Decision mailed: 12/31/10
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

SEAN T. CONNOLLY,
Appellant

v.

DOCKET NO.: G1-06-167

BOSTON POLICE DEPARTMENT,
Respondent

Appellant:

Robert J. Powers, Jr. Atty.
Law Offices of Robert J. Powers
One Court Street, Suite 27
Plymouth, MA 02360
(508) 830-3464

Appointing Authority:

Nicole I. Taub, Atty. &
Sheila B. Gallagher, Atty.
Office of the Legal Advisor
Boston Police Department
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(617) 343-4550

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Sean Connolly (hereinafter the "Appellant" or "Connolly") seeks review of the Human Resources Division's (HRD) decision in accepting reasons proffered by the Respondent-Appointing Authority, Boston Police Department (hereafter the "Department", "Appointing Authority" or "BPD"), for the bypass of the Appellant for original appointment to the position of

Boston police officer. The reasons proffered for the bypass and accepted by the Human Resources Division was that the Appellant was deemed psychologically unfit for appointment as a Boston police officer. The Department substantially based its determination of psychological unfitness on the evaluation and opinion of Dr. Julia M. Reade. The Appellant filed a timely appeal at the Civil Service Commission, (hereinafter "Commission"). A full hearing was held on January 6, 2009 at the offices of the Commission. At approximately 10:00 AM, on the morning of the full hearing, the Department filed a Motion to Recuse- Requesting that Commissioner Daniel M. Henderson recuse himself from presiding at this hearing. The Appellant opposed the Motion. A brief hearing on the Motion was held and the Motion was denied. Two (2) audio tapes were made of the full hearing. Both parties filed a post hearing proposed decision at the Commission.

FINDINGS OF FACT

Twenty–one (21) exhibits and a stipulation of facts were entered into evidence. HRD's document packet filed at the Commission on September 5, 2007 is also part of the evidence. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Dr. Julia M. Reade

For the Appellant:

- Sean Connolly

I make the following findings of facts:

1. After having taken and passed a civil service exam, the Appellant's name was placed on a certified eligibility list, Certification #251237 dated 12/12/2005, as

qualified for selection for the position of Boston Police officer. (HRD document packet, Exhibit 3)

2. The Appellant applied for a position of police officer with the Boston Police Department and met with the Department's Recruit Investigations Unit (RIU). He provided the Department with his Student Officer Application and numerous other required documents, including three "Personal Letter of Reference Forms", a "Life Relationship" Form, and three "Supervisor Forms". As required, his Student Officer Application was verified, sworn, signed, with a notarized signature by the Appellant, and submitted on November 18, 2005. (Exhibit 1)
3. The Appellant received outstanding references and evaluations from all of the contacts made by the BPD-RIU Investigator. All of his prior employers and supervisors, including Captain Mark Stahlin US ARMY, who served with the Appellant in Iraq and has kept in contact with him since. The Appellant was Honorably discharged from the US ARMY in 2004. He received outstanding references from Sergeant Preston, his supervisor at the MBTA Police Department and from others. (Exhibit 1)
4. The Student Officer Application and the numerous other required documents were BPD forms requiring specific answers to specific questions. The three "Personal Letter of Reference Forms" were also required to be signed by the reference with a notarized signature. That reference form required information on the Appellant's: Life, Good Judgment, Personal Involvement, Good Character, Community Activity, Ability to Handle Street/Crisis/Dispute, Use of Illegal Drugs and Use of Alcohol. The "Life Relationship" Form and three "Supervisor Forms" required

specific detailed answers to questions. The Section XII USE OF ALCOHOL ask only three questions: Have you been in a fight or in an accident while drinking and were you taken into protective custody? The Appellant checked the box "NO" for each of these three questions. (Exhibit 1)

5. A Sergeant Detective from the Boston Police Department Recruit Investigations Unit undertook a thorough investigation into the Appellant's background. The Appellant passed the Department's background investigation. (Exhibit 1)

6. The Department extended a conditional offer of employment by letter dated February 2, 2006 to the Appellant, contingent upon his successful completion of the medical and psychological screening component of the hiring process. (Exhibit 2)

7. On April 3, 2006, BPD's Robin Hunt sent a bypass letter to HRD's Sally McNeely stating the reasons that the BPD was bypassing the Appellant. The Appellant was bypassed by the BPD for appointment as a Boston police officer on the basis of psychological unfitness; substantially based on the opinion of Dr. Julia Reade. (Testimony of Dr. Reade, Exhibit 3)

8. That April 3, 2006 bypass letter contained the opinion of Dr. Reade for the bypass: "In summary, Mr. Connolly presents a pattern of concerning behaviors and limitations. He has no insight into his pattern of heavy alcohol consumption, is unable to provide a coherent history, appears to have some cognitive limitations and has trouble thinking clearly. He also appears mildly depressed and has a stiff and slightly menacing interpersonal manner. Finally, there are serious concerns raised about Mr. Connolly's truthfulness with respect to his clearly baseless claim

to disability benefits for PTSD. For these reasons, Mr. Connolly is currently found not acceptable for the police department." That letter further states: "Given the highly stressful nature of urban police work, *the Boston Police Department is unable to provide Mr. Connolly with a reasonable accommodation."* (Emphasis added) (Exhibit 3)

9. On June 9, 2006, HRD's Jenifer Murphy notified the Appellant by letter that HRD had approved the BPD's stated reasons for bypass, thereby allowing for appointing individuals ranked lower on Certification No. 251237. This letter also notified the Appellant of his right to appeal this bypass decision to the Civil Service Commission. (HRD's document packet)
10. 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)
11. 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)

12. The Commonwealth's personnel administrator (HRD) [HRD regulations] has established Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel HRD regulations, for police officers, establish two disqualifying categories of psychiatric medical conditions:

    - "Category A Medical Condition" is a "condition that would preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others." Category A "psychiatric" medical conditions include "disorders of behavior, anxiety disorders, disorders of thought, disorders of mood, disorders of personality".
    - "Category B Medical Condition" is a "condition that, based on its severity or degree, may or may not preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others." Category B "psychiatric" medical conditions include "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" and "any other psychiatric condition that results in an individual not being able to perform as a police officer." (administrative notice:(HRD) Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel).(administrative notice)

13. The personnel administrator's (HRD) Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel, effective until September 7, 2007, mandated a per se disqualification of any candidate with a Category A medical condition. However, those standards only called for a disqualification for 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." (administrative notice)

14. Dr. Reade testified that she did not find that the Appellant suffered from either a Category A or a Category B medical condition. She also did not report in her written opinion that she found the Appellant suffered from either medical condition. Dr. Reade testified that these interviews are employment prescreening interviews not diagnostic. (Testimony of Dr. Reade, Exhibit 7)
15. 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 Model 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 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."*(Emphasis added)(administrative notice: HRD "Model Plan For Psychological Screening of Entry-Level Public Safety Positions")

16. On or about June 2004, the Department submitted a psychological screening plan ("BPD Plan") to the Human Resources Division (hereinafter "HRD") for approval. (Exhibit 21)
17. On or about July 2004, Sally McNeely, the Director of the Organizational Development Group of the Human Resources Division of the Commonwealth of Massachusetts, approved the psychological screening plan submitted by the Boston Police Department. (Exhibit 21)
18. As stated in the BPD Plan, "[T]he goal of the proposed psychological screening process is to identify candidates who may exhibit any evidence of a mental

disorder.... This process will be used to detect through a review of the background investigation, personal history as provided by the candidate, psychological testing, interviews, and *any psychological or behavior characteristics*, which would *significantly interfere* with the candidate's successful *performance of the essential functions and duties of the position of Boston Police Officer*." The BPD Plan then goes on to state that: "Psychological screening will be administered to all recruit candidates to ensure that each candidate is *emotionally and psychologically fit to perform the essential functions of the position of Boston Police Officer.*"(Emphasis added), (Exhibit 21)

19. The Boston Police Department's Psychological Screening Plan consists of three phases. During Phase I of the Plan, all candidates are administered two written psychological tests, the Minnesota Multiphasic Personality Inventory-2 Exam (hereinafter "MMPI-2") and the Personality Assessment Inventory Exam (hereinafter "PAI"). (Exhibit 21)

20. Pursuant to the BPD Plan, no specific instructions are given to the psychiatrists conducting the first and second level clinical interviews with respect to what information and/or documents may be relied upon. Dr. Scott and Dr. Reade must abide by the Plan in conjunction with their training and experience and utilize the standards set forth by the laws of the Commonwealth (G.L.c.31, §61A and regulations promulgated by HRD pursuant thereto) to determine the psychiatric fitness to perform the duties or manage the stresses of an armed police officer. (Exhibit 21)

Phase I - Written Psychological Tests

21. The MMPI-2 is a 567 question psychometric test. It was "normed" on a combination of clinical populations and non-clinical populations initially to diagnose psychological conditions; however, as the test was further researched, researchers have been successful in ferreting out even more personality characteristics based on how a person responded on the test. The test results provide information about how the applicant has approached the test and also highlight both enduring personality traits and more acute problems that the candidate is experiencing. (Testimony of Dr. Reade)
22. The Appellant responded defensively to the MMPI-2, "admitting to few or no problems or undesirable characteristics." [H]e was hesitant to "admit to faults that most people are willing to disclose." According to his test results, the Appellant is guarded but there were not any other significant concerns that appeared on his MMPI-2 results.(Exhibit 2, testimony of Dr. Reade)
23. Dr. Reade reviews the test results both before and during the interview. She found that the MMPI-2 test results showed "a pretty unremarkable profile" for the Appellant. The Appellant was only "more defensive" than the average applicant to the BPD. Defensiveness in approach tends to suppress the test results. However, the Appellant's responses "did not invalidate the test." (Testimony of Dr. Reade)
24. Neither Dr. Scott nor Dr. Reade audio or video record their psychological prescreening interviews. However, Dr. Reade does record her forensic interviews. (Testimony of Dr. Reade)

25. On February 5, 2006, the Appellant was administered the Personality Assessment Inventory exam ("PAI") and subsequently a PAI Law Enforcement, Corrections and Public Safety Selection Report was generated by computer. (Exhibit 5)
26. The PAI is a 344 question, multiple choice test that also examines different domains of personality functioning. The PAI has been "normed" against the general population and against different gender groups, different ethnic groups, and also against post-probationary public safety officers. Because of this, the PAI results allow for comparisons to be made of the applicant to other applicants who have passed through to the point of being probationary candidates. (Testimony of Dr. Reade)
27. The PAI results indicated that the Appellant has a "moderate level of risk in five named areas: of job-related, integrity, anger management, and alcohol and substance abuse problems." In addition to these concerns, the Appellant's results demonstrated "elevations in the domains of grandiosity and verbal aggression." The Appellant also endorsed critical items relating to irritability, negative relationships, antisocial behaviors and verbal concerns. (Exhibit 5, and Testimony of Dr. Reade)
28. Dr. Reade believed that the Appellant approached the PAI test less defensively. There are sometimes problems in understanding test questions and misunderstanding or misinterpreting a question occurs. Some questions are worded as such, for instance, in the double negatives to trip people up. Dr. Reade does rely on a specialist, Psychologist colleague to interpret these written test results for her, but she did not do so in this case. (Testimony of Dr. Reade)

Phase II – Interview/Evaluation by Dr. Marcia Scott

29. On February 11, 2006, the Appellant moved onto Phase II of the Psychological Screening and met with Dr. Marcia Scott, a Department Psychiatrist, who conducted a first level psychiatric examination, pursuant to the Boston Police Department psychological screening plan, (PSP). (Exhibit 6)

30. Prior to the interview, Dr. Scott reviewed the Appellant's background documents, his MMPI-2 test scores/results, and his PAI test scores/results. As read by Dr. Scott, the Appellant's MMPI-2 profile was "defensive but valid and indicates he is self confident, gregarious and may engage in attention seeking." It also indicated that "dominance responses were high and reliability was much lower." Dr. Scott further observes that the PAI "reported a moderate job, integrity, anger management and alcohol and reflected a very high degree of impression management." She observed that as a result of the PAI scores, "the risk factors, paranoia, low motivation raises concerns about antisocial behaviors, aggression and alcohol." (Exhibit 6)

31. Dr. Scott made note of her evaluation of the Appellant. She indicated that the Appellant appeared "red-faced and sloppy." She notes, "his speech was muffled and only some words were clear." He affect was flat and he was unable to provide explanations about the history of his behavior when Dr. Scott confronted him about his enlistment in the army, employment at the MBTA and the few years he remained unemployed. (Exhibit 6)

32. Dr. Scott found that the Appellant "presented a vague story of two unconnected events." Specifically, Dr. Scott questioned the Appellant about the incident where he was stabbed and the Appellant's response was that in South Boston, "people

walk around from one corner to another." When Dr. Scott asked for more details about how he was stabbed, the Appellant indicated that he intervened when he saw another man about to get stabbed and wound up getting stabbed himself. Dr. Scott noted in the court papers she received from the Recruit Investigators described a more complex dispute. (Exhibit 6)

33. When asked for specifics about why he was arrested for carrying a "dangerous weapon," the Appellant explained that he had a blackjack because "some of the man's friends tried to stab him again." According to Dr. Scott's reports, the Appellant could not provide a coherent account of what happened or how he came to own such a weapon. (Exhibit 6)

34. Dr. Scott included in her report a description of the Appellant's work history. After high school, the Appellant informed that Dr. Scott that he was unemployed because he needed the time "to get healthy and lose weight." During this time, the Appellant was stabbed and arrested and subsequently entered the service. When asked about his most recent position with the MBTA police department, the Appellant admitted he "did booking, dispatch and service." However when Dr. Scott showed the Appellant that the MBTA records indicate he only worked in booking he admitted this was true. (Exhibit 6)

35. Another concern for Dr. Scott was that the Appellant did not "present any symptoms" when initially asked how he was feeling. When Dr. Scott noted the disability form and asked again, the Appellant said he was disabled by PTSD. Dr. Scott asked about the symptoms and, according to her report, the Appellant said "they might be bad dreams." When Dr. Scott asked the Appellant about his

symptoms again, she claimed that he stated, "the doctor gave it to him and that he did not ask for it." According to Dr. Scott's report, when she pressed the Appellant to describe his symptoms, he gave vague answers, including "bad dreams" and "did not have good relationships." (Exhibit 6)

36. In her summary, Dr. Scott stated that the Appellant's interview and testing results "raised questions about the Appellant's judgment, motivation and reliability." Dr. Scott found that the Appellant "gave detached, superficial answers to all the questions about negative and positive events in his life." Dr. Scott concluded that the Appellant's responses to her questions were "incoherent" and he failed to "make causal connections between significant and related events." In regards to VA disability award, regarding post traumatic stress disorder (hereinafter "PTSD"), Dr. Scott found that the Appellant is "coolly sociable, calm, even when confronted and could not describe symptoms illustrating PTSD." (Exhibit 6)

37. Dr. Scott in her report seems to have covered a large volume and variety of facts and circumstances for an interview that lasted only forty (40) minutes. The Appellant disputes the length of the interview, testifying that it lasted only fifteen (15) minutes. Dr. Scott in her report seems to focus on the Appellant's criminal history; despite his answering all questions in writing and providing documentation regarding it and passing the BPD background investigation which included criminal history. Dr. Scott also found his explanation of the incident of being charged with possession of a dangerous weapon-black jack, not to be coherent. She also found that "Despite prodding and specific questions related to pneumonia, he could give no details about..." the incident of pneumonia he suffered in US Army

training in 2002. She also questioned him and then pressed him on the symptoms of PTSD for which he received a disability VA. Her inquiry and description creates the inference that he somehow fraudulently or dishonestly applied for and received this PTSD disability from the VA. The Appellant denied this, in his testimony. It is important to note here that Dr. Scott's interview is an employment psychological prescreening interview and not a diagnostic determination of PTSD, pneumonia or other medical or psychological condition. The Appellant also testified that he provided all of his medical and other records to the BPD attached to the BPD Student Officer Application form. Finally, Dr. Scott summarily characterized the Appellant at the interview as follows- Appearance: red-faced and sloppy, Speech: muffled, only some words were clear, Intelligence: He did not give a coherent story of any of the negative or positive events in his history, Cognition/focus/concentration: He concentrated well. Affect: His affect was flat, Mood: His mood was low, Relate: He was confident and not anxious …, and Behavior: Controlled, etc. (Exhibits 1 & 6, Testimony of Appellant, reasonable inference)

38. I also find, that Dr. Scott's notes do reflect a certain pre-disposed negativity or criticism toward the Appellant. I find it suspect that Dr. Scott could zero in on issues i.e., a stabbing incident on 2/21/01 in which the Appellant, the victim, was walking with two friends in his neighborhood and he has set upon by an assailant and stabbed. The BPD incident report list the Appellant as the victim and his two friends as witnesses. The assailant was later arrested and charged with the assault. The BPD incident report does also give the assailant's version of the events; after

the assailant admitted to the stabbing. The Appellant had provided detailed answers with the all the incident report documentation for this and all of the other incidents involving police intercession. Yet, Dr. Scott found the Appellant's interview explanation of the stabbing to be unsatisfactory: she claimed it to be "a brief vague story of two unconnected events" and "The description had nothing to do with him or a stabbing". Dr. Scott did not further explain this harsh characterization. She asked him again about the stabbing but found his explanation inadequate since "The court documents describe a more complex and involved conflict..."of after he had disclosed it completely on the BPD medical questionnaire with all the supporting records. Yet, Dr. Scott otherwise glossed over the rest of his excellent employment and military service history and references in her interview and evaluation. The Appellant had passed the BPD background investigation; yet, Dr. Scott seems to be searching for something in his background, on which to base her determination of him being unqualified, dishonest or non-disclosing. The negative focus and slanting in Dr. Scott's report indicates a pre-disposition to disqualify him and send him on to Dr. Reade for a second level review. (Exhibits 1 & 6, Testimony of Appellant, reasonable inferences)

39. Dr. Scott did not testify at this hearing. I draw no adverse inference from this fact alone as no subpoena was requested and Dr. Scott's availability to testify is unknown. However, it is noted that Dr. Scott's supposed report is not signed by her or otherwise authenticated as her report. On balance, it is recognized that the BPD did follow its approved psychological prescreening plan and Dr. Scott's interview-evaluation was an integral part of that plan. It is also recognized that therefore, it

was reasonable for the BPD and Dr. Reade to rely on and employ Dr. Scott's report in the prescreening process. Accordingly, for all of these stated reasons, while Dr. Scott's notes are accepted in evidence, except for facts that are supported by other credible evidence, I give her observations or conclusions less weight. (Exhibit 6)

40. Since Dr. Scott concluded that the Appellant's "history and interview indicate personality traits, which would interfere with his ability to make the judgments and fulfill the responsibilities of an armed police officer." Dr. Scott then referred the Appellant to Dr. Julia M. Reade to undergo a Second Opinion Psychiatric Review, pursuant to Phase III of the Boston Police Department psychological screening plan. (Exhibits 6 & 21)

Phase III – Interview/Evaluation by Dr. Julia Reade

41. Dr. Reade is a Board Certified psychiatrist who has worked for the Department for approximately 10 years conducting Second Level Psychiatric Interviews for police officer recruits. She is Board Certified in General Psychiatry and Forensic Psychiatry and has extensive experience in Law and Psychiatry as well as Occupational Psychiatry. (Exhibit 9, testimony of Dr. Reade)
42. Dr. Reade conducts Second Level Psychiatric Screening interviews when Dr. Scott deems an applicant as not psychologically fit to be a Boston police officer and when an applicant was psychologically bypassed in the past. (Testimony of Dr. Reade)
43. Dr. Reade explains to each candidate that, even though she has been hired by the City of Boston and even though she is reviewing what Dr. Scott has sent to her, she is obligated to be as objective and as careful as possible and that even though the

recruit is coming to see her for a second opinion, "it is not in the bag and that everybody gets a fresh look." (Testimony of Dr. Reade)

44. Dr. Reade estimates that she has overruled Dr. Scott, the Department's First Level screener, approximately 5-20% of the time and has deemed recruits as psychologically fit to be Boston police officers. Dr. Reade and Dr. Scott are separate entities who have separate practices. (Testimony of Dr. Reade)

45. Dr. Reade has conducted between 200-300 Second Level Psychiatric Screenings for the Boston Police Department. She has also consulted with other police departments in Massachusetts, to include Cambridge, Lawrence, Cohasset and Hamilton. (Testimony of Dr. Reade)

46. Dr. Reade testified that the Department's Psychological Screening Process is in place because the Boston Police Officer position is a complicated job, a high stakes job, that requires autonomy, the ability to get along well with others, adjust to difficult circumstances, review and be accountable for your own behaviors, adjust to a hierarchal structure, be flexible, deal with very high levels of stress and deal with high levels of boredom. She also testified that the process is important to protect the safety of the general public; the safety of the actual recruit/police officer; the safety of their partner(s); and the reputation of the Department. (Testimony of Dr. Reade)

47. Prior to her interview with each candidate, Dr. Reade also reviews the summary report, (not in evidence) from the investigating detective which summaries the background materials. She also reviews the personal data questionnaire, the

references from an individual's work and his personal references and his MMPI-2 and PAI test scores/results. (Testimony of Dr. Reade)

48. Dr. Reade used the MMPI-2 and the PAI to help focus her inquiry during her interview with the Appellant. (Testimony of Dr. Reade)

49. Dr. Reade did not base her recommendation to bypass solely on the Appellant's MMPI-2 and PAI test results. (Testimony of Dr. Reade)

50. Dr. Reade analyzes the test results, the MMPI-2 and PAI, with caution. She looks at how someone approached the test, whether the person was defensive, how willing was the person to disclose information. She reads through the computer generated narrative report of the test results to see if there are any issues that are flagged as particular concerns and she focuses on those areas in her interview. (Testimony of Dr. Reade)

51. Prior to her interview with each candidate, Dr. Reade also reviews the report from the investigating detective which summaries the background materials. She also reviews the references from an individual's work and his personal references as well. (Testimony of Dr. Reade)

52. Dr. Reade typically spends an hour with the candidate. She realizes that everybody is nervous and they are worried because the stakes are very high and a lot of recruits have never met with a psychiatrist before. Everyone comes in with some level of nervousness and the doctor is looking at how the person handles the stress of that situation – whether he is able to keep command of himself and manage the interaction in a way that gives the doctor confidence in his ability to handle stressful situations. (Testimony of Dr. Reade)

53. Dr. Reade conducts her interview in semi-structured fashion, always with the focus on whether the candidate is a good fit to be a Boston Police officer. She looks at a series of domains, to include a candidate's life experiences, their problem solving skills, interest in police work, communication, interpersonal relationships, and community. This is a standardized methodology for pre-screening public safety candidates, with a focus on job specific domains. (Testimony of Dr. Reade)

54. Dr. Reade testified that the clinical evaluation is an important step in the Department's screening process. There are issues that arise in the test and/or in the candidate's background that Dr. Reade would like to ask the candidate about. She wants to gain an understanding as to why the candidate answered questions in a particular way on the test or, relative to the candidate's background, why the candidate made particular choices in his life. The purpose of this questioning is to gain an understanding of what the context of the trait or behavior at issue is. (Testimony of Dr. Reade)

55. Dr. Reade is looking to see if the candidate can not only give a coherent account of what has happened in his life, but is looking to hear the candidate's thoughts about what has happened, whether the candidate is willing to take any responsibility for unfortunate events in his life, whether the candidate has learned from his experiences, how the candidate solves problems, etc. She stresses that a police officer must have the ability to make split second decisions and must be able to learn from any missteps along the way. An officer must have the ability to analyze his past actions and must do so in an honest manner. (Testimony of Dr. Reade)

56. Dr. Reade recounted her interview with the Appellant, which took place on February 16, 2006. She indicated that the Appellant was on time and appeared "mildly agitated." Dr. Reade testified that the Appellant was hard to understand because he spoke in a "monotone voice," and "spoke rapidly." Dr. Reade also recounted that the Appellant had a flat affect and barely opened his mouth when he answered her questions. (Exhibit 7 and testimony of Dr. Reade)

57. Dr. Reade reviewed the Appellant's VA records and found that in September 2004, the Appellant was awarded 30% service-connected disability for PTSD, as well as 10% disability for a knee injury and 10% disability for ear pain. Dr. Reade reports apparently from those VA records that the Appellant's complaints regarding the PTSD included insomnia, intrusive memories, nightmares, flashbacks, social isolation, emotional numbing, irritability with anger outbursts, concentration difficulties, hypervigilance, exaggerated startle response and anxiety attacks." **Dr. Reade then references: "Dr. Scott's evaluation revealed concerns about the veracity of Mr. Connolly's disability claim for PTSD ..."** (Emphasis added) (Exhibit 7)

58. Dr. Reade appears to press the Appellant to explain and verify his PTSD symptoms in the interview. She reported the Appellant "looked blank and was unable to provide any details." The Appellant, as a lay person, tried to explain as best he could: "I've been told if you have Post Traumatic you don't necessarily know you have it unless you read it. I can't really explain what the doctor did when I had knee surgery. It's kind of the same thing." Reade reports the Appellant said "I went for the ear [disability] appointment and it turned out it was a PTSD screening and he

[VA Examiner] said I had symptoms." When asked to tell Dr. Reade what his symptoms were, the Appellant replied indicating the VA report, "He [VA Examiner] has it on the third page." Dr. Reade then urged the Appellant to tell her in his own words, what he had experienced as symptoms, he stated, "He [VA Examiner] said flashbacks." Dr. Reade then asked him what his flashbacks consisted of. He responded: "He stared tensely and stated, "I don't know if I have that." denied the condition and was unable to provide any details. Specifically, Dr. Reade asked whether the Appellant had flashbacks. Dr. Reade then reported that the Appellant went on to deny the symptoms of PTSD previously stated in his disability award. Dr. Reade also reported that when asked if he had trouble sleeping, the Appellant stated that he had insomnia which he attributed to the "wrist or joint pain." Based on the Appellant's representations during their interview, Dr. Reade testified that she did not believe the Appellant had PTSD. (Exhibit 7, and Testimony of Dr. Reade)

59. Additionally, the Appellant suggested to Dr. Reade that the diagnosis was put on him by a doctor at the Veterans Affairs hospital, not due to his instigation. The Appellant told Dr. Reade that he did not know the Veterans Affairs hospital was screening him for PTSD and he thought he was going in for an "ear appointment." Dr. Reade indicated that the Appellant presented himself as a "passive actor" in this diagnosis. Although the Appellant denied symptoms of PTSD, he could not explain to Dr. Reade satisfaction, why he was awarded VA disability benefits in part for PTSD. (Exhibits 7 & 11, and testimony of Dr. Reade)

60. Dr. Reade testified that having PTSD is not a disqualifier for becoming a Boston Police Officer. In fact, Dr. Reade stated that she is looking to see if a candidate who has this condition can manage the symptoms. (Testimony of Dr. Reade)

61. Dr. Reade indicated that when she questioned the Appellant about his 2001 arrest for "Dangerous Weapon Unlawfully Concealed, which was dismissed after a hearing", (blackjack) as a juvenile, the Appellant was unable to provide a clear, account of what happened or how he was involved in an incident. According to Dr. Reade, the Appellant was unable to explain why he had chosen a blackjack, he replied, "I didn't realize it was a dangerous weapon." The Appellant testified that he explained to both Dr. Scott and Dr. Reade that he felt that he need protection since he had been previously attacked and stabbed and also that since he bought the blackjack at a police supply store, he assumed that it was legal to carry it. "He further explained that even as a police officer, he still didn't know all the dangerous weapons. It's just a stick, in a way." (Exhibit 7, and testimony of Dr. Reade and Appellant)

62. Besides asking about his 2001 arrest, Dr. Reade testified that she did not know if the Appellant was carrying the blackjack as a result of an incident which occurred a few weeks prior where the Appellant was stabbed. Dr. Reade claimed she could not understand the Appellant's account of how he was stabbed. According to Dr. Reade: He "gave a complicated and nearly incoherent account of events leading up to his second arrest for carrying (blackjack) an illegally concealed dangerous weapon." (Exhibit 7, and testimony of Dr. Reade)

63. Dr. Reade also asked the Appellant about his use of alcohol. The Appellant stated that he drank a six (6) pack of beer one (1) to two (2) times weekly. When asked if he had any blackouts, the Appellant told Dr. Reade "no not really." Dr. Reade was concerned that the Appellant did not see how consuming this much alcohol in a period of time is a problem. Dr. Reade stated that she was concerned he had no insight to his drinking and how this could be a problem. (Exhibit 7, and testimony of Dr. Reade)

64. While Dr. Reade did not feel, based on her interview with the Appellant, that he was suffering from a diagnosable mental disorder, she was concerned about his truthfulness, his disorganized thinking and inability to communicate coherently as well as his lack of interpersonal skills. (Exhibit 7 and testimony of Dr. Reade)

65. The appropriate criminal statute regarding a "blackjack" is G.L. c. 269 §10(b) Carrying dangerous weapons: "Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches, or a slung shot, blowgun, **blackjack**, metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles, nunchaku, zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood,

plastic or metal connected at one end by a length of rope, chain, wire or leather, a shuriken or any similar pointed starlike object intended to injure a person when thrown, or any armband, made with leather which has metallic spikes, points or studs or any similar device made from any other substance or a cestus or similar material weighted with metal or other substance and worn on the hand, or a manrikigusari or similar length of chain having weighted ends; or whoever, when arrested upon a warrant for an alleged crime, or when arrested while committing a breach or disturbance of the public peace, is armed with or has on his person, or has on his person or under his control in a vehicle, a billy **or other dangerous weapon other than those herein mentioned and those mentioned in paragraph (a)**, shall be punished by imprisonment for not less than two and one-half years nor more than five years in the state prison, or for not less than six months nor more than two and one half years in a jail or house of correction, except that, if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one half years in a jail or house of correction." (emphasis added) (administrative notice)

66. Dr. Reade admitted that she does not become involved in the prescreening process unless Dr. Scott makes a negative evaluation. She reviews Dr. Scott's report before she interviews the candidate. Dr. Reade cited and credited Dr. Scott's reported unfavorable evaluation and some Dr. Scott's specific concerns numerous times in her own written report. On cross-examination, Dr. Reade was unable to describe the HRD medical standards for both a Category A and B psychiatric medical

condition without having a copy to read from. Regarding the blackjack, she testified that he acted defensively for not knowing what a dangerous weapon was, but she interpreted it as him trying to minimize the situation. Dr. Reade could not remember the specific questions she had asked the Appellant or the specific answers he gave, about more than several of the incidents, even after reviewing her notes- "I didn't write them all down." She testified several times: "I believe I said…" or "I believe he said…" She was general in her description of the interview questions she asked; she admitted at one point-"But, I may be misremembering." **Dr. Reade admitted that she overstated her conclusion regarding untruthfulness "with respect to his clearly baseless claim to disability benefits for PTSD." She testified that she would now change the phrase "clearly baseless" to "appears to be a baseless…" or "possible it is a spurious or baseless" She admitted that "I wrote intemperately then; I phrased it more baldly than I should have."** Regarding the charge of her actually banging on the table during the interview, she responded- "I'm not a table banger." **However, despite her concessions and indefiniteness during cross-examination; Dr. Reade testified at one point, that she held to her opinion on the Appellant "to a reasonable degree of medical certainty."**(Exhibit 7 and testimony of Dr. Reade)

Conclusion of Dr. Reade

67. Dr. Reade concluded her evaluation of the Appellant with the following: "In summary, Mr. Connolly presents with a pattern of concerning behaviors and limitations. He has no insight into his pattern of heavy alcohol consumption, is unable to provide a coherent history, appears to have some cognitive limitations

and has trouble thinking clearly. He also appears to be mildly depressed and has a stiff and slightly menacing interpersonal manner. **Finally, there are serious concerns raised about Mr. Connolly's truthfulness with respect to his clearly baseless claim to disability benefits for PTSD. For these reasons, Mr. Connolly is currently found not acceptable for the police department."** (Emphasis added) (Exhibit 7, and testimony of Dr. her Reade)

Testimony of Appellant

68. The Appellant testified that he works for the MBTA as a police officer, which he claimed has the same responsibilities as a Boston Police Officer. He graduated from the Police Academy. He carries a firearm. Although he is currently assigned as a dispatcher, he has made arrests, and has made random motor vehicle stops. The Appellant admitted that as a practice the territory is restricted to areas close to the MBTA. However, The MBTA-Transit Police have full police powers in the 175 cities and towns served by the MBTA. The Appellant also conceded that the Boston Police Department differs from the MBTA because it is much larger in number of police officers. (Testimony of Appellant)

69. When asked what division he was assigned to at the MBTA-Transit Police, the Appellant admitted he was assigned to the dispatch unit. Although he claimed he could be required to patrol the streets, he admitted that his main assignment was as dispatch/booking. However, three to four times per week, he is ordered outside for street patrol overtime assignments. (Testimony of Appellant)

70. When asked whether he received disability from the Veterans Affairs for PTSD, the Appellant admitted that he was awarded 30% disability and more recently 70% total disability, for his knee, his ear, and PTSD. (Testimony of Appellant)
71. The Appellant testified that Dr. Reade "banged her fists on the table" in the "small room" and yelled at him, demanding that he describe his symptoms of (PTSD) post traumatic stress disorder. He was shocked at Dr. Reade's behavior. Dr. Reade became more aggressive until eventually she stopped the interview. (Testimony of Appellant)
72. The Appellant testified that he tried to clearly explain each situation that Dr. Reade asked him about: the stabbing, the blackjack charge, the PTSD VA disability and his drinking of 6-7 beers over a six-eight hour period, while watching three football games on TV with friends on a Sunday. However, each time his answer would be interrupted by Dr. Reade, while Dr. Reade would go on and ask another question. (Testimony of Appellant)
73. The Appellant worked after completing high school and at a point in time decided to enlist in the United States Army. During his tour with the army, he spent a tour overseas in Iraq, where he served as a Calvary Scout with the infantry. He saw substantial combat / action while serving in the Army and in Iraq. As a result of this action and his combat experiences, the Appellant received several commendations and decorations. (Exhibits 15, 16, 17 Testimony of Appellant)
74. After being discharged from the military, with an Honorable discharge, Mr. Connolly sought employment as a police officer, taking the Civil Service Examination for Police Officer and eventually was hired by the Massachusetts Bay

Transportation (MBTA), Transit Police department as a police officer. (Exhibit 10, testimony of Appellant)

75. The Appellant was hired by the MBTA, Transit Police as Police Officer and after completing the required certified Police Academy training, he assumed the duties as a Police Officer. His duties included police patrol in the City of Boston, as well as various duties such as dispatch, plain clothes patrol. He described his duties as varied and the fact that as a junior officer, he was subject to any number of assignments. He described his police duties and responsibilities as similar to that of a Boston Police Officer and described the jurisdiction (175 cities and towns including Boston) and police powers to be the same as those of a Boston Police Officer. (Testimony of Appellant)

76. The Appellant testified that the background check, as well as the psychological and medical evaluation for MBTA Transit Police, was similar to that of the Boston Police Department. He was subjected to several interviews and background checks and conditionally offered employment, subject to his successfully passing a medical and psychological examination. The psychological portion of the examination included both the MMPI and the PAI test. The Appellant passed all phases of the MBTA examinations and was considered fit for employment as a police officer for the MBTA Transit Police Department. (Testimony of Appellant)

77. The Appellant continues to date employed as a fulltime MBTA Transit Police Officer and during the course of his employment has received various certificate of commendations for bravery and outstanding achievement and accomplishment. The

Appellant has also been selected and recognized by the Chief of Police, as Officer of the Month. (testimony of Appellant and exhibits 13 and 14)

78. The Appellant testified that he is continuing his education and pursuit for a degree in Criminal Justice, by attending classes towards his degree. (Testimony of Appellant)

79. The Appellant testified that he had been diagnosed and is presently being treated through the Department of Veterans Services for Post Traumatic Stress Disorder, as well as other physical issues involving his knee and hearing. The Appellant stated that he did not seek treatment directly for the PTSD, that he was encouraged to be examined during a routine (ear appointment) physical examination at the VA facility. As a result of this examination, it was determined that he was in fact suffering from PTSD and was subsequently awarded VA disability and benefits. (Testimony of Appellant and exhibit 11)

80. The Appellant testified and stated that he is still to this date uncomfortable with the diagnosis of the PTSD and has difficulty discussing it as well as describing any associated symptoms related to the disorder. He further stated that as a result of his service in Iraq and the fact that he had sustained injuries related to an improvised explosive attack on a vehicle that he was riding in during a combat related incident, he volunteered to be examined for possible head trauma. As a result of this examination, he was **certified pursuant to G.L. c. 123B as a disabled person due to a head injury, trauma.** (Testimony of Appellant and Exhibit 20)

81. Other than conditions described above Mr. Connolly has never been diagnosed with a mental disorder or sought treatment from a mental health care provider. He

further testified that he has never been treated for any substance abuse or alcohol abuse. He has been subject to regular testing for drugs/ alcohol at the MBTA. He has been tested twice, the results have been negative for drugs/alcohol He described his social patterns as that of a single male in his twenties and that he is a social drinker. He described his drinking pattern as a weekend social drinker who will in the course of 6-8 hours have six or seven beers out with friends while watching 3 football games. He went on to state that he does not drink outside of the social circle but will, on occasion, have drinks with friends while they watch various sporting events together. He never drinks while alone at home. (testimony of Appellant)

82. The Appellant actively employed fulltime as a police officer for the Massachusetts Bay Transportation Authority, Transit Police and to date has never been reprimanded or disciplined for any reason including alcohol abuse, depression, or any medical/psychological or substance abuse problems. (Testimony of Appellant)

83. The Appellant, Sean Connolly testified. He is a short heavy set man with a short military type haircut. He wore a suit and tie. He is polite and military in his bearing. He speaks very quickly but his speech is not unintelligible, despite running some words together. He described his education, employment, military background, VA disability and the interview process in a clear concise way. There was no hesitation in his answers. If he was not completely sure of an answer, he so stated. He does not guess or embellish his answers. He appears intelligent and appropriate in his explanations. He displays a good memory. I detected no cognitive impairment from his testimony. He responded well under cross-examination. He testified

emphatically that he never told Dr. Reade that he had been denied admission to the military due to overweight or for any other reason. He explained that all returning Iraq veterans were sent for PTSD screening. He did not realize it at the time he had been sent for an ear exam and was examined for PTSD. He recently, 8-12 months earlier than his testimony here, was re-evaluated for PTSD and had his total disability increased to 70%. I find that the Appellant is a reliable and credible witness.(Testimony and demeanor of Appellant)

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, Bielawksi 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.23d 386, 388 (1990).[1]

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 (1891); 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).

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

[1] 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).

made in some of the expert's assumptions that generally goes to the weight of the evidence. Commonwealth v. DelValle, 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).

In the case at bar, the Department has sustained its burden of proving that it was reasonably justified in bypassing Appellant Sean Connolly for appointment as a Boston police officer. The Department followed its HRD approved psychological screening plan. "[T]he goal of the... psychological screening process is to identify candidates who may exhibit *any evidence of a mental disorder*.... This process will be used to detect through a review of the background investigation, personal history as provided by the candidate, psychological testing, interviews, and *any psychological or behavior characteristics*, which would significantly interfere with the candidate's successful performance of the essential functions and duties of the position of Boston Police Officer."

As testified to by Dr. Julia Reade, the Department's psychological screening process is in place because a Boston police officer position is a complicated job, a high stakes job, that requires autonomy, the ability to get along well with others, adjust to difficult circumstances, review and be accountable for your own behaviors, adjust to a hierarchal structure, be flexible, deal with very high levels of stress and deal with high levels of boredom. She also testified that the psychological screening process is important to protect the safety of the general public, the safety of the police officer himself, the safety of their partner(s), and the reputation of the Department.

The Department followed its HRD approved psychological screening plan.

> "[T]he goal of the... psychological screening process is to identify candidates who may exhibit *any evidence of a mental disorder*.... This process will be used to detect through a review of the background investigation, personal history as provided by the candidate, psychological testing, interviews, and *any psychological or behavior characteristics*, which would significantly interfere with the candidate's successful performance of the essential functions and duties of the position of Boston Police Officer."

(Ex. 21, Boston Police Department's psychological screening plan)

Every potential Boston police recruit that has been given a conditional offer of employment, including the Appellant, must take the MMPI-2 and PAI exams, meet with a first level psychiatric screener, and if he is given an unfavorable first opinion, is then referred to the Department's second level psychological screener. After undergoing the testing, the Appellant was sent for an evaluation with Dr. Marcia Scott, the first level screener. After a review of the Appellant's test results and background information, Dr. Scott undertook a clinical evaluation with the Appellant. Dr. Scott had some concerns about the "Appellant's truthfulness surrounding his claim for PTSD." She reported that the Appellant is "coolly sociable, calm and can not describe any symptoms associated with

PTSD." She felt that the Appellant's "cool avoidance, manipulativeness and lack of motivation appear also to precede his service." Dr. Scott felt that, due to the Appellant's history and interview, he possesses personality traits that would interfere with his ability to make judgments necessary to perform the duties of an armed police officer.

Dr. Scott concluded by reiterating that the Appellant's responses raise concerns about his ability "to judge events, report or interact in a controlled way." The Appellant provided Dr. Scott with "detached, superficial answers to all questions regarding his life." For example, the Appellant only gave Dr. Scott minimal details about important events and behaviors prior to his service. The Appellant could not explain what his job responsibilities were as a MBTA police officer. He claimed he was involved in booking, dispatch and patrol although the record he provided in his application indicates that he is assigned only to the dispatch unit. According to Dr. Scott, all these personality traits would interfere with the Appellant's ability to make the assessments and judgments necessary to train for and perform the duties of an armed police officer.

Since Dr. Scott opined that the Appellant was not psychologically fit to become a Boston Police Officer, the Appellant was referred to Dr. Julia Reade to undergo a Second Opinion Psychiatric Review, pursuant to Phase III of the Boston Police Department psychological screening plan. Prior the interview, Dr. Reade reviewed the Appellant's background information, his recruit investigation information, his MMPI-2 test results and analysis, his PAI test results and analysis and Dr. Marcia Scott's report of unfavorable opinion with the Appellant. Although the Appellant's responses on his MMPI-2 were valid, he responded in a somewhat "defensive manner" and endorsed items that suggested he was afraid to admit to faults that most people are willing to disclose. Dr. Reade was

most concerned with the Appellant's PAI test results. The PAI results suggest that the Appellant tends to have "integrity, anger management, alcohol and substance abuse problems," and also has elevations in the areas of "grandiosity and verbal aggression." The Appellant also endorsed critical items relating to "irritability, negative relationships, antisocial behavior and verbal aggression."

Although, Dr. Scott did not testify at this hearing. I draw no adverse inference from this fact alone as no subpoena was requested and Dr. Scott's availability to testify is unknown. However, it is noted that Dr. Scott's supposed report is not signed by her or otherwise authenticated as her report. On balance, it is recognized that the BPD did follow its approved psychological prescreening plan and Dr. Scott's interview-evaluation was an integral part of that plan. It is also recognized that therefore, it was reasonable for the BPD and for Dr. Reade to rely on and employ the substance of Dr. Scott's report in the prescreening process. Accordingly, for all of these stated reasons, while Dr. Scott's notes are accepted in evidence, except for facts that are supported by other credible evidence, I give her observations or conclusions less weight.

In addition to these test-related issues, Dr. Reade testified that she had concerns about the Appellant's truthfulness, thinking and communication skills, interpersonal skills and consumption of alcohol. Dr. Reade highlighted certain aspects of the Appellant's interview that demonstrated the concerns she had. The Appellant claimed that he is still uncomfortable with the VA determination of PTSD, and that he did not volunteer for or seek out this disability award. Yet, he admits that he receives benefits from the Veterans Affairs for this condition. When Dr. Reade tried to find out what symptoms the Appellant had been experiencing, the Appellant denied having flashbacks associated with the war and

attributes his insomnia to wrist and joint pain. The Appellant also suggested to Dr. Reade that the PTSD diagnosis was forced upon him by the doctors at the Veterans Affairs and that he was a "passive actor." Dr. Reade found that that Appellant had trouble providing her with a coherent account of his career in school, his job history, as well as the circumstances surrounding his stabbing. Additionally, the Appellant gave a "complicated and nearly incoherent account" of the events leading up to his second arrest for carrying an illegally concealed weapon. The Appellant appeared hostile and mildly depressed during the interview and Dr. Reade found that he lacked interpersonal skills and may have difficulty interacting with the public. Lastly, Dr. Reade concluded that the Appellant has no insight into his pattern of drinking or the possible risks associated with that behavior. All of these factors led Dr. Reade to find that the Appellant could not handle the stresses of urban police work and therefore is psychologically unfit to be a Boston 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 *City of Beverly* 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][2] 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

[2] "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)."

commission is bound to defer to the city's exercise of its 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

The BPD in this case at bar appeared to follow its approved psychological screening plan. It utilized well accepted written psychological tests. It employed very experienced and well credentialed Psychiatrists to conduct the two levels of interview/evaluations. Those two Psychiatrists described concerns and formulated opinions in general conformity with the relevant statutory medical standards and the approved BPD Plan. Their concerns and opinions were expressed with reference to past historical events and the Appellant's presentation at the interviews. The Beverly decision generally affords the appointing authority "significant latitude" in the decisions of hiring police officers, which latitude is unfettered by the burden of proving the actual truth of alleged bypass reasons. The Appeals Court in Beverly further stated that the Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. The Appeals Court recognized that hiring a police officer applicant under certain circumstances posed a risk and that the appointing authority rightly held the prerogative of whether to take such a risk. The Beverly Court concluded that "Absent proof that the City acted unreasonably, we believe that the Commission is bound to defer to the City's exercise of its judgment." It would

seem that in the context of a psychological bypass, the appointing authority's prerogative is even more ensconced and less easily assailed by the bypassed applicant. Two written psychological tests were administered to the Appellant. Thereafter two Psychiatrists conducted separate evaluation interviews incorporating their analysis of those test results in their evaluations. Although this hearing officer had some problems with Dr. Scott's first level interview and evaluation; the Appellant was sent on to Dr. Reade for a second level interview and evaluation. The BPD's determination of the Appellant's psychological unfitness ultimately rested on Dr. Reade's opinion. Dr. Reade testified here and was subject to cross-examination. Dr. Reade did express some indefiniteness, equivocation and concessions during cross-examination. However, despite her concessions and indefiniteness during cross-examination; she testified at one point that she held to her opinion on the Appellant "to a reasonable degree of medical certainty". This expert opinion of unfitness was founded on some historical facts, psychological testing and analysis and the Appellant's interview presentation. The Appellant failed to submit sufficient psychological evidence, including any qualified expert opinion evidence to rebut Dr. Reade's opinion of unfitness. In this case at bar, the Appellant did not effectively rebut or refute the factual and/or psychological evidence against him to meet the burden of production of the evidence in the record. Some competent and qualified expert psychological testimony and/or evidence would seem to be needed to show the Department's psychological evaluation was not reasonably justified; and to meet the burden of submitting a preponderance of credible evidence in the record, in this matter.

On the evidence presented here, the BPD has met its burden; showing by a preponderance of the credible evidence in the record that it had reasonable justification to bypass the Appellant for appointment as a police officer.

The Appellant has failed to show that the Department's decision to bypass him was made with any political considerations, favoritism and/or bias.

For all the above reasons, the Appeal under Docket No.G1-06-167 is hereby ***dismissed***.

Civil Service Commission,

Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell, Stein and Marquis, Commissioners) on December 30, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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:
Sheila B. Gallagher, Atty.
Robert J. Powers, Jr. Atty.
John Marra, Atty. - HRD

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

SEAN T. CONNOLLY,
Appellant

v.

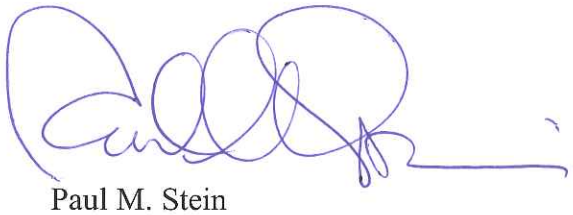
CASE NO: G1-06-167

BOSTON POLICE DEPARTMENT,
Respondent

STATEMENT OF COMMISSIONER STEIN CONCURRING IN RESULT

I concur in the conclusion of the Hearing Commissioner that, based on the preponderance of the credible evidence proffered by the BPD and the Appellant, and accepting the Hearing Officer's assessment of the credibility of disputed evidence, the Boston Police Department (BPD) has demonstrated "sound and sufficient" reasons that justify its decision to bypass Mr. Connolly for appointment as a BPD Police Officer, consistent with basic merit principles as set forth in applicable civil service law. See e.g., Beverly v. Civil Service Comm'n, 78 Mass.App.Ct., 182 (2010); Town of Reading v. Civil Service Comm'n, 78 Mass.App.Ct. 1106 (2010): Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315, 321 (1991). In concurring in this decision (as well as two others decided today [Printemps v. Boston Police Dep't, CSC Case No. G1-08-293, 23 MCSR --- (2010) and Coren v. Boston Police Dep't, CSC Case No. G1-07-402, 23 MCSR --- (2010)], it is important to distinguish this result from other similar cases, most recently, Chaves v. Boston Police Dep't, CSC Case No. G1-08-151, 23 MCSR --- (2010), in which I joined a majority of the Commission in *allowing* an Appellant's bypass appeal based on an alleged psychological disqualification. In the present case, unlike in Chaves, the psychological opinion offered by the BPD's expert witness, Dr.

Julia Reade, was unequivocally stated with "reasonable medical certainty" and was not rebutted by any other sworn expert testimony. Although there may be a rare future case in which the testimony of the Appellant or other lay witnesses is so convincing that it would discredit the testimony of an expert, the Hearing Officer's credibility determination that it was not so in this case must be respected. Moreover, unlike cases such as Chaves, in which the majority concluded that there was no credible historical basis for the expert's finding of a disqualifying psychological condition, the record here clearly showed that the Appellant had a history that included a significant psychological disability (PTSD), as well as some problematic responses to his level of alcohol consumption, among other relevant historically documented evidence, that fairly supports Dr. Reade's expert opinion in this case that Mr. Connolly was not psychologically fit to serve as a BPD Police Officer.



Paul M. Stein
Commissioner