

COMMONWEALTH OF MASSACHUSETTS

Decision mailed: 12/31/10
Civil Service Commission *JS*

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

DAVID CHAVES,
Appellant

v.

Docket NO.: G1-08-151

BOSTON POLICE DEPARTMENT,
Respondent

Appellant:

Leah Barrault, Atty.
Pyle, Rome, Lichten, Ehrenberg
& Liss-Riordan, PC
18 Tremont St., Suite 500
Boston, MA 02108
Tel (617) 367-7200

Appointing Authority:

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant David Chaves (hereinafter referred to as "Chaves" or "Appellant"), seeks review of the Personnel Administrator's (hereafter referred to as "HRD") decision in accepting reasons proffered by the Responding-Appointing Authority Boston Police Department (hereinafter referred to as the "Department" or "BPD"), for the psychological bypass of the Appellant for original appointment to the position of police

officer. HRD accepted the Department's reasons for the psychological bypass and the Appellant was bypassed on August 15, 2008 by other candidates who were lower on certification #271117. (Ex. 11.) The reasons proffered for the psychological bypass and accepted by the personnel administrator were: "In summary, Mr. Chaves appears to be an intelligent, hard-working man with a sincere interest in police work. The current testing indicates that he may be too defensive or rigid to acknowledge his limitations or ask for help. Prior testing, which he approached in a less-guarded fashion, raised concerns about significant emotional turmoil, anxiety and problems managing anger. In his two interviews with Dr. Scott, Mr. Chaves appeared paralyzed by his anxiety and unable to communicate coherently. In his interview with me, Mr. Chaves was more collected, but was still acutely and unable to answer even simple questions clearly or directly. He also presented as a rigid, moralistic man who has difficulty acknowledging any limitations or seeing his part in a difficulty. These limitations, in my opinion, would interfere with Mr. Chaves ability to tolerate the stress of police work, to communicate clearly or to ask for help appropriately. For these reasons, Mr. Chaves is currently found not acceptable for the Boston Police Department. (Ex. 10.) The Appellant filed a timely appeal at the Commission. A full hearing was held on February 24, 2009 at the offices of the Civil Service Commission. A total of three (3) audio tapes were made of the hearing. The parties subsequently filed proposed decisions with the Commission.

FINDINGS OF FACT:

The contents of the Commission's case file is considered and referenced appropriately, if relevant, as needed in this decision. The parties stipulated to Exhibits 1-17. The BPD offered Exhibits 18 & 19, which were strongly objected to by the Appellant; they were marked for identification and admitted *de bene*, subject to later written argument in proposed decisions. The

BPD made an oral motion to sequester witnesses, but offered no grounds. The motion was denied as the Appellant would stay as a matter of right and the only other witness present was expert Dr. Mark Schaeffer. This hearing officer prefers for convenience and economy to have expert witnesses hear the testimony of opposing experts and Dr. Julia Reade is the BPD's initial and only expected witness. The BPD objected for the record to the ruling of denial but offered no grounds. Based on the documents entered into evidence (Ex. 1-17) (*de bene* 18 & 19- later excluded) and a stipulation of facts, the Testimony of the Appellant, and the Testimonies of Dr. Mark Schaeffer, Dr. James Beck, and Dr. Julia Reade, **I make the following findings of fact:**

A. Background Facts Related to the Appellant

1. The Appellant is a twenty-six (26) year old male who born in Bogota, Columbia. (Ex. 1, Recruit Application.) He moved to the United States when he was five (5) years old and he currently resides in West Roxbury, Massachusetts. He is bilingual speaking both English and Spanish. (Appellant.)
2. Appellant has wanted to be a police officer for nearly his entire life. He is interested in BPD because he lives in Boston and because through his job at the Dorchester District Court he knows the "impact players" and thinks he could make a difference. (Appellant.)
3. The Appellant has two (2) sisters who both live in Massachusetts. The Appellant's parents are still together and they also live in Massachusetts. The Appellant's relationship with his sisters and his parents was and continues to be "excellent." Growing up the Appellant naturally had typical minor arguments with his siblings but such arguments **never** rose to the level of violence. (Appellant.)
4. The Appellant graduated from Randolph High School. He then went on to receive a Bachelor of Arts Degree in Criminology from Stonehill College and a Masters of Science in Criminal Justice from Northeastern University. The Appellant graduated from Northeastern with a 3.3 GPA. He majored in Criminology and Criminal Justice during his college career because he has always been interested in criminal justice and wanted to be a police officer. (Ex. 1; Appellant.)
5. While at Stonehill College the Appellant interned with the Randolph Police Department for six months where he collected data and researched racism as it pertained to traffic stops within that community. The Appellant rode along with police officers and participated with traffic stops, some arrests and transportation of prisoners. He observed the "day to day" job of police officers, including making phone calls and going to court. (Appellant.)

6. The Appellant frequently engaged in public speaking during his attendance at Stonehill College and Northeastern University, he presented researched speeches on such topics as gangs and the public housing project in Jamaica Plain. While at Northeastern University he performed an Internship at the Institute for Racial Justice, conducting a study on minority drivers' arrests and stops. At **no** point in time did any professor or anyone from either school express concerns relative to Appellant's level of anxiety or communication skills. (Appellant.)
7. The Appellant does not and has **never** suffered from or been treated for or taken medication for a mental or psychological disorder. He has **never** had issues with anger, anxiety or communication. The Appellant has **never** been arrested nor was he ever disciplined at school for fighting. (Appellant.)
8. One of the Appellant's written personal references, Mr. Klotz, a close friend since junior high school, then a law school student and law clerk, and now a practicing attorney at the time of this hearing. Mr. Klotz describes the Appellant as being very honest, responsible, committed and possessing good judgment. Mr. Klotz also offered examples of these various traits. He specifically believed that he would be "a tremendous asset to the BPD". He described the Appellant as having **"great ability in dealing with stressful events and disputes."** and offered an example of this trait. (Ex. 1, back of packet.) (Emphasis added, Appellant.)
9. The Appellant has a proven ability in dealing with the public, even in stressful circumstances. The Appellant's supervisor at the liquor store where he had previously worked also gave a glowing recommendation for him. He had known the Appellant for 10 years and described him as: **"extremely professional and conscientious"** **In his relationship with co-workers he was "easy going and ready to receive or give training when needed."** **"He never had a problem with customers or employees".** **He handled stress well: "During busy times at the store, [he] remained calm and under control."** (Ex. 1, back of packet.) (Emphasis added.)
10. The Appellant's employment history shows that he has been employed with the Dorchester District Court for two years as a "case specialist." Dorchester District Court is the busiest court in the Commonwealth and within the jurisdiction of the BPD. The Appellant issues warrants and summonses, conducts background investigations, and he assists both the public and the judges assigned to that Court. Appellant previously held jobs at a liquor store and an ice skating rink. (Ex. 1; Appellant.)
11. The Appellant's record with the Dorchester Court is unblemished. He has **never** been disciplined. No judge, police officer, member of the public or Court employee has ever expressed a concern to Appellant relative to his level of anxiety or communication skills. Appellant likewise had unblemished work records with the liquor store and ice-skating rink for which he was previously employed. (Appellant.)

12. The Dorchester District Court is the busiest court in the state of Massachusetts. The Appellant frequently interacts with the public, police officers and judges. The pace there is very fast and stressful. Some days at the Court can be especially busy and stressful, for instance a Monday or day after a holiday, due to the high number of arrests to be arraigned. The Appellant has performed well under this stressful environment and has always asked for assistance when his workload has become unmanageable. (Appellant.)
13. **Anthony S. Owens is the Clerk Magistrate for the Dorchester District Court.** Mr. Owens describes the Appellant's job performance as: **"hardworking, completes all tasks assigned to him, and requires little direct supervision. His work product is always of the highest quality."** In response to the question "How does the employee manage stressful situations" Mr. Owens states: **"Mr. Chaves appears to manage stress well.** Currently he works in the courts record room. He fields telephone calls, updates computer entries without complaint." Clerk-Magistrate Owens states conclusively regarding the Appellant: **"In my opinion, Mr. Chaves has many of the qualities of a solid police officer. Aside from police training, I see no areas of need."** (Ex. 1, back of packet.) (Emphasis added.)
14. Deirdre Kennedy, a probation officer at the Dorchester District Court states: **"Our colleagues at Dorchester District Court and I have been impressed with David's demeanor and professionalism over this past year. He does his job, does what needs to be done, but always in a respectful, professional manner."** In response to the question "how will candidate respond to street/crisis/dispute Ms. Deirdre Kennedy states: **"One of David's biggest strengths is that he effectively deescalates potentially volatile situations so that they do not become crises or disputes. I do know that he has been the voice of reason with his friends at parties or clubs when a dispute starts to arise. He is the one who will calm people down, apologize, and get people out of the situation. I also have to say that I haven't seen or heard him be stressed out by anything other than final exams at school."** She had known Chaves for approximately 20 years at the time of her letter of reference; she further described him as possessing **"excellent interpersonal skills, good communication skills and a lot of common sense and compassion."** (Ex. 1 back of packet.) (Emphasis added).
15. It is noted that the BPD collects a volume of specific detailed written information on the candidates from the Student Officer Application and its' Recruit Investigation Unit (RIU). The candidate is required to submit with the application: signed and notarized personal letters of reference forms and employment supervisor forms. The information is solicited by the completion of detailed questionnaire forms, signed and notarized. The BPD Investigator also collects detailed written information from landlords, friends, employers and other sources. It is also noted that all of the personal references here have known the Appellant for at least a decade or longer. (Administrative notice, Ex. 1 back of packet.)

B. Facts Related to the BPD's Psychological Screening Plan

16. On or around July 22, 2004, the BPD submitted to the Human Resources Division ("HRD") a request for the authority to utilize a psychological screening plan. In July of 2004, Sally McNeely, the Director of the Organizational Development Group of HRD, gave verbal approval to Edward Callahan for BPD to proceed with the psychological screening of current police officer candidates pursuant to its psychological screening plan. (Stipulated Facts.)
17. BPD permits clinicians conducting the first and second level clinical interviews pursuant to the Department's psychological screening to rely upon the following in making their psychological suitability determinations: a) Results from MMPI-2, PAI, personnel data questionnaire, background investigation, recruit application, and medical records may be used when the first and second level interviews are conducted by psychiatrists. No specific instructions are given to psychiatrists conducting the first and second level clinical interviews pursuant to the BPD's psychological screening plan with respect to what information and/or documents s/he may rely upon in making their psychological determination. The doctors are expected to abide by the psychological screening plan in conjunction with their training and experience. **The doctors utilize the standards set forth by the Commonwealth of Massachusetts to determine the psychological ability to perform the duties or manage the stresses of an armed police officer.** (M.G.L. c. 31, §61A) (Stipulated Facts.) (Emphasis added.)

C. Facts Related to Appellant's 2006 Application to the Boston Police Department To Be a Civilian Dispatcher (not the subject of this bypass appeal)

18. Sometime in 2006, the Appellant applied for and was processed for the position of BPD civilian dispatcher. He passed the background investigation, recruit interview, drug test, typing test and medical examination. (Appellant.)
19. On August 22, 2006, the Appellant took two paper and pencil psychological tests, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and the Personality Assessment Inventory ("PAI"), in connection with his dispatcher application. (Stipulated facts; Exs. 18 & 19 taken *de bene*.¹)
20. Appellant admittedly approached the MMPI -2 and the PAI trying to be as honest as possible, acknowledging any faults or feelings he may have had. (Appellant.)
21. The Appellant met with BPD staff psychiatrist Dr. Marcia Scott in connection with his 2006 dispatcher hiring process. Their meeting lasted thirty (30) minutes. Appellant recalls Dr. Scott informing him (without explanation) that the results of his psychological testing raised flags relative to anger/aggression issues. Appellant explained to Dr. Scott during this interview that he never suffered from any anger issues and was very surprised

¹ As detailed later in the findings and in the Conclusion of this decision; the Appellant's 2006 MMPI-2 and PAI results are inadmissible and excluded from evidence in this proceeding.

regarding this result. Dr. Scott did not show him or go over Appellant's test results with him during their interview. (Appellant.)

22. Appellant was disqualified based upon the BPD's position that he had failed the psychological examination. Appellant **never** received anything in writing detailing the reasons for such disqualification. Appellant was surprised that he was being disqualified based upon the results of his psychological testing because he has no psychological or mental health problems. **The position of BPD dispatcher is not a civil service position and therefore Appellant did not have appeal rights at this Commission to protest his disqualification.** (Stipulated Facts; Appellant.)

D. Facts Related to Appellant's 2008 Conditional Offer of Employment
(Subject of this bypass appeal)

23. In November, 2007, Appellant's name appeared on special **Certification 271117** for **Spanish Speaking** persons for the position of twenty (20) permanent full-time police officers for the BPD. The Appellant was bypassed by the BPD for appointment by persons who appeared lower on that certification. (Ex. 5.)
24. Appellant met with BPD Recruit Investigations Unit, (RIU) and provided them with his Student Officer Application, letters of personal reference, supervisor/human resources data forms, and confidential neighborhood assessment forms. (Ex. 1; Stipulated Facts.)
25. Appellant passed his pre-employment background investigation. (Ex. 2; Stipulated Facts.)
26. On February 15, 2008, BPD offered Appellant a conditional offer of employment subject only to his passing a medical examination and the psychological screening component of the medical examination. (Ex. 3; Stipulated Facts.)
27. On February 24, 2008, the Appellant completed the MMPI-2 and PAI. (Exs. 6 & 7; Stipulated Facts.)
28. The second time around, after being psychologically disqualified for the BPD civilian dispatcher position he expected to obtain in 2006, Appellant admittedly approached this 2008 testing in a cautious manner. (Appellant.)
29. On February 24, 2008 Appellant attended a forty (40) minute psychological interview with Dr. Scott. (Stipulated Facts.) He was nervous going into this interview because Dr. Scott had disqualified him for BPD dispatcher back in 2006. Dr. Scott did **not** review Appellant's recruit application or supervisor references with him during this 2008 interview. Dr. Scott did **not** review Appellant's paper and pencil psychological tests with him during this 2008 interview. Dr. Scott told Appellant that he had responded defensively on his 2008 MMPI-2 and PAI but did not explain to Appellant what that meant. (Appellant.)

30. On March 10, 2008, BPD sent Appellant to see Dr. Julia Reade for a forty-five to sixty (45-60) minute Second Opinion psychiatric review interview. (Ex. 9; Stipulated Facts.) Dr. Reade did **not** review Appellant's recruit application or supervisor references with him. Dr. Reade did **not** review Appellant's paper and pencil psychological tests with him. Dr. Reade told Appellant that he had responded defensively on the MMPI-2 and PAI but did not explain to Appellant what that meant. (Appellant.)
31. Dr. Reade's understanding of the nature and responsibilities of a police officer is through reading literature. She has spent **no** time with police officers on the beat or at the police station. (Dr. Reade; Ex. 8.)
32. In Dr. Reade's report dated March 28, 2008, as grounds for the Appellant's psychological disqualification, she states: "In summary, Mr. Chaves appears to be an intelligent, hard-working man with a sincere interest in police work. The current testing indicates that he may be too defensive or rigid to acknowledge his limitations or ask for help. Prior (2006) testing, which he approached in a less-guarded fashion, raised concerns about significant emotional turmoil, anxiety and problems managing anger. In his two interviews with Dr. Scott, Mr. Chaves appeared paralyzed by his anxiety and unable to communicate coherently. In his interview with me, Mr. Chaves was more collected, but was still acutely and unable to answer even simple questions clearly or directly. **He also presented as a rigid, moralistic man** who has difficulty acknowledging any limitations or seeing his part in a difficulty. These limitations, in my opinion, would interfere with Mr. Chaves ability to tolerate the stress of police work, to communicate clearly or to ask for help appropriately. For these reasons, **Mr. Chaves is currently found not acceptable for the Boston Police Department.** (Ex. 9, p. 3.) (Emphasis added)
33. In a letter dated May 16, 2008 from the BPD Human Resources Director, Robin W. Hunt, to Sally McNeely of HRD the Appellant was informed, among other things, "that the results of his psychological screening indicate that he cannot adequately perform the essential functions of the public safety position for which [he] applied and **a reasonable accommodation is not possible.**" The letter further provided that he would not be appointed as a Boston Police Officer." (Ex. 10; Stipulated Facts.) (Emphasis added)
34. BPD's disqualification of Appellant was based **solely** upon the opinion of Dr. Reade. (Ex. 10.)
35. In a letter dated August 15, 2008 from Jennifer Murphy of HRD to the Appellant was informed, among other things, that HRD had accepted the Department's reasons for the psychological bypass of the Appellant. (Ex. 11; Stipulated Facts.)
36. The Boston Police Department did not produce any evidence regarding its exploration of or offer of or attempt to provide any "reasonable accommodations" to the Appellant, due to his alleged "disability" or mental limitation, so that he could perform the duties of a Boston Police Officer. This could be considered an act of employment discrimination or the denial of an employment opportunity to a job applicant who is an otherwise qualified individual with an alleged disability. This appears to possibly be a violation of the so

called “Americans with Disabilities Act of 1990”. (Administrative notice Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq., Exhibit 9, 10, 11, exhibits and testimony).

37. Under the ADA, a disability is: (A) a physical or mental impairment that substantially limits one or more of the major life activities . . . (B) a record of such an impairment; or (C) **being regarded as having such an impairment.** (Emphasis added) 42 U.S.C. §§ 12102(2)(A) and Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000) (Administrative notice)
38. A conditional offer of employment is a legal term of art developed under the Massachusetts anti-discrimination laws, M.G.L. c. 151B, as well as the federal Americans with Disabilities Act (ADA). Specifically, under these statutes, an employer may not require that an applicant undergo a medical examination prior to making that individual a conditional offer of employment. Most relevantly, G.L. c. 151B provides: “An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that **an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job...**” G.L. c. 151B §4(16) (emphasis added, administrative notice)
39. Dr. Reade testified here that in her psychological screenings she is not necessarily looking for disqualifying psychological conditions or enduring traits; she also looks for a candidate who is psychologically fit to complete the BPD police academy and then perform successfully as a police officer. (Dr. Reade)
40. However, Dr. Reade testified at this hearing and admitted that a “very high percent” had dropped out of the BPD’s last Academy class of 2008. She admitted that she and the BPD were looking into that unusual situation; including a re-assessment of or looking at who had been flagged and evaluated, who received a green light from her, and still others who she did not see at all, yet got into the BPD Academy and then dropped out. (Dr. Reade)
41. On December 19, 2008, Dr. James Beck interviewed and performed an independent psychological consultation of the Appellant. (Ex. 14; Stipulated Facts.)
42. Dr. Beck is a recognized expert in the field of police psychological fitness for duty cases. Dr. Beck is a graduate of Harvard and Yale. He has taught at the Harvard Medical School for over thirty (30) years. In his nearly thirty (30) years of experience as a forensic psychiatrist, Dr. Beck has conducted numerous police fitness for duty interviews, which are virtually identical to psychological pre-screenings. Dr. Beck has also had extensive experience working directly with police officers, particularly those in emotional distress, and therefore has vast knowledge regarding the emotional rigors and job duties required of police work. Notably, in addition to all of his expertise, Dr. Beck served as a consultant to the Human Resources Division (then the Personnel Administration) of the

Commonwealth and participated in at least earlier versions of HRD's regulations with respect to psychological disqualifications. (Ex. 15; Beck)

43. Dr. Beck reviewed the Appellant's Recruit Application materials, the results of his MMPI-2 and the PAI, as well as the reports of Dr. Scott and Dr. Reade. In his report, Dr. Beck opines: **"Mr. Chaves does not suffer from a psychological condition which would interfere with his abilities to perform the functions of a police officer for the City of Boston. I find no evidence that he has any mental disorder. I saw no evidence in my interview that Mr. Chaves suffers from any condition that would impair his ability to perform as a Boston Police Officer. Regarding his life history, Mr. Chaves has generally shown himself in recent years to be a responsible well functioning adult with good values."** Dr. Beck then stated in conclusion- **"I hold these opinions to a reasonable medical certainty."**²(Ex. 14, p. 2.) (Emphasis added.)
44. On December 24, 2008, Dr. Mark Schaeffer interviewed and performed an independent psychological consultation of the Appellant.³ (Ex. 16.)
45. Dr. Schaeffer is a licensed clinical and forensic psychologist. He has been performing psychological pre-screenings for police departments, including those in Watertown, Framingham, Lynn and Randolph, since 1980. **He has performed 500 to 700 screenings.** (Ex. 17; Schaeffer.) Dr. Reade has conducted **only 250** psychological pre-screenings. (Dr. Reade.)
46. Dr. Schaeffer reviewed the Appellant's Recruit Application materials, his results on the MMPI-2 and the PAI, as well as the reports of Dr. Scott and Dr. Reade disqualifying the Appellant. In his report dated January 12, 2009, Dr. Schaeffer opines: **"After interviewing Mr. Chaves and reviewing other sources of information, I did not see any indication of past or current severe emotional turmoil, or such rigidity that he cannot process information or function appropriately. In my interview with Mr. Chaves he presented as intelligent and articulate. He is bilingual, and has clearly been interested in law enforcement for a number of years, taking steps both in school and selection of employment to gain experience in the field. He is in good physical shape and has no reported issues with substances. He was disqualified for the position of police officer for the City of Boston after observations by Drs. Scott and Reade that Mr. Chaves has problems in communication, difficulties in managing stress, and limited ability to address difficulties as they arose. Quite frankly, it is hard to imagine how Mr. Chaves could have been this successful in past**

² Over the past 16 months Dr. Beck has evaluated 12 candidates for BPD who have appealed a rejection on psychological grounds. (Ex. 14, p. 7.) Dr. Beck agreed with Dr. Reade regarding three (3) of these candidates. (Dr. Beck.)

³ The fact that Dr. Beck and Dr. Schaeffer's clinical interviews of the Appellant occurred nearly eight (8) months after Dr. Reade's interview of the Appellant in no way weakens their conclusion or their findings with respect to the validity of Dr. Reade's conclusion. The clinical interview is intended as a mechanism to gather further data regarding a police candidate. Dr. Beck and Dr. Schaeffer reviewed the **same** MMPI-2 results, PAI results, and application materials including employment references which were before Dr. Reade during her psychological evaluation of the Appellant. The Appellant's life history and data had remained unchanged making the time lapses between the clinical interviews irrelevant.

endeavors if he was genuinely “unable to give a responsive answer to *any* question.” (my emphasis)...His disqualification by Dr. Scott led to his being referred to Dr. Reade, who described him as a “small man” who appeared “meek” and “ingratiating.” Dr. Reade noted that Mr. Chaves was so “acutely anxious” that he was “unable to answer simple questions clearly or directly.” Without belaboring the point, none of these rather dramatic observations was reported by his current supervisor, nor a probation officer that has known him for twenty years, nor was there any indication that he has manifested behavioral problems suggestive of significant difficulties with communication, anxiety, rigidity or coping with stress. Based on my interview, and review of past documents and evaluations, I saw no indication of any psychological or substance abuse problem which would interfere with Mr. Chaves’s ability to function as a police officer for the City of Boston. In fact, he seems like an excellent candidate.” (Ex. 16, p.6.)

E. Facts Related to Appellant’s 2008 MMPI-2 and PAI Results

47. Conclusions based upon paper and pencil psychological testing should **never** be used as the sole basis for disqualifying a candidate. (Dr. Reade, Dr. Beck, Dr. Schaeffer; Jx. Ex. 14, p. 7.)
48. For purposes of psychological screenings, a candidate’s MMPI-2 and PAI test results flag possible employment issues and can serve as a basis upon which the clinician conducting the clinical interview can explore with the candidate and gather data regarding whether those issues have had on that individual’s ability to function in life. This exploration is done through a clinical interview as well as a thorough review of a particular candidate’s background history. (Dr. Schaeffer and Dr. Reade.)
49. The MMPI-2 is comprised of 500 true-false questions or “items.” (Jx. Ex. 6.) The MMPI-2 has ten clinical scales and three validity scales as well as a variety of supplementary scales. The three validity scales, L, K, and S, are designed to help the psychologist identify abnormal response sets that might suggest that a candidate is “faking good.” (Dr. Schaeffer.)
50. When a candidate “fakes good” s/he is sufficiently defensive in their answering of questions, *i.e.*, denying normal human frailties or unusual thoughts. This type of answering may be a sign that the candidate has issues acknowledging their own limitations and asking for help. (Dr. Schaeffer; Dr. Beck.)
51. It is very common for an individual taking the paper and pencil psychological testing in connection with an application for law enforcement to “fake good” and even invalidate the results of their psychological tests because they are trying to put their best foot forward and impress their prospective employer. (Dr. Schaeffer; Dr. Beck.)
52. When a candidate “fakes good” and invalidates the results of their paper and pencil psychological testing a clinician must review a candidate’s historical data, including

employment history, to determine whether that candidate is in fact overly defensive or whether the test results are “outliers.” (Dr. Schaeffer.)

53. On the computer generated “Interpretive Report” of the MMPI 2 administered in February, 2008, it was noted: “It is not possible to interpret his MMPI-2 profile. His MMPI-2 responses were too defensive to permit an adequate assessment of his psychological adjustment. **Other sources of information should be consulted if an opinion is to be formed about his overall adjustment.**” (Jx. Ex. 6, p. 5.) (Emphasis added)
54. There is **nothing** in the Appellant’s historical data to support that he is defensive and has had difficulties acknowledging limitations and asking for help. Thus, Appellant’s test results are “outliers.” (Dr. Schaeffer.)
55. In his report, Dr. Beck states: **“His 2008 MMPI-2 results were invalid because of an elevated L (lie) scale. In the absence of corroborating evidence from life that the candidate is less than truthful, this result should be taken with a substantial grain of salt. After his initial rejection on psychological grounds it is quite possible that he would try to present himself in a more positive light the second time around.”** (Ex. 14, pp. 5.)
56. Dr. Reade reviewed and in disqualifying Appellant in 2008 relied upon the results of Appellant’s 2006 MMPI and PAI testing in connection with his BPD civilian dispatcher application. Dr. Reade’s report states: “Previous testing from 2006 was valid and indicated significant anxiety, anger and emotional turmoil.” As part of Dr. Reade’s conclusion she states again: “Prior testing, which he approached in a less-guarded fashion, raised concerns about significant turmoil, anxiety and problems managing anger.” (Ex. 9, pp. 1 & 3.)
57. Dr. Schaeffer went over the Appellant’s 2006 MMPI and PAI test results with Appellant during their clinical interview. (Dr. Schaeffer.) In his report, Dr. Schaeffer states: **“Mr. Chaves was sufficiently “defensive” in his responding while taking the MMPI-2 that the results were deemed invalid. Certainly, as part of a psychological pre-screening evaluation, this needs to be examined, particularly since a past psychological testing (2006) included MMPI-2 results which suggested that Mr. Chaves might be an individual in significant emotional turmoil. After reviewing the testing with Mr. Chaves, as well as examining his history, there was nothing in Mr. Chaves’s past to suggest that the 2006 results were an accurate assessment, or even that they uncovered some “hidden” aspect to Mr. Chaves’s personality. Rather, there is every reason to believe that, in the first testing, Mr. Chaves was overly candid in admitting any fault or unusual thought which he has ever had, inadvertently portraying himself in an overly negative light. The second time around, after being disqualified for a position he expected to obtain, he was much more careful and in fact, was sufficiently defensive in denying normal human frailties that the results were deemed invalid. As was noted in the MMPI-2 results from 2008, “other sources**

of information should be consulted if an opinion is to be formed about overall adjustment.” (Ex. 16, pp. 5-6.)

58. The PAI is comprised of 340 true-false questions or “items.” PAI results “should be viewed as only one component of a comprehensive screening procedure that should also include at least one other psychological test based on normal personality functioning. A comprehensive personal history questionnaire and a structured interview focused on job-relevant behavior are recommended. The hiring authority’s final screening decision should be based upon corroborating information gathered from multiple data sources.” (Ex. 7, PAI Report, p. 1.)
59. Dr Schaeffer states. **“On the [PAI] Mr. Chaves had an elevated score on the scale of Positive Impression Management (PIM), which can be a sign of someone responding to the test in an overly defensive manner. It should be noted that when his score is compared to post-probationary police officers, Mr. Chaves score on PIM is below significant levels. On his PAI results, Mr. Chaves also had elevated scores on two scales related to interpersonal interactions, Dominance and Warmth. In terms of his psychological risk rating factor (the probability that current applicant would be rated as ‘poorly suited’ by psychologists familiar with expertise in criminal justice) Mr. Chaves in the “low risk” range at 6%. He endorsed only one critical item, which was below the average of most applicants. On a scale which measures likeliness that a ‘personal history review...will elicit admissions of past problem behavior that police and public safety hiring authorities regard as possible negative indicators,’ Mr. Chaves was rated at a ‘low’ risk level in five of six categories, including ‘job related problems,’ ‘Anger management problems,’ and ‘Substance Abuse Proclivity. He was a ‘moderate’ risk in ‘job integrity.’** (Ex. 16, p. 3.)
60. In his report, Dr. Beck states: “His 2008 PAI summary reported that he had a very low risk of receiving a poorly suited rating on psychological grounds. He endorsed one critical item; far below the average candidate who endorses 10 critical items. On six subscales rating job relevant behavior he scored low risk on five, and moderate risk on the sixth.” (Ex. 14, p. 5.)
61. The BPD offered into evidence, two reports pertaining to the Appellant’s prior 2006 testing. (Exhibits 18 & 19). The Appellant objected to their admission. These exhibits were taken *de bene* subject to later written argument on admissibility, probity and weight etc. The parties were ordered to file relevant argument and motions in their post-hearing proposed decisions. In this case, Dr. Reade and Dr. Scott did not personally consult a psychologist about the results of the Appellant’s (2006) MMPI-2 and PAI tests. They each apparently used two written reports dated August 22, 2006: (1) a “Personnel Selection Interpretive Report” of the MMPI-2 test prepared by NCS Pearson, Inc. (a/k/a Pearson Assessments) and James N. Butcher, PhD (the MMPI-2 Report), (Exhibit 18) and (2) a “PAI Law Enforcement, Corrections, and Public Safety Selection Report” published by Psychological Assessment Resources, Inc. and Michael D. Roberts, PhD (the PAI Report), (Exhibit 19). The reports include a computer-generated textual narrative “interpretation” of the numerical scores. The methodology used to prepare the

computer-generated narrative is proprietary and was not a subject of inquiry at the hearing by either party. **These Exhibits, 18 & 19 are excluded**; as these reports are too stale to be useful for the Appellant's evaluation in this 2008 bypass. These reports are unnecessary and could be interpretively unreliable and confusing and since the parties have agreed to the admission of the timely reports dated February 24, 2008. (Exhibits 6 & 7)

F. Facts Related to Psychological Evidence

62. Dr. Beck, Dr. Schaeffer and Dr. Reade agreed that the Appellant does **not** suffer from a psychiatric condition as defined by the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association ("DSM-IV").⁴ (Beck, Schaeffer, Reade.)
63. Appellant does **not** suffer from any of the psychiatric conditions as described by the HRD Regulations.⁵ (Ex. 13, pp. 37-38; Dr. Beck and Dr. Schaeffer.)
64. Appellant has never suffered from or been diagnosed with a mental disorder or sought treatment from a mental health care provider. His BPD background investigation confirmed that he has no criminal record, no history of any traffic violations, no history of substance abuse, and no history of outstanding or unusual debt. (Testimony of Appellant, Exhibits and testimony)
65. HRD has developed in conformance with its policies and published a "Model Plan For Psychological Screening of Entry-Level Public Safety Positions" HRD's stated goal of this Plan is: "The goal of this psychological screening program is to detect any serious psychological disorders or characteristics that would render a candidate unable to perform with reasonable accommodation the essential functions of the public safety position for which the candidate is being considered." It is also noteworthy that HRD's Model Plan, at Section II Stage One, (A.) calls for the group administration of the MMPI test and several other named tests, of which the PAI test is not one. The HRD Model Plan requires that the Psychological Screener, at Section II Stage Two -Clinical Interview, (BPD's 1st level screener) "...will examine the results of the psychological tests, review background information provided by the hiring department (concerning criminal convictions, relevant medical information, if any, and information from interviews with employers, teachers and associates) and conduct a clinical interview of the candidate." The HRD Model Plan also lists one to three additional tests at Stage Two that the

⁴ The DSM-IV is a diagnostic manual that lists symptoms for all psychiatric disorders. It is used as shorthand for clinicians nation-wide to ensure that they are all on the same page with respect to diagnosing disorders. (Dr. Schaeffer.)

⁵ Those disorders listed as Category A medical conditions are based upon the DSM-IV and a candidate can only be disqualified for employment under Category A if they have a diagnosed mental disorder as found within the DSM-IV. Category B medical conditions, including sub categories (a) and (b), do not require as grounds for disqualification diagnosis under the DSM-IV, however, it must be shown that the candidate has a "psychiatric condition" either historically, subcategory (a), or presently, subcategory (b). A "psychiatric condition" is an aspect of behavior which has endured over time and has shown up for an individual in a range of forums. (Dr. Beck.)

Psychological Screener may administer to further evaluate the candidate. The PAI test is not one of the three named discretionary tests. HRD's Model Plan, at Section II Stage Three, (BPD's 2nd level screener), requires that a board-eligible or board-certified psychiatrist perform certain duties and evaluate the candidate. The screening psychiatrist, at Stage Three is required to file a written, signed report. *"The report must describe why the candidate is unqualified for appointment as a public safety employee. Evidence substantiating this opinion must be supplied, and the report must explain specifically why the disorder prevents the candidate from successfully performing with reasonable accommodation the essential functions of the public safety position for which s/he was considered."* Section III Responsibilities of the Appointing Authority at (6.) also requires the appointing authority to notify HRD with a written statement that the candidate has *"... been found unqualified... and that no reasonable accommodation is possible."* (administrative notice: HRD "Model Plan For Psychological Screening of Entry-Level Public Safety Positions")

66. Dr. Reade did **not testify** that she found that the Appellant suffered from either a "Category A Medical Condition" or a "Category B Medical Condition". Dr. Reade also did **not state** such findings or conclusions in her unfavorable psychiatric second opinion **report** of March 18, 2008. (Ex 9 and testimony of Dr. Reade)
67. A psychological pre-screener's job is not to decide whether to hire a candidate for the position of police officer. Rather, a pre-screener's job is to discern from the material presented whether that candidate **suffers currently** from a psychological condition, which would interfere with their ability to carry out the duties of a police officer. (Dr. Schaeffer.)
68. In psychological screenings, **employment history** is a critical factor used in assessing whether a candidate possesses a psychological condition which has interfered with the applicant's ability to function well in a work setting and therefore may impair that candidate's ability to function in the position for which he has applied. (Dr. Beck and Dr. Schaeffer.)
69. The Appellant's employment history in this case suggests that he does **not** possess any psychological conditions, which have or would in the future interfere with his ability to function well as a police officer. There is **no** evidence that he exhibited "defensiveness," "rigidity," "anxiety," "emotional turmoil," problems with "anger," or issues "communicat[ing] clearly" in any of his past jobs. (Ex. 9, pp. 2-3; Dr. Beck and Dr. Schaeffer.)
70. Dr. Schaeffer's report states: "**He is currently working in Dorchester District Court, gaining an inside view of the criminal justice system at work. Mr. Chaves has also been employed since he was in his mid-teens. A reference from a probation officer at Dorchester District Court, who also knows his family, described him as having 'excellent interpersonal skills,' as well as using 'common sense and compassion.'** His supervisor at Dorchester District Court described him as 'hard working, dependable, and managing stress well.' In the documentation on his past

employment, there were no reports of his having problems with anxiety nor that he has difficulty in articulating or communicating with others. Indeed there was every indication that both in academia and the work place, Mr. Chaves has performed at a highly competent level.” (Ex. 16, p. 5.)

71. Dr. Reade admits that Appellant’s work references “**praise his common sense, compassion, work ethic and integrity.**” (Ex. 9, p.1.)
72. Dr. Reade also admits that the Appellant is “**an intelligent, hard-working man with a sincere interest in police work.**” Dr. Reade’s disqualification of the Appellant was based upon the anxiety and communication problems she **purportedly** saw during their interview, and his rigidity and defensiveness (inability to acknowledge faults and ask for help), which she **purportedly** saw in his test results and interview. (Dr. Reade, Ex. 9, p.2) (Emphasis added)
73. However, Dr. Reade reported her opinion in vague, insubstantial or indefinite language: “the current testing *indicates* that he *may be too defensive or rigid* to acknowledge his limitations or ask for help.” And “*raised concerns...*” and “*...indications of possibilities*” (testimony). Dr. Reade relied on “*the records provided to me by the Boston Police Department*”. She also relied on her own subjective interview appraisal, the current and prior (2006) testing and Dr. Scott’s unfavorable reports of her two prior interviews to formulate her opinion. (Dr. Reade, Ex. 9) (Emphasis added)
74. Rigidity is manifested by black and white thinking. A person who suffers from rigidity has a difficult time adjusting to novel situations. (Dr. Schaeffer.)
75. Dr. Reade admits that there is **no indicia** in the Appellant’s employment, educational or personal history that he has ever suffered from defensiveness, anxiety, rigidity, and communication problems. She did **not** contact any of Appellant’s employers or references to determine whether what she was seeing in Appellant’s interview and paper and pencil testing had ever manifested itself in Appellant’s real life. (Dr. Reade.)
76. When asked why she had not contacted or reviewed on the references contained in the Appellant’s BPD Student Officer Application and attachments; Dr. Reade testified defensively that “**it’s a little trickier evaluating reference**”. However, she admitted that she had not reviewed the BPD Student Officer Application and attachments (Ex 1) in her evaluation. Despite her opinion of unfitness, Dr. Reade testified that she gave “a lot of weight” to the Appellant’s resume and job background. Dr. Reade testified in an evasive and reluctant manner when questioned about her failure to review or rely on the Appellant’s personal and employment references regarding the issues of: extreme defensiveness, rigidity, anxiety and communication problems when under stress. Dr. Reade testified: “None of the references specifically address those points.” However, that would seem all the more reason for Dr. Reade to want to contact them or review the references. (Dr. Reade, reasonable inferences)

77. Dr. Reade **constructed an explanation** for the total void of any examples, in the Appellant's background of: **extreme defensiveness, rigidity, anxiety and communication problems when under stress**. She profiled the Appellant as a person who is very conscientious and effective in a structured situation, yet he would react the way she described, if he were asked to step out of that comfort zone and into a novel and stressful situation; as she claims he did in her interview. (Dr. Reade)
78. Dr. Reade reported and testified that the Appellant admitted to a difficulty in her interview that he can **"get tongue-tied"** when under stress and she testified that he then immediately tried to retract that statement. **The Appellant denied** making any such statement during the interview and in fact claimed that working under pressure and public speaking may be his strong suit. Dr. Reade testified here in an emphatic manner, in expression, tone, cadence and facial expression: **"He actually told me..."** This is an example of Dr. Reade attempting to create an admission by the Appellant to confirm her interview observations and evaluation opinion. The Appellant did not make this statement or attempted retraction during the interview. (Dr. Reade, Appellant, demeanor, exhibits, reasonable inference)
79. Dr. Reade's prejudicial predisposition was set by her reviewing and relying on Dr. Scott's reports of her first level screening interviews of the Appellant. Dr. Reade automatically knew Dr. Scott's reports were negative. Dr. Reade testified that she relied on Dr. Scott's reported observations, concerns and assessment as if they were accurate and truthful. **For example Dr. Reade relied on the accuracy of Dr. Scott's reported concern that the Appellant showed a history of unacknowledged irritability with potential explosive outbursts.** Yet, this concern is ethereal, tenuous and indefinite without at least a single historical example in his background, on which to project potential future behavior. The Appellant has no such history. The approach indicated here for Drs. Scott and Reade appears to be the use of the word **"unacknowledged"** which could mean that it was psychologically determined to exist, without any real world confirmation in the historical data. (Dr. Reade, Ex 9, reasonable inference)
80. Dr. Reade is well aware of the **subjective nature** and two-way interaction of her interviews and the **serious consequences** of her fitness determination on the candidates. She admits that **she has a lot of power** in these situations. She claims to make a great effort to eliminate the subjective aspect of the evaluation process and to be as objective as possible. Dr. Reade's actual **style or technique of psychologically interviewing is unknown**, certainly in its more subtle and indirect aspects, like word choice, emphasis and delivery. She admits in her report to pressing the Appellant on certain matters, during the interview. An audio-video recording of the interview would have been helpful in filling this critical void. (Ex 9, Dr. Reade)
81. Dr. Reade also had another opportunity to gather convincing evidence in support of her ultimate opinion of unfitness. Her opinion of unfitness is essentially grounded on her reporting of events and conversation which occurred during the Appellant's interview with her and with Dr. Scott. She attributed the Appellant's extremely poor performance in the interviews to the level of anxiety and stress caused to him by the nature of the

interview, a long sought career being determined. Surely, if Dr. Reade's premise were true, another follow-up interview with Dr. Reade would have caused the Appellant even greater stress and anxiety. If Dr. Reade's opinion on present or future performance is accurate and she had confidence in it; had she scheduled another interview and audio-video recorded it; she would then have convincing, demonstrative evidence to support or corroborate her opinion. In the face of such convincing demonstrative evidence; it would be unlikely that the Appellant would have appealed his bypass. (Exhibits, testimony, Dr. Reade, demeanor, reasonable inferences)

82. In her report, Dr. Reade records harsh observations relative to Mr. Chaves's size and physical appearance. She states: **"He was a small man who appeared meek and had an ingratiating manner. His palm was sweaty when he shook my hand."** Dr. Reade also refers to Mr. Chaves as a **"moralistic"** man inferring that such trait is negative. This is an example of Dr. Read's prejudice and predisposition. (Jx. Ex. 9, pp. 2-3.reasonable inference)
83. Dr. Reade was cross-examined on how she had formulated that initial, harsh characterization of the Appellant while he was in her waiting room for the interview. Dr. Reade denied that it was a harsh description, but **could not remember** exactly how she made it, since the interview was a year earlier. Unhindered by a lack of memory, she automatically fell back on a declaration of the obvious reliability and accuracy of her assessment. She answered: **"Clearly, he presented in a way that elicited that assessment from me."** (Dr. Reade)
84. Dr. Reade also testified giving a description of and stating her concerns regarding the Appellant's supposed personality factors. She testified that **"... being quite moralistic can be quite troubling for police work."** She did not further explain this statement. (Dr. Reade)
85. Dr. Reade reported and testified that the Appellant suffered from anxiety to an extent that it drastically affected his ability to communicate, as example: **"...acutely anxious and unable to answer even simple questions clearly or directly."** Dr. Reade also testified that she found **his anxiety so extreme, as to put him and others at risk.** However, Dr. Reade also testified that: **"He had no difficulty talking about his strengths and accomplishments."** Dr. Reade also reported that at the interview he **"provided me with an exhaustive list of various talents."** I find this testimony to be inconsistent but intended by Dr. Reade to create a negative inference; that inference is: the Appellant is egotistical or prideful, to the extent that it could even cure his significant anxiety induced communication problems. (Ex. 9, Dr. Reade, reasonable inference)
86. It is natural for a candidate to be anxious during the interview portion of their psychological screening because their potential employment is on the line. This is particularly true for recruits who have had little to no contact with a mental health professional. (Dr. Reade; Dr. Schaeffer.)

87. Dr. Beck states in his report: **"The fact that a candidate makes a poor impression on an interviewer is secondary information that must be evaluated in the context of overall life functioning. The interview is a two person situation, and it is always possible that the interviewee is responding to something in the situation, e.g., knowing that rejection is likely, or to something about that the interviewer that we can not evaluate..."** (Ex. 14, p.7.)
88. In conducting his own psychological pre-screenings, Dr. Schaeffer gives **some** weight to a candidate's performance in an interview; however, he is cautious not to draw too much from something small or insignificant. Dr. Schaeffer has contacted employers or investigators when he was unsure about something he saw in an interview to "see what was going on there" and to confirm what he saw. (Dr. Schaeffer.)
89. With respect to Dr. Beck's interview of the Appellant Dr. Beck states: **"[Chaves] made good contact with me and presented himself as a serious person who wished to respond appropriately to my questions and to convey an accurate impression of himself...His thought was formally intact. His vocabulary was excellent. His insight and judgment appeared to be sound."** (Ex. 16, p. 8.) (Emphasis added.)
90. Dr. Schaeffer's report states: **"He acknowledged being a bit nervous about the interview, given that he had been disqualified on the basis of a psychiatric evaluation in the past, but he answered all questions in a calm, clear manner, with no evidence of significant anxiety."** (Ex. 16, p. 1.) Dr. Schaeffer goes on to state: **"In our interview, we discussed concerns voiced by both Drs. Scott and Reade that Mr. Chaves had not been clear in his responses to questions, both in terms of mumbling and being disorganized in his thinking. Mr. Chaves noted that he was surprised at that observation, given that public speaking had been a "strong suit" for him. However, he acknowledged that because he had been disqualified when he applied to be a dispatcher, and now found himself again talking to the same psychiatrists, he may have become more nervous, fearing it was "happening again" (meaning he'd be disqualified). As to why he did not seem that nervous in our interview, he acknowledged some anxiety, though it did not appear to interfere with his ability to respond.** (Ex. 16, 2.)
91. The psychological testing methods employed by Dr. Reade were flawed because she overly relied upon the Appellant's interview performance, and gave little to no weight to the Appellant's adult life functioning including relevant work history. (Dr. Beck and Dr. Schaeffer; Ex. 14, pp. 6-7.)
92. Dr. Beck states: **"[Drs. Scott and Reade] based their conclusions primarily on their interviews of the candidate, and, in the case of Dr. Reade, secondarily on the results of his earlier 2006 MMPI-2 which were not invalid and taken in connection with his Boston Police Dispatcher application. Once again, we find the Boston psychiatrists rejecting a man on basis of test and interview data alone. In this case, not only are they unsupported by evidence from life, but there is substantial evidence from life that this man has performed well in multiple job situations. Neither in my own**

interview, nor in his life history is there any evidence that would support the conclusion that this interview and this test are evidence for a condition that would be cause to reject this candidate. *Neither psychiatrist provided any data from the applicant's history in support of their conclusions that he was unfit. Both psychiatrists noted his history of successful educational and professional function.*" (Ex. 14, p. 5.)

93. Neither Dr. Scott nor Dr. Reade audio or video record their psychiatric candidate review interviews. (Exhibits, testimony, administrative notice)

G. Facts Related to Dr. Scott & Her Failure to Testify

94. **Dr. Reade's report states:** "Dr. Scott concluded that Mr. Chaves 'is sincere and persistent and has some awareness that he has difficulty thinking and responding under stress.' She noted that he has 'been steady in his accomplishments' in school and at work. 'However, under the stress of both the testing and the interview, even a second time, he was unable to focus, organize, listen, and respond coherently to straightforward questions and directions. His thinking is slowed when preoccupied with his emotional response to his questions and he was unable to answer directly, reassure himself or move onto the next question.'" (Ex. 9, p. 1.)
95. The Department did **not** produce Dr. Marcia Scott at hearing to testify nor did BPD submit Dr. Scott's report into evidence. The Department did not offer any evidence of any subpoena or other request for Dr. Scott's presence or for her unavailability to testify or any other excuse for her absence as a witness. I draw no adverse inference from these facts or Dr. Scott's failure to be called as a witness.
96. All references related to Dr. Scott's examination and opinion, reported by or testified to by Dr. Reade during this proceeding are unauthenticated and unsubstantiated hearsay. They are excluded from the evidence, if proposed for the truth or accuracy of its content. They are unreliable for truthfulness or accuracy. This hearing officer sustained the Appellant's objection to Dr. Reade's testimonial reference to the statements and observations of Dr. Scott as contained in Scott's reports and referenced in Reade's report. Dr. Reade relied on Dr. Scott's reported statements and observations, having reviewed them prior to her own interview of the Appellant. I believe that some of Dr. Scott's negative purported observations and assessments did influence or taint Dr. Reade's view of the Appellant. However, I attribute no weight, accuracy or truthfulness to Dr. Scott's alleged statements or observations. Yet, I recognize that Dr. Reade relied on Dr. Scott's reports in arriving at her own opinion of unfitness. (Ex. 9 and testimony of Reade, Exhibits and testimony)

H. Facts Related to Witnesses' Demeanor and Testimony at Hearing

97. Dr. Reade's minimalization or complete omission of the Appellant's established considerable educational, employment and personal history as a foundation for her own opinion is inexplicable. Dr. Reade is obligated to substantiate a Category B Medical (psychiatric) condition by the showing of a "history of any psychiatric condition, behavior disorder or substance abuse problem." HRD regulations and its Model Plan, require that "such history shall be evaluated on that individual's history, current status, prognosis, and ability to respond to the stressors of the job..." Dr. Reade failed to even attempt to corroborate her assessment by contacting any of the numerous personal and other references he provided on his BPD application and supporting documentation. She failed to contact BPD's Occupational Health or the Recruit Investigation Unit to seek support or corroboration. She failed to contact the Dorchester District Court, the busiest court in the state and within the BPD's jurisdiction for information on the Appellant. Certainly there are numerous BPD employees and court contacts; such as Clerk-Magistrate Owens, who are familiar with the Appellant, the court work environment and his performance there. Dr. Reade could have obtained specific detailed information from these valuable sources to address her concerns regarding the Appellant's behavior or psychology. Dr. Reade's failure to make a reasonable inquiry or search for information to support her opinion of psychological unfitness is a dereliction, given the serious nature of the matter, a career being at stake. Dr. Reade's characterization and portrayal of the Appellant's behavior and statements during the interview, in her testimony and her report appear to be incongruous, sometimes vague or indefinite, subjective and/or misleading; certainly contrary to what the Appellant's background information, personal references, interview presentation to Drs. Beck and Schaeffer and his presentation and demeanor at this hearing would support. (Exhibits, demeanor and testimony)
98. Dr. Reade's demeanor is that of a well practiced and experienced psychiatric professional. However, it is difficult to reconcile her alleged critical observations and her extremely negative characterizations of the Appellant's behavior and presentation during her interview; with the Appellant's calm and appropriate demeanor at this hearing. Dr. Reade chose to assess and interpret the Appellant's MMPI-2 and the PAI test results on her own, without the recommended assistance of a specially trained psychologist. Dr. Reade was aware, at the time of her evaluation, that the Appellant is: well educated, intelligent, bilingual, conscientious, hard-working and possessing common sense, compassion, integrity and a sincere interest in police work and with a blemish-free background and employment history. Dr. Reade was also well aware that her interviews cause anxiety in most candidates, as a career was on the line. She was also aware of the two-way interactive dynamic of an interview, in which each participant reacts to the other. She was also aware of the subjective nature of interview observation and recording. Yet, Dr. Reade gave an opinion of unfitness at the conclusion of her psychological screening evaluation. Dr. Reade gave this ultimate opinion of unfitness primarily based on her interview/evaluations of the Appellant. It is inexplicable and unjustified for Dr. Reade to have formed these dire and incongruous opinions of the Appellant, without ever attempting to corroborate them, by contacting background references familiar with the Appellant and the other sources of data previously cited. Alternatively, Dr. Reade could easily have audio-video taped her interview with the Appellant, to corroborate her very serious observations and opinions. The lack of an

accurate interview record also denied the Appellant evidence to support his version of the interviews. The lack of an accurate record of the interviews also hampers the Commission's ability to independently determine facts related to it. Dr. Reade had an affirmative duty to specifically substantiate her opinion by reference to the Appellant's background history. This failure to corroborate was Dr. Reade's choice, since the Appellant had provided a volume of background documentation with accompanying releases and waivers, as required by the BPD. I do not find Dr. Reade to be a credible or reliable witness, especially regarding her subjective rendition of the interview occurrences. I found this finding partly on Dr. Reade's resistant, sometimes evasive testimonial style and repetitive omissions regarding any actual historical corroboration and substantiation of her grave and consequential opinion of unfitness. Dr. Reade's opinion and conclusions were substantially subjective determinations of the degree or intensity of the Appellant's alleged traits or behavior patterns, as exhibited during her interview. Her memory of or documenting of the specifics of the interview is questionable. She admitted that she could not remember how she had formed her initial harsh impression and characterization of the Appellant; while in her waiting room prior to the interview. Her excuse was that the interview had occurred a year earlier. Her interview had been tainted from the beginning by her review and reliance on Dr. Scott's prior negative reports. Dr. Reade, as the regular second level screener expects a negative report from Dr. Scott, the regular first level screener. Preliminarily reading and then citing Dr. Scott's negative observations and opinions as a basis for her opinion of unfitness seems prejudicial and unsound scientifically. It also seems like a feeble attempt to conjure up supportive or corroborative historical data. Dr. Reade's predisposition to follow Dr. Scott's prior opinion is borne out by the available statistics. I find Dr. Reade's testimony and the opinions and documents she authored to be biased or insufficiently factually supported by reliable and credible evidence in the record. (Exhibits and testimony, reasonable inferences, testimony and demeanor of Dr. Reade)

99. Dr. Schaeffer's testimony and demeanor: I found Dr. Schaeffer to be a confident and very competent professional in his field who impressed me as an honest, credible and articulate expert witness. His ease of testimony reflects his many years of professional practice, impressive professional and academic credentials and numerous opportunities as an expert witness. (Ex. 17) He confidently and completely explained and justified his reported opinion of psychological fitness of the Appellant for the position of police officer. He did this by frequent specific reference to the Appellant's history and interview interaction. (Dr. Schaeffer, Ex. 16) He also listed and explained the flaws and shortcomings in Dr. Reade's approach and methodology employed in her psychological screening/evaluation; primarily an over-reliance on a single interview presentation, while nearly ignoring strong positive historical data. He substantially corroborated the observations, findings and opinion of Dr. Beck. He was forthright, consistent and resolute under cross-examination. I find him to be a reliable and credible witness. (Testimony and demeanor of Dr. Schaeffer)
100. Dr. Beck's testimony and demeanor: I also found Dr. Beck to be a confident and very competent professional in his field, who impressed me as an honest, credible and articulate expert witness. Yet, Dr. Beck has even more years of professional experience

and more opportunities as an expert witness. He has impressive professional and academic credentials, being extensively published. (Ex. 15) He confidently and completely explained and justified his reported opinion of psychological fitness of the Appellant for the position of police officer. He did this by frequent specific reference to the Appellant's history and interview interaction. (Ex. 14) He also listed and explained the flaws and shortcomings in Dr. Reade's approach and methodology employed in her psychological screening/evaluation; primarily an over-reliance on a single interview presentation, while nearly ignoring overwhelmingly strong positive historical data. He substantially corroborated the observations, findings and opinion of Dr. Schaeffer. He was forthright, consistent and resolute under cross-examination. Dr. Beck appeared to be genuinely concerned that both the Appellant and the BPD would suffer a great loss if the Appellant were disqualified to be a Boston Police Officer. I find him to be a reliable and credible witness. (Testimony and demeanor of Dr. Beck)

101. Appellant is neat in appearance with short hair and was dressed in a suit and tie. He appeared calm, relaxed and at ease. He remained relaxed and poised throughout both days of hearing. His mannerisms and presentation were appropriate. He maintained good eye-contact with me as hearing officer and the examiner throughout. He observed Dr. Reade during her sometime negative testimony without any inappropriate expression. Appellant's testimony was clear and easily understood. His responses on both direct and cross-examination were thoughtful, yet quick and concise. Appellant exhibited little, if any anxiety, even under the pressures of cross-examination. He exhibited indicia of sincerity and appropriate pride when describing: his employment duties, educational experiences and goals and his college Internship and public speaking programs as it related to his long held interest in a police career. He is soft spoken but not timid or lacking in confidence. He exhibited a good memory but did not embellish his testimony, even if an opportunity presented itself. He believes that his job at the Dorchester District Court calls for efficiency, accuracy, thoroughness, reliability and professionalism. He takes his responsibilities seriously since the Judge, Clerk and others rely on him. His testimony rang true in tone, delivery, word choice and body language; including his refutation of events and statements claimed by Dr. Reade and Dr. Scott, to have occurred at their interviews. He asserted that he has never had any problem handling stressful situations or becoming tongue-tied and on the contrary handles them very well. He believes that reacting appropriately and communicating well in stressful situations is a strong suit for him. He used his experience in public speaking as an example. He testified that he did not exhibit any signs of stress or anxiety or poor communication during the interview. He thought he had a good interview with Dr. Reade; "I answered all of her questions". I find the Appellant's testimony to be a credible and reliable. (Demeanor and testimony of Appellant, testimony and exhibits)

CONCLUSION:

In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was

“reasonable justification” for the bypass. E.g., City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997) (Commission may not substitute its judgment for a “valid” exercise of appointing authority discretion, but the Civil Service Law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”). See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) (“The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles the commission acted well within its discretion.”); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”). See also, Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission “sufficient to satisfy due process”)

It is well settled that reasonable justification requires that Appointing Authority actions be based on “sound and sufficient” reasons supported by credible evidence, when weighed by an

unprejudiced mind guided by common sense and correct rules of law. See Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346, 348 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 451 N.E.2d 443, 430 (1928). All candidates must be adequately and fairly considered. The Commission has been clear that a bypass is not justified where “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988).

A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991).

The greater amount of credible evidence must . . . be to the effect that such action ‘was justified’. . . . {I}f [the factfinder’s] mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different . . . from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, ‘unless it shall appear that it was made without proper cause or in bad faith.’

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*)

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001). “Abuse of discretion occurs . . . when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and improper factors are assessed but the [fact-finder] makes a serious mistake in weighing them.” E.g., I.P.Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir.1998).

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a by-pass decision, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert's opinion is based are grounded on an adequate foundation, either by establishing "general acceptance in the scientific community" or by showing that the evidence is "reliable or valid" through an alternative means, e.g., Canavan's Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) citing Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by "education, training, experience and familiarity" with special knowledge bearing on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990).⁶

Experts' conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, 767 N.E.2d 629, 634, rev. den., 437 Mass 1109, 747 N.E.2d 1099 (2002). As a corollary, when the fact-finder is presented with conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See, e.g., Ward v. Commonwealth, 407 Mass. 434, 438, 554 N.E.2d 25, 27 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73, 420 N.E.2d 298, 305-308 (1981); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, 566 N.E.2d 1132, 1133, rev.den., 409 Mass. 1104, 569 N.E.2d 832 (1991).

⁶ As to the latter point, the Commission's notes that it is granted broader discretion in the admission of evidence than permitted in the Massachusetts courts. Compare G.L.c.30A, §11(2) with Department of Youth Services v. A Juvenile, 398 Mass. 516, 531, 499 N.E.2d 812, 821 (1986).

No specific degree of certitude is required for expert testimony and it may be accepted if the opinion is “reasonable” and expressed with sufficient firmness and clarity. See, e.g., Commonwealth v. Rodriguez, 437 Mass. 554, 562-63, 773 N.E.2d 946, 954 (2002); Bailey v. Cataldo Ambulance Service, Inc., 64 Mass.App.Ct. 228, 235, 832 N.E.2d 12, 11-18 (2005); Resendes v. Boston Edison Co., 38 Mass.App.Ct. 344, 352, 648, N.E.2d 757, 763, rev.den., 420 Mass. 1106, 651 N.E.2d 410 (1995). So long as the expert’s opinion is sufficiently grounded in the evidence, but certain facts were unknown or mistakes were made in some of the expert’s assumptions, that generally goes to the weight of the evidence. Commonwealth v. DeValle, 443 Mass. 782, 792, 824 N.E.2d 830, 839 (2005); Sullivan v. First Mass. Fin. Corp., 409 Mass. 783, 79-92, 569 N.E.2d 814, 819-20 (1991). However, “it is also a familiar principle that testimony may not rest wholly on conjecture, and that is no less the case when the conjecture flows from the mouth of an expert. [Citations] Qualification as an expert does not confer a license to spout nonsense.” Fourth Street Pub, Inc. v. National Union Fire Ins. Co., 28 Mass.App.Ct. 157, 547 N.E.2d 935, 939 (1989) (Kass.J., dissenting), rev.den., 406 Mass. 1104, 550 N.E.2d 396 (1990). See also Board of Assessors v. Odgen Suffolk Downs, 398 Mass. 604, 606-607, 499 N.E.2d 1200, 1202-1203 (1986) (expert testimony stricken which blatantly overlooked critical facts). See also: (impartial medical examiner’s opinion (IME) found in part to be unsupported by admissible evidence in the record of hearing at DIA), Thomas Brommage’s Case 75 Mass. App. Ct. 825 (2009). This issue was also addressed by Justice Christine M. Roach in a recent Superior Court Memorandum and Order at page 6.- Boston Police Department v. Roberts, Superior Court Docket No. 2008-4775-G (December 30, 2009) “Stripped of these inappropriate foundations, BPD’s expert opinions failed to establish reasonable justification for the bypass. Under these circumstances, the Commission reasonably decided BPD bypassed Roberts, based on the biased

decision-making of its experts, rather than a fair application of the psychological standards set forth in G.L. c. 31, § 61A and its accompanying regulations. The Commission as fact finder was well within its discretion to credit Robert's experts' opinions in this regard. Commonwealth v. Hinds, 450 Mass. 1, 12, note 7 (definitive jury charge on assessment of expert opinion testimony). The court is aware of no authority to the contrary.

In so doing, the Commission did not substitute its judgment for that of BPD, because it made no determination of its own as to Roberts psychological fitness as a police officer. Boston Police Dept. v. Cawley, Suffolk Civil No. 06-5331-C;..." Justice Roach further concluded "The problem on this record is that the clinicians' interview conclusions are not supported by substantial, reliable, psychiatric evidence." Memorandum and Order on Cross-Motions for Judgment on the Pleadings, dated December 30, 2009, at page 6, Suffolk Civil Action No. 2008-4775-G Boston Police Department vs. Shawn Roberts and Massachusetts Civil Service Commission

Applying these applicable standards in the circumstances of the present case, the Commission concludes that the BPD's bypass of the Appellant for appointment to the position of Boston police officer did not comport with basic merit principles resulting in harm to her employment status through no fault of her own. **The Department's Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Appellant Does Not have a Mental Disorder as Defined by the HRD Regulations, or the DSM-IV**

The rules under which the BPD may justify a bypass for medical reasons, including psychiatric conditions, are spelled out by HRD's regulations for "Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel" (the HRD Regulations) and incorporated into the BPD's Psychological Screening Plan (PSP). The standards for a "Category

A” medical condition, which is an automatic disqualifying condition, requires proof that a police officer applicant carries a psychiatric diagnosis of certain specific psychiatric “disorders”, as defined by the DSM-IV. [HRD Regulations, §10(6)(o)(1)]. A “Category B” psychiatric medical condition includes (a) any “history” of a “psychiatric condition, behavior disorder, or substance abuse problem not covered by Category A”, which “may or may not” be disqualifying depending on its “severity and degree”, based on that individual’s “current status, prognosis, and ability to respond to the stressors of the job” [HRD Regulations, §10(6)(o)(2)(a)] and (b) “any other psychiatric condition that results in an individual not being able to perform as a police officer.” [HRD Regulations, §10(6)(o)(2)(b)].

The evidence here establishes that the Appellant does not carry, and has never been diagnosed with any “Category A” or “Category B” psychiatric or behavior disorder contained within the DSM-IV, has no history of any such disorders, and has no history of substance abuse problems within the meaning of the HRD Regulations. *cf. Adesso v. City of New Bedford*, 20 MCSR 426 (2007) (multiple hospitalizations and treatment for substance abuse and schizophrenia); *Melchionno v. Sommerville Police Dep’t*, 20 MCSR 443 (2007) (diagnosis of Schizotypal Personality Disorder and repeated, bizarre job-related problems); *Hart v. Boston Police Dep’t*, 19 MCSR 397 (2006) (history of substance abuse and prior treatment); *Lerro v. Boston Police Dep’t*, 19 MCSR 402 (history of Obsessive Compulsive Disorder and treatment for Acute Stress Disorder); *Mitchell v. Marblehead Fire Dep’t*, 19 MCSR 23 (history of bipolar disorder and substance abuse).

Thus, the justification for bypassing the Appellant turns on whether the evidence supports a conclusion that she fits one of the “Category B” definitions of a “psychiatric condition” of sufficient severity and degree to disqualify her to serve as a police officer.

A “psychiatric condition” would seem to be virtually synonymous with a mental or emotional “disorder”. See, e.g., MERRIAM-WEBSTER’S MEDICAL DICTIONARY (2002) (“psychiatric” means “dealing with cases of mental disorders”); AMERICAN HERITAGE DICTIONARY (2006) (“psychiatry” means “the branch of medicine that deals with the diagnosis, treatment and prevention of mental and emotional disorders”). The experts who testified, however, all seem to use the term more broadly to encompass behavior that does not necessarily qualify as a “disorder”. Dr. Beck defined a Category B disqualifying “psychiatric condition” to mean evidence of some aspect of a person’s behavior or trait that appears over a range of circumstances or in a variety of situations, either in the historical past [§10(6)(o)(2)(a)] and/or the historical present [§10(6)(o)(2)(b)].

The Commission accepts this premise. An applicant may be disqualified for having a Category B “psychiatric condition” so long as the applicant has a “psychiatric condition” which has manifested itself by a preponderance of scientifically reliable and credible proof of deficient mental health behavior, but not necessarily proof of a psychiatric “disorder” found within the DSM-IV.

The Appellant has a very impressive background history in all respects. However, both BPD screeners pay lip service to this important overt fact and concentrate on purported interview generated events instead. The first-level screening by Dr. Scott was improperly infected with a perfunctory, pre-disposition to disqualify the Appellant as indicated by her prior interview, testing results and her report from 2006. There is a strong indication that Dr. Reade takes the lead from Dr. Scott and relies on those prior negative observations and determinations. focuses on those same minor events raised by Dr. Scott. The taint of Dr. Scott’s ultimate negative determinations in 2006 and 2008 and her other negative observations clearly contaminates Dr.

Reade's evaluation, to the point of nearly predetermining the results. This inclination is also indicated by the one-sided statistical figures for these two Interviewers over a three year period. (See *Roberts* decision) and Dr. Reade's ready acceptance and affirmation of the unauthenticated and unsubstantiated hearsay events cited in Dr. Scott's negative first level report. However, the accuracy of the BPD's version of the interview events and observations are not susceptible to independent verification, since neither Dr. Scott nor Dr. Reade audio or video record their evaluation interviews.

The BPD had the capacity to audio-video the Appellant's psychological-screening interviews by both Dr. Scott and Dr. Reade. The audio-video technology or equipment is relatively inexpensive and easily operated. These interviews are pre-scheduled and take place at a set location. Indeed, the BPD has used such electronic audio-video recording equipment in the past for what it describes as "discretionary interviews" of applicants by the BPD-(RIU) Recruit Investigation Unit for disqualification or "bypass" purposes of those applicants. See Jeffrey J. Cordeiro, Jr. v. Boston Police Department, No. G1-07-362, CSC decision allowed on January 15, 2009 and Brian Walker v Boston Police Department, No. G1-07-371, CSC decision allowed on October 29, 2009. Such audio-video recording of these interviews, if available would be the best evidence of the actual relevant statements, events and other circumstances alleged to have occurred. The basis for a psychological disqualification bypass of a candidate may rely in a substantive part on a subjective version of the interview events, which the candidate contests. The benefit of this type of inexpensive yet actual objective evidence, for the parties and the adjudicatory reviewer of this controvertible matter, is indisputable. The interaction of the candidate and the Psychiatrist during the interview may be complex and sometimes confused or conflicting. The determination of or the evaluation of this interaction may depend on subtle

factors or implications. The interview evaluation is subjective by nature and both participants engage in it, to the best of their ability and understanding. Mistakes or misunderstandings may be made by either party, rendering a later accurate detailed version of the interview difficult to determine. The lack of a complete audio-video recording resulted in the expenditure of significant resources by both parties; all in an attempt to reconstruct what transpired during two short interviews and to perform an analysis of the psychological ramifications of that incomplete reconstruction.

On the evidence presented here, the Commission is satisfied that the BPD clearly failed to carry its burden to justify bypassing the Appellant because of a disqualifying Category B “psychiatric condition”. Therefore, The Department’s Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Appointing Authority’s Characterizations of the Appellant as Possessing Psychological Characteristics Which Impair His Ability to Perform the Essential Functions of a Police Officer Lack Factual Support in the Appellant’s Background.

Dr. Reade described her role, purpose and procedures in conducting her pre-employment psychological screenings for the BPD. Her aim is to do an evaluation that is tied to the characteristics and duties of the job being applied for. It is a “very job specific” evaluation.

II. CONCLUSIONS OF LAW:

A. The Department’s Psychological Bypass of Appellant Must be Overturned Where Dr. Reade Relied on Stale and Impermissible 2006 Medical Evidence in Coming To Her Conclusion

It is the long-standing practice of HRD that an appointing can only consider and reply upon negative medical testing as a reason for a bypass if the testing was conducted **no more than six months prior to disqualification.** See *Buckley v. Boston Police Department*, 13

MCSR 191 (2000). As detailed below, a candidate receiving a conditional offer of employment from the BPD must undergo a medical examination, which includes a psychological screening component. (Ex 3, and 12.) HRD instituted its practice to prohibit appointing authorities from using prior negative medical test results, including psychological test results, against recruit candidates *ad infinitum*. *Id.*

Put simply, Dr. Reade in bypassing the Appellant in 2008 reviewed and relied upon the Appellant's negative psychological testing from 2006 conducted in connection with a non-civil service civilian dispatcher job. (Ex. 9, pp. 1 & 3.) Indeed, Dr. Reade's report states: "Previous testing from 2006 was valid and indicated significant anxiety, anger and emotional turmoil." (Ex. 9, pp. 1.) As part of Dr. Reade's conclusion she states again: "Prior testing, which he approached in a less-guarded fashion, raised concerns about significant turmoil, anxiety and problems managing anger." (Ex. 9, pp. 3.) Thus, Dr. Reade did **exactly** what HRD's long-standing practice has been intended to prevent. Specifically, she impermissibly reviewed and relied upon stale two (2) year old psychological testing from 2006 in bypassing the Appellant in 2008.

For these reasons alone, where the Appointing Authority's psychological bypass of the Appellant relied upon negative medical testing conducted more than six months prior to his current disqualification, the bypass appeal must be allowed. For this *de novo* Commission hearing the Appellant's 2006 MMPI-2 and PAI test results, (Exs. 18 & 19 taken *de bene*) are not admissible and have been struck from the record of this proceeding.

B. The Department's Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Appointing Authority's Characterizations of the Appellant as Possessing Psychological Traits and Characteristics Which Impair His Ability to Perform the Essential

Functions of a Police Officer Lack Factual Support in the Appellant's Background.

Where a candidate has no mental impairment, and otherwise has an unblemished work record, the Civil Service Commission has refused to uphold a psychological bypass based upon mere speculation raised by a candidate's performance on his or her psychological testing including the clinical interview. Like a medical bypass, mere speculation with respect to a psychological or mental condition is not enough. There has to be significant evidence in the record that the candidate suffers from a psychological or mental condition, and that this condition will interfere with his or her ability to perform the essential functions of a job. Here, the Appointing Authority, relying upon Dr. Reade's second-level opinion, bypassed the Appellant stating that he suffered from "anger," "anxiety," "emotional turmoil," "defensiveness," "rigidity," "and poor "communication" which would interfere with his ability to function effectively and safely as a police officer." (Ex. 9, p. 3.) As detailed below, however, in addition to the fact that the Appellant does not suffer from a specific condition as described in the DSM-IV or the HRD regulations, Dr. Reade's conclusions with respect to the Appellant lack factual support in the Appellant's background and in the record as a whole.

Where an appointing authority has bypassed a candidate on the grounds that s/he did not pass its psychological examination, the Commission applies basic merit principles in determining whether the bypass was appropriate. *Gerakines v. Town of North Reading Police Department*, 12 MSCR 30 (1999); citing G.L. c. 31, s. 1; *Flynn v. Civil Service Commission*, 15 Mass. App. Ct. 206 (1983). The issue before the Commission in these cases then becomes whether on the evidence presented before it, the Appointing Authority has sustained its burden of proving there was sound and sufficient reason for disqualifying the Appellant for appointment on the grounds that s/he was psychologically unfit. *Id.*; citing *City of Cambridge v. Civil Service Commission*,

43 Mass. Ct. 300 (1997), *McIsaac v. Civil Service Commission*, 38 Mass.App.Ct. 473, 476 (1995), *Gloucester v. Civil Service Commission*, 408 Mass.App.Ct. 292, 297 (1990); *Mayor of Revere v. Civil Service Commission*, 31 Mass.App.315 (1991).

The Commission has consistently held that a candidate should not be psychologically bypassed unless there is psychological evidence showing that the applicant is **actually unqualified** for the position of police officer, rather than simply being **potentially unqualified**. *Frank J. Masiello Jr. v. Town of Framingham*, 15 MCSR 6 (2002); *Michael Kilmartin v. Lowell Police Department*, 10 MCSR 89 (1997) (evidence and supportive testimony concerning appellant's proven record of disciplined behavior in what is considered a stressed environment as a corrections officer cannot be disregarded.); *Gerakines v. Town of North Reading, supra*; *Lucero v. City of Revere*, 8 MSCR 200 (1995)(absolutely no evidence that elevated scale 9 spotlights psychological condition which has interfered with Appellant's ability to function well in an employment setting); *Daniel Funaro v. Chelmsford Fire Department*, 8 MSCR 29 (1995) (Commission overturned bypass holding that a psychological bypass based on psychological testing and clinical observations obtained after a single interview will not stand up where there exists evidence in the appellant's background to the contrary); *Thomas Whalen v. City of Quincy*, 7 MCSR 271 (1994).

Indeed, in the case of *Daniel Funaro v. Chelmsford Fire Department*, the Commission overturned a psychological bypass even though two (2) doctors for the Appointing Authority found the appellant unfit perform the essential functions of a firefighter. In support of his case, the Appellant submitted to the Commission an independent psychological assessment as well as a letter from Steven Vellucci, his plant supervisor for six years in a job unrelated to firefighting,

addressing areas of concern highlighted by the Appointing Authority doctors. The Commission found as follows:

The Vellucci letter paints the Appellant as an exceptionally hard-working and reliable employee. The Appointing Authority has no basis for disrupting this portrait other than paper and pencil test results and the clinical observations of Drs. Barry and Gressitt, arrived after a single meeting with each. Dr. Barry's and Dr. Gressitt's characterizations lack factual support in the Appellant's background and fail to diagnose any specific disorder identified in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. While the test results may highlight areas of concern regarding a candidate's background, they should not deny career opportunities to individuals who otherwise have blemish-free records.

Moreover, in the case of *Lucero v. City of Revere*, 8 MSCR 200 (1995), the Commission overturned a psychological bypass, even though the applicant had an elevated personality level based on an MMPI scale and "appears hyperactive with a tendency to drive himself excessively with periodic episodes of irritability, hostility, and aggressive outbursts." The Commission found that because there was no evidence that the elevated scale had ever interfered with the appellant's ability to work, it could not justify his psychological disqualification. *Id.*

First, as detailed below, it was unrefuted at hearing that the Appellant does **not** suffer from a psychiatric condition as defined by the HRD regulations or the DSM-IV. Secondly, and most importantly, there is absolutely **no** evidence that the psychological issues - "anxiety," "defensiveness," "rigidity," "emotional turmoil," "anger," or poor "communication"- cited by Dr. Reade in her report have ever interfered with the Appellant's ability to function in an employment setting-even where such employment has been stressful in nature. Dr. Beck and Dr. Schaeffer testified that a candidate's employment history is a critical factor used in assessing whether a candidate possesses a psychological condition, which has interfered with or would interfere with the applicant's ability to function well in an employment setting. Indeed, as detailed above, this Commission itself has overturned psychological bypass appeals where there

exists no evidence that the psychological condition cited to by the Appointing Authority has ever been problematic for the applicant in the employment context. *See Funaro and Lucero, supra.*

Here, it is compelling that the Appellant has rigorously pursued his secondary education and has received both a bachelors and a masters' degree related to law enforcement from highly esteemed schools. During his school tenure the Appellant interned with a police department and engaged in numerous public speaking activities without issue. Appellant currently works at the Dorchester District Court, the busiest court in the state of Massachusetts. Appellant boasts an unblemished record with the Court as well as with his previous employers including a liquor store and ice skating rink. Appellant provided BPD with several employment references and **none** of these references provide data to substantiate Dr. Reade's finding that Appellant suffers from any psychological issues – let alone “anxiety,” “defensiveness,” “rigidity,” “emotional turmoil,” “anger,” or poor “communication” - and thus could not handle the rigors of a BPD police officer position. (Ex. 1 back of packet; Jx. Ex. 9, pp. 2-3.)

To the contrary, Anthony S. Owens, the Clerk Magistrate with the Dorchester District describes the Appellant's job performance as: “**hardworking, completes all tasks assigned to him, and requires little direct supervision. His work product is always of the highest quality.**” In response to the question “How does the employee manage stressful situations” Mr. Owens states: “**Mr. Chaves appears to manage stress well.** Currently he works in the courts record room. He fields telephone calls, updates computer entries without complaint.” (Ex. 1 back of packet.) (Emphasis added.) Additionally, Deirdre Kennedy, a probation officer at the Dorchester District Court, states: “**Our colleagues at Dorchester District Court and I have been impressed with David's demeanor and professionalism over this past year. He does his job, does what needs to be done, but always in a respectful, professional manner.**” In

response to the question “how will candidate respond to street/crisis/dispute Ms. Deirdre Kennedy states: **“One of David’s biggest strengths is that he effectively deescalates potentially volatile situations so that they do not become crises or disputes. I do know that he has been the voice of reason with his friends at parties or clubs when a dispute starts to arise. He is the one who will calm people down, apologize, and get people out of the situation. I also have to say that I haven’t seen or heard him be stressed out by anything other than final exams at school.”** (Ex. 1 back of packet.) (Emphasis added).

There is simply **no** evidence that the psychological issues cited by Dr. Reade - “anxiety,” “defensiveness,” “rigidity,” “emotional turmoil,” “anger,” or poor “communication,” - have **ever** been problematic for the Appellant in the employment context or would even potentially be problematic in his future employment as a police officer. *See Funaro and Lucero, supra*. In fact, all of the evidence is to the contrary.⁷

Oddly, Dr. Reade admits that there is absolutely **no** data in Appellant’s history to support her findings that Appellant suffers from “anxiety,” “defensiveness,” “rigidity,” “emotional turmoil,” “anger,” or poor “communication” or that, such issues have ever been problematic for Appellant in his employment, educational or personal life. Rather, Dr. Reade admits that her findings related to Appellant’s psychological issues - anxiety,” “defensiveness,” “rigidity,” “emotional turmoil,” “anger,” or poor “communication”- are based **solely** upon Appellant’s psychological testing results and his performance during her one forty-five (45-60) to sixty minute interview with him.

⁷ The fact that the Appellant’s employment at the Dorchester District Court is not identical to the functions of a BPD police officer does not change the impact of his experience. In a psychological bypass appeal, the Commission’s test does **not** require that the Appellant’s previous work history be identical in nature rather that the Appellant’s previous work history is useful in determining whether the psychological concerns raised by the Appointing Authority have ever posed problems for the Appellant in the work setting. *See Fucero and Lucero, supra*. Here, the Appellant has dealt with high stress situations and anxiety and communication have never been problems for him.

In sum, Dr. Reade asks this Commission to ignore Appellant's twenty-six (26) years of exemplary and competent life functioning, and to ignore the fact that Appellant does **not** suffer from any psychological or mental health condition, and uphold her bypass of him based solely upon her subjective non-medical opinion come to after a short clinical interview that: the Appellant will not be able to withstand the rigors of the BPD—his life long dream.

First, the Appellant's psychological testing in **no** way supports Dr. Reade's concerns relative to Appellant's psychological functioning. The Appellant "faked good" and invalidated the results of his 2008 MMPI-2 and PAI. According to Dr. Schaeffer, who has conducted and interpreted thousands of psychological tests (far more than Dr. Reade), it is absolutely normal for a law enforcement job applicant taking the MMPI-2 and PAI to "fake good," answering the questions in such a way as to deny normal human frailties and faults, because such applicant is trying to put their best foot forward to impress their employers. In any event, when a candidate "fakes good" and invalidates the results of his or her psychological test it raises a red flag for a clinician that such candidate may be "defensive" and have difficulties admitting their own faults and asking for help. It is the clinician's role to take such test results and meet with the candidate to gather information relative to their life history to determine whether the test results are an anomaly or whether they are corroborated by evidence. Dr. Schaeffer reviewed Appellant's 2008 psychological test results with Appellant and was not able to uncover any data from Appellant's life history to support that "defensiveness" was or had been a problem for Appellant thereby rendering Appellant's tests baseless. Indeed, Dr. Reade admitted at hearing that there was no indicia in Appellant's life history to support the "defensiveness" seen in his 2008 psychological test results. Thus, even according to Dr. Reade, Appellant's 2008 testing in **no**

way supports that he has any psychological condition, which renders him, unfit to be a BPD police officer.

As detailed above, Dr. Reade's reliance on Appellant's 2006 negative psychological in bypassing Appellant in 2008 (the subject of this appeal) was unlawful. In any event, Dr. Reade took **no** part in Appellant's 2006 hiring process for BPD dispatcher and **never** reviewed the results of such testing with Appellant at that time or during her 2008 interview with Appellant in connection with this bypass appeal. It was unrefuted at hearing that sound medical practice mandates that a clinician **never** cite to a paper and pencil psychological test result, *i.e.*, anger problems, as a medical truth without reviewing such results with a candidate and gathering historical data from that candidate to corroborate such results. In her 2008 report bypassing the Appellant, however, Dr. Reade violates her own medical practice and cites as truth Appellant's 2006 test results – "anxiety, emotional turmoil, and anger issues"- without any corroborating data. To the contrary, Dr. Schaeffer reviewed Appellant's 2006 test results with him during their 2008 interview and was not able to uncover any data from Appellant's life history to support that he has issues with "emotional turmoil," "anxiety," or "anger" thereby rendering such test results baseless. Thus, notwithstanding Dr. Reade's baseless assertions to the contrary, Appellant's 2006 testing in **no** way supports that he has a psychological condition, which renders him, unfit to be a BPD police officer.

Secondly, the Appellant's clinical interview performance in **no** way supports Dr. Reade's concerns relative to Appellant's psychological functioning. At the outset, it is striking that Dr. Reade appears to be the **only** person who has had difficulty with Appellant's communication skills making her concerns regarding their exchange at the clinical interview spurious, at best. Dr. Reade relies on Dr. Scott's statements made to her relative to the Appellant's performance

during their interview as evidence supporting Dr. Reade's observations. However, BPD did not produce Dr. Scott to testify nor did it submit Dr. Scott's report in this matter. Thus, Dr. Reade's statements both in her report and during her testimony at this hearing attributed to Dr. Scott are unsubstantiated hearsay and this Commission gives them no consideration. The Appellant's employment references praise his communication skills. Dr. Beck and Dr. Schaeffer had **no** problems with Appellant's communication skills during their clinical interviews. The Appellant testified before this Commissioner and he was thoughtful, clear and concise even under the rigors of a contentious and stressful cross-examination. Dr. Reade's difficulties in communicating with Appellant appear, at best, appear to be a function of Dr. Reade and her interview style, of which there is no reliable direct evidence and which this Commission has found in the past questionable and often infused with subjectivity and personal bias. *See Cawley v. Boston Police Department*, G1-06-95 (2006 Bowman); *affirmed Cawley v. Boston Police Department*, Superior Court Case No. 06-5331-C (2007 Muse); *Roberts v. BPD*, G-06-321) (2008, Stein).⁸

Dr. Reade's disqualification opinion of the Appellant is also concerning, given the harsh comments she made both in her report and during her testimony at this hearing relative to Appellant's size and physical appearance. Surprisingly, Dr. Reade refers to Mr. Chaves as a "small man who appeared meek and had an ingratiating manner." Dr. Reade also makes reference to Mr. Chaves "sweaty" handshake and refers to Mr. Chaves having morals as being a negative trait. There is clear indication from Dr. Reade's statements that she developed a bias

⁸BPD appealed this decision to Superior Court. On Cross-Motions for Judgment on the Pleadings, Roberts' Motion was Allowed and BPD's Motion was Denied and the case was Dismissed With Prejudice. The court found that, "... BPD's experts failed to establish reasonable justification for the bypass. Under these circumstances, the Commission reasonably decided BPD bypassed Roberts, based on the biased decision-making of its experts, rather than a fair application of the psychological standards set forth in G.L. c. 31, § 61A and its accompanying regulations." *See Memorandum and Order BPD v. Civil Service Commission & Shawn Roberts*, Superior Court Action No. 08-4775-G, page 6 (Roach, December 30, 2009).

towards Mr. Chaves even before their interview began which then clouded her judgment and her role as a psychological pre-screener. Dr. Reade determined that based upon Mr. Chaves's size and physical appearance that he would not be able to sustain the rigors of being a BPD police officer. It is not the role of Dr. Reade to determine whether a candidate is tall enough or tough enough to be a BPD police officer. BPD has a rigorous application process which includes a medical examination and a physical abilities test which is administered by HRD. Moreover, to fault an employment candidate for being "moralistic", or having "sweaty" hands or for looking "ingratiating" during an interview as Dr. Reade has done to Mr. Chaves is simply outrageous and is in no way medical evidence from which a candidate can be excluded from employment. The Commission has overturned at least two of her prior determinations based upon unsupported factual presumptions and Dr. Reade's apparent bias. See *Cawley v. Boston Police Department*, G1-06-95 (2006, Bowman); *affirmed Cawley v. Boston Police Department*, Superior Court Case No. 06-5331-C (2007 Muse); *Roberts v. BPD*, G-06-321) (2008, Stein)

Even if Dr. Reade's observations of the Appellant made during their forty-five (45-60) to sixty minute interview are accurate; the fact that Dr. Reade relied upon such observations – that he suffered from "anxiety," "defensiveness," "rigidity," "emotional turmoil," "anger," or poor "communication"- in forming her opinion that Appellant had a psychological condition which rendered him unfit to be a BPD police officer in light of Appellant's twenty-six (26) years of life functioning which showed that he had **never** suffered from any such psychological conditions is not sound medical practice. Dr. Reade admitted at hearing that she did **not** contact any of Appellant's employment or personal references to discover whether the observations she was seeing during her clinical interview with Appellant had **ever** actually been problematic for the Appellant though she could have easily made such calls. Dr. Schaeffer testified that it is sound

clinical practice and the clinician's responsibility both to the respective police department and to the candidate to contact employment or personal references when the interview performance does match up with that candidate's life history to "see what is going on there." Had Dr. Reade contacted the Appellant's employment and personal references she could have confirmed that was she seeing was a function of the interview process and not a function of the Appellant's psychological functioning and Appellant would now be a BPD police officer. Under this Commission's strict standards as to psychological bypasses, Dr. Reade's unsubstantiated hunch that Appellant cannot withstand the rigors of the BPD particularly in light of the fact that all of Appellant's life data shows otherwise must be overturned.

For these reasons, where the Appointing Authority's psychological bypass of the Appellant lacks factual support in the Appellant's background, particularly his employment history, and in the record of this proceeding as a whole.

C. The Department's Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Department Doctor's Own Psychological Testing Methods Were Inaccurate.

In psychological bypass appeal cases, the Commission does far more than simply look to make sure that impermissible reasons are not being asserted, rather, it will require an Appointing Authority to show that its doctors' psychological screening methodology is accurate and defensible. *See Michael Doran of Norwood*, 11 MCSR 121 (1998).

Here, Dr. Schaeffer and Dr. Beck, both experts in their fields, testified that the Department doctors' psychological testing methods were flawed in that they gave too much weight to the Appellant's performance during clinical interviews and gave virtually no weight to the Appellant's background history and adult life functioning. In coming to her conclusion with

respect to the Appellant, Dr. Reade, by her own admission, relied almost solely on the Appellant's performance during her clinical interview. There are other factors or variables which also, may have had an effect on the results of the BPD's psychological evaluation. Dr. Reade's assessment of the Appellant may have been prejudiced by Dr. Scott's prior interview and negative conclusions concerning the Appellant. There is statistical evidence to support the strong likelihood of a negative assessment by Dr. Reade will follow a negative assessment by Dr. Scott. Dr. Reade was unable to explain the anomaly, of a "very high percent" that had dropped out of the BPD's last Academy class in 2008, after being pre-screened by both her and Dr. Scott. Neither Dr. Reade nor Dr. Scott reviewed the results of the two written tests, (PMI and MMPI-2) with the Appellant. Neither Dr. Reade nor Dr. Scott is specially trained to evaluate these written psychological test results. Neither Dr. Reade nor Dr. Scott consulted with a specially trained psychologist for the evaluation of the Appellant's test results. They both relied on proprietary computer generated "interpretive reports" for such evaluations. Dr. Schaeffer, the only witness specially qualified to evaluate these written test results pointed out for instance, that approaching such tests defensively or overly cautiously does affect the results. The Appellant admitted that he approached the written testing in a cautious manner. Additionally, Dr. Reade reported her opinion of the Appellant in vague, insubstantial or indefinite language: "the current testing *indicates* that he *may be too defensive or rigid* to acknowledge his limitations or ask for help." And "*raised concerns...*" and "*...indications of possibilities*" (testimony). Dr. Reade relied on "*the records provided to me by the Boston Police Department*". She also relied on her own subjective interview appraisal, the current and prior (2006) testing and Dr. Scott's unfavorable reports of her two prior interviews, to formulate her opinion. However, Dr. Reade's actual style or technique of psychologically interviewing, especially in its subtlety and detail, is unknown.

Dr. Reade had a huge volume of information on the Appellant's background at her disposal with which to confirm or corroborate her psychological opinions and conclusions. However, Dr. Reade testified that in fact she did **nothing** to ascertain whether her concerns with respect to the Appellant having psychological issues had been issues for the Appellant in the employment context and in his life. Indeed, Dr. Reade gave **no** weight to the Appellant's years of employment at the Dorchester District Court and the fact that not one single reference indicated any issues with "anger," "anxiety," "emotional turmoil," "defensiveness," "rigidity," "and "communication." Dr. Reade did **not** contact any of the Appellant's references or supervisors to see whether the purported problems she was seeing in the clinical interview had ever been problematic for the Appellant in the employment contact.

According to Dr. Beck and Dr. Schaeffer, experts in their field, a sound psychological testing methodology consists of the clinician taking any questionable test results, as well as any red flags raised during the clinical interview, and determining whether these issues have ever impacted that Applicant's ability to live or work in such a way that it would suggest them incapable of performing the job for which they have applied, *i.e.*, a police officer. This determination is made through a thorough investigation and understanding of the Appellant's background and history of adult life functioning. If the issues raised by the testing and the interview are not supported by data, then a disqualification and bypass is not justified. Dr. Beck and Dr. Schaeffer's psychological testing model is indeed consistent with Commission case law in that it necessitates psychological evidence. *See Funaro and Lucero, supra.*

As to the Department doctors' over-reliance on the Appellant's performance during her clinical interviews the following can be said. The clinical interview is an unnatural setting. Candidates are seeking employment and therefore come into the interview wary that their job is

on the line and wanting to impress the clinician. Moreover, the clinical interview is **not** intended to be a therapeutic setting. Indeed, many of the candidates have never in their lives been before a mental health professional and therefore it would be unreasonable to anticipate that in one (1) hour they could form a trusting relationship with the interviewer and disclose and process “emotionally-charged” times in their lives.

The fact that somebody is “anxious” during this clinical interview is therefore natural and should be taken within the context of the situation. Indeed, Dr. Schaeffer testified that in conducting his own psychological pre-screenings, Dr. Schaeffer gives some weight to a candidate’s performance in an interview; however, he is cautious not to draw too much from something small or insignificant. If the Appellant’s background history had suggested that “anger,” “anxiety,” “emotional turmoil,” “defensiveness,” “rigidity,” “ and “communication” had been a recurring issues for him and that it had interfered in the employment context, then Dr. Reade’s observations that the Appellant exhibited such traits during their clinical interview, and her reliance on this observation in coming to her conclusion, might have some credibility. But, as described above, the Appellant’s employment history and references suggests otherwise leaving Dr. Reade’s observations to the contrary as nothing more than mere speculation.

Thus, at best, what you are left with is an Appellant who did not live up to the subjective expectations of the clinical interviewer. According to Dr. Beck and Dr. Schaeffer, experts in their field, these psychological testing methods are simply unacceptable and almost always lead to conclusions without factual support in the record, as described-above, which occurred in the case at hand.

D. The Department’s Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Appellant Does Not

Have a Mental Disorder as Defined by the HRD Regulations, or the DSM-IV.

In the case at hand, the Department gave the Appellant a conditional offer of employment, contingent upon him passing a medical examination and the psychological screening component of the medical examination. A conditional offer of employment is a legal term of art developed under the Massachusetts anti-discrimination laws, Massachusetts General Laws. c. 151B, as well as the Americans with Disabilities Act. Specifically, under these statutes, an employer may not require that an applicant undergo a medical examination prior to making that individual a conditional offer of employment. Most relevant, G.L. c. 151B provides as follows:

An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that **an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job...**

M.G.L. c. 151B, s. 4 (16) (emphasis added). Thus, an offer of employment is conditional under those statutes when the only condition for appointment is the passing of a medical examination that is directly related to the performance of the position to be filled. *Id.* It follows therefore that a candidate's conditional offer of employment can only be rescinded based upon the type of information that can be obtained from a "medical examination." *Id.* These requirements have created a system where individuals receive appointments off Civil Service lists but are still required to undergo physical, medical and psychological screenings for certain jobs (mainly public safety positions).

In the Boston Police Department, a candidate receiving a conditional offer of employment from the Department must undergo a medical examination which includes a psychological screening component. (Ex 3, and 12.) This is consistent with G.L. c. 151B and its

requirement that a conditional offer of employment can only be made conditional subject to a further medical examination. The Department administers the psychological screening component of the medical examination pursuant to its psychological screening plan, which has been approved by HRD. (Ex. 12.) According to the first sentence of the Department's psychological screening plan, the goal of the psychological screening process is to "identify candidates who may exhibit any evidence of a mental disorder as described in the Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel." ("HRD Regulations") The HRD Regulations referenced in the Department's psychological screening plan were promulgated by HRD pursuant to its authority under the Massachusetts Civil Service Laws, G.L. c. 31, section 61A, which provides that a candidate appointed to a municipal police department **must** undergo an initial medical evaluation and shall have met the initial standards prior to performing the duties of that position. (Ex. 13.)

The HRD Regulations spell out the pre-placement medical evaluation standards for police officers as well as the medical conditions for which a candidate can be disqualified from employment. These medical conditions are broken down into two (2) categories, Category A and Category B medical conditions, and are described as follows:

Category A Medical Condition: A medical condition that would (1) preclude an individual from performing the essential functions of a municipal fire fighter or police officer in a training or emergency operational environment, or (2) present a significant risk to the safety and health of that individual or others.

Category B Medical Condition: A medical condition that, based on its severity or degree, may or may not, (1) preclude an individual from performing the essential job functions of a municipal fire fighter or police officer in training or emergency operational environment, or (2) present a significant risk to the safety and health of that individual or others.

(Ex. 13, Section 02, p. 1.)(emphasis added) Most relevant to this case, the Regulations include the **psychiatric conditions** for which a police candidate can be disqualified from

employment. Specifically, Section 10(5)(o) provides as follows:

(o)Psychiatric

1. Category A medical conditions shall include:

- disorders of behavior
- anxiety disorders
- disorders of thought; disorders of mood
- disorders of personality

2. Category B medical conditions shall include:

- a. a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual's history, current status, prognosis, and ability to respond to the stressors of the job,
- b. any other psychiatric condition that results in an individual not being able to perform as a police officer.

(Ex. 13 pp. 37-38.)

In this case, the Appellant was granted a conditional offer of employment and underwent the psychological screening component of the medical examination. The Appellant “failed” the psychological screening component and was bypassed on those grounds. Notwithstanding this bypass, however, it was unrefuted at hearing that the Appellant does **not** suffer from any medical condition or psychiatric condition as defined by the HRD regulations and was not bypassed on those grounds. Moreover, it was unrefuted at hearing that the Appellant does not suffer from any mental health condition as described by the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (“DSM-IV”), which is a manual listing symptoms for disorders used by psychiatrists and other mental health professionals in diagnosing patients with mental health conditions nationwide. It follows therefore that where the Appellant simply has **no** identifiable medical or psychiatric condition under the HRD Regulations or the DSM-IV, the Department had no medical grounds under the Civil Service Laws, or even its own psychological screening plan, to disqualify him and revoke his conditional offer of employment. In effect, the Department reneged the Appellant’s conditional offer of employment on the basis

of what can only be described as “non-medical” information which flies in the face of the very premise and legal protections afforded by G.L. c. 151B to a candidate given a conditional offer of employment.

BPD’s Noncompliance with “Americans with Disabilities Act of 1990”. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq., G.L. c. 151B §4(16), G.L. c. 31 § 61A and other Relevant Laws and Rules:

The Boston Police Department did not produce any evidence regarding its exploration of or offer of or attempt to provide any “reasonable accommodations” to the Appellant, due to his alleged “disability” or mental limitation, so that he could perform the duties of a Boston Police Officer. This could be considered an act of employment discrimination or the denial of an employment opportunity to a job applicant who is an otherwise qualified individual with an alleged disability. This appears to possibly be a violation of the so called “Americans with Disabilities Act of 1990”. (Administrative notice Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq., Exhibits 9, 10, 11, exhibits and testimony).

Under the ADA, a disability is: (A) a physical or mental impairment that substantially limits one or more of the major life activities . . . (B) a record of such an impairment; or (C) being regarded as having such an impairment., 42 U.S.C. §§ 12102(2)(A) and Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000) (Administrative notice)

The effect of ADA, “Americans with Disabilities Act of 1990” has been explicitly expanded by at least one recent Circuit Court decision to include all employees or job applicants not just those with disabilities. See John Harrison vs. Benchmark Electronics, Huntsville, Inc. No. 08-16656, The United States Court of Appeals for the Eleventh Circuit, Decision dated January 11, 2010. This decision reversed and remanded an appeal from the United States

District Court for the Northern District of Alabama, D.C. Docket No. 07-00815-CV-5-IPJ. The Circuit Courts decision states at page 13: “In enacting § 12112(d), Congress sought to prevent employers from using pre-employment medical inquiries “to exclude applicants with disabilities- particularly those with so-called hidden disabilities such as epilepsy, diabetes, *emotional illness*, heart disease, and cancer-before their ability to perform the job was even evaluated.”(Emphasis added) H.R. Rep. No 101-485, pt. 2, at 1. The legislative history of § 12112(d)(2) indicates that “Congress wished to curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment by drafting [§ 12112(d)].” Griffin v. Steeltek, 160 F.3d at 594, (10th Cir. 1998). Allowing non-disabled applicants to sue will enhance and enforce Congress’s prohibition.” (Administrative notice)

A conditional offer of employment is a legal term of art developed under the Massachusetts anti-discrimination laws, M.G.L. c. 151B, as well as the federal Americans with Disabilities Act (ADA). Specifically, under these statutes, an employer may not require that an applicant undergo a medical examination prior to making that individual a conditional offer of employment. Most relevantly, G.L. c. 151B provides: “An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that **an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job...**” G.L. c. 151B §4(16) (emphasis added, administrative notice)

In the bypass letter dated May 16, 2008, from the Boston Police Department Human Resources Director, Robin W. Hunt, the Appellant was informed, “Given the highly stressful

nature of urban police work, the Boston Police Department is unable to provide David Chaves with a **reasonable accommodation**.” The BPD thereby raised and addressed the issue of reasonable accommodation in its bypass letter regarding the Appellant. The conclusory language in the letter implies that the BPD did attempt to specifically determine what essential functions of the position he could not perform, why, and what specific reasonable accommodation might be implemented by the BPD. I believe that the BPD is legally obligated by Massachusetts General Laws, HRD rules and Federal law to perform these specific acts and determinations, in good faith. The BPD failed to meet or even attempt in good faith to meet its obligations under these enumerated and other relevant laws and rules. The BPD’s failure to comply with the requirements of the ADA by meaningfully addressing the issue of reasonable accommodation is another indication of some unpermitted motivation or consideration in the process. Dr. Reade and the BPD should have addressed this issue fully.

The Appointing Authority is not without recourse in redressing errors with respect to the appointment of candidates, since the legislators of this Commonwealth in their wisdom provide a one year trial period for such public safety personnel, during which time such employees can be removed from employment without recourse to this Commission. (G.L. c. 31§ 61) *See Kilmartin, supra*. This lengthy probation period should provide the Appointing Authority with ample opportunity to evaluate the performance of the Appellant under stress, and if a problem arises, or he is found to be psychologically unfit, to sever her employment. *See Lucero, supra*.

In sum, the Appellant possesses a very impressive and consistent background and employment history. There is no suggestion in his extensive background of any problems whatsoever, certainly not those claimed by Dr. Reade of: stress related, acute anxiety affecting his ability to communicate. On the contrary, his ability to perform, execute good judgment and

communicate effectively under stress appears to be his strong suit. Dr. Reade's claimed observations that the Appellant exhibited those flaws or traits during her clinical interview, and her reliance on those observations in coming to her conclusion, without any historical corroboration stretches credulity to the breaking point

The preponderance of the credible evidence shows simply that the Appellant did not live up to the subjective expectations of the clinical interviewer and this, substantially served as the basis for the Appellants' disqualification. According to Dr. Beck and Dr. Schaeffer, this psychological testing method of over reliance on claimed interview performance without a corroborating history is simply inadequate and unacceptable.

Dr. Beck and Dr. Schaeffer credibly and reliably testified in substantive support of their opinions as contained in their respective reports. They found that the Appellant did not suffer from any disqualifying psychological condition and on the contrary that he had exhibited and demonstrated over his life history to be able and qualified in all respects, including psychologically, to be a police officer.

Acknowledgment is made of a recent decision *City of Beverly* (cited below) by the Appeals Court. The *City of Beverly* decision addressed the standard of review employed by the commission for cases involving the bypass for hiring a candidate for a civil service police officer position. The Court's decision also addressed the issues of burden of proof and proper exercise of judgment incumbent upon the appointing authority in these hiring matters. The candidate there, Bell, was bypassed for appointment based on an allegation of misconduct which led to him being fired by a prior employer. The alleged misconduct by the prior employer was: "intentionally accessing the private voicemail system of another person is a serious confidentiality breach, an invasion of the privacy of other employees, as well as potentially a

violation of the law.” See City of Beverly v. Civil Service Commission & another, 78 Mass. App. Ct. 182 (2010), Appeals Court (No. 9-P-1959), Essex county, October 28, 2010. There the Appeals Court found “A Superior Court judge vacated the commission’s ruling after concluding that the commission had improperly substituted its judgment for that of the city, and Bell appealed. We affirm. [FN4]” id page 183.

The decision further stated: “although it is plain that the finding of facts is the province of the commission, not the appointing authority, the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. [FN11]⁹ Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately held, [FN12] appointing authorities are given significant latitude in screening candidates, and “[p]rior misconduct has frequently been a ground for not hiring or retaining a police officer.” Cambridge v. Civil Serv. Comm., 43 Mass. App. Ct. at 305, and cases cited.” City of Beverly at page 188.

And the Appeals Court also stated: “Instead of focusing on whether the city had carried its burden of demonstrating a “reasonable justification,” the commission focused on whether the city had proven that Bell in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing an added evidentiary burden on the city. In simple terms, neither Bell nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired. [FN15]” id at page 190 And further stated: “Absent proof that the city acted unreasonably, we believe that the commission is bound to defer to the city’s exercise of its

⁹ “FN11 As demonstrated below, this case well illustrates the difficulties inherent in sorting out what is fact finding (the province of the commission) and what is the exercise of judgment with regard to the facts (the province of the appointing authority).”

judgment.” *id* at page 191 And further elaborated: the [commission] “...ultimately rested their ruling on the city’s failure to prove that the allegations of misconduct were in fact true, a burden that we have concluded the commission erroneously assigned to the city. [FN17]” *id* at page 192. The Appeals court concluded: “In sum, we agree with the judge below that the city demonstrated a reasonable justification to bypass Bell and that the commission improperly substituted its judgment for that of the city in ordering that he be hired.” *id* at page 192

However, this present appeal, *Chaves*, is distinguishable from the *City of Beverly Appeals* Court decision, for the following reasons. The *Beverly decision* involved the determination of actual intentional physical act(s) of misconduct based at least in part on some direct and demonstrative evidence. The present *Chaves* appeal involves the determination of a psychiatric condition, with a clear definition and regulatory standards for determination of such, including the showing of some historical record of it. Instead of the BPD substantially relying on evidence of past historical occurrences; it chose to rely on the expert opinion of Dr. Reade, which opinion was primarily founded on her one hour unrecorded interview and evaluation of Chaves. In forming her opinion of psychological unfitness of Chaves Dr. Reade chose to ignore or minimize Chaves’ long term historical performance evidence which countered her opinion.

For all of the above reasons, Appellant’s bypass appeal, Docket No. G1-06-286 is ***allowed***.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, amending Chapter 534 of the Acts of 1976, the Commission directs that name of the Appellant, David Chaves be placed at the top of the eligibility list for original appointment to the position of Police Officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of Police Officer in

the Boston Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a BPD police officer. The Commission further directs that, if and when David Chaves is selected for appointment and commences employment as a BPD police officer, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification #271117. Finally, the Commission directs that the BPD may elect to require David Chaves to submit to an appropriate psychiatric medical screening in accordance with current BPD policy either (1) in the ordinary course of the medical examination process or (2) immediately upon receipt of a certification in which his name appears, as a condition to further processing of his application for appointment. In either case, such screening shall be performed, de novo, by qualified professional(s) other than Dr. Scott or Dr. Reade. It is strongly suggested that any subsequent psychological screening interview be audio-video recorded.

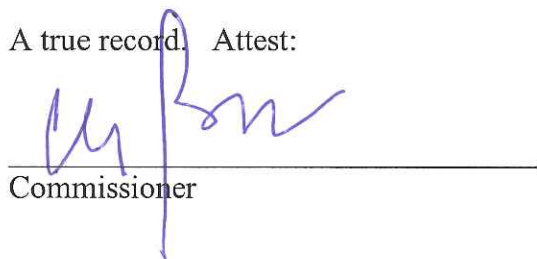
Civil Service Commission,



Daniel M. Henderson
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman-No; Henderson-Yes, Marquis-No, McDowell-Yes and Stein-Yes, Commissioners) on December 2, 2010.

A true record. Attest:


Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical

error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice: Leah Marie Barrault, Atty.
Asha White, Atty.
John Marra, Atty.-HRD