

After careful review, and in accordance with our Standard Governing Disclosures of Sensitive Personal Data, the Commission has opted to use a pseudonym for the Appellant to appropriately balance their privacy interests with the Commission's statutory obligation to provide the public with a transparent record of its deliberative process and interpretation of civil service law.

Decision mailed: 1/28/11
Civil Service Commission 03

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

J [REDACTED] O [REDACTED],
Appellant

v.

Docket NO.: [REDACTED]

BOSTON POLICE DEPARTMENT,
Respondent

Appellant:

J [REDACTED] O [REDACTED]
Pro se

Appointing Authority:

Asha White, Atty.
City of Boston Law Department
Boston City Hall, Room 615
One City Hall Plaza
Boston, MA 02101

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant J [REDACTED] O [REDACTED] (hereinafter "Appellant" or "C [REDACTED]") seeks review of the Human Resources Division's (HRD) decision in accepting reasons proffered by the Respondent- Boston Police Department (hereafter, "Department" or "Appointing Authority" or "BPD"), for the bypass of the Appellant for original appointment to the position of Boston police officer. The reason proffered for the bypass and accepted by the Human Resources Division was that the Appellant was deemed psychologically unfit for original appointment to the position of Boston police officer. The reasons proffered for the bypass and accepted by the Human

Resources Division, (HRD). The Department substantially based its determination of psychological unfitness on the evaluation and opinion of Dr. Julia M. Reade. The Appellant filed a timely appeal at the Civil Service Commission, (hereinafter "Commission"). A full hearing was held on May 12, 2009, at the offices of the Commission. One (1) audio tape was made of the full hearing. Neither party filed a post hearing proposed decision at the Commission.

FINDINGS OF FACT

Nine (9) exhibits, including HRD's document packet filed at the Commission, were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Dr. Julia M. Reade

For the Appellant:

- J [REDACTED] O [REDACTED], Appellant

I make the following findings of facts:

1. The Appellant having previously taken and passed a civil service exam; being qualified his name appeared on an eligibility list for police officer. The Appellant's name appeared on special Certification # 271119, dated 11/16/2007, for the position of Haitian-Creole speaking Boston Police officer. (Exhibits 1 and 9- HRD document packet)
2. The Appellant applied for a position with the Boston Police Department and met with the Department's Recruit Investigations Unit. He provided the Department

with his Student Officer Application, and thereafter, a Recruit Investigations Unit detective undertook an investigation into the Appellant's background. The Appellant passed the background check. (Exhibit 3, testimony of Dr. Reade)

3. Following the background investigation, the Department extended a conditional offer of employment to the Appellant, contingent upon his successful completion of the medical/psychological component of the hiring process. (Exhibit 2)
4. On May 16, 2008, BPD's Director of Human Resources Robin Hunt sent a bypass letter to HRD. The letter stated the BPD's reason for bypassing the Appellant, being psychologically unqualified, the determination having been based on the evaluation and opinion of Dr. Julia Reade. Dr. Reade's opinion stated: "In summary, Mr. O [REDACTED] appears to be an irritable man with little insight into himself and little willingness to consider his own contributions to his difficulties. He externalizes blame and has difficulty meeting his adult responsibilities. The testing and interviews provide a consistent picture of a man with troublesome and entrenched psychological limitations that would, in my opinion, interfere with his ability to perform effectively or safely as a police officer. For these reasons, Mr. O [REDACTED] is currently found not acceptable for the police department." The letter further states that: "Given the highly stressful nature of urban police work, the Boston Police Department is unable to provide J [REDACTED] O [REDACTED] with a reasonable accommodation." (Exhibit 1)
5. On November 18, 2008, the Appellant was notified by letter from Jenifer Murphy of HRD that the BPD's reasons for bypass were deemed acceptable. The letter

further notified the Appellant of his right to appeal this bypass decision to the Civil Service Commission. (Exhibit 9)

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

- "Category A Medical Condition" is a "condition that would preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others." Category A "psychiatric" medical conditions include "disorders of behavior, anxiety disorders, disorders of thought, disorders of mood, disorders of personality".
- "Category B Medical Condition" is a "condition that, based on its severity or degree, may or may not preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others." Category B "psychiatric" medical conditions include "a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual's history, current status, prognosis, and ability to respond to the stressors of the job" and "any other psychiatric condition that results in an individual not being able to perform as a police officer." (administrative notice:(HRD) Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel).(administrative notice, regulations pursuant to G.L. c.31,§ 61A)

Phase I - Written Psychological Tests

7. The MMPI-2 is a 567 question psychometric test. It is targeted to an 8th grade reading level. It was "normed" on a combination of clinical populations and non-clinical populations initially to diagnose psychological conditions; however, as the test was further researched, researchers have been successful in ferreting out even more personality characteristics based on how a person responded on the test. The test results provide information about how the applicant has approached

the test and also highlights both enduring personality traits and more acute problems that the candidate is experiencing. (Testimony of Dr. Reade, Exhibit 4)

8. On or about April 5, 2008, the Appellant was administered the Minnesota Multiphasic Personality Inventory-2 Exam (hereinafter "MMPI-2") and subsequently a Law Enforcement Interpretive Report and an Extended Score Report were generated by computer. (Exhibit 4)
9. The Appellant was fairly open and non-defensive when responding to the MMPI-2. His test results showed several content themes; including that he might be sensitive, mistrustful or might have passivity problems, health concerns and demoralization concerns. She also found content themes indicating: anxiety, anti-social feelings, depression, tension and odd behavior and his test indicators for cynicism being extremely high (Testimony of Dr. Reade)
10. However, despite the content themes, the Law Enforcement Interpretive Report for the MMPI-2 stated under Possible Employment Problems: "This normal-range personality pattern suggests very few likely employment problems. He would probably have little trouble adapting to a wide range of work environments." (Exhibit 4)
11. On or about April 5, 2008, the Appellant was administered the Personality Assessment Inventory exam ("PAI") and subsequently a PAI Law Enforcement, Corrections and Public Safety Selection Report was generated by computer. (Exhibit 5)
12. The PAI is a 344 question, multiple choice test that also examines different domains of personality functioning. The PAI has been "normed" against the general population and against different gender groups, different ethnic groups,

and also against post-probationary public safety officers. Because of this, the PAI results allow for comparisons to be made of the applicant to other applicants who have passed through to the point of being post-probationary public safety officers.. (Testimony of Dr. Reade, Exhibit 5)

13. The Appellant approached the PAI test fairly openly. The test results compared to post-probationary public safety officers showed high elevations in mania and that he might have a tendency to grandiosity. (Testimony of Dr. Reade) The PAI Law Enforcement, Corrections, and Public Safety Selection Report authored by Michael D. Roberts, PhD, ABPP cautions the “qualified professional” in the interpretation of this report. Under Interpretive Caveats it advises: “The hiring authority’s final screening decision should be based on corroborating information gathered from multiple data sources.” And goes on to state: “The usefulness and validity of the The PAI Law Enforcement, Corrections, and Public Safety Selection Report is directly related to the knowledge and experience of the qualified professional who interprets this report.” (Exhibit 5)
14. Compared to a normed sample of post-probationary public safety officers, the Appellant showed a low risk of a receiving a “poorly suited” rating from a psychologist. He also exhibited a low or moderate risk of a negative behavioral history, in six job-relevant behavior domains that show likelihood of job-related, integrity, anger management, alcohol, illegal drugs and substance abuse problems. (Exhibit 5)

Phase II - Evaluation by Dr. Marcia Scott

15. On or about April 14, 2008, the Appellant undertook Phase II of the Boston Police Department Psychological Screening and met with Dr. Marcia Scott, a Department Psychiatrist, who conducted a first level psychiatric examination, pursuant to the Boston Police Department psychological screening plan. (Exhibit 6)
16. Prior to the interview, Dr. Scott apparently reviewed some of the Appellant's background documents, his MMPI-2 test scores/results, and his PAI test scores/results. She made apparent notes of her evaluation and interview of the Appellant. She evaluated his MMPI-2 test scores/results, and his PAI test scores/results. She found his MMPI-2 "profile reflected extreme cynicism and persecutory feelings. Indicators of psychological problems were extremely elevated and aggression significantly elevated on PSY5." She also noted elevated scores or indicators on his PAI test. She noted that: "His understanding of spoken English is very functional although there were some words on testing he did not understand." that he has two positive references from retail supervisors who say he is in a dance group and "could be more aggressive." She also notes he "became argumentative" and "Throughout the interview he was irritable and manipulative ..." On balance; Dr. Scott's report is negative regarding the Appellant and he failed Dr. Scott's evaluation. Her reported conclusions states in part that: "He takes no responsibility for his failures and infractions and has no insight into his tendency to blame others. Testing and interview indicate reflect a history of negative relationships, mistrust and barely covered paranoid feelings related to both family and strangers. Throughout adulthood Mr. O [REDACTED] has coped

with his mistrust and disorganization with aggression, unrealistic planning and blaming. These mental impairments and personality traits would interfere with his ability to manage the stresses and perform the duties of an armed police officer.” (Exhibit 6)

17. Dr. Scott concluded that the Appellant’s “mental impairments and personality traits would interfere with his ability to manage the stresses and perform the duties of an armed police officer.” (Exhibit 6)
18. Since Dr. Scott opined that the Appellant was not psychologically fit to become a Boston Police Officer, the Appellant was referred to Dr. Julia M. Reade to undergo a Second Opinion Psychiatric Review, pursuant Phase III of the Boston Police Department psychological screening plan. (Exhibits 6 & 8, testimony of Dr. Reade)
19. Dr. Scott did not testify at this hearing. I draw no adverse inference from this fact alone as no subpoena was requested and Dr. Scott’s availability to testify is unknown. However, it is noted that Dr. Scott’s supposed report is not signed by her or otherwise authenticated as her report. On balance, it is recognized that the BPD apparently did follow its psychological prescreening plan and Dr. Scott’s interview-evaluation was an integral part of that plan. It is also recognized that therefore, it was reasonable for the BPD and Dr. Reade to rely on and employ Dr. Scott’s report in the prescreening process. Accordingly, for all of these stated reasons, while Dr. Scott’s notes are accepted in evidence, except for facts that are supported by other credible evidence, I give her observations or conclusions little weight. (Exhibit 6)

20. The BPD submitted a one page report entitled "Evaluation and Impressions" prepared by a Lucinda I. Doran, PhD dated April 17, 2008 and sent to Marcia Scott, M.D. Neither Doran nor Scott testified in explanation of this report. I attribute no weight to this exhibit. (Exhibit 7)
21. Neither Dr. Scott nor Dr. Reade audio or video record their interviews. (Testimony and exhibits)

Phase III - Evaluation by Dr. Julia Reade

22. Dr. Julia Reade is a Board Certified psychiatrist who has worked for the Department for almost ten (10) years conducting Second Level Psychiatric Interviews for police officer recruits. She is Board Certified in General Psychiatry and Forensic Psychiatry and has extensive experience in Law and Psychiatry as well as Occupational Psychiatry. (Exhibit 8 and testimony of Dr. Reade)
23. Dr. Reade conducts Second Level Psychiatric Screening interviews for the BPD when Dr. Scott deems an applicant as not psychologically fit to be a Boston Police officer. Dr. Reade does not interview/evaluate a candidate unless they have failed Dr. Scott's evaluation. (Testimony of Dr. Reade, Exhibit 8)
24. Dr. Reade interviewed the Appellant on April 17, 2008. Prior to the clinical evaluation, Dr. Reade reviewed the Appellant's "records provided to [her] by the Boston Police Department", including the recruit investigation summary report, and personal data questionnaire, Dr. Scott's report and his MMPI-2 and PAI test scores/results. (Testimony of Dr. Reade, Exhibit 8)

25. Dr. Reade specifically referenced Dr. Scott's mostly negative; concerns, findings and observations in her own report and testimony. (Exhibits 6 & 8 and testimony of Dr. Reade)
26. Dr. Reade explains to each candidate that, even though she has been hired by the City of Boston and even though she is reviewing what Dr. Scott has sent to her, she is obligated to be as objective and as careful as possible and that even though the recruit is coming to see her for a second opinion, everybody gets a fresh look. She indicated that she is sensitive to the fact that most of the recruit candidates have never seen a psychiatrist before and may be very nervous. She tries to put the candidate at ease. (Testimony of Dr. Reade, Exhibit 8)
27. Dr. Reade used the MMPI-2 and the PAI to help focus her inquiry during her interview with the Appellant. (Testimony of Dr. Reade)
28. Dr. Reade did not base her recommendation to bypass solely on the Appellant's MMPI-2 and PAI test results. (Testimony of Dr. Reade)
29. Dr. Reade analyzes the results of the MMPI-2 and PAI, with caution. She looks at how someone approached the test, whether the person was defensive, and how willing the person was to disclose information. She also uses several software programs that the BPD recognizes. She reads through the narrative results of the test to see if there are any issues that are flagged as particular concerns and she focuses on those areas in her clinical interview with the individual. (Testimony of Dr. Reade)
30. Dr. Reade typically spends an hour with the candidate. She realizes that everyone she meets with is nervous, based upon the fact that the stakes are very high and a

lot of recruits have never met with a psychiatrist before. Everyone comes in with some level of nervousness and Dr. Reade is looking at how the person handles the stress of that situation – whether he is able to keep command of himself and manage the interaction in a way that gives the doctor confidence in his ability to handle stressful situations. (Testimony of Dr. Reade)

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

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

33. Dr. Reade recounted her interview with the Appellant, which took place on or about April 17, 2008. She indicated in part that the Appellant "was on time and dressed in an untucked shirt and trousers. He greeted [her] in a confident manner,

and appeared irritable, hypersensitive and defensive from the outset. His hostility was barely contained..." She discussed several issues with him, including family, education, financial problems, military experience and his desire to be a police officer. She noted that it was not possible to get a coherent account from him regarding his financial situation. (Exhibit 8 and Testimony of Dr. Reade)

34. Dr. Reade testified that she spoke with the Appellant about why he wanted to become a police officer. She related that he responded: "I wanted too work in an office and I just never got a chance to. I got stuck in security and I started doing security and I've been doing it ever since." (Exhibit 8 and Testimony of Dr. Reade)

35. Dr. Reade reported that he denied any history of psychiatric symptoms or any history of drug or alcohol abuse. He also denied other critical items; yet, at many other points, he agreed with items related to verbal aggression, perfectionism, persecutory ideas and depression. (Exhibit 8 and testimony of Dr. Reade)

36. Dr. Reade's overall assessment of the Appellant, after reviewing his background information, his MMPI-2 and PAI test results, Dr. Scott's report, and meeting with the Appellant, was that: "In summary, Mr. O████ appears to be an irritable man with little insight into himself and little willingness to consider his own contributions to his difficulties. He externalizes blame and has difficulty meeting his adult responsibilities. The testing and interviews provide a consistent picture of a man with troublesome and entrenched psychological limitations that would, in my opinion, interfere with his ability to perform effectively or safely as a police officer. For these reasons, Mr. O████ is currently found not acceptable for

the police department.” The letter further states that: “Given the highly stressful nature of urban police work, the Boston Police Department is unable to provide J. [REDACTED] O. [REDACTED] with a reasonable accommodation.” (Exhibits 1 & 8 and Testimony of Dr. Reade)

37. Dr. Reade admitted that candidates may have problems understanding the true meaning of the test questions. She tried during the interview to discern whether there was a comprehension or language problem with the Appellant. She knew that the Appellant was from Haiti and she worried about his understanding of English. She reviewed his educational background and asked him questions. He didn't understand some words, phrases and questions in the testing; for instance: “high strung” and “seldom”. Some questions are designed to be confusing, (e.g. double negatives) causing mistaken answers. (Testimony of Dr. Reade)

Testimony of Appellant

38. The Appellant testified that he made mistakes on the written test questions, which he discovered later on. He read the questions a certain way which he found out later were wrong. He gave the following examples of some of the words he did not understand: “cynicism”, “rigid”, “high strung”, and “depressed” etc. He claimed that he went to each interview dressed well; in a jacket, shirt and tie. He claimed that his Driver's license has never been suspended and the traffic citations mentioned, were minor. He tried to answer every question honestly but did not understand many of them. He works hard and takes responsibility for his actions. He has stayed out of trouble and has never been arrested or anything similar. His credit problems are simply a result of not having enough money to

meet all of his living expenses. His father died five years ago. His motivation is to be a role model for his two younger brothers, so that they will be successful in life. He is very responsible and dependable and loves helping people. He would love to be a police officer. He has completed 2 years of college and obtained an associates degree in Business. He has been a supervisor for Wackenhut Security for 2 years of the 5 years there. He has 6-12 people under his supervision, depending on his assignment. He believes he has very good parents and leads a good, normal life. He denied being irritable or impatient and the other negative characterizations by Dr. Scott and Dr. Reade. (Testimony and demeanor of Appellant)

39. The Appellant is a thin black male, approximately 6' 1" tall. He was dressed neatly in a suit with short hair. He speaks slowly with a strong accent. He disagreed with most of what Dr. Scott and Dr. Reade reported as observations and conversations occurring at his interviews; while admitting to a language comprehension problem. However, he only read those reports recently, in preparation for this hearing. He is polite and appropriate in his demeanor when testifying and when not testifying. He stated that he remembers clearly having explained and answered each question differently. He especially disagreed with Dr. Reade's description of his alleged manner and tone of voice which conveyed irritability; once the term was explained to him. He admitted to "major problems" with the written tests. He believes that Dr. Reade did not understand his accent, having to repeat his answers to her questions many times. He also believes that Dr. Reade expected negative results from his interview based on Dr.

Scott's negative report of the first interview. He took responsibility and apologized for the misimpression he unintentionally conveyed to Dr. Scott. The Appellant appears to be honest to a fault; asked about employment discipline; he admitted to an incident 2 months earlier in which he let an employee leave early, for which he got into trouble. This single incident appears to be informal discipline which occurred after the relevant bypass. He claimed that he took responsibility for his actions in that instance. He claims that he deals with the public all the time and does well at it. He claims that he has never been irritable or hostile in his life. The Appellant is sincere and forthcoming. He seems to be incapable of dishonesty. Despite the strong accent, he is understandable and direct and spontaneous in his responses. He made good eye contact and his answers rang true. I find the Appellant to be a credible and reliable witness.

(Testimony and demeanor of Appellant)

40. The Appellant submitted no exhibits. He did not present any witnesses other than himself. He testified to having made mistakes on the written tests and interviews due to misunderstanding of words and phrases. He appears to be capable and responsible, likeable and honest. However, he did not effectively rebut or refute every factual or psychological assertion made against him. He failed to present sufficient qualified, factual and psychological evidence, relevant to the time of his evaluation and bypass, to meet the burden of submitting a preponderance of credible evidence in the record. (Exhibits, testimony and demeanor, reasonable inferences)

CONCLUSION

In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was “reasonable justification” for the bypass. E.g., City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997) (Commission may not substitute its judgment for a “valid” exercise of appointing authority discretion, but the Civil Service Law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”). See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) (“The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles the commission acted well within its discretion.”); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”). See also, Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d

821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission “sufficient to satisfy due process”)

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

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

The greater amount of credible evidence must . . . be to the effect that such action ‘was justified’ [I]f [the factfinder’s] mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different . . . from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, ‘unless it shall appear that it was made without proper cause or in bad faith.’

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

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001). "Abuse of discretion occurs . . . when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and improper factors are assessed but the [fact-finder] makes a serious mistake in weighing them." E.g., I.P.Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir.1998).

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a by-pass decision, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert's opinion is based are grounded on an adequate foundation, either by establishing "general acceptance in the scientific community" or by showing that the evidence is "reliable or valid" through an alternative means, e.g., Canavan's Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) citing Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by "education, training, experience and familiarity" with special knowledge bearing on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990).¹

¹ As to the latter point, the Commission's notes that it is granted broader discretion in the admission of evidence than permitted in the Massachusetts courts. Compare G.L.c.30A, §11(2) with Department of Youth Services v. A Juvenile, 398 Mass. 516, 531, 499 N.E.2d 812, 821 (1986).

Experts' conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, 767 N.E.2d 629, 634, rev. den., 437 Mass 1109, 747 N.E.2d 1099 (2002). As a corollary, when the fact-finder is presented with conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See, e.g., Ward v. Commonwealth, 407 Mass. 434, 438, 554 N.E.2d 25, 27 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73, 420 n.E.2d 298, 305-308 (1891); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, 566 N.E.2d 1132, 1133, rev.den., 409 Mass. 1104, 569 N.E.2d 832 (1991).

No specific degree of certitude is required for expert testimony and it may be accepted if the opinion is "reasonable" and expressed with sufficient firmness and clarity. See, e.g., Commonwealth v. Rodriguez, 437 Mass. 554, 562-63, 773 N.E.2d 946, 954 (2002); Bailey v. Cataldo Ambulance Service, Inc., 64 Mass.App.Ct. 228, 235, 832 N.E.2d 12, 11-18 (2005); Resendes v. Boston Edison Co., 38 Mass.App.Ct. 344, 352, 648, N.E.2d 757, 763, rev.den., 420 Mass. 1106, 651 N.E.2d 410 (1995). So long as the expert's opinion is sufficiently grounded in the evidence, but certain facts were unknown or mistakes were made in some of the expert's assumptions that generally goes to the weight of the evidence. Commonwealth v. DelValle, 443 Mass. 782, 792, 824 N.E.2d 830, 839 (2005); Sullivan v. First Mass. Fin. Corp., 409 Mass. 783, 79-92, 569 N.E.2d 814, 819-20 (1991). However, "it is also a familiar principle that testimony may not rest wholly on conjecture, and that is no less the case when the conjecture flows from the mouth of an expert. [Citations] Qualification as an expert does not confer a license to spout nonsense." Fourth Street Pub, Inc. v. National Union Fire Ins. Co., 28 Mass.App.Ct. 157, 547 N.E.2d 935,

939 (1989) (Kass.J., dissenting), rev.den., 406 Mass. 1104, 550 N.E.2d 396 (1990). See also Board of Assessors v. Odgen Suffolk Downs, 398 Mass. 604, 606-607, 499 N.E.2d 1200, 1202-1203 (1986) (expert testimony stricken which blatantly overlooked critical facts). See also: (impartial medical examiner's opinion (IME) found in part to be unsupported by admissible evidence in the record of hearing at DIA), Thomas Brommage's Case 75 Mass. App. Ct. 825 (2009).

In the case at bar, the Department sustained its burden of proving that it was reasonably justified in bypassing Appellant for appointment as a Boston police officer. The Department followed its BPD psychological screening plan.

The HRD regulations set forth Category A and Category B medical conditions for which a candidate can be disqualified from employment. A Category A condition would preclude a candidate from performing the essential functions of police officer or present a significant risk to the safety and health of that individual or others. A Category B condition may or may not preclude a candidate from performing the essential functions of police officer or present a significant risk to the safety and health of that individual or others. The HRD regulations do not require the diagnosis of a psychological *disorder* to disqualify a candidate as being psychologically unfit, as evidenced by the list of Category B psychological *conditions*. However, in this case, the Appellant's history, testing, and presentation led Dr. Reade to conclude that the Appellant was suffering from "troublesome and entrenched psychological limitations" rendering him psychologically unfit to perform the duties of a Boston Police officer.

Every potential Boston police recruit that has been given a conditional offer of employment, including the Appellant, must take the MMPI-2 and PAI exams, meet with a

first level psychiatric screener, and if he is given an unfavorable first opinion, is then referred to the Department's second level psychological screener. The Department's psychological screening process is in place because a Boston police officer position is a complicated job, a high stakes job, that requires autonomy, the ability to get along well with others, adjust to difficult circumstances, review and be accountable for your own behaviors, adjust to a hierarchal structure, be flexible, deal with very high levels of stress and deal with high levels of boredom. The psychological screening process is important to protect the safety of the general public, the safety of the police officer himself, the safety of their partner(s), and the reputation of the Department.

As was found by Dr. Reade in the MMPI-2 results, the Appellant showed that he was fairly open and non-defensive when responding to the MMPI-2. His test results showed Dr. Reade several content themes; including that he might be sensitive, mistrustful or might have passivity problems, health concerns and demoralization concerns. She also found content themes indicating: anxiety, anti-social feelings, depression, tension and odd behavior and his test indicators for cynicism being extremely high.

The Appellant's PAI test results were found by Dr. Reade to show high elevations in the area of mania and grandiosity.

After undergoing the testing, the Appellant was sent for an evaluation with Dr. Marcia Scott, the Boston Police Department's psychological first level screener. After a review of the Appellant's test results and background information, Dr. Scott undertook a clinical evaluation with the Appellant. In her summary, Dr. Scott indicated that she found the Appellant presents with barely controlled anger and irritability. He had difficulty planning his life and following rules. Dr. Scott concluded that: "throughout adulthood Mr.

O████ has coped with mistrust and disorganization with aggression, unrealistic planning and blaming. These mental impairments and personality traits would interfere with his ability to manage the stresses and perform the duties of an armed police officer.”

Although, this hearing officer found problems with Dr. Scott’s report and her failure to testify in authentication and support of it: Dr. Scott is recognized as a credentialed expert fulfilling an integral part of the BPD’s prescreening process. Since Dr. Scott opined that the Appellant was not psychologically fit to become a Boston Police Officer, the Appellant was referred to Dr. Julia M. Reade to undergo a Second Opinion Psychiatric Review, pursuant Phase III of the Boston Police Department psychological screening plan. Based on Dr. Reade’s review of the Appellant’s background information, his recruit investigation information, his MMPI-2 test results and analysis, his PAI test results and analysis, Dr. Marcia Scott’s report, and Dr. Reade’s own clinical interview with the Appellant, Dr. Reade concluded that: “In summary, Mr. O████ appears to be an irritable man with little insight into himself and little willingness to consider his own contributions to his difficulties. He externalizes blame and has difficulty meeting his adult responsibilities. The testing and interviews provide a consistent picture of a man with troublesome and entrenched psychological limitations that would, in my opinion, interfere with his ability to perform effectively or safely as a police officer. For these reasons, Mr. O████ is currently found not acceptable for the police department.” The letter further states that: “Given the highly stressful nature of urban police work, the Boston Police Department is unable to provide J██████████ O████ with a reasonable accommodation.”

Consequently, the BPD decided to bypass the Appellant for appointment based on Dr. Reade's conclusion that the Appellant was not psychologically fit to be a Boston Police officer.

Acknowledgment is made of a recent decision *City of Beverly* (cited below) by the Appeals Court. The *City of Beverly* decision addressed the standard of review employed by the commission for cases involving the bypass for hiring a candidate for a civil service police officer position. The Court's decision also addressed the issues of burden of proof and proper exercise of judgment incumbent upon the appointing authority in these hiring matters. The candidate there, Bell, was bypassed for appointment based on an allegation of misconduct which led to him being fired by a prior employer. The alleged misconduct by the prior employer was: "intentionally accessing the private voicemail system of another person is a serious confidentiality breach, an invasion of the privacy of other employees, as well as potentially a violation of the law." See City of Beverly v. Civil Service Commission & another, 78 Mass. App. Ct. 182 (2010), Appeals Court (No. 9-P-1959), Essex county, October 28, 2010. There the Appeals Court found "A Superior Court judge vacated the commission's ruling after concluding that the commission had improperly substituted its judgment for that of the city, and Bell appealed. We affirm. [FN4]" id page 183.

That decision further stated: "although it is plain that the finding of facts is the province of the commission, not the appointing authority, the commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there

was “reasonable justification” shown. [FN11]² Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately held, [FN12] appointing authorities are given significant latitude in screening candidates, and “[p]rior misconduct has frequently been a ground for not hiring or retaining a police officer.” Cambridge v. Civil Serv. Comm., 43 Mass. App. Ct. at 305, and cases cited.” *City of Beverly* at page 188. And the Appeals Court also stated: “Instead of focusing on whether the city had carried its burden of demonstrating a “reasonable justification,” the commission focused on whether the city had proven that Bell in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing an added evidentiary burden on the city. In simple terms, neither Bell nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired. [FN15]” *id* at page 190 And further stated: “Absent proof that the city acted unreasonably, we believe that the commission is bound to defer to the city’s exercise of its judgment.” *id* at page 191 And further elaborated: the [commission] “...ultimately rested their ruling on the city’s failure to prove that the allegations of misconduct were in fact true, a burden that we have concluded the commission erroneously assigned to the city. [FN17]” *id* at page 192. The Appeals court concluded: “In sum, we agree with the judge below that the city demonstrated a reasonable justification to bypass Bell and that the commission improperly substituted its judgment for that of the city in ordering that he be hired.” *id* at page 192.

² “FN11 As demonstrated below, this case well illustrates the difficulties inherent in sorting out what is fact finding (the province of the commission) and what is the exercise of judgment with regard to the facts (the province of the appointing authority).”

The Appellant submitted no exhibits. He did not present any witnesses other than himself. He testified in admission to many of his misunderstandings regarding the written test questions and the oral questions during his interviews. He did not effectively rebut or refute every factual or psychological assertion made against him. He failed to present sufficient qualified, factual and psychological evidence, relevant to the time of his evaluation and bypass, to meet the burden of submitting a preponderance of credible evidence in the record.

The Appellant has failed to show that the BPD's decision to bypass him was made with any political considerations or other unpermitted consideration.

For all the above reasons, the Appeal under Docket No. [REDACTED] is hereby *dismissed.*

Civil Service Commission,



Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell, Stein and Marquis, Commissioners) on January 27, 2011.

A true record. Attest:



Commissioner

**Commissioner Marquis was
absent on January 27, 2011**

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

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30)

days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Asha White, Atty.-BPD

J [REDACTED] C [REDACTED]

John Marra, Atty. - HRD