

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DANIEL FITZGIBBON,
Appellant

v.

DOCKET NO.: G1-07-224

BOSTON POLICE DEPARTMENT,
Respondent

Appellant:

Tod Cochran, Atty.
Pyle, Rome, Lichten, Ehrenberg & Liss-
Riordan, PC
18 Tremont St., Suite 500
Boston, MA 02108

Appointing Authority:

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

Commissioner:

Daniel M. Henderson

DECISION

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

bypass must be approved or accepted by the Human Resources Division (HRD) pursuant to G.L. c. 31 § 27. The proffered reason for bypass was that the Appellant was deemed psychologically unfit for appointment as a Boston police officer. A full hearing was held on April 3, 2008 at the offices of the Civil Service Commission. Three (3) audio tapes were made of the hearing.

FINDINGS OF FACT

Nineteen (19) exhibits and two stipulations were entered into evidence. Exhibit 15 is the HRD document packet, from the case file. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Dr. Julia M. Reade

For the Appellant:

- Dr. James C. Beck;
- Dr. Mark Schaefer;
- Daniel Fitzgibbon

I make the following findings of facts:

1. The Appellant is a male born and raised in South Boston, Massachusetts. (Jt. Ex. 2, Recruit Application.) He has always wanted to be a police officer and believes strongly in the idea of service and helping others. (Testimony of Appellant.)
2. In 2007, at the time of this bypass appeal, the Appellant was twenty-six (26) years old. (Testimony of the Appellant.)
3. The Appellant attended Catholic Memorial High School. He was a good student and was involved in sports. He received his High School diploma in June, 1999. (Jt. Exhs. 1, 2)
4. Upon graduation from high school, the Appellant attended one and half years of college at the UMass Boston campus. Although he did reasonably well in college, he decided to put his education on hold while he pursued his life-long interest of becoming a police officer. (Testimony of Appellant.)
5. After leaving UMass Boston, the appellant became very involved in the South Boston Boys and Girls club. He started out as a junior staff and worked his way up through day

camp lifeguard and supervisor in the aquatics department. Mr. Fitzgibbon's supervisor described him as a "great employee," "model citizen and a great role model" who is "very professional and dependable." (Jt. Exh. 1)

6. The Appellant's employment history also shows that he has been employed with Suffolk County Sheriff's Department for five years. He has an extremely good work history, having received all positive recommendations from his superiors at the jail. In his five year period, Mr. Fitzgibbon received only one oral warning which was for failing to allow inmates to use the bathroom facilities in a timely manner. (Jt. Exh. 2)
7. As a correctional officer, the Appellant is responsible for overseeing the safety and well-being of the inmates incarcerated at the facility as well as the safety and well-being of his fellow correctional officers. (Testimony of Appellant.) Mr. Fitzgibbon was appointed to be a member of the Sheriff's Emergency Response Team, where his supervisor, Lieutenant Melvin Reed personally witnessed him "de-escalate many violent situations using verbal commands and communication skills." To his credit, Mr. Fitzgibbon has also routinely assisted the Sheriff's Gang Intelligence Unit. (Testimony of Appellant.)
8. The Suffolk County Sheriff's Department wrote Mr. Fitzgibbon a commendation in March 2006 for saving a drunken woman's life by chasing her down through the middle of highway traffic and returning her to his vehicle. According to the Deputy Superintendent the appellant "heroically intervened in a situation that could have resulted in serious injury or death." (Jt. Exh. 1).
9. Mr. Fitzgibbon received another commendation from the Suffolk County Sheriff's Department in 2007 when he saved an inmate's life by providing CPR and defibrillation. Id.
10. The Appellant's supervisor in corrections, Lieutenant Melvin Reed, described the Appellant as: "routinely confronted with high stressed emergency situations in which his calm demeanor and instinct has proven to be an invaluable asset to the department. . . . Danny has good instinct, is sensitive to other cultures and ethnicities and has the necessary tools to become an excellent Police Officer. . . . Deputy Fitzgibbon is well respected, [and] trusted." (Jt. Ex. 2, Appellant's Recruit Application.)
11. The Suffolk County Superintendent, Gerard Horgan stated that: "I have observed [Mr. Fitzgibbon] exhibiting good communication skills with inmates. He has de-escalated situations on more than one occasion. . . ." Mr. Horgan praised Mr. Fitzgibbon's work on the Sheriff's Emergency Response Team: "He has responded to several incidents and there has never been an allegation of an excessive use of force." (Jt. Ex. 2, Appellant's Recruit Application.)
12. The Appellant lives with his parents in South Boston and has been regularly providing daycare for his niece, who is a toddler. (Testimony of Dr. Beck)

13. In 2007, at the time of his bypass, the Appellant had a girlfriend of three years. (Testimony of Dr. Beck)
14. The Appellant does not and has never suffered from a mental disorder. The Appellant has never been seen by or treated by a mental health professional. (Testimony of Appellant)
15. The Appellant was required to undergo and pass a written psychological evaluation as a condition of his becoming a Suffolk County Correctional Officer (Testimony of Appellant.)
16. The Appellant is a heavy-set white male. He was dressed properly in a suit and tie for this hearing and comported himself professionally. His body language, facial expressions and phraseology were consistent with someone speaking honestly and truthfully. The Appellant testified in a straight forward and unhesitant manner. He is polite and unassuming. He testified on cross-examination that he was shocked when he heard Dr. Scott tell him he looked like an alcoholic kid from South Boston His testimony generally and his description of the two relevant interviews was delivered with sincerity and conviction. His presentation, demeanor and testimony at this hearing matched the descriptions of his abilities and character from his background and employment references. I find the Appellant's testimony to be credible and reliable. (Testimony and demeanor of Appellant, Jt. Exhs. 1, 2)

Facts Related to the Boston Police Department's Psychological Screening Plan:

17. In or around January 2007, Appellant Daniel Fitzgibbon's name appeared on a Certification for the position of permanent full-time police officer in the Boston Police Department. (Statement of Stipulated Facts, # 1)
18. Appellant met with the Recruit Investigations Unit of the Boston Police Department ("Department") and provided them with his Student Officer Application, letters of personal reference, supervisor/human resources data forms, and confidential neighborhood assessment forms. (Statement of Stipulated Facts, # 2)
19. Appellant passed his pre-employment background investigation. (Statement of Stipulated Facts, # 3)
20. The Department offered Appellant a conditional offer of employment subject only to his passing a medical examination and the psychological screening component of the medical examination. (Statement of Stipulated Facts, # 4)
21. On April 4, 2007, the Appellant completed the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and the Personality Assessment Inventory ("PAI"). (Statement of Stipulated Facts, # 5)
22. Later in April 2007, Appellant attended a psychological interview with Dr. Marcia Scott, the Boston Police Department's consulting psychiatrist. Thereafter, on April 13, 2007

the Department sent Appellant to see Dr. Julia Reade for a Second Opinion psychiatric review interview. (Statement of Stipulated Facts, # 6)

23. On April 24, 2007, Appellant attended a Second Opinion psychological interview with Dr. Julia Reade. (Statement of Stipulated Facts, # 7)
24. In a letter dated August 1, 2007 from the Boston Police Department Human Resources Director, Robin W. Hunt, the Appellant was informed, "that the results of your psychological screening indicate that you cannot adequately perform the essential functions of the public safety position for which you applied and **a reasonable accommodation is not possible.**" The letter further provided "therefore you will not be appointed as a Boston Police Officer." Where Appellant was being bypassed he was also notified of his appeal rights to the Civil Service Commission. (Emphasis added) (Statement of Stipulated Facts, # 8, Exhibit 8)
25. The Boston Police Department did not produce any evidence regarding its exploration of or offer of or attempt to provide any "reasonable accommodations" to the Appellant, due to his alleged "disability" or mental limitation, so that he could perform the duties of a Boston Police Officer. This could be considered an act of employment discrimination or the denial of an employment opportunity to a job applicant who is an otherwise qualified individual with an alleged disability. This appears to possibly be a violation of the so called "Americans with Disabilities Act of 1990". (Administrative notice Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq., Exhibit 7, exhibits and testimony).
26. Under the ADA, a disability is: (A) a physical or mental impairment that substantially limits one or more of the major life activities . . . (B) a record of such an impairment; or (C) being regarded as having such an impairment., 42 U.S.C. §§ 12102(2)(A) and Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000) (Administrative notice)
27. The effect of ADA, "Americans with Disabilities Act of 1990" has been explicitly expanded by at least one recent Circuit Court decision to include all employees or job applicants not just those with disabilities. See John Harrison vs. Benchmark Electronics, Huntsville, Inc. No. 08-16656, The United States Court of Appeals for the Eleventh Circuit, Decision dated January 11, 2010. This decision reversed and remanded an appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 07-00815-CV-5-IPJ. The Circuit Courts decision states at page 13: "In enacting § 12112(d), Congress sought to prevent employers from using pre-employment medical inquiries "to exclude applicants with disabilities-particularly those with so-called hidden disabilities such as epilepsy, diabetes, **emotional illness**, heart disease, and cancer-before their ability to perform the job was even evaluated." (Emphasis added) H.R. Rep. No 101-485, pt. 2, at 1. The legislative history of § 12112(d)(2) indicates that "Congress wished to curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment by drafting [§ 12112(d)]." Griffin v. Steeltek, 160 F.3d at 594, (10th Cir. 1998). Allowing non-disabled applicants to sue will enhance and enforce Congress's prohibition." (Administrative notice)

28. A conditional offer of employment is a legal term of art developed under the Massachusetts anti-discrimination laws, M.G.L. c. 151B, as well as the federal Americans with Disabilities Act (ADA). Specifically, under these statutes, an employer may not require that an applicant undergo a medical examination prior to making that individual a conditional offer of employment. Most relevantly, G.L. c. 151B provides: “An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that **an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job...**” G.L. c. 151B §4(16) (emphasis added, administrative notice)
29. HRD has developed in conformance with its policies and published a “Model Plan For Psychological Screening of Entry-Level Public Safety Positions” HRD’s stated goal of this Plan is: “The goal of this psychological screening program is to detect any serious psychological disorders or characteristics that would render a candidate unable to perform with reasonable accommodation the essential functions of the public safety position for which the candidate is being considered.” It is also noteworthy that HRD’s Model Plan, at Section II Stage One, (A.) calls for the group administration of the MMPI test and several other named tests, of which the PAI test is not one. The HRD Model Plan requires that the Psychological Screener, at Section II Stage Two -Clinical Interview, (BPD’s 1st level screener) “...will examine the results of the psychological tests, review background information provided by the hiring department (concerning criminal convictions, relevant medical information, if any, and information from interviews with employers, teachers and associates) and conduct a clinical interview of the candidate.” The HRD Model Plan also lists one to three additional tests at Stage Two that the Psychological Screener may administer to further evaluate the candidate. The PAI test is not one of the three named discretionary tests. HRD’s Model Plan, at Section II Stage Three, (BPD’s 2nd level screener), requires that a board-eligible or board-certified psychiatrist perform certain duties and evaluate the candidate. The screening psychiatrist, at Stage Three is required to file a written, signed report. *“The report must describe why the candidate is unqualified for appointment as a public safety employee. Evidence substantiating this opinion must be supplied, and the report must explain specifically why the disorder prevents the candidate from successfully performing with reasonable accommodation the essential functions of the public safety position for which s/he was considered.”* Section III Responsibilities of the Appointing Authority at (6.) also requires the appointing authority to notify HRD with a written statement that the candidate has *“... been found unqualified... and that no reasonable accommodation is possible.”* (administrative notice: HRD “Model Plan For Psychological Screening of Entry-Level Public Safety Positions”)
30. The Personnel Administrator Rule (PAR) that applies to the appointing authority’s statement of reasons for bypass : “Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule, PAR.02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for

selecting another person or persons, lower in score or preference category. Such statement shall indicate all reasons for selection or bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. The certification process will not proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approves reasons for selection or bypass. PAR.08(3) (Administrative notice)

31. The Commonwealth's personnel administrator (HRD) has established Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel HRD regulations, for police officers, establish two disqualifying categories of psychiatric medical conditions:
 - “Category A Medical Condition” is a “condition that would preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others.” Category A “psychiatric” medical conditions include “disorders of behavior, anxiety disorders, disorders of thought, disorders of mood, disorders of personality”.
 - “Category B Medical Condition” is a “condition that, based on its severity or degree, may or may not preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others.” Category B “psychiatric” medical conditions include “a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual's history, current status, prognosis, and ability to respond to the stressors of the job” and “any other psychiatric condition that results in an individual not being able to perform as a police officer.” (administrative notice:(HRD) Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel).
32. The personnel administrator's (HRD) Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel, effective until September 7, 2007, mandated a per se disqualification of any candidate with a Category A medical condition. However, those standards only called for a disqualification for a Category B medical condition “that is of sufficient severity to prevent the candidate from performing the essential functions of a police officer without posing a significant risk to the safety and health of him/herself or others.” (administrative notice)
33. Dr. Reade did not testify that she found that the Appellant suffered from either a “Category A Medical Condition” or a “Category B Medical Condition”. Dr. Reade also did not state such findings or conclusions in her unfavorable psychiatric second opinion report of June 24, 2007 nor were such reasons contained in the BPD's bypass letter to the Appellant, dated August 1, 2007. (Exhibits 7 & 8 and testimony of Dr. Reade)
34. The specific reasons proffered by the BPD for the bypass of the Appellant must be approved or accepted by the Human Resources Division (HRD) pursuant to G.L. c. 31 § 27. The proffered reason for bypass was that the Appellant was deemed psychologically unfit for appointment as a Boston police officer. However there is no documentation in

the case file, including Exhibit 15-HRD document packet or this hearing record to substantiate that HRD did approve or accept the proffered reasons for bypass. This omission in the record was noted on the record by this hearing officer. (Administrative notice, case file, exhibits, stipulations and testimony)

Department's Psychological Screening Plan:

35. On or around July 22, 2004, the BPD submitted to HRD a request for the authority to utilize a psychological screening plan. (Statement of Stipulated Facts, # 10)
36. In or around late July 2004, Sally McNeely, the Director of the Organizational Development Group of HRD, gave verbal approval to Edward Callahan for the Boston Police Department to proceed with the psychological screening of current police officer candidates pursuant to its psychological screening plan. (Statement of Stipulated Facts, # 11)
37. Roberta Mullan, the Department's Director of Occupational Health Services, is responsible for administration of the Department's psychological screening plan. (Statement of Stipulated Facts, # 12)
38. The Department permits clinicians conducting the first and second level clinical interviews pursuant to the Department's psychological screening to rely upon the following in making their psychological suitability determinations: a) Results from MMPI-2, PAI, personnel data questionnaire, background investigation, recruit application, and medical records may be used when the first and second level interviews are conducted by psychiatrists. (Statement of Stipulated Facts, # 13)
39. No specific instructions are given to psychiatrists conducting the first and second level clinical interviews pursuant to the Boston Police Department's psychological screening plan with respect to what information and/or documents s/he may rely upon in making their psychological determination. The doctors are expected to abide by the psychological screening plan in conjunction with their training and experience. The doctors utilize the standards set forth by the Commonwealth of Massachusetts to determine the psychological ability to perform the duties or manage the stresses of an armed police officer. (M.G.L. c. 31, §61A). (Statement of Stipulated Facts, # 14)
40. The number of recruits who have been referred to a second level clinical interview with Dr. Reade over the past four (4) years are as follows:
 - Fall 2005 = 16
 - Spring 2006 = 43
 - Fall 2006 = 44
 - Summer 2007 = 50 (Statement of Stipulated Facts, # 15)
41. Of those recruits who were referred to a second level clinical interview with Dr. Reade over the past four (4) years the following numbers were disqualified by Dr. Reade.
 - Fall 2005 = 16/16

Spring 2006 = 38/43

Fall 2006 = 32/44

Summer 2007 = 44/50 (Statement of Stipulated Facts, # 16)

Facts Related to Appellant's Screening Interview and Psychiatric Evaluations:

42. During the Appellant's interview with Dr. Marcia Scott, Dr. Scott told the appellant that he looked like a big drinker and was an alcoholic from South Boston, even though none of Mr. Fitzgibbon's background information mention any problems with alcohol and he vigorously denies this accusation. He also denied this accusation to Dr. Scott at the interview. (Testimony of appellant)
43. The Appellant was never told by either Dr. Scott or Dr. Reade of any psychological problem or condition or disorder that he suffered from. (Testimony of appellant)
44. The Department's offer of Dr. Scott's April 12, 2007 report as an exhibit (Exhibit 17) was objected to by the Appellant, as hearsay. Dr. Scott did not appear as a witness at this hearing. The report was identified and admitted for a limited purpose. The report was admitted not for the truth or accuracy of its contents but only as a document relied upon by the Department, in the psychological evaluation of the Appellant. Dr. Scott did not testify. I draw no adverse inference from this fact alone as no subpoena was requested and Dr. Scott's availability to testify is unknown. (Administrative notice, Exhibit 17)
45. When Dr. Reade interviewed the Appellant on April 24, 2007 she did not go over with him his Recruit Application or testing results. In addition, Dr. Reade never reviewed the Appellant's employment references and other background documents. Dr. Reade testified that she reviews "everything sent to [her] by the BPD prior to the interview". It was later learned that she only reviewed the summary produced by the BPD Recruit Investigation Unit. (Testimony of Dr. Reade.)
46. In Dr. Reade's report, dated June 24, 2007, she stated that Mr. Fitzgibbon was excessively defensive and that he invalidated his PAI test. She complained that in his interview, he "was early and knocked on my closed door insistently twenty minutes before his appointment" and that "he appeared anxious." (Jt. Exh. 7). However, Dr. Reade described her Chestnut Hill office on cross-examination. There is no office receptionist. There is a waiting area with a hallway off of it, the hallway having three office doors and two other doors. One of the office doors has her name plate on it and it, and was closed at the time the Appellant arrived. The Appellant testified otherwise, that there was no secretary and no name plates on the doors and he was not sure that he was at the right location. Dr. Reade further complained that he was defensive in explaining the incident at work of not releasing inmates for the bathroom facilities. (Testimony of Appellant and Dr. Reade.)
47. Dr. Reade summarized her findings in her report, as follows: "Mr. Fitzgibbon is a defensive and inflexible man who cannot acknowledge even minor limitations or vulnerabilities. These traits appear to be ingrained and of longstanding nature. The defensiveness is so extreme that it interferes with Fitzgibbon's ability to reflect on his decisions and behavior or to provide a coherence account of his actions. There are also

concerning indications of aggressive behavior and possible rule manipulations which Mr. Fitzgibbon could not address or explain.” For these reasons, Mr. Fitzgibbon is currently found not acceptable for the police department.” (Jt. Ex. 7)

48. Dr. Reade testified at the hearing that she was concerned the Appellant was “anxious.” However, Dr. Reade’s report says nothing about any such anxiety. She testified that candidates often appear anxious or upset at the psychological interviews. (Testimony of Dr. Reade.)
49. Dr. Reade admitted that there was no reference to the Appellant’s “defensiveness” from any other source. She was specifically asked on cross-examination whether that complete lack of reference, gave her pause? She answered “No” (Testimony of Dr. Reade.)
50. Dr. Reade explained why the candidate interview is important. She expects the candidate to be able to present a coherent history. “I want them to tell me a story that is logical and coherent.” “I invited him in a clear manner...” “It was hard to get a clear story from him...” However, Dr. Reade in her testimony repeatedly described the Appellant’s answers or responses by way of her subjective assessments, impressions or characterizations. Dr. Reade does not audio or video record her candidate interviews. (Administrative notice, testimony of Dr. Reade)
51. Dr. Reade criticized Dr. James Beck’s interview style and report writing skills. She testified that his report contained “typos” and “incomplete sentences”. She pointed out that Dr. Beck “misspelled [her] name and we were colleagues”. Dr. Reade attributed this to Dr. Beck’s use of a lap-top computer during the interview. Dr. Beck testified that his use of a lap-top actually allowed him to focus on the interviewee since he is a long time touch typist with out the need to look down at paper and written notes. (Testimony of Dr. Reade and Dr. Beck)
52. Dr. Beck is a Massachusetts licensed Psychologist and Medical Doctor. He is also Board certified in Forensic Psychology and in Psychiatry and Neurology. He has been qualified as an expert witness in various courts including Massachusetts Superior Court. He practices in the field of police psychological fitness for duty cases. Dr. Beck is a graduate of Harvard and Yale. He has taught at the Harvard Medical School for over thirty (30) years. In his nearly thirty (30) years of experience as a forensic psychiatrist, Dr. Beck has conducted numerous police fitness for duty interviews, which are virtually identical to psychological pre-screenings. Dr. Beck has been extensively published as an author in his field. Dr. Beck has also had extensive experience working directly with police officers in the Cambridge police department, particularly those in emotional distress, and therefore has vast practical and/or percipient knowledge regarding the emotional rigors and job duties required of police work. (Testimony of Dr. Beck; Jt. Ex. 10).
53. On May 31, 2008, Dr. James Beck interviewed and performed an independent psychological consultation of the Appellant. (Jt. Ex. 11.)

54. Dr. Beck reviewed the Appellant's Recruit Application materials, the results of his MMPI-2 and the PAI, as well as the reports of Dr. Scott and Dr. Reade disqualifying the Appellant. In his report, Dr. Beck states, "I find no evidence that the candidate has any mental disorder. I saw no evidence in my interview that Mr. Fitzgibbon was defensive. As far as in his life history, Mr. Fitzgibbon has generally shown himself in recent years to be a responsible, well functioning adult with good values. His five year history working as a correction officer provides evidence that he can perform well in this role. . . . In my opinion Mr. Fitzgibbon is psychologically fit to serve as a Boston Police Officer." (Jt. Ex. 11)
55. On May 2, 2008, Dr. Mark Schaeffer interviewed and performed an independent psychological consultation of the Appellant. (Jt. Ex. 13.)
56. Dr. Schaeffer is a licensed clinical and forensic psychologist. He has been performing psychological pre-screenings for police departments, including those in Watertown, Framingham, Lynn and Randolph, since 1980. He has performed literally hundreds of screenings. (Testimony of Dr. Schaeffer; Jt. Ex. 12.)
57. Dr. Schaeffer reviewed the Appellant's Recruit Application materials, his results on the MMPI-2 and the PAI, as well as the reports of Dr. Scott and Dr. Reade disqualifying the Appellant. In his report dated June 26, 2008, Dr. Schaeffer states: "Mr. Fitzgibbon was . . . extremely cooperative, answering all questions put to him without hesitation. . . . There was no indication in this evaluation that Mr. Fitzgibbon has had any significant past or current emotional or substance abuse problems. . . . we went through the incident which led to his being disciplined as a corrections officer. His defense of his actions was neither illogical nor incoherent. . . . He acknowledged that superior officers felt he should have handled the matter differently. . . .(Jt. Exh. 13)
58. Dr. Schaeffer summarized his interview with Mr. Fitzgibbon as follows: "In sum, Daniel Fitzgibbon . . . has prepared himself for the rigors of police work by being employed as a corrections officer for over five years. His references were very positive, his work history has a single blemish which has been suitably addressed. . . . His presentation in this interview gave no indication of a difficulty in either accepting personal faults or in discussing alternate ways of handling situations. He should be found Acceptable on the psychological pre-screening." (Jt. Ex. 13)

Facts Related to Appellant's MMPI-2 and PAI Results:

59. Dr. Beck and Dr. Schaeffer reviewed the same MMPI-2 results, PAI results, and application materials including employment references which were before Dr. Reade during her psychological evaluation of the Appellant. The Appellant's life history and data had remained unchanged making the time lapses between the clinical interviews irrelevant. (Testimonies of Dr. Beck and Dr. Schaeffer.)

60. The MMPI-2 should only be scored and interpreted by individuals with graduate level training in psychology, and who have received specialized MMPI-2 training. (Testimony of Dr. Schaeffer.)
61. The Department had the Appellant's MMPI-2 and PAI results scored and interpreted by a computer because neither Dr. Scott nor Dr. Julia Reade are trained to score or interpret either the MMPI-2 or the PAI. Dr. Reade admitted that she "might revise" her initial test assessment after consultation with a colleague who is test specialist Psychologist. (Testimony of Dr. Julia Reade.)
62. Dr. Schaeffer, on the other hand, is specially trained and qualified as a Psychologist to assess and interpret these tests. He has administered and interpreted hundreds of MMPI's. (Testimony of Dr. Schaeffer.)
63. The MMPI-2 is comprised of 500 true-false questions or "items." MMPI-2 results "can serve as a useful guide for employment decisions in which personality adjustment is considered important for success on the job...the MMPI-2 should NOT be used as the sole means of determining the applicant's suitability for employment." (Jt. Ex. 4, Law Enforcement Interpretive Report).
64. For purposes of psychological screenings, a candidate's MMPI-2 and PAI test results flag possible employment issues and can serve as a basis upon which the clinician conducting the clinical interview can explore with the candidate and gather data regarding whether those issues have had an impact on that individual's ability to function in life. This exploration is done through a clinical interview as well as a thorough review of a particular candidate's background history. While having value, neither the results of MMPI-2 nor the PAI can serve as the sole basis for disqualifying a police candidate. (Testimonies of Dr. Schaeffer and Dr. Reade.)
65. The MMPI-2 has ten clinical scales and three validity scales as well as a variety of supplementary scales. The three validity scales, L, K, and S, are designed to help the psychologist identify abnormal response sets that might suggest "faking good." (Testimony of Dr. Schaeffer.)
66. It is natural for a candidate to be anxious during the interview portion of their psychological screening. This is particularly true for recruits who have had little to no contact with a mental health professional. This may well explain why the appellant had an unusually high L and K scale scores. (Testimony of Dr. Reade, and Dr. Schaeffer.)
67. Furthermore, there are studies which indicate that "police officer applicants – regardless of gender, race, tenure, or department type – tended to present moderately defensive MMPI-2 profiles. . . ." Dr. Schaeffer testified that he was familiar with that publication, (Exhibit 16), and that it reflects his own professional experience and findings. It also represents a common sense approach. He finds a certain level of anxiety and caution to be normal in public safety candidates. He also found similarity in Appellant's role as a correction officer with that of a police officer e.g. constant decision making at the right

level of assertion of authority and stress, and he gave several examples from the Appellant's experience. He found the Appellant's successful five year work history as a correction officer to be the best available data to determine suitability and future performance in a public safety position. (Testimony of Dr. Schaeffer, Exh. 16)

68. The Appellant endorsed five (5) critical items out of 500 questions administered to him on the MMPI-2. This is well below the average of ten (10) items normally endorsed by job applicants for public safety positions. (Jt. Exh. 5)
69. The PAI is comprised of 340 true-false questions or "items." PAI results "should be viewed as only one component of a comprehensive screening procedure that should also include at least one other psychological test based on normal personality functioning. A comprehensive personal history questionnaire and a structured interview focused on job-relevant behavior are recommended. The hiring authority's final screening decision should be based upon corroborating information gathered from multiple data sources." (Jt. Ex. 5, PAI Report; Testimony of Dr. Beck and Dr. Schaeffer.)
70. The Appellant's "PIM" scale, scale used to evaluate defensiveness, was below the significant level when compared to the norms for hired, post-probationary police officers. (Jt. Ex. 5, PAI Report, p. 5; Testimony of Dr. Schaeffer.) Accordingly, contrary to Dr. Reade's opinion, the appellant's PAI results were not invalidated. (Testimony of Dr. Beck)

Findings With Respect to Psychological Evidence:

71. A psychological pre-screener's job is not to decide whether to hire a candidate for the position of police officer. Rather, a pre-screener's job is to discern from the material presented whether that candidate suffers currently from a psychological condition which would interfere with his ability to carry out the duties of a police officer. (Testimony of Dr. Schaeffer.)
72. At hearing, Dr. Beck, Dr. Schaeffer and Dr. Reade agreed that the Appellant does not suffer from any psychiatric condition as defined by the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association ("DSM-4").
73. In psychological screenings, employment history is a critical factor used in assessing whether a candidate possesses a psychological condition which has interfered with the applicant's ability to function well in a work setting and therefore may impair that candidate's ability to function in the position for which he has applied. If the past work is similar to the position in question the screener can use the candidate's past performance as an indicator of future performance. (Testimonies of Dr. Beck and Dr. Schaeffer.)
74. According to Dr. Beck and Dr. Schaeffer, there is nothing in the Appellant's record to suggest that he possesses any psychological issues or a condition which would interfere with his ability to perform the essential functions of a police officer. In fact, all of the evidence is to the contrary. (Testimonies of Dr. Beck and Dr. Schaeffer)

75. The Appellant's employment history in this case suggests that he does not possess any psychological conditions which have interfered, or would in the future interfere, with his ability to function well as a police officer. This is particularly true since his previous employment has been similar to police work. (Testimonies of Dr. Beck and Dr. Schaeffer.)
76. Dr. Reade's findings that the Appellant possesses psychological traits or characteristics which would interfere with his ability to perform the essential functions of a police officer is not supported by any background or evidence. (Testimonies of Dr. Beck and Dr. Schaeffer.)
77. Dr. Reade did not review any of Appellant's references from previous employers nor did she contact anyone within the Boston Police Department or Cadet program to discuss whether her concerns with respect to the Appellant's "defensiveness" had ever actually been problematic for him. (Testimony of Dr. Reade.)
78. In weighing the relevance of the Appellant's work history, Dr. Reade made a presumption that the Appellant's work environments in the jail facility was "structured" and therefore gave little to no weight to his performance in those positions. However, Dr. Reade has no first hand knowledge regarding the structure of the Suffolk County corrections department or police work in general. (Testimony of Dr. Reade.)
79. The psychological testing methods employed by Dr. Reade demonstrated over-reliance upon the Appellant's test scores and interview performance, and gave little to no weight to the Appellant's adult life functioning including relevant work history.¹ (Testimonies of Dr. Beck and Dr. Schaeffer). Moreover, her negative opinion with respect to Appellant's arriving early to his interview and appearing defensive in many of his answers is a value judgment rather than a symptom of a clinical condition. (Testimonies of Dr. Beck and Dr. Schaeffer.)
80. There has been at least one prior appeal heard at the Commission in which it was concluded that Dr. Reade's evaluation of the candidate was tainted by some bias held by Dr. Reade against the candidate. The Commission concluded in that appeal that "... intervention is warranted in cases such as this where personal bias has tainted a hiring process." (Administrative notice: See *Kerri Cawley v Boston Police Dept.*, No. G1-06-95 decision page 18, *Allowed*, dated November 22, 2006.)
81. There have been a series of appeals heard at the Commission involving the bypass of the Appellants by the Boston Police Department for psychiatric reasons, based primarily on the opinions of Dr. Scott as the first level screener and Dr. Reade as the second level screener. The decisions in the following eight appeals were allowed with remedial orders

¹At hearing, Dr. Beck and Dr. Schaeffer testified that they would disqualify a candidate based upon his test scores and his interview performance alone if such candidate's test scores were truly problematic and such candidate was behaving in such way during his or her clinical interview as to substantiate his or her concerning test results (Testimonies of Dr. Beck and Dr. Schaeffer.)

issued precluding Dr. Reade and Dr. Scott from participating in any subsequent psychiatric screening of the Appellants. Those appeals are: Kerri Cawley v Boston Police Department, No. G1-06-95, allowed November 22, 2006. On appeal affirmed by superior court, Suffolk Civil Action No. 06-5331-C. Shawn Roberts v Boston Police Department, No. G1-06-321, allowed September 25, 2008. On appeal affirmed by superior court, Suffolk Superior Court, Civil Action No. 2008-4775-G, memorandum and order dated December 30, 2009. Jessica Boutin v Boston Police Department, No. G1-06-139 & G1-07-317, allowed January 29, 2009, Daniel Moriarty v Boston Police Department, No. G1-05-442, allowed April 9, 2009, Kelley Coutts v Boston Police Department, No. G1-07-277, allowed May 7, 2009, Kevin O'Loughlin v Boston Police Department, No. G1-07-282, allowed on May 29, 2009 and Jill Kavaleski v. Boston Police Department, No. G1-07-299, allowed October 22, 2009, Richard Savickas v Boston Police Department, No. G1-07-51 allowed January 7, 2010 (administrative notice)

CONCLUSION

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

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

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

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

The greater amount of credible evidence must . . . be to the effect that such action ‘was justified’. . . . {I}f [the factfinder’s] mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with

the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different . . . from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, ‘unless it shall appear that it was made without proper cause or in bad faith.’

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*)

Appointing Authorities are charged with the responsibility of exercising sound discretion with honesty and good faith when choosing individuals from a certified list of eligible candidates on a civil service list. “On a further issue we may now usefully state our views. The appointing authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select, in the exercise of a sound discretion, among persons eligible for promotion or may decline to make any appointment. See the line of cases cited in Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971): Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv. 348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs. 242 Mass. 61, 65; (1922) Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). A judicial judgment should “not be substituted for that of . . . [a] public officer” who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272.”

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001). “Abuse of discretion occurs . . . when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when

all proper and improper factors are assessed but the [fact-finder] makes a serious mistake in weighing them.” E.g., I.P.Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir.1998).

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a by-pass decision, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert’s opinion is based are grounded on an adequate foundation, either by establishing “general acceptance in the scientific community” or by showing that the evidence is “reliable or valid” through an alternative means, e.g., Canavan’s Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) *citing* Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by “education, training, experience and familiarity” with special knowledge bearing on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990).²

Experts’ conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, 767 N.E.2d 629, 634, *rev. den.*, 437 Mass 1109, 747 N.E.2d 1099 (2002). As a corollary, when the fact-finder is presented with conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See, e.g., Ward v. Commonwealth, 407 Mass. 434, 438, 554 N.E.2d 25, 27 (1990); New Boston Garden Corp. v. Board of Assessors, 383

² As to the latter point, the Commission’s notes that it is granted broader discretion in the admission of evidence than permitted in the Massachusetts courts. Compare G.L.c.30A, §11(2) *with* Department of Youth Services v. A Juvenile, 398 Mass. 516, 531, 499 N.E.2d 812, 821 (1986).

Mass. 456, 467-73, 420 N.E.2d 298, 305-308 (1891); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, 566 N.E.2d 1132, 1133, rev.den., 409 Mass. 1104, 569 N.E.2d 832 (1991).

No specific degree of certitude is required for expert testimony and it may be accepted if the opinion is “reasonable” and expressed with sufficient firmness and clarity. See, e.g., Commonwealth v. Rodriguez, 437 Mass. 554, 562-63, 773 N.E.2d 946, 954 (2002); Bailey v. Cataldo Ambulance Service, Inc., 64 Mass.App.Ct. 228, 235, 832 N.E.2d 12, 11-18 (2005); Resendes v. Boston Edison Co., 38 Mass.App.Ct. 344, 352, 648, N.E.2d 757, 763, rev.den., 420 Mass. 1106, 651 N.E.2d 410 (1995). So long as the expert’s opinion is sufficiently grounded in the evidence, but certain facts were unknown or mistakes were made in some of the expert’s assumptions, that generally goes to the weight of the evidence. Commonwealth v. DelValle, 443 Mass. 782, 792, 824 N.E.2d 830, 839 (2005); Sullivan v. First Mass. Fin. Corp., 409 Mass. 783, 79-92, 569 N.E.2d 814, 819-20 (1991). However, “it is also a familiar principle that testimony may not rest wholly on conjecture, and that is no less the case when the conjecture flows from the mouth of an expert. [Citations] Qualification as an expert does not confer a license to spout nonsense.” Fourth Street Pub, Inc. v. National Union Fire Ins. Co., 28 Mass.App.Ct. 157, 547 N.E.2d 935, 939 (1989) (Kass.J., dissenting), rev.den., 406 Mass. 1104, 550 N.E.2d 396 (1990). See also Board of Assessors v. Odgen Suffolk Downs, 398 Mass. 604, 606-607, 499 N.E.2d 1200, 1202-1203 (1986) (expert testimony stricken which blatantly overlooked critical facts). See also: (impartial medical examiner’s opinion (IME) found in part to be unsupported by admissible evidence in the record of hearing at DIA), Thomas Brommage’s Case 75 Mass. App. Ct. 825 (2009). This issue was also addressed by Justice Christine M. Roach in a recent Superior Court Memorandum and Order at page 6. “Stripped of these inappropriate foundations, BPD’s expert opinions failed to establish reasonable justification for the bypass. Under these

circumstances, the Commission reasonably decided BPD bypassed Roberts, based on the biased decision-making of its experts, rather than a fair application of the psychological standards set forth in G.L. c. 31, § 61A and its accompanying regulations. The Commission as fact finder was well within its discretion to credit Robert's experts' opinions in this regard. Commonwealth v. Hinds, 450 Mass. 1, 12, note 7 (definitive jury charge on assessment of expert opinion testimony). The court is aware of no authority to the contrary.

In so doing, the Commission did not substitute its judgment for that of BPD, because it made no determination of its own as to Roberts psychological fitness as a police officer. Boston Police Dept. v. Cawley, Suffolk Civil No. 06-5331-C;..." Justice Roach further concluded "The problem on this record is that the clinicians' interview conclusions are not supported by substantial, reliable, psychiatric evidence." Memorandum and Order on Cross-Motions for Judgment on the Pleadings, dated December 30, 2009, at page 6, Suffolk Civil Action No. 2008-4775-G Boston Police Department vs. Shawn Roberts and Massachusetts Civil Service Commission

Applying these applicable standards in the circumstances of the present case, the Commission concludes that the BPD's bypass of the Appellant for appointment to the position of Boston police officer did not comport with basic merit principles resulting in harm to his employment status through no fault of his own. **The Department's Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Appellant Does Not have a Mental Disorder as Defined by the HRD Regulations, or the DSM-4**

The rules under which the BPD may justify a bypass for medical reasons, including psychiatric conditions, are spelled out by HRD's regulations for "Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel" (the HRD Regulations) and

incorporated into the BPD's Psychological Screening Plan (PSP). The standards for a "Category A" medical condition, which is an automatic disqualifying condition, requires proof that a police officer applicant carries a psychiatric diagnosis of certain specific psychiatric "disorders", as defined by the DSM-IV. [HRD Regulations, §10(6)(o)(1)]. A "Category B" psychiatric medical condition includes (a) any "history" of a "psychiatric condition, behavior disorder, or substance abuse problem not covered by Category A", which "may or may not" be disqualifying depending on its "severity and degree", based on that individual's "current status, prognosis, and ability to respond to the stressors of the job" [HRD Regulations, §10(6)(o)(2)(a)] and (b) "any other psychiatric condition that results in an individual not being able to perform as a police officer." [HRD Regulations, §10(6)(o)(2)(b)].

The evidence here establishes that the Appellant does not carry, and has never been diagnosed with any "Category A" or "Category B" psychiatric or behavior disorder contained within the DSM-4, has no history of any such disorders, and has no history of substance abuse problems within the meaning of the HRD Regulations. *cf. Adesso v. City of New Bedford*, 20 MCSR 426 (2007) (multiple hospitalizations and treatment for substance abuse and schizophrenia); *Melchionno v. Somerville Police Dep't*, 20 MCSR 443 (2007) (diagnosis of Schizotypal Personality Disorder and repeated, bizarre job-related problems); *Hart v. Boston Police Dep't*, 19 MCSR 397 (2006) (history of substance abuse and prior treatment); *Lerro v. Boston Police Dep't*, 19 MCSR 402 (history of Obsessive Compulsive Disorder and treatment for Acute Stress Disorder); *Mitchell v. Marblehead Fire Dep't*, 19 MCSR 23 (history of bipolar disorder and substance abuse).

Thus, the justification for bypassing the Appellant turns on whether the evidence supports a conclusion that he fits one of the “Category B” definitions of a “psychiatric condition” of sufficient severity and degree to disqualify him to serve as a police officer.

A “psychiatric condition” would seem to be virtually synonymous with a mental or emotional “disorder”. See, e.g., MERRIAM-WEBSTER’S MEDICAL DICTIONARY (2002) (“psychiatric” means “dealing with cases of mental disorders”); AMERICAN HERITAGE DICTIONARY (2006) (“psychiatry” means “the branch of medicine that deals with the diagnosis, treatment and prevention of mental and emotional disorders”). The experts who testified, however, all seem to use the term more broadly to encompass behavior that does not necessarily qualify as a “disorder”. Dr. Beck defined a Category B disqualifying “psychiatric condition” to mean evidence of some aspect of a person’s behavior or trait that appears over a range of circumstances or in a variety of situations, either in the historical past [§10(6)(o)(2)(a)] and/or the historical present [§10(6)(o)(2)(b)].

The Commission accepts this premise. An applicant may be disqualified for having a Category B “psychiatric condition” so long as the applicant has a “psychiatric condition” which has manifested itself by a preponderance of scientifically reliable and credible proof of deficient mental health behavior, but not necessarily proof of a psychiatric “disorder” found within the DSM-4. Should the occasion present itself in future cases, the Commission may consider further refinement of this definition, as well as further inquiry into the scientifically appropriate role of clinical interview impressions and standardized testing in the evaluation process, with a view to seeking greater clarity on these subjects that will preserve the balance necessary to respect the legitimate purposes of PSP screening while promoting requirements of the basis merit principle

that eschews public employment decisions when they are arbitrary and capricious or incapable of fair and objective substantiation.

The rules under which the BPD may justify a bypass for medical reasons, including psychiatric conditions, are spelled out by HRD's regulations for "Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel" (the HRD Regulations) and incorporated into the BPD's Psychological Screening Plan (PSP). The standards for a "Category A" medical condition, which is an automatic disqualifying condition, requires proof that a police officer applicant carries a psychiatric diagnosis of certain specific psychiatric "disorders", as defined by the DSM-4. [HRD Regulations, §10(6)(o)(1)]. A "Category B" psychiatric medical condition includes (a) any "history" of a "psychiatric condition, behavior disorder, or substance abuse problem not covered by Category A", which "may or may not" be disqualifying depending on its "severity and degree", based on that individual's "current status, prognosis, and ability to respond to the stressors of the job" [HRD Regulations, §10(6)(o)(2)(a)] and (b) "any other psychiatric condition that results in an individual not being able to perform as a police officer." [HRD Regulations, §10(6)(o)(2)(b)].

The evidence here establishes that the Appellant does not carry, and has never been diagnosed with any "Category A" or "Category B" psychiatric or behavior disorder contained within the DSM-4, has no history of any such disorders, and has no history of substance abuse problems within the meaning of the HRD Regulations. *cf. Adesso v. City of New Bedford*, 20 MCSR 426 (2007) (multiple hospitalizations and treatment for substance abuse and schizophrenia); *Melchionno v. Sommerville Police Dep't*, 20 MCSR 443 (2007) (diagnosis of Schizotypal Personality Disorder and repeated, bizarre job-related problems); *Hart v. Boston Police Dep't*, 19 MCSR 397 (2006) (history of substance abuse and prior treatment); *Lerro v.*

Boston Police Dep't, 19 MCSR 402 (history of Obsessive Compulsive Disorder and treatment for Acute Stress Disorder); Mitchell v. Marblehead Fire Dep't, 19 MCSR 23 (history of bipolar disorder and substance abuse).

Thus, the justification for bypassing the Appellant turns on whether the evidence supports a conclusion that he fits one of the “Category B” definitions of a “psychiatric condition” of sufficient severity and degree to disqualify him to serve as a police officer.

The Commission accepts this premise. An applicant may be disqualified for having a Category B “psychiatric condition” so long as the applicant has a “psychiatric condition” which has manifested itself by a preponderance of scientifically reliable and credible proof of deficient mental health behavior, but not necessarily proof of a psychiatric “disorder” found within the DSM-IV. Should the occasion present itself in future cases, the Commission may consider further refinement of this definition, as well as further inquiry into the scientifically appropriate role of clinical interview impressions and standardized testing in the evaluation process, with a view to seeking greater clarity on these subjects that will preserve the balance necessary to respect the legitimate purposes of PSP screening while promoting requirements of the basis merit principle that eschews public employment decisions when they are arbitrary and capricious or incapable of fair and objective substantiation.

On the evidence presented here, the Commission is satisfied that the BPD clearly failed to carry its burden to justify bypassing The Appellant because of a disqualifying Category B “psychiatric condition”.

The first-level screening by Dr. Scott was improperly infected with a perfunctory, pre-disposition to disqualify the Appellant. This is indicated by the one-sided statistical figures for

these two Interviewers over a four year period and Dr. Reade's consideration of Dr. Scott's negative first level report.

On the evidence presented here, the Commission is satisfied that the BPD clearly failed to carry its burden to justify bypassing the Appellant because of a disqualifying Category B "psychiatric condition". Therefore, The Department's Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Appointing Authority's Characterizations of the Appellant as Possessing Psychological Characteristics Which Impair His Ability to Perform the Essential Functions of a Police Officer Lack Factual Support in the Appellant's Background.

Where a candidate has no mental impairment, and otherwise has a very strong work record, the Civil Service Commission has refused to uphold a psychological bypass based upon mere speculation raised by a candidate's performance on his or her psychological testing including the clinical interview. Like a medical bypass, mere speculation with respect to a psychological or mental condition is not enough. There has to be significant evidence in the record that the candidate suffers from a psychological or mental condition, and that this condition will interfere with his or her ability to perform the essential functions of a job. Here, the Appointing Authority, relying upon Dr. Reade's second-level opinion, bypassed Appellant, Daniel Fitzgibbon, stating that he was defensive and inflexible which would interfere with his "ability to adequately perform the essential functions of the public safety position." As detailed below, however, in addition to the fact that the Appellant does not suffer from any specific conditions as described in the DSM-4 or the HRD regulations, Dr. Reade's conclusions with respect to the Appellant, as concurred to by Dr. Scott, lack factual support in the Appellant's background and in the record as a whole. Thus, the Appellant's bypass must be allowed.

Where an appointing authority has bypassed a candidate on the grounds that s/he did not pass its psychological examination, the Commission applies basic merit principles in determining whether the bypass was appropriate. *Gerakines v. Town of North Reading Police Department*, 12 MSCR 30 (1999); *citing* G.L. c. 31, s. 1; *Flynn v. Civil Service Commission*, 15 Mass. App. Ct. 206 (1983). The issue before the Commission in these cases then becomes whether on the evidence presented before it, the Appointing Authority has sustained its burden of proving there was sound and sufficient reason for disqualifying the Appellant for appointment on the grounds that s/he was psychologically unfit. *Id.*; *citing* *City of Cambridge v. Civil Service Commission*, 43 Mass. Ct. 300 (1997), *McIsaac v. Civil Service Commission*, 38 Mass.App.Ct. 473, 476 (1995), *Gloucester v. Civil Service Commission*, 408 Mass.App.Ct. 292, 297 (1990); *Mayor of Revere v. Civil Service Commission*, 31 Mass.App.315 (1991).

The Commission has consistently held that a candidate should not be psychologically bypassed unless there is psychological evidence showing that the applicant is actually unqualified for the position of police officer, rather than simply being potentially unqualified. *Michael Kilmartin v. Lowell Police Department*, 10 MCSR 89 (1997) (evidence and supportive testimony concerning appellant's proven record of disciplined behavior in what is considered a stressed environment as a corrections officer cannot be disregarded.); *Frank J. Masiello Jr. v. Town of Framingham*, 15 MCSR 6 (2002); *Daniel Funaro v. Chelmsford Fire Department*, 8 MSCR 29 (1995) (Commission overturned bypass holding that a psychological bypass based on psychological testing and clinical observations obtained after a single interview will not stand up where there exists evidence in the appellant's background to the contrary); and *Thomas Whalen v. City of Quincy*, 7 MCSR 271 (1994).

Indeed, in the case of *Daniel Funaro v. Chelmsford Fire Department*, the Commission overturned a psychological bypass even though two (2) doctors for the Appointing Authority found the appellant unfit to perform the essential functions of a firefighter. In support of his case, the Appellant submitted to the Commission an independent psychological assessment as well as a letter from Steven Vellucci, his plant supervisor for six years in a job unrelated to firefighting, addressing areas of concern highlighted by the Appointing Authority doctors. The Commission found as follows:

The Vellucci letter paints the Appellant as an exceptionally hard-working and reliable employee. The Appointing Authority has no basis for disrupting this portrait other than paper and pencil test results and the clinical observations of Drs. Barry and Gressitt, arrived after a single meeting with each. Dr. Barry's and Dr. Gressitt's characterizations lack factual support in the Appellant's background and fail to diagnose any specific disorder identified in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. While the test results may highlight areas of concern regarding a candidate's background, they should not deny career opportunities to individuals who otherwise have blemish-free records.

First, as detailed below, it was unrefuted at hearing that the Appellant does not suffer from a psychiatric condition as defined by the HRD regulations, or the DSM-IV. Second, there is absolutely no evidence that the defensiveness and inflexibility cited to by Dr. Reade in her report has ever interfered with the Appellant's ability to function in an employment setting-even where such employment has been stressful in nature. Id. Both Dr. Beck and Dr. Schaeffer testified that an Appellant's employment history is a critical factor used in assessing whether a candidate possesses a psychological condition which has interfered with the applicant's ability to function well in an employment setting, and whether the candidate can in fact handle the rigors of the position for which s/he has applied. Indeed, as detailed above, the Commission itself has overturned psychological bypass appeals where there exists no evidence that the psychological

condition cited to by the Appointing Authority has ever been problematic for the applicant in the employment context. *See Funaro, supra.*

Here, it is compelling that the Appellant has had highly relevant and challenging employment experience with the Suffolk County Sheriff's Department as a corrections officer. Appellant has worked for the Suffolk County Sheriff's Department for five years. He has an extremely good work history, having received all positive recommendations from his superiors at the jail.³ As a correctional officer, the Appellant is responsible for overseeing the safety and well-being of the inmates incarcerated at the facility as well as the safety and well of his fellow correctional officers. (Testimony of Appellant.) Mr. Fitzgibbon was appointed to be a member of the Sheriff's Emergency Response Team, where his supervisor, Lieutenant Melvin Reed personally witnessed him "de-escalate many violent situations using verbal commands and communication skills." Mr. Fitzgibbon has also routinely assisted the Sheriff's Gang Intelligence Unit. (Testimony of Appellant.)

There is simply no evidence that the psychological issues cited by Dr. Reade including "defensiveness" have ever been problematic for him in the employment context or would even potentially be problematic in him future employment as a police officer. *See Funaro, supra.* In fact, all of the evidence is to the contrary.

Dr. Reade supported her finding that Appellant suffers from "defensiveness" by pointing to a work incident in which Appellant supposedly received a suspension for failing to allow inmates to use the bathroom facility in a timely manner. Upon cross-examination, however, it was determined that the Department had reduced this suspension down to an oral warning.

³ In his five year period, Mr. Fitzgibbon only received one oral warning for failing to allow inmates to use the bathroom facilities. (Jt. Exh. 2)

Moreover, at the hearing, the Appellant gave a perfectly logical and coherent explanation for his conduct on the day in question.

Dr. Reade admitted at hearing that when weighing the relevance of appellant's work environments in the corrections department and in the boys and girls club she made the presumption that they were "structured" and did nothing to ascertain whether her understanding was accurate. Moreover, Dr. Reade admitted to never looking at Appellant's supervisor references. Finally, since Dr. Reade has never actually worked in a police department or spent time "on the beat" she would have no basis to compare the work Appellant performed as a corrections officer with the work performed by a full-time police officer with the Boston Police Department. As it turns out, the Appellant's history shows that he has taken almost every job that an employee could take with the corrections department in order to better prepare himself for employment with the Police Department.

Dr. Reade also testified at hearing that Appellant's psychological testing results support her conclusion that his defensiveness would interfere with his ability to perform the functions of a police officer. However, Dr. Schaeffer and Dr. Beck presented evidence that Appellant's psychological testing do not necessarily support that Appellant suffered from "defensiveness." To the contrary, most of Appellant's clinical and content scales on the MMPI-2 were "well within normal range." (Jt. Ex. 6, Law Enforcement Interpretive Report, pp. 3, and 5).⁴

For these reasons, where the Appointing Authority's psychological bypass of the Appellant lacks factual support in the Appellant's background, particularly his employment history, and in the record of this proceeding as a whole, the bypass appeal must be allowed.

⁴ The MMPI-2 and the PAI should only be scored and interpreted by individuals with training in psychology, and the Department had the Appellant's MMPI-2 and PAI results scored and interpreted by a computer because neither Dr. Scott nor Dr. Julia Reade is trained to score or interpret such tests. Dr. Schaeffer, on the other hand, has administered and interpreted almost one thousand MMPI-2's and PAI's.

The Department's Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Department Doctor's Own Psychological Testing Methods Were Inaccurate.

In psychological bypass appeal cases, the Commission does far more than simply look to make sure that impermissible reasons are not being asserted, rather, it will require that the Appointing Authority show its doctors' psychological screening methodology is accurate and defensible. *See Michael Doran of Norwood*, 11 MCSR 121 (1998).

Here, Dr. Schaeffer and Dr. Beck, both experts in their fields, testified that the Department doctors' psychological testing methods were flawed in that they gave too much weight to the Appellant's paper and pencil psychological testing results and his performance during clinical interviews and gave virtually no weight to the Appellant's background history and adult life functioning. (Testimonies of Dr. Schaeffer and Dr. Beck.). In coming to her conclusion with respect to the Appellant, Dr. Reade, by her own admission, relied in large part upon the information that she had obtained through the Appellant's paper and pencil tests, the Appellant's performance during her clinical interview, and Dr. Scott's first-level interview notes based upon the same.

Dr. Reade testified that in fact she did nothing to ascertain whether her concerns with respect to the Appellant having psychological issues had been issues for the Appellant before. She never interviewed any of his supervisors at the jail. Indeed, Dr. Reade appeared to give little or no weight to the Appellant's five years of employment at Suffolk County Corrections based on her presumption that the Appellant's work there was "structured" and had no parallels in actual police work.

According to Dr. Beck and Dr. Schaeffer, a sound psychological testing methodology consists of the clinician taking any questionable test results, as well as any red flags raised during

the clinical interview, and determining whether these issues have ever impacted that Applicant's ability to live or work in such a way that it would suggest them incapable of performing the job for which they have applied, *i.e.*, a police officer. *Id.* This determination is made through a thorough investigation and understanding of the Appellant's background and history of adult life functioning. *Id.* If the issues raised by the testing and the interview are not supported by background data, then a disqualification and bypass is not justified. *Id.*

In his report, Dr. Beck states that:

I saw no evidence that the PAI was invalid. The test results appeared to show a low risk for job-related difficulties consistent with that of other successful applicants. . . . This is a man with a solid life story. There is no evidence for mental disorder and no history of a behavioral condition that would interfere with his ability to perform the duties of a police officer. He grew up in a stable home. He has strong family relations. He appears to be a loving uncle who spends considerable time caring for his niece. . . .

He has worked successfully as a corrections officer for five years. He had one episode in which his supervisor strenuously disagreed with his judgment, upon administrative review the organization did not find his behavior worthy of sanction.

Against this life-long evidence, Dr. Reade opposes her concerns based on psychological testing and on the psychiatric interviews conducted by herself and Dr. Scott. As I have written in previous reports, rejection on these grounds represents in my view a fundamental misunderstanding of the weight to be given to interview and test data in comparison with life history.

(Jt. Ex. 11.) Dr. Beck and Dr. Schaeffer's psychological testing model is indeed consistent with Commission caselaw in that it necessitates psychological evidence. *See Funaro, supra.*

Furthermore, Dr. Reade over-relied on the Appellant's performance during his clinical interview -- which is an unnatural setting. Since candidates are seeking employment, they come into the interview wary that their job is on the line and wanting to impress the clinician. Many of the candidates have never in their lives been before a mental health professional and therefore are justifiably nervous.

The fact that somebody appears nervous and defensive during this clinical interview is therefore natural and should be taken within the context of the situation. Dr. Schaeffer gives some weight to a candidate's performance in his own psychological pre-screening interviews, however, he is cautious not to draw too much from something small or insignificant. (Testimony of Dr. Schaeffer.)

BPD's Noncompliance with "Americans with Disabilities Act of 1990". Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq., G.L. c. 151B §4(16), G.L. c. 31 § 61A and other Relevant Laws and Rules:

In a letter dated August 1, 2007 from the Boston Police Department Human Resources Director, Robin W. Hunt, the Appellant was informed, "that the results of your psychological screening indicate that you cannot adequately perform the essential functions of the public safety position for which you applied and **a reasonable accommodation is not possible.**" The letter further provided "therefore you will not be appointed as a Boston Police Officer." Where Appellant was being bypassed he was also notified of his appeal rights to the Civil Service Commission. (Emphasis added) (Statement of Stipulated Facts, # 8, Exhibit 8) The BPD raised and addressed the issue of reasonable accommodation in its bypass letter regarding the Appellant. The conclusory language in the letter: "that the results of your psychological screening indicate that you cannot adequately perform the essential functions of the public safety position for which you applied and **a reasonable accommodation is not possible.**"; implies that the BPD did attempt to specifically determine what essential functions of the position he could not perform, why, and what specific reasonable accommodation might be implemented by the BPD. I believe that the BPD is legally obligated by Massachusetts General Laws, HRD rules and Federal law to perform these specific acts and determinations, in good faith. The BPD failed to meet or even attempt in good faith to meet its obligations under these enumerated and other

relevant laws and rules. The BPD's failure to comply with the requirements of the ADA by meaningfully addressing the issue of reasonable accommodation might be considered by some to be a separate and distinct issue unaddressed by the pleadings and evidence in this matter.

However, I feel that this substantive issue should at least be referenced and outlined in this decision, so that it might be addressed by the courts upon appellate review. I would reach the same result and conclusion in this decision exclusive of any evidence or lack of, weight attributed to or reasonable inferences drawn from or any other consideration of this entire ADA issue.

The Boston Police Department did not produce any evidence regarding its exploration of or offer of or attempt to provide any "reasonable accommodations" to the Appellant, due to his alleged "disability" or mental limitation, so that he could perform the duties of a Boston Police Officer. This could be considered an act of employment discrimination or the denial of an employment opportunity to a job applicant who is an otherwise qualified individual with an alleged disability. This appears to possibly be a violation of the so called "Americans with Disabilities Act of 1990". (Administrative notice Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq., Exhibit 7, exhibits and testimony).

Under the ADA, a disability is: (A) a physical or mental impairment that substantially limits one or more of the major life activities . . . (B) a record of such an impairment; or (C) being regarded as having such an impairment., 42 U.S.C. §§ 12102(2)(A) and Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000) (Administrative notice)

The effect of ADA, "Americans with Disabilities Act of 1990" has been explicitly expanded by at least one recent Circuit Court decision to include all employees or job applicants not just those with disabilities. See John Harrison vs. Benchmark Electronics, Huntsville, Inc. No. 08-16656, The United States Court of Appeals for the Eleventh Circuit, Decision dated

January 11, 2010. This decision reversed and remanded an appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 07-00815-CV-5-IPJ. The Circuit Courts decision states at page 13: “In enacting § 12112(d), Congress sought to prevent employers from using pre-employment medical inquiries “to exclude applicants with disabilities- particularly those with so-called hidden disabilities such as epilepsy, diabetes, *emotional illness*, heart disease, and cancer-before their ability to perform the job was even evaluated.”(Emphasis added) H.R. Rep. No 101-485, pt. 2, at 1. The legislative history of § 12112(d)(2) indicates that “Congress wished to curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment by drafting [§ 12112(d)].” Griffin v. Steeltek, 160 F.3d at 594, (10th Cir. 1998). Allowing non-disabled applicants to sue will enhance and enforce Congress’s prohibition.” (Administrative notice)

A conditional offer of employment is a legal term of art developed under the Massachusetts anti-discrimination laws, M.G.L. c. 151B, as well as the federal Americans with Disabilities Act (ADA). Specifically, under these statutes, an employer may not require that an applicant undergo a medical examination prior to making that individual a conditional offer of employment. Most relevantly, G.L. c. 151B provides: “An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that **an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job...**” G.L. c. 151B §4(16) (emphasis added, administrative notice)

In summation; If the Appellant's background history had suggested that defensiveness had been a recurring issue for him and that it had interfered in the employment context, then Dr. Reade's observations that the Appellant was defensive during his clinical interview, and her reliance on this observation in coming to her conclusion, might have some credibility. But, as described above, the Appellant's five year work record with the Sheriff's Department and commendations with respect to his ability to handle stress and the rigors of corrections work suggests otherwise.

At worst, this is an Appellant who did not live up to the subjective expectations of the clinical interviewer and this, taken together with some paper and pencil test results, served as the basis for the Appellants' disqualification. According to Dr. Beck and Dr. Schaeffer, these psychological testing methods are simply inadequate and unacceptable. (Testimonies of Dr. Schaeffer and Dr. Beck.)

For all of the above reasons, Appellant's bypass appeal, Docket No. G1-07-224 is ***allowed***.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, amending Chapter 534 of the Acts of 1976, the Commission directs that name of the Appellant, Daniel Fitzgibbon be placed at the top of the eligibility list for original appointment to the position of Police Officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of Police Officer in the Boston Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a BPD police officer. The Commission further directs that, if and when Daniel Fitzgibbon is selected for appointment and commences employment as a BPD police officer, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest

Employment Date of the other persons employed from Certification #270048. Finally, the Commission directs that the BPD may elect to require Daniel Fitzgibbon to submit to an appropriate psychiatric medical screening in accordance with current BPD policy either (1) in the ordinary course of the medical examination process or (2) immediately upon receipt of a certification in which his name appears, as a condition to further processing of his application for appointment. In either case, such screening shall be performed, de novo, by qualified professional(s) other than Dr. Scott or Dr. Reade. Should the parties be unable to agree, they should select qualified professional(s) from a list of six names, three to be submitted by each party.

Civil Service Commission,



Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Henderson, Stein and Taylor, Commissioners)
[Bowman and Marquis absent], on February 4, 2010.

A True Record. Attest:


Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:
Tod A. Cochran, Atty.
Sheila Gallagher, Atty.
John Marra, Atty. (HRD)