

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

JOSEPH KAUFMAN,
Appellant

v.

G1-12-284

NEW BEDFORD POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Pro Se
Joseph Kaufman

Appearance for Respondent:

Jane Medeiros Friedman, Esq.
City of New Bedford Law Dept.
133 William Street
New Bedford, MA 02740

Commissioner:

Christopher C. Bowman

DECISION

On October 5, 2012, the Appellant, Joseph Kaufman (Mr. Kaufman), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the New Bedford Police Department (City) to bypass him for original appointment to the position of permanent, full-time police officer in the City's Police Department (Department).¹ A pre-hearing conference was held on November 9, 2012 at the UMASS Dartmouth School of Law in North Dartmouth and a full hearing was held at the same location on February 22, 2013. The hearing was digitally recorded

¹ The New Bedford Police Department is still considered a "Consent Decree" department. As such, HRD, unlike with most other communities, has not delegated the responsibility for approving bypass reasons to the New Bedford Police Department. Although the City submitted the bypass reasons to HRD on September 12, 2012, it appears that, due to an administrative oversight, HRD did not formally approve those reasons until April 4, 2013.

and both parties were provided with a CD of the hearing. Proposed decisions were submitted by both parties.

FINDINGS OF FACT:

Ninety-six (96) exhibits were entered into evidence at the hearing and I kept the record open for additional documents that were submitted and marked as Exhibits 97 – 102. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Christopher Dextradeur, Police Officer, New Bedford Police Department;
- Donald I. Seckler, Ph.D., Licensed Psychologist;
- Ricard Rezendes, Lieutenant, New Bedford Police Department;

Called by the Appellant:

- Kathleen N. Kelly, LICSW;
- Joseph Kaufman, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, agreed post-hearing documents, and reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes the following findings of fact:

1. Mr. Kaufman is a thirty-seven (37) year old married male with two young children who resides in New Bedford. He has been employed by the City's Inspectional Services Department as a local building inspector for the past two (2) years. He is also a call firefighter / EMT for the Town of Dartmouth. (Testimony of Mr. Kaufman)
2. Mr. Kaufman graduated from Chelmsford High School in 1993, where he was ranked 66th out of 380 students. He received an Associates degree from the New England

Institute of Technology in automotive technology in March 2002. (Testimony of Mr. Kaufman and Exhibit 12)

3. Mr. Kaufman enlisted in the United States Army after graduating from high school in 1993 and, over the past twenty (20) years, has served either as a reservist or active duty member. (Testimony of Mr. Kaufman)
4. Mr. Kaufman was first diagnosed with Attention Deficit Disorder (ADD) by medical professionals at a Veterans Administration (VA) hospital in 2003 while he was attending classes at Providence College. Mr. Kaufman had difficulty staying focused on his classwork. He was prescribed low doses of Adderall and was able to maintain a B grade in the class. At some point, Mr. Kaufman opted to stop taking the Adderall because it impacted his sleeping. (Testimony of Mr. Kaufman)
5. In retrospect, Mr. Kaufman believes that he has been impacted by ADD since at least he was a teenager. He declined a scholarship to attend Wentworth Military Academy after high school because of difficulty writing papers, which he attributes to ADD. (Testimony of Mr. Kaufman)
6. For the past two years, Mr. Kaufman has been seeing a Licensed Independent Clinical Social Worker (LICSW) for depression and marriage counseling. (Testimony of Mr. Kaufman and Ms. Kelly)
7. In March 2012, Mr. Kaufman's name appeared second on Certification No. 202611 from which the City ultimately appointed nineteen (19) permanent, full-time police officers, eighteen (18) of whom were ranked below Mr. Kaufman. (Stipulated Facts)

8. A New Bedford police officer was assigned to conduct a thorough background investigation of Mr. Kaufman, the results of which were entered as Exhibit 12.
(Testimony of Officer Dextrateur and Exhibit 12)
9. The background investigation revealed that Mr. Kaufman's driver's license had expired one (1) week earlier. Upon being notified of this, Mr. Kaufman renewed his license the next day. In 1998, Mr. Kaufman's license was suspended after receiving three (3) speeding tickets within one (1) year. (Exhibit 12)
10. As part of his application, Mr. Kaufman indicated that he was delinquent on certain financial bills. (Exhibit 12)
11. Mr. Kaufman also stated as part of his application that he had been in a physical fight as an adult. (Exhibit 12)
12. Also as part of his application, Mr. Kaufman indicated that he was involved in a domestic dispute with a former girlfriend in November 2002 for which he was charged with simple assault and destruction of property (telephone). (Exhibit 12)
13. The background investigator contacted the ex-girlfriend via phone and memorialized the conversation in his report. According to the ex-girlfriend, she and Mr. Kaufman were roommates for approximately one and a half (1 ½) years during which time they become involved in a romantic relationship. The ex-girlfriend described Mr. Kaufman at the time as someone with a bad temper who kicked the side view mirror off of her vehicle, threw a plate of spaghetti against a wall; and splashed soda at her child who was throwing a tantrum at the time. (Exhibit 12)
14. When asked about the November 2002 incident, the ex-girlfriend told the investigator the following. Mr. Kaufman came home intoxicated one night and she found another

female's phone number in his possession. The ex-girlfriend at some point ran into a closet and locked the door. Mr. Kaufman continuously banged on the door until she exited the closet and tried to leave the house. At some point, Mr. Kaufman pulled the telephone off the wall and attempted to rip the ex-girlfriend's clothes off to prevent her from leaving the house. The ex-girlfriend was eventually able to leave the house and called the police. (Exhibit 12)

15. Although Mr. Kaufman was arrested and criminal charges were filed against him, the charges were at some point "expunged" and the background investigator was unable to obtain any court documents or police incident report(s). (Exhibit 12)
16. The ex-girlfriend told the background investigator that she believed that Mr. Kaufman has since undergone anger management counseling and that she would recommend him for appointment. (Exhibit 12)
17. The background investigator also spoke with Mr. Kaufman's neighbors. Most of his neighbors either described him positively or didn't know him well enough to offer a positive or negative comment. One neighbor indicated that he and Mr. Kaufman had a dispute about a fence between their properties and stated that Mr. Kaufman was immature and may have "psychological problems." (Exhibit 12)
18. The background investigator also interviewed three (3) references provided by Mr. Kaufman, including a Virginia State Trooper, a former Warwick, RI police officer and another individual. All described him in glowing terms. (Exhibit 12)
19. The background investigator also interviewed two (2) New Bedford police officers whom Mr. Kaufman stated that he knew personally. One (1) of these police officers stated that he didn't recall Mr. Kaufman. The other police officer stated that he and

Mr. Kaufman were in the same military unit together and that Mr. Kaufman always seemed to be “banging heads” with other members of the unit whether they were subordinates or supervisors and that there appeared to be “something off” about Mr. Kaufman and that he acts as if he is “still in deployment.” (Exhibit 12)

20. The background investigator met with Mr. Kaufman regarding the information he had obtained and asked Mr. Kaufman to provide any additional information or clarification regarding the information he had obtained. (Exhibit 12)
21. In regard to his finances, Mr. Kaufman told the background investigator that he is on the verge of filing for bankruptcy protection due to credit card bills and a home equity loan he took out for construction costs related to his house. (Exhibit 12)
22. In regard to the domestic incident in November 2002, Mr. Kaufman acknowledged that he broke a telephone on the night in question, but denied trying to rip the clothes off his ex-girlfriend. He told the investigator that he “wrapped his arms around” his ex-girlfriend for a few seconds and then let her exit the house. Mr. Kaufman told the investigator that he pled guilty to misdemeanor assault and destruction of property. (Exhibit 12)
23. In regard to other incidents raised by his ex-girlfriend, Mr. Kaufman acknowledged in his interview with the investigator that he threw a plate of spaghetti against the wall during a dispute, but that he did not remember breaking a mirror off of his ex-girlfriend’s car. Mr. Kaufman told the investigator that he used to have a bottle present when his ex-girlfriend’s children misbehaved and that he “squirted the children” as a form of discipline. (Exhibit 12)

24. Mr. Kaufman told the investigator that he had subsequently attended anger management counseling which had benefited him. (Exhibit 12)
25. In regard to having been involved in a physical fight as an adult, Mr. Kaufman told the investigator that he was involved in a physical altercation twice, once in Iraq with an Iraqi civilian and another with a U.S. soldier. (Exhibit 12)
26. Mr. Kaufman offered additional information about the Iraq incident as part of the full hearing before the Commission. According to Mr. Kaufman, he had detained an Iraqi soldier regarding a fight that occurred overnight. When Mr. Kaufman attempted to handcuff the soldier, he swung at Mr. Kaufman and Mr. Kaufman put the soldier into a chokehold to defend himself. Mr. Kaufman was not found to have engaged in any wrongdoing. (Testimony of Mr. Kaufman)
27. With the exception of the additional information regarding the Iraq incident, Mr. Kaufman's testimony before the Commission largely mirrored what he stated to the background investigator. (Testimony of Mr. Kaufman)
28. The "Summary" section of the background investigator's 11-page report states:
- "Through my investigation [I] found that most people I spoke with including neighbors, references, previous and current employers spoke very highly of Mr. Kaufman. The only negative feedback was from [a neighbor] and this appeared to be from several years ago. Although Mr. Kaufman does have a previous arrest for misdemeanor assault and destruction of property and also some minor motor vehicle issues, both from ten years ago and more I do recommend that the applicant move on to the next step in the hiring process." (Exhibit 12)
29. Mr. Kaufman was then interviewed by a four (4)-member panel comprised of superior officers from the Police Department. They rated Mr. Kaufman, and all of the candidates, based on eight (8) categories, using a scale of 1 to 5, with 1 being unsatisfactory and 5 being excellent. Thus, the highest possible score each panelist

could give a candidate was a 40 (8 x 5). The panelists gave Mr. Kaufman total scores of 30, 28, 32, 33 respectively, with each of the panelists giving Mr. Kaufman a score of 4 or 5 in the category of “Ability to converse: can applicant express himself logically, convincingly?” Each of the panelists also indicated that they would recommend Mr. Kaufman for hire. (Exhibit 102)

30. Mr. Kaufman was subsequently given a conditional offer of employment contingent upon successfully completing the medical and psychological screening components of the hiring process.

31. The New Bedford Police Department had previously submitted a psychological screening plan to the state’s Human Resource Division (HRD) which was approved by HRD. (Exhibit 11)

32. The New Bedford Police Department’s Psychological Screening Plan, which was approved by HRD states that: “The goal of this psychological screening program is the detection of any serious psychological disorders or characteristics that would render a candidate unable to perform with reasonable accommodation the essential functions of a police officer.” (Exhibit 11)

33. The “Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel” establishes two categories of medical conditions, “Category A” and “Category B”. A “Category A” Medical Condition is “a medical condition that would preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or others.” (emphasis added)

A “Category B” Medical Condition is “a medical condition that, based on its severity or degree, may or may not preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or others. (emphasis added) (Administrative Notice: HRD Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel)

Using the same above-referenced “A” and “B” categories, the “Psychiatric” section of the regulations indicate that a “Category A” medical condition shall include:

“disorders of behavior; anxiety disorders; disorders of thought; disorders of mood; disorders of personality.” A “Category B” medical condition shall include: “a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated base on that individual’s history, current status, prognosis, and ability to respond to the stressor’s job;” or “any other psychiatric condition that results in an individual not being able to perform as a police officer.” (emphasis added) (Administrative Notice: HRD Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel)

34. Since 2006, the City of New Bedford has contracted with licensed clinical psychologist Donald A. Seckler, Ph.D. to conduct psychological screening for applicants for entry level police officer positions, in accordance with a psychological screening plan that has been approved by the Human Resources Division.

(Testimony of Dr. Seckler and Exhibit 11)

35. Dr. Seckler conducts psychological screening for public safety personnel including

police, fire and dispatch jobs. His clients include the following municipalities:

Attleboro, Carver, Franklin, Foxboro, Harwich, Hingham, Kingston, Marion, Marlboro, Middleborough, Milford, Millis, New Bedford, Newton, Orleans, Plymouth, Plympton, Reading, Sandwich, Somerset, Walpole, Wellesley, Worcester, and Essex County Sheriff's Department. (Testimony of Dr. Seckler and Exhibit 11)

36. Dr. Seckler has performed approximately eighty (80) psychological evaluations for the New Bedford Police Department. (Testimony of Dr. Seckler)

37. Dr. Seckler administers written examinations that include the Press Test, MMPI-2 and Inwald Personality Inventory. The Press Test is a booklet that contains a series of three tasks. The three tasks require the candidate under the pressure of time to do some repetitive tasks involving the filling in of blank circles. It is designed to pick up issues such as ADD, cognitive or neurological blocking on the ability to manage the flow of information required by the test. Dr. Seckler has been administering this test for more than twenty years. The Press Test is a widely used test that is scored by Dr. Seckler. (Testimony of Dr. Seckler)

38. The MMPI-2 is a paper and pencil personality test, more than 500 true or false questions. The test is highly researched and particularly normed on police candidates and other candidates for sensitive positions such as police, firefighter, paramedic and seminary positions. The test is scored by computer which compares the candidate's responses to people with a wide variety of people with psychological problems or disorders. (Testimony of Dr. Seckler)

39. Inwald Personality Inventory is a paper and pencil personality test designed to illicit information about issues with personality that may impact the performance of the

police role, normed on and researched on Police officers very extensively. Used as a check against what is seen in the MMPI, so there are two objective personality tests on each candidate. (Testimony of Dr. Seckler)

40. The written tests are administered to the group in New Bedford. Interviews are then conducted, usually after the test results are administered. Prior to conducting the interview, which lasts approximately one hour, Dr. Seckler reviews the background investigation. The purpose of the interview is to gather information to make a clinical assessment of the candidate. Dr. Seckler asks questions regarding history, open-ended questions, questions that go to motivation and questions that may arise from the background investigation to follow up on issues to shed light on important issues such as judgment and impulse control, issues that are related to the performance of a police job. (Testimony of Dr. Seckler)

41. Dr. Seckler's first encounter with Mr. Kaufman took place during the testing session when the candidates were seated and waiting for the testing to begin. Mr. Kaufman made several comments, which Dr. Seckler found to be unusual. Dr. Seckler looked over at him twice and when the behavior continued, Dr. Seckler pointed at Mr. Kaufman, so he would stop. Mr. Kaufman's behavior made Dr. Seckler wonder about Mr. Kaufman's judgment and impulse control. The behavior was out of the ordinary, like talking in church. (Testimony of Dr. Seckler)

42. Interviews are usually limited to one hour, however, Mr. Kaufman's interview exceeded one hour because Dr. Seckler was unable to adequately cover many things that had come upon during the process. (Testimony of Dr. Seckler)

43. Dr. Seckler asked Mr. Kaufman about the incidents involving his former girlfriend

that included throwing the telephone, throwing a plate of spaghetti and spraying a child in the back seat of the car with water which Dr. Seckler conclude involved loss of control and poor judgment. (Testimony of Dr. Seckler)

44. Dr. Seckler asked Mr. Kaufman about the dispute with his neighbor. Mr. Kaufman provided an explanation about what had happened and why it had happened.
(Testimony of Dr. Seckler)

45. Dr. Seckler asked Mr. Kaufman about marriage. Mr. Kaufman said he was nearly bankrupt because of poor decisions he had made in rehabilitating a house he had purchased. He had overinvested in a house, which had left him in a catastrophic financial situation. (Testimony of Dr. Seckler)

46. Dr. Seckler concluded that Mr. Kaufman's answers regarding his wife were inappropriate and demeaning towards her. For example, Mr. Kaufman told Dr. Seckler that "my wife is a drug pusher". He explained she is a pharmacy tech. He also made other comments regarding his marriage which Dr. Seckler found inappropriate and/or were not solicited by him. (Testimony of Dr. Seckler)

47. Dr. Seckler asked Mr. Kaufman about his parents' divorce and what had taken place. Responses were voluminous and tangential which led him to believe that Mr. Kaufman's ability to govern his thoughts and to govern the process of interaction within that interview were seriously affected by his cognitive neuropsychological status. Dr. Seckler then asked Mr. Kaufman if he had ever been diagnosed with ADD and he told Dr. Seckler "I'm the poster boy". They discussed his therapy and his attempts to cope with the condition. Mr. Kaufman told Dr. Seckler he was receiving psychotherapy. (Testimony of Dr. Seckler)

48. “ADD is a condition that affects cognitive function and regulation of thoughts, feelings and impulses, and therefore, behavior. Police work involves a variety of behaviors that may be impacted by ADD. One involves impulse control. Police work requires very sophisticated control of your behavior. When people are angry they still have to behave appropriately and gather evidence. When they are frightened, they still have to do what they were trained to do. ADD has a tendency to short-circuit the process of making good sense of the data from the outside and from the inside. Striking a balance of good impulse control and good judgment, people have to adequately learn and rely on their skill and training under conditions of intense pressure, stress and threat and perform appropriately so that data is gathered, appropriate procedures are followed, that reports are filed, that testimony may be given in an accurate way and all the parts need to fit together. If all the pieces don’t fit together, the case could be lost or someone could be injured. Good judgment and impulse control is very important. Police work also requires ability to function in a highly structured organization that doesn’t tolerate individual variations in decision making, individual response to rules, or individual variations in response to command. You have to work for someone who you don’t like or who is not very smart. Until you go through appropriate procedures, you have to do what that person asks of you and you have to do it day in and day out. ADD is a condition that frequently has an impact on the ability to process and manage the expression of angry feelings in conflict situation with authority figures.” (Testimony of Seckler)
49. Dr. Seckler found the interview with Mr. Kaufman to be strange and alarming. It was substantially and profoundly different than what takes place during the interviews of

hundreds of other job candidates. Dr. Seckler has interviewed many candidates with ADD and did not find ADD in and of itself a condition that precludes him / her from performing effectively as a police officer. The diagnosis is a matter of degree. Dr. Seckler thought he saw before him someone whose thought processes and behavior were characteristic of Attention Deficit Disorder in a way profound enough to make him concerned that he could perform the basic functions of the job, including the gathering and reporting of evidence, the giving of testimony, the inhibition of impulses under stressful conditions and the making of sound judgments under stressful conditions. He found Mr. Kaufman's thought process to be consistently impulsive, tangential, over-inclusive and under-inclusive. (Testimony of Dr. Seckler)

50. Dr. Seckler reviewed the written test results. The Inwald test results came back the day of interview and had likely been reviewed by Dr. Seckler prior to the interview. MMPI results came back two days after the interview had occurred and the Press Test was scored by Dr. Seckler prior to the interview. (Testimony of Dr. Seckler and Exhibits 13 and 15)

51. Mr. Kaufman's performance on the Press Test was a classic indicator or "yellow flag" for ADD. The third segment of the test requires you to shift mental gears to inhibit putting down a certain response and instead insert the correct response. People with ADD have a great deal of difficulty with inhibiting that response. They generally do less well on the third segment than on the first and second segments. Mr. Kaufman's performance was significantly different and he misunderstood the directions for part three which is also characteristic of people with ADD. He was not able to transfer the directions into the proper behavior on what is called the sample section of the test.

He made an adjustment following that correction and did appropriate work on the following section but he did the sample section incorrectly. Hardly anybody makes that kind of error. That kind of error is generally made by people who are lacking in intellectual ability or people who have ADD. (Testimony of Dr. Seckler and Exhibit 14)

52. MMPI-2 comes back with a summary. The MMPI-2 is a personality test and has nothing to do with ADD. His performance on the MMPI-2, standing on its own, had this been the only piece of data Dr. Seckler was working with, would have been in the adequate range. (Testimony of Dr. Seckler and Exhibit 13)

53. The Inwald test referenced many concerns. Most important of which, the summary score, which references Mr. Kaufman's performance relative to the research sample of people who become police officers, whose performance was then tied to their performance on the Inwald, he was seen as high risk of future performance difficulty. The test narrative was peppered with asterisks, which, while not unprecedented, are fairly rare. Dr. Seckler read into the record some of the items with asterisks that were noted on Mr. Kaufman's report. (Testimony of Seckler and Exhibit 15)

54. Role playing was also included in Mr. Kaufman's evaluation. Role playing is done in communities whose plans were approved by HRD, prior to around 2008. It was done widely up to that point. Past that point, new plans for communities were not permitted to include role plays. Plans that were passed with role playing are required to include it. Mr. Kaufman's performance was in the acceptable range. He made a reasonable attempt to cope with the situation. There was one peculiarity that was somewhat striking. The role player was playing the role of someone who was

hallucinating, hearing voices to pray to God to be saved on judgment day. The candidates were not expected to do a professional job in the situation. Mr. Kaufman said “what if God sent me here to get you out of this church”. This was creative but strange. From a clinical point of view, you don’t ally yourself with the delusional system of a person who is crazy. (Testimony of Dr. Seckler)

55. Dr. Seckler was aware of Mr. Kaufman’s positive recommendations. He concluded that while Mr. Kaufman may perform well in other jobs, he would not be able to perform the duties of a police officer. People with ADD frequently do very well in jobs that are highly structured, and routinized. (Testimony of Dr. Seckler)

56. In regard to whether there were reasonable accommodations that could be made that could address these issues, Dr. Seckler concluded that the number of tasks that require sustained focus, good judgment and consistent impulse control are, in a police job, almost unique. “This has come up time and again in fitness for duty issues. There is no such thing as taking a police officer and just having him do fingerprints alone or background checks alone. A police officer comes to work in a uniform, wearing a sidearm and may be involved at any time in activities that are emergent, that are complex that put himself, other officers and the public in very difficult and dangerous situations. The ability to gather information accurately, to use good judgment and to proceed appropriately under those circumstances is paramount.” (Testimony of Dr. Seckler)

57. As a result of the rejection, the information at Dr. Seckler’s disposal was shared with Michael Bennett, M.D., the psychiatrist who performed the second level review. Dr. Seckler spoke with Dr. Bennett after his interview with Mr. Kaufman. They came to

the conclusion jointly that Mr. Kaufman would not proceed further in the hiring process and they jointly signed a report. (Testimony of Seckler)

58. In the written psychological screening report, pertaining to Mr. Kaufman, Dr. Bennett wrote “On September 5, 2012, Mr. Kaufman was interviewed for a “second opinion... performance of the police role would put Mr. Kaufman repeatedly in situations of the very sort he has had most difficulty managing. It is unlikely that the police job would support his growth. It would repeatedly place him, and the police department, in problematic interactions around the requirement that he accept and follow direction, the role-related need for flexibility, and the accurate, and timely processing of information, and the importance of regulating impulsive behavior. For these reasons he is not suitable for employment as a police officer at this time.”

(Exhibit 16)

59. ADD cannot be cured. It can be modified through medication and compensatory learning strategies. Medication does not cure the condition. Medication to modify the condition would require that the patient take the medication every day.

(Testimony of Seckler)

60. Dr. Seckler frequently approves candidates who have been diagnosed with ADD, but here he concluded that Mr. Kaufman, at the time he was seen by Dr. Seckler, was not a person whose ADD was under any kind of control that would permit Dr. Seckler to go along with his becoming a police officer. His behavior was not well controlled ADD.

61. Medication is a reasonable accommodation for a person with a treatable condition.

Mr. Kaufman, as he presented to Dr. Seckler, was not treated well enough to place in

remission important aspects of his medical condition. Mr. Kaufman suffered from a degree of ADD that Dr. Seckler had to judge, at that time, so poorly controlled that he would be unable to meet the demands of the job. (Testimony of Seckler)

62. Kathleen Kelly is a licensed independent clinical social worker, who began working with Mr. Kaufman in 2010. She diagnosed Mr. Kaufman with Attention Deficit Hyperactivity Disorder (hereafter “ADHD”) and has been treating him for depression and ADHD. He was referred to a psychiatrist for medication. The psychiatrist did not feel that he needed medication at that time. He was treated with behavioral therapy and dialectical behavior therapy to manage his depression and ADHD. (Testimony of Ms. Kelly)

63. Ms. Kelly has never reviewed the City’s approved plan for psychological screening nor has she reviewed the job duties of the police officer. (Testimony of Kelly)

64. When Ms. Kelly began treating Mr. Kaufman she found him to be fairly highly functioning given his history with ADHD. He was working in sales, at the time, and he was working towards becoming a firefighter and had been in the military for fifteen or sixteen years. (Testimony of Ms. Kelly)

65. The City was advised of the results of Mr. Kaufman’s psychological screening in a report dated August 18, 2012. (Testimony of Lt. Rezendes and Exhibit 16)

66. Since the results of Mr. Kaufman’s psychological screening indicated that he cannot adequately perform the essential functions of the position, the decision was made to bypass Mr. Kaufman. The New Bedford Police Department relies on the report of the psychologist and psychiatrist. (Testimony of Lt. Rezendes)

67. In a letter dated September 10, 2012, the City notified HRD of the reasons for bypass

and notified Mr. Kaufman for the reasons on September 12, 2012. (Exhibit 17) This appeal followed.

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v.

Civil Service Comm’n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm’n, 447 Mass. 824-826 (2006). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether there was “reasonable justification” shown. Beverly citing Cambridge at 305, and cases cited.

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

The Commission is entitled to discredit a psychiatrist’s assessment of a candidate even if the candidate offers no expert testimony of his own, but the Commission must provide a basis for the rejection in the record. Kavaleski citing Daniels v. Board of Registration in Medicine, 418 Mass. 380, 392 (1994) quoting Commonwealth v. DeMinico, 408 Mass. 230, 235 (1990) (“[t]he law should not, and does not, give the opinions of experts on either side of ... [a]n issue the benefit of conclusiveness, even if there are not contrary opinions introduced at the trial”).

ANALYSIS

The City argues that it relied on a sound psychological screening process, including the conclusions of two highly qualified mental health professionals, to bypass Mr. Kaufman and that there was no evidence of any personal or political bias or favoritism that would warrant the Commission overturning their decision.

Mr. Kaufman argues that Dr. Seckler unwittingly developed a personal bias against him as a result of the incident preceding the written examination in which Dr. Seckler admonished Mr. Kaufman to be quiet. More substantively, Mr. Kaufman argues that his ADD does not prevent him from performing the essential duties of a police officer, citing the opinion of his LICSW and the various prior employers and others who provided strong references and letters of recommendation.

This is the first bypass decision involving a psychological evaluation that the Commission has issued since the SJC's decision in Kavaleski. In upholding the Commission's decision in Kavaleski, the SJC relied on the fact that the Commission had found an "indication of some bias or some other improper consideration" by the psychiatrist who evaluated Ms. Kavaleski.

Here, the evidence does not support Mr. Kaufman's argument that Dr. Seckler had a personal bias against him. Dr. Seckler was a good witness. He performs first-level evaluations for over two dozen Massachusetts cities and towns and completed approximately eighty (80) such evaluations for the New Bedford Police Department. He appears to undertake his task with seriousness and understands the limited role of a psychological evaluation. While he was admittedly taken aback by having to caution Mr. Kaufman (twice) to stop talking at the commencement of the written examinations, I do not believe this was a deciding factor in his ultimate conclusion nor do I believe it caused him to be predisposed to not recommending Mr. Kaufman for appointment as a police officer. Further, I do credit Dr. Seckler's version of events regarding this pre-examination episode and accept that Mr. Kaufman's behavior was indeed a data point that could be considered as part of the overall evaluation.

In Kavaleski, the SJC also relied on the fact that the Commission had found that “neither [the psychiatrist] nor the [Boston Police] Department asserted that Kaveleski would be unable to perform the essential functions of the job of a police officer ...”

Here, Dr. Seckler, who conducted the first-level review, found that:

“Mr. Kaufman has Attention Deficit Disorder. This condition adversely affects his processing of information, particularly in regard to social interactions, as well as his impulse control, judgment and behavior ...”

Dr. Seckler further found that:

“The police job requires consistent, reliable, interpersonal and intellectual skills. Mr. Kaufman’s behavior during the screening process was characterized by significantly scattered thinking, poor judgment, and erratic impulse control. These problems also arise in his history of work and his economic and social circumstances. In my professional judgment, Mr. Kaufman is likely to have trouble consistently performing major requirements of the police job. Indeed, the demands of the police job may erode, rather than support, changes he has tried to make in his behavior.”

Dr. Bennett, who conducted the second-level review, found that:

“Performance of the police role would put Mr. Kaufman repeatedly in situations of the very sort he has had most difficulty managing. It is unlikely that the police job would support his growth. It would repeatedly place him, and the police department, in problematic interactions around the requirement the he accept and follow direction, the role-related need for flexibility, and the accurate, and timely processing of information, and the importance of regulating impulsive behavior. For these reasons he is not suitable for employment as a police officer at this time.”

Notwithstanding the positive references and records of achievement related to his employment and military background, there was ample information upon which Dr. Seckler and Dr. Bennett could reach this conclusion including: the results of the Press and Inwald tests, Mr. Kaufman’s “strange and alarming” interview with Dr. Seckler, the incidents related to his ex-girlfriend, including the domestic incident which resulted in criminal charges against Mr. Kaufman and concerns from a New Bedford Police officer,

who served with Mr. Kaufman in the military, that Mr. Kaufman was always “batting heads” with others.

While I considered the testimony of the LICSW who has been treating Mr. Kaufman, she acknowledged that she is not aware of the job duties and responsibilities of a New Bedford police officer nor is she familiar with the psychological screening process approved by HRD.

In summary, the evaluation of Dr. Seckler and Dr. Bennett was sufficient to disqualify Mr. Kaufman from the position of police officer with or without a reasonable accommodation. As such, the New Bedford Police Department was reasonably justified in rescinding Mr. Kaufman’s conditional offer of employment and bypassing him for appointment.

For all of the above reasons, Mr. Kaufman’s appeal under Docket No. G1-12-284 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on April 18, 2013.

A true record. Attest:

Commissioner

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

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

Notice:

Joseph Kaufman (Appellant)

Jane Medeiros Friedman, Esq. (for Respondent)

John Marra, Esq. (HRD)