

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

SUFFOLK, SS.

No. 2018-P-0246

**BOSTON POLICE DEPARTMENT,
PLAINTIFF-APPELLEE,**

v.

**MICHAEL GANNON AND THE MASSACHUSETTS CIVIL SERVICE
COMMISSION,
DEFENDANTS-APPELLANTS.**

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF OF DEFENDANT-APPELLANT MICHAEL GANNON

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. Whether the Civil Service Commission applied the correct "preponderance of the evidence" standard when it found that the Boston Police Department did not have reasonable justification, supported by credible evidence, to bypass the Appellant for employment as a police officer.

STATEMENT OF THE CASE

In Boston Hair Drug Test Appeals, D-01-1409, et al (26 MCSR 73 (2013)), the Commission established that hair drug testing "does not meet the standard of reliability necessary to be routinely used as the sole grounds to terminate a tenured public employee." Id. at 107. The Superior Court concluded that the Commission, in Gannon, extended that "sole basis" test from tenured employees to new hires. The Superior Court erred when it made this conclusion. The Civil Service Commission applied the correct "preponderance of the evidence" standard when it found that the Boston Police Department did not have reasonable justification, supported by credible evidence, to

bypass the Appellant for employment as a police officer.

On November 28, 2012, the Appellant, Michael Gannon ("Appellant" or "Gannon"), pursuant to G.L. c. 31, §2(b), filed an appeal with the Civil Service Commission ("Commission"), contesting the decision of the Boston Police Department ("BPD" or "the Department") to bypass him for original appointment as a full-time permanent police officer. Record Appendix, Vol. II, ("R.A.II") at 546. A prehearing conference was held at the Commission on January 15, 2013. Id. The Boston Police Department filed a Motion for Summary Decision on or about February 1, 2013. Id. The Appellant filed an opposition to the Motion on February 12, 2013. Id. A hearing on the Motion was held on February 19, 2013. Id. The Motion was denied on October 9, 2013. Id. at 547. The Civil Service Commission held a hearing over two days (March 17, 2014 and March 26, 2014), id., and made extensive findings of fact. See id. at 550-69. On May 23, 2014, the parties filed post-hearing briefs. Id. at 549. On October 29, 2015, the Commission voted 4-0 allowing Gannon's appeal. Id. at 549, 584.

On November 30, 2015, the Department filed an action in Superior Court pursuant to G.L. c. 30A, §14, seeking judicial review of the Commission's decision. R.A.I at 2, 5. On or about June 13, 2016, the Department filed a Motion for Judgment on the Pleadings. R.A.I at 2. On or about July 13, 2016, Gannon filed an Opposition to the Department's Motion. *Id.* On or about October 19, 2016, the Commission filed a memorandum in support of the affirmance of the Commission's decision. *Id.* A hearing was held on February 14, 2017 in front of the Honorable Judge Elizabeth Fahey. *Id.* at 3. On March 13, 2017, the Department's motion for judgment on the pleadings was allowed, reversing the decision of the Civil Service Commission. *Id.* Judgment entered on March 17, 2017. *Id.* On May 4, 2017, Gannon filed a Notice of Appeal. *Id.* On May 8, 2017, the Commission filed a Notice of Appeal. *Id.* at 4.

STATEMENT OF FACTS

The Civil Service Commission held a hearing over two days (March 17, 2014 and March 26, 2014), and made extensive findings of fact. See *id.* at 550-569.

Michael Gannon was employed by the Boston Police Department (BPD) as a Boston Police Cadet from January of 2007 until July of 2009, when he was laid off due to BPD ending the Cadet program. R.A.II at 551-53. Gannon accepted employment as a Boston Police Cadet with the goal of eventually becoming a Boston Police Officer. Id. During his employment as a Boston Police Cadet, Gannon was subjected to three hair drug tests at the request of the Boston Police Department. Id. at 552. These hair drug tests were analyzed by the Psychemedics Corporation, one in each of the years 2006, 2007 and 2008. All three of these tests came back negative for all drugs. Id. at 552-53. Since his layoff from the Cadet program, Mr. Gannon has continued to seek employment with BPD as a Police Officer. Id. at 553.

In April of 2009, Appellant took and passed the Civil Service examination. Id. The state's human resources division (HRD) issued certification 202233, on which the Appellant's name appeared. Id. On March 27, 2010, as part of the recruitment process subsequent to the April 2009 Civil Service exam, Gannon submitted to a routine, pre-employment drug screening. Id. at 554. Gannon submitted a hair

specimen to be tested; No "B" Sample was taken. Id. at 554-55. The specimen was analyzed and tested by the Psychemedics Corporation. Id. at 555. On April 20, 2010, Gannon received a phone call from medical review officer Dr. Eleanor Gilbert of Concentra Health Services. Dr. Gilbert informed him that he had tested positive for cocaine. Id. at 554.

Mr. Gannon, upon learning of the results of this test on April 20, 2010 immediately sought to have himself re-tested. Id. He contacted the probation Department at the South Boston District Court in order to have himself tested for drugs. He was told to come to the courthouse the next day. Id. at 554-55. Gannon went to the South Boston District Court the next morning, April 21, 2010, and had himself re-tested ("South Boston Test"). Id. This South Boston test was a hair drug test and was analyzed by the Psychemedics Corporation, the same company that analyzed the march 27, 2010 test and the three negative drug tests from his employment as a Boston Police Cadet. This South Boston test came back negative. Id. at 555.

Gannon took the Civil Service Exam on April 30, 2011. R.A.II at 558. In March 2012, BPD requested certification from the human resources division (HRD)

to fill forty (40) police officer positions from Certification 202869. Id. at 560. In June 2012, BPD requested certification from HRD to fill an additional thirty (30) police officer positions from Certification 202869. Id. On June 28, 2012, Mr. Gannon's name appeared on certification 202869. Id. On August 4, 2012, as part of the recruitment process, Mr. Gannon took another hair drug test administered by Psychemedics. Id. This test also tested negative for all drugs, making it Gannon's fifth negative hair drug test administered by Psychemedics. Id.

On January 7, 2013, sixty-seven (67) candidates entered the Boston Police Academy. Mr. Gannon was not one of these sixty-seven (67) candidates selected for employment. Id. at 561. Two candidates were selected for employment before Mr. Gannon whose names appeared below Mr. Gannon's on Certification 202869. One person was selected for employment despite his name not even appearing on the certification list at all. Id. at 560-61. Gannon filed an appeal at the Civil Service Commission (G1-12-329) based upon his bypass from Certification 202869. Id. at 558.

In March 2013, BPD requested two certifications from HRD to fill sixty-five (65) police officer

positions and on May 10, 2013, Gannon appeared on Certification 746. Id. at 556-57. On February 7, 2014, Gannon received a bypass letter from BPD. Id. at 557. Gannon filed another appeal at the Civil Service Commission (G1-13-181) based upon his bypass from Certification 746. Id. at 557-58. That appeal is still pending. Id. at 558. The bypass letter states the sole reason associated with Gannon's bypass:

...[B]elow are reasons associated with your bypass.

On March 27, 2010 you were administered a hair drug test which was analyzed by the Psychomedics Corporation. The results indicate that you tested positive for the use of cocaine. Dr. Eleanore Gilbert, Medical Review Officer, of Concentra Health Services then confirmed the positive test result.

For the reasons cited above, the Boston Police Department finds you ineligible for appointment as a Boston Police Officer at this time.

Id. at 557.

Dr. Gilbert electronically signed her name on two different Medical Review Officer (MRO) reports relative to the March 27, 2010 hair drug test. Id. at 555; R.A.III at 224, 349. Although both MRO reports state that the Defendant tested positive for cocaine, the data contained on these reports indicate that the

Defendant did not test positive for cocaine. Id. One of the MRO reports indicates that there was a screen of 5ng/10mg and a confirmation of 5ng/10mg for cocaine. Id. at 224. 5ng/10mg are the hair drug test cutoff numbers established by Psychemedics. However, the report does not state that the Defendant's test result was above the cutoff level. Id. The second MRO report relative to the March 27, 2010 test does not indicate that any cocaine was present in the sample at all. Id. at 349. Ian Mackenzie, Director of BPD's Occupational Health Unit, which handles the drug test's administration, admitted under oath that he had never seen two different MRO reports for the same test subject and could not state why two different reports had been created. R.A.II at 555.

Psychemedics' hair drug testing procedures involve two different tests to analyze the hair samples. The first type of test is called radioimmunoassay (RIA) which is an inexpensive screening level test that does not confirm that there are drugs present, but can provide information that a sample is presumptively positive and should be subjected to further testing. Id. at 564-65. RIA testing is not the most accurate method and is prone

to false positives. Id. at 565. After coming back as presumptively positive through RIA testing, the samples must then be tested by a more reliable method in order to confirm the findings. The second type of test is liquid chromatography/mass spectrometry/mass spectrometry (LC/MS/MS). Id. This LC/MS/MS method is a more reliable (and more expensive) confirmatory level test. It is the most reliable of the hair testing methods used by Psychemedics. Id. After a sample comes back as presumptively positive through the initial RIA test, another portion of the sample is subjected to this LC/MS/MS test in order to confirm the test result. Id. Prior to testing by LC/MS/MS, the hair must be thoroughly washed so that testing reveals evidence of ingestion of drugs by the test subject, rather than evidence of external contamination. Id.

Psychemedics' process to remove external contaminants not only involves washing the hair, but also utilizes a mathematical computation which consists of subtracting 5 times the quantity of cocaine determined in the hair and comparing if that resulting value still exceeds the stated cutoff. See R.A.III, at 407; R.A.IV at 214.

After the hair is washed, the wash itself must be tested in order to verify that the washing procedure was effective. R.A.II at 565. Dr. Cairns, scientific advisor for the Psychomedics Corporation, testified that the wash is tested by the less reliable RIA screening test instead of the confirmatory LC/MS/MS because it is a less expensive test and takes less time to administer. R.A.IV at 212-13.

Dr. David Benjamin, expert witness for the Appellant, testified that the Psychomedics test can produce false positives because the test cannot discern environmental exposure from ingestion of the drug. R.A.V at 54. See also Boston Hair Drug Test Appeals, supra at 46. Dr. Benjamin submitted an affidavit which summarized his conclusions that "hair testing for cocaine is unreliable because decontaminating the external portion of the hair follicle (by any currently proposed method, laboratory, mathematical, using government ratios, or a combination of all of the above), to insure removal of environmentally adsorbed cocaine cannot be demonstrated at a scientific level that would insure reliable testing and reporting of the presence of cocaine within the hair follicle, which would indicate

cocaine ingestion, rather than environmental contamination." R.A.II at 433.

The Commission noted in its decision a scientific study submitted by the parties entitled, "External Contamination of the Hair with Cocaine: Evaluation of External Cocaine Contamination and Development of Performance-Testing Materials," by Peter R. Stout, Jeri D. Roper-Miller, Michael R. Baylor and John M. Mitchell, Center for Forensic Sciences, Research Triangle Institute ("RTI"), North Carolina, Journal of Analytical Toxicology, Vol. 30 (October 2006) ("the Stout Study"), See R.A.III, at 395-405. The Stout Study used 65 hair samples which were decontaminated by Psychomedics' procedures, but noted that 28, or 43 percent, of these samples still contained trace amounts of cocaine that that would have been reported positive using proposed federal cutoffs. Id. at 404.

The Study concluded that:

contamination of the surface of the hair may result in the incorporation of analytes into the hair without wetting the hair. The addition of moisture to the hair as artificial sweat markedly increased the concentrations of drug in the hair. Once the analytes were absorbed into the hair, they were resistant to removal by shampooing the hair

and/or current laboratory
decontamination wash procedures.
R.A.III at 404; R.A.II at 566-67.

The Stout Study further concluded that "the presence of trace quantities of [cocaethylene] and [norcocaine] in the [cocaine] used in the study confounded the use of ratios, cutoffs, and other mathematical criteria to distinguish a contaminated sample." R.A.III at 404; R.A.II at 566.

In its opinion, the Commission took administrative notice of its decision in Boston Hair Drug Test Appeals, noting that "the decision provides a lengthy, detailed and scholarly analysis of hair drug testing by Psychemedics." R.A.II at 571.

ARGUMENT

In reviewing the Commission's decision, the Superior Court is required to give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G.L. c. 30A, §14; Hickey v. Commissioner of Pub. Welfare, 38 Mass. App. Ct. 259, 262 (1995). The "standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." Police Dept. of Bos. v. Kavaleski, 463

Mass. 680, 689 (2012). The civil service commissioner is to determine whether the appointing authority has sustained its burden of proving that there was reasonable justification for action taken. City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 304 (1997). The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the Commission, there was reasonable justification for the action taken by the appointing authority..." Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983).

The Court is "bound to accept the findings of fact of the Commission's hearing officer, if supported by substantial evidence." Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). "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., Substantial evidence has been define as "such evidence as a reasonable mind might accept as adequate to support the agency's conclusion." Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988). "Assessing the credibility of witnesses is a preserve of the finder of fact upon

which a court conducting judicial review treads with great reluctance." Stratton, supra at 729. The Commission's decision was soundly decided based upon substantial evidence and a proper application of existing law.

I. **THE CIVIL SERVICE COMMISSION USED THE CORRECT "PREPONDERANCE OF THE EVIDENCE" STANDARD IN CONCLUDING THAT REASONABLE JUSTIFICATION DID NOT EXIST FOR THE BOSTON POLICE DEPARTMENT TO BYPASS APPELLANT**

The Commission was within its discretion when it found by a preponderance of the evidence that the Boston Police Department did not have reasonable justification, sufficiently supported by credible evidence, to bypass the Defendant, Michael Gannon for original appointment to the position of Police Officer. The Superior Court erred when it concluded that the Commission made an error of law by extending the Boston Hair Drug Test Appeals "sole basis" test for tenured employees to new hires.

G.L. c. 31, §2(b) requires that bypass cases be determined by a preponderance of the evidence. Preponderance of the evidence means that "the reasons assigned for the bypass were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315 (1991). The

Commission must determine "whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge, supra at 303.

In its decision, the Commission correctly noted that "[t]he appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified." R.A.II at 569 (citing Brackett v. Civil Service Comm'n, 447 Mass. 233, 241 (2006)). The Commission further noted that "[r]easonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence when weighed by unprejudiced mind, guided by common sense and correct rules of law." R.A.II at 569 (citing Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971), quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928)).

After acknowledging the proper standard of review, the Commission found by a preponderance of the evidence that reasonable justification, sufficiently supported by credible evidence, did not exist for the

Department's action to bypass Gannon for original appointment to the position of Police Officer. The reasonable justification standard requires that the reasons for the appointing authority to bypass an applicant must be "sufficiently supported by credible evidence." Selectmen of Wakefield, supra at 482 (emphasis added).

The sole reason provided by the Boston Police Department for Mr. Gannon's bypass was the March 27, 2010 hair drug test. R.A.II at 557. However, the Commission found that the Psychemedics Corporation's hair drug testing procedures cannot properly distinguish between evidence of cocaine ingestion and externally contaminated hair. Id. at 578; see also Boston Hair Drug Test Appeals, supra. The Commission also noted that with respect to Mr. Gannon's test, two distinct medical review officer (MRO) reports were generated relative to the test result. ("the two MRO reports for the March 27, 2010 test are conflicting, with one failing to report a confirmatory test and neither indicating that the test results exceeded the 5ng/10mg cutoff."). R.A.II at 579, 555. One of the MRO reports seems to suggest that no cocaine was found in the sample at all. R.A.III at 349. BPD relied on a

single positive hair test to bypass Gannon for employment as an officer. R.A.II at 557. It presented no additional evidence of drug use.

Gannon testified under oath that he never used cocaine, testimony that the Commission found to be credible. Id. at 579. ("Appellant ardently, repeatedly and credibly insists that he has never used cocaine...") (emphasis added). Gannon also testified that he immediately sought to be re-tested upon notification of the positive result. Id. The Commission concluded that the urgency with which he acted demonstrated that Gannon was not seeking delay to avoid detection. Id. Gannon also presented evidence of five previous hair tests (in 2006, 2007, 2008, on April 21, 2010, and in 2012). Id. at 580. All tests were performed at the behest of the Boston Police Department, analyzed by Psychemedics, and all five of these tests were negative for all drugs. Id.

The Commission, as finder of fact, weighed all the evidence presented and concluded that by a preponderance of the evidence that reasonable justification, sufficiently supported by credible evidence, did not exist to bypass the Appellant for employment as a police officer.

A. The Civil Service Commission Drew From Boston Hair Drug Test Appeals Only To Evaluate the Reliability of the Drug Testing Procedures

The Commission's opinion in Gannon was careful to note that it drew from Boston Hair Drug Test Appeals "regarding the reliability of hair drug tests." Id. at 577-78 (emphasis added). The Superior Court concluded that the Commission extended the sole basis test from tenured employees to new hires. R.A.I at 112. However, a full reading of the Commission's opinion demonstrates that the Commission's reliance on Boston Hair Drug Test Appeals is much more limited in scope.

The Commission in Gannon drew from Boston Hair Drug Test Appeals only with respect to the science of hair drug testing. The Commission, in order to properly evaluate the only piece of evidence the Boston Police Department presented to justify its decision to bypass the Appellant, drew from the scientific analysis in the Boston Hair Drug Test Appeals case to conclude in Gannon that hair drug testing is unable to differentiate between ingestion of cocaine and external contamination.

In the Gannon opinion, the Commission took administrative notice of its decision in Boston Hair

Drug Test Appeals, R.A.II at 550-51, noting that "the decision provides a lengthy, detailed and scholarly analysis of hair drug testing by Psychemedics." Id. at 571. The Commission notes that the Gannon case and the Boston Hair Drug Test Appeals shared "commonality of issues and evidence." Id. at 578. In both Gannon and Boston Hair Drug Test Appeals, Psychemedics performed the hair drug testing at issue. In each case, Dr. Thomas Cairns, scientific advisor for Psychemedics, provided expert testimony for the Department. Id. at 577. In its opinion, the Commission noted that "the testimony of Dr. Cairns and Dr. Benjamin, [Gannon's expert witness] in this case regarding the reliability of Psychemedics' hair drug testing is similar in substance to the supporting and opposing expert views offered in Boston Hair Drug Test Appeals." Id. The Department in each case produced a litigation data package regarding the hair drug test. Id. The parties produced and referenced a scientific study ("The Stout Study") which "address issues similar to those raised in Boston Hair Drug Test Appeals." Id. at 577-78. The Stout Study concluded that current laboratory procedures are unable to determine whether cocaine present in a hair sample is due to ingestion or

external contamination. R.A.III at 404. The Commission in Gannon was very careful to note the substantial similarity of the scientific evidence regarding the reliability of hair drug testing between the two cases.

In Boston Hair Drug Test Appeals, the Commission described how hair becomes externally or environmentally contaminated.

It is also generally accepted in the scientific community that hair follicles are somewhat porous and may be penetrated by exposure of the exterior of the cuticle to a drug molecule deposited on the surface which, under certain conditions, can permeate into the layers of the cuticle and lodge in the interstitial spaces within the cortex and medulla. This is generally referred to as "passive" or "environmental" contamination.

Id. at 29.

There is also scientific support for the premise that drugs can enter the hair of a non-user through "passive inhalation". i.e., second-hand smoke, as well as what is sometimes called "passive ingestion", i.e., contamination via drug contact with the skin, sweat and sebum (a skin lubricant associated with hair produced by the sebaceous gland).

Id. at 29-30.

In Boston Hair Drug Test Appeals, the Commission noted that there is ample evidence that cocaine exists

in the environment and can be transferred to a non-user. The Commission noted that "[t]he fact that cocaine powder and vapors exist in the general environment and can be transferred is a generally accepted scientific proposition..." Id. at 51. The Commission also noted a study in which 92 percent of US paper currency was contaminated with cocaine, and another in the desks of elementary school children in the Washington D.C. area were contaminated with cocaine. Id. at 51-52. Additionally, the Commission noted a study in which Psychemedics participated which "confirm[ed] levels of cocaine intake ... in a non-user's hair that is exposed to contamination of, through the external surface of the cuticle and without ingestion." Id. at 53-54. In July of 2009, the FBI discontinued its hair drug testing program, noting that "the data sufficiently demonstrate that exterior contamination of hair with cocaine hydrochloride can lead to an innocent individual being accused of cocaine use." Id. at 39. Similarly, the Commission noted in Boston Hair Drug Test Appeals that "Dr. Donald Kippenberger, a former Psychemedics laboratory director and member of SAMHSA's [Substance Abuse and Mental Health Services Administration] Hair Working

Group, who was then employed with the U.S. Army Medical Command, recommended that all military labs within the Department of Defense cease hair drug testing." Id. at 40.

The Commission noted that it had previously found in Boston Hair Drug Test Appeals that "[h]air testing for drugs of abuse has not achieved general acceptance within the scientific or law enforcement communities." Id. at 107. The Commission also noted that the testing procedure used by Psychomedics is unable to differentiate between cocaine ingestion and external contamination ("the scientific evidence is compelling that no proven level of cocaine metabolite has been identified that is conclusive of ingestion."). Id. at 108. The Commission also noted the "uncertainty about the efficacy of current decontamination strategies" of the hair samples. Id. Because the hair sample is unable to be properly decontaminated, the test is unable to prove that a positive test reading is due to ingestion of an illicit drug.

After its decision in Boston Hair Drug Test Appeals, the Commission, in Lecorps v. Dep't of Correction, 26 MCSR 519 (2013), held that in order for an appointing authority to establish reasonable

justification for its bypass decision based upon hair drug test results, it "need[s] to address the applicable factors identified in [Boston Hair Drug Test Appeals] and provide appropriate evidence in support thereof." Lecorps, at 7. These applicable factors "were determined to affect the hair test's accuracy and levels of the drugs found in an individual's system, including, without limitation, the type, length, and location of the hair sampled for testing, the reliability of the testing process itself, and the standard used to determine the existence of illegal drugs." Id. (emphasis added).

The Commission, through its previous examination of Psychomedics' hair drug testing procedures, had a wealth of institutional knowledge from which to draw in understanding the technical scientific issues at play in the Gannon case. The Commission drew upon this institutional knowledge to assist in properly evaluating the only piece of evidence the Boston Police Department presented to justify its decision to bypass the Appellant.

- B. The Civil Service Commission Did Not Rely on Boston Hair Drug Test Appeals to Extend the "Sole Basis" Test for Tenured Employees to New Hires**

The Commission did not extend the "sole basis" test for tenured employees from Boston Hair Drug Test Appeals to new hires. The Commission acknowledged the distinction between tenured employees and new hires, noting that hair drug testing "'while potentially useful' in certain scenarios, including pre-employment decisions' (emphasis in original), it "does not meet the standard of reliability necessary to be routine used as the sole grounds to terminate a tenured public employee." R.A.II at 578. The Superior Court incorrectly uses this language to conclude that the Commission applied the tenured employee standard in analyzing Mr. Gannon's test. R.A.I at 112. The Commission distinguishes between tenured employees and new hires because there are different testing procedures for each group. The Commission establishes that the testing procedures for new hires is even less reliable than for tenured employees. The Commission does not make this distinction in order to extend the 'sole basis' test to new hires, but in order to evaluate the credibility of the evidence presented by the BPD.

The Commission notes that the single hair test performed on new hires is less reliable than the multiple tests performed on tenured employees. ("[T]he Respondent took only one hair sample, not the multiple samples it takes for tenured employees."). R.A.II at 578. The Commission, tasked with assessing the credibility of the evidence presented and assigning the proper evidentiary weight to it, concluded that "[h]aving found in Boston Hair Drug Test Appeals that the hair drug test is insufficiently reliable in one context, such as testing of tenured employees, the Commission's decision in Boston Hair Drug Test Appeals cannot be construed that a test result with less reliability is applicable in another context, such a pre-employment testing." Id. at 578. Rather than extending the 'sole basis' test for tenured employees to new hires, the Commission concluded that the Department's testing procedures for new hires produced evidence with a lower level of credibility than the testing procedures for tenured employees.

Although the Commission did not extend the "sole basis" test for tenured employees to Gannon specifically, the Commission does note that Gannon's bypass letter stated that his failed hair drug test

was the sole reason for his bypass. Id. at 557. The Commission assigned the proper evidentiary weight to the sole piece of evidence introduced by the Boston Police Department. The Commission concluded that an even less reliable version of a test that it had previously found unreliable was not sufficiently credible evidence to justify Gannon's bypass.

The Commission was within its discretion to discount the credibility of the hair drug test because it is unable to properly determine whether cocaine was in the hair due to ingestion or external contamination. The Commission was also within its discretion to discount the credibility of the test because of the discrepancy in the data presented on the two medical review officer reports. When weighed against the evidence presented by Gannon, the Commission, as finder of fact, concluded that by a preponderance of the evidence that reasonable justification, sufficiently supported by credible evidence, did not exist to bypass the Appellant for employment as a police officer.

II. THE SUPERIOR COURT INCORRECTLY CONCLUDED THAT THE APPELLANT FAILED THREE HAIR DRUG TESTS; ONLY ONE WAS POSITIVE FOR DRUGS

In its opinion, the Superior Court made an error of fact in concluding that "Psychemedics Corporation tested Mr. Gannon's hair three separate times. Each test was positive for cocaine." R.A.I at 109. There was only one failed test, the March 27, 2010 test at issue in this case. The Superior Court's opinion reflects a misunderstanding of the hair drug testing procedure.

During its testing procedure, Psychemedics tests the hair sample initially by radioimmunoassay (RIA) R.A.II at 564. RIA testing is an inexpensive, screening level test prone to false positives. Id. at 565. See also Commonwealth v. Martin, 427 Mass. 816, 820 n.5 (1998) ("False positives are common ... with error rates exceeding 60 percent."). A failure to confirm the presence of a drug with a confirmatory level test makes the positive result of the RIA screening test of low probative value. Id. Because of this high error rate, this method cannot be used alone.

If the RIA screening test is positive, the sample is then tested by another method, Liquid chromatography/mass spectrometry/mass spectrometry

(LC/MS/MS). R.A.II at 565. This is a more reliable (and more expensive) test used to confirm the results of the RIA test. Id. Prior to re-testing by LC/MS/MS, Psychemedics washes the hair in an effort to remove external contaminants from the hair. Id. After the hair is washed by Psychemedics, the wash itself is tested in order to verify that the washing procedure was effective. Id.

Although there are three parts to the drug test (initial screen by RIA, confirmatory test by LC/MS/MS, and then the wash by RIA), there is only one test. Only one sample of Mr. Gannon's hair was tested. If the Superior Court ruled under the mistaken assumption that Michael Gannon failed three drug tests, it is grounds for reversal of the Superior Court opinion and the reinstatement of the decision of the Civil Service Commission.

CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse the ruling of the Superior Court and reinstate the ruling of the Civil Service Commission.

Respectfully submitted,

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ADDENDUM

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G.L. c. 30A, §14	1
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Part I ADMINISTRATION OF THE GOVERNMENT

Title III LAWS RELATING TO STATE OFFICERS

Chapter 30A STATE ADMINISTRATIVE PROCEDURE

Section 14 JUDICIAL REVIEW

Section 14. Except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof, as follows:--

Where a statutory form of judicial review or appeal is provided such statutory form shall govern in all respects, except as to standards for review. The standards for review shall be those set forth in paragraph (7) of this section, except so far as statutes provide for review by trial de novo. Insofar as the statutory form of judicial review or appeal is silent as to procedures provided in this section, the provisions of this section shall govern such procedures.

Where no statutory form of judicial review or appeal is provided, judicial review shall be obtained by means of a civil action, as follows:

(1) Proceedings for judicial review of an agency decision shall be instituted in the superior court for the county (a) where the plaintiffs or any of them reside or have their principal place of business within the commonwealth, or (b) where the agency has its principal office, or (c) of Suffolk. The court may grant a change of venue upon good cause shown. The action shall, except as otherwise provided by law, be commenced in the court within thirty days after receipt of notice of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for rehearing. Upon application made within the thirty-day period or any extension thereof, the court may for good cause shown extend the time.

(2) Service shall be made upon the agency and each party to the agency proceeding in accordance with the Massachusetts Rules of Civil Procedure governing service of process. For the purpose of such service the agency upon request shall certify to the plaintiff the names and addresses of all such parties as disclosed by its records, and service upon parties so certified shall be sufficient. All parties to the proceeding before the agency shall have the right to intervene in the proceeding for review. The court may in its discretion permit other interested persons to intervene.

[Paragraph (3) of the second paragraph following the introductory paragraph effective until October 27, 2015. For text effective October 27, 2015, see below.]

(3) The commencement of an action shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper.

[Paragraph (3) of the second paragraph following the introductory paragraph as amended by 2015, 108, effective October 27, 2015. For text effective until October 27, 2015, see above.]

(3) The commencement of an action shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper. Notwithstanding the foregoing, if the sex offender registry board issues a stay of a final classification in a sex offender registry board proceeding, then such stay shall be for not more than 60 days but if a court issues a stay of a final classification in a court appeal held pursuant to section 178M of chapter 6, then such hearing shall be expedited and such stay shall be for not more than 60 days, without written findings and good cause shown.

(4) The agency shall, by way of answer, file in the court the original or a certified copy of the record of the proceeding under review. The record shall consist of (a) the entire proceedings, or (b) such portions thereof as the agency and the parties may stipulate, or (c) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess any one unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court.

(6) If application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of such additional evidence and shall file with the reviewing court, to become part of the record, the additional evidence, together with any modified or new findings or decision.

(7) The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is--

(a) In violation of constitutional provisions; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

(c) Based upon an error of law; or

(d) Made upon unlawful procedure; or

(e) Unsupported by substantial evidence; or

(f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or

(g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

The court shall make the foregoing determinations upon consideration of the entire record, or such portions of the record as may be cited by the parties. The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.

If the court finds that the action of the appointing authority in discharging, removing, suspending, laying off, lowering in rank or compensation or abolishing his position, or the action of the commission confirming the action taken by the appointing authority, was not justified, the employee shall be reinstated in his office or position without loss of compensation and the court shall assess reasonable costs against the employer.

Part I ADMINISTRATION OF THE GOVERNMENT

Title IV CIVIL SERVICE, RETIREMENTS AND PENSIONS

Chapter CIVIL SERVICE

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Section 2 POWERS AND DUTIES OF COMMISSION

Section 2. In addition to its other powers and duties, the commission shall have the following powers and duties:

- (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth.
- (b) To hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations; provided that no decision or action of the administrator shall be reversed or modified nor shall any action be ordered in the case of a failure of the administrator to act, except by an affirmative vote of at least three members of the commission, and in each such case the commission shall state in the minutes of its proceedings the specific reasons for its decision.

No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status.

Any person appealing a decision, action or failure to act of the administrator shall file a copy of the allegations which form the basis of the aggrieved person's appeal with the administrator within three days of the filing of such allegations with the commission and provided further such person shall not have standing before the commission until such filing takes place. Said allegations shall clearly state the basis of the aggrieved person's appeal, and make specific references to the provisions of this chapter or the rules of the department or basic merit principles promulgated thereunder which are alleged to have been violated, together with an explanation of how the person has been harmed.

Hearings on any appeal before the commission may be held before less than a majority of its members, or the chairman may assign one or more members to hold such hearings and to report his or their findings of fact and recommendations to the commission for its action.

No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record.

(c) Subject to the procedures set forth in paragraph (b), except that all references therein to the administrator shall be taken to mean the local appointing authority or its designated representative, to hear and decide appeals by persons aggrieved by decisions, actions, or failure to act by local appointing authorities in accordance with the provisions of section eight of chapter thirty-one A.

(d) To conduct hearings regarding performance audits conducted by the administrator in accordance with provisions of chapter thirty-one A.

(e) To hear and decide appeals concerning performance evaluations, as provided by this chapter and chapter thirty-one A.

(f) To recommend any proposed rule changes to the administrator it feels would be consistent with basic merit principles outlined in this chapter and would be in the public interest.

(g) To adopt such rules of procedure as necessary for the conduct of its proceedings.

Mass R. App. P. 16(k) Certification

I, Michael F. Neuner, hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices.

/s/ Michael F. Neuner

Michael F. Neuner

