Decision mailed: 8/26/11
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

PATRICK J. MULCAHY,

Appellant

v.

Docket No. G1-10-326

CITY OF FITCHBURG,

Respondent

Attorney for the Appellant:

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Attorney for the Respondent:

Michael Ciota, City Solicitor
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Commissioner:

Daniel M. Henderson[1]

DECISION

Pursuant to the provisions of G.L. c. 31, §§2(b) and 27, the Appellant, Patrick J. Mulcahy ("Mulcahy" or Appellant"), appealed to the Massachusetts Civil Service Commission (Commission) from the decision of the Massachusetts Human Resources Division ("HRD") approving the reasons of the City of Fitchburg, Mayor Lisa Wong ("City" or "Respondent") to bypass him for original appointment as a permanent full-time firefighter for the City of Fitchburg Fire Department ("FFD"). A full hearing was held by the Commission on March 16, 2011. A digital recording of the hearing was made by the Commission. The Commission received post-hearing submissions from the Parties on May 16, 2011.

[1] The Commission acknowledges the assistance of Law Clerk William Davis in the drafting of this decision.

Findings of Fact

During the hearing, a total of fourteen exhibits, the HRD document packet and a stipulation were entered into evidence by the parties. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Bernard Stephens, Director, Human Resources, City of Fitchburg
- Kevin Roy, Fire Chief, City of Fitchburg Fire Department
- John J. Murray III, Detective, City of Fitchburg Police Department

For the Appellant:

- No witnesses were called by the Appellant

I make the following findings of facts:

The following stipulations of facts were made by the parties.

1. The Appellant, Patrick J. Mulcahy ("Mulcahy") is a resident of Fitchburg, Massachusetts.
2. Mulcahy, who at all times relevant to this action was/is a licensed EMT, is now 33 years old.
3. Mulcahy's father, Jack Mulcahy, is a thirty-six year veteran firefighter employed by the City of Fitchburg Fire Department, ("FFD").
4. In or around January of 2010, Mulcahy's name appeared on the then current Civil Service Eligible List ("List") for appointment as a permanent full-time fire fighter for the Respondent municipality. Mulcahy was, at all times relevant to this matter, tied for first place on the List for appointment to the FFD as a permanent full-time firefighter.
5. Mulcahy's eligibility for appointment from the List expired on December 1, 2010.

6. In or around December of 2009, the City requested certification (Certification No. 2009-0922) from the HRD to appoint eight (8) permanent full-time firefighters.
7. On or about December 31, 2009, Mulcahy, at the City's request, submitted to a pre-employment drug examination.
8. On or about March 2, 2010, the City provided HRD with its written reason for bypassing Mulcahy in connection with Certification No. 2009-0922.
9. In connection with Certification No. 2009-0922, the City ultimately appointed eight (8) permanent full-time firefighters. Mulcahy was bypassed but remained on the List, tied for first as the next candidate eligible for subsequent appointment.
10. On or about June 18, 2010, HRD notified Mulcahy, in writing, that it had received the March 2, 2010 letter from the City stating his bypass reasons and that, after review of the same, it had "determined that these reasons are acceptable for bypass."
11. On or about May 27, 2010, the City requested certification (Certification No. 2010-8662) from HRD to appoint four (4) additional permanent full-time firefighters.
12. On or about June 24, 2010, Mulcahy, at the City's request, again submitted to a pre-employment drug examination.
13. On or about July 22, 2010, the City provided HRD with its written reasons for bypassing Mulcahy in connection with Certification No. 2010-8662.
14. On or about August 24, 2010, HRD wrote to the City and requested additional information about the City's reasons for bypassing Mulcahy (and another individual).
15. On or about September 7, 2010, City (in response to HRD's August 24, 2010 letter) provided HRD with more details about the reasons for bypassing Mulcahy in connection with Certification No. 2010-8662.

16. In connection with Certification No. 2010-8662, the City ultimately appointed four permanent full-time firefighters. Mulcahy was again bypassed.

17. On or about October 1, 2010, HRD notified Mulcahy, in writing, that it had received the September 7, 2010 letter from the City stating his bypass reasons and, after review of the same, it had determined that the reasons are acceptable for bypass.

18. In connection with Certification No. 2010-8662, Mulcahy filed a timely appeal (Docket No. G1-10-326),(present appeal) of the bypass.

In addition, the following facts were found by the Commission:

19. In December 2009 through January 2010, the City conducted a background investigation of Mulcahy which revealed the existence of Criminal Offender Record Information ("CORI") and related material concerning a charge assault and battery and a restraining order occurring on or about June 6, 2009. The City was in possession and had knowledge of the information contained in the CORI report as of January 2010. (*Testimony of Bernard Stephens and Exhibit 3*)

20. The City conducted no independent investigation of the information contained in the CORI report at that time. (*Testimony of Bernard Stephens and Exhibit 3*)

21. Mulcahy was arrested on June 9, 2009 in connection with the assault and battery charge occurring on June 6, 2009. However, he was not convicted of that charge. The charge was dismissed by the Fitchburg District Court on January 22, 2010. (*Testimony of Detective John Murray and Exhibits 3 and 9*)

22. It is noted that the City did not have the documentation contained in Exhibit 9 in its possession at the time it made the decision to bypass Mulcahy. However, it did know

then of the location of this documentation and did obtain copies in preparation for this Commission hearing. *(Testimony of Bernard Stephens and Exhibit 9)*

23. Detective Murray interviewed the victim of the assault and battery charge on June 10, 2009. The victim was Mulcahy's girlfriend then and they had a three year old child together. Murray described the victim's injuries as two black eyes and a swollen nose, possibly broken. The victim appeared to him to be distraught and fearful, even four days after the incident. He arrested Mulcahy for this assault and battery. Murray confirmed that the photograph of the victim accurately represented his visual observations of her when he interviewed her. He identified the other documentation contained in Exhibit 9 as accurate. *(Testimony of Bernard Stephens and Exhibit 9)*
24. On or around December 31, 2009, the City requested and obtained a pre-employment drug examination from Mulcahy, which he tested positive for marijuana. (*Exhibit 10*)
25. The City only listed Mulcahy's positive test for marijuana as a reason for the First bypass in the letter to HRD on March 2, 2010, despite having knowledge of the assault and battery charge. (*Testimony of Bernard Stephens and Chief Kevin Roy and Exhibit 12*)
26. Bernard Stephens, the City's Director of Human Resources for the past twelve years, stated that any positive response on a drug test is enough of a reason to bypass an otherwise qualified candidate. He said this was how the City operated since he started and also testified that although there is a written policy requiring all candidates for city positions to take a drug screen, there is no such written policy on whether they can hire a candidate who tests positive. In addition to no written policy on how to handle candidates who test positive, he stated that the policy for marijuana has not changed

since the State's adoption of G.L. c. 94C, §32L ("An Act Establishing a Sensible State Marihuana Policy"). (*Testimony of Bernard Stephens*)

27. Pursuant to Personnel Administration Rules ("PAR"), PAR.08(4), the City is required to inform the personnel administrator, in writing, of all the reasons for a potential candidate's bypass. Any reasons that are not included and known or reasonably discoverable at the time of informing the administrator are not allowed to be brought up in any subsequent proceedings. (*Exhibit 11*)
28. For his next consideration, this Second bypass, Mulcahy took a second pre-employment drug examination on or about June 24, 2010 and passed it. (*Testimony of Bernard Stephens and Chief Kevin Roy*)
29. The City provided HRD with a statement of reasons for bypass on July 22, 2010. HRD responded by requesting a more detailed statement and on September 7, 2010, the City provided HRD with a detailed report stating the reasons for bypassing Mulcahy. Amongst those reasons are: a failed drug test on December 31, 2009 and an assault and battery charged from June 10, 2009. The City also noted a restraining order and revocation of a license to carry a firearm resulting from the assault and battery. On October 4, 2010, HRD sent a response letter to the City approving the bypass reasons. (*Exhibits 6 and 7*)
30. Stephens does the CORI checks through his office computer. Stephens takes the CORI restrictions and regulations very seriously and he feels that he cannot release that documentation to anyone. He did not even release Mulcahy's CORI documentation to the Fire Chief Roy or Mayor Wong. He conveyed that information to them verbally or

generally in summary form. The City also argued that none of the selected candidates had any negative CORI reports. *(Testimony of Bernard Stephens, City's argument)*

31. It is found that despite the City's failure to respond to the Appellant's request to produce the CORI information/documents; that in fact, the Appellant was not prejudiced by such failure. Therefore, no sanction or remedial result is required here. *(Exhibits and testimony, testimony of Bernard Stephens, City's argument)*
32. The City contends that some information is confidential, such as social security numbers, and should not be produced. However, it is a recognized for future consideration, a routine practice of redaction of confidential information and the use of designated code names or numbers to protect the identity of candidates. This is also a common practice at the Civil Service Commission as well as other adjudicatory agencies. *(administrative notice, testimony of Bernard Stephens and Chief Kevin Roy and Exhibits 2&3*)
33. The Appellant failed to testify at this hearing and also failed to call any witnesses on his behalf. The Appellant offered no explanation for this course; yet based on the Appellant's pleadings and argument, it is inferred that the Appellant conceded the fact of if not the justifiable reason of the failed drug test for marijuana but also strongly believed that any evidence on the CORI assault and battery and related restraining order reasons would be excluded from consideration here. None of the exhibits and/or testimony on the CORI assault and battery related matter is excluded from evidence. I am not drawing an adverse inference against the Appellant for his failure to testify. I attribute his decision not to testify here as one based on strategy. *(Exhibits, testimony and reasonable inferences)*

34. All of the City's witnesses, Bernard Stephens, Fire Chief Kevin Roy and Detective John J. Murray III were good witnesses. They testified in a professional manner. Their dress, demeanor and responses were professional, precise and responsive. They made good eye contact while testifying. They answered promptly and without hesitation. They did not volunteer extraneous or advantageous material to their answers. Their answers were corroborated by or in conformity with other evidence and testimony. Their answers rang true. I did not detect any political overtones or any bias or favoritism involved in their decisions, actions or testimony. They held up well under cross-examination. I find them all to be credible and reliable witnesses. *(Exhibits, testimony and demeanor of Bernard Stephens, Chief Kevin Roy and Detective John J. Murray III)*

CONCLUSION

The Civil Service Commission determines "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken...." Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. 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 (1991). G.L. c. 31, § 43.

Appointing authorities are expected to use their significant yet sound discretion when choosing individuals from a certified list and may select, "in the exercise of sound discretion, among persons eligible for promotion or may decline to make an appointment." See Commissioner of Metropolitan Dist. Comm'n v. Director of Civil Serv. 348 Mass. 184, 187-193 (1964). See also Starr v. Bd. Of Health of Clinton, 356 Mass. 426, 430-431 (1969). The Commission owes substantial deference to the Appointing Authority's exercise of sound judgment in determining whether there was reasonable justification for the decision to bypass a public employee. Beverly v. Civil Service Comm'n. 78 Mass. App. Ct. 182, 187-188 (2010). A judicial judgment should "not be substituted for that of a public officer who acts in good faith in the performance of a duty." See Goldblatt v. Corporation Counsel of Boston, 360 Mass. 660, 666 (1971); M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272 (1952). 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 Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, 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 v. Civil Service Comm'n., 43 Mass. App. Ct. 300, 304 (1997).

The Substantial Evidence of Past Misconduct

In the present appeal, Mulcahy's arrest for assault and battery and related circumstances, with the related restraining order and revocation of his license to carry are sound and sufficient reasons that justify his bypass. The City produced strong, reliable and credible evidence and testimony to support these findings, by a preponderance of the credible evidence in the record. The police report and the percipient testimony of Detective John J. Murray III, together with the photograph of the victim's injuries were especially descriptive and persuasive. There is no evidence found in Mulcahy's bypass of any bias, political influence or any other considerations unrelated to basic merit principles or neutrally applied public policy.

The Appellant argues that the CORI results or related information presented by Fitchburg in this case regarding his criminal record and restraining order should not be considered as reasons for his bypass in July 2010 from Certification 2010-8662, because they were not included in the reasons stated when he was initially bypassed in March 2010 from Certification 2009-0922, although those reasons were known at the time of Mulcahy's March, 2010 bypass. He also argues that he requested through discovery certain CORI documentation from the City relating to this claim which it failed to produce, and that the evidence of those matters should have been excluded. Neither of these arguments is persuasive.

The relevant rules are found inPAR.08 (4) of the Personnel Administration Rules, promulgated pursuant to G.L.c.31, §3 & §4, by HRD with the Commission's approval these rules require that an Appointing Authority to provide a written statement of the full reasons for a bypass. The statement should be full and complete by indicating all the negative reasons for bypass on which the appointing authority intends to rely or might in the future rely to justify the bypass or selection of the candidate. (Exhibit 11). The purpose of PAR.08(4) is to "uphold the

basic tenet of the civil service law to protect the service from arbitrary and capricious actions and to avoid overtones of political motivations and bias in employment." Oxford v. Civil Service Comm'n., 22 Mass. L. Rep. 237. The failure by an Appointing Authority to identify all of the reasons on which it intends or might in the future rely to justify bypass has significant consequences and no reasons that are known or reasonably discoverable by the Appointing Authority and which have not been disclosed to the Personnel Administrator shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. (Exhibit 11).

Mulcahy correctly points out that, on or about March 2, 2010, the City provided HRD with a letter citing the failed drug test as the reason for bypass on Certification No. 2009-0922. No other reasons were disclosed by the City in the March 2010 bypass letter. However, Mulcahy was bypassed a second time and the second bypass is what is being appealed, not the first. In the second bypass, the City sent a letter to HRD on July 22, 2010 citing both the drug test and the CORI review information as the reasons for the bypass. HRD did not find the letter particularly detailed so they asked for more details and received a response on September 7, 2010. The September letter explained in further detail the failed drug test from December 2009 and the assault and battery charge from June 10, 2009. The letter goes on to explain how there was a restraining order issued against Mulcahy and his license to carry a gun was suspended.

Mulcahy contends that because the City did not state the assault and battery charge as a reason for the first bypass in March 2010, it can't use the charge as a reason in its second bypass in July 2010. To reason in this manner would be to misunderstand Civil Service law. PAR.08(4) does not state that once you bypass a candidate you cannot bypass them again using reasons that you knew or reasonably should have known in the first one. It is meant to limit the ability of

Appointing Authorities to create additional after-acquired reasons learned after the bypass decision was made and while an appeal process is on-going. Had Mulcahy appealed the March bypass, the City would have been precluded from using the assault and battery against the Appellant. However, Mulcahy is appealing the July bypass, where the assault and battery was listed in the letter of stated reasons, and therefore can be used by the City as justification for the bypass. The assault and battery arrest and related circumstances is on its own, sound and sufficient reason for bypass.

Mulcahy also contends that drug examinations are void after six months in accordance with HRD policy. Although the drug testing issue is not being decided here, the Commission does not believe that the HRD six month time limit for the use of medical examination results does not apply. This is due to the different nature of a drug test verse a medical examination, to which the rule was meant to apply. The drug test is some evidence of the presence of a substance in the body on a certain day; while medical exam results indicate medical conditions which could change over time making old exam results stale or inapplicable. Lastly,

The Marijuana Test Results

The Appellant also asserted that, as a matter of public policy, his marijuana test results cannot properly be considered as reasonable justification for bypassing him. First, he argues that, pursuant to the recent change in the law: "An Act Establishing A Sensible State Marihuana Policy," a positive test for marijuana is not a justifiable reason to bypass a candidate for a civil service position. Second, he contends that, since he passed the drug screen on his second try, the first failed test was too stale to be a reliable basis for bypassing him. The Commission need not reach these issues, since the other bypass reasons stated by the City – proven involvement in: assault and battery arrest, and related restraining order, and revoking of a license to carry a

firearm – are sound and sufficient reasons which are reasonable justification, standing alone, for the bypass. It is also important to note that this appeal involved solely an issue of marijuana use, and did not encompass the circumstances or aggravating factors that could be involved in other situations such as possession and/or sale of a large quantity of marijuana, drugged driving while under the influence of marijuana, for example. However, as the issues were briefed by both parties, and the question is one that may need to be revisited in the future, the Commission offers a brief summary of the public policy issues and concerns on the subject.

Positive Marijuana Test

By way of background, on November 4, 2008, the voters approved St.2008, c. 387, §§2-4, pursuant to the provisions of art. 48, The Initiative, Part V, §1, as amended by art. 81, §2, of the Amendments to the Massachusetts Constitution. This initiative was codified at G.L. c. 94C, §§32L-32N, and entitled, "An Act establishing a sensible State marihuana policy." ("The Act"). The Act changed the status of possession of one ounce or less of marijuana from a criminal to a civil offense, effective December 4, 2008. The Act defines possession to include having marihuana or tetrahydrocannabinol (its metabolite) in the "urine, blood, saliva, sweat, hair, fingernails, toenails or other tissue or fluid of the human body." G. L. c. 94C, § 32L, second par. The Act states

> [N]either the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana.. . . By way of illustration rather than limitation, possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance including unemployment benefits, to deny the right to operate a motor vehicle or to disqualify an offender from serving as a foster parent or adoptive parent."

Id. The Act also defines aggravating factors which raises the seriousness of the offense of marijuana use such as operating a motor vehicle and manufacture and distribution. Id.

The Supreme Judicial Court recently published an opinion that articulates the intent of the Massachusetts voters to treat possessors of less than one ounce of marijuana differently from perpetrators of other drug crimes. Commonwealth v. Cruz. 459 Mass. 459 (2011). In Cruz, the Court held that because marijuana is not a criminal offense, the police need something more than the odor of burnt marijuana to conduct a search of an offender's vehicle. They stated that the smell of marijuana does not give police officers any probable cause of a criminal amount of marijuana, and therefore, they must assume it is only a non-criminal amount. Id. The Court reasoned that because the voters changed the offense of marijuana possession from a criminal offense to a civil offense, they must have also intended to treat offenders who possess less than an ounce of marijuana differently from perpetrators of other drug crimes. Id. The Court cites the clear and plain meaning of the statute as an indication of the intent of the voters to treat possessors of less than an ounce of marijuana differently than other drug offenders. Id.

Mulcahy argues that Act as interpreted by the SJC means that, as a matter of public policy, it is no longer lawfully permitted to bypass a potential candidate for a firefighter (or any other public safety or civil service position) for testing positive for marijuana. He suggests that the list of benefits in the Act that are not to be affected by possession of a small quantity of marijuana (financial aid, public housing and assistance, operating a motor vehicle, foster parenting) are illustrative, not exclusive, and public employment rights are also encompassed within the intent of the Act. The City disputes this interpretation. Bernard Stephens testified that since the adoption of the State's new marijuana policy, the City has not altered their own policy towards marijuana in drug screens and continues to treat all positive drug screens similarly.

Additionally, under G.L. c. 94C §§ 31-37, the legislature established a drug scheduling system which provides for scaled penalties regarding the possession, distribution, and

manufacturing of the substances listed. Possession for over an ounce of marijuana is classified with the Class E substances, the lowest in the law. G.L. c. 94C §34. For distribution and manufacturing offenses, marijuana is defined as a Class D substance, warranting a penalty of not more than two years in jail and a five thousand dollar fine. G.L. c. 94C §32C. The maximum jail term for a Class C violation, including mescaline, psilosybin, and valium, is five years, a significant increase from Class D offenses. G.L. c. 94C §32B. Class A drugs, which include heroin and other synthetic opiates, have a penalty of up to ten years for manufacture. G.L. c. 94C §32. The scaled scheduling of drug classification in the Commonwealth is evidence that the legislature views drugs differently from each other and warrant appropriate offenses based on the relative severity of the drug. Thus, there does appear to be some basis to question Mr. Stephen's, belief that all positive results for any type of drugs are to be treated the same is inconsistent with the distinctive legislated classification of controlled substances outlined above.

The effect of the Act on employment decisions in the public and private arenas, however, has not been addressed in any judicial decisions of which the Commission is aware, and none have been identified by the parties.[1] There are clearly strong public policy reasons to enforce a

[1]In 2008, the California State Supreme Court decided that a private corporation can choose not to hire an individual who has a prescription for medicinal marijuana. Ross v. Ragingwire Telecommunications, Inc., 42 Cal 4th 920 (2008). In Ross, an employee was discharged before commencing employment for testing positive for marijuana. Id. The plaintiff had a physician sanctioned prescription for medicinal marijuana but the Court reasoned the marijuana policy articulated in the Compassionate Use Act of 1996 did not include any policy on private actor's abilities to discharge a patient, therefore the corporation was able to discharge a patient. Id. The Court looked at the language and found no stated policy on its implications on employment and therefore did not extend the reach of the law to protect employment. Id. The Court did not feel that it was within its powers to include employment because the statute represented the intent of the voters and to grant powers beyond the bill would be to undermine the intent of the voters. Id. The dissent, authored by Justice Kennard, argues that the law loses its purpose if it can't protect patients from losing their job for having a prescription. Id. Other courts in Washington and Oregon have come to similar conclusions regarding employment protections for medicinal marijuana use. See Roe v. Teletech Customer Care Management LLC, 247 P.3d 121 (2011); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 348 Or. 159 (2010).

Legislation is pending in the Massachusetts legislature to authorize the medicinal use of marijuana by providing that a qualifying patient who possesses a registry identification card "shall not be subject to...disciplinary action by a business or occupational or professional licensing board or bureau for the medical use of marijuana." S.B. 1169, §3(a).

zero-tolerance policy of drug use, especially for public safety positions, such as firefighter. There are also questions about the conclusions to be reached by a positive drug screen for marijuana, such as whether such tests are capable of quantifying the amount of marijuana that the test subject has used and over what period, and whether such use fits within or without the "one ounce" rule prescribed by the Act. While a future case may require the Commission to face these and perhaps other scientific, statutory interpretation and public policy issues in a more fully developed record in another appeal, it is not necessary do delve further into them here, as the City has justified its bypass on other unrelated grounds.

Timing of the failed drug test

Mulcahy also contends that the first drug test should not be admitted because it is more than six months old. The HRD guidelines for medical examinations place a six month limit on the validity of medical examinations. A Certification Handbook, Entry Level Public Safety Appointment Subject to Civil Service, Human Resources Division, Civil Service Unit Publication, page 14. The medical examinations that the handbook refers to has more to do with physical ability to perform the duties of a firefighter than having drugs in the person's system. The intent of the six month rule is to not discriminate against a candidate who at one point fails a physical but can later show fitness for the job. While there may be some force to this argument, the record here is not sufficiently developed to know what reasonable inference may properly be drawn from an applicant's or an employee's failed marijuana drug screen, and whether those inference lose their persuasiveness over time. For example, if a drug screen is probative that the test subject had ingested a large quantity of marijuana- that behavior would still appear to be criminal, whereas evidence that was inconclusive of the quantity ingested may not permit an inference of any criminal behavior in light of the statutory definitions in the Act. Since the

Commission has good reason to dismiss this appeal on other grounds, it does not further address the Appellant's "six month rule" argument.

Accordingly, for the reasons stated above, the appeal of the Appellant, Patrick Mulcahy, on Docket No. G1-10-326 is hereby ***Dismissed.***

Civil Service Commission,

Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson and McDowell, Commissioners)[Marquis & Stein absent], on August 25, 2011

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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

Notice to: Michael B. Halpin, Atty. (*for Appellant*)
Michael Ciota, Atty. (*for Respondent*)
John Marra, Atty. *(HRD)*