

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

PATRICK COREN,  
Appellant

v.

Docket NO.: G1-07-402

BOSTON POLICE DEPARTMENT,  
Respondent

Appellant:

Patrick Coren,  
Pro se

Appointing Authority:

Sheila B. Gallagher, Atty.  
Office of the Legal Advisor  
Boston Police Department  
One Schroeder Plaza  
Boston, MA 02120  
(617) 343-4550

Commissioner:

Daniel M. Henderson

**DECISION**

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Patrick Coren, (hereinafter "Appellant" or "Coren") seeks review of the Human Resources Division's (HRD) decision in accepting reasons proffered by the Respondent-Appointing Authority, Boston Police Department (hereafter, "BPD", "Department" or "Appointing Authority"), 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 13, 2009 at the offices of the Commission. At approximately 10:20 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. A brief hearing on the motion was held and the motion was denied. One (1) audio tape was made of the full hearing. Only the Department filed a post hearing proposed decision at the Commission.

### **FINDINGS OF FACT**

Thirteen (13) exhibits and a stipulation of facts were entered into evidence. HRD's document packet filed with the Commission on January 22, 2008 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:**

- Patrick Coren

#### **I make the following findings of facts:**

1. The Appellant's name appeared on eligibility list, Certification #270048, dated: 1/17/2007, as qualified for selection for the position of Boston Police officer. (HRD's document packet)
2. On June 25, 2007 BPD's Robin Hunt sent a 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 1)

3. That June 25, 2007 bypass letter contained the opinion of Dr. Reade for the bypass: “In summary, Mr. Coren is a hard-working and earnest man who has difficulty managing many of his adult responsibilities and seems encumbered by self doubt. He appears to be emotionally fragile, and although he reports that psychotherapy has been helpful to him, he continues to struggle with fearfulness and mistrust Mr. Coren also has difficulty communicating clearly and presenting data in an organized or complete fashion. His view of police work appears superficial and naïve. For these reasons, Mr. Coren is currently found not acceptable for the police department.” The letter further states: “Given the highly stressful nature of urban police work, *the Boston Police Department is unable to provide Mr. Coren with a reasonable accommodation.*” (Emphasis added) (Exhibit 1)
4. On August 1, 2007, BPD’s Robin Hunt sent a letter to the Appellant notifying him that he had been bypassed for appointment and the reasons for the bypass. This letter also notified the Appellant of his right to appeal this bypass decision to the Civil Service Commission. (Exhibit 2)
5. On September 17, 2007, HRD’s Jenifer Murphy notified the Appellant by letter that HRD had approved the BPD’s stated reasons for bypass. This letter also notified the Appellant of his right to appeal this bypass decision to the Civil Service Commission. (HRD’s document packet)

### **Background**

6. The Appellant is a married black male, 35 years old, (DOB 11/13/73). He resides in the Mattapan section of Boston with his wife and three children. He is employed full time

now as a police officer for the Boston School Department, with a second full time job as a special police officer for a private security company. For five years he has held a Mass. license to carry a firearm. He carries a firearm for the private security company work. He has no criminal record; the Board of Probation reported: "NRBOP" for him. He had only one charge of operation of an unregistered and uninsured motor vehicle in 1995, which was dismissed. He was employed as a custodian for the BPD for seven years (2001-6/2008). He resigned that BPD job to work as a special police officer at night. He has been employed simultaneously in two full time jobs since 2001. (Testimony of Appellant, Exhibit 3)

7. 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 February 9, 2007. (Exhibit 3.)
8. The Appellant received excellent references and evaluations from all of the contacts made by the BPD-RIU Investigator. All of his prior employers and supervisors, including Phillip Polizzi, Supervisor of Custodians while he worked as a custodian for the BPD and from another administrator at the BPD. (Exhibit 3)
9. 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. (Exhibit 3.)

10. A Sergeant Detective from the Boston Police Department Recruit Investigations Unit undertook a thorough investigation into the Appellant's background. The Appellant passed the BPD background check. (Exhibit 3.)

11. The Department extended a conditional offer of employment to the Appellant; contingent upon his successful completion of the medical and psychological screening component of the hiring process. (Exhibit 13)

12. 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)

13. 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)

14. 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)

15. 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) (See also Exhibit 12)

16. 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. (Testimony of Dr. Reade, Exhibit 9)
17. 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 1<sup>st</sup> 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 2<sup>nd</sup> 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”)

18. On or about June 2004, the Department submitted a psychological screening plan to the Human Resources Division (HRD) for approval. Boston Police Department’s Psychological Screening Plan, “BPD Plan” (Exhibit 10)
19. 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 10)
20. 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 10)

21. 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 10)

22. No specific instructions are given to the psychiatrists conducting the first and second level clinical interviews pursuant to the Plan 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 10)

#### **Phase I - Written Psychological Tests**

23. 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)

24. Although the Appellant produced a valid MMPI-2 score, he had an elevated L score which indicated that he attempted to “portray himself in an overly positive manner.” According to his test results, the Appellant endorsed critical items associated with, “anxiety, depression, family conflict, mental confusion, somatic concerns and antisocial behavior.” (Exhibits 4 & 5, and Testimony of Dr. Reade)
25. On March 31, 2007, 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 becoming post-probationary public safety officers. (Testimony of Dr. Reade)
27. The PAI results indicated that the Appellant has a “moderate likelihood of poorly-suited rating, high likelihood of job-related, integrity and anger management problems.” In addition to these concerns, the Appellant’s results demonstrated he “had a moderate likelihood of substance abuse problems.” However, what was significant to Dr. Reade was the Appellant’s PAI scores was the fact that he endorsed nineteen (19) critical items associated with “drug problems, health concerns, anxiety, traumatic stress, depression, irritability, negative relationships, antisocial behaviors, hypervigilance and feelings of persecution.” Dr. Reade testified that the elevated subscales on the PAI suggest that the Appellant experienced some family trauma. As found on his PAI results, the Appellant

had high elevations in the “domains of paranoia and borderline characteristics to stress, hypervigilance, negative relationships and antisocial behaviors.” (Exhibits 5 & 9 and Testimony of Dr. Reade)

**Phase II - Interview/Evaluation by Dr. Marcia Scott**

28. On April 10, 2007, the Appellant moved onto Phase II of the Psychological Screening and met with Dr. Marcia Scott, a Department Psychiatrist, who conducted a first level 30 minute interview and evaluation, pursuant to the Boston Police Department psychological screening plan. (Exhibit 8)
29. 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 valid “but had an elevated L score suggesting he tried to present himself in an overly positive manner.” The Appellant’s MMPI-2 scores were consistent with “60% of the male law enforcement applicants.” However, Dr. Scott observed that the Appellant’s PAI reported “extremely elevated subscales in the areas of traumatic stress and negative relationships.” Additionally, the Appellant’s PAI results indicate that he has a “job, anger management, integrity concerns.” The Appellant’s PAI results also suggested that he had elevated hypervigilance, anxiety and stress. (Exhibits 5 & 8)
30. Dr. Scott made note of her evaluation of the Appellant. She indicated that the Appellant appeared “well groomed and neatly dressed.” However, Dr. Scott notes that the Appellant’s “speech was very slow as was his thinking.” His affect was “withdrawn” and his mood was “sad.” (Exhibit 8)

31. Dr. Scott found that the Appellant “often struggled for words to explain why something had not worked out.” Specifically, Dr. Scott questioned the Appellant about why he declared bankruptcy and lost his house. The Appellant explained that he bought the house because it was “too crowded” living with his mother. At some point, the Appellant refinanced his house which led to his “second mortgage going up.” The Appellant stated that he could not afford this increase and after speaking with the bank and a lawyer, he declared bankruptcy. He also reported to Dr. Scott that: His wife had a high risk pregnancy and couldn’t work, so they went into bankruptcy and moved in with her mother.” Obviously, the loss of his wife’s income contributed to their financial distress. (Exhibit 8, reasonable inferences)
32. When asked about his work as a union steward for the custodians, the Appellant explained that he resigned after he attended a meeting where the Union president did not show up and failed to support the union’s agendas. However, Dr. Scott felt that the Appellant was vague with the information he provided to her regarding his resignation as a union steward. (Exhibit 8)
33. Dr. Scott also included in her report her concerns about the Appellant’s motor vehicle infractions and motor vehicle accidents. When Dr. Scott asked for specifics about one of the Appellant’s motor vehicle accidents, he responded with what Dr. Scott deemed an “unclear and incomplete account of what happened.” The Appellant’s explanation for the motor vehicle infractions was that “he was not responsible at the time,” and he denied any drinking. Dr. Scott may have misconstrued his explanation, since “not responsible” or “NR” is a court disposition of a civil motor vehicle infraction, in the Appellant’s favor. (Exhibit 8, administrative notice, reasonable inference)

34. Another concern for Dr. Scott was that the fact that the Appellant neglected to disclose that he had attended couples counseling with his wife for two (2) years. When asked why he did *not mention the counseling*, the Appellant told Dr. Scott he did not believe it was important. The Appellant had previously provided all of his counseling records, attaching them to his BPD medical questionnaire and answered the relevant questions regarding prior counseling on that medical questionnaire. The Appellant noted in his testimony that neither the medical questionnaire nor his counseling records were included as part of Exhibit 3, his BPD Student Officer Application. (Exhibit 8 & 3, testimony of Appellant)
35. In her summary, Dr. Scott reported that the Appellant is “slow thinking and obsessive.” The Appellant “only takes responsibility when he is told that he is wrong.” He does not try to solve problems and passively accepts failures. Dr. Scott opined that the Appellant “cannot communicate his own reasoning or decisions nor can provide an organized report of events.” (Exhibit 8)
36. Then, Dr. Scott, based on her conclusions, referred the Appellant on to Dr. Julia M. Reade to undergo a Second Opinion Psychiatric Review, pursuant to Phase III of the Boston Police Department psychological screening plan. (Exhibit 8)
37. 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. (Exhibit 8)
38. Dr. Scott in her report seems to have covered a large volume and variety of facts and circumstances for an interview that lasted only thirty (30) minutes. Dr. Scott in her report seems to focus on the Appellant’s driver’s record as a negative circumstance and

expresses dissatisfaction at his explanation of the “MV violations” quoting him as to infer an admission or a cavalier attitude- “I just wasn’t responsible.” However, she may have misconstrued him since “not responsible” is a court disposition in his favor, on a civil motor vehicle charge. The Appellant testified that he had no record, “NRBOP” except for a single MV charge which was eventually dismissed. Dr. Scott also claimed that he did not “tell me he had been in couples counseling for two years. When it arose on his medical screening form he said he didn’t mention it because he didn’t think it was important” This statement by Dr. Scott seems to infer that the Appellant was non-disclosing or somehow dishonest. Yet, Dr. Scott admits in her report that she found that information on his “medical screening form”. The Appellant also explained that he didn’t think it was important to mention since he had already disclosed it on his medical questionnaire form. The Appellant also testified that he provided all of his counseling records to the BPD with the BPD medical questionnaire form. He also testified that his medical questionnaire form and his counseling records were not included as part of Exhibit 3. (Exhibits 3 & 8, Testimony of Appellant)

39. 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 like his stale MV driving record and his failure to verbally raise his couples’ counseling experience, 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 and industrious employment 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 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.

40. 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 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 8)

### **Phase III – Interview/Evaluation by Dr. Julia Reade**

41. Dr. Reade is a Board Certified psychiatrist who has worked for the Department for 8-9 years conducting Second Level Psychiatric Interviews for Boston 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 6 and Testimony of Dr. Reade)
42. Dr. Reade conducts Second Level Psychiatric Screening interviews when Dr. Scott finds areas of concern regarding an applicant's psychological fitness to be a Boston police officer or when an applicant had been 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 has disagreed with Dr. Marcia Scott, the Department’s First Level screener, approximately 5-20% of the time, (% according to academy class) and has deemed recruits as psychologically fit to be Boston police officers. (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 the clinical evaluation, Dr. Reade reviewed the Appellant’s “records provided to [her] by the Boston Police Department”, including the recruit investigation summary



report, and personal data questionnaire, and his MMPI-2 and PAI test scores/results.

(Testimony of Dr. Reade)

48. Dr. Reade used the MMPI-2 and the PAI test results (red flags) 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 proprietary, computer generated narrative report of the test to see if there are any issues that are flagged as particular concerns and she focuses on those areas in the clinical interview. Dr. Reade found that the Appellant had endorsed a critical area of drug use. However, after questioning the Appellant on it, she was satisfied that this was a mistake due to Appellant's "misunderstanding of the phrasing of the question." (Testimony of Dr. Reade)

51. Prior to her interview with each candidate, Dr. Reade also reviews the summary report, (not in evidence) from the investigating detective which summarizes 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 a 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 follows the BPD approved screening plan. She looks at factors that relate to job criteria of a Boston Police Officer. She also looks at the “job specific factors” developed by the California POST Commission. 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 the doctor would like to ask the candidate about. The doctor wants to gain an understanding as to why the candidate answered questions in a particular way on the test, explores the possibility of a candidate misunderstanding a question 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.

She believes that 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 April 24, 2007. She indicated that the Appellant was “neatly dressed and appeared mildly depressed.” Dr. Reade testified that the Appellant’s “speech was slow and although he denied symptoms of depression”, he was “close to tears at the end of the interview.” Dr. Reade noted that the Appellant had told her he was “overwhelmed” by circumstances at various points in his life. Exhibit 9 and testimony of Dr. Reade)
57. Dr. Reade reported that since the Appellant could not provide a clear account to her of why he saw a counselor for help with a history of his childhood trauma, she had to ask a number of questions. According to Dr. Reade, she did not review any of the Appellant’s counseling records other than a one page letter discussing the couples’ therapy he had attended. During his interview with Dr. Reade, the Appellant revealed that he has struggled to overcome his own self doubt and mistrust of others, which he claimed hindered him from, “taking control of his life.” Despite these struggles, the Appellant denied having any symptoms of mental illness. (Exhibit 9 and testimony of Dr. Reade)
58. When Dr. Reade probed further about the Appellant’s childhood, he revealed that he had a difficult childhood since his parents divorced and his father struggled with substance abuse. He also indicated that he was abused by his stepfather and felt unprotected by his mother. (Exhibit 9 and testimony of Dr. Reade)
59. Dr. Reade’s report expresses concern over the Appellant’s employment history; specifically the high number, five (5) jobs within a short period of ten (10) years and the

five (5) residential moves in that time. Most recently, the Appellant revealed to Dr. Reade that he worked as a custodian for seven (7) years at the Boston Police Department.

(Exhibit 9 and testimony of Dr. Reade)

60. Dr. Reade like Dr. Scott, expressed concern over the Appellant's driving record. Dr. Reade claimed that many of the infractions arose from the Appellant failing to make payments. Dr. Reade testified that she was concerned about the Appellant's ability to meet certain obligations and she wondered if the driving infractions were symptomatic of the Appellant's emotional problems or his inability to follow rules. (Testimony of Dr. Reade)

61. When asked about his home life during his interview with Dr. Reade, the Appellant revealed that he currently lives with his wife and (3) three children and his mother in law. Previously, the Appellant had purchased his own home but was forced to file for bankruptcy because he did not understand the terms of the loan, which Dr. Reade determined was another example of the Appellant's inability to manage adult responsibilities. (Exhibit 9 and testimony of Dr. Reade)

62. 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 that the Appellant appears emotionally fragile and still struggling with feelings of mistrust and fearfulness. According to Dr. Reade, the Appellant had difficulty communicating clearly and his view of police work appears naïve. (Exhibit 9 and testimony of Dr. Reade)

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

64. Dr. Reade, testified in this present appeal, and described her role, purpose and procedures in conducting her pre-employment psychological screenings for the BPD. Her aim is to do an evaluation that is tied to the characteristics and duties of the job being applied for. It is a “very job specific” evaluation. She looks job specific factors as developed and outlined by the POST Commission. She testified that she uses the “POST” guidelines promulgated by the State of California POST Commission or the “Peace Officer Standards & Training Commission”. This Commission traces its lineage back to the 1950’s for the establishment of hiring qualification standards, including psychological fitness, among other hiring requirements. (Dr. Reade)
65. Doctor Reade concluded that the Appellant “is a hard-working and earnest man who has had difficulty managing many of his adult responsibilities and seems encumbered by self doubt.” Although the Appellant has attended psychotherapy, he still appears to struggle with feelings of mistrust. Dr. Reade opined that the Appellant has difficulty communicating and presenting data in a clear, organized manner. Additionally, his view of police work appears naïve and superficial. Based on the Appellants test results, background investigation and interview, Dr. Reade does not believe that the Appellant could handle the stressful nature of police work and therefore is not fit to be an armed Boston Police Officer. (Exhibit 9 and testimony of Dr. Reade)

### **Testimony of Appellant**

66. The Appellant testified that he agrees with some of Dr. Reade’s assessment but also disagrees with some of it. He claimed that he was not treated fairly by the BPD in this application process. He previously believed that the BPD was built on honesty and integrity. He had been completely honest with the BPD in this process and feels that he

has been punished for it, like revealing and documenting his past counseling, as the BPD required and it being used against him. He believes that his childhood problems and subsequent counseling caused him to be bypassed. He believes that he is being penalized for suffering childhood abuse, something he did not ask for; instead of being congratulated for overcoming the effects of it. He has an established a record of success in life, despite his childhood experiences. He disagreed with the assessment that he lacked the ability to think and communicate clearly or write coherent reports. He has written proper reports in his employment for many years. He has felt overwhelmed by certain severe circumstances in the past, yet has always dealt appropriately with those circumstances, according to those circumstances. His wife's high-risk pregnancy caused a loss of her income. He has worked two full time jobs for many years to meet his responsibilities and protect his family. He especially disagreed with the assessment of the likelihood that he would have job-related integrity and anger management problems or substance abuse problems. He has always been honest and has never lost self-control in his life and has never had a substance abuse problem. He admitted that he did not know how to analyze the MMPI-2 or the PAI test results, but he disagreed with the assessment that he was continuing to struggle with the old childhood issues and the fear and mistrust it engendered. He has put those issues behind him and he is not now fearful or mistrustful. "I'm 35 years old now, I was only 7 then." He stated that he was trying to make a better life for he and his family, and his childhood abuse experience motivate him do better and care for people. He believes that his experience would make him a good police officer for the Boston Police Department since he currently works as a police officer for the Boston School Department. (Testimony of Appellant)

67. The Appellant, Patrick Coren is a black male with a shaved head. He is neat and well groomed. He wore a suit and tie and expressed himself clearly, in a polite and likeable manner. He looked down at his paper work as Dr. Reade testified, largely in an unflattering way about him. He expressed himself clearly, in a strait forward manner. He had good eye-contact and body language when he testified. He did not have to modify or equivocate under cross-examination. He appeared to be giving honest and sincere responses and testimony. He appeared to be genuinely hurt by the mere intimation that he had been less than completely honest and disclosing. He also believed that he was penalized by the BPD for that honesty and the disclosures. He is proud of his life and the way he overcame the adversity of a bad childhood through hard work, responsibility and commitment. He is quiet and controlled in his personal presentation that engenders confidence by others. He projects as a strong-quiet personality type. In sum, He handles himself in a manner that would make someone in a dangerous situation feel relieved, if he were to show up in a police uniform. He is found to be a credible and reliable witness.(Exhibits, testimony and demeanor of Appellant)

68. I observed the Appellant closely during the hearing and especially during his testimony. I did not observe or detect any of the traits, behaviors or types of responses which Dr. Reade testified to or reported as being a concern to her. I did not observe or detect any of the traits, behaviors or types of responses that Dr. Scott reported in her interview notes, as being a concern to her. (Testimony and demeanor of Appellant, Exhibits 8 & 9, testimony of Dr. Reade)

69. The Appellant submitted only one exhibit, Exhibit 13. He did not object to testimony or exhibits. He waived his opening statement and also waived cross-examination of Dr.

Reade, the BPD's sole witness. He did not present any witnesses other than himself. He testified about the psychological evaluation process, his personality and his experiences concisely but generally. He did not effectively rebut or refute every factual or psychological assertion made against him. He failed to present sufficient qualified, factual and psychological evidence to meet the burden of submitting a preponderance of credible evidence in the record. (Exhibits, testimony, reasonable inferences)

## **CONCLUSION**

In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. E.g., City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997) (Commission may not substitute its judgment for a "valid" exercise of appointing authority discretion, but the Civil Service Law "gives the Commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground."). See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) ("The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles . . . . the commission acted well within its discretion."); MacHenry v. Civil Service Comm'n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission



oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”). See also, Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission “sufficient to satisfy due process”)

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

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

*The greater amount of credible evidence must . . . be to the effect that such action ‘was justified’. . . . {If [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 (1<sup>st</sup> Cir.1998).

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

personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990).<sup>1</sup>

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 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

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<sup>1</sup> 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).

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 sustained its burden of proving that it was reasonably justified in bypassing Appellant Patrick Coren 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.

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. As was found in the MMPI-2 results, the Appellant produced an "elevated L score," which indicated that he tried to present himself in an "overly positive manner." Although the Appellant had an elevation on his MMPI-2 scores, his did produce valid test results. The Appellant's PAI results were significant to Dr. Reade and indicated that Mr. Coren tends to have high likelihood of job related, integrity and anger management problems. He also endorsed numerous critical items relating to "drug problems, health concerns, anxiety, traumatic stress, depression, irritability, negative relationships, antisocial behaviors, hypervigilance and feelings of persecution."

After undergoing the written testing, the Appellant was sent for an initial 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 found that the Appellant "was slow thinking and obsessive." She reported that the Appellant "fails to anticipate or try to solve problems and he does not understand the reasoning behind what he is asked to do." Dr. Scott felt that, due to the Appellant's inability to communicate his own reasoning and provide a organized report of events, the Appellant would have difficulty explaining the judgments he would make in performing the duties of an armed police officer.

Dr. Scott concluded that the Appellant initially appeared withdrawn but gradually discussed his failures. According to Dr. Scott when asked about why he filed for bankruptcy, the

Appellant revealed that he agreed to a second mortgage without really understanding the consequences of his actions. Additionally, when asked why he was no longer the union steward for the custodians, the Appellant provided Dr. Scott with an unclear explanation only telling her that he resigned because he failed to understand the issues. When asked why he had so many motor vehicle infractions, the Appellant provided an explanation that was unsatisfactory to Dr. Scott revealing some lack of comprehension on his part. Finally, Dr. Scott indicated that she was concerned that the Appellant failed to disclose he was in couples counseling for (2) two years even though Dr. Scott discussed marital matters with him. In her opinion, Dr. Scott determined that the Appellant is reliable when performing simple tasks but has difficulty understanding his role when things fail. Dr. Scott found that the Appellant's inability to communicate his own reasoning or decisions, leads the Appellant to respond in generalities. According to Dr. Scott, 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.

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 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, this is especially appropriate since the Appellant offered no objection to its inclusion in the evidence. Except for facts that are supported by other credible evidence, I give her reported observations or conclusions less weight.

Dr. Scott, based on her conclusions, referred the Appellant on to Dr. Julia Reade to undergo a Second Opinion Psychiatric Review, pursuant to Phase III of the Boston Police Department psychological screening plan.

Prior to that second opinion interview, Dr. Reade reviewed the Appellant's investigative background summary report and other information, his MMPI-2 test results and analysis, his PAI test results and analysis and Dr. Scott's report of unfavorable opinion with the Appellant. Dr. Reade was most concerned with the Appellant's PAI test results. Although the Appellant's responses on his MMPI-2 were valid, he endorsed a significant amount of critical items related to anxiety, depression, family conflict, mental confusion, somatic concerns and antisocial attitudes. Similarly, Dr. Reade noted the Appellant's PAI results signified that he may have difficulties in a public safety position because his results suggested that he had job-related, integrity, anger management problems and substance abuse problems. In addition to these issues, Dr. Reade felt that "the Appellant had high elevations in the domains of paranoia and the subscales of stress, hypervigilance, negative relationships and antisocial behaviors." Dr. Reade testified that the Appellant appears to be an emotionally fragile man, whose history of abuse has impacted him in his work history, home life, driving history and finances. While the Appellant acknowledged he had encountered many challenges in his life. He revealed to Dr. Reade that he was overwhelmed by some of the problems that had occurred and was even close to tears during his interview with her. While Dr. Reade noted that the Appellant was a "determined and earnest man, he had difficulty managing many of his adult responsibilities and often was encumbered by self doubt." Dr. Reade found that the Appellant struggles with his "mistrust of others and is unable to communicate clearly or present data in a coherent fashion." All of the concerns, Dr. Reade noted were evident in how the Appellant explained why he filed for bankruptcy, how he decided to

become a police officer, how he explains his work history and lengthy history of motor vehicle infractions. Dr. Reade determined that the Appellant's inability to communicate and manage situations that can become overwhelming for him would prevent him from handling the stresses of urban police work and therefore make him 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 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]<sup>2</sup> Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately held, [FN12] appointing authorities are given significant latitude in screening candidates, and “[p]rior misconduct has frequently been a ground for not hiring or retaining a police officer.” Cambridge v. Civil Serv. Comm., 43 Mass. App. Ct. at 305, and cases cited.” *City of Beverly* at page 188.

And the Appeals Court also stated: “Instead of focusing on whether the city had carried its burden of demonstrating a “reasonable justification,” the commission focused on whether the city had proven that Bell in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing an added evidentiary burden on the city. In simple terms, neither Bell nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired. [FN15]” *id* at page 190 And further stated: “Absent proof that the city acted unreasonably, we believe that the commission is bound to defer to the city’s exercise of its 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 Appellant submitted only one exhibit, Exhibit 13. He waived his opening statement and also waived cross-examination of Dr. Reade, the BPD’s sole witness. He did not present any

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<sup>2</sup> “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).”


witnesses other than himself. He testified about the psychological evaluation process, his personality and his experiences concisely but generally. He did not effectively rebut or refute every factual or psychological assertion made against him. The Appellant failed to present sufficient qualified, factual and psychological evidence to meet the burden of submitting a preponderance of credible evidence in the record.

On the evidence presented here the Commission is satisfied that 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 on the basis of any political considerations, favoritism, bias or some other unpermitted consideration.

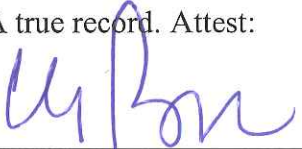
For all the above reasons, the Appeal under Docket No. G1-07-402 is hereby *dismissed*.

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.

Patrick Coren

John Marra, Atty. - HRD