

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

CHRISTOPHER DUNN,
Appellant

v.

G1-14-80

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Christopher Dunn (“Mr. Dunn” or “Appellant”), duly appealed to the Civil Service Commission (“Commission”) on April 7, 2014, from the decision of the Boston Police Department, the Appointing Authority (hereinafter “BPD” or “Respondent”), to bypass him for appointment to the position of police officer. A pre-hearing conference was held on April 22, 2014 and a full hearing was held on June 11, 2014 at the offices of Commission. The hearing was digitally recorded and the parties were provided a copy of the recording.² Both parties submitted post-hearing briefs on August 8, 2014. For the reasons stated here, the appeal is allowed.

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

² If there is a judicial appeal from this Decision, the plaintiff in the judicial appeal is obliged to provide the court a written hearing transcript to the extent necessary to challenge the Decision as unsupported by substantial evidence, arbitrary or capricious or an abuse of discretion. The CD is to be used to prepare and file that transcript.

FINDINGS OF FACT

Fifteen (15) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the witnesses (Ian Mackenzie, BPD Director of Occupational Health Services; Donald Seckler, Ph.D.; and the Appellant) and taking administrative notice of all matters duly filed in the case and pertinent statutes, regulations, case law and policies, a preponderance of the credible evidence, and reasonable inferences therefrom, I make the following findings of fact:

Appellant's Background

1. The Appellant, Christopher Dunn, is a twenty-five (25) year old resident of South Boston.
(Exh. 2)
2. Mr. Dunn is a veteran and was honorably discharged from active duty in the U.S. Marine Corps in August 2011. His service included non-combat tours in the Middle East, Mediterranean and African Coast in 2009 and deployment distributing humanitarian aid in Haiti from January 2010 through April 2010. His final deployment was a combat deployment to Afghanistan in 2011. Mr. Dunn received various commendations during his military service including a Good Conduct Medal that attests he had never been disciplined. He continues his military service in Marine Corps Reserves and has achieved the rank of Sergeant. *(Exh. 2; Testimony of Dunn)*
3. Upon leaving active duty, Mr. Dunn returned to work as a bartender for Ames Plow Tavern, where he had been previously employed as a doorman. At the time of the bypass, he had taken a full-time job as a security guard at Children's Hospital. *(Exhs. 2, 10, 15; Testimony of Dunn)*

4. Mr. Dunn's work as a security guard for Children's Hospital requires him to deal with the public, patients and parents of patients. Many patients have a mental illness, are under extreme emotional pressures, and can become violent. His work requires him to exercise a wide range of discretion calling for deciding on the appropriate use of force to deploy when confronting an intruder or dealing with patients and their families. (*Exhs. 10, 15; Testimony of Dunn*)

The TD Garden Incident

5. On April 27, 2010, while Mr. Dunn (then age 22) was on military leave, he was arrested for belligerent behavior while intoxicated. Mr. Dunn had attended a Celtics game at the TD Garden with about six or seven other friends. He had been asked to leave the building by security because of his loud and drunken behavior but he refused to go. Mr. Dunn referenced his own status as a Marine, yelled a homophobic epithet at a BPD officer and lunged at him. Mr. Dunn ultimately was physically restrained. He was arrested and held in custody at BPD Station A-1 overnight, and charged with disorderly conduct and resisting a police officer. (*Exhibits 2, 4 & 15*)
6. After he was arraigned on the charges the next day, Mr. Dunn voluntarily returned to Station A-1 and waited for the arresting officer to come on duty and offered his apology for his behavior. Eventually, he admitted to sufficient facts and made a written apology to the arresting officer stating how deeply sorry he was. The case was continued without a finding and eventually dismissed. (*Exhs. 2, 4 & 14; Testimony of Dunn*)

Mr. Dunn's Application for Appointment as a BPD Police Officer

7. In April 2011, Mr. Dunn took the Municipal Police Officer civil service examination, scoring a 95. An eligible list was established from this exam on November 1, 2011. On

May 10, 2013, BPD requested a Certification from the state's Human Resource Division (HRD) and HRD sent Certification No. 00746 to BPD. Mr. Dunn was ranked twenty-first (21st) on the Certification. Eighty-three (83) candidates were selected from the Certification, seventy (70) of whom were ranked below Mr. Dunn. On May 14, 2012, Mr. Dunn filled out an application for the BPD. (*Stipulated Facts*)

8. As part of his BPD application, Mr. Dunn admitted to his behavior in the TD Garden incident and acknowledged that his misconduct was a matter of serious and legitimate concern. The ensuing background investigation revealed uniformly strong military, employment and character references, no other criminal record and no other negative matters. (*Exhs. 2 & 9; Testimony of Dunn*)
9. On July 1, 2013, BPD elected to conduct a discretionary interview with Mr. Dunn. The specific purpose of the interview was to make an in-depth review of the TD Garden incident and determine whether Mr. Dunn's behavior in the TD Garden incident should disqualify him from becoming a BPD police officer. The interview was conducted before a panel of three BPD officers: the Internal Affairs Recruit Investigator assigned to perform the background investigation of Mr. Dunn, BPD Deputy Superintendent Holmes and Sgt. Ayala, Commander of the BPD Recruit Investigation Unit. The discretionary interview was video-recorded and a copy of the interview recording admitted in evidence at the Commission hearing. (*Exhs 2 & 15; Testimony of Dunn*).
10. At the interview, Mr. Dunn was thoroughly questioned about the TD Garden incident. His answers were courteous, direct and responsive. He was forthright in disclosing that the TD Garden incident had caused the Boston Fire Department to bypass him. He took full responsibility for his behavior, admitting that he had "blown it" and had brought

dishonor to himself and the Marine Corps. He told the interview panel that he had been in many different countries and some terrible places but the “one night in [Station] A-1 topped them all” and was a real wake-up call that taught him “the biggest lesson in my life”. He admitted to being drunk and out of control but showed genuine remorse for his behavior. (*Exh. 15*)

11. The interview panel specifically probed Mr. Dunn about his inflammatory verbal outburst (calling the BPD officer a “fat f --ing -f -got”). Mr. Dunn explained that he was drunk and did not remember making the statement but accepts the fact that he made such a statement and noted that he has two lesbian relatives and many gay friends. He explained that he has always had a very high regard for police officers, his grandfather was in the FBI, and it has been his dream to become a police officer. (*Exh. 15*)
12. Dep. Sup’t. Holmes asked him if he knew that it would be possible he would have to ride in the same cruiser someday with the BPD officer who had arrested him, and asked what he had to say about that and what he would do if the same thing happened to him as a BPD police officer. Mr. Dunn responded that he fully understood what she was saying and that, while he cannot take back what he did, he has had further discussion with the arresting officer (whom he has seen on a motorcycle patrol) and believes it would not be a problem. He also explained that, as a security guard at Children’s Hospital, he has to handle patients who become violent, and knows not to take their assaults personally but treat the situation calmly and professionally. He stated that if he were the officer confronted with the incident like the one at TD garden, he would have made an arrest as well. (*Exh. 15*)

13. Mr. Dunn explained that since the TD Garden incident, he avoids drinking alcohol and has done so very rarely and always in moderation. (*Exhs. 2 & 15; Testimony of Dunn*)

14. On July 3, 2013, BPD notified Mr. Dunn via e-mail that he was being extended a conditional offer of employment for the position of Boston Police Officer. This offer was contingent upon passing the medical examination, including the psychological screening component. (*Exh. 3*)

The BPD Psychological Screening Plan

15. As required by civil service law and rules, BPD had submitted a psychological screening plan to, and received approval from HRD. The stated purpose of the BPD psychological screening plan “is to identify candidates who show any evidence of a mental disorder as described in the Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel, promulgated by the Human Resources Division [of the Commonwealth] . . . [HRD Medical Standards]. (*Exhs 12 and 13*)

16. The HRD Medical Standards establish two categories of disqualifying medical conditions. A candidate who has a “Category A” medical condition is automatically disqualified. A candidate with a “Category B” condition is disqualified only if the medical examiner concludes that it “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.” These categories are described in HRD’s Physician’s Guide Initial-Hire Medical Standards. (*Exh. 11*)

17. For psychiatric purposes, Category A medical conditions are: anxiety disorders and disorders of behavior, thought, mood, and personality. Category B 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." Category B also covers "any other psychiatric condition that results in an individual not being able to perform as a police officer." (*Exh. 11, p. 16*)

18. A candidate should not be disqualified for an isolated instance, but only when he or she has a history that manifests over a range of circumstances or in a variety of situations.

(*Testimony of Dr. Seckler*)

19. The psychological screening is a three step process. Phase I is testing. Candidates take the Minnesota Multiphasic Personality Inventory–2RF ("MMPI-2RF"), and the Personality Assessment Inventory ("PAI"). These tests are scored using a proprietary computer program and are not intended to serve as the sole determining factor for assessing a candidate's psychiatric condition. (*Exhs. 5 & 6; Testimony of Dr. Seckler*)

20. Phase II consists of a thirty (30) minute clinical interview performed by a psychiatrist/doctorate level psychologist designated by the BPD . If no questions are raised by this process, the designated clinician will notify the BPD in writing that he found no psychiatric condition that would disqualify the candidate to be appointed as a police officer. Should questions arise during the interview process, these issues are explored, and a report is generated by the first level screener that is forwarded to a second opinion psychiatrist/doctorate level psychologist to further evaluate the applicant in Phase III of the process. The second-opinion clinician then makes a final recommendation to the BPD as to whether the candidate is disqualified for a Category A or Category B psychiatric condition. (*Exhibits 11, 12 & 13; Testimony of Mackenzie*)

21. In this case, Dr. Andrew Brown was the first-level psychological screener. Dr. Brown is a consulting psychiatrist assisting BPD since 2006. (*Exhs. 7 & 9*)

22. Mr. Dunn met with Dr. Brown on August 10, 2013, who. After reviewing the written tests results with him, found no problematic psychological issues there:

- The MMPI-2RF test results showed “no indications of somatic, cognitive, emotional, thought, or behavior dysfunction”. Mr. Dunn had failed to answer 15 of 330 questions, but, after reviewing these omissions with Mr. Dunn and getting his verbal responses, Dr. Brown concluded there was nothing “problematic” about it.
- The PAI test results showed some indications of risk factors for substance abuse and aggression, but Dr. Brown discounted this, because he concluded that it was Mr. Dunn’s (honest) endorsement of many “critical items” related to the TD Garden incident that “probably contributed to the risk assessment”.³

(*Exhs. 5, 6 & 9*)

23. After further extensive probing into Mr. Dunn’s drinking history and the TD Garden incident in particular, Dr. Brown concluded:

“Reports reflecting the 2010 incident referenced above are unaccompanied by any other reports of alcohol-related incidents. Driver’s history, financial history, and legal history are unproblematic. References are consistently positive. There is no history of absenteeism, lateness, or inappropriate assumption of the sick role. There is no history that suggests the presence of a pervasive or enduring pattern of problems with impulsivity, substance abuse, irresponsible or reckless behavior. . . .The applicant’s responses and explanations did not suggest the presence of a high risk of substance abuse or dependence in this applicant.”

Overall, Dr. Brown found Mr. Dunn “Adequate” on, among other things, Impulse Control, Emotional Regulation and Assertiveness and, specifically that he was an “Acceptable Level of Risk” for Substance Abuse and Risk Taking Behavior. Dr. Brown stated that “the applicant’s history and presentation are, overall, consistent with intact behavioral control.” (*Exh. 9*)

³ The PAI computer generated assignment of high risk in the areas of Alcohol abuse and aggression are inconsistent with the MMPI -2RF test results which show all scores consistently well within the normal range of all public safety candidates who took these tests. (*See Exh.5, pp.3-5*)

24. Despite this, however, Dr. Brown referred Mr. Dunn to a second opinion because of the “potential significance” of the one TD Garden incident “with respect to this candidate’s suitability” because it raised a “concern” for Mr. Dunn’s capacity “to sufficiently regulate” his consumption of alcohol “in the event that he was to be employed” as a BPD Police Officer.” (*Exh. 9*)

25. Dr. Donald. Seckler is a clinical psychologist and has evaluated candidates as a first level screener for various police departments in Massachusetts since 1979. Dr. Seckler is the second level screener at BPD, the only department for which he was a second-level screener. (*Exhibit 8; Testimony of Mackenzie & Dr. Seckler*)

26. On October 22, 2013, Mr. Dunn met with Dr. Seckler. Dr. Seckler recommended a bypass believing that Mr. Dunn’s “history” would make him an unacceptably high risk for poor judgment and disinhibition. Dr. Seckler’s report concludes:

“Generally speaking, he came across as a ‘good guy’ who was genuinely chagrined at his misbehavior in the 2010 incident. . . .Mr. Dunn has served his country well, and may well have carried with him from that service some PTSD-like condition that gave rise to his intoxication and loss of control in 2010. Indeed, if that is the case, his severe loss of judgment and catastrophic disinhibition may have been transient phenomena. However, the nature of the breakdown in that incident is so severe that it becomes a risk too great for the BPD to take in hiring him for the police job. The BPD cannot be sure that he no longer drinks, or that, if he has stopped, that will continue his abstinence through the life trials of middle age, or the stresses of a police career. If he does drink, there is no assurance that he will not again lose control”

(*Exhibit 10*)⁴

27. Mr. Dunn has never been diagnosed with PTSD, and never saw combat in the Marines prior to the TD Garden incident. (*Testimony of Dunn*)

⁴ The BPD asserts that Dr. Seckler also testified about his “concern” with Mr. Dunn’s vicious and angry “feelings” about homosexuals, although he did not mention that concern in his report to BPD that was the basis for the bypass. (*See Exh. 10*) I find no evidence or reason to believe that Mr. Dunn harbors any animus toward the GLBT community. (*See Exh. 15; Testimony of Dunn*)

28. Dr. Seckler would recommend that Mr. Dunn be bypassed again should he attempt to be a BPD officer in the future, even if Mr. Dunn further evidenced good behavior and that the incident in 2010 remained a one-time incident. (*Testimony of Dr. Seckler*)

29. On February 7, 2014, BPD notified Mr. Dunn he was being bypassed due to his psychological screening results. (*Exhibit 1*)

30. Mr. Dunn duly filed this appeal with the Commission on April 7, 2014. (*Claim of Appeal*)

CONCLUSION

Applicable Legal Standard

This appeal involves a bypass for original appointment from a civil service list, or “Certification”. Candidates are ranked on the Certification based on their scores on a competitive qualifying examination administered by HRD, along with certain statutory preferences. In order to bypass a more highly ranked candidate, an appointing authority has the burden to prove, by a preponderance of the evidence, specific reasons – either positive or negative, or both -- consistent with basic merit principles, that “reasonably justify” picking a lower ranked candidate. G.L.c. 31, §1, §27. See, e.g., Brackett v. Civil Serv. Comm’n, 447 Mass. 233, 241 (2006). Only the reasons proffered to the candidate at the time of bypass may be used by the appointing authority to justify its decision upon appeal to the Commission.

“A bypass will not be permitted without a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed . . . shall later be admissible as reason for selection or bypass in any proceedings before . . . the Civil Service Commission... Personnel Administration Rules, PAR.08(3) (*emphasis added*)

Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Commissioners of Civil Service v. Municipal

Ct., 359 Mass. 211, 214 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Serv. Comm’n, 31 Mass. App. Ct. 315, 321n.11, 326 (1991). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 187 (2010) (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev. den., 440 Mass. 1108 (2003)). “The commission . . . does not act without regard to the previous decision of the appointing authority, but rather decides whether 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.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823-24 (2006); Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev. den., 390 Mass. 1102 (1983).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 188 (2010) [“Beverly”] An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new . . . officer than in disciplining an existing tenured one.” See City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly, 78 Mass.App.Ct. at 191. Nevertheless, the Commission is charged with ensuring that the system operates on “[b]asic merit principles.” MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635(1995), rev.den., 423 Mass. 1106(1996) (bypass evaluated “in accordance with [all] basic merit principles”); Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an

appointing authority.” Id. (*emphasis added*) (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987))

The role of a psychiatrist conducting a pre-employment evaluation for police officers in civil service communities is ... “narrowly circumscribed. [His] sole task [is] to determine whether [the candidate] [has] a psychiatric condition that [prevents him] from performing, even with reasonable accommodation, the essential functions of the job.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 694-95 (2012) [“Kavaleski”].

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, rev. den., 437 Mass (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 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73 (1891); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, rev.den., 409 Mass. 1104 (1991). The Commission may discredit a psychiatrist’s assessment even if the candidate offers no expert testimony of his own, but the Commission must provide a basis for the rejection in the record. Kavaleski, 463 Mass.. at 694,. citing Daniels v. Board of Registration in Medicine, 418 Mass. 380, 392 (1994) quoting Commonwealth v. DeMinico, 408 Mass. 230, 235 (1990) (“[t]he law should not, and does not, give the opinions of experts on either side of ... [a]n issue the benefit of conclusiveness, even if there are not contrary opinions introduced at the trial”).

Analysis

Applying the foregoing principles to the facts of this appeal, the BPD's bypass of Mr. Dunn has not been reasonably justified within the parameters of basic merit principles, generally, and the HRD Medical Standards, specifically. Here, the BPD was required to establish that Mr. Dunn has a Category B medical disqualification. The preponderance of evidence fails to prove that Mr. Dunn has any such on-going psychiatric condition or substance abuse problem that prevents him from performing the essential functions of a BPD police officer or presents a significant risk to his safety or the safety of others.

Dr. Seckler claims that Mr. Dunn's "history" makes him an "unacceptably high risk" for "poor judgment" and "disinhibition" resulting in assaultive behavior, "particularly" in conditions in which he has "consumed" alcohol and "since the job cannot be modified to require less self-control, Mr. Dunn should not be hired at this time." In effect, Dr. Seckler arrived at the decision that Mr. Dunn should be bypassed by pegging Mr. Dunn as alcoholic (for which there is no credible evidence) and disqualifying him based on failure to prove a negative, i.e., "there is no assurance" that Mr. Dunn will not get drunk and become aggressive ever again and "the BPD" cannot be "sure" that he "no longer drinks or that, if he has stopped, that he will not continue his abstinence through the life trials of middle age, or the stresses of a police career."

First, the only credible evidence of uncontrolled behavior while under the influence of alcohol upon which Dr. Seckler relied was one episode of misconduct at the TD Garden. Even Dr. Brown credibly found that there was absolutely nothing else in Mr. Dunn's "history" or in the results of his psychological testing to believe that he was at risk of substance abuse or dependence and I give his conclusion considerable weight. Dr. Seckler acknowledged that a

candidate should not be disqualified for an isolated instance, but only when his psychiatric condition appears over a range of circumstances or in a variety of situations.

Second, in this case, the entire history on which Dr. Seckler relies is the same incident of intoxication that several experienced BPD investigators and superior officers were expressly assigned to assess. After being fully informed about that incident, together with the full results of the BPD's internal affairs investigation covering Mr. Dunn's stellar military, personal and employment background, these police experts offered their considered collective opinion that Mr. Dunn should not be disqualified from an offer of employment because of the TD Garden incident. Dr. Seckler has, in effect, conducted his own superficial internal affairs investigation and substituted his judgment about the TD Garden incident for the judgment of three BPD law enforcement professionals. After Kaveleski, the law is clear that the sole task of the psychiatric medical evaluator is to determine whether a candidate comes to the job with some identifiable medical impairment, as defined in the HRD Medical Standards, that is not capable of reasonable accommodation. It is not the medical evaluator's purview to conduct a de novo background investigation on a candidate and attempt to offer his own speculation as to whether or not some episode(s) in the candidate's background portend that he was not suited for a career in a law enforcement. Yet that is essentially what Dr. Seckler did, and in relying on his opinion, the BPD has actually overruled the sound judgment of its own experienced law enforcement officers to the contrary, who found Mr. Dunn's "history" acceptable to them.

Third, even if Kaveleki could be read, in theory, to justify finding a "history" of a psychiatric condition based on a single episode, which is doubtful, it is clear to me that, in this case, that conclusion is wholly implausible on the evidence in this case, taken as a whole. That evidence clearly showed that Mr. Dunn knew, from the moment he sobered up in the Station A-1

jail cell, that his behavior at the TD Garden was irresponsible. He immediately apologized to the arresting officer, he showed deep regret for his behavior, and has taken care to avoid repeating that behavior.⁵ He persuaded the Commander of the BPD Recruit Investigations Unit and a BPD Deputy Superintendent at a discretionary interview of his trustworthiness and bona fides in this regard.

Fourth, the conclusions reached by Dr. Seckler that Mr. Dunn's behavior at the TD Garden incident may be explained "PTSD-like symptoms" from military service, and that he harbored a bias against homosexuals based on the remark he made at the TD Garden, is simply not supported by credible evidence. I conclude that these mistakes more likely than not, contributed to Dr. Seckler's erroneous analysis, and provides further reason to discredit Dr. Seckler's ultimate opinion that Mr. Dunn was unsuitable for hire as a BPD officer. I am also concerned that Dr. Seckler stated that he would recommend that Mr. Dunn be bypassed again if he were to reapply to the BPD.

BPD cites to numerous Superior Court and Appeals Court cases to argue that the Commission reached beyond its proper role in determining psychological bypass decisions. City of Boston v. Buckley, 61 Mass.App.Ct. 1117 (2004) (Rule 1:28 decision); Boston Police Department v. Munroe, 14 Mass.L.Rptr. 446 (2002); Boston Police Department v. Daniel Moriarty, SUCV2009-01987; Boston Police Department v. Savickas, SUCV2010-1237; Boston Police Department v. Chaves, SUCV2011-022. These cases are not binding upon the Commission; they are distinguishable on their facts; and, most importantly, they are all superseded by the SJC's definitive 2012 decision in Kavaleski.

⁵ I do not give significant weight to the BPD's assertion that Mr. Dunn's purported inconsistent statements that he has stopped drinking and other evidence and his own admission to having a drink with his girlfriend on a rare occasion, warrant discrediting his practice of abstinence. I find the distinctions more a matter of semantics than credibility and do not outweigh the other evidence, supported by Mr. Dunn's impeccable criminal and driving record, that leads me to believe that Mr. Dunn is not being untruthful about his drinking habits.

The BPD attempts to distinguish Kaveleski on the grounds that Mr. Dunn's psychological testing supported the evaluators "concerns" and "unlike the appellant in Kavaleski" and that Mr. Dunn offered no expert opinion to counter the evidence presented by BPD's witnesses. As noted in the findings of fact, BPD's own experts admitted and the tests expressly disclaim on their face that psychological paper and pencil tests results cannot stand alone to support clinical judgments about a test subject's psychiatric condition, and, in fact, Dr. Brown's assessment expressly found nothing to substantiate that Mr. Dunn actually possessed any specific characteristics alleged flagged as problematic risks by the computer generated test profiles. (Exs. 5, 6 & 9; Testimony of Dr. Brown & Dr. Seckler) Furthermore, BPD is simply wrong to suggest that Kavaleski rebutted the BPD's expert testimony with an expert of her own – she was pro se, presented no experts, and, despite the lack of contradictory expert testimony, the SJC upheld the Commission's conclusion to disbelieve the BPD's expert "concerns" in that case.

In sum, although the BPD is afforded appropriate discretion to screen out questionable candidates in favor of those more demonstrably suitable, this discretion is not absolute or unreviewable. The essential issue being evaluated in a bypass appeal to the Commission remains whether or not the BPD has proved by credible evidence some valid reason, under basic merit principles, to skip over a candidate whose performance on the civil service qualifying examination ranked next in line, and hire one with a lower score instead. That burden has not been met in this case. The evidence before the Commission did not prove the BPD's assertion that the psychological evaluation of Mr. Dunn provided reasonable justification to disqualify him as unable to perform the job of a BPD police officer.

Relief to be Granted

In rejecting the BPD's appeal in Kavaleski, the Supreme Judicial Court made clear that, when the Commission has determined that a candidate has been impermissibly bypassed on the basis of an invalid psychological screening, the Commission has the discretion to decide whether or not to order a de novo screening by psychiatrists other than those who had previously evaluated the candidate, and expressly held that "nothing in the HRD rules required further screening". Kavaleski, 463 Mass.at 695 n.24. While the Commission is mindful that the passage of time may yield new information that could be deemed relevant to the qualification of previously bypassed candidate, absent such information, in the case of a candidate such as Mr. Dunn, who has received a conditional offer of employment, subject only to satisfactory medical screening, the Commission finds it inappropriate to require that such a candidate be required to begin the hiring process anew, when the sole reason for rescinding the offer of employment was reliance, not on an assessment of the candidate's background, but solely an invalid medical screening. Thus, this would not be an appropriate case in which to simply require that HRD place Mr. Dunn at the top of the next certification so that he may be considered for employment by BPD in the next hiring cycle, whenever that may occur. Rather, the appropriate relief to be granted here would be to order that the BPD's conditional offer of employment be reinstated and that Mr. Dunn be processed for employment forthwith for entry into the next available police academy, subject only to updating of his application as required and a review of circumstances arising subsequent to his initial offer of employment. See generally, Funaro v. Chelmsford Fire Dep't, 8 MCSR 29 (1995) (town precluded from rescinding conditional offer to candidate for firefighter after invalid rejection of reason for psychological disqualification except for circumstances arising subsequent to the original offer).

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission orders HRD and/or the BPD to take the following actions:

- HRD shall revive Certification No. 00746 for the sole purpose of allowing the BPD to comply with the orders below.
- The BPD shall reinstate the conditional offer of employment to Christopher Dunn for the position of Boston Police Officer and proceed to process him forthwith for the next available police academy, subject only to updating of the information in his application (medical or non-medical), if any, as necessary or required by civil service law.
- The BPD is precluded from subsequently revoking the conditional offer of employment to Mr. Dunn except for circumstances arising subsequent to the original offer that were not known at the time of the bypass decision which is the subject of this appeal.
- In particular, as there was no disqualifying condition or disorder identified by the post-offer medical screening, further medical screening will not be allowed unless a new screening is required to comply with any statutory or regulatory time frames required by law regarding the time period that a current medical opinion must be on file prior to the actual date of appointment and provided that the psychological component, if any, shall be limited to addressing new information in a manner consistent with this Decision and the terms of the relief granted above, and further provided that such screening shall be performed, de novo, by qualified professional(s) but not by Dr. Seckler who, by his prior evaluation and

testimony before the Commission, demonstrated a pre-disposition against Mr. Dunn, and shall be without access to Dr. Seckler's report.

- If Mr. Dunn is appointed as a Boston Police Officer, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 00746.
- This retroactive civil service seniority date is not intended to provide Mr. Dunn with any additional pay or benefits including creditable service toward retirement.

For all of the above reasons, the BPD's decision to bypass Mr. Dunn is overturned and his appeal under Docket No. G1-14-80 is hereby *allowed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman⁶; Ittleman and Stein, Commissioners [McDowell – Absent]) on August 21, 2014.

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

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

Notice:

Joseph G. Donnellan, Esq. (for Appellant)
Peter Geraghty, Esq. (for Respondent)
Mark Detwiler, Esq. (HRD)

⁶ Concurring opinion of Chairman Bowman attached.

CONCURRING OPINION OF CHRISTOPHER BOWMAN

I concur with the well-reasoned analysis of Commissioner Stein and his conclusion that Mr. Dunn's appeal should be allowed.

I feel compelled, however, to clarify the reason for my decision. Less than five (5) years ago, Mr. Dunn engaged in outrageous behavior at the TD Garden which included hurling vile homophobic remarks at a Boston police officer. The fact that Mr. Dunn purports to have gay relatives and friends, frankly, does not mitigate or excuse his vile comments. Rather, that incident, standing alone, in my opinion, would have provided the BPD with a valid reason to exercise their judgment and bypass Mr. Dunn for the position of police officer.

As detailed in Commissioner Stein's decision, however, that is not what happened here. The BPD, after conducting a thorough investigation of that incident, which included a three-member interview panel posing tough questions to Mr. Dunn, ultimately concluded that this one incident did not define who Mr. Dunn is and apparently gave greater weight to his otherwise exemplary record, including his distinguished military service. Exercising the considerable judgment afforded to them, they granted Mr. Dunn a conditional offer of employment.

Here, the sole reason for bypass was a conclusion by one mental health professional that Mr. Dunn has a psychiatric "Category B" medical condition that disqualifies him from employment as a police officer. The Commission's role, in this particular appeal, is limited solely to determining whether, by a preponderance of the evidence, the BPD has shown that Mr. Dunn has a history of any psychiatric condition, behavior disorder, or substance abuse problem that would prevent him from responding to the stressors of the job or any other psychiatric condition that results in him not being able to perform as a Boston police officer with or without a reasonable accommodation. For the reasons stated in Commissioner Stein's decision, they have not. Thus, I

voted to allow the appeal and grant the appropriate relief, restoring Mr. Dunn's conditional offer of employment.

/s/ Christopher C. Bowman