COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss. **Docket No. G1-07-101**

JUSTINIANO PLAZA,
Appellant
v.

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:	Frank D. Camera, Esq. 56 N. Main Street #321 Fall River, MA 02720
Respondent's Attorney:	Sheila B. Gallagher, Esq. Boston Police Department Office of the Legal Advisor One Schroeder Plaza Boston, MA 02120
Hearing Officer:	John J. Guerin, Jr.[1]

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Justiniano Plaza (hereafter "Appellant"), seeks review of the Human Resources Division's (hereafter "HRD") decision to accept reasons proffered by the Respondent-Appointing Authority, Boston Police Department (hereafter, "BPD" or "Appointing Authority"), for the bypass of the Appellant for original appointment to the position of Boston Police Officer. The reasons proffered for the bypass and accepted by the HRD was that the Appellant had failed a drug test in April 2004 and accepted a 45-day suspension from his employer, Suffolk County Sheriff's Department, thereby rendering him ineligible for appointment as a Boston Police Officer.

[1] John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

The appeal was timely filed. A full hearing was held on September 13, 2007, at the offices of the Civil Service Commission (hereafter "Commission"). One audiotape was made of the hearing. Thereafter, the parties were invited to submit Proposed Decisions to the Commission, but only the Appointing Authority did so.

HEARING OFFICER'S FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1-7) and the testimony of the Appellant and Mr. Edward Callahan (hereafter "Mr. Callahan"), BPD Assistant Chief for the Bureau of Administration and Technology, I make the following findings of fact:

1. On June 20, 2006, the Appellant's name appeared on Civil Service Certification List No. 260617 for the position of police officer. This Certification List was a special certification for Spanish-speaking Police Officers. The Appellant is fluent in Spanish. (Exhibits 6 and 7)
2. At the time of this hearing, the Appellant had been employed by the Suffolk County Sheriff's Department for approximately six (6) years. He is an honorably discharged veteran of the United States Marine Corps having served from August 1995 through August 1999 and having attained the rank of sergeant (E5). Previous to his employment with Suffolk County, the Appellant worked for FEDEX for two years as a courier. I found him to be polite and respectful. (Testimony of Appellant and Exhibit 2)
3. On July 16, 2006, the Appellant signed his Student Officer Application and submitted it to the BPD. (Exhibit 2)

4. On page 11, Question 1, Section J of his Student Officer Application, the Appellant admits that he had been disciplined by an employer. The Appellant attached an explanation sheet whereby he indicated that he was suspended from work as a Suffolk County Corrections Officer for a period of 45 days, without pay, due to a positive result from his annual drug test. As a result of the positive drug test, the Appellant had to complete a substance abuse program and submit to random urine screens for a period of three years. (Testimony of Appellant and Exhibit 2)
5. The Appellant testified at the Commission hearing that the positive results could be from the "No Doz" stimulant pills he took during the week of March 26, 2004, while driving back from a vacation in Florida. A few weeks after returning from Florida, a drug test was administered to the Appellant on April 26, 2004, the results of which were positive for cocaine. In addition to the April 26, 2004 test, the Appellant disclosed that he had a re-test on May 10, 2004, which also resulted in a positive finding. (Testimony of Appellant)
6. Previous to his recent appointment as BPD Assistant Chief for the Bureau of Administration and Technology, Mr. Callahan served for 19 years as the BPD's Director of Human Resources. In that capacity, Mr. Callahan oversaw the screening processes for hiring and promotion of Boston Police Officers. Mr. Callahan was Director of Human Resources during all times relative to the bypass of the Appellant. According to Mr. Callahan, the second test, also known as a "safety net" test, screens for illegal substances and only documents whether there is a LOD (level of detection). The Appellant inaccurately stated on his application that LOD meant that the test was "inconclusive." The Appellant had no evidence or

documentation to support his allegations. (Exhibit 2 and Testimony of Appellant and Mr. Callahan)

7. I find that Mr. Callahan's testimony was credible. He is a regular witness before this Commission and his knowledge of the BPD hiring process is beyond reproach. I assign significant weight to his explanations of that process as well as other BPD personnel policies.
8. On page 14, Question G of his Student Officer Application, the Appellant admits that he had applied for a public safety position before. On a separate page attached to the back of the Application, the Appellant indicated that he had applied for a position with the Fort Lauderdale, Florida Police Department and the Broward County Sheriff's Department in Florida. The Appellant testified under cross examination that he was denied positions in those agencies for the same reason he was bypassed by the BPD, the failed drug test at the Suffolk County Sheriff's Department. (Exhibit 2 and Testimony of Appellant)
9. On page 15, Question H of the Student Officer Application, the Appellant admitted that he has never been selected for a public safety position anywhere else. On a separate page attached to the Application, the Appellant indicates that he was not selected because of his "false positives on a drug test." When asked to elaborate at the Commission hearing as to what he meant when he wrote "false positives on a drug test", the Appellant testified that he had no medical evidence to support his theory of false positives on a drug test. (Exhibit 2 and Testimony of Appellant)
10. On page 22, Question 1, of his Student Officer Application, the Appellant was asked if ever used or possessed any illegal substances including cocaine. In his

response, the Appellant checked off the box for "NO". The Appellant testified in the proceeding that he had never used illegal drugs and didn't know why he tested positively for cocaine ingestion. He stated that, after thinking about it, he theorized that it may have been because of his use of the "No Doz". He claimed that he contacted the company that manufactures "No Doz" to see if the drug could have caused a false positive drug test result but that the company would not provide documented support for that theory. (Id.)

11. I find that the Appellant's testimony was unhesitant and confident but lacking in the substance necessary to convince me that his Suffolk County Sheriff's Department drug test resulted in a "false positive." Despite his well-mannered demeanor and thoughtful consideration of the questions posed to him, he simply could not provide a definitive answer as to why the BPD could not substantiate his drug test failure as reasonable justification for his bypass.
12. Once the Appellant submitted his Student Officer Application, a background investigation was undertaken by a Detective assigned to the BPD's Recruit Investigations Unit. (Testimony of Mr. Callahan)
13. The result of the background investigation was presented to a BPD hiring committee during a "roundtable" discussion, which typically involves the Commander of Recruit Investigations, the Director of Human Resources, a Deputy Superintendent from Internal Affairs and an attorney from the Legal Advisor's Office. (Id.)
14. Mr. Callahan was a member of the roundtable discussion involving the Appellant. All members of the roundtable discussion agreed that the totality of the

circumstances surrounding the Appellant's positive drug screens rendered the Appellant unsuitable to be a Boston Police Officer. Mr. Callahan explained the hiring process in order to become a Boston Police Officer. He credibly testified that the BPD heavily considers a candidate's employment history and background investigation when making hiring decisions for employment in a law enforcement position. He indicated that an applicant who tests positive for an illegal substance is just not a good candidate. He stated that a positive drug test of a candidate is an "automatic disqualifier" of that candidate, especially one who is working in another law enforcement agency. He offered that the BPD must make sound decisions when hiring because the public's safety is at issue and the City is liable for those persons under its employ. (Id.)

15. The BPD investigation into the Appellant's background revealed, as the Appellant testified at the Commission, that on April 26, 2004, the Suffolk County Sheriff's Department administered its annual hair-sample drug analysis test to the Appellant. Additionally, the Appellant requested that a "safety net" test be conducted to insure that the positive results were accurate. On May 10, 2004, the "safety net" test was conducted and resulted in a positive finding. (Exhibit 3 and Testimony of Mr. Callahan)

16. Mr. Callahan testified that the Suffolk County Sheriff's Department hair-sample drug test policy is identical to that of the BPD. Officers who fail the drug test must accept a 45-day suspension and undergo a rehabilitation program before being reinstated to employment. This is the discipline that the Appellant accepted.

Officers who refuse are terminated. A second violation of the policy results in automatic termination. (Testimony of Mr. Callahan)

17. During cross examination, the Appellant's counsel pointed out that there are Boston Police Officers who have tested positive for illegal substances and have not been terminated from their jobs. Mr. Callahan responded by testifying that an *applicant* to the BPD who tests positive for drugs differs from someone who is currently a Boston Police Officer. (Emphasis added.) Mr. Callahan further stated that no one has a right to become a Boston Police Officer and once they do, collective bargaining and other contractual issues come into play. Mr. Callahan also indicated that the Department receives many applications from individuals who have not tested positive for cocaine on a drug test performed by their employer. (Id.)
18. Because the Appellant tested positive for cocaine in 2004 when administered two drug tests during his employment with the Suffolk County Sheriff's Department, a law enforcement position, the BPD found that the Appellant lacked sound judgment and was unsuitable to be a police officer. (Id.)
19. The Appellant was officially bypassed for appointment as a Boston Police Officer and, on February 1, 2007, was removed from Special Certification for Spanish-speaking Police Officers List No. 260617 by the HRD, in accordance with Personnel Administration Rule (hereafter "PAR") .09. (Exhibit 7)

HEARING OFFICER'S RECOMMENDED CONCLUSION:

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and 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).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is "to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy." If the Commission finds that there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy", then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

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 Commission, 31 Mass. App. Ct. 315 (1991). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

While working for a law enforcement agency, the Suffolk County Sheriff's Department, the Appellant tested positive for cocaine on two tests that were administered a month after he returned from a vacation in Florida. The Appellant admitted to the Commission that he can not explain how the drug test came back with a positive finding for cocaine. His theory that the result may have been caused by his ingestion of "No Doz" stimulant pills was unconvincing and could not be substantiated. In the absence of evidence to the contrary, the Appellant's failure of his drug test is accepted as fact. Such behavior is most certainly conduct unbecoming of an officer and a valid indication that the applicant is unsuitable to be employed as a police officer. At the very least, it exhibits extremely poor judgment.

Based on a preponderance of the credible evidence presented in this matter, the Appointing Authority has sustained its burden of proving reasonable justification for the bypass, and subsequent removal from the certification list, of the Appellant. Therefore, I recommend that the appeal on Docket No. G1-07-101 be ***dismissed.***

_____
John J. Guerin, Jr.,
Hearing Officer

CONCLUSION OF THE MAJORITY (COMMISSIONERS STEIN, HENDERSON & TAYLOR) AND THE RELIEF TO BE GRANTED TO THE APPELLANT PURSUANT TO CHAPTER 310 OF THE ACTS OF 1993:

The majority respectfully demurs to the recommendations of Hearing Officer (former Commissioner) Guerin and concludes that the Commission is obliged to allow this appeal. The majority finds that the BPD did not meet it burden in this case to establish, by a preponderance of the substantial, credible evidence, sound and sufficient reasons needed to justify: (1) BPD's proposed by-pass of the Appellant for the position of Boston Police Officer on Certification #260617 (6/20/2006), on or about November 27, 2006, in favor of nine other candidates, including three candidates listed lower than him on that Certification; (2) HRD's approval of that hiring and by-pass, apparently without hearing or other independent analysis, in January 2007; and (3) HRD's determination on or about January 23, 2007 (pursuant to PAR.09)[2] to remove the Appellant from all future lists of eligible candidates for original appointment to the position of Boston Police Officer.

ADDITIONAL FINDINGS OF FACT

In addition to the facts found by Hearing Officer (former Commissioner) Guerin, which the majority adopts, the following relevant facts are noted:

20. Mr. Callahan testified the Suffolk County Sheriff's Department hair-sample drug test policy is identical to that of the BPD. (Finding #16)
21. As stated by Mr. Callahan, the April 26, 2004 "annual" hair-sample test and the May 10, 2004 "safety net" conducted by the Suffolk County Sheriff's Department (referred to in Finding #14) are actually two separate tests of the same sample taken from the Appellant on a single occasion, not tests of two different samples taken

[2] Relevant sections of PAR are set forth below in Paragraph 29 of the Additional Findings of Fact.

from the Appellant two weeks apart. (Testimony of Mr. Callahan).

22. The hair-sample drug test to which the Appellant submitted in April 2004 was performed by the Psychemedics Corporation. (JE 3, 4).

23. The Commission will take administrative notice that the BPD drug test policy, and test of hair sample tests pursuant to that policy by Psychemedics Corporation, are currently *sub judice* in a civil action pending in the United States District Court for the District of Massachusetts (05CV11832-GAO), captioned "Jones et als v. City of Boston, et als" ("Jones"), brought in September 2005 by the Massachusetts Association of Minority Law Enforcement Officers along with certain individuals who allege either they had been by-passed for or discharged from appointment as a Boston Police Officer because they tested "false" positive for cocaine on a Psychemedics hair-sample drug test. (Civil Docket for Case #05-CV-11832-GAO)

24. The Commission also will take administrative notice of eighteen cases pending with the Commission which various other Appellants have brought against the BPD, each of which assert that such other Appellants were by-passed for or discharged from the position of Boston Police Officer (over a period of time from 2002 through 2007) because they had tested "false" positive for cocaine on a Psychemedics hair-sample drug test. (Nos.G-02-324,G1-07-342,D-01-631;D-01-1409,D-03-116, D-03-212, D1-07-101, D-02-656, D-02-657, D-03-213, D-03-214, D-03-362, D-04-52,G-01-240, G-01-1106, D-02-392, G1-05-167, G1-05-209, G1-06-114, G1-07-356)

25. The Commission will take administrative notice (but not for the truth) that the Plaintiffs in the Jones federal case allege:

"Upon information and belief, there are currently no government-mandated guidelines for testing hair samples for the presence of illegal drugs. Nor are there

such guidelines concerning collection procedures or cut-off levels for the [Psychemedics] Hair Test used by the defendants [BPD]. In addition, scientific studies demonstrate that the procedures used by the defendants to test hair samples for the presence of illegal drugs are flawed, imprecise, arbitrary, unreliable, and inherently biased against people of color. For example, upon information and belief, the procedures and methods used in performing the Hair Test cannot identify whether a result that is positive for the presence of illegal drugs is due to ingestion or to external contamination from environmental exposure. In addition, the Hair Test has an inherent propensity to yield "false positives" on hair samples taken from persons of color because of the composition of the hair itself and other factors. Indeed, upon information and belief, the Society of Forensic Toxicologists consider the testing of hair samples for the presence of illegal drugs to be too unreliable to be used in making individual employment decisions.

"Seven of the plaintiffs are former Boston police officers – "former," because they were wrongfully terminated on the basis of their allegedly positive results on the Hair Test. One plaintiff is a police officer who is still with the Boston Police Department but who, on the basis of her alleged positive Hair Test, was wrongfully forced to chose between termination and signing documents falsely stating that she had requested drug rehabilitation treatment and agreeing to, among other things, undergo such treatment at her own expense. Another plaintiff is a police cadet who was wrongfully terminated on the basis of her allegedly positive result on the Hair Test. The plaintiff officers who were terminated each served with distinction, including commendations and medals, for between 4 and 28 years; collectively for nearly 100 years. The plaintiff officer still with the Boston Police Department has served for approximately 18 years and the plaintiff cadet had served for approximately 4 years prior to her wrongful termination.

Each of the plaintiffs vehemently denies using illegal drugs. The plaintiffs' allegedly positive results on the Hair Test is the only "evidence" of illegal drug use by the plaintiffs that was considered by the defendants in making their adverse employment decisions against them. All but two of the plaintiffs obtained results negative for the presence of illegal drugs in their independent hair drug tests performed soon after the allegedly positive result on the Hair Test used by the defendants. Indeed, the independent hair drug tests of some of the plaintiffs were performed by the very same laboratory that performed the Hair Tests on which they had allegedly tested positive. In the case of one plaintiff, the negative and allegedly positive results were obtained from tests performed by the very same laboratory on hair samples taken on the very same day."

(Civil Docket for Case #05-CV-11832-GAO, Amended Complaint, ¶¶4-6 (Docket Entry #17, 4/07/2006. See https://ecf.mad.uscourt.gov)

26. The Commission will take administrative notice of the fact that, inasmuch as the Suffolk Sheriff's Department is "identical" to the BPD hair-sampling policy (Finding #16), each calls for a review of a laboratory report of a positive result for illegal drugs by a "Medical Review Officer" who is expected to give the tested employee an opportunity to discuss the results and examine "alternative medical explanations" for the positive test result. (Finding #16; JE3, 4). See also Commission Docket No. D-01-1409, *rev'd other grounds sub nom*, Boston Police Department v. Thompson, Suffolk Superior Court C.A. 03-4073C (2004). [3]

27. The Appellant testified that, during with his two-year employment as a courier for FedEx Corporation (Finding #2), he was subject to and passed random drug tests; this evidence was not contested.

28. The following l facts appear in JE7 (documents produced by HRD):

    a. Certification 260617 was issued by HRD to BPD on June 20, 2004.

    b. On November 27, 2004, BPD submitted a Form 14 to HRD, attesting to selection of nine candidates from Certification 260617, three of whom appear lower on the Certification than the Appellant.

    c. The Form 14 states November 27, 2006 Employment Date for each candidate.

    d. HRD endorsed its approval of the BPD Form 14 on or about January 11, 2007.

    e. On or about November 27, 2006, BPD also wrote to HRD requesting the approval to by-pass the Appellant for the following specific reasons:

> "On May 25, 2004, Mr. Plaza was suspended from his employment position with the Suffolk County Sheriff's Department for 45 working

[3] No plausible reason can be imagined to contest the Commission's notice of the federal or Massachusetts dockets or cases on the Commission's own docket in which the BPD is also a party, and of the notice of the provisions of PAR below. If, however, any party contests the facts so noticed, the Commission will afford the opportunity for a full consideration of that objection as part of any motion to reconsider this Decision.

days for violation of the Suffolk County Sheriff's Department annual drug testing program. Mr. Plaza had been administered a drug test on April 24, 2006 [sic] and tested positive for the use of cocaine."

f. The aforesaid letter from BPD to HRD refers to "ATTACHMENTS", but no such attachments appear in the document produced by HRD in JE7.

g. The aforesaid letter from BPD to HRD bears an HRD receipt stamp "2006 DEC 13 P3:50".

h. On or about January 10, 2007, BPD wrote to HRD requesting, inter alia, that the Appellant be PAR.09 removed from Certification 260617.

i. The aforesaid letter from BPD to HRD bears an HRD receipt stamp "2007 JAN 10 P2:27"

j. On or about January 23, 2007, HRD wrote to the Appellant, stating:

> "Enclosed please find a copy of a letter from the appointing authority for the Boston Police Department requesting that you be PAR.09 removed from certification number 260617 for the position of Spanish-speaking police officer.
>
> "The Human Resources Division has determined that the reasons submitted are acceptable for removing you from not only this certification but also the current Boston eligible list.
>
> You have the right to appeal this determination . . . [to] the Civil Service Commission."

29. The Commission will take administrative notice of the Personnel Administration Rules (PAR) prepared by HRD, effective as of February 28, 2003 and applicable to this appeal, which include:

a. PAR.08(3):

> "Upon determining that any candidate on a certification is to be bypassed . . . an appointing authority shall, immediately upon making such determination, sent to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for by-passing a person or

persons more highly ranked . . . . Such statement shall indicate all reasons for selection or bypass on which the appointing authority intends to rely or might in the future rely, to justify the bypass . . . . No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. The certification will not proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approve reasons for selection or bypass.

"The Personnel Administrator shall, within fifteen days of receiving reasons for selection or bypass, review the reasons submitted and inform the appointing authority of approval or disapproval of the reasons for selection or bypass. The appointing authority shall be granted a hearing, as necessary, with the Personnel Administrator, or the Administrator's designee, during the fifteen-day review period to explain, clarify or justify reasons for selection or bypass. If the Personnel Administrator disapproves any reason or reasons for selection or bypass, he shall immediately notify the appointing authority, with clear and specific reasons for the rejection. If the Personnel Administrator accepts the reasons,he shall forthwith notify the appointing authority and the bypassed candidate or candidates, who may then appeal the decision to the Civil Service Commission pursuant to M.G.L. Chapter 31, §2, subsection (b).

"Candidates for appointment shall not be permitted to assume the duties with their proposed appointments until said appointments have been approved by the Personnel Administrator. Appointments and promotions made in violation of this Rule shall be void if the Administrator deems them to be a violation of this Rule, and may be subject to issuance of stop-pay orders pursuant to M.G.L. Chapter 31, §73."

b. <u>PAR .09(2):</u>

"If an appointing authority concludes the appointment of a person whose name has been certified to it would be detrimental to the public interest, it may submit to the administrator a written statement giving in detail the specific reasons substantiating such a conclusion. The administrator shall review each such statement, and if he agrees, he shall remove the name of such person from the certification and shall not again certify the name of such person to such appointing authority for appointment to such position. For the purposes of this section, 'appointment' shall include promotions."

(See Civil Service, Guides and Publications, Personnel Administration Rules (PARs), www.mass.gov/hrd)

MAJORITY CONCLUSION

Save for one respect, Hearing Officer (former Commissioner) Guerin accurately recites the appropriate legal standards and it is not necessary to repeat them here. The majority does not read the Callanan case to stand for the proposition cited. That case involved a question of HRDs discretion in delaying the establishment of a civil service eligibility list. The guiding legal framework for the Commission's review in bypass cases is set forth principally in City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass 1102, 687 N.E.2d 642 (1997) (noting that, while the Commission may not substitute its judgment for a "valid" exercise of appointing authority discretion, the Civil Service Law "gives the commission some scope to evaluate the legal basis of the appointing authority's action, even if based on a rational ground."). See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) ("The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles . . . . the commission acted well within its discretion."); MacHenry v. Civil Service Comm'n 40 Mass.App.Ct.632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that role of personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is not that of a "ministerial depository" but the administrator is expected to "review, and not merely formally to receive bypass reasons" and evaluate them "in accordance with basic merit principles"); Mayor of Revere v. Civil Service Comm'n, 31

Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) ("presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce 'sound and sufficient' reasons to justify his action"). See also, Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission "sufficient to satisfy due process")

Applying these applicable standards in the circumstances of the present case, the majority conclude that the bypass of the Appellant did not comport with basic merit principles and violates the Appellant's rights under the Civil Service Law.

First, the preponderance of the evidence simply does not establish "adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law" that justify approval of the Appellant's bypass for appointment according to his ranking on Certification 260617, and certainly does not justify removal of his name from all future lists of candidates for appointment to the position of Boston Police Officer.[4]

Make no mistake; the actions of the BPD and HRD are a life-long impediment to the Appellant's career aspirations as a law enforcement officer, either with the Boston Police Department or anywhere else. The only evidence on which to hang this result is the April 2004 hair-sample drug test result reported by Psychemedics Corporation to the MRO for the Suffolk County Sheriff. (JE3, 4) At bottom, this evidence is rank, totem-pole hearsay.

[4] The Appellant appealed under G.L.c.31, §2(b) from action taken by HRD in its letter to him dated January 23, 2007 (JE7), approving the request by BPD to bypass him for appointment (as provided by G.L.c.31, §27 and PAR.08(3)), as well as to remove his name from all future lists (as provided by PAR.09(2), HRD provided copies of it official records germane to the appeal (JE7), but did not appear and defend its actions at the hearing before the Commission; only the BPD did so. If HRD knows of any relevant information that the majority decision overlooked, and despite its failure to appear at the hearing, HRD should make that information or argument known to the Commission by way of a motion for reconsideration.

No qualified witnesses testified about what actual levels of cocaine were detected by the test, what the meaning of such test results were, or whether protocol was followed in performing the test[5]; given the passage of time, such evidence would seem highly unlikely to be forthcoming. The recommended conclusion by Hearing Officer (former Commissioner) Guerin side-steps this issue by shifting the burden of proof to the Appellant to establish a negative in order to prevail, i.e., to adduce proof the 2004 test was invalid or offer other evidence to "convince" the Hearing Officer that Mr. Plaza did not "use" cocaine. (e.g., Finding #11; Recommended Conclusion, para.4) We find this approach inconsistent with the established case law and the Commission's established procedure regarding our evidentiary standards and the order and burden of proof.

While it is within the purview of the Commission to accept hearsay evidence, the Commission has considerable discretion as to the weight it should be given. Were there no body of direct, credible evidence on point, we would be inclined to give fair weight to the result of a drug screen duly administered by an employer, especially if authenticated by a qualified witness subject to cross-examination, or when other direct evidence supports the appointing authority's conclusion, which the Commission has done on other occasions.

But that is not the case here.

The Appellant, Justiniano Plaza, a Hispanic American citizen, has honorably worn the uniform of his country as a United States Marine, serving for four years and attaining the rank of Sergeant. (JE2; Finding #2) At the time of his bypass, he had a solid employment record in law enforcement as a corrections officer in the Suffolk County Sheriff's office

[5] BPD's only witness, Edward Callahan is BPD's Assistant Chief for Administration and Technology and its former HR director. (Finding #6)

for more than five years, including two and a half years after the drug test in question, and had worked as a courier with FedEx for two years prior to that. (JE2; Finding #2; Additional Finding #27) Although subject to drug screening throughout his career, there is no evidence that he tested "positive" for any illegal drugs whatsoever at any time other than the test in question or that there was any other blemish on his record. Hearing Officer (former Commissioner) Guerin describes Mr. Plaza as "polite and respectful" and finds his testimony was "unhesitant and confident" with a "well-mannered demeanor and thoughtful consideration of the questions posed to him". (Finding ##2, 11) Mr. Plaza strenuously and consistently denies any use of cocaine, in his application (JE2), and in his testimony (Finding #10). Mr. Plaza made full disclosure of the Suffolk County Sheriff's incident in his application and in his appeal to HRD; there is no evidence of concealment or mendacity on his part as to his written statements or sworn testimony denying ever making "use" of cocaine. (JE2; JE7) The majority cannot justify giving less weight to this notably strong, credible record supported by direct and uncontroverted evidence that clearly points to the conclusion that Mr. Plaza is no substance abuser and never has been one. cf. Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001) (commission must take account of all the evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence)

Second, the record reveals an unacceptable inconsistency about the BPD's explanation for its decision to bypass Mr. Plaza and remove him from any future certification, which, together with the apparently perfunctory nature of the HRD review of the BPD's requests, would, as a matter of law, at least raise a specter of pretextual or

unlawful behavior. See, e.g., Sinai v. New England Tel.& Tel. Co., 3 F.3d 471, 474, cert.den., 513 U.S. 1025, 115 S.Ct. 597, 130 L.Ed.2d 509 (1993); Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432 (1st Cir. 2000); Brennen v. GTE Government Systems Corp., 150 F.3d 21, 29 (1st Cir. 1998) ("Deviation from established policy or practice may be evidence of pretext"); Wooster v. Abdow Corp., 46 Mass.App.Ct. 665, 672-73, 709 N.E.2d 71, 77 (1999) citing Powers v. H.B. Smith Co., 42 Mass.App.Ct. 657, 658, 662, 679 N.E.2d 252, rev.den., 425 Mass. 1105, 682 N.E.2d 1362 (1997) (case "rife with 'procedural tangles and . . . several critical missteps.' ")

For example, Mr. Callahan testified that the BPD roundtable considered the "totality of the circumstances" and "heavily considers" a candidate's employment history and background investigation in evaluating whether to request a bypass of Mr. Plaza; but he also testified that failing a drug screen was an "automatic disqualifier", and no evidence of any background investigation (other than confirmation of what Mr. Plaza had disclosed in his application form) was included in the reasons for the requested bypass presented to HRD or introduced in evidence. (Finding ##14-15)

The BPD cannot have it both ways; either it took into account Mr. Plaza's strong record of current employment in law enforcement, including nearly three years following his suspension (in which he was required to submit to heightened scrutiny through random drug testing), and discounted it, or it did not. Failure to consider all the evidence or, at a minimum, failure to proffer justification for why it should be discounted, are equally offensive to the merit principle which requires that BPD and HRD give candidates the fair evaluation required by the Civil Service Law. See, e.g., Joseph v. Brookline Police Dep't, Case No. G3414(a), 10 MCSR 243 (1997) ("Appointing

Authority must consider redeeming and ameliorating factors such as recent work history, civic contributions, and overall deportment of the Appellant")

Moreover, the limited role played by HRD in the BPD bypass and PAR.09 removal request in this case, suggests that the intent of the law – to provide a substantive and expeditious independent check on the appointing authority – may have gone awry. (JE7; Additional Finding #28) The BPD request for by-pass was dated November 27, 2006, the same date that BPD returned the Form 14 to HRD identifying the nine candidates selected for hire, all effective that same day; the bypass request was apparently not received at HRD for three weeks and not acted on for six more weeks. HRD approved the hiring of the nine selected candidates, effective November 27, 2006, on January 11, 2007, apparently two weeks before approving the request to bypass the Appellant. Also, the BPD bypass request referred to attachments not in the record that asserted Mr. Plaza had tested positive for the "use" of cocaine "on April 24, 2006 [sic]", a mistake that should have been a red-flag for further inquiry. Or, perhaps, it mislead HRD to thinking the test was more recent than it actually was; in the absence of the attachments, HRD may have not received a full and complete picture that could have invited inquiry into any mitigating or other circumstances HRD might have chosen to investigate. As it stands on this record, the unexplained and confusing sequence of events – which would appear to violate the spirit, if not the letter of G.L.c.31,§27 and PAR – meant that, prior to the

hearing before the Commission, BPD's reasons for bypass or permanent removal of Mr. Plaza from consideration were never previously vetted as expected by the law.[6]

HRD's resources may well be limited and, arguably, do not permit such vetting. Yet, from the Commission's perspective, heightened scrutiny and input by HRD would be especially valuable and welcome in original appointment bypass cases. Unlike discipline or promotional bypass appeals, where an appellant generally has access to experienced and competent counsel at the expense of his or her labor union at all stages of the dispute, the typical original by-pass appellant – probably not yet a union member – all too often does not, or cannot, engage counsel; he or she brings the appeal *pro se;* or as in this case, even when counsel is later retained, the representation is often less than thorough, either due to lack of experience or an appellant's inability to pay fully for the services needed (there being no attorneys fees or "back pay" awarded in an original appointment case). In the absence of any effective advocate for such an appellant, the Commission is obliged to be vigilant and employ its own limited resources in giving especially careful attention to the rights of such under-represented parties in cases as these.

Third, what seems most abhorrent to the merit principle in allowing this allegedly "automatic" and "permanent" bypass of Mr. Plaza, as proposed by BPD and approved by HRD, is the apparent indifference that action imputes to the idea of rehabilitation. Common sense suggests some truth to the hypothesis that innocent "first offender" officers may opt to "accept" a suspension and assignment to a drug rehabilitation program in lieu of termination, and that no inference can be drawn that they thereby

[6] The absence of a documented, substantive HRD review is further complicated by the pending Jones case and related matters at the Commission. Although it is not necessary to the majority view to decide whether or not BPD's potential exposure in these "Hair Test" cases came into play in the decision-making, either consciously or subconsciously, this is the type of question that an HRD review might have addressed and documented in reviewing the bypass request.

admit to the use of drugs (See Additional Finding ##23-25); but, in any event, it should not matter as much whether Mr. Plaza once used cocaine in or about April 2004 or not. What is more relevant here is the documented fact that Mr. Plaza completed his rehabilitation program and returned to his position as a law enforcement officer in June 2004 with the obligation to submit to random drug testing for three years, and his own uncontested sworn testimony that proves he has never used illegal drugs at any time before or, more poignantly, ever since. (Appellant's Testimony; JE2, 3, 4)

It is completely abhorrent to our system of jurisprudence, in general, and to the merit principle, in particular, to deny the possibility of rehabilitation, to assume that a risk of recidivism, no matter how remote, is an "automatic disqualifier", especially in the face of credible evidence to the contrary. When this argument was posed to the Supreme Judicial Court in opposition to the reinstatement of Alger Hiss to the bar of the Commonwealth, despite his conviction for treason and unwavering refusal to admit guilt, Chief Justice Tauro dismissed the argument:

> "*Such a harsh, unforgiving position is foreign to our system of reasonable, merciful justice. It denies the potentiality for reform of character. A fundamental precept of our system (particularly our correctional system) is that men can be rehabilitated.* 'Rehabilitation' . . . is a 'state of mind' and *the law looks with favor upon rewarding with the opportunity to serve, one, who has achieved 'reformation and regeneration'* [Citation] . . . *Fundamental fairness demands that the [offender] have opportunity to adduce proofs*.
>
> . . .
>
> Neither the controlling case law nor the legal standard for reinstatement to the bar requires that one who petitions for reinstatement must proclaim his repentance and affirm his adjudicated guilt. . . . [W]e recognize that a convicted person may on sincere belief believe himself to be innocent. *We also take cognizance of Hiss's argument that miscarriages of justice are possible.* Basically, his underlying theory is that innocent men conceivably could be convicted, that *a contrary view would place a mantle of absolute and inviolate perfection on our system of justice, and that this is an attribute that cannot be claimed for any human institution or activity. . . .*"

In Re Hiss, 368 Mass. 447, 453-56, 333 N.E.2d 429, 435-37 (1975) (*emphasis added*). See, Ramirez v. Springfield Police Dep't, Case No. G-3568, 10 MCSR 256 (1997) (denied bypass for criminal record, but appointing authority may be required to provide additional reasons in any future by-pass to rebut an appellant's claim of rehabilitation); Radley v. Brookline Police Dep't, Case No. G-3414(B), 10 MCSR 289 (1997) (noting that, in the future, appellant's "redeeming factors must be given added weight" and "past indiscretions should play a lessened role")

Thus, precinding from Mr. Plaza's likely innocence of any illegal drug use at all, it is beyond dispute that he completed an "identical" program of rehabilitation as any BPD officer similarly situated and returned to duty without any evidence of illegal drug use since June 2004. The majority simply cannot reconcile on any rational basis how the BPD can admit that it agrees to deem one of its own officers as "rehabilitated" and fit for duty after a positive drug test, but deem an officer who has completed the identical program with another Massachusetts law enforcement agency too risky that he must be "automatically" and "permanently" declared unfit for the BPD, without any investigation of the individual case, save a paper copy of a two-year old test result, about which the candidate had already made full disclosure. There is simply insufficient credible evidence in this record to suggest how the appointment of Mr. Plaza – who must still pass the BPD's own drug screen as part of a required medical exam and pass a rigorous training program at the Police Academy – poses more (or any) measurable "risk" to the public or the BPD than any similarly situated officer presently on duty with the BPD.

Lest an attempt be made to read more into this Decision than is intended, this appeal is decided on the specific facts of this particular case. No doubt that a drug-free police

force is a legitimate goal. The Decision does not impugn the BPD's current drug testing program or the right of the BPD to continue to disqualify candidates who test positive on the basis of a demonstrably valid contemporaneous drug screen conducted under the auspices of the BPD as part of a pending appointment or promotion, and such actions will continue to be approved in those cases where the evidence so warrants. See Dean v. Civil Service Comm'n, 64 Mass.App.Ct. 1111, 835 N.E.2d 324, rev.den., 445 Mass 1107, 838 N.E.2d 576 (2005) (upholding the Commission's dismissal of the appeal of a BPD officer after her second positive drug screen, rejecting challenges to the test procedures and accepting documented test results for the truth thereof "in light of the absence of any meaningful evidence to the contrary") See also Monteiro v. Boston Police Dep't, Case No.G1-06-184, 20 MCSR 230 (BPD deputy superintendent testified that, if appellant found in possession of three bags of marijuana had been an isolated incident "it may not have been a disqualifying factor", but additional evidence tying appellant to crack cocaine dealers sufficient to justify bypass); Grace v. City of Newton, Case No. G1-04-326, 20 MCSR 57 (2007) (bypass appellant convicted of trafficking in cocaine in a school district); Miller v. Brookline Police Dep't, Case No. G-01-17, 15 MCSR 3 (2002) (dismissing appeal of bypassed candidate whose pre-employment urinalysis tested positive for morphine despite allegation of a subsequent "clean" test but was never produced); Hayes v. Boston Police Dep't, Case No.G-3270, 10 MSCR 267(1997) (dismissing appeal of bypassed candidate whose urinalysis tested positive for marijuana, where an expert in toxicology and chemistry testified that the levels of marijuana could not have been the result of "passive inhalation"). Nor does this Decision imply any

predisposition toward the pending challenges to the BPD "Hair Test" in the Jones case or in any of the related matters now before the Commission.

The minority may suggest that the majority plows new ground and treads upon forbidden "substitution of judgment" by the Commission for an appointing authority's "wide" discretion to select candidates of its choosing. This is simply not what the majority has decided. Rather, the majority hews to the long-established distinction between deferring to an appointing authority's sound discretion, and stepping in when the appointing authority abuses its discretion or exercises unsound judgment that cannot be supported by the preponderance of the credible evidence proffered to the Commission. To put this Decision in perspective, **COMPARE** Stanley v. Town of Watertown, Case No. G1-04-468, 20 MCSR 632 (2007) (preponderance of evidence failed to establish alleged reasons for bypass); Driscoll v. Boston Police Dep't, Case No.G1-06-70, 20 MCSR 477 (2007) (same); Crosby v. Boston Police Dep't, Case No. G-06-149, 20 MCSR 288 (2007) (noting "City's reluctance to be more transparent regarding how many candidates *selected as police officers* had "*some type of criminal record*" and encouraged BPD to "develop a more objective process"); Dillion v. Brookline Police Dep't, G-02-403, 20 MCSR 273 (2007) (evidence of appellant's alleged misconduct disbelieved); Smith v. City of Lynn, Case No. G-01-391, 18 MCSR 74 (2005) (insufficient evidence to permit reasonable person to conclude that appellant showed poor judgment or denied responsibility for prior misconduct); N.Nahim v. Boston Police Dep't, Case No. G-02-400, 17 MCSR 39 (2004) (hearsay allegations against appellant outweighed by preponderance of other evidence); Beriau Worcester Police Dep't, Case No. G-3967, 12 MCSR 33 (1999), *on remand*, 13 MCSR 6 (1999) (lack of credible evidence to support

bypass); Tolland v. Boston Police Dep't, Case No. G-3647, 11 MCSR 32 (1998) ("We are not substituting our judgment for that of the Appointing Authority but rather seeing that the prudent exercise of fairness and justice is accomplished"); Hamilton v. Boston Police Department, Case No. G-3720, 11 MCSR 16 (1998) (insufficient investigation into alleged misconduct the subject of military court martial against appellant; preponderance of evidence did not establish underlying misconduct) **WITH** Lilly v. Boston Police Dep't, Case No. G1-07-48, 21 MCSR 49 (2008) (appellant's testimony not credible); Croteau v. Boston Police Dep't, Case No. G1-06-96, 20 MSCR 243 (2007) (ten year lapse since appellant placed under 209A restraining order, outweighed by severity of underlying allegations of threats and stalking behavior toward ex-fiancée and her new boyfriend); Ferguson v. Boston Police Dep't, Case No. G1-06-138, 20 MCSR 13 (2007) (appellant misrepresented his fluency in Spanish and failed to disclose issuance of 209A order); Buote v. Lawrence Police Dep't, Case No. G1-04-3, 19 MSCR 429 (2006) (appellant' lack of candor, failure to disclose adverse reason for military discharge or problems in prior employment, demeanor at hearing raised legitimate doubts about his self-control, judgment and credibility); Wojtczak v. Town of South Hadley, Case No. G1-05-387, 19 MCSR 418 (2006) (appellant's demeanor before the Commission lacked remorse for multiple errors of judgment that caused his previous discharge as a police officer); Jones v. Brockton Police Dep't, Case No.G-99-178, 14 MCSR 33 (2001) (mendacity about social security status, multiple criminal charges and record of domestic violence); Cavanaugh v. Braintree Police Dep't, Case No. G-3494, 10 MCSR 132 (1997) (assault & battery charge, employment problems and domestic abuse case within past four years)

RELIEF TO BE GRANTED TO THE APPELLANT:

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs that the Division of Human Resources (HRD) rescind its determination pursuant to PAR.09 removing the Appellant, Justiniano Plaza, from eligibility for appointment to the position of Boston Police Officer, that his name be placed at the top of the eligibility list for original appointment to the position of Police Officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of Police Officer in the Boston Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a police officer in the Boston Police Department. The Commission further directs that Justiniano Plaza not be bypassed again for the same reasons that the Commission has, in this Decision, deemed insufficient. The Commission further directs that, if and when Justiniano Plaza is selected for appointment, his civil service records shall be retroactively adjusted to show, for seniority purposes, a starting date of November 27, 2006, the Employment Date of the other persons selected from Certification 260617. Finally, the Commission directs that the Boston Police Department may elect to require Justiniano Plaza to submit to an appropriate pre-employment drug screen in accordance with current Boston Police Department policy either (1) in the ordinary course of the medical examination process or (2) immediately upon receipt of a certification in which his name appears, as a condition to further processing of his application for appointment.

For The Majority

_____
John Taylor, Commissioner

_____
Daniel M. Henderson, Commissioner

_____
Paul M. Stein, Commissioner

OPINION OF THE MINORITY (Bowman, Chairman; Marquis, Commissioner)

We respectfully dissent. We accept the findings of fact and the conclusion of the hearing officer.

Appointing Authorities have an obligation to consider a candidate's employment history before determining whether or not to hire them – and, in the case of police officers, issue them a badge, a gun and all the authority that comes with them. In this case, the Appellant's employment history revealed that he was suspended for forty-five (45) days for testing positive for cocaine during an annual drug test via his current employer, the Suffolk County Sheriff Department. This test was conducted thirty-three (33) months before the Boston Police Commissioner's decision to bypass him.

It is unclear if the majority is overruling the decision of the Boston Police Commissioner because he (and HRD) gave too much weight to the fact that the Appellant tested positive for cocaine in 2004; or because of its independent finding that the Appellant is not and never has been a drug-user.

While conceding that it is not the role of the Commission to substitute its judgment for that of the Boston Police Commissioner, the majority proceeds to do just that in their conclusion stating, "it should not matter as much whether Mr. Plaza once used cocaine in or about April 2004 or not. What is more relevant here is the documented fact that Mr. Plaza completed his rehabilitation program and returned to his position as a law enforcement officer in June 2004 with the obligation to submit to random drug testing for three years, and his own uncontested sworn testimony that proves he has never used illegal drugs at any time before or, more poignantly, ever since." (emphasis added) In this case, the Boston Police Commissioner concluded that it does indeed matter whether

Mr. Plaza used cocaine in 2004 – for good reasons. Drug offenses present a particular challenge to any urban police force: those urban officers are clothed in authority, entrusted with a weapon, and have access to narcotics. In narcotics work police officers are required to investigate drug offenses, handle narcotics, work undercover as potential buyers, work with confidential informants on drug buys, preserve drugs as evidence for future prosecution, deliver drugs to court, and testify in criminal proceedings. To appoint an officer with a proclivity to drug abuse could present devastating circumstances. Put simply, the Commission may not substitute its own judgment by concluding, contrary to the sound judgment of the Boston Police Commissioner, that it does not matter if the Appellant used cocaine in 2004.

The majority's other conclusion, that the Appellant has proven that "he has never used illegal drugs at any time before, or, more poignantly, ever since [the positive drug test]" is based on the Appellant's "unrefuted testimony" before the hearing officer. The Majority deems the Appellant's testimony as "unrefuted" only after concluding that evidence regarding the Appellant's forty-five (45) day suspension and his failed hair drug test should not have been admitted as evidence in the instant appeal. We disagree.

The majority argues that prior to admitting this evidence into the record, the hearing officer should have required the Boston Police Department to call witnesses to testify about what actual levels of cocaine were detected by the test, what the meaning of such test results were, or whether protocol was followed in performing the tests in question. For all practical purposes, this is an unattainable bar regarding admissibility of evidence as part of this particular proceeding. In effect, the Appellant who lacked civil service review of his drug test while at the Suffolk County Sheriff's Department, is being

afforded that very same protection here, four years after the suspension in question. While the Appointing Authority has the burden of showing reasonable justification for bypassing a candidate for employment, that burden can not reasonably be construed to include calling expert witnesses to corroborate the validity of a drug test that was administered in accordance with the collecting bargaining agreement of the Appellant's current employer.

The Appellant did not submit any evidence to this Commission to show that he contested the results of the drug test at the time. Rather, he now speculates before the Commission that he "may" have tested positive as a result of taking "No-Doz" and "Red Bull," a thirst-quenching beverage. This, remarkably, is the unrefuted testimony upon which the Majority relies for its conclusion that the Appellant has never used cocaine.

Finally, the minority addresses the following procedural issues raised in the majority opinion: (1) the role of the state's Human Resources Division (HRD) in hearings before the Civil Service Commission; and (2) the requirements and impacts of Section 9 of the Personnel Administration Rules (PAR.09).

First, the majority upbraids HRD for its failure to appear at the full hearing to "defend its actions" thereby implying some form of neglect of its duty and some potential defect in the hearing process. Nothing could be further from the truth. The practice of the Commission is for counsel for HRD to appear and participate at the *pre-hearing* portion of the (bypass) appeals process, and, absent a request from the Commission, not to appear at the full hearing. In fact, the administrative record confirms that HRD was represented at the pre-hearing conference conducted and submitted follow-up correspondence to the Commission on June 25, 2007 confirming that HRD would not be in attendance at the

full hearing. (*See* Notice of Appearance by HRD Attorney Martha O'Connor and HRD Correspondence dated June 25, 2007.)

Second, the majority's conclusion incorrectly gives the impression that by approving the requested "PAR.09 removal" requested by the Boston Police Commissioner, HRD was forever prohibiting the Appellant's name from appearing on a future eligibility list. This is not the case. A PAR.09 removal only applies to the eligibility list in place as a result of the most recent civil service exam. The Appellant's PAR.09 removal was tied to the eligibility list created from the 2005 civil service exam and would not have prevented him from taking the 2007 civil service exam and being placed on the next eligibility list.

Finally, the majority conclusion that the testimony of long-time Boston Police Department employee Ed Callahan, coupled with HRD's "perfunctory" role in this bypass appeal, raises a "specter of pretextual or unlawful behavior" is misplaced at the very least and unfortunate at best. We have already addressed the role HRD played in this appeal above. As his testimony shows, Mr. Callahan served as the HR Director for the Boston Police Department for 19 years prior to assuming his current position and he has regularly appeared before the Commission offering credible testimony referenced in dozens of prior Commission decision. The majority has unfairly parsed his testimony to fulfill their so-called foundation for "pretextual and unlawful behavior." We do not see how his recorded testimony before the Commission could lead to this conclusion and we strongly disagree with this estimation of Mr. Callahan's conduct.

For all of the above reasons, the minority respectfully dissents.

For the minority.

_____

Christopher C. Bowman, Chairman

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:
Frank D. Camera, Esq. (for Appellant)
Sheila B. Gallagher, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)