

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

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

**LENCOL S. MONTEIRO,**  
*Appellant*  
v.

**G1-14-77**

**BOSTON POLICE DEPARTMENT,**  
*Respondent*

Appearance for Appellant:

Pro Se  
Lencol Monteiro

Appearance for Respondent:

Nicole I. Taub, Esq.  
Boston Police Department  
One Schroeder Plaza  
Boston, MA, 02120

Commissioner:

Paul M. Stein<sup>1</sup>

**CORRECTED DECISION**

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Lencol Monteiro (Mr. Monteiro or Appellant), duly appealed to the Civil Service Commission (Commission) on March 28, 2014, from the decision of the Boston Police Department, the Appointing Authority (hereinafter “BPD” or “Respondent”), to bypass him for appointment to the position of BPD police officer. A pre-hearing conference was held on April 22, 2014 and a full hearing was held on July 9, 2014 at the offices of the Commission. The hearing was digitally recorded and copies were provided to the parties.<sup>2</sup> The Commission received a post-hearing proposed decision from BPD on August 13, 2014. For the reasons stated herein, the appeal is allowed.

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

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

## **FINDINGS OF FACT:**

Fifteen (15) exhibits were entered into evidence at the hearing. Two additional exhibits offered by the Appellant were marked for identification (15ID and 16ID) but not received in evidence. Based on the exhibits in evidence and the testimony of the witnesses (Ian Mackenzie, BPD Director of Occupational Health Services; Donald Seckler, Clinical Psychologist; and the Appellant) and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, a preponderance of the credible evidence, and reasonable inferences therefrom, establishes the following findings of fact:

### **The Appellant's Background**

1. Mr. Monteiro is a thirty-five (35) year old Cape Verdean native who is a naturalized US citizen and resident of Roxbury, MA, where he has lived since 2000. Mr. Monteiro graduated from South Boston High School and completed a semester at Bunker Hill Community College. He has two children from previous relationships. He is fluent in Cape Verdean Creole, his native language. (*Exhibits. 2 & 3; Testimony of Appellant*)
2. As a youth and young adult, Mr. Monteiro got himself in trouble on more than one occasion through his association with unsavory friends and relatives, including being arrested when the BPD raided his cousin's home and found others using drugs, and another arrest for kidnapping and rape that turned out to be a case of mistaken identity. He was suspended from high school for fighting. As a youth, he also compiled a substantial record of motor vehicle infractions. Since 2000, Mr. Monteiro has maintained a clean criminal and driving record. He has an excellent credit rating. (*Exhibits 2, 3, 16 & 17; Testimony of Appellant*)

3. Mr. Monteiro's spotty history as a young man caused him to be bypassed by the BPD on his initial application in 2007 which he did not appeal. In 2010, three years later, after a fresh look, the BPD did extend him a conditional offer of employment. He received an unfavorable psychological screening, however, which resulted in the revocation of his conditional offer and a second bypass and appeal to the Commission. The 2010 psychological screenings were conducted at that time by Dr. Marcia Scott and Dr. Ronn Johnson. (*Administrative Notice [Monteiro v. BPD, Case No. G1-11-65]*)
4. The second bypass was appealed to the Commission and, eventually, the parties agreed to settle the matter and, on joint motion, the Commission ordered relief under Chapter 310 so that Mr. Monteiro's name was placed at the top of the next certification for appointment of BPD police officers and he received a fresh opportunity for consideration. The settlement states, in part, "In the event that Mr. Monteiro is given a conditional offer of employment, the Boston Police Department may elect to require him to submit to the Department's psychological screening provided that such screening shall be performed by qualified mental health professionals other than those involved in Mr. Monteiro's prior bypass(es)." (*Administrative Notice [Monteiro v. BPD, CSC Docket No. G-11-65]*)
5. After his second bypass, Mr. Monteiro obtained a CDL and worked briefly as a bus driver for Cavalier Trailways in 2011. He left that job to pursue a similar job at Paul Revere Transportation, which offered better pay and benefits (\$18/hr vs \$12.50/hr) and where he is currently employed. Mr. Monteiro would have preferred to work for Paul Revere Transportation all along, but took the job with Cavalier Coach because Paul Revere said it had no openings. When he learned soon after taking the job with Cavalier Coach that an opening would be coming up with Paul Revere, Mr. Monteiro gave notice

to Cavalier Coach and quit that job. Unfortunately, the opening he expected did not materialize and he had to wait for another opening before he was hired. (*Exhs. 2 & 3; Testimony of Appellant*)

6. The Division Manager at Paul Revere considers Mr. Monteiro “a very good employee” who is “never late for work”, “very courteous to passengers” and “wishes he had more employees like him”. Mr. Monteiro “never refuses to work extra if requested, to cover a sick colleague or emergency” and “has very good customer skills.” (*Exhibits 2 & 3; Testimony of Appellant*)

*The 2013 BPD Application Process*

7. In May 2013, BPD requested a certification from HRD for the position of BPD Police Officer and, on May 10, 2013, HRD issued Certification No. 00746. Mr. Monteiro ranked thirteenth (13<sup>th</sup>) on the Certification among those willing to accept employment. Eighty-three (83) candidates were selected for appointment, seventy-six (76) of whom were ranked below Mr. Monteiro. (*Stipulated Facts*)
8. Mr. Monteiro filled out the BPD recruit application on June 1, 2013. His application “self-reported” among other things, his prior criminal and driving record, his high school suspension, and his experimentation with marijuana as a teenager, all issues that had been disclosed to the BPD prior to his two conditional offers of employment. (*Exh. 2*).
9. The BPD conducted a thorough background investigation of Mr. Monteiro, including a home visit, review of his criminal and driving records, a financial check, and interviews with his neighbors and personal references, all of which were positive, with most references specifically noting his reputation in the neighborhood as a “peacemaker” who

is “good at defusing situations” and “likes to help people”, and “is calm and not agitated in everything he deals with”. (*Exhibit 3*)

10. The BPD recruit investigator spoke with a supervisor at Cavalier Coach Trailways, who stated that Mr. Monteiro has worked there a “very short time” and “walked off the job without notice”. The supervisor said Mr. Monteiro was not “cut out” for the job but otherwise had “no opinion” about him. (*Exhibits 2 & 3*)

11. Mr. Monteiro had no idea why his former supervisor would say he “walked off the job” or would disparage him. He was adamant that was not true, and I believe him. (*Exhs. 2 & 3; Testimony of Appellant*)

12. The investigator also wrote at length about the positive employment references from Paul Revere Transportation, as well as two other prior employers:

- Cape Verdean Adult Day Care Center – “applicant was very diligent and capable. He always did more than was expected of him. He was kind to the seniors who used the facility on a daily basis. He was honest and humble. He did favors for everyone. He was just so caring and generous. He is missed and would be re-hired.”
- Barnes and Noble at Bunker Hill Community College – “applicant is a good manager who thinks ahead of potential problems and manages them effectively. He was hard working and very smart. He got along with everyone and . . . was respectful and honest. He could be relied upon . . .to solve every problem. . . He would easily be rehired.”

(*Exhibit 3*)

13. On June 27, 2013, BPD extended Mr. Monteiro a second conditional offer of employment for the position of BPD Police Officer. This conditional offer, again, depended upon Mr. Monteiro passing the medical examination and the psychological screening component of the medical examination. (*Exhibit 4*)

#### The BPD Psychological Screening Plan

14. As required by civil service law and rules, BPD had submitted a psychological screening plan to, and received approval from HRD. The stated purpose of the BPD psychological

screening plan “is to identify candidates who show any evidence of a mental disorder as described in the Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel, promulgated by the Human Resources Division [of the Commonwealth] . . . [HRD Medical Standards]. (*Exhibits 5 & 6*)

15. The HRD Medical Standards establish two categories of disqualifying medical conditions. A candidate who has a “Category A” medical condition is automatically disqualified. A candidate with a “Category B” condition is disqualified only if the medical examiner concludes that it “is of sufficient severity to prevent the candidate from performing the essential functions of a police officer without posing a significant risk to the safety and health of him/herself or others.” (*Exhibit 5, p.24*)
16. For psychiatric purposes, Category A medical conditions are: anxiety disorders and disorders of behavior, thought, mood, and personality. Category B medical conditions include: “a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual’s history, current status, prognosis and ability to respond to the stressors of the job.” Category B also covers “any other psychiatric condition that results in an individual not being able to perform as a police officer.” (*Exhibit 5, pp. 37-38*)
17. The psychological screening is a three-step process. Phase I is written testing. Candidates take the Minnesota Multiphasic Personality Inventory–2RF (“MMPI-2RF”), and the Personality Assessment Inventory (“PAI”). These tests reflect a candidate’s “personal opinion of themselves”, scored using a proprietary computer program that compares the answers to those who have known psychological problems. (*Exhs. 7 & 8; Testimony of Dr. Seckler*)

18. The computer-generated results and accompanying written narrative are subject to numerous disclaimers described in the test reports. The tests are never used as the sole determining factor alone. A candidate should be disqualified only when he or she presents a “pattern” of “real world evidence” of behavioral issues. “Behavior in the real world is the best psychological test” and without “real world evidence”, psychological evaluations are “worthless.” (*Exhibits 7 & 8; Testimony of Dr. Seckler*)
19. In particular, the PAI’s disclaimers include the following “interpretative caveats”:
- “One of the primary objectives of . . . screening of public safety officers is to identify and screen out emotionally unstable applicants. . . . Although almost all applicants for these job classifications will meet minimum emotional stability standards, a significant proportion of applicants display personality traits and characteristics that render them poorly suited to perform essential job functions in the public safety field. . .
- “The PAI and this special report 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 on corroboration information gathered from multiple data sources.”
- (*Exhibit 8*) (*emphasis added*)
20. Phase II consists of a clinical interview performed by a psychiatrist/doctorate level psychologist designated by the BPD. If no questions are raised by this process, the designated clinician will notify the BPD in writing that he found no psychiatric condition that would disqualify the candidate to be appointed as a police officer. Should questions arise during the interview process, these issues are explored, and a report is generated by the first level screener that is forwarded to a second opinion psychiatrist/doctorate level psychologist to further evaluate the applicant in Phase III of the process. The second-opinion clinician then makes a final recommendation to the BPD as to whether the

candidate is disqualified for a Category A or Category B psychiatric condition.. (*Exhibit 6; Testimony of Mackenzie & Dr. Seckler*)

Mr. Monteiro's 2013 Psychological Screening

21. In this case, after taking the MMPI-2RF and PAI written tests, Mr. Monteiro was interviewed on September 13, 2013 by Dr. Andrew Brown as the first-level psychological screener. Dr. Brown is a consulting psychiatrist assisting BPD since 2006. Dr. Brown did not testify at the Commission hearing (*Exhibits 7 through 10*)
22. Mr. Monteiro met with Dr. Brown on September 13, 2013. (*Exhibit 10*)
23. At the beginning of the report Dr. Brown states, "The reader is referred to reports reflecting the applicant['s] 2010 evaluations by Dr[s] Scott and Johnson for pertinent background concerning this applicant".[sic] (*Exhibit 10*)<sup>3</sup>
24. Dr. Brown states that the "Reason for Referral" is to assess whether the applicant is "well suited to serve" as a BPD police officer. (*Exhibit 10*).
25. Dr. Brown reported the following "relevant history" gleaned from his review of the BPD background investigation and his interview that focused on three subjects: employment with Cavalier Coach Trailways, employment with Barnes and Noble and his family relationships:
  - Cavalier Coach Trailways – Mr. Monteiro was asked twice about his experience at Cavalier Coach, Mr. Monteiro said that after taking the job, he learned of another better paying job at Paul Revere, gave notice and left the job after about a month and started with Paul Revere a few months later. As Mr. Monteiro was preparing to leave

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<sup>3</sup> Neither the BPD's Director of the Occupational Health Unit Director, nor Dr. Seckler, had been informed of the conditions imposed on the BPD's subsequent psychological screening in the Commission's Decision in the prior bypass appeal, (*Testimony of Ian McKenzie & Dr. Seckler*. See Findings of Fact ¶¶3 & 4) This Decision does not turn on this apparently unintentional oversight.



the interview, Dr. Brown brought up the Cavalier Coach job for a third time, stating that he had been told that Mr. Monteiro had “walked off the job”. Mr. Monteiro “wondered” why Dr. Brown kept bringing up this subject and “proceeded to reassure this evaluator that the information I had received was inaccurate, and repeated that he had given notice.” Some time thereafter, Dr. Brown asked the BPD to confirm or disconfirm the accuracy of the background investigation information concerning Mr. Monteiro’s employment at Cavalier Coach. On or about September 24, 2013, Dr. Brown was informed that a BPD Investigator had spoken to the “President and owner” of the company who stood by “what her manager . . . stated”.<sup>4</sup>

- Barnes and Noble – Dr. Brown noted Mr. Monteiro’s eight years of employment and questioned him about his decision to leave after not receiving a promotion and reported that Mr. Monteiro could not identify “what his employer found wanting” (referencing that Dr. Scott (one of the psychological evaluators in a prior bypass) had reported that Barnes and Noble “would not rehire the applicant”. Dr. Brown could not “determine the basis and circumstances surrounding Mr. Monteiro’s separation from Barnes and Noble.”
- Family Relationships – Mr. Monteiro “emphasized his close relationship with both his children”, from relationships with two women. He described his breakup with his first relationship as due to the girlfriend’s decision to move back with her mother and “alluded” to other issues.

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<sup>4</sup> Dr. Brown’s use of ellipses (. . .) implies that he probably received more information about the follow-up investigation than he reported but the identity of the BPD investigator or the person at Cavalier Coach who supplied the information is not identified. While I note that Dr. Brown reported this information and relied on it, I do not credit the totem pole hearsay from these unidentified sources for the truth asserted. (*See Exhibit 10*)

Dr. Brown mentioned Mr. Monteiro's current job at Paul Revere Transportation but did not report any substantive discussion about his work there. (*Exhibit 10*).

26. As to the psychological test results, Dr. Brown extracted the following statements from the computer-generated narratives:

- The MMPI-2RF raised concerns about under-reporting. The applicant "presented himself in an extremely positive light by denying many faults and shortcomings that most people would acknowledge" and presented a level of virtue and adjustment that is "relatively rare in the general population."
- The PAI results indicated that the applicant is a moderate risk (25%) of receiving a "poorly suited" rating and is a "high" risk for job relevant problems related to Integrity and Anger Management. The applicant tested as a "Cold Submission".

27. Dr. Brown concluded that the "inconsistency" between how Mr. Monteiro described his separation from Cavalier Coach and what was reported to the BPD investigators reflects "problems relating to integrity in this applicant." He also concluded that Mr. Monteiro had problems "in the domain of impulsivity and decision-making" shown by "impulsively leaving jobs" and by attempting "to deny and/or conceal such tendency." Dr. Brown recommended a second opinion. (*Exhibit 10*)

28. Dr. Donald Seckler is a clinical psychologist and has evaluated candidates as a first level screener for various police departments in Massachusetts since 1979. Dr. Seckler is the second level screener at BPD, the only department for which he was a second-level screener. (*Exhibit 11; Testimony of Seckler*)

29. On October 8, 2013, Mr. Monteiro met with Dr. Seckler for his second opinion psychological screening. On October 27, 2013, Dr. Seckler issued his report to the BPD recommending that Mr. Monteiro should be bypassed. (*Exhibit 12*)
30. Dr. Seckler's report acknowledges that Mr. Monteiro's background investigation record generated by the BPD is "voluminous" and states that he referenced "only those data germane to current findings." The report then proceeds to describe Mr. Monteiro's two prior bypasses, including (i) Dr. Scott's findings that he was "financially unstable, and has associated with criminals" and (ii) "has a substantial motor vehicle record." Dr. Seckler reported that Mr. Monteiro's answers to questions keyed to two particular scales (the "L" and "K" scales) on the MMPI 2-RF showed that he was "defensive" in his answering of his test questions, which means that he answered test questions in a manner designed to make him 'look good,' which called into question the validity of the test results. On the PAI, Mr. Monteiro had "endorsed" a well-above-average number of critical items, scoring in the 91<sup>st</sup> percentile, and had high scores for clinical scales that flagged issues about depression, somatic problems, and aggression." (*Exhibit 12*)
31. During his interview with Mr. Monteiro, Dr. Seckler inquired about leaving the job at Barnes and Noble and why he had not been promoted to store manager. Dr. Seckler states in his report, "When I asked a probing question about why he thought he had been passed over, he said that he didn't know. When I asked if he thought it was because he had a foreign accent, he said 'is that what you think?' When I responded 'I don't know, I just wondered what ideas you may have about it' he said, pointedly, 'Is that what you think?' (*Exhibit 12; Testimony of Dr. Seckler*)

32. Dr. Seckler concludes:

“Mr. Monteiro was seen as defensive on the MMPI 2 RF. He was seen as likely to be aggressive on the PAI. He has a substantial record of motor vehicle issues. His ex-employer claims that he lied when stating that he gave notice before leaving his job at Trailways. He was defensive in his interview... Mr. Monteiro’s defensiveness and lack of candor are traits that do not suit him for a job with the BPD. Candor is the rock on which police work is founded... Since this characteristic is an important component of the police role... Mr. Monteiro should be bypassed for the job.”

*(Exhibit 12)*

33. The last motor vehicle incident for which Mr. Monteiro was found responsible was in

2000. *(Exhibits 3, 16 & 17)*

34. Mr. Monteiro did get into a fight when he was in high school, which he disclosed in his

BPD application. Dr. Seckler could point to no history of aggressive behavior by Mr.

Monteiro. When asked to explain what led him to believe that Mr. Monteiro had

problems with aggression, he pointed to Mr. Monteiro’s responses to test questions in

which Mr. Monteiro answered “False” to questions such as “it takes a lot to make me

angry; and “my temper never gets me into trouble”, which he interpreted to represent an

admission that he is “angrier than most people”. Dr. Seckler also claimed that Mr.

Monteiro’s “defensiveness” in responding to questions about his employment and family

history during his psychological interviews “was a form of aggression” although there

was no accompanying physically offensive gesturing or demeanor. *(Testimony of Dr.*

*Seckler & Appellant)*

35. Dr. Seckler acknowledged that, despite the PAI test scores that flagged concerns in the

areas of depression, somatic behavior and suicidal tendencies, Mr. Monteiro was not a

depressed person and Dr. Seckler saw nothing in his history to suggest somatic or

suicidal tendencies. *(Exhibit 3; Testimony of Dr. Seckler & Appellant)*

36. Dr. Seckler also acknowledged that he had been mistaken in his belief that Barnes and Noble had been “turned off” by Mr. Monteiro and would not be rehired as Dr. Scott incorrectly reported. He had no recollection of seeing the statement to the contrary in the BPD investigator’s report and acknowledged that this information was “positive information from an important source”. (*Exh. 3; Testimony of Dr. Seckler*)

Mr. Monteiro’s Testimony About Cavalier Coach

37. On February 7, 2014, BPD informed Mr. Monteiro that his psychological screening results indicated that he could not adequately perform the essential functions of a police officer, and, therefore, would not be appointed as a Boston Police Officer. (*Exhibit 13*)

38. Mr. Monteiro duly filed this appeal on March 28, 2014. (*Claim of Appeal*)

**CONCLUSION**

Applicable Legal Standard

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

“A bypass will not be permitted without a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed ... shall later be admissible as reason for selection or bypass in any

proceedings before . . . the Civil Service Commission... Personnel Administration Rules, PAR.08(3) (*emphasis added*)

Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Serv. Comm’n, 31 Mass. App. Ct. 315, 321n.11, 326 (1991). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” City of Beverly v. Civil Serv. Comm’n, 78 Mass.App.Ct. 182, 187 (2010) (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission . . . does not act without regard to the previous decision of the appointing authority, but rather decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823-24 (2006); Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 188 (2010) [“Beverly”]. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new... officer than in disciplining an existing tenured one.” See City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly, 78 Mass.App.Ct. at 191. Nevertheless, the Commission is charged with ensuring that the system operates on “[b]asic merit principles.” MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632,

635(1995), rev.den., 423 Mass. 1106(1996) (bypass evaluated “in accordance with [all] basic merit principles”); Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a *valid exercise of discretion based on merit or policy considerations* by an appointing authority.” Id. (*emphasis added*) (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n, 23 Mass.App.Ct. 410, 413 (1987))

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

Experts’ conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, rev. den., 437 Mass (2002). As a corollary, when the fact-finder is presented with conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See, e.g., Ward v. Commonwealth, 407 Mass. 434, 438 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73 (1891); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, rev.den., 409 Mass. 1104 (1991). The Commission may discredit a psychiatrist’s assessment even if the candidate offers no expert testimony of his own, but the Commission must provide a basis for the rejection in the record. Kavaleski, 463 Mass.. at 694., citing Daniels v. Board of Registration in Medicine, 418 Mass. 380, 392 (1994) quoting Commonwealth v. DeMinico, 408 Mass. 230, 235 (1990) (“[t]he law should not, and does not,

give the opinions of experts on either side of ... [a]n issue the benefit of conclusiveness, even if there are not contrary opinions introduced at the trial”).

### Analysis

Applying the foregoing principles to the facts of this appeal, the BPD’s bypass of Mr. Monteiro has not been reasonably justified within the parameters of basic merit principles, generally, and the HRD Medical Standards, specifically. Here, the BPD was required to establish that Mr. Monteiro has a Category B medical disqualification that prevents him from performing the essential functions of a BPD police officer or presents a significant risk to his safety or the safety of others. The stated reasons for disqualification are based entirely upon the conclusions of Dr. Brown and Dr. Seckler due to his test results, his “lack of candor” and “defensiveness” in regard to whether Mr. Monteiro gave notice to Cavalier Coach Trailways, Mr. Monteiro’s response to Dr. Seckler’s question if he thought his failure to get promoted at Barnes and Noble was related to his accent, as well as the erroneous report that Mr. Monteiro would not be rehired.

First, neither BPD evaluator actually opined that Mr. Monteiro has any history of a condition or disorder, even broadly defined under Category A or B in HRD’s Medical Standards, that would prevent him from being a police officer pursuant to HRD’s Initial Hire Medical Standards. Without evidence that either evaluator found Mr. Monteiro to have such a condition, the BPD has failed its burden of proof at the most fundamental level.

Second, the evidence is insufficient to support the existence of such a disqualifying disorder or condition. As to the alleged “lack of candor” and “defensiveness”, that is based entirely on Dr. Seckler’s doubts about Mr. Monteiro’s response to questions about his giving notice before leaving Cavalier Coach, based on hearsay reports, and Mr. Monteiro’s response to



being asked if he thought his failure to get promoted at Barnes and Noble was related to his Cape Verdean accent.

Mr. Monteiro presented at the Commission hearing as well-mannered and with appropriate demeanor at all times. He navigated the adversary hearing process better than many pro se litigants. He focused on eliciting evidence of to show that there was nothing in his “daily life” that supported Dr. Seckler’s opinions, and politely pressed Dr Seckler when that witness responded in a non-responsive manner. His own testimony, both substantively and in demeanor, demonstrated a very clear memory of events and carried the ring of truth. In particular, Mr. Monteiro persuaded me that the events surrounding his departure from Cavalier Coach happened exactly as he had consistently maintained throughout his background investigation and as he testified at the Commission hearing and not as Dr. Seckler erroneously assumed.

Mr. Monteiro’s persistence in a (good faith, truthful) position in his psychological interview is hardly inappropriate behavior, and certainly does not support the existence of a disqualifying psychiatric condition or disorder. Similarly, I cannot credit the opinion that Mr. Monteiro is to be disqualified because of alleged “defensiveness” and “push back” when Dr. Seckler asked if Mr. Monteiro thought it might have been his Cape Verdean accent that “ticked off” Barnes and Noble and blocked his promotion. To the contrary, this evidence actually demonstrated Mr. Monteiro’s sound judgment and restraint even when his buttons were pushed. In addition, BPD had already cleared Mr. Monteiro’s background, including his employment. (Untruthfulness in a candidate would have been a clear red flag for the BPD.) “Lack of candor” is neither a Category A medical condition nor is it a Category B psychiatric condition that was shown to prevent Mr. Monteiro from performing an essential function of a police officer without jeopardizing the health or safety of him or others.

The law is clear that the sole task of the psychiatric medical evaluator is to determine whether a candidate comes to the job with some identifiable medical impairment defined in the HRD Medical Standards that subjects a candidate or others to a significant risk to health or safety and is not capable of reasonable accommodation. It is not the medical evaluator's purview to conduct a de novo background investigation on a candidate and attempt to offer his own speculation as to whether or not some episode(s) in the candidate's background portend that he was not suited for a career in law enforcement for non-medical reasons. Yet that is exactly what Dr. Seckler did. Boston Police Department v. Kavleski, C.A. 2009SUCV4978 (August 14, 2014, Lauriet, J.)

Third, Dr. Seckler's conclusions rested, in part, on factual assumptions that are plainly erroneous. As previously noted, Dr. Seckler relied here on the mistaken impression that Mr. Monteiro had left two employers under unfavorable circumstances and showed "defensiveness" and "lack of candor" that Dr. Seckler found to be off-putting and disqualifying. Dr. Seckler admitted that, without the Cavalier Coach incident (he acknowledged his mistake about the Barnes & Noble job), he would have "passed" Mr. Monteiro.

Fourth, with the foundation in Mr. Monteiro's "daily life" cut away, Dr. Seckler's remaining basis for disqualification remained the results of the written tests which, even he acknowledged, was not sufficient, alone, to disqualify a candidate.<sup>5</sup>

Fifth, Dr. Seckler's interpretation of the written tests misrepresents the actual results. There was only one scale (the "K" scale) out of eight "validity scales" on the MMPI-2RF that was

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<sup>5</sup> As to the PAI test in particular, the test documentation appears to suggest that the test is not necessarily designed to identify candidates who "meet minimum emotional stability standards" but who "display personality traits and characteristics" that "could" affect job performance and render them "poorly suited" for a public safety job. (e.g., Exh. 8, pp. 1, 2 & 7). The HRD Medical Standards require proof of a disqualifying disorder, condition or substance abuse problem, which would seem to mean more than a finding that a candidate may be "poorly suited" for the job.. At a minimum, this distinction emphasizes why the tests rightly do not serve as a stand-alone basis to disqualify a candidate under Massachusetts civil service law and rules.

elevated above normal range, not two. Moreover, the suggestion that Mr. Monteiro was skewing the MMPI-2RF to “look good” is wholly inconsistent with the observation that his answers to the PAI test questions reflected an abnormally high number of endorsed “critical items” (unfavorable characteristics and disclosed problems with a litany of serious psychiatric conditions, including depression and suicidal tendencies (of which there is, in fact, no empirical evidence to support any such conditions). Dr. Seckler provided no convincing reason why these two inconsistent test results are worthy of any weight at all, and certainly not when there is no empirical support upon which to form an opinion as to which of the inconsistencies to believe and which to discount.

In sum, although the BPD is afforded appropriate discretion to screen out questionable candidates in favor of those more demonstrably suitable, this discretion is not absolute or unreviewable. The BPD bears the burden to prove by credible evidence some valid reason, under basic merit principles, for the bypass, i.e, in this case, proof that the Mr. Monteiro possessed some Category A or Category B medical condition that disqualified him for appointment. That burden has not been met in this case.

### **RELIEF TO BE GRANTED**

In rejecting the BPD’s appeal in Kavaleski, the Supreme Judicial Court made clear that, when the Commission has determined that a candidate has been impermissibly bypassed on the basis of an invalid psychological screening, the Commission has the discretion to decide whether or not to order a de novo screening by psychiatrists other than those who had previously evaluated the candidate, and expressly held that “nothing in the HRD rules required further screening”. Kavaleski, 463 Mass..at 695 n.24. While the Commission is mindful that the passage of time may yield new information that could be deemed relevant to the qualification of previously bypassed candidate, in the case of a candidate such as Mr. Monteiro, who has

received two prior conditional offers of employment, subject only to satisfactory medical screening, the Commission finds it inappropriate to require that such a candidate be required to begin the hiring process anew, when the sole reason for rescinding the offer of employment was reliance, not on an assessment of the candidate's background, but solely on two invalid medical screenings. Thus, this would not be an appropriate case in which to simply require that HRD place Mr. Monteiro at the top of the next certification so that he may be considered for employment by BPD in the next hiring cycle, whenever that may occur. Rather, the appropriate relief to be granted here would be to order that that Mr. Monteiro be processed for employment forthwith for entry into the next available police academy, subject only to updating of his application as required and a review of circumstances arising subsequent to his initial offer of employment. See generally, Funaro v. Chelmsford Fire Dep't, 8 MCSR 29 (1995) (town precluded from rescinding conditional offer to candidate for firefighter after invalid rejection of reason for psychological disqualification except for circumstances arising subsequent to the original offer).

Pursuant to its authority under Chapter 310 of the Acts of 1993, the state's Human Resources Division or the BPD in its delegated capacity shall:

- Place the name of Lencol Monteiro at the top of any current or future Certification for the position of Boston Police Officer, so that he may be processed in the round of hiring for the next available Boston Police Academy class, until he is appointed or bypassed.
- BPD may elect to require Lencol Monteiro to submit to an updated background investigation, but BPD shall not bypass Lencol Monteiro as a result of any facts or circumstances in his background which it had knowledge of prior to making its conditional offer of employment to him on June 27, 2013.

- Subject to Lencol Monteiro passing the background investigation referenced above, the BPD shall extend a conditional offer of employment to Lencol Monteiro. In the event that BPD extends a conditional offer of employment to Lencol Monteiro following a background investigation, BPD may elect to require Lencol Monteiro to submit to an appropriate psychiatric and medical screening in accordance with current BPD policy in the ordinary course of the hiring process. In the event of such evaluation, such screening shall be performed, de novo, by qualified professional(s) other than any of those who have performed prior psychological evaluations of Lencol Monteiro.
- If Lencol Monteiro is appointed as a Boston Police Officer, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 00746. This retroactive civil service seniority date is not intended to provide Lencol Monteiro with any additional pay or benefits including creditable service toward retirement.

Civil Service Commission

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Paul M. Stein  
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on October 2, 2014.

A true record. Attest:

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Commissioner

[Corrected 10/15/2014 for scrivener's error.]

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

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

Notice:

Lencol S. Monteiro (Appellant)

Nicole I. Taub, Esq. (for Respondent)

John Marra, Esq. (HRD)