independent laboratory on May 13, 2003; the laboratory reported the result as negative, but did not provide specific levels or cut-off thresholds. On the same day, he had an independent hair test through another laboratory, with the result reported as "none detected," without additional data.

Downing offered the MRO no specific theory of environmental exposure; he had not worked in the drug control unit or the evidence unit, although he had worked in an anti-crime unit that put him in contact with persons who had outstanding warrants. He refused to sign a settlement agreement, and was discharged in January of 2004. He successfully applied for unemployment benefits, prevailing at a contested hearing before the DET and on judicial review, including ultimately in the Appeals Court. After his discharge he became employed with an employer who provides security services under contract with the Department of Homeland Security; in that role he was required to take random urine tests, all of which were negative. The Commission's hearing officer found Downing's testimony "candid and credible," and concluded that the Department did not meet its burden of proving just cause for his discharge.

Rudy Guity: Guity, who was bald, had a test of beard hair on April 27, 2006, with positive results for cocaine at levels well above the cut-off. He had a safety net test on May 18,

2006, with results at levels 67% higher than the initial test. He offered an explanation to the MRO based on anaesthesia during dental and medical procedures, but the MRO rejected that theory as inconsistent with the medications used for that purpose. Guity's assignments over his 28 years as a Boston Police officer were primarily patrol. He worked in the drug control unit in the 1990's, but not since then, and he never worked in the evidence unit. Guity took urine and blood tests through his private medical provider on June 1, 2006, with negative results. Guity refused to sign a settlement agreement, and was discharged in March, 2007, five years before the date when he would have been eligible for retirement.

At the Commission's hearing, Guity offered medical records showing medications administered to him during procedures, but no evidence that he had ever received cocaine for any medical purpose, and no expert testimony to suggest that the medications he did receive could account for positive results on hair tests for cocaine. The hearing officer credited testimony from the Department's expert that the drugs administered could not result in a false positive test for cocaine. Guity initially testified that he did not take an independent hair test, but later acknowledged that he did, with a positive result, and that the test had "slipped his mind." The hearing officer observed that "the extreme degree of prevarication that Mr. Guity demonstrated by this testimony on a key evidentiary issue imposed a mortal wound on his credibility." The Commission concluded that the Department had proved just cause for his discharge.

Based on these findings, the Commission dismissed the appeals of Officers Thompson, Bridgeman, Bridgeforth, and Guity. It then turned to the remedy to be ordered for Officers Beckers, Jones, McGowan, Harris, Washington, and Downing. The Commission acknowledged the statutory directive that an employee who has been terminated without just cause "be returned

to his position without loss of compensation or other rights." G. L. c. 31, § 43. Nevertheless, the Commission ordered their reinstatement with back-pay and benefits not to the date when each was terminated, but to October 21, 2010, the date when the evidentiary hearing began. The Commission's rationale for this ruling, although perhaps less than explicitly stated, appears to be that the officers bore primary responsibility for the substantial delay in the proceedings, much of which resulted from related litigation in federal court brought by some of these and other officers.

The Department and all ten officers brought these consolidated actions for judicial review. The Department contends that the Commission substituted its judgment for that of the Department, ignored the collective bargaining agreement, gave insufficient weight to evidence of the reliability of the hair testing, and failed to apply the preponderance of the evidence standard. As for the officers, the four whose appeals were dismissed contend that the Commission lacked authority to act on any ground other than the failed hair tests, since the notices provided to them cited only that ground; they further argue that the Commission's findings of just cause are not supported by substantial evidence. The other four officers argue that the Commission's finding of lack of just cause for their discharge entitles each of them to reinstatement with full back-pay and benefits back to the date of discharge.

DISCUSSION

A "party aggrieved by a decision of the [C]ommission may obtain judicial review in Superior Court" as prescribed by G. L. c. 30A, § 14. *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 728 (2003); see G. L. c. 31, § 44. Pursuant to G. L. c. 30A, § 14(7), a court may affirm, reverse, remand, or modify the Commission's decision if "the substantial rights of any party may

have been prejudiced" because the decision was based on an error of law or unlawful procedure, was arbitrary and capricious, was unwarranted by facts found by the Commission, or was unsupported by substantial evidence. G. L. c. 30A, § 14(7). In reviewing the Commission's decision, the Court must give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." *Id.* The Court "is . . . bound to accept the findings of fact of the [C]ommission's hearing officer, if supported by substantial evidence." *Stratton*, 58 Mass. App. Ct. at 728. "The open question on judicial review is whether, taking the facts as found, the action of the [C]ommission was legally tenable," *id.*, and supported by substantial evidence, defined as "such evidence as a reasonable mind might accept as adequate to support the agency's conclusion." *Id.*; *Seagram Distillers Co.* v. *Alcoholic Beverages Control Comm'n*, 401 Mass. 713, 721 (1988). "This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." *Police Dep't of Bos.* v. *Kavaleski*, 463 Mass. 680, 689 (2012), quoting *Brackett* v. *Civil Serv. Comm'n*, 447 Mass. 233, 242 (2006). The Court may not "substitute its judgment for that of the [C]ommission." *Thomas* v. *Civil Serv. Comm'n*, 48 Mass. App. Ct. 446, 451 (2000). "[A]ssessing the credibility of witnesses is a preserve of the finder of fact upon which a court conducting judicial review treads with great reluctance." *Stratton*, 58 Mass. App. Ct. at 729.

A tenured civil service employee aggrieved by a disciplinary decision of an appointing authority (here, the Department) made pursuant to G. L. c. 31, § 41, may appeal to the Commission under G. L. c. 31, § 43. See G. L. c. 31, § 41; *Stratton*, 58 Mass. App. Ct. at 727. "It is the duty of the [C]ommission to determine, applying a 'preponderance of the evidence'

criterion, whether 'there was just cause' for the action taken." *Stratton*, 58 Mass. App. Ct. at 727, quoting G. L. c. 31, § 43. As the statute more fully articulates:

> If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

To determine whether there was just cause for an employer's discharge of an employee, "the appropriate inquiry is whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." *Murray* v. *Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514 (1983). "The term 'just cause' must be construed in light of the purpose of the civil service legislation which . . . is 'to free public servants from political pressure and arbitrary separation . . . but not to prevent the removal of those who have proved to be incompetent or unworthy to continue in the public service.'" *School Comm. of Brockton* v. *Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 488 (1997), quoting *Cullen* v. *Mayor of Newton*, 308 Mass. 578 , 581 (1941). A proposition is proved by a preponderance of the evidence if "it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." *Tucker* v. *Pearlstein*, 334 Mass. 33, 35-36 (1956).

In conducting its review, the Commission "does not view a snapshot of what was before the appointing authority . . . [but rather] hears evidence and finds facts anew." *Stratton*, 58 Mass.

App. Ct. at 727. The Commission conducts "a hearing de novo upon all material evidence," and is not limited to "that which was before the appointing officer." *Id.*, quoting *Sullivan* v. *Municipal Ct. of the Roxbury Dist.*, 322 Mass. 566, 572 (1948). The question before the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the [C]ommission, there was [just cause] for the action taken by the appointing authority in the circumstances found by the [C]ommission to have existed when the appointing authority made its decision." *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 334 (1983).

1. The Department's Appeal.

The Department's primary argument is that the Commission erred in concluding that positive hair tests, standing alone, were insufficient to establish just cause to discharge the officers. Under the preponderance of the evidence standard, the Department argues, it had only to show that it was more likely than not that the officers had used cocaine. The hair tests, it contends, even if less than one hundred percent reliable, were sufficient to meet that standard. Moreover, the Department argues, the collective bargaining agreement expressly authorizes discharge based on hair tests. The Commission, the Department contends, identified no direct conflict between the collective bargaining agreement and the governing statute, but nevertheless ignored the collective bargaining agreement, instead applying its own view of just cause. In so doing, the Department argues, the Commission impermissibly substituted its judgment for that of the Department as the appointing authority.

The Court is not persuaded. The Commission's decision leaves no room for doubt that it recognized and applied the preponderance of the evidence standard. It did not decide any of the

appeals before it based solely on rejection of evidence of a positive hair test standing alone; hair test results did not stand alone in any of the instances before the Commission. Rather, each of the officers denied use of cocaine. The Commission was thus called upon to consider whether the hair test alone was sufficient to outweigh the officer's denial, so as to meet the Department's burden to prove misconduct by a preponderance of the evidence. The Commission properly recognized that, if the scientific basis for the hair test were so well-grounded that its results would be unimpeachable in every instance, then a positive hair test would necessarily outweigh any other evidence. But if the scientific basis for the hair test was not so well-grounded – that is, if the hair test was subject to false positive results in some significant percentage of instances – then the hair test could not by itself carry the Department's burden in the face of an officer's credible denial. In such instances, evaluation of the preponderance of the evidence would have to depend on other factors. As set forth *supra*, the Commission concluded that the scientific basis for hair testing was not so well-grounded. The Commission's conclusion in this regard was fully supported by its evaluation of the evidence before it, including its credibility judgments of the expert testimony. The Court is not in a position to second-guess the Commission's judgment in this regard. See *Kavaleski*, 463 Mass. at 689; *Stratton*, 58 Mass. App. Ct. at 728.[4]

The Department's reliance on the collective bargaining agreement is similarly unpersuasive. As the Department points out, the collective bargaining agreement incorporates Rule 111, which authorizes termination of an officer based solely on a positive hair test. But the

[4] The Department argues that the Commission disregarded various arbitration and court decisions upholding discharges based on hair testing. None of the cited decisions establishes any binding authority, nor did any occur in the context of application of the just cause requirement under the civil service law, after full examination of the scientific evidence on the question of whether hair testing reliably distinguishes between ingestion and external contamination.

union had no authority to waive by contract the right of each officer to be protected from termination without just cause. "Where a conflict has existed between the terms of a collective bargaining agreement and a statute concerning terms and conditions of employment, the statute has prevailed." *Local 1652, Int'l Ass'n of Firefighters* v. *Framingham*, 442 Mass. 463, 476 (2004); see *Fall River* v. *AFSCME Council 93, Local 3177, AFL-CIO*, 61 Mass. App. Ct. 404, 406 (2004) ("[t]he civil service law is not one of the statutes . . . which may be 'superseded by a collective bargaining agreement'").

Contrary to the Department's contention, the Commission's decision does identify a direct conflict between the collective bargaining agreement and the civil service law. The agreement allows termination for a positive hair test standing alone, even where the test result may not reflect actual misconduct. The civil service law, G. L. c. 31, §§ 41, 43, in contrast, permits termination only for just cause. The statute thus supercedes the collective bargaining agreement, and the Commission properly applied the standard required by statute. See *Fall River*, 61 Mass. App. Ct. at 406.

In doing so the Commission did not, as the Department suggests, usurp the authority of the appointing authority; rather, it performed its statutory function of protecting public employees from termination without just cause. See *Bos. Police Dep't* v. *Collins*, 48 Mass. App. Ct. 408, 411 (2000) ("The role of the [C]ommission was to determine whether the [D]epartment proved, by a preponderance of evidence, just cause for the action taken"). The Department emphasizes the special importance to the public of police discipline, particularly in the context of alleged substance abuse. See *id.* at 413 (2000); *Arria*, 16 Mass. App. Ct. at 335-336. But nothing in the Commission's decision prevents the Department from enforcing its policy of zero tolerance for

substance abuse, as long as it does so based on reliable evidence that such conduct has actually occurred.

The Department further argues that the Commission's findings as to each of the six officers to whom it granted relief lack substantial evidence. The Court has carefully examined the Department's arguments in this regard. It is sufficient to say that they rest on disagreements with the Commission's evaluation of the credibility and weight to be given to particular aspects of the evidence. Such arguments do not meet the standard for judicial review pursuant to G. L. c. 30A, § 14(7).

2. The Officers' Appeal.

The issues raised by the ten officers fall into two categories, based on the Commission's dispositions: The four officers whose appeals the Commission dismissed argue that the Commission had no basis to go beyond its finding that the hair test alone was insufficient, and further, that the Commission's findings as to each of them lack substantial evidence. The six officers to whom the Commission granted relief argue that they are entitled to reinstatement with full back pay and benefits as of the date of each officer's termination. The Court rejects the arguments of the four, but agrees with the six regarding the relief required.

The four officers argue that the Commission is constrained by the notice of termination each received from the Department, and that those notices advised them of termination based solely on their positive hair tests, not on any other ground. Thus, the argument goes, once the Commission found that the hair tests alone were insufficient to establish just cause, it was obligated to grant relief; it had no basis to take evidence and make findings as to whether the officers had actually ingested cocaine.

It is true that "to show just cause, the appointing authority can rely only on those reasons . . . that it gave to the employee in writing." *Gloucester* v. *Civil Serv. Comm'n*, 408 Mass. 292, 297 (1990). "[A] decision of the [C]ommission is not justified if it is not based on the reasons specified in the charges brought by the appointing authority." *Murray*, 389 Mass. at 516. The purpose of requiring the appointing authority to specify the reasons for its actions in writing is "to enable the removed officer or employee to know why he has been deemed unworthy to continue longer in the public service." *McKenna* v. *White*, 287 Mass. 495, 498 (1934).

As set forth *supra*, the notices the Department provided to each officer referred to violations of Department rules and policies, including "Rule 102, § 35 (Conformance to laws)," and "Rule 111 (Substance Abuse)," as well as "toxicology testing which revealed positive levels of cocaine." Rule 111, as recited *supra*, does more than establish the testing procedure; it affirmatively prohibits "[p]ossession, use, manufacture, distribution, dispensation or sale of illegally-used drugs or controlled substances." A reasonable reader of these notices would have understood that he or she was alleged to have violated this prohibition, and to have violated the law. That information, along with the positive hair test results for cocaine, could have left no doubt in the minds of the officers that the misconduct alleged was ingestion of cocaine, with the positive hair test demonstrating that conduct. The Court concludes, therefore, that the Commission was well within its authority to make a *de novo* determination whether each officer had committed the alleged misconduct.

The four officers as to whom the Commission found just cause make arguments regarding the Commission's particular findings as to each of them that largely correspond to the Department's arguments regarding the other six officers. Giving the required deference to the

Commission's evaluation of the credibility and weight of the evidence, the Court must reject those contentions. These officers offer one additional argument; they suggest that the Commission improperly treated its adverse evaluation of their credibility as affirmative evidence against them. This contention, in the Court's view, misreads the Commission's decision. The Commission did not conclude that the hair tests supplied no evidence; its conclusion, rather, was that hair tests alone were not sufficiently reliable to outweigh a credible denial. As to those officers whose denials the Commission did not credit, the evidence consisted of the hair tests, along with whatever other circumstances might support inferences one way or the other. Among those circumstances, as to these four officers, were their decisions to give inconsistent, implausible, or otherwise incredible testimony. The Court concludes, as to each of these officers, that the Commission's findings were supported by substantial evidence.

As to the six officers who prevailed before the Commission, however, the statute expressly dictates the relief required. General Laws c. 31, § 43, provides that if the Commission determines that the appointing authority has failed to prove just cause for its action, the Commission "shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights . . . ." "'Where the language of a statute is clear, courts must give effect to its plain and ordinary meaning and the courts need not look beyond the words of the statute itself.'" *Milford* v. *Boyd*, 434 Mass. 754, 756 (2001), quoting *Massachusetts Broken Stone Co.* v. *Weston*, 430 Mass. 637, 640 (2000). The word "shall" indicates a clear legislative intent that the Commission return the employee "to his position without loss of compensation or other rights." See *Garrison* v. *Merced*, 33 Mass. App. Ct. 116, 118 (1992) ("The distinction between words of command and words of discretion, such as 'shall' and 'may'

have been carefully observed in our statutes"). The Commission had no discretion to do other than what the statute requires, regardless of its evaluation of the equities arising from the delay in its proceedings.

The Department suggests that the Commission's order was an exercise of its authority to "modify any penalty imposed by the appointing authority." G. L. c. 31, § 43. But the Commission ruled that no just cause existed for any penalty against these officers; thus there could be no penalty to modify. The Court concludes, therefore, that Officers Beckers, Jones, McGowan, Harris, Washington, and Downing are entitled to reinstatement, with full back-pay and benefits, as of the date of each officer's discharge.

CONCLUSION AND ORDER

For the reasons stated, the Plaintiff Boston Police Department's Motion for Judgment on the Pleadings is **DENIED**, and the Defendant Boston Police Officers' Motion for Judgment on the Pleadings is **ALLOWED** in part and **DENIED** in part. The Court orders entry of **JUDGMENT** that the Civil Service Commission's decision is **AFFIRMED** in all respects except as to the remedy afforded to Officers Beckers, Jones, McGowan, Harris, Washington, and Downing, which is modified such that the Boston Police Department is **ORDERED** to reinstate those officers with full back-pay and benefits as of the date of each officer's discharge.

Judith Fabricant

Judith Fabricant
Justice of the Superior Court

October 6, 2014

Notice Sent
10.03.14
(MD)