

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUCV 2011-00022-H

BOSTON POLICE DEPARTMENT

v.

DAVID CHAVES and MASSACHUSETTS CIVIL SERVICE
COMMISSION

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR A
STAY OF THE COMMISSION'S DECISION

This matter came before the Court on plaintiff Boston Police Department's (the

"Department's") motion to stay pending its appeal of the Order of the defendant Massachusetts Civil Service Commission (the "Commission") invalidating the Department's determination of the psychological unfitness of the defendant David Chaves ("Chaves") for appointment as a Boston Police Officer. For the reasons set forth, this motion is ALLOWED.

The standard, well known, will not be repeated here in the interest of expediency. See, J.Smith & H.Zobel, Rules Practice § 62.3 (2007) (with citations)

1. Likelihood of success on the merits.

A review of the record reveals a number of issues which may and likely will result in the Department prevailing. The main one being that the Commission is *obligated* to grant wide deference to the Department in its decision as a matter of law. It has not done so. To the contrary, the record supports a strong conclusion that the hearing officer did not agree with the Department's decision and made findings which support his own view of the case.

As to the argument of an institutional systemic bias against it which the Department claims is present at the Commission the numbers, at a glance, certainly tend to paint a concerning picture given that the Department is entitled to wide deference. In addition to the statistical

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evidence as to decisions presented by the Department, there are certain inexplicably strict rulings which raise questions on the issue of bias. First, there is the refusal to sequester witnesses, in the interest of "convenience" and "economy". Where these cases in many instances, come down to a battle of the experts, this Court cannot imagine a case where sequestration is more crucial to ensure an adequate means to assess the credibility of the witnesses. The hearing officer's preference for convenience ought not to have trumped the parties, including the Department's, right to a fair hearing. Motions to sequester are routinely made and granted throughout the courts and administrative agencies of the Commonwealth and it would hardly seem that the Department would need to articulate the reason for this very basic device to ensure accuracy, honesty and integrity of witnesses. Permitting an expert to sit in and hear another party's expert, particularly one of the party's objects, allows that witness to tailor his or her testimony. This is not good practice at the very least.

Then, there is the striking of Dr. Scott's testimony because it is "unauthenticated" and contains "hearsay". Given that this is an administrative hearing, latitude of evidence is permitted which would certainly include accepting the report of the examining psychologist where the risk to the public in the event of an error is so high. In this day and age of photocopies of virtually every record introduced into courts of law, the ruling that the report of the examining psychologist ought to be excluded because it is "unauthenticated" tends to lend some credence to the Department's claim of bias. As to the psychologist's report, hearsay evidence can and in fact, is quite frequently relied upon by reviewing administrative agencies. Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), citing Embers of Salisbury, Inc. V. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530 (1988). If the goal was to evaluate the reasonableness of the Department's decision, excluding this evidence certainly was not

conducive to a fair review.

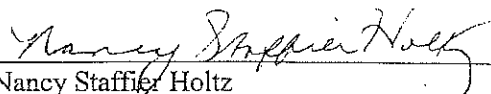
2. The Balancing of Harms.

As to the relative harms to the parties, Chaves will lose time and money if the stay is granted. The Department, on behalf of the citizens, will lose one more police officer. Chaves argues that given the attrition rate of a typical recruit class, one more empty seat, if Chaves does not prevail, does not mean much. This Court doubts that the citizens of the City of Boston who count on police protection, would agree.

3. Lastly, there is the public interest. This Court cannot say it better than the following:

"There is no more sensitive issue than the psychological fitness of law enforcement officers. A police officer's badge endows powers of arrest, and an officer's gun simultaneously poses great assurance and grave risk to the public. Thus no action should be unnecessarily taken by a reviewing court that permits one who has been determined to be psychologically unfit to be a police officer until all reasonable avenues of appeal have been exhausted. The appeal process as to that issue is underway. The stay ordered herein simply protects the *status quo* and the public's entitlement to law enforcement officers on the beat who are in fact psychologically fit for the job." (Boston Police Department v. Daniel Fitzbiggon and Massachusetts Civil Service Commission (SUCV 2010-0128-E, MacDonald, J., April 29, 2010))

SO ORDERED.


Nancy Staffier Holtz
Justice of the Superior Court

April 27, 2011

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