

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KELLY CLARK,

Appellant

v.

BOSTON POLICE DEPARTMENT,

Respondent

CASE NOS: G1-09-237

G1-11-256

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Kelly Clark, duly appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31, §2(b), from decisions by the Boston Police Department (BPD), as delegated authority of the Personnel Administrator of the Massachusetts Human Resources Division (HRD), to bypass Ms. Clark for original appointment to the position of Boston Police Officer based on the results of pre-employment psychological screening. A full hearing was held on December 6 and 19, 2010, at the offices of the Commission and was digitally recorded. Twenty-eight (28) exhibits were entered into evidence at the hearing. BPD called two witnesses and Ms. Clark called one witness and testified on her own behalf. The witnesses were not sequestered. Both parties subsequently submitted proposed decisions.

FINDINGS OF FACT

Based upon the Exhibits and the testimony of the Appellant, BPD Occupational Health Services Unit Director Roberta Mullan, Dr. Ronn Johnson, Ph.D and Dr. Mark Schaeffer, Ph.D. and inferences reasonably drawn from that evidence as I find credible, I find:

The Appellant's Background

1. The Appellant, Kelly Clark, is a native-born resident of Boston, Massachusetts in her mid-twenties. After high school, she attended one year of college prior to enlisting in the U.S. Air Force and served on active duty as a Military Logistics Technician for four years. She was honorably discharged in December 2009. She has continued her military career as a member of the U.S. Air Force Reserve and currently holds the rank of Senior Airman (E-4). (*Exhs.1 & 2; Testimony of Appellant*)

2. While undergoing basic military training, Ms. Clark completed a weapons course and was licensed to carry a handgun. (*Testimony of Appellant*)

3. Upon returning to Boston, Ms. Clark returned to school full-time to earn a degree in Medical Logistics. She was employed at Beacon Academy and as a nanny. (*Exhs.2 & 18; Testimony of Appellant*)

4. At the time of the Commission hearing, Ms. Clark was in the process of an amicable divorce from her husband whom she had met while they were both serving in the Air Force. (*Exhs.2 & 18; Testimony of Appellant & Dr. Schaefer*)

Appellant's 2010 Application for Employment with the BPD

5. Ms. Clark took and passed the civil service examination for municipal police officer and her name appeared on Certification No. 207159 issued in April 2010 by HRD for appointments to the position of full-time police officer with the BPD. (*Exh.5*)

6. Ms. Clark met with the BPD's Recruit Investigations Unit (RIU) and submitted the required Student Officer Application, which included supplying personal, professional and neighborhood letters of reference, all of which contained unqualified high opinions and numerous anecdotal examples of her good character on personal knowledge, along with documentation confirming her educational record and her exemplary military service. (*Exh.1*)

7. In particular, US. Air Force S/Sgt. Kevin Grant, who personally supervised Ms. Clark during her active duty service, praised her dedication, poise and integrity:

- "Clark worked in Medical Logistics Customer Service and resolved conflicts with customers every day"
- "Clark handles stressful situations very well . . . we work 12-14 hour days with high tempo and she had a lot of responsibility"
- "She . . . never got razzled or frustrated, but most of all, she was always respectful"
- "Everything I ever needed, Kelly was my go to person"
- "Her job performance was the standard I told the others that worked for me to emulate"
- "She has people skills and problem solving ability"
- "I also know that she believes and demonstrates the Air Force Core Values of service before self, integrity first, and excellence in all we do"

(*Exh.1; Testimony of Appellant*)

8. In response to a question in the Student Officer Application about "any information" that might suggest "a possible source of embarrassment to you, your family or the Boston Police Department", Ms. Clark disclosed that she was involved in making offensive phone calls "to a girl whom I felt had stolen my boyfriend". This resulted in harassment complaints against her filed in Roxbury District Court. At the suggestion of the RIU investigator, Ms. Clark submitted a detailed explanation in which she stated that she was "truly embarrassed and ashamed of my behavior". The first complaint occurred over the summer following her graduation from high school in 2004 and was dropped after Ms. Clark personally appeared before a clerk magistrate and apologized to the other woman. The second incident arose in early 2006, when Ms. Clark was home on leave from the military and, while at a party with some friends, she joined in when

her friends started making demeaning phone calls to the same woman from their cell phones, which resulted in a second complaint. Ms. Clark then had returned to military service and, in her absence, the parents of the two women met. Ms. Clark's father relayed his daughter's promise "never to do anything stupid and hurtful like that again" and asked "that her sincere and heartfelt apology be accepted." This amicably resolved the matter. No further formal action was taken on either complaint. (*Exhs.1,3 & 18; Testimony of Appellant, Dr. Johnson & Dr. Schaefer*)

9. Ms. Clark also disclosed on her application that, after completing basic training, she went out with her classmates to celebrate and had a few drinks, although she was several months shy of the legal age of 21 at the time. She admitted her actions when questioned by the "gate guard" upon return to the military base. She took full responsibility for the mistake, her commander credited her "honesty", and she received Article 15 (non-judicial) discipline in the form of a forfeiture of pay and temporary restriction to base. (*Exh.1; Testimony of Appellant*)

10. On or about June 19, 2010, BPD Detective Kenneth Westhaver, the RIU investigator completed his background investigation of Ms. Clark and submitted a report to the RIU commanding officer and to the BPD Director of Human Resources, Robin Hunt. His report states, in part: "Criminal Record: NONE"; no history of substance abuse (her BPD drug screen was negative); and stated: "Concerns: NONE." (*Exhs.1 & 2*)

11. On July 23, 2010, the BPD extended a conditional offer of employment to Ms. Clark, subject to completion of the medical/psychological screening process. (*Exh.4*)

BPD Psychological Screening Process

12. The BPD conducts the psychological screening of police officer candidates pursuant to the terms of HRD's "Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel" (HRD Medical Standards). (*Exh.20*)

13. The HRD Medical Standards state:

“Each municipal police department shall establish and implement a pre-placement medical evaluation process for candidates. During medical evaluation, the physician shall evaluate each individual to ascertain the presence of any medical conditions listed in these standards, or any medical conditions not listed which would prevent the individual from performing the essential job functions without posing significant risk. It is our intent to encourage the use of professional judgment regarding medical conditions that are not specifically listed. A candidate shall not be certified as meeting the medical requirements of these standards if the physician determines that the candidate has any Category A medical condition specified in these standards. Furthermore, a candidate shall not be certified as meeting the medical requirements of these standards if the physician determines that the candidate has a Category B medical condition that is of sufficient severity to prevent the candidate from performing the essential functions of a police officer without posing a significant risk to the safety and health of him/herself or others.”

(Exh. 20, p. 24) (*emphasis added*)

14. Category A and Category B “Psychiatric” medical conditions are defined as follows:

Category A medical conditions shall include: a. disorders of behavior, b. anxiety disorders, c. disorders of thought, d. disorders of mood, e. disorders of personality.

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.

(Exh. 20, pp. 37-38)

15. The purpose of a psychological evaluation is to identify “job-related psychopathy” that “rules out” a candidate from serving as a police officer. A current diagnosis of a mental disorder as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association is sufficient to qualify as a Category A medical condition. A Category B psychiatric condition is manifest by any other job-related “patterns of behavior or cognitive dysfunction” that “are present” and justify a clinical judgment that a candidate’s current impairment will interfere with his or her ability to perform the essential functions of the job of a police office. (*Testimony of Dr. Johnson & Dr. Schaefer*)

16. In or about July 2004, BPD submitted, and HRD approved, the BPD's Proposed Psychological Screening Plan, which provided for a three-phase testing and interview process.

Phase I – Administration of two written, computer scored psychological tests – the Minnesota Multiphasic-Personality Inventory – 2 (MMPI-2), and Personality Assessment Inventory (PAI). In addition, candidates are required to complete a biographical history questionnaire.

Phase II – A thirty (30) minute interview performed by the BPD's staff psychiatrist .

Phase III – If the Phase II interview raised any suitability issues, a second "in-depth clinical interview" by a Board Certified Psychiatrist, who generates a comprehensive report. The BPD staff psychiatrist will review this report and concurrence will be recorded.

(*Exh.19*)

17. On July 1, 2010, BPD's Director of Human Resources submitted a revised psychological screening plan to HRD, and requested HRD's review and approval "as soon as possible, as we have begun processing for another recruit class and will soon be required to engage in the psychological and medical screening components." (*Exh.22; Testimony of Roberta Mullan*)

18. The revised plan continued the basic three-phase components of the 2004 plan, with three principal substantive changes: (a) the MMPI-2[Restructured Form] (MMPI-2RF) replaced the MMPI-2 as one of the two written test instruments to be used,¹ (b) the initial or second screening interview could be performed by either a licensed psychiatric or a "doctoral level" psychologist, and (c) a BPD staff psychiatrist was no longer required to document concurrence with a second level screening recommendation. (*Exh.22*)

19. After an initial review, HRD indicated that it did not "see any reason to not approve" the proposed revised plan, so long as HRD received the necessary particulars about the licensed

¹ The MMPI-2RF and the MMPI-2 are substantially similar, with the MMPI-2RF being a new, condensed version. I do not find that the differences in the two versions have any material bearing on this appeal. Both tests involve a series of true-false questions or "items" which are scored in the same categories of clinical scales and both include a series of validity scales that help assess whether the test results suggest that the test taker has consciously or unconsciously skewed the results by "faking good" (under reporting) or "faking bad" (over reporting). The BPD is the first appointing authority to be approved by HRD to use the MMPI-2RF. (*Testimony of Dr. Schaefer*)

clinicians the BPD planned to employ. Following further exchanges between BPD and HRD, HRD formally approved the BPD's revised plan for psychological screening of candidates on June 30, 2011. (*Exhs.23, 28A through 28D; Testimony of Roberta Mullan*)

The Appellant's 2010 Psychological Screening

20. In July 2010, the BPD began processing candidates using the proposed revised version of its psychological screening plan. (*Exhs. 6, 7 & 9; Testimony of Roberta Mullan & Dr. Johnson*)

21. On July 31, 2010, Ms. Clark took the MMPI-2RF and PAI tests. Ms. Clark's MMPI-2RF test report stated that she presented as "well-adjusted" and "there are no indications of somatic or cognitive complaints or of emotional, thought, behavioral, or interpersonal dysfunction". The PAI test report stated that Ms. Clark's results indicated that she was a "Low risk" that she would be rated as "Poorly Suited" for the job by psychologists with expertise in law enforcement, corrections and public safety screening. She tested below average for "Critical Items endorsed" that may indicate "job-relevant concerns." (*Exhs.6 & 7*)

22. Psychological testing can properly suggest possible areas of concern, but the test results are not alone sufficient to rule out a candidate as unfit for employment. Socio-economic circumstances and semantics, as well as psychological factors, can influence how a candidate responds to the test questions. (*Testimony of Dr. Schaefer & Dr. Johnson*)

23. The only potential "concern" about the MMPI-2RF results flagged in the computer generated report involved a "possible" underreporting, indicated by the scores on the validity scales (i.e., so-called "faking good" or denying normal human frailties in an effort to put oneself in the best light). It is not uncommon, however, for a candidate to "fake good", when taking a psychological test in connection with an employment opportunity and a high score on the L or K

scales is not significant (for psychopathology purposes), unless it surpasses 65. Ms. Clark's K scale was 62, elevated, but did not reach a significant level. Her L scale was 47, well below a significant level. Similarly, Ms. Clark's PIM score on the PAI, counterpart to the MMPI L & K scales, was well below the significant level of 70 (as were all other scales) and relatively low when compared to scores of other law enforcement officers who took the test. Thus, the weight of the evidence established that Ms. Clark's 2010 written psychological test results were typical for a police officer candidate. (*Exhs.6, 7 & 13; Testimony of Dr. Schaeffer & Dr. Johnson*)

24. Ms. Clark met with Dr. Marcia Scott, the BPD staff psychiatrist, for a Phase II interview on August 5, 2010. Dr. Scott found Ms. Clark psychologically unsuitable and referred her for a Phase III interview based on the following findings:

"Ms. Clark is a tall, thin pale, sad appearing, young appearing very awkward woman; her hair tied back severely and looked anxious even greeting me. . . . [T]he interview was dominated by her failure to answer even neutral questions directly and often not honestly. Throughout the interview she was anxious, stiff, her affect angry and inflexible, her eyes bulging with anger but tears were close behind. . . . She appears unable to manage her emotions, is untruthful and breaks rules when she cannot manage them. . . . Currently, she is emotionally unstable She does not accurately assess situations, understand her reasoning, make effective judgments, control her thinking and behavior, or take responsibility for her role in problems. . . . These mental limitations and coping behaviors would make her unable to effectively to [sic] manage the stresses and perform the essential duties of an armed police officer."

(*Exhs.24 & 25ID*)

25. Dr. Scott did not testify at the Commission hearing. The Appellant objected to introduction of Dr. Scott's reports, and I marked them for identification purposes only. Dr. Scott had retired and the BPD declined to accept service of a subpoena for her to testify or to facilitate her appearance, although she still resided in the Commonwealth. After review of the reports, together with all of the other evidence, I find that the hearsay assertions in Dr. Scott's reports contain numerous subjective impressions and characterizations that are not otherwise supported in the report or corroborated through other direct evidence in the record and lack sufficient

indicia of accuracy or reliability to be credited for their truth, absent the opportunity to hear her testify. Dr. Scott's findings are reported here as they resulted in Ms. Clark's referral for a Phase III interview and were a part of the information provided to the Phase III evaluator, but I give their uncorroborated statements no weight for their truth when assessing the justification for BPD's decision to bypass Ms. Scott. (*Exh.27A*)

26. Ms. Clark's Phase III interview was conducted by Dr. Ronn Johnson, Ph.D., on September 25, 2010. Dr. Johnson is a licensed clinical psychologist who is employed as an Associate Professor and Coordinator of the Clinical Mental Health Specialization School of Leadership & Education Sciences at the University of San Diego, San Diego CA. In addition to his teaching experience, Dr. Johnson has been retained by numerous law enforcement agencies nationwide, including the San Francisco, Los Angeles and New York State police departments, and conducts about 400 pre-employment psychological screenings per year as well as additional "fitness for duty" evaluations of employed police officers. He began performing Phase III psychological screenings for the BPD in July 2010. (*Exh.8; Testimony of Dr. Johnson*)

27. Dr. Johnson's interview with Ms. Clark lasted approximately 75 minutes. He came to Boston to conduct screening interviews in "big bunches" of candidates, as many as fifteen in a day, whom he met at BPD headquarters. As was his practice, he did not record the interview. He took notes but they were not produced. (*Testimony of Dr. Johnson*)

28. Dr. Johnson asked Ms. Clark what "steps" she had taken to ensure that she would not repeat her past mistakes. He was looking for some "documented capacity to manage stress". She told him that she was "embarrassed" by her past behavior and since 2006 she had "grown up", served in the military and gotten married. Dr. Johnson said that those "words don't mean much" and, while she may have been happily married and served honorably in the military, that did not

prove that she had matured since her prior incidents of poor judgment. He did not ask her a single follow-up question about her well-documented positive work references or military work history in the Air Force which the BPD had provided him, but on which he placed little weight.

(Testimony of Appellant & Dr. Johnson)

29. Dr. Johnson concluded:

“[P]sychological test results, interview, and background information . . . reveal a problematic pattern of behavior for the applied position. . . . There is clear and convincing evidence of a well-established mental or personality pattern that would interfere with her ability to appropriately perform the essential functions of the job of police officer. In this case, there are several, areas associated with the police position that this recruit is likely to struggle to perform at a satisfactory level. These areas include interpersonal skills, managing stress, quality of judgment, and teamwork.”

“Ms. Clark has a poor understanding of herself and cannot see how her misguided thinking lead to actions that result in negative consequences. Her decision-making and judgment are irrational whenever something goes counter to her views. The psychological testing reveals a person who has an unrealistic view of herself. It also suggests that she may be inflexible and unoriginal when trying to handle conflicts. She perceives her world in an unyielding and self-centered manner. This rigidity signals low tolerance to stress and contributes to poor insight. The best example of her lack of insight was observed by her repeated problems with authorities. The recruit made threats and harassed a female romantic competitor. She also received Article 15 in the military for underage drinking. Probably the most egregious part of these matters is her seeming inability to take responsibility for her misconduct. For example, she was asked to clarify the Article 15 and magistrate incidents and reported, “I have grown up and happily married, and go to school. I have grown up a lot. My mistakes in the past are not who I am now.” She offered no tangible evidence of real maturity or self-improvement efforts aimed at preventing similar problems from reoccurring in the future.”

“The mistakes stemming from her thinking and reasoning do not register with her in a manner that allows for pre-emptive self-correction. For example, she was unable to see even a few months later that a harassing phone call made to a female competitor would be logically traced back to her. She also failed to offer a believable explanation as to how her friends were curiously able to obtain the victim’s phone number and then somehow while they were all together make a harassing phone call. Neither the intervention by her father or the magistrate influences her ability to exercise proper judgment in this situation. The recruit has an opportunity to express sincere remorse for her repeated misguided actions but instead her remarks indicate that she has not matured enough to make well-reasoned decisions. The quality of her judgment declines to a point where she avoids accepting accountability for her poor choices. It is worth noting that the recruit’s troublesome behavior contains an obsessional element that appears to be fueled by her rigid disposition. When asked about personality shortcomings, she

identified being stubborn and well as her inability to restrain herself because emotions tend to override her intellect in personally stressful situations. According to Ms. Clark, ‘Maybe I am strong-willed. Sometimes I don’t put a filter on and say what I don’t want to say.’ The recruit’s repeated offenses are *indicative of a person* who does not profit or learn from her negative experiences. History is not her best teacher. And she has an oppositional side that underscores concerns about her being inconsistently receptive to supervision intended to improve her performance as someone who would function as an armed police officer. This recruit is NOT RECOMMENDED for hire as a police officer with the Boston Police Department.”

(Exh.9; Testimony of Dr. Johnson) (*emphasis added*)

30. Although Dr. Johnson was provided with copies of each recruit’s Student Officer Application and claims he reviewed them all prior to his interviews, his report makes very little reference to the credible, percipient evidence compiled by the BPD of Ms. Clark’s personal, employment and military references and record – partially described in the findings above – that substantially discredit many of the conclusions in his report. I infer that he paid little, if any, attention to these details. (Exhs.1 through 3; Testimony of Appellant, Dr. Johnson Dr. Schaeffer)

31. On December 13, 2010, the BPD’s Director of Human Relations, Robin Hunt, wrote to Ms. Clark, informing her that the results of the psychological screening “indicate that you cannot adequately perform the essential functions” of a BPD police officer and “a reasonable accommodation is not possible” so that “you will not be appointed as a Boston Police Officer at this time.” The letter quoted verbatim the last two paragraphs from Dr. Johnson’s report, stated above, as the reasons for the BPD’s decision. (Exh.10)

32. On February 7, 2011, Ms. Clark duly appealed to the Commission from the BPD’s decision to bypass her. (Claim of Appeal, No.G1-11-39)

The Appellant’s 2011 Application for Employment with the BPD

33. In January 2011, the BPD began a new hiring cycle and Ms. Clark’s name appeared on Certification No. 203604 issued by HRD. (Exh.12)

34. Ms. Clark's prior Student Officer Application package was supplemented with updated information concerning her new residence and her recently obtained employment at Beacon Academy (where the owner "speaks very highly of the applicant and reports a perfect attendance record to date"). An updated criminal history revealed no new incidents. (*Exh.2*)

35. On March 23, 2011, the BPD extended another conditional offer of employment to Ms. Clark, subject to passing a new medical examination and psychological screening. (*Exh. 11*)

36. On March 26, 2011, Ms. Clark took the MMP1-2RF and PAI tests for the second time. These test results substantially mirrored the initial tests with no clinical scales on either test scoring above the significant level (70). In fact, the second MMPI-2RF test report added "Comparison Group Data", comparing Ms. Clark's scores with those of a sample of 674 law enforcement officers who had taken the same test. Ms. Clark's clinical and validity scale scores are all remarkably similar to those of the comparison sample of law enforcement officers. In particular, her K score (62), the one elevated validity score, supposedly suggestive of under-reporting (or "faking good"), again, was virtually identical to the K score (63) of other law enforcement officers. (*Exhs.13, 14 & 18: Testimony of Dr. Schaeffer*)

37. On April 4, 2011, Dr. Scott performed Ms. Clark's Phase II interview. Dr. Scott again characterized Ms. Clark as "very thin and tense", appeared "exquisitely groomed; well dressed, very low cut blouse with a skirt", and was "visibly stiff in her face in a frozen mask with an occasional stiff smile." Dr. Scott claimed that Ms. Clark "began to lecture me" and repeatedly characterized Ms. Clark as speaking "angrily", "blandly" and "stiffly". Dr. Scott again referred Ms. Clark for a Phase III interview. For the reasons stated earlier, I give Dr. Scott's hearsay report no weight as the basis for justification of the decision to bypass Ms. Clark. (*Exh. 26ID*)

38. On April 18, 2011, Dr. Johnson, again, conducted Ms. Clark's Phase III interview. His report of the interview recited the findings made by Dr. Scott in both her 2010 and 2011 reports. For the most part, his 2011 report is a verbatim copy of his 2010 report, even down to his erroneous transposition of the test scores on the MMPI-2RF L & K scales, his reference to Ms. Clarks's PAI PIM score from the 2010 test (the 2011 PAI PIM score was even further below the significant level and well within normal range), and his recital of her employment status as "unemployed" (although the record clearly indicated that she was then employed by Beacon Academy who had given the BPD a favorable report. (*Exh.15; Testimony of Dr. Schaeffer*)

39. Dr. Johnson's 2011 report referenced the one clinical scale score on the 2011 MMPI-2RF which was "approaching" (but did not exceed) the significant level of 70, namely her answer to a single unidentified question which gave her a score of 64 on the "Gastrointestinal Complaint" (GIC) scale. He concluded this score "is consistent with" a recruit that "may be" reporting a higher frequency of somatic complaints or "may respond" to stress through bodily means. Dr. Johnson knew of no specific evidence that Ms. Clark actually exhibited such somatic complaints, he did not explore this particular issue with Ms. Clark (he considered it ethically inappropriate to discuss a candidate's answers to specific test questions with her) and there was no other medical evidence proffered to support his conclusion. (*Exh.15; Testimony of Appellant, Dr. Johnson & Dr. Schaeffer*)

40. On June 28, 2011, the BPD's Director of Human Relations, Robin Hunt, again wrote to Ms. Clark, informing her that the results of the psychological screening "indicate that you cannot adequately perform the essential functions" of a BPD police officer and "a reasonable accommodation is not possible" so that "you will not be appointed as a Boston Police Officer at this time." The letter cited the conclusions from Dr. Johnson's 2011 report which he had copied,

essentially verbatim, from the conclusion of his 2010 report, as stated above, as the reasons for the BPD's decision. (*Exh.16*)

41. On August 15, 2011, Ms. Clark duly appealed to the Commission from the BPD's second decision to bypass her. (*Claim of Appeal, No.G1-11-256*)

Dr. Schaefer's Psychological Examination of the Appellant

42. At the request of Appellant's counsel, Dr. Mark S. Schaefer, Ph.D., interviewed Ms. Clark on August 26, 2011. Dr. Schaefer is a licensed clinical and forensic psychologist, whose experience includes pre-employment screening for a number of Massachusetts municipal police and fire departments, including Cambridge, Concord, Framingham, Lexington, Lynn, Salem and Watertown. (*Exh.17; Testimony of Dr. Schaefer*)

43. Dr. Schaefer's report made note of numerous factual errors and mischaracterizations of Ms. Clark's past behavior as reported by Dr. Scott and Dr. Johnson. For example, Dr. Scott incorrectly reported that Ms. Clark was "in treatment" with a therapist, her aunt, when, in fact, Ms. Clark had consulted her aunt for advice about her upcoming second round of psychological evaluations. Similarly, Dr. Johnson mistakenly reported the results of the psychological tests. (*Exh.18; Testimony of Dr. Schaefer*)

44. Dr. Schaefer related a significantly different version of Ms. Clark's prior episodes of poor behavior – the altercations with the romantic rival and the underage drinking incident while in the military. He portrays the former as an isolated, situational-specific incident which Ms. Clark readily admitted to him was the product of impulsive, immature "dreadful judgment" for which she showed him genuine remorse. He pointed out that she had no other problems with "authorities" or the legal system. He also noted as significant that her marriage of three years was in the process of divorce, but there was no evidence of physical or emotional abuse or

indication that she was “distraught” over the break-up; if anything, “the marriage was failing from apathy.” As to the underage drinking, he also portrays Ms. Clark to have taken full responsibility for her mistake and notes a dearth of evidence that she has ever had a substance abuse issue either before or since. (*Testimony of Dr. Schaefer*)

45. Dr. Schaefer recited a substantial body of credible evidence that both Dr. Johnson and Dr. Scott largely overlooked or ignored. He found no clinical foundation for an opinion that Ms. Clark suffered from a “well-established” (but unspecified) Category B disorder or condition. In particular, he saw no evidence that Ms. Clark “currently” exhibits difficulty with what Dr. Scott and Dr. Johnson perceived as “avoidance of aggressiveness, dependability, integrity, managing stress, and quality of judgment” and which they derived mainly from interview impressions that are not linked to any data or evidence of a single subsequent real world experience after 2006. He opined that, from a clinical point of view, the impressions of Ms. Clark’s shortcomings as characterized by Dr. Scott and Dr. Johnson were, in fact, so extreme that, if accurate, it would necessarily imply that she would be find it virtually impossible to function in the world, which is clearly not the case. (*Exh.18; Testimony of Dr. Schaefer*)

Dr. Johnson’s Testimony

46. During his testimony at the Commission hearing, Dr. Johnson was asked to identify the specific “well established” Category B “behavior disorder” that he had in mind when he wrote his report on Ms. Clark, but he was unable to do so. In fact, he believed it was improper for him to make such a “diagnosis” as part of a pre-employment psychological evaluation. (*Testimony of Dr. Johnson*)

47. Dr. Johnson agreed that there were no data that showed Ms. Clark “currently” exhibited stress management problems in the past six years. He also agreed that it was “not likely” that his

“concerns” about Ms. Clark’s behaviors would manifest themselves in her “everyday activities”,
(*Testimony of Appellant & Dr. Johnson*)

Testimony of the Appellant

48. Ms. Clark presented as physically fit and soft-spoken. Her stature closely matched Dr. Johnson’s observation (5’4” and 128 pounds) that it did Dr. Scott’s description of her as “very thin”. She appeared appropriately mature for her age, although somewhat shy and nervous, but not excessively so. I saw no signs of anger, stiffness or inability to handle the stress of the situation while she sat through the hearing and gave testimony herself. (*Testimony of Appellant*)

49. Ms. Clark had continued her college education and was one class short of earning her degree. She knew she had made a few mistakes as a young woman and offered no excuses for that past behavior. Her demeanor convinced me that she was sincere when she said that she had matured and learned from those mistakes and, specifically, knows not to let “emotions control” and to “think before she acts”. (*Testimony of Appellant*)

CONCLUSION

This appeal involves a bypass of the Appellant for original appointment to a permanent civil service position. This process is governed by G.L.c.31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

The task of the Commission when hearing a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification” for the decision to bypass the candidate Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by

correct rules of law.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (discussing preponderance of the evidence test); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (same)

“In determining whether [an appointing authority] has shown reasonable justification for a bypass, the commission’s primary concern is to ensure that the appointing authority’s action comports with ‘basic merit principles,’ as defined in G.L.c.31,§1.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban , 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. E.g., Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if “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.”)

The Commission must take account of all credible evidence in the 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 (2001) However, it is the purview of the hearing officer to determine the credibility of the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of

Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (decision relying on an assessment of the relative credibility of witnesses cannot be made by someone who was not present at the hearing)

When an appointing authority relies on expert opinion of a pre-employment psychological evaluation as the justification for a bypass decision, the Commission is mindful that the function of the psychological screening process is “narrowly circumscribed”, i.e., the psychological screener’s “sole task [is] to determine whether [the candidate] had a psychiatric condition that would prevent [the candidate] from performing, even with reasonable accommodation, the essential functions of the job.” Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 694 (2012). The role of the psychological evaluation is to ascertain whether the candidate’s “history, current status, prognosis and ability to respond to the stressors of the job” affirmatively prove the existence of a specific “disqualifying” psychiatric condition; it is not sufficient for the evaluator to find a candidate’s psychological profile “not inconsistent” with a disqualifying condition or one the evaluator thought “may” be present and it is not appropriate for the evaluator to look for the presence of “qualifying traits” or to make “substantially subjective determinations” about a candidate’s potential to perform police work at a “satisfactory” level. Id., 463 Mass. at 692-695.

The opinions of expert witnesses have no special “magic qualities” and the Commission, as the trier of the facts, may decline to adopt them in whole or in part and may give them such weight as they deserve. See, e.g., Police Dep't of Boston v. Kavaleski, 460 Mass. 680, 694-695 (2012) and cases cited; Commonwealth v. Gaynor, 443 Mass. 245, 266 (2005); Ward v. Commonwealth, 407 Mass. 434, 438 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73 (1891); Turners Falls Ltd. Partnership v. Board of Assessors, 54

Mass.App.Ct. 732,737-38, rev.den., 437 Mass. 1109 (2002). Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, rev.den., 409 Mass. 1104 (1991).

Applying these principles to the facts of the present appeal, the BPD has failed to prove by a preponderance of the evidence that Ms. Clark suffers from a disqualifying psychiatric condition that justified her bypass for appointment to the position of BPD Police Officer, as specified in the HRD Medical Standards.²

First, there was never any claim that Ms. Clark was ever diagnosed with, treated for, or suffered from a Category A psychiatric condition that would constitute an automatic disqualification for appointment.

Second, while there is some room for consideration of a recruit's history of risky behavior in the context of a separate search for evidence of a current Category B medical condition, the HRD Medical Guidelines clearly require more than simply having an evaluator offer his or her subjective impressions drawn from selected episodes of candidate's past conduct that the BPD already knew about and found not to be disqualifying. The Commission has construed a Category B medical condition to mean:

“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. Should the occasion present itself in future cases, the Commission may consider further refinement of this definition, as well as further inquiry into the scientifically appropriate role of clinical interview impressions and standardized testing in the evaluation process, with a view to seeking greater clarity on these subjects that will preserve the balance

² The Appellant argued that the screening process that the BPD used to disqualify Ms. Clark does not comply with the HRD Medical Standards, insofar as it allows a psychologist, rather than a physician, to determine if the HRD Medical Standards have been met. The Appellant also argues that the revised plan had not been approved at the time she was bypassed and, therefore, requires the Commission to invalidate the action on those grounds. While the HRD Medical Standards do not appear to have been formally adopted as regulations pursuant to G.L.c.31,§4 and §61A, they are mandated by statute and have been used for public safety hiring in their present form since 2007. In general, the Commission is not inclined to interfere with the reasoned decisions of HRD on such technical matters, and this appeal presents no reason to do so here, especially when the remedy for any such procedural error, if any, would not differ from the remedy ordered here on the merits.

necessary to respect the legitimate purposes of PSP screening while promoting requirements of the basis merit principle that eschews public employment decisions when they are arbitrary and capricious or incapable of fair and objective substantiation.” (emphasis added)

See Goff v. Fall River Police Dep’t, CSC No. G1-12-263, 26 MCSR --- (2013) citing Roberts v. Boston Police Dep’t, 21 MCSR 536 (2008). Under HRD’s Medical Guidelines, the evidence must show that the candidate’s psychiatric condition is also of “sufficient severity to prevent the candidate from performing the essential functions of a police officer without posing a significant risk to the safety and health of him/herself or others.” Finally, the Commission has noted that the BPD’s screening plan requires that a candidate’s condition must be one that cannot be ameliorated by “reasonable accommodation.” Goff v. Fall River Police Dep’t, CSC No. G1-12-263, 26 MCSR --- (2013) ³

Although Dr. Johnson recited that Ms. Clark showed “current evidence of a Category B behavioral disorder”, he never supported that opinion by identifying any such disorder. I find no credible evidence that Ms. Clark currently has, or ever did have, any such unidentified Category B disorder or condition. Indeed, Dr. Johnson couched his opinions as “concerns”, that “could raise” issues that “might be a problem”: He stated that Ms. Clark “has a poor understanding of herself” and might “experience difficulties” in “avoidance” of aggressiveness, “dependability”, “integrity”, “managing” stress and “quality of judgment”. These opinions boil down to her alleged possible inability to “control her emotions” in stressful situations based solely on three occasions of poor judgment in her past personal life. He acknowledged that there were no clinical or historical data within the past six years to support his opinions. He agreed it was “not

³This interpretation is consistent with the opinions of both experts who testified in the present appeal to the effect that a psychiatric disqualification must turn on evidence that ties episodes in a candidate’s history to some specific clinically-justified and current “job related pathology”, to use Dr. Johnson’s expression, or to an on-going “pattern of behavior or cognitive dysfunction” that is actually interfering “now” with a candidate’s ability to conform behavior to acceptable clinical norms, as Dr. Schaefer put it.

likely” that she would act out these alleged problematic behaviors in her current personal life. His could point to no current data to justify why he supposed Ms. Clark would bring these past alleged “difficulties” to current job-related police work. In fact, such a hypothesis was discredited by the current data, and, at bottom, was based on general speculation. For example, Dr. Johnson stated that, in general, police officers had to know how to relate to the public and needed to be able to regulate their emotions so that, after a “high speed chase”, in particular, they would not “go ballistic and beat the person to a pulp.” Dr. Johnson did not ever opine that Ms. Clark had a specific psychiatric condition that put her safety or the safety of others at risk of any such extreme hypothetical behavior and, even if he had, I find no credible basis to believe she was such a risk.

Third, Dr. Johnson’s subjective impressions are not consistent with the BPD recruit investigators’ findings about Ms. Clark’s history. Every one of the three prior occasions of poor judgment used to support Dr. Johnson’s opinion that she was “not suitable for hire” by the BPD, had been fully disclosed to the BPD by Ms. Clark as part of her Student Officer Application and were found to raise no “concerns.” These incidents were thoroughly investigated by experienced BPD officers, and fully considered, individually, in combination and collectively, with all of her other prior history, before BPD decided twice to offer her an appointment as a BPD police officer. Dr. Johnson did not just disagree with the BPD investigators that the few prior incidents were not disqualifying events, but he actually failed to consider other parts of the relevant data of the overall positive record of her “dependability”, “integrity”, “quality of judgment” and other traits desired in police officers that the BPD investigation had confirmed.

Fourth, although Dr. Johnson asserted each psychiatric evaluation was meant to be a “fresh look”, this was not entirely true in Ms. Clark’s case. Dr. Johnson’s second report is essentially a

verbatim repeat of the findings and conclusions found in his first report. He even copied verbatim certain interview responses attributed to her.⁴ In addition, although Ms. Clark's second round of MMPI-2RF test results changed from the first test (to be somewhat more favorable to her), Dr. Johnson included the first test results in both reports and made the same scrivener's error in reporting those results (switching the validity scores on the K and L scales). Similarly, although Dr. Johnson claimed not to have relied on the first level screening, in fact, his 2011 evaluation report quoted at length from both Dr. Scott's 2011 AND her prior 2010 first level screening reports. Whether these facts indicate a predisposition against her, or merely inattentive conflating of the process, or both, I conclude that Dr. Johnson failed to provide Ms. Clark with the objective "fresh look" that he was obliged to give her.

Relief to be Granted

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the name of the Appellant, Kelly Clark, shall be placed at the top of the all future certifications for original appointment to the position of Police Officer in the BPD until she is selected for appointment or bypassed. If and when Kelly Clark is selected for appointment and commences employment as a BPD police officer, her civil service records shall be retroactively adjusted to show, for seniority purposes, as her starting date, the earliest Employment Date of the other persons employed from Certification 207159. Finally, the BPD may elect to require Kelly Clark to submit to an appropriate psychiatric medical screening in accordance with current BPD policy; provided,

⁴ For example, Dr. Johnson's 2010 report described this colloquy: "Probably the most egregious part of these matters is her seeming inability to take responsibility for her misconduct. For example, she was asked to clarify the Article 15 and magistrate incidents and reported: 'I have grown up and happily married and go to school. I have grown up a lot. My mistakes in the past are not who I am now.' She offered no tangible evidence of real maturity or self-improvement efforts aimed at preventing similar problems from reoccurring in the future." (*Exh.9*) He repeats this same colloquy in his 2011 report, essentially verbatim, adding only two words to his last sentence. (*Exh.15*) It is not plausible that Ms. Clark gave precisely identical answers in the two interviews, and said no more, but, rather, as with other aspects of his report, Dr. Johnson failed to take care to distinguish the two evaluations.

however, that such screening shall be performed, de novo, by qualified professional(s) selected by the BPD other than Dr. Reade, Dr. Scott or Dr. Johnson.

For all of the above reasons, the appeals of the Appellant, Kelly Clark, under Docket Nos. G1-11-39 and G1-11-256 are *allowed*.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on June 27, 2013.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

Leah M. Barrault, Esq.(for Appellant)
Nicole Taub, Esq. [for Appointing Authority]
John Marra, Esq. [HRD]