

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Rm 503
Boston, MA 02108
617-979-1900

THOMAS DESTEFANO,
Appellant

v

G1-19-016

NEWTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Michael K. Gillis, Esq.
Gillis & Bikovsky, P.C.
1150 Walnut Street
Newton, MA 02461

Appearance for Respondent:

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Commissioner:

Cynthia A. Ittleman, Esq.

SUMMARY OF DECISION

For multiple reasons cited in this decision, the City of Newton was unable to establish by a preponderance of the evidence that the positive results of a *hair* drug test, which, unlike *urine* drug testing, has not been approved by federal regulators, was conclusive of ingestion of an illegal drug, the sole reason given for bypassing the Appellant for appointment as a police officer. For this reason, the Commission has allowed the Appellant's appeal to ensure that he receive one additional consideration for appointment. Nothing in this decision limits the City's ability to conduct a thorough background investigation during the subsequent hiring cycle and, should other valid reasons for bypass be discovered, using those valid reasons to bypass the Appellant for appointment.

DECISION

On January 15, 2019, the Appellant, Thomas DeStefano (“Appellant”) pursuant to G.L. c. 31, § 2(b), filed a bypass appeal with the Civil Service Commission (“Commission”), claiming that the City of Newton’s (“City”) Police Department (“NPD” or “Respondent” or “Department”) improperly bypassed him for original appointment to the position of permanent, full-time police officer. A prehearing conference in this case took place on March 12, 2019 at the offices of the Commission. On April 18, 2019, the Appellant filed a Motion for Summary Decision. A full hearing was held in this case at the Commission on May 10, 2019.¹ The full hearing was digitally recorded and both parties received a CD of the proceedings.² The parties submitted post-hearing briefs in the form of proposed decisions. The Respondent incorporated its opposition to the Appellant’s Motion in its brief. As indicated herein, the appeal is allowed and the summary decision motion is moot.

FINDINGS OF FACT

The parties entered 14 exhibits into evidence, including 9 joint exhibits, 2 exhibits for the Appellant and 3 exhibits for the Respondent (including the affidavit of NPD Captain Geary ordered at the hearing). At the Respondent’s request, the Commission also took administrative notice of 6 websites relating to Quest Diagnostics (Quest), the company that conducted the drug tests referenced herein, which, as with all evidence, are given the weight they are due in view of

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² A stenographic transcript of the digital recordings has been prepared and furnished to the Commission. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with the original transcripts of all on-the-record hearing proceedings to the extent that such party wishes to challenge this Decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

the rest of the evidence in the record. Based on the documents submitted and the testimony of the following witnesses:³

Called by the Respondent:

- Thomas H. Winters, MD
- Reid T. Boswell, MD
- Captain Dennis Geary, Newton Police Department

Called by the Appellant:

- David M. Benjamin, Ph.D., Sc.D. (hon.)
- Thomas DeStefano, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies and reasonable inferences drawn from the evidence, I make findings of fact set forth below.

Background of Appellant

1. At the time of the hearing in this appeal, the Appellant was 25 years old. He had lived in Framingham until he was approximately 12 years old, when he moved to Newton, graduating from high school in 2011. In public school, the Appellant played football, basketball and lacrosse. (Testimony of Appellant)
2. The Appellant's father was a police officer at the Department for approximately 28 years but became disabled approximately 7 years ago. The Appellant knows NPD Capt. Dennis Geary because the Appellant's father coached the Pop Warner Youth Football team on which the Appellant and Capt. Geary's son played. Even though the Appellant had been given a conditional offer of employment in the hiring process at issue in this appeal, the Appellant believes that Capt. Geary opposed the Appellant's appointment to the NPD because the Appellant's father gave Capt. Geary's son less football playing time

³ Job titles associated with the above witnesses were accurate as of the dates of hearing.

than the Appellant. (Id.) At an unspecified time (but not during the hiring process at issue in this appeal), Capt. Geary's son applied to the Department to be a Newton Police Officer but he was not hired. (Id.)

3. After high school in Newton, the Appellant attended and graduated from Benjamin Franklin Institute of Technology after 2 years, playing basketball while in college. Members of the college basketball team were required to refrain from using illegal drugs. (Id.)
4. The Appellant has worked at a car wash since approximately 2014. At the time of the hearing in this appeal, the Appellant had been the full-time Assistant Manager of the car wash for approximately three years. In addition to cleaning cars, the Appellant handles the money, opens the car wash, turns on the machines, talks to customers, checks the inventory and signs off on papers when inventory is dropped off. (Id.)
5. The Appellant cleans cars by removing any trash from the car, he looks into the crevices in the cars to determine if he needs to use an air gun to blow out any substances since there are some places, like the dashboard, where it is difficult to vacuum. The Appellant wipes down the interior car surfaces and windows and then vacuums the inside of the cars. In the cold weather months, he works in an enclosed environment. (Id.)
6. The car wash where the Appellant works washes the Department police vehicles. (Testimony of Appellant and Geary) The Appellant has seen drug paraphernalia and powders in the police vehicles, in addition to various bodily fluids. He asserted that he observed drug paraphernalia in police cars most days of the week but he could not identify specific occasions on which he had seen the drugs or paraphernalia. (Testimony of Appellant)

7. Outside of work, the Appellant volunteers at the Boys & Girls Club in Newton, where he coaches their sports travel team. The teams practice one or two nights per week and play games once per week. In addition, the Appellant referees on Saturdays. At other times, the Appellant also coaches 3 Amateur Athletic Union (AAU) boys' year-round teams at multiple practices during the week and at weekend tournaments. (Id.)
8. The Appellant lived with his parents in Newton until sometime in 2018 when he moved to another location in Newton where he shared a home with a roommate and the roommate's parents, and in which he lived at the time of the Commission hearing. At an unspecified time that the Appellant could not recall, he found out that his roommate was using cocaine and his roommate moved out of his (the roommate's) parents' home, allowing the Appellant to remain as a tenant. The Appellant was unable to specify the dates that he lived with the roommate or when the roommate moved out but I find that the move out more likely than not occurred sometime in late summer or early fall of 2018. (Id.)
9. The Appellant took and passed the civil service exam for the position of police officer at least once prior to the March 25, 2017 exam.⁴ (Id.; App.Ex. 2) It is the Department's practice to require candidates to take both a urine drug test and a hair drug test twice in the hiring process: once sometime early in the process, prior to issuing conditional offers of appointment, and a second time after issuing conditional offers to the candidates so that a candidate who is ultimately selected and then hired has taken a total of four drug tests in the hiring process. (Testimony of Geary) In the fall of 2017, which was the hiring cycle prior to the 2018 hiring cycle that is at issue in this case, the Appellant applied for

⁴ The Appellant was uncertain about the dates that he took the police officer exams.

the position of police officer. On November 8, 2017, and, prior to the issuance of an offer of employment, he took both a urine drug test and a hair drug test and tested negative for cocaine on both tests. (Id.; App.Ex. 2) However, the Appellant did not score high enough in 2017 to be considered for employment at the Department. (Id.; App.Ex. 2)⁵

The 2018 Hiring Process the Subject of This Appeal

10. The Appellant took and passed the March 25, 2017 written civil service exam for the position of police officer. In August or September, the state's Human Resources Division (HRD) established the eligible list containing the names of candidates who passed the 2017 exam. In August 2018, HRD issued certification 05750 to the Respondent, authorizing the Respondent to hire three (3) permanent full time police officers. Among the seven candidates who signed the Certification, including the Appellant, the Appellant ranked third. (Stipulation; Administrative Notice of information provided by HRD; Respondent's Post-Hearing Affidavit of Geary produced pursuant to an order at the Commission Hearing)
11. The Department did not require the Appellant to submit an application during the 2018 hiring process because NPD Officer Bradley informed him that he did not need to do so if there had been no changes in the information he provided in his previous application and the Appellant said there had been no changes. (Testimony of Appellant)
12. Capt. Geary was involved in the hiring process at issue in this appeal. Capt. Geary has been a member of the Department for 35 years. He was promoted to Captain in 2016

⁵ Although there are no exhibits in the record pertaining to the Department's consideration of the Appellant in 2017, such as the pertinent eligible list and Certification and the Appellant's application in 2017, there are no exhibits in the record contradicting the Appellant's testimony in this regard. In addition, NPD Capt. Geary confirmed that the Department had considered the Appellant's candidacy at some point in 2017 and that the Appellant submitted to a hair drug test in the fall of 2017. The September 2018 hair drug test result is in the record but the September 2018 urine drug test is not in the record.

where he commands the Special Operations Bureau. In that capacity, Capt. Geary reports to Police Chief David MacDonald, who is the appointing authority for Newton Police Officers. (Testimony of Geary)

13. Asked how long the Department has been using the two sets of drug tests (urine and hair) during the hiring process he replied, “as far as I know, forever”. (Testimony of Geary, Transcript p. 243)

14. Asked who performs the hair drug tests on police candidates, Capt. Geary incorrectly stated that Dr. Boswell’s office at Mount Auburn Hospital performs the hair drug test. (Testimony of Geary) Dr. Boswell’s office only collects the candidates’ hair samples and sends them to Quest Diagnostics for the hair drug test. (Testimony of Boswell)

15. Capt. Geary was unaware that hair drug tests are not federally approved. (Testimony of Geary; *see* Testimony of Boswell, Winters and Benjamin indicating that hair drug tests are not federally approved) Part of Capt. Geary’s job as the commander of the Special Operations Bureau is to be the liaison for hiring, overseeing the civil service hiring process. He requests certifications from HRD from which the Department may attempt to fill any vacancies in the Department. The Department reviews the civil service certification ranking (by undisclosed score) of the names of candidates within the “2N+1” formula who have passed the civil service exam. HRD notifies candidates to sign the certification indicating their interest in working at the Department. Interested candidates fill out an application then are scheduled for urine and hair drug tests, with specimens collected at the office of Dr. Reid Boswell, an MRO (Medical Review Officer) at the Mount Auburn Hospital who forwards the samples Quest Diagnostics (Quest), which tested the specimens. On September 13, 2018, the Appellant took and passed the initial

urine and hair drug tests. When the Department receives the drug test results, detectives are assigned to investigate the candidates. When the investigations are completed, the Department interviews candidates. Capt. Geary was involved in the Appellant's interview during the 2018 hiring process. (Testimony of Geary; Jt.Ex. 1)

16. Following the interviews, the Department issues conditional offers of employment to certain candidates, requiring them to successfully complete a medical exam, a psychological evaluation and a second set of drug tests (urine test and hair test). The Appellant took the second hair drug test on December 7, 2018⁶, providing a hair sample at the office of the Department's MRO, Dr. Boswell, which office sent the sample to Quest. On December 14, 2018, Quest informed Dr. Boswell that the Appellant's December 2018 urine drug test result was negative for cocaine and all other drugs but his hair drug test result was "Positive for cocaine." (R.Exh.2)

17. Dr. Boswell did not reach out to the Appellant to explore whether there might be an explanation, i.e., exposure through passive or external contamination, that could explain the result. At some point, however, Dr. Boswell informed the Department of the results of the Appellant's hair drug test. Capt. Geary informed Chief McDonald of the drug test results. Chief McDonald decides whom to hire and whom to bypass and notifies the candidates accordingly. (Testimony of Geary and Boswell)

18. Sometime around the end of December 2018 or early January 2019, the Appellant received an email message from a source that he did not recall with the drug test results

⁶ The December 2018 urine drug test result document is not in the record but there appears to be no dispute that the Appellant took the urine drug test and the test result was negative for cocaine.

from his December 7, 2018 drug tests.⁷ (Testimony of Appellant) Immediately after receiving the results, the Appellant called the Department a number of times in an effort to discuss the drug test results with someone there. (Testimony of Appellant and Geary) Capt. Geary, who was involved in the hiring process, was on vacation around the holidays. (Testimony of Geary)

19. Sometime between January 3 and 6, 2019, Capt. Geary returned the Appellant's calls to the Department regarding the December 2018 drug test results. The Appellant told Capt. Geary that he was not a drug user, that he never used drugs, that he had researched the subject online because his then-roommate used cocaine and the Appellant believed that his own hair was contaminated by cocaine when he used his roommate's comb. (Testimony of Geary and Appellant)

20. By letter dated January 6, 2019, Chief MacDonald informed the Appellant that he had been bypassed stating, in part,

...This action is taken after receiving the Commonwealth of Massachusetts Human resources medical examination form from Doctor Reid Boswell of Mount Auburn Hospital indicating a category A medical failure whereby you failed a drug screening; testing positive for cocaine. A failure of a category A medical failure (sic) under Massachusetts civil service regulations is considered an absolute disqualifier for the position of Police Officer. Candidate Thomas McCarthy ranked lower than you on the civil service certification list# 05750 but was selected ... Additionally, I have petitioned the Personnel Administrator at Civil Service Human Resource Division for your permanent removal from civil service list #05750

⁷ At the Commission hearing, the Appellant offered to show the email with the December 2018 hair drug test result on his phone. Instead, I asked the Appellant to print the email message and submit it to the Respondent and the Commission. I do not have a record of receiving the printed email message that the Appellant offered. As a result, it is unclear who (Quest or the Department) sent the Appellant the results of his December hair drug test.

(Testimony of Geary; Jt.Ex. 3)⁸ The HRD medical examination form from Dr. Boswell, the Medical Review Officer (MRO) for the Respondent, is not in the record although Dr. Boswell's MRO Report is in the record (Resp.Ex. 2), as is the Quest Documentation Packet regarding the hair drug test results on the Appellant's December 2018 hair sample. (Jt.Ex. 2).

21. On January 7, 2019, the day after the January 6 bypass letter sent to the Appellant, the Appellant obtained his own Quest hair drug test.⁹ As with the hair drug tests the Respondent required the Appellant to take on November 7, 2017 (negative), September 13, 2018 (negative) and December 7, 2018 (positive), the Appellant was directed to Dr. Boswell's office to provide a hair sample, which sample was sent to Quest. The January 2019 hair drug test result was negative for cocaine and any other drugs. Quest sent the January 7, 2019 hair drug test result to Dr. Boswell. On January 15, 2019, Dr. Boswell reviewed and signed the test result as the MRO (Jt.Ex. 4; Testimony of Appellant)

22. The Appellant filed this appeal on January 18, 2019. (Administrative Notice)

23. On April 4, 2019, Appellant's counsel sent an email message to the Respondent's counsel stating that when the Appellant received the December drug test result, the Appellant "immediately" asked Capt. Geary for a "retest", Capt. Geary denied the request and the Respondent was required to give the Appellant a retest within 16 weeks to address the "category A medical failure" mentioned in the bypass letter or for the Respondent to accept the results of the Appellant's January 7, 2019 test result as the retest. (Jt.Ex. 8)

⁸ The January 6, 2019 letter also stated that the appointing authority asked the state's Human Resources Division to permanently remove the Appellant's name from Certification 05750 (apparently as opposed to asking that his name be removed from the pertinent eligible list). It is unknown if HRD removed the Appellant's name from the pertinent eligible list.

⁹ It is unclear how the Appellant arranged for the January 2019 drug test.

24. On April 5, 2019, counsel for the Respondent replied to the Appellant's April 4 email stating that counsel would discuss the Appellant's request with her client. (Jt.Ex. 9). There is no indication in the record that the Respondent responded further to the Appellant's April 4, 2019 email. (Administrative Notice)
25. By letter dated April 25, 2019, the Department issued the Appellant a second letter stating that the reason for the bypass was the Appellant's failed drug test in December 2018 without mentioning the statement in the January 6, 2019 bypass letter that the failed drug test constituted an automatic Category A medical disqualifier. (Jt.Ex. 5)
26. The sole candidate who was hired via the 2018 hiring process (Certification 05750) ranked below the Appellant and he had no "immediate family members" working in the NPD. The Department had granted conditional offers to three candidates: the one selected candidate and two who had "immediate family members" who worked in the Department – the Appellant and a candidate whose father is a member of the Department. Capt. Geary's affidavit asserts that the latter candidate's father did not participate in the hiring process. One candidate who received an offer was ranked below the Appellant and effectively withdrew his application by requesting a deferral, which the NPD did not allow. One candidate who ranked above the Appellant withdrew; his father is a retired member of the NPD. Another candidate ranked above the Appellant on the Certification did not complete the application and did not have an "immediate family member" in the Department. (R.Post-Hearing Affidavit)

State Law Fitness Standards

27. The original (January 7, 2019) bypass letter's reference to a Category A medical failure and disqualifier is a reference to physical fitness standards for law enforcement positions.

Specifically, G.L. c. 31, s. 61A provides that,

“[t]he [personnel] administrator, with the secretary of public safety and the commissioner of public health shall establish initial health and physical fitness standards which shall be applicable to all police officers ...” (Id.)

This statute further provides,

“ [n]o person appointed to a ... police or firefighter position ... shall perform the duties of such position until he shall have undergone initial medical and physical fitness examinations and shall have met such initial standards... If such person fails to pass an initial medical or physical fitness examination, he shall be eligible to undergo a reexamination within 16 weeks of the date of the failure of the initial examination. If he fails to pass the reexamination, his appointment shall be rescinded....” (Id.)

28. The state's Human Resource Division (HRD) established the HRD Physician's Guide/Initial-Hire Medical Standards (Medical Standards).¹⁰ The Medical Standards require physicians to examine public safety candidates' physical systems and organs, such as the musculoskeletal, cardiovascular, gastrointestinal, neurological and respiratory systems, as well as the candidates' medical conditions such as their ears and hearing conditions and psychiatric medical conditions. (Administrative Notice – HRD Medical Standards)

29. Upon identifying a medical condition, the physician is required to determine and document whether the candidate has a Category A disqualifying condition or a Category

¹⁰ The HRD Medical Standards have been revised from time to time. The version relied on here was effective Oct. 1, 2018 as it appears to have been in effect at the time of the Appellant's December 2018 drug tests. The provisions of the Medical Standards quoted herein appear to be the same in the 2019 and 2020 versions of the Medical Standards.

B condition, which the physician is required to assess to determine whether the condition “would prevent [the candidate] from safely and effectively performing the essential functions” of a police officer. (Id.)

30. The Medical Standards, section 6.23, regarding “Psychiatric Conditions”, states that a Category A medical condition includes “a psychiatric condition that results in the candidate not being able to safely perform one or more of the essential job tasks” and a Category B medical condition includes “(1) [a] history of psychiatric condition or substance abuse problem¹¹ or (2) [r]equirement for medications that increase an individual’s risk of heat stress, or other interference with the ability to safely perform essential job tasks. (Id.)¹²

31. Medical Standards, section 6.24.1.2, regarding “Chemicals, Drugs, and Medications” provides, “**Evidence of illegal drug use detected through testing, conducted in accordance with Substance Abuse and Mental Health Service Administration (SAMHSA), shall be a Category A medical condition.**” (Id.)(**emphasis added**)

The Quest Hair Drug Tests

32. Quest’s laboratory in Lenexa, Kansas has a number of certifications and accreditations, including from SAMHSA(regarding urine drug testing), the College of American Pathologists Forensic Drug Testing (for hair, oral fluid and urine drug testing); Florida (hair and urine testing); and New York State (hair, oral fluid, and urine testing). (Testimony of Winters)

¹¹ There is no punctuation between Category B part (1) and part (2).

¹² The Medical Standards include a list the essential tasks of a police officer.

33. No employee or representative of Quest testified at the Commission hearing to explain the Quest hair drug test process applied to the Appellant's December 2018 hair sample or to his hair drug tests in September 2018 and January 2019. (Administrative Notice)
34. The Respondent asked the Commission to take administrative notice of six documents from the internet purporting to describe the Quest hair drug testing process, which I numbered documents 1 through 6. As noted above, I informed the parties at the hearing that I took administrative notice of the documents but that I was not taking notice thereof for the truth of the statements therein. Five of the six documents are from Quest website links such as a section on "Frequently Asked Questions - Hair Testing". Another Quest website link references Quest accreditations and certifications but of the licenses/accreditations that the Respondent provided from 10 states, only one of them indicates that Quest is authorized to conduct hair drug tests in that state. One of the Quest website links consists of a brief video purporting to show part of the hair testing process. (Administrative Notice – documents/Quest website links 2 through 6)
35. Dr. Winters, the Respondent's MRO expert, indicated that he would not rely on the information from the Quest websites and links because they are not refereed articles, meaning that the information on the websites have not been peer reviewed, the reviewers' comments have not been forwarded to the original author and the original author has not made appropriate changes suggested by reviewers, prior to publication of the information. (Testimony of Winters at 142, 143)
36. One of the documents of which administrative notice was taken is a document entitled, "Quest Diagnostics 510(k) Clearance by the U.S. Food and Drug Administration" (FDA), dated 2016. The document includes a letter from the

FDA referencing a “*Trade/Device* Name: Quest Diagnostics HairCheck-DT (Cocaine)”. (Administrative Notice – document/internet link 1)(emphasis added).

The letter states that the FDA had reviewed Quest’s “premarket notification of intent to market the *device*” (id. emphasis added), stating that the *device* “is substantially equivalent (for the indications for use stated in the enclosure) to legally marketed predicate devices marketed in interstate commerce prior to May 28, 1976, the enactment date of the Medical Device Amendments, or to devices that have been reclassified” pursuant to federal law. (Id.) This document refers to a “device”, not a test.

37. Quest’s specimen collection requires a collector to first appropriately identify the donor, fill out part of the chain of custody form and indicate the part of the body where the collected hair was located, cut the hair sample from the donor, write down the collection date, wrap the specimen in foil, have the donor write his or her personal and contact information where appropriate, initial (by the collector and the donor), have the donor write his initials on the chain of custody form, place the hair sample in a sealed container in the presence of the donor and place the container in a locked Quest box for pick up by a Quest courier. (Testimony of Boswell; R.Ex. 1)
38. Dr. Boswell testified that the hair sample may be taken from various places on the donor’s body, as stated in the document Quest gave him for obtaining hair samples. (Testimony of Boswell; R.Ex. 1) However, the FDA 510(k) letter evaluating Quest’s marketing of its hair drug testing device specifically limited hair collection to the donor’s head. (Administrative Notice – document/link 1)

39. The hair specimen for a Quest hair drug test is supposed to be taken near the rear of the crown of the donor's head and as close to the scalp as possible and the collector is to gather a tuft of hair which is about 120 strands of hair, or a quarter-inch to a half-inch thick. The Quest hair collection process involves only one hair sample (R.Ex. 1)
40. Urine drug testing is federally regulated, requiring compliance with federal guidelines. For example, federal guidelines require an MRO to follow up with the donor when there is a positive drug test result. (Testimony of Boswell and Winters) Hair drug testing is not federally regulated. (Testimony of Boswell, Winters and Benjamin)
41. Dr. Boswell, the Respondent's expert witness Dr. Winters and the Appellant's toxicologist witness, Dr. Benjamin concur that, unlike urine drug tests, hair drug tests are not federally regulated and have not been approved by SAMHSA, the pertinent federal regulatory agency. (Testimony of Bowell, Winters and Benjamin) Urine drug tests can detect cocaine use or exposure from the prior several days whereas hair drug tests can detect cocaine use or exposure from the prior ninety days or so. (Id.)
42. The 119-page Quest Documentation Packet provides a handful of pages of narrative about the hair drug test of the Appellant's December 2018 hair sample including,

DOCUMENTATION PACKAGE COVER SHEET

Attached is a summary and copies of laboratory documents related to the analysis of Donor ID #031766782, Specimen ID# 8919688 with access number 793953A. The following 119 pages are true and accurate copies of the original documents that were generated during the normal course of business by Quest ... The original documents were generated at or near the time of each process.

The specimen number 793753A screened positive for Cocaine Metabolites by immunoassay technique and confirmed positive for Cocaine by Gas Chromatography/Mass Spectrometry. Following review of the analytical data and chain of custody documentation, a positive result for Cocaine was reported.” (Jt.Ex. 2)

43. The Documentation Pack narrative about its “General Overview of Laboratory Procedures” states,

Specimen Receipt

The laboratory acknowledges receipt of the specimen(s), verifies ID, and verifies that there is no evidence of tampering ... The external Custody and Control Form ... is completed and the internal laboratory Chain of Custody ... is initiated. All specimen and subsequent aliquot handling is carefully documented ...

Aliquot for Screening Test

The specimen card is opened and 3.9 cm of hair from the root end is removed and cut into small sections. The cut hair is mixed and a portion weighted ... is transferred to the testing laboratory. The remaining cut and uncut hair is placed in temporary secured storage. The handling of the specimen and the aliquot is documented ...

Drugs of Abuse Screening Test

The aliquot of cut hair is washed and then extracted for the initial screening test. The initial screening test for drugs of abuse is conducted using immunoassay procedures on Tecan analyzers. A specimen is considered negative if the response for a given analyte is above that of the cutoff standard. If the response is equal to or less than the cutoff standard, the specimen is scheduled for confirmation testing....

Confirmation Test for Drugs of Abuse

If the initial test result is positive, a second aliquot ... is washed and tested by Gas Chromatography/Mass Spectrometry ... or Gas Chromatography/Mass Spectrometry/Mass Spectrometry (GC/MS/MS). A concentration less than that of the client specific cutoff for a given analyte is reported as negative. A concentration equal to or greater than that of the client specific cutoff is considered to be positive....

44. The “Initial Test Description” states in part,

Initial testing for drugs of abuse is performed on the Tecan instrument by immunoassay. The cutoff for each drug of abuse assay is based on the average response of the cutoff calibrator. Based on the applied technology, if a donor specimen has a response that is greater than the cutoff absorbance, the specimen is determined to be negative for the specific test. If a donor specimen has a response that is less than or equal to the cutoff absorbance, the specimen is determined to be positive ... and requires additional confirmation testing. Each batch contains both negative and positive quality controls samples along with one blind quality control sample that is inserted into the batch in a random position. (Id. at 10)

The only other narrative in the 119-page Documentation Packed, entitled

“Confirmation Test Description”, states in part,

Confirmation testing for drugs of abuse is performed by Gas Chromatography/Mass Spectrometry or Gas Chromatography/Mass Spectrometry/Mass Spectrometry. The concentration of drug in each donor specimen is determined by comparison of the response of the specimen to the response of calibrators of known (sic) concentration. If a donor specimen has a concentration of drug that is less than the client specific cutoff, the specimen is determined to be negative for the confirmation test. If a donor specimen has a concentration of drug that is greater than or equal to the client specific cutoff, the specimen is determined to be positive for the specific test. Each batch contains both negative and positive quality control samples. (Id. at 34)

45. Although it is proprietary information, Mr. Tarver, at Quest, told Dr. Winters over the phone that in the initial Quest hair drug test, a portion, or aliquot, of the hair sample is to be washed using methanol and rinsed with distilled water, then extracted, and placed into a solution for the initial screening test. This information is not in the Documentation Packet. Dr. Winters does not know the duration of the washes since Mr. Tarver told him that that was proprietary information. Lab staff are to conduct the initial screening test using an Enzyme-Linked Immunosorbent Assay, or an “ELISA” technique. The ELISA technique is commonly used in medical testing for screening in various contexts, such as HIV testing and drug testing. (Testimony of Winters)
- 46 Thereafter, the hair drug testing wells are to be lined with a cocaine antibody. The donor hair specimen solution is placed into the well. If there is cocaine in the donor hair specimen solution, antigens¹³ from it would be absorbed by the cocaine antibody in the well. Each test batch contains blank or negative samples as well as high and low samples for quality control. Lab staff are to measure the absorbance level of the donor hair specimen and compare it to the known cutoff absorbance. (Jt.Ex. 2; Testimony of

¹³ An antigen is defined as “any substance (such as an immunogen or a hapten) foreign to the body that evokes an immune response either alone or after forming a complex with a larger molecule (such as a protein) and that is capable of binding with a product (such as an antibody or T cell) of the immune response”. <https://www.merriam-webster.com/dictionary/antigens> (March 2, 2022)

Winters; Quest 510(k) Clearance by the U.S. Food and Drug Administration – Administrative Notice – document 1))

47. If an initial hair sample test positive, it is subjected to confirmation testing. Quest's confirmation testing consists of a gas chromatography-mass spectrometry test (GC-MS). GC-MS is a standard test for identification of many chemicals and chemical levels and exposures, such as exposure of workers to certain chemicals in the workplace. (Jt.Ex. 2; Testimony of Winters) In the alternative, Quest may conduct a confirmation test using gas chromatography-mass spectrometry-mass spectrometry (GC-MS-MS). (Jt.Ex. 2).

The Appellant's Drug Test Results

48. Quest performed all of the Appellant's hair drug tests in September 2018, December 2018 and January 2019. (Testimony of Appellant; Jt.Exs. 1 and 4) MRO Dr. Boswell's staff obtained the Appellant's hair sample in three hair drug tests. (Jt.Exs. 1, 2 and 4; App.Ex. 2; Resp.Exs. 1 and 2) The chain of custody of the Appellant's three hair samples was intact. (Testimony of Boswell and Winters)

49. The person who collected the Appellant's hair sample for a hair drug test required by the Respondent in September 2018 appears to have been the nurse practitioner in Dr. Boswell's office and for the Appellant's hair sample in December 2018 it appears to have been collected by the medical assistant in Dr. Boswell's office. (Jt.Exs. 1 and 2)

50. Although an introductory section of the Quest Documentation Packet for the Appellant's hair test in December 2018 says that the test is supposed to be conducted on 3.9 centimeters of the hair sample, there is no indication in the record of the actual length of the Appellant's hair sample taken for the December 2018 test. (Jt.Ex. 2)

51. The September 2018 urine drug test results were negative, for Cocaine Metabolites (and numerous other drugs), meaning that the level, if any, of cocaine metabolites in the urine was below the “cut-off” amount required to declare the test positive, i.e. 300 ng/mL on the Initial Test, or below 150ng/mL on the Confirmatory Test. .¹⁴ (Jt.Ex. 1)
52. The September 13, 2018 test was also negative for all five drugs for which tests were conducted, including cocaine/metabolites with a “cut off” of 300pg/ng at either the Initial Test or Confirmatory Test Level.
53. The Appellant’s December 7, 2018 urine test result was negative but his hair drug test result was reported as “Positive for cocaine”. (Jt.Ex. 2; Testimony of Geary)
Specifically, the Quest hair drug test result for the Appellant’s December 2018 hair drug test reported the detection of 901 picograms (pg) of cocaine per nanaogram of hair after a GS/MS Confirmation Test. and contained 68pg/ng of the cocaine metabolite Benzoylcegonine (BEHC), and Zero pg/ng of the two other cocaine metabolites – Cocaethylene (COCHC) and Norcocaine (NOCHC), for which tests were performed.. (Jt.Ex. 2 at 96)¹⁵
54. The January 7, 2018 hair test result was negative (below the 300pg/ng cut off for cocaine, as well as negative for all other drugs.. (Jt.Ex. 4)
55. The Respondent relied on the testimony of Dr. Boswell, the MRO for the Respondent, whose staff obtained the Appellant’s hair samples for the Appellant’s hair drug tests in September 2018, December 2018 and January 2019. (Jt.Exs. 1, 2 and 4)

¹⁴ The technical interpretation of these results is discussed further below.

¹⁵ The Documentation Packet reported that the Appellant’s December 2018 hair sample tested negative for Benzoylcegonine, a metabolite of cocaine. (Jt.Ex. 2 at 96)

56. Since 2016, the Respondent has employed the services of Mount Auburn Hospital Occupational Health Services (MAH-OHS) in conjunction with Quest for various testing services. (Testimony of Boswell; Jt.Ex. 5) Mount Auburn has a hospital lab but if a specialty test is needed, MAH-OHS sometimes will send specialty testing specimens to Quest. (Testimony of Boswell)
57. Dr. Reid T. Boswell (“Dr. Boswell”) has been the Medical Director of MAH-OHS in Cambridge for nearly twenty-five years. Dr. Boswell attended medical school at Emory University and worked as an urgent care physician for approximately five (5) years before completing an occupational health fellowship at Boston University. (Testimony of Boswell)
58. Dr. Boswell is a certified MRO and serves as the MRO for the Respondent in various matters, including the pre-employment drug tests for police candidates. (Testimony of Boswell)
59. An MRO must be trained in a subdiscipline of occupational medicine, tested, and certified to review drug test results. The function of an MRO, *inter alia*, is to review drug test results. (Testimony of Boswell)
60. Dr. Boswell is not a toxicologist although he took some toxicology courses. Dr. Boswell has some knowledge about hair drug testing and thinks that it would be possible for there to be environmental contamination of drugs on a candidate’s body. He does not have any specific knowledge about the way that the Quest hair drug tests in this appeal were conducted. He is unaware of the rate of error or the rate of false positives in hair follicle drug tests. The vast majority of Dr. Boswell’s experience with regard to drug testing have been with urine drug testing, not hair drug testing. (Testimony of Boswell)

61. Dr. Boswell reports to the Chief of Medicine at Mount Auburn Hospital. Within MAH-OHS, Dr. Boswell supervises a staff including a full-time nurse practitioner, a part-time medical assistant, a front desk staff member, an office manager, and several per-diem nurses who provide services off-site to various companies. (Testimony of Boswell)
62. Dr. Boswell’s clinic has performed a variety of occupational health services to various clients, like Newton, under contract. Dr. Boswell’s clinic provides many services relating to workplace injuries, regulatory exams, and drug testing, among other services. Dr. Boswell’s clinic has provided such services for Newton since 2016.¹⁶ (Testimony of Boswell)
63. Dr. Boswell’s clinic has had a long-standing contractual relationship with Quest to perform various tests. (Testimony of Boswell)
64. Until 2019, Newton was Dr. Boswell’s only client that used pre-employment hair drug tests. (Testimony of Boswell)
65. One of the roles of Dr. Boswell’s clinic in the drug testing performed for the Respondent is the collection of hair samples from the Newton police candidates to be tested and to make sure that it is sent to Quest in an appropriate manner for testing. (Id.)
66. Dr. Boswell received a one-page description from Quest indicating the manner in which hair samples are to be taken by Dr. Boswell’s clinic. When the clinic received the Respondent’s first request for a hair drug test, Dr. Boswell and his staff performed the hair collection process together to ensure they followed the collection directions correctly. (Testimony of Boswell; R.Ex. 1) Dr. Boswell, the nurse practitioner and medical assistant at the clinic “simply followed what [Quest] provided[.]”, but Quest did

¹⁶ Dr. Boswell testified that the Respondent may have obtained hair drug testing via another clinic prior to 2016 but he was not certain.

not provide any training in addition to the brief description that it gave the clinic.

(Testimony of Boswell, Transcript at 205-206)

67. If Dr. Boswell had any questions about the result, he can call the Quest certified scientist but he did not do so with regard to the Appellant's hair drug test results. (Testimony of Boswell)

68. Dr. Boswell did not contact the Appellant in regard to his December 2018 hair sample positive test result because "I was not under any obligation to do so, and I did not feel that there was any potential medical explanation" for the Appellant's test positive result. (Testimony of Boswell, Transcript at 193) Dr. Boswell also does not believe that he was obligated to contact the Appellant about his positive test result because a hair drug test "[i]s not federally regulated." (Id.) The Appellant received an email message with the positive results.¹⁷ (Testimony of Appellant)

69. After being informed that his December 2018 hair sample test result was positive, the Appellant appeared at Dr. Boswell's clinic to provide another hair sample for an additional hair drug test on his own in early January 2019. The Appellant and Dr. Boswell's clinic subsequently received the result of the Quest January 2019 hair drug test, which was negative. (Testimony of Boswell)

70. Thereafter, the Appellant phoned Dr. Boswell and asked him how he (the Appellant) could have a positive result in December (for the Appellant's December 2018 hair sample) but a negative result in January. Dr. Boswell testified at the Commission hearing

¹⁷ The Appellant testified that he received the results of the December 2018 hair drug test via email. Since the Appellant was required to provide identifying information when Dr. Boswell's clinic obtained his hair sample for the hair drug test, Quest may have emailed the test result to the Appellant. The Appellant offered to show the email message on his cell phone at the Commission hearing. I declined the Appellant's offer but asked him to print it and send it to the Commission and the Respondent. I did not receive the Appellant's printed email.

that he told the Appellant in their phone call that he did not know the reason but that “...it’s possible you could have had a haircut in between” the two tests. (Testimony of Boswell, Transcript at 197) When asked at the Commission hearing how the Appellant responded to Dr. Boswell’s haircut statement, Dr. Boswell twice asserted, “I think he [the Appellant] said yes. It’s hard for me to remember.” (Id.) There is no indication in the record that Dr. Boswell asked the Appellant if he had experienced any external exposure to cocaine.

71. In his testimony at the Commission hearing, the Appellant was asked twice whether he cut his hair between the December 2018 and January 2019 hair drug tests. On each occasion, the Appellant answered simply “no”. (Testimony of Appellant)

72. Dr. Boswell believes that his clinic has provided roughly 100 hair drug tests of the Respondent’s police candidates since it began providing hair drug testing services two years earlier and that the Appellant is the only such candidate who tested positive. One Newton employee (not a police officer) tested positive on a hair drug test. The Respondent uses the same hair drug test for firefighter candidates. Dr. Boswell did not recall if any Newton firefighter candidates had positive hair drug test results. (Testimony of Boswell)

Dr. Winters

73. The Respondent called Dr. Thomas Winters to testify at the hearing in this case as an expert Medical Review Officer. Dr. Winters is board certified in internal medicine and occupational environmental medicine and board eligible in infectious disease. He is not a toxicologist. (Testimony of Winters)

74. Dr. Winters attended Tufts Medical School, doing a residency in internal medicine and infectious disease. He taught at UMass Medical School for a number of years in internal medicine and infectious disease and was then trained in occupational health and began working in occupational medicine clinics at UMass, later moving to Carney Hospital in the same field. He has had teaching appointments at Boston University and Tufts Medical schools. (Testimony of Winters; Jt.Ex. 6)

75. At New England Baptist Hospital, Dr. Winters and others built an occupational health network of clinics that provided a number of services, including various testing services. As a consultant to a hospital or other facility, Dr. Winters engages an outside medical testing company, like Quest, to actually perform testing for the facilities, including the testing of employees.¹⁸ As was true about Dr. Boswell, the vast majority of Dr. Winters' experience with drug testing has been involved in is regulated testing such as urine testing (Testimony of Winters)

76. Dr. Winters and others subsequently bought the clinic medical directorships and built a company called Occupational Environmental Health Network (OEHN). OEHN has five occupational health doctors, 3 nurse practitioners, several nurses, and administrative staff, and they place doctors and nurse practitioners at multiple hospitals including a Harvard teaching hospital, Steward Hospital and UMass Memorial Hospital. As half owner of OEHN, he is the MRO-fill-in for a couple of the doctors who work for Dr. Winters. (Testimony of Winters)

77. Dr. Winters also currently teaches at Harvard's School of Public Health master's degree program parttime, where students learn occupational health subjects such as biostatistics,

¹⁸ At at least one facility, Dr. Winters mentioned that the drug testing of employees, including himself, involves urine testing only, not hair testing. Most of the testing he is involved in is regulated testing.

epidemiology, toxicology, legal medicine and how to take care of injured workers, workers' compensation, exposures in the workplace and ergonomics. (Testimony of Winters; Jt.Ex. 6)

78. Dr. Winters has been a parttime MRO for approximately two decades. He is unaware of the rate of error or the rate of false positives associated with hair follicle tests. (Testimony of Winters)

79. Dr. Winters is also professionally involved with multiple biotech pharma companies. (Testimony of Winters)

80. Dr. Winters defines an MRO as a "kind of subdiscipline of occupational medicine where you're trained to – and it's experiential . . . usually, a two-day course; and then you take a test, a half day test, and you get certified." (Testimony of Winters, Transcript at 70) MROs are required to take the exam every five years. (Testimony of Winters)

81. Dr. Winters described the function of an MRO to include reviewing positive drug tests from labs usually involving a urine test result but sometimes hair test results and perhaps a saliva test result. The manner of the review depends on whether it's regulated by a federal authority such as SAMHSA [in the U.S. Department of Health and Human Services. (Testimony of Winters at 71) Dr. Winters indicated that some drug testing is regulated and some is not. (Id.)

82. More specifically, regarding the duty of an MRO pertaining to positive urine tests, Dr. Winters added:

"And you pretty much mirror the testing program similar. (sic) And then your job is to search for an alternate explanation for that positive test; and then you report it out as whether MRO positive or MRO negative...." (Dr. Winters, Transcript at 71 - 72)

83. "Hair [testing] hasn't been accepted by the regulated arena yet." (Id. at 72)

84. Some employers “don’t use an MRO to find out if the positive [test result] is a true positive, and if there’s an alternate explanation.” (Id. at 76)
85. Dr. Winters added that, with regards to testing for opioids, “You have a prescription for OxyContin for chronic pain, and you’re positive for oxycodone, it behooves you to have an MRO ask that person if they have a prescription; and then it becomes a negative test, you would still report it to – if it is a safety-sensitive job, you would report it forward that that person is on opioids and they’re performing safety-sensitive work, and its the employer’s business what to do” (Id. at 78)
86. Based on Dr. Winters’ education and his training, experience and certifications as an MRO, I find him to be a general MRO expert.
87. As an MRO, Dr. Winters usually only sees the one-page drug test result from a testing company for his review (as in Jt.Ex. 2 at 96), although he was not certain whether the one-page result he recalled was a form used by Quest or another testing company (Psychemedics). He had never seen many parts of the Quest Documentation Packet and he repeatedly stated that he consulted Mr. Tarver at Quest about the lengthy packet and the Quest hair drug test process. More specifically, Dr. Winters stated that his testimony was “both based on my review and analysis of it and the conversation with Mr. Tarver.” (118)
88. In preparation for his testimony at the Commission hearing, Dr. Winters spoke to the Quest Certifying Scientist, John Tarver, on the phone. Mr. Tarver’s bona fides include an MA, MBA, FABFT [American Board of Forensic Toxicology], TC-NRCC [Toxicology Chemist – National Registry of Certified Chemists]. (Testimony of Winters) Mr. Tarver signed the Documentation Packet regarding the testing of the Appellant’s

December 2018 hair sample but he was not involved in the drug testing of the Appellant's December 2018 hair sample. Dr. Winters stated that his testimony was based partly on his knowledge of hair testing and based partly on Mr. Tarver's comments. (Testimony of Winters) Dr. Winters is familiar with aspects of hair drug testing performed by Psychemedics because he sat on an unspecified panel with "the principal of Psychemedics." (Testimony of Winters) Dr. Winters stated that he was also familiar with the Psychemedics hair drug testing process through the litigation involving Psychemedics and the Boston Police Department. Dr. Winters believes that Psychemedics checked its washes at some point in time to see if they removed environmental contaminants. (Id.) Testing the hair sample wash is one way to assess whether there were external contaminants that were present and removed. (Testimony of Benjamin) Dr. Winters does not know if Psychemedics regularly tests the washes as part of its hair drug testing process. He believes that Quest does not test its washes. Quest and Psychemedics have different cutoff levels for concluding that a hair sample tests positive for cocaine. Specifically, Quest's cutoff is 300 picograms per milligram of hair and Psychemedics has a cutoff of 500 picograms per milligram. Dr. Winters believes that the two companies' cutoffs is the only difference between the hair drug testing by Quest and by Psychemedics. (Id.)

89. Prior to this case, Dr. Winters had not conducted an in-depth analysis of hair drug testing.

To facilitate an analysis for this appeal, Dr. Winters reviewed his MRO study guide

"because we don't see a lot of hair testing because it's not federally accepted."

(Testimony of Winters at 113)

90. Dr. Winters appeared to be familiar with the Quest hair collection process for hair drug testing, noting, for example the width of the hair sample needed. He did not mention whether a specific length of hair is required for the Quest hair dug test, nor did he indicate the actual length of the Appellant's hair sample used to test the Appellant's December 2018 hair sample. (Testimony of Winters)

91. Dr. Winters did not know, with regard to the Quest Documentation Packet for the Appellant's December 2018 hair sample drug test (Jt.Ex. 2):

- why there was no confirmation recertification
- what the calibration controls were
- what the sequence tables were
- what the internal standard abundance criteria worksheet is
- what the calculation worksheet is
- why a corrective action was taken

(Testimony of Winters)

92. Dr. Winters did not ask anyone about the environment in which the Appellant lived or worked in order to determine what possible environmental contamination the Appellant may have. (Id.)

Dr. Benjamin

93. The Appellant called David Benjamin, Ph.D. (Sc.D. Hon.)) to testify at the hearing in this case as a clinical pharmacology and toxicology expert. Dr. Benjamin has been a Clinical Pharmacologist and Toxicologist since the 1970s, earning his Ph.D. from the University of Vermont College of Medicine and completing a Fellowship in Clinical Pharmacology/Toxicology at the Kansas University Medical Center. In his full C.V., Dr. Benjamin lists more than 200 presentations and publications on a variety of pharmacology and toxicology subjects, including ingestion of marijuana and opioids and pain management and addiction, as well as the professional standards of clinical

pharmacologists and toxicologists. His many professional writings include a chapter on a Forensic Pharmacology in the Forensic Science Handbook, Vol. III. (Jt.Ex. 7)

94. Over the years, Dr. Benjamin has taught aspects of clinical pharmacology and forensic toxicology at many schools, including B.U. Medical School, Tufts Medical School, the Harvard Medical School Risk Management Program, several law schools, the Harvard School of Public Health, and the Massachusetts College of Pharmacy and Allied Health Sciences. In addition, Dr. Benjamin has provided training on drug abuse analysis to scientists, physicians, judges and attorneys at various professional associations in multiple states and countries and made presentations concerning pertinent scientific evidence in legal proceedings, including, for example, a presentation at the American Academy of Forensic Sciences entitled “Presenting Scientific Evidence in Court: Meeting the *Daubert* Standards for Reliability”. He has held leadership positions in a number of professional associations in his field and has conducted research over the decades in his profession. (Id.)

95. Dr. Benjamin has worked in the pharmaceutical industry for more than a decade at different companies, performing clinical drug studies and related activities, he has conducted research and he has been a clinical pharmacology and toxicology consultant for decades. His consulting clients have included a Boston Police union in connection with hair drug testing of members of the Boston Police Department. (Jt.Ex. 7) Based on Dr. Benjamin’s many years of applicable education, training, writing, teaching, presentations, research, professional leadership and related professional experience, I find him to be an expert toxicologist and pharmacologist.

96. Although drugs can access human hair internally through the blood stream, when test results are positive, it's common for there to be drug on the outside of the hair. Dr. Benjamin interviewed the Appellant, the first medical professional to do so, in the presence of the Appellant's attorney, to assess the possible environmental contaminants to which the Appellant may have been exposed since the Appellant denied using drugs. The Appellant informed Dr. Benjamin that his (the Appellant's) roommate had been a cocaine user and that that roommate had used the Appellant's brush and comb. Dr. Benjamin added that the Appellant said that when he (the Appellant) found out that his roommate used cocaine, the roommate was asked to leave the house. (Testimony of Benjamin)
97. If cocaine is present on an object handled or touched by the Appellant's roommate and the Appellant touched the same object and then rubbed his eyes or put his fingers in his mouth, there would be a transfer, which is a term used in forensics for evidence that is transferred from one person or setting to another. (Testimony of Benjamin)
98. The Appellant told Dr. Benjamin that he (the Appellant) has washed Newton police cars at his job at the car wash and seen different containers with different powders and drugs, including white powders. Such white powder could be cocaine, heroin or crushed aspirin but "certainly the possibility exists for exposure in that unwittingly." (Id. at 276). If, as the Appellant told Dr. Benjamin, the Appellant uses a blower to clean the interior of the police cars instead of a vacuum, it would "aerate" the particles, exposing the particles to the people who got in the car. (Testimony of Benjamin)
99. From his study of the pertinent literature and the consensus of agencies conducting the hair collection process for hair drug testing, Dr. Benjamin indicated that the general hair

collection protocol in hair drug testing involves usually taking enough follicles of hair from the crown of the head, cutting as close to the scalp as possible. The tests require a certain weight of hair. (Testimony of Benjamin)

100. Before testing the hair sample for a hair drug test, the hair should be washed and rinsed.

There are different methods of washing hair samples. Dr. Benjamin reviewed the Respondent's Documentation Packet (Jt.Ex. 2) but the information provided by Quest does not include information indicating certain aspects of the type of wash done on the Appellant's December 2018 hair drug test hair sample. Absent further information about the hair wash that Quest may have performed on the Appellant's hair sample from December 2018, Dr. Benjamin is unable to determine if the hair drug tests were done correctly to a reasonable degree of scientific certainty. However, Dr. Benjamin noted that the Appellant's positive hair drug test result was confirmed by the Quest confirmation test. (Testimony of Benjamin)

101. Testing of the wash used to purportedly clean a hair sample to be tested is essential to ensure that any exterior drug exposure to the hair has been removed. Dr. Benjamin found that there is no indication in the Quest Documentation Packet that Quest tested the wash of the Appellant's December 2018 hair sample. (Id.)

102. Dr. Benjamin is not an MRO but he has written MRO newsletters. He knows that Dr. Boswell, the MRO associated with the Appellant's positive hair drug test result from Quest, is an occupational physician who took a specialized program called the MRO program for Medical Review Officers. The program is designed to teach physicians who have not had sufficient training in analysis of drug test results to be able to analyze the drug test results and offer an opinion on them. Dr. Benjamin firmly believes that trained

MROs should call hair donors when they test positive so that they can ask the donor whether there are medical or other possible explanations for the test result. Dr. Boswell, who is a trained MRO, simply called Capt. Geary at the NPD and said that the Appellant tested positive without contacting the Appellant to find out whether there could be another explanation such as a false positive or external contamination. (Testimony of Benjamin)

103. Although Dr. Benjamin believed that the Quest hair drug test chain of custody for the Appellant's December 2018 hair sample was good, he noted that a signature is missing from the Quest lab reconfirmation form in the Quest Documentation Packet. (Testimony of Benjamin)

104. The federal government has not yet approved hair drug testing because it is unreliable. It is "[t]oo easily contaminated by environmental factors" *id.* at 285) and leads to false positives (*id.* at 289).

Administrative Notice of BPD Drug Testing Decisions

105. As I announced at the outset of this hearing, I take administrative notice of the Commission's Decision in Boston Police Department Drug Testing Appeals (D Cases), 26 MCSR 73 (2013), *aff'd sub nom Boston Police Dep't v. Civil Service Comm'n*, Suffolk Sup. Ct. Nos. 13-1250-A & 13-1256-A (Fabricant, J.)(Oct. 6, 2014) ("in all respects" save for remand to provide a further remedy to the six officers whose appeals were allowed), *aff'd sub nom, Preston Thompson v. Civil Service Comm'n*, 90 Mass.App.Ct. 462 (2016); *rev den.*, 476 Mass. 1106 (2017)(hereinafter "BPD Drug Testing Appeals").

Applicable Law

The role of the Civil Service Commission in consideration of a bypass appeal is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). Section 2(b) of G.L. c. 31 requires that bypass cases be determined by a preponderance of the evidence. 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 Commission, 31 Mass.App.Ct. 315 (1991). Appointing Authorities have considerable discretion when choosing individuals from a certified list of eligible candidates on a civil service list, especially in choosing to hire candidates for employment in public safety. The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

Analysis

I find that the Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification for bypassing the Appellant. The sole reason the Respondent provided for its bypass of the Appellant was the reported result from a single Quest hair drug test upon a single sample of the Appellant's hair taken in December 2018.

The Commission has found in other cases that adverse personnel actions in the law enforcement field based exclusively on the results of hair drug test results do not pass muster. Specifically, in 2013, the Commission ruled that while a drug-free workplace policy at the Boston Police Department was an appropriate policy to help ensure that current Police Officers are not taking drugs, “ ... a positive hair test does not provide the 100% refutable evidence of drug ingestion” BPD Drug Testing Appeals.

The Commission found further:

... Workplace hair testing for drugs, as distinct from urinalysis, has been and remains a ‘work in progress’. There has been a long-standing debate within both the scientific and law enforcement communities as to how accurately hair tests are able to differentiate between drug (sic) found in hair due to ingestion as opposed to contamination by external or passive means. There are no uniform, nationally approved standards for hair testing. Protocols vary from laboratory to laboratory and have changed significantly over time. Depending on what protocol is applied, what laboratory does the testing, or what instrumentation is used, many Appellants would test negative rather than positive. The BPD was the first and, until 2009, the only major municipal police department conducting annual hair testing of officers. The FBI Laboratory recently suspended hair testing of law enforcement personnel pending further study as to its efficacy.

The Commission concludes that, under basic merit principles and ‘just cause’ standards of the Civil Service Law (G.L. c. 31, §§ 1, 41-43) applicable to all tenured public employees, a BPD police officer's hair test that is reported as positive may be used for the purpose of determining whether or not an officer had used illicit drugs. A reported positive test result, however, is not necessarily conclusive of ingestion and, depending on the preponderance of evidence in a particular case, may or may not justify termination or other appropriate discipline of a tenured BPD officer.

(Id. at 4, 5)(denying appeals of four appellants and allowing appeals of six appellants).

At the hearing in the instant appeal on March 12 and May 10, 2019, I advised the parties that I would consider the 2016 Appeals Court decision in the BPD Drug Testing Appeals involving the discipline of existing members of the BPD who tested positive for drugs; additionally, multiple witnesses during this (DeStefano) appeal referenced the BPD Drug Testing Appeals in their testimony. In addition, the parties in the instant appeal were aware at the Commission hearing that in 2015 the Commission allowed the appeal in Gannon v. Boston Police Department, in which Mr. Gannon, a police candidate, was bypassed for testing positive in a hair drug test, that the Superior Court reversed the Commission decision in 2017 and that the case was then pending at the Supreme Judicial Court at the time of the DeStefano hearing at the Commission. In October 2019, five months after the DeStefano Commission hearing, the SJC upheld the Commission's decision allowing the appeal. Boston Police Department v. Gannon 483 Mass. 461 (2019)(herein "Gannon").

While the hair drug test at issue in the instant appeal was performed by Quest and the hair drug tests in BPD Drug Testing Appeals and the Gannon appeal were performed by another company (Psychemedics), those cases are equally apt here. As the Appeals Court and the Supreme Judicial Court decisions noted, the Commission's decisions provide both a thorough and detailed analysis of the reliability of the science of hair drug testing, with the benefit, *inter alia*, of the extensive expert testimony of numerous experts experienced with the science of hair drug testing and the extensive published literature on the subject who testified for days in the BPD Drug Testing Appeals.

In the instant appeal, the Respondent was unable to establish by a preponderance of the evidence that the positive results of the hair drug test on the Appellant's December 2018 hair sample was conclusive of ingestion, thereby justifying the Respondent's bypass of the Appellant.

Although the Quest report on the Appellant's December 2018 hair sample was reported "Positive for Cocaine", that result falls short of establishing by a preponderance of the evidence that the amount of cocaine reported to be found in the Appellant's hair was the result of his ingestion of the drug and not the result of passive or environmental contamination.

First, the actual Quest Confirmation Test results found no cocaine metabolites above the required cut-off of 300 pg/ng. Rather, there was 68pg/ng of Benzoyllecgonine (BE), and zero quantities of Cocoaethylene (COC) or Norcocaine (NORC). Neither Dr. Boswell nor Dr. Winters was able to explain with a reasonable degree of scientific certainty how the Appellant's December 2018 hair sample test was deemed positive for cocaine without metabolites registering above the 300 pg/ng cut-off in order to permit an inference of how the hair became contaminated. This conclusion stems from the well-established facts that (1) the quantities of these substances is infinitesimal (millionths of millionths of a gram); (2) metabolites, especially the BE found in the Appellant's sample can also found in the environment; and (3) there is evidence that the testing process, itself, can also "create" metabolites. Thus, no inference of ingestion can be drawn from the results of the Appellant's December 2018 "positive" test for "cocaine", but without the presence of any cocaine metabolites above the cut-off of 300pg/ng prescribed by Quest. *See BPD Drug Test Appeals*, pp.44-74, 106-114.¹⁹

Second, no one with personal knowledge of the entire Quest process testified in support thereof. The Respondent's witnesses called to testify about the Quest testing process consisted of Dr. Boswell, the Respondent's MRO, who summarily accepted the Quest results which served

¹⁹ The testimony of Dr. Winters and Dr. Boswell to the effect that the detection of 68pg/ng of BE justifies an inference of ingestion is simply not credible. The level of detection is the smallest quantity that the testing machine can detect, it is not the quantity prescribed as the "cut-off" to satisfy the requirement that there is sufficient substance to infer its presence by ingestion rather than passive or environmental contamination. The Commission expressly rejected the contention that a "limit of detection" could confirm ingestion in *Boston Drug Testing Cases* at pp.110-112.

as the sole basis of the Respondent's bypass of the Appellant, and Dr. Winters, the Respondent's MRO expert. Dr. Boswell is not a toxicologist. He acknowledged that the vast majority of his work as an MRO for drug testing involves urine drug testing, which is a long-standing reliable and federally regulated drug test, unlike hair drug testing. Dr. Boswell's business relationship with the Respondent relating to occupational medicine and his long-term professional association with Quest undermine the independence of his testimony. Dr. Winters is also no toxicologist, has never done an in-depth study of hair drug testing, and also appeared to be willing to accept at face value statements the personnel at the for-profit Quest laboratory provided over the phone. The testimony of these poorly informed witnesses, who also had limited experience with hair drug testing, deserves significantly diminished weight.

Dr. Boswell has not had any first-hand knowledge of the actual Quest test processes. His involvement with the Quest test process in this matter appears to be limited to serving as a the MRO at the facility where the Appellant provided his hair sample, his review of a one-page test result from Quest and his report of the test results to the Respondent. Though Dr. Boswell has been an MRO for a number of years, he has spent a very small portion of his time as an MRO involved with hair drug testing. He had no direct involvement in the hair sample collection process here. Asked to describe the training that he and the two people in his office who were authorized to collect hair samples for the Quest hair drug test underwent, Dr. Boswell said it involved receiving a brief written description of the hair collection process that they reviewed together, with no apparent hands-on training by Quest, followed by performance of a practice hair sample collection. Dr. Boswell had never seen the more than 119-page Quest documentation packet on which the Respondent relied in this case or in others, with the exception of the one page of information provided to him as the MRO. Although the Quest

Documentation Packet states that the length of the hair to be tested is 3.9 centimeters, there is no indication in the record of the actual length of hair that his staff took from the Appellant when one of the staff collected his hair sample in December 2018. As Mr. Benjamin, a toxicologist with decades of experience indicated, the length of the hair sample is key to determining the time period covered by a hair drug test.

Dr. Winters, the Respondent's MRO expert, provided limited support for the Respondent's reliance upon the Quest hair drug test of the Appellant's December 2018 hair sample. Dr. Winters had no involvement in the Appellant's hair drug testing. He has not trained as a toxicologist. Like Dr. Boswell, Dr. Winters spends only a small portion of his work days performing as an MRO and the vast majority of his work as an MRO in drug testing overseeing urine drug testing. Asked if the significant professional writings listed in his curriculum vitae include writing about hair drug testing, Dr. Winters said that if he did, it was "rare". Until he prepared for his testimony at the Commission, Dr. Winters had never seen the type of information in the Quest Documentation Packet in evidence. In support of his comments about the Quest hair drug test here, Dr. Winters stated that he knows a senior official at Psychemedics, which company also conducts hair drug testing, and attended a conference or meeting where there was some discussion about an anticipated approval by a federal agency of hair drug testing. Eventually, Dr. Winters acknowledged that no federal authority has approved of hair drug testing.

More troubling is the fact that, as he acknowledged, Dr. Winters' testimony was heavily based on a phone conversation with Mr. Tarver, the Quest employee who certified the positive test result of the Appellant's December 2018 hair sample, in addition to his own alleged knowledge of hair drug testing. Dr. Winters repeatedly referred to Mr. Tarver in his testimony

stating explicitly, at times, that Mr. Tarver had provided him with certain information about the hair drug testing process that he (Dr. Winters) did not previously know, on the one hand, and, on the other hand, that Mr. Tarver would not answer some of Dr. Winters' questions because the information was proprietary. Dr. Winter's reliance on an incalculable amount of word-of-mouth information in his testimony, as opposed to his own knowledge exclusively, undermines the testimony that he provided. In addition, there were significant questions about the Quest hair drug test process that Dr. Winters simply could not answer.

As a toxicologist and pharmacologist with decades of experience in the field, Dr. Benjamin provided significant testimony about the shortcomings of hair drug testing. I find Dr. Benjamin's testimony credible in that he acknowledged both the strengths and weaknesses of the hair drug testing performed on the Appellant's December 2018 hair sample. He noted that the positive hair drug test result in this case does not indicate the size of the hair sample that was taken. The length of a hair sample is significant in that it indicates the period of time within which it may be asserted that a donor used the drug at issue. Dr. Benjamin also noted that accurate hair drug testing requires a test of the wash used on the hair sample and that he found no indication that Quest had tested the wash of the Appellant's hair. Further, Dr. Benjamin noted that MRO Boswell had not contacted the Appellant to ask if he had experienced environmental exposure or whether there might be medical reasons that the Appellant's hair sample tested positive. While the Appellant's hair drug test result was three times the Quest cutoff, these significant shortcomings of the evidence in support of the hair drug test process undermine the conclusiveness of the test.

Third, the record reflects numerous lapses and irregularities in the Quest documentation and procedures that further undermine the reliability of the test result in this case. *See Gannon*, 483 Mass. at 495, fnt. 21.

In particular, Dr. Boswell acknowledged that if a urine sample donor tests positive for certain drugs, applicable federal requirements indicate that the approving authority is to contact the donor to inquire if there are medical reasons for the positive test result. Dr. Boswell did not contact the Appellant to find out if there was a medical reason for his positive hair test result. Logic and common sense would indicate that inquiring of the donor is especially important in dealing with an unregulated testing process like hair drug testing. Dr. Boswell acknowledged that it was possible for external contamination, as opposed to ingestion, may result in a positive hair drug test result but he made no effort to ask the Appellant if he had been externally exposed to cocaine, as the Appellant alleged, via his roommate and his work at a car wash where the NPD vehicles potentially contaminated by illicit drugs were cleaned.

Similarly, the record evidence here does not establish that the testing of the Appellant's hair followed the Quest protocols to assure a reliable result. There is a dearth of evidence as to the quantity of the hair sample, the protocols, if any, and results of the testing procedures for washing the samples and testing the wash which are the key prerequisites to a reliable test.

There was NO detailed documentation introduced in evidence for the September 2018 and January 2019 negative hair drug test results. As the SJC noted in *Gannon*, “[n]ot having the same information for each test precludes further assessment of the hair drug test’s reliability.” *Gannon*, 483 Mass. at 473, fnt. 21.

Fourth, the Appellant’s single “positive” hair test overlaps with a confirmed negative test immediately prior and another confirmed negative test within days after he first learned of the

positive test. The Commission has credited an appellant's denial that he used drugs when he sought to obtain a retest immediately upon learning of his positive test and the subsequent test comes back negative. The proximity of the tests in this appeal is far closer than any of the tests that the Commission credited in Gannon or the BPD Drug Testing Appeals as the basis for an inference that the person did not ingest drugs.²⁰

Fifth, the testing equipment used by Quest in this matter is known as a Gas Chromatography/ Mass Spectrometry machine (GC/MS). The evidence did not include any conclusive explanation about the accuracy of this type of method. Based on the evidence in the BPD Drug Testing Appeals, according to the experts in that case, the "gold standard" in hair drug testing is a different, state-of-the art method known as Liquid Chromatography/Mass Spectrometry/Mass Spectrometry (LC/MS/MS). As indicated in that case, only this state-of-the art method is capable of measuring the extremely small quantities (especially of metabolites) involved in hair drug testing. *See also Gannon*, 481 Mass. at 473 fnt 11 and accompanying text.²¹

Sixth, the Respondent's bypass letter asserted that the Appellant's positive hair drug test result constitutes an automatic disqualifier under the state Medical Standards for Police Officer candidates and pursuant to G.L. c. 31, s. 61A. This bypass rational is undermined by the facts that the HRD Medical Standards specifically require that a drug test used by police departments must be approved and/or regulated by SAMHSA, the federal agency for regulating drug tests, among other things. The record here is clear: the test performed by Quest was a hair drug test

²⁰ The gap between the date that Quest reported the December 2018 test positive to the MRO (December 14, 2018) and the date that the Appellant learned of the result (sometime in early January 2019), further undermines the result. Had the Appellant been duly informed sooner, any question about the lapse of time between the December 7, 2018 positive test and the January 7, 2019 negative test would be substantially mitigated.

²¹ The dearth of evidence here about the relative reliability of the GC/MS method may also explain why the Quest cut-offs for both cocaine AND cocaine metabolites is set at the same levels of 300pg/ng (somewhat different from the metabolite criteria applied by other laboratories who use an LC/MS/MS method).

and hair drug tests have not been approved and/or regulated for this purpose by SAMHSA. As a result, the Appellant's positive hair drug test result may not be considered an automatic disqualifier under the Commonwealth's Medical Standards for police officers.

Seventh, I have not overlooked certain aspects of the Appellant's testimony at the Commission hearing casting a shadow on his credibility. I would have expected him to have a clearer memory about when he moved away from his own parents' home and when his roommate moved out of his (the roommate's) parents' home, leaving him as their sole "tenant". I also have my doubts about the Appellant's explanation of how he came to learn of his roommate's cocaine use and the lapse of time in the Appellant doing anything about it – i.e., not taking effective steps until after his positive drug test. Similarly, although the possibility that the Appellant may have become contaminated while performing his job washing police cars has some plausibility, (corroborated by Dr. Benjamin), I doubt that it can fully explain the contamination, since the Appellant was working at the car wash throughout the entire period of his Quest drug tests from 2017 to 2019 (several of which came out negative). However, the potential inconsistencies in the Appellant's testimony about how he supposedly became contaminated by cocaine without ingestion does not change my conclusion that the Quest test results are not nearly conclusive enough to permit any inference that the Appellant actually ingested cocaine. As stated in Gannon:

“[I]t is the [police] department that shoulders the burden of proof at the hearing before the commission. The fact that [Appellant] did not provide an explanation for what the commission concluded was an insufficiently reliable positive drug test result does not imbue the test with reliability or otherwise provide credible evidence of [Appellant's] drug use”

Gannon, 483 Mass. at 475 fnt.25.

Conclusion

For all of the foregoing reasons, the Appellant's appeal docketed under G1-19-016 is hereby *allowed* and the motion for summary decision is moot. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission ORDERS that the Massachusetts Human Resources Division and/or the City of Newton in its delegated capacity take the following action:

- A. Place the name of Thomas DeStefano at the top of any current or future Certification for the position of Newton Police Officer until he is appointed or bypassed after one further consideration consistent with this Decision.
- B. Nothing in this Decision shall preclude the City of Newton from requiring Mr. DeStefano to submit a new application for appointment and that he satisfy all of the same requirements for appointment applicable to all other candidates or from deciding whether Mr. DeStefano should be appointed or bypassed for any sound and sufficient reasons save only that the results of the December 2018 positive drug test may not be used as a reason to bypass him in any future consideration.
- C. If Mr. DeStefano is appointed as a Newton Police Officer, he shall receive a retroactive civil service seniority date which is the same date as the first candidate ranked below Mr. DeStefano who was appointed from Certification No. 05750. This retroactive civil service seniority date is not intended to provide Mr. DeStefano with any additional pay or benefits including, without limitation, creditable service toward retirement.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman

Commissioner

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 24, 2022.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

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