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Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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SHAWN ROBERTS,
Appellant
v.
BOSTON POLICE DEPARTMENT,
Respondent

CASE NO: G1-06-321

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Shawn Roberts, seeks review, pursuant to G.L.c.31, §2(b), of the decision by the Personnel Administrator of the Massachusetts Human Resources Division (HRD) approving a request by the Respondent, Boston Police Department (BPD), as Appointing Authority, to bypass the Appellant as psychologically unfit for original appointment to the position of Boston police officer. A full hearing was held by the Commission on June 23, 2008 and July 8, 2008. BPD called one expert witness. The Appellant testified on his own behalf and called two expert witnesses. Twenty-three (23) exhibits were received in evidence (Exhibits 22 and 23 *de bene*). A document entitled "Additional Stipulated Facts" was received on July 10, 2008 and marked Exhibit 24. The hearing was recorded on five audiocassettes.

FINDINGS OF FACT

Giving due weight to the Exhibits, the testimony of Julia M. Reade, MD, James C. Beck, MD, PhD, Mark Schaefer, PhD, and the Appellant, Shawn Roberts, and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

Appellant's Background

1. Mr. Roberts is a native and life-time, unmarried resident of Boston, Massachusetts who was 26 years of age in November 2006 at the time of the by-pass that is the subject of this appeal. (*Testimony of Roberts; Exhibits 2 & 11*)
2. Mr. Robert's parents divorced when he was sixteen. He said the divorce left him "confused and sad" but "did not change his life." He since talked things out with his mother and continues to see his father once or twice a week, including at the local community center where his father is activity director. He lives at home, currently with his mother, in West Roxbury, primarily for financial reasons. He pays $200/month rent and some utilities. (*Testimony of Roberts; Exhibits 2, 16*)
3. Mr. Roberts received a high school diploma from Boston Latin Academy High School in 1998, where he was an average student (B's and C's), participated in sports and held part-time jobs at a supermarket and as a Boston BYCC supervisor in the summers. (*Testimony of Roberts; Exhibit 2*)
4. From high school, Mr. Roberts attended St. Anselm's College in Manchester NH. He spent excessive time "partying" and neglected his class work which resulted in his involuntary departure after the fall semester. Hearsay evidence of undergraduate drinking at St. Anselm's was introduced, but that evidence is insufficient to persuade

me that Mr. Roberts drank heavily or otherwise abused alcohol at St. Anselm's or at any other time. The preponderance of the evidence is to the contrary. (*Testimony of Roberts, Reade, Beck, Schaeffer; Exhibits 2, 10, 16, 18*)

5. Mr. Roberts resumed his college education in September 1999 at Mass Bay Community College where he attended classes until December 2005 at his own personal expense. He believes he is one course shy of his associate's degree – a statistics class – but he is not currently pursuing the completion of his degree due, in part, to his work schedule. Mr. Roberts also continues to pay down his education loans incurred at St. Anselm's. (*Testimony of Roberts, Beck*)
6. From 2001 to June 2004, Mr. Roberts worked two jobs as a bartender at Buck Mulligan's in West Roxbury and at Doyle's Café in Jamaica Plan, where he had responsibility for cash transactions, for the safety of patrons, and had to be vigilant not to over-serve alcoholic beverages to customers. Since 1999, he also worked for Aramak Vending as a concession salesman at Fenway Park during the baseball season, where he also had responsibility for the "Cash Till", i.e., accounting for the cash transactions during his shift. (*Testimony of Roberts; Exhibits 2 & 3*)
7. In June 2004, Mr. Roberts resigned his employment at Doyle's and Buck Mulligan's to accept appointment as a Boston Police Cadet, a position he held for three years. (*Testimony of Roberts; Exhibits 2 & 3*)
8. The job of Boston Police Cadet is a civilian position in the BPD. Cadets are not sworn personnel, they do not carry a gun, nor do they have the power to arrest. Cadets serve in administrative functions within the BPD and receive $10/hour pay. The status of Boston Police Cadet is coveted by those who desire to become BPD officers

because, after two years of service, cadets earn "preference" in the hiring process for the position of Boston Police Officer. (*Testimony of Roberts; Exhibits 2, 3*)

9. During Mr. Roberts's first year as a Boston Police Cadet, he worked the front desk of the BPD's District B-3 (Mattapan) police station. Thereafter, he worked at the Juvenile Detention Center. Both duties brought Mr. Roberts into contact with stressful situations on a daily basis. (*Testimony of Roberts; Exhibits 2, 3*) [1]

10. Both of Mr. Roberts's BPD supervisors provide glowing reports of his work as a cadet. The District B-3 supervisor, BPD Lieutenant John McDonough, reports:

    - "Working the front desk of B-3 requires excellent mediation skills. Conflicts erupted daily due to domestic incidents, accident disputes and tow complaints. Cadet Roberts was able to handle all of these incidents and keep order of the situation."
    - "There is no civilian job in the Police Department more stressful than the front desk at B-3. We have had victims stagger into the lobby suffering from gunshot wounds and Cadet Roberts maintained his composure and professionalism."
    - "Based on my observations of Cadet Roberts over the last year, no improvement is necessary [for him to become a better police officer]. He will make an excellent police officer and I would gladly welcome him back to B-3 in that capacity."

    Mr. Roberts's supervisor at the Juvenile Detention Center, Lisa Bowes, states:

    - "Shawn . . . has good judgment and he uses it wisely."
    - "He [manages stressful situations with juveniles] in a calm manner."
    - "I don't think having the power over people will change him. He uses common sense & does not jump to force. He will try and work out an issue without violence. I feel Shawn will be an officer that the people and the department will be proud to have working for them."

(*Exhibit 2*)

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[1] In 2007, Mr. Roberts completed duty as a cadet. He was hired as a civilian at the BPD Juvenile Detention Center and is now a supervisor. (*Testimony of Roberts*) At the hearing, this post-bypass evidence was ruled outside the scope of review and is not considered by the Commission on the merits of this appeal. In an appropriate future case, however, the Commission might be persuaded to accept such evidence of subsequent events on the issues of credibility and/or relief. This Decision will address elsewhere whether the opinions of expert witnesses called by Appellant also should be excluded as post-bypass evidence.

11. Mr. Roberts's social life is centered on friendships he has made from grade school through college. (*Testimony of Roberts, Reade, Beck*) One friend, Neale Kelly Jr., vouches for Mr. Roberts sound judgment in the face of temptation and stress in a letter submitted to BPD in support of Mr. Roberts's application:

- "[Shawn] worked as a bartender, and when he saw that one patron had too much to drink, he not only took his keys, but also called him a cab and made sure he got into the cab safely."
- He found a purse in a mall parking lot. He used the cell phone in the purse to contact someone who knew the woman and left his phone number. When the woman contacted him, he drove over a few towns to return the purse to the woman."
- "Shawn, myself, and two other friends were in a serious car accident. We were all pretty shook up but Shawn made sure we were all alright and made sure we were able to get out of the car safely."

(*Exhibit 2*)

12. Myron B. Peterson, MD, PhD, is a physician who has known Mr. Roberts since infancy. Dr. Peterson wrote BPD of the following examples in his letter of reference on behalf of Mr. Roberts application for appointment as a Boston police officer:

- "A *most recent example* of Shawn using good judgment was the day his mother was informed of the sudden, tragic death of his grandmother. His mother's reaction to the telephone call was one of shock. Her ability to make judgments and decisions was completely impaired and Shawn was able to recognize these signs of extreme emotional trauma and take charge of the situation at hand for a number of days until his mother's mental status improved." (*emphasis added*)
- "Shawn does not smoke and never has. . . . [I]n a situation with . . . close friends (male and female), and was repeatedly pressed to smoke. He graciously declined . . . at risk of substantial personal embarrassment . . . [H]e displayed remarkable will power in the face of adversity without explanation. To me that is one definition of good character."
- "Shawn is of sound moral character. He has never used illegal drugs to my knowledge. In fact he has made a very conscientious choice to avoid situations that might put him at risk."
- "Shawn uses alcohol on a very limited basis. He occasionally has a drink socially."

(*Exhibit 2*)

13. Mr. Roberts had never been diagnosed with a mental disorder or sought treatment from a mental health care provider. His BPD background investigation confirmed that he has no criminal record, no history of any traffic violations, no history of substance abuse, and no history of outstanding or unusual debt. (*Testimony of Roberts; Exhibits 2, 3*)

Appellant's Application for Appointment as a Boston Police Officer

14. Mr. Roberts's name appeared on HRD Certification No. 260616, dated June 20, 2006, issued in response to BPD's requisition of a list for original appointment to the BPD of ten permanent full-time police officers. (*Exhibit 1*)

15. On July 5, 2006, after he had duly submitted a Student Officer Application including personal and employment references (*Exhibits 2, 4*), and passed a pre-employment background investigation conducted by the BPD which confirmed many of the background facts stated above (*Exhibit 3*), Mr. Roberts was provided a conditional offer of employment in the position of Boston Police Officer (*Exhibit 5*), subject only to his passing a medical examination, including the psychological component thereof. (*Exhibits 2, 3, 4, 5 & 21*)

16. The BPD's July 5, 2006 conditional offer of employment was the second such employment offer made to Mr. Roberts. In 2005, he previously applied for and passed the initial screening for appointment as a Boston Police Officer and received an offer of employment at that time. That offer was subsequently revoked after the BPD determined that the results of a psychological screening in 2005 disqualified him. (*Testimony of Roberts, Reade, Exhibits 10, 22*)

17. Mr. Roberts's submitted to an new series of psychological screenings in August and September 2006, consisting of the administration of the same two written tests [the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and the Personality Assessment Inventory (PAI)] and clinical interviews by the same two psychiatrists [Marcia Scott, MD and Julia M. Reade, MD] who had examined him in 2005. (*Testimony of Roberts, Reade; Exhibits 6 through 10, 21 &, 22*)

18. Dr. Scott is a licensed psychiatrist in private practice with over 50 years experience. She has worked for the BPD for over eight years as its first level psychological screener. (*Exhibit 23*)

19. Dr. Reade is a licensed psychiatrist in private practice with over twenty years' experience and Board Certified in General Psychiatry and Forensic Psychiatry. Dr. Reade has served as the BPD second-level psychological screener for approximately 10 years. She has consulted for other police departments in Massachusetts, to include Cambridge, Lawrence, Cohasset and Hamilton. (*Testimony of Reade; Exhibit 9*)

20. On November 22, 2006, BPD informed Mr. Roberts that Dr. Reade and Dr. Scott "indicated that you cannot adequately perform the essential functions [and] . . . you will not be appointed as a Boston Police Officer at this time." (*Exhibit 11*)

21. BPD also submitted a psychological by-pass report to HRD on November 22, 2008 which stated the following reasons for by-passing Mr. Roberts:

> "Mr. Roberts' vulnerability to such extreme anxiety, with attendant distortion of his thinking and behavior, would interfere with his ability to function effectively and safely as a police officer. It is possible that with treatment aimed at ameliorating his anxiety and teaching him an expanded repertoire of coping skills, Mr. Roberts could successfully manage the duties of a police officer. Mr. Roberts is currently found not acceptable for the police department."

(*Exhibit 12*)

22. HRD approved the above reasons stated in BPD's letter to HRD as acceptable to by-pass Mr. Roberts on Certification No. 260616. (*Exhibit 20*) This appeal ensued.

Overview of BPD's Process for Police Officer Applicant Psychological Screening

23. Psychological screening of an applicant for original appointment as a Boston police officer is authorized by a BPD Psychological Screening Plan (PSP) that appears to have been verbally approved by HRD and in use since July 2004, and which appears to incorporate HRD's own regulations for "Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel", promulgated pursuant to the authority of Mass. G.L.c.31, §61A. (*Exhibits 13 through 15, 21*)[2]

24. HRD regulations establish two categories of psychiatric medical conditions:

- "Category A Medical Condition" is a "condition that would preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others." Category A "psychiatric" medical conditions include "disorders of behavior, anxiety disorders, disorders of thought, disorders of mood, disorders of personality".
- "Category B Medical Condition" is a "condition that, based on its severity or degree, may or may not preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others." Category B "psychiatric" medical conditions include "a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be

[2] The PSP states that BPD would ensure that "psychological screening is not conducted until this plan is approved in writing by the Personnel Administrator." (*Exhibit 13*) No party objects to the lack of written approval, however, and the Commission accepts the PSP as fully approved and applicable in the circumstances here.

evaluated based on that individual's history, current status, prognosis, and ability to respond to the stressors of the job" and "any other psychiatric condition that results in an individual not being able to perform as a police officer."

(Exhibit 14 at 10(5), 10(6)(o))

25. The PSP establishes a three-phase process "to identify candidates who may exhibit any evidence of a mental disorder as described in the [HRD regulations] and as recommended by the . . . International Association of Chiefs of Police . . . which would significantly interfere with the candidate's successful performance of the essential functions duties of the position of Boston Police Officer. Psychological screening will be administered to all recruits to ensure that each candidate is emotionally and psychologically fit to perform the essential functions of the position of Boston Police Officer." The three phases described in the PSP are:

Phase I – Group administration of the MMPI-2 and PAI.

Phase II – Thirty minute clinical interview and mental status examination of each candidate by a BPD psychiatrist covering any questions of possible psychological vulnerability raised by the background investigation, medical history, biographical data and test results, followed by a "roundtable review" with background investigators for any additional data pertinent to the overall evaluation. If the BPD psychiatrist deems the candidate suitable after completion of Phase II, the process is complete; if there are questions, a report is generated for a second opinion by another psychiatrist.

Phase III – Review of the Phase II interview process by an independent psychiatrist, followed by an in-depth clinical interview of any candidate whom the Phase II psychiatrist forwards for a second-opinion, and a final report and recommendation to the BPD, in which the Phase I psychiatrist is required to concur.

(*Exhibit 13*)

26. No specific instructions are given to the psychiatrists conducting the first and second level clinical interviews pursuant to the PSP with respect to what information and/or documents may be relied upon. Dr. Scott and Dr. Reade must abide by the PSP in

conjunction with their training and experience and utilize the standards set forth by the laws of the Commonwealth (G.L.c.31, §61A and regulations promulgated by HRD pursuant thereto) to determine the psychiatric fitness to perform the duties or manage the stresses of an armed police officer. (*Exhibit 21*)

27. Dr. Scott has referred approximately 200-300 applicants to Dr. Reade for a second level screening. Of those applicants, Dr. Reade found approximately 5% to 20% (i.e., about 10 to 60 of them) fit to be a Boston police officer and had found 80% to 95% unfit (i.e., from 160 to 285 of them). For the past three years, the statistics show:

	Referred for Second Interview	Recruits Qualified	Recruits Disqualified
Fall 2005	16	0	16
Spring 2006	38	5	33
Fall 2006	44	12	32
Summer 2007	50	6	44

(*Testimony of Reade; Exhibit 21*)

Phase I – Psychological Testing (MMPI-2 & PAI)

28. The MMPI-2 is a second-generation, proprietary written psychological test and widely-used research instrument. The MMPI-2 consists of 567 "items" or statements (e.g., "I am easily awakened by noise", "I don't blame people for trying to grab everything they can get in this world", "I have very few fears compared to my friends", "I like making decisions and assigning jobs to others") which the test subject is required to ascribe as being either "True" or "False" as applied to him/her. A subject's answers are recorded and tabulated according to approximately 50 scales and sub-scales in three categories ("validity", "clinical" and "content"), which produce a "profile" that can be compared statistically to the profiles of a sample population of job applicants and a more limited sample of law enforcement job applicants. (*Testimony of Reade, Schaeffer, Beck: Exhibit 6*)

29. The PAI is a proprietary written psychological test published, scored and interpreted by Psychological Assessment Resources, Inc. The PAI consists of 344 "items" as to which the test subject chooses: "True" "Mostly True" Mostly False" or "False". Similarly to the MMPI-2, PAI test answers are complied into approximately 30 scale profiles that can be compared statistically to the responses of a sample population of law enforcement applicants, as well as the sub-set of those applicants who go on to be hired and work in law enforcement. (*Testimony of Reade; Schaffer; Exhibit 7*)

30. The design, administration, scoring and interpretation of psychological tests such as the MMPI-2 and the PAI fall within the professional discipline of psychology, as opposed to medicine and psychiatry. While psychiatrists make use of such tests in their practices, all the expert witnesses who testified in this case agree that a qualified psychologist is the recommended professional with the necessary expertise to which a psychiatrist generally defers when it comes to the subject of psychological testing. The evidence also established that no conclusions about psychological fitness should be based solely on the scores of a psychological test. (*Testimony of Reade, Shaffer, Beck; Exhibits 6, 7 & 8*)

31. In this case, Dr. Reade and Dr. Scott did not personally consult a psychologist about the results of Mr. Roberts' MMPI-2 and PAI tests. They each used two written reports dated August 11, 2006: (1) a "Law Enforcement Interpretive Report" of the MMPI-2 test prepared by NCS Pearson, Inc. (a/k/a Pearson Assessments) and James N. Butcher, PhD (the MMPI-2 Report) and (2) a "PAI Law Enforcement, Corrections, and Public Safety Selection Report" published by Psychological Assessment Resources, Inc. and Michael D. Roberts, PhD (the PAI Report). Each report identifies

the test subject's age, gender, years of education (and, in the case of PAI, "ethnicity") and contains the numerical results, in both tabular and graphical form, which display the test subject's scores and comparable scores taken from the test baseline sample populations for the various scales (i.e. "VRIN" "TRIN", etc) (e.g., *Exhibit 6, p.2*). In general, scores that fall above the 65% mean are considered "elevated." The reports also include a computer-generated textual narrative "interpretation" of the numerical scores (e.g., *Exhibit 6, p.5*). The methodology used to prepare the computer-generated narrative is proprietary and was not a subject of inquiry at the hearing by either party. (*Testimony of Reade, Schaeffer; Exhibits 6, 7 & 13*)

32. BPD also produced a written report entitled "Public Safety Candidate Screening Report" under the name of Lucinda I. Doran, PhD and The Corporate Advisory Group, which appears to include a generic cover sheet to which is attached a one-page "Evaluation and Impressions" sheet specific to Mr. Roberts's MMPI-2 and PAI test results. The identity of Dr. Doran or her company was not disclosed. The evidence indicates that Dr. Reade did not see or use the Doran Report or that the BPD relied on the "Evaluations and Impressions" in the Doran Report in the process of disqualifying Mr. Roberts. (*Testimony of Reade; Exhibits 8, 10*) Accordingly, I give no weight to any conclusions about Mr. Roberts's MMPI-2 or PIA test results contained in the "Evaluations and Impressions" in the Doran Report that are not consistent with other credible evidence.

33. The only expert psychologist qualified to interpret Mr. Roberts' MMPI-2 and PAI test results who testified was Dr. Mark S. Schaefer, a licensed clinical and forensic psychologist with approximately 30 years experience, which includes approximately

500 to 750 psychological screenings for police departments in Watertown, Framingham, Lynn and Randolph. Dr. Schaeffer has administered nearly 1,000 MMPI tests. According to Dr. Schaeffer, the role of a psychological screener is to discern whether to "rule out" a person already conditionally offered employment if he finds that the person suffers from a psychological or emotional condition (or substance abuse issue) that would interfere with job performance. (*Testimony of Schaeffer; Exhibits 19*)

34. Dr. Schaeffer was engaged by Mr. Roberts's attorney to review the psychological screening documentation concerning her client's 2006 by-pass and to interview Mr. Roberts which he did on December 27, 2007. Dr. Schaeffer generated a report dated 04/01//08 (the Schaeffer Report). (*Testimony of Schaeffer: Exhibit 18*)

35. Dr. Schaeffer received a fee of $1,500 for his record review, interview of Mr. Roberts and preparation of the Schaeffer Report. Dr. Schaeffer testified that he expected to receive an additional fee for his hearing preparation and testimony time, but could not specify what hourly rate he would use, although he stated it would be below his usual and customary rate. I find nothing in the evidence concerning Dr. Schaeffer's financial arrangements for his services to infer that those arrangements are in any way out of the ordinary in a matter of this nature or that his opinions in the matter have been influenced in any way by his financial interest. To the contrary, I found Dr. Schaeffer to be an exceptionally competent professional in his field who impressed me as an honest, credible and articulate expert witness. (*Testimony of Schaeffer*)

36. The Schaeffer Report states:

> "Dr. Reade . . . cited test results as confirming [Mr. Roberts'] "problematic constriction and rigidity when he feels anxious.' . . . In point of fact. . . all of

> Mr. Roberts' clinical and content scales were solidly in the normal range. In fact the only scale scores which showed significant levels (65 or above) were mild elevations on the supplementary scales of Social Responsibility, Ego Strength, and Over-controlled Hostility. Both Social Responsibility and Ego Strength are *positive* indicators, with Social Responsibility reflecting a strong sense of moral justice and Ego Strength an indicator of someone who may feel confident and resourceful. Over-controlled Hostility can be a sign of someone who tends to hold in feelings of anger, and Mr. Roberts' score on Repression . . . also approached a significant level. While these latter two scores are worth noting, it should also be emphasized that problems with controlling his temper had not been cited as an issue with this candidate. Dr. Doran's analysis also cited 'evidence of depression and anxiety,' following on the theme of Dr. Scott and then amplified by Dr. Reade. In fact, the two MMPI-2 computerized interpretive reports on Mr. Roberts from August 2006 cited by Dr. Reade, Scott and Doran, do not use the word 'depression' or 'anxiety' on even one occasion. *There is simply no reference to either disorder as any type of concern on those test results.*"

(*Exhibit 18*) (*emphasis in original*)

37. The Schaeffer Report cites from the MMPI Report and PAI Report's computer-generated conclusions about Mr. Roberts' test results that are self-contradictory and/or which Dr. Reade and Dr. Scott had omitted to take note.

- "All of Mr. Roberts' clinical and content score profiles were noted to be 'well within the normal range'. . . . Individuals with this profile typically consider themselves able to manage their lives well and generally show resiliency in dealing with problems when they occur."
- Mr. Roberts . . . was also described as 'outgoing and sociable', showing 'little social anxiety' and probably 'effective in social situations.'
- [T]he report noted: "This normal range personality pattern does not suggest any likely employment problems based on psychological maladjustment. This individual would probably have little trouble adapting to a wide range of work environments."
- On the PAI . . . Mr. Roberts was rated at 'Low Risk' level of being rated "poorly suited" for the job by psychologists with expertise in law enforcement. The probability of his being rated "at risk" was 4%. . . ."

(*Exhibit 18,* quoting from *Exhibits 6 & 7*)

38. At the hearing, Dr. Schaeffer amplified these points and provided convincing evidence of the complexities in interpreting a psychological test which can lead an

uninformed or inexperienced evaluator to misconstrue the results or mistakenly take isolated or statistically insignificant responses by a subject out of context, especially if not fully and skillfully assessed together with all other data available about the subject from as many multiple sources as possible, something that a mostly anonymous computer analysis simply cannot do. (*Testimony of Schaeffer*)

39. Sometimes the explanation is as simple as the fact that the subject simply misread or misunderstood a question or inadvertently marked the wrong answer, as Mr. Roberts later explained, was the case with an answer he gave to one of the so-called "critical items" (concerning "problems" with drugs.).

40. In other cases, such as the suggestion Mr. Roberts is suppressing his faults, based on elevated levels of two of the "validity" scales – the K scale and the S scale – a qualified interpreter with personal knowledge of the subject (as opposed to a blind computer-generated interpreter) would know to discount those results because: (a) an elevated K scale is common for educated individuals such as Mr. Roberts,[3] (b) the S scale is new; its predictive value and the weight it deserves is relatively unknown, (c) such elevated scores are "par for the course" with public safety applicants, and (d) it is the L(Lie) scale, on which Mr. Roberts scored normally, that is specifically designed to detect someone attempting to show a (false) positive light by rejecting existence of shortcomings and unfavorable characteristics. (*Testimony of Schaeffer, Beck, Roberts; Exhibits 6 & 7*)

[3] The MMPI-2 Report shows some information about Mr. Roberts' educational level, but, absent evidence whether, if at all, the computer-generated narrative factors those data down to the level of statistically valid interpretation of individual scales, such as the K scale, the Commission will not infer that it does so.

41. Similarly, while Mr. Roberts's Do scale and Re scale were "mildly" elevated (at the 70% mean), Dr. Schaeffer opined that no significance should be given to the slight elevation of those two scales on any of the issues concerning Mr. Roberts – depression, anxiety and limited coping skills -- when all the relevant scales designed to detect those specific conditions are all "solidly" in the normal range (e.g., A[anxiety], D[depression], Hy[hysteria], Sc[schizophrenia], SI[social introversion] scales in the MMPI and the comparable ANX, ARD, SCZ, BOR and ANT scales in the PAI). (*Testimony of Schaeffer; Exhibits 6 & 7*)

42. Based on credible and uncontroverted testimony from Dr. Schaeffer and corroborating testimony from Dr. Beck and Mr. Roberts, I accept Dr. Schaeffer's expert opinion that Mr. Roberts' test results showed a "pretty healthy. . . public safety applicant" and find, on the preponderance of the evidence, that there is nothing contained in either of the computer-generated interpretative reports provided to Dr. Scott and Dr. Reade upon which a qualified professional could reasonably rely as probative evidence that Mr. Roberts suffered from depression, extreme anxiety or that his psychological condition was anything but "solidly in the normal range". I also find that the computer-generated interpretation of these tests deserves little, if any weight at all, compared to the interpretation of a qualified psychologist such as Dr. Schaeffer who personally reviewed the scores and interviewed the test subject in depth, including questions probing the MMPI-2 and PAI test results, which Dr. Reade did not do. (*Testimony of Reade, Schaeffer, Beck, Roberts; Exhibits 6 & 7*)

Phase II – Dr. Scott's First Level Screening

43. Dr. Scott did not testify. I draw no adverse inference from this fact alone as no subpoena was requested and Dr. Scott's availability to testify is unknown.

44. Dr. Scott's Curriculum Vitae and the notes of her interview were proffered by BPD and accepted, de bene, over objection. The Appellant presses this objection in his post-hearing Proposed Decision. As far as the CV is concerned, I find no reason to infer that Dr. Scott's CV is inaccurate or that, even if inaccurate, such discrepancies would be material to her 50+ years of experience. Accordingly the objection to the CV is overruled and the CV is accepted as a full exhibit in evidence. (*Exhibit 23*)

45. The relevance of Dr. Scott's notes (*Exhibit 22*) are a closer question. BPD did not rely on Dr. Scott in by-passing Mr. Roberts. Dr. Scott's notes certainly would be relevant were there an issue as to whether BPD followed proper procedure under the PSP and applicable law and regulations, but no such issue was presented in this case. Although Dr. Reade quotes Dr. Scott's 2005 evaluation, and did have access to Dr. Scott's prior first level evaluations, I note that Dr. Reade did not adopt many of the conclusions and hypotheses of Dr. Scott's 2006 evaluation of Mr. Roberts. To the extent, however, that Dr. Reade's own second level opinion does rely upon or is based on Dr. Scott's notes, the notes would seem relevant to the source of support for Dr. Reade's opinions, as to which full opportunity for cross-examination was taken.

46. I also find, however, that Dr. Scott's notes do reflect a certain pre-disposed animosity toward Mr. Roberts. For example, her Mental Status Exam lists him as a "depressed appearing" man; she sarcastically notes he "curtly" told her "I am still a cadet"; she cites him for "untruthfulness" after he responded that he had not had a migraine

"since he was 15", pulling out his BPD cadet file and reading to him that he took a sick day for migraine in May 2005 (the only sick day he has taken in three years as a BPD cadet); the latter interchange also found its way into her mental status exam: "Symptoms mental/somatic: Migraine". I find it suspect that Dr. Scott could zero in on Mr. Roberts' attendance record in a somewhat inquisitional interview style, yet otherwise gloss over the rest of his employment history and references in her interview and evaluation. I also find that Dr. Scott's notations about the MMPI-2 and PAI results appear similarly selective and wholly unreliable. Finally, I find Dr. Scott's statement to Mr. Roberts at the end of her interview that "a second opinion with the same psychiatrist was routine" after being bypassed to infer a pre-disposition to disqualify him and send him to Dr. Reade for another second level review. Accordingly, while Dr. Scott's notes are accepted in evidence, except for facts that are supported by other credible evidence, I do not give her observations or conclusions any weight. (*Testimony of Reade, Schaeffer, Beck, Roberts; Exhibit 23*)

Phase III – Dr. Reade's Second Level Review

47. Dr. Julia M. Reade has conducted a total of four second-level interviews of Mr. Roberts: the September 5, 2006 interview incident to the bypass on appeal, once before in October 2005, and two times since the 2006 bypass. (*Testimony of Reade; Exhibit 10*)

48. Dr. Reade initially testified that she could not recall precisely whether her recollection of Mr. Roberts was based on all of her prior interviews, but, after colloquy, she was directed to focus her testimony solely on what she knew as of the time of the 2006 bypass. I find that she has hewed to that instruction and accept her

testimony as limited to her evaluation of Mr. Roberts' mental status as of November 5, 2006, the date of her report. (*Testimony of Reade; Exhibit 10*)

49. Dr. Reade presented a professional demeanor that should be expected of a person of her considerable experience. She methodically described her understanding of the important reasons for psychological screening of potential police officers to be confident that they can handle a job that requires sound judgment and honesty in exercising the discretionary authority they would have, the ability to manage both stress and danger as well as boredom, the ability to work within a hierarchical, military-style structure, which requires autonomy and the ability to work with others, and to adjust to difficult circumstances. (*Testimony of Reade*)

50. Dr. Reade outlined the standard procedures for psychological screening of BPD applicants, including her protocol for conducting the "second level" interview. Prior to interviews, she typically reviews the candidate's biographical sheet (Exhibit 4), the BPD background investigation report (*Exhibit 3*), the MMPI-2 and PIA test reports (*Exhibits 6 & 7*), Dr. Scott's report (*Exhibit 23*) and occasionally other data (such as the prior 2005 evaluation records in the case of Mr. Roberts, not in evidence). Unlike Dr. Scott, she does not typically review the candidate's full application or references (*Exhibit 2*). The goal of the interview is to be "objective" and put the applicant "at ease". The interview is typically one hour. She employs a "semi-structured" agenda focused on "domains" of life experience, problem solving skills, interest in police work, communication, interpersonal relationships and community. She concentrates on "red flags", i.e., areas of concern, raised during her record review. She looks to

distinguish a "bump in the road" (which is not disqualifying) from an "enduring pattern" that makes a candidate unfit to serve as a police officer. (*Reade Testimony*)

51. Dr. Reade sometimes evaluates candidates multiple times, as she did with Mr. Roberts. Although not stated explicitly, I infer that Dr. Reade and Dr. Scott perform substantially all, if not all, BPD psychological screening interviews. The number of second chance candidates whom Dr. Reade found fit for hire is not known, but Dr. Reade testified that there were some. (*Reade Testimony*)

52. Dr, Reade began her 2006 written evaluation of Mr. Roberts with a summary of her conclusions from her 2005 evaluation which led her to find him unfit, and referenced the "red flags" she saw in the 2006 MMPI-2 and PAI test scores. Mr. Roberts arrived for his interview "on time", "neatly dressed in a suit and tie" and "well groomed". She noted he appeared "very anxious" and "looked grim and unhappy", "spoke rapidly, in an intense fashion", "answered questions with short, clipped sentences", "his thinking was notably concrete" and his "affect was constricted". She told him that, despite his prior bypass, her evaluation was not a "done deal". As the interview progressed, she noted he "appeared slightly more relaxed, and gave longer, more revealing answers" than in his 2005 interview. Dr. Reade testified that Mr. Roberts was "cooperative and polite". (*Testimony of Reade; Exhibit 10*)

53. Dr. Reade's one hour interview addressed (a) the notion Mr. Roberts is "depressed", which he understood was the rationale for disqualifying him and which he "forcefully rejected"; he was "shocked and confused" by his prior bypass, listing ways he felt Dr. Reade's 2005 evaluation mischaracterized him; (b) his progress toward an Associate Degree ["in statistics"] and a B.A. in criminal justice; (c) his current work as a BPD

cadet; he noted "proudly" that he had done well on the front desk of the Mattapan station, which he characterized as "the toughest civilian job in the department"; (d) his "active social life" centered around playing sports with friends; (e) his parent's divorce and possible consequences for his view of long term relationships, including his current girl friend whom he had been dating for two months; (f) his difficulty in college, which he related to "excessive partying", by which he meant "staying out late", not drinking; (g) absence of any alcohol and substance abuse; (h) his long-time desire to become a Boston Police officer and work in the community; (i) his poor prior interview performances that he attributed to being "frustrated", "stubborn" and "extremely nervous"; and (j) his strategies for managing anxiety by "thinking positively and deep breathing". (*Reade Testimony; Exhibit 10*)

54. Prior to stating her ultimate conclusions, Dr Reade's finds:

> "Mr. Roberts presented himself in a far more forthright and thoughtful fashion in his interview with me than he had a year ago. He is clearly a hard-working, focused man, who appears to have a sincere interest in and understanding of police work. I do not think that Mr. Roberts meets criteria for a depressive disorder currently, but his level of anxiety in this interview as well as the prior interview with me are of concern. When under the press of his severe anxiety, Mr. Roberts appears rigid, evasive and depressed. When he is able to relax more, it is clear that he can be more flexible and thoughtful. Although Mr. Roberts could superficially acknowledge his anxiety, he does not, in my opinion, understand the severity of his symptoms or the degree to which it distorts his thinking and interpersonal relatedness. (The psychological testing also supports the clinical observations about Mr. Roberts' problematic constriction and rigidity when he feels anxious.)"

(*Exhibit 10*)

55. Dr. Reade's ultimate finding that Mr. Roberts is unsuitable to serve as a Boston Police officer reduces to three conclusions: (a) he is developmentally "stuck" - extreme rigidity and defensiveness leads him to avoid new experiences; (b) he is subject to "overload" - when he does venture out into unfamiliar circumstances his

extreme anxiety kicks in with resulting distortion of his thinking and behavior; and (c) he is a "one trick pony" – he demonstrated a "legitimate way to manage his feelings", but his coping skills were too limited and insufficient "to be up to the task." (*Testimony of Reade; Exhibit 10*)

56. Dr. Reade stressed the following external data that she used to support her opinion: (a) criticism of a BPD cadet supervisor that he could be more "assertive", which she found particularly significant, since she very seldom sees any criticism by a cadet supervisor; (b) lack of any long term romantic relationships; (c) his work history that showed affinity for low-challenging, repetitive, predicable, structured jobs, including bartending, working at Fenway Park and the front desk as a BPD cadet; (d) his "overreaction" to the stress of being away from home for the first time that forced him to leave college and continue to "make little progress" toward his degree even six years later; (e) socializing with the same group of "life-long" friends; and (f) inexplicably still living at home with his mother. (*Testimony of Reade; Exhibit 10*)

57. Dr. Reade testified that the critical comment by Mr. Roberts' BPD cadet supervisor was an especially "striking piece of data" that she extensively discussed with Mr. Roberts at the interview. However, Dr. Reade's report contains no mention of the subject. No direct evidence of such a critique appears in Mr. Roberts' BPD record, the supervisor's name or source of the hearsay information was not identified, and I find the preponderance of the evidence fails to establish that any of Mr. Roberts' cadet supervisors made that comment. (*Testimony of Scott, Reade, Roberts; Exhibit 2*)

58. Similarly, Dr. Reade testified that she learned that Mr. Roberts expressed a lack of interest in employment with the NYPD because it was "too far away", which gave

additional confirmation of her opinion of Mr. Roberts' is a person who clings close to home. I cannot find any evidence in the record, however, that Mr. Roberts made such a statement to anyone. (*Testimony of Reade, Roberts; Exhibits 16, 18*)

59. As to work history, Dr. Reade testified she knew Mr. Roberts "did a good job" as a bartender "managing conflicts" and "challenges", which included having to "cut people off" and "keeping people from getting into fights". She saw these jobs primarily as negative, not positive indicators, however, because "the two bars where he worked were part of an extension of Mr. Roberts' community so the kind of people coming into the bar were the same kind of people that he grew up with", thus, reinforcing her opinion of Mr. Roberts as a person who avoided unfamiliar experiences. (*Testimony of Reade*)[4]

60. The Appellant called Dr. James Beck, MD, PhD, a licensed clinical, forensic and teaching psychiatrist and psychologist, with more than 40 years experience, who is Board Certified in Psychiatry and Forensic Psychiatry. Dr. Beck currently holds an academic appointment as Professor of Psychiatry at Harvard Medical School as well as appointments to the Department of Psychiatry at Beth Israel Deaconess Hospital and Massachusetts General Hospital. His prior experience includes consulting to the Massachusetts Division of Personnel Administration [now HRD] from 1975 through 1983 (at which time he contributed to prior versions of HRD regulations regarding psychiatric evaluation of public safety personnel), consulting to the Cambridge Police

[4] Dr. Reade offered no testimony to warrant a finding that she had any personal knowledge of the nature of or clientele served by the establishments who employed Mr. Roberts and I conclude that her testimony in this regard is mere speculation. The Commission could take administrative notice that one establishment, Doyle's Café, is located in the heart of Jamaica Plain (not West Roxbury where Mr. Roberts resides) and that it claims a city-wide, if not national, recognition as a favorite of many local Boston and Massachusetts politicians as well as other celebrities from Clint Eastwood to the late Tim Russert. See www.doyles-cafe.com

Department, as well as performing fitness-for-duty examinations for approximately a dozen Massachusetts cities and towns, including Cambridge, Waltham and Watertown, as well as applicant. He has also performed a few pre-screenings of applicants (two or three in the past year and about six such evaluations total). (*Testimony of Beck; Exhibit 17*)

61. Dr. Beck was engaged by Appellant's attorney to evaluate Mr. Roberts's "psychological health and in particular his fitness to be a Boston police officer." Dr. Beck's customary hourly rate as a forensic psychiatrist is $450/hour. In this case, he charged a flat fee of $1,500 for his evaluation and a reduced hourly rate (from $225 to $300 per hour) for the time spent preparing to testify and appear at this hearing. I find nothing inappropriate about his financial arrangements and I do not find Dr. Beck's testimony colored because of his financial interest. Although loquacious and ebullient at times, I find Dr. Beck's expert opinions credible and reliable on matters of general psychiatric methodology as well as his specific critique of the clinical and analytic methods of Dr. Reade in this case. (*Testimony of Beck*)

62. Dr. Beck reviewed Mr. Roberts' MMPI-2 Report and the PIA Report (Exhibits 6 & 7), the BPD first and second level 2006 screening reports of Dr. Reade and Dr. Scott (Exhibits 10 & 23), and Mr. Roberts' BPD recruit application (Exhibit 2). He interviewed Mr. Roberts on November 20, 2007 for an hour.

63. Dr. Beck's evaluation of Mr. Roberts occurred more than a year after Dr. Reade's interview. That fact, alone, is not persuasive reason to discount his opinions. Dr. Beck's testimony is accepted solely for what it may be worth as relevant to whether Dr. Reade's work is based on scientifically sound methods and reasonably supported

by evidence. Nearly all Dr. Beck's analysis of Dr. Reade's work is derived from the same data that was used by, or available to Dr. Reade. While Dr. Beck did make a few observations about Mr. Roberts that could not have been known at the time of Dr. Reade's evaluation, i.e., the book Mr. Roberts happened to be reading at the time and his subsequent hire as a civilian supervisor at the BPD Juvenile Detention Center, I find there is nothing to warrant an inference that those few additional facts materially affected Dr. Beck's conclusions on the relevant issues of the soundness of Dr. Reade's analysis and methods. (*Testimony of Reade, Beck, Exhibits 10, 16*)

64. Dr. Beck disputed Dr. Reade's opinions, finding Mr. Roberts qualified and fit to become a police officer. Dr. Beck opined that Dr. Reade's analytical methods and evaluation of the evidence were professionally flawed, and gave these examples:

- The BPD screeners "failed" Mr. Roberts as professionals, by giving undue weight to a few isolated remarks in computerized test reports and their own subjective "impressions" from clinical interviews, without accounting for the extensive positive evidence of a "normal functioning adult" contained in those same tests and in an exemplary life history as a "normal functioning adult".
- The screeners made clinically-inappropriate personal "value judgments" about Mr. Roberts' lifestyle and personality traits.
- The screeners' finding that Mr. Roberts has sought low-stress, predictable jobs misunderstood (or overlooked) the documented and obvious complexity, stress and quick-thinking required in all the jobs Mr. Roberts has held.
- There is no evidence to support the claim that dysfunctional behavior is driving Mr. Roberts' currently deferred educational career path nor is there any connection to his prior failure in college for completely different reasons.

(*Testimony of Beck; Exhibit 16*).

65. Dr. Beck described the standard reference for diagnosis of psychiatric conditions as the "Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition" of the American Psychiatric Association (DSM-IV). The DSM-IV catalogues all mental disorders and defines the series of symptoms that psychiatrists have agreed must be

present to make a diagnosis of any particular disorder. All the experts who testified agreed that Mr. Roberts does not fit the diagnosis of any mental disorder as defined in the DSM-IV. (*Testimony of Reade, Schaeffer, Beck*)

66. According to Dr. Beck "chronic depression" strictly is not a diagnosis or mental disorder found in the DSM-IV. Sometimes episodic "depression" can be an appropriate response to a traumatic event. Dr. Beck stated that, following the generally accepted diagnostic framework used in the DSM-IV, in order to be "chronically" depressed, he would need to find that the subject had a history of significant dysfunction for a sustained period of time, evidenced by a series of specific symptoms, lack of sleep, poor appetite, concentration, suicidal ideation, etc. Similarly, "dysthymia" is a form of depression that requires evidence of symptoms of dysfunctional behavior "some or all of the day every day for two years". These diagnoses cannot be determined by how a subject appears in a 30 minute or one hour interview. (*Beck Testimony*)

67. According to Dr. Beck, a Category B "psychiatric condition" as described in the HRD regulations, does not necessarily imply a disorder within the DSM-IV, as a Category A condition does. He defined a Category B psychiatric condition to means an aspect of behavior which has endured over time and has shown up for an individual in a range of forums. (*Beck Testimony*)

Mr. Roberts' Testimony

64. I made the following observations about Mr. Roberts' during the two days of hearings. His was reserved but attentive while listening to other witnesses. He appears physically fit and carries his large frame erect, with clean-shaven head and

face, accented by bright eyes. This physical appearance, on an initial, superficial impression, might seem "tense" or "rigid", but I perceived no unusual behavior or nervousness during the two days Mr. Roberts' appeared at the Commission. (*Testimony of Roberts*)

65. Overall, Mr. Roberts' testimonial performance was good. He gave short, but very responsive answers. I was impressed with his clear memory, his ability to stand up to some tough cross-examination and his resistance to being easily led without being argumentative. He was equally forthright in describing his accomplishments as well as in acknowledging his shortcomings. I found his testimony honest and sincere. (*Testimony of Roberts*)

66. Mr. Roberts left no doubt that his priority in life is to become a Boston Police officer, a vision that he has maintained for many years. He explained convincingly how many of his life choices flow from that desire, including his living at home to hold down expenses while he worked as a BPD cadet and paid down his debts. (*Testimony of Roberts*)

67. I find that Mr. Roberts' genuinely believes he is not "depressed" and his BPD psych by-pass was a "shock", after which he did seek other opinions in case he "might not be seeing it". He saw a psychiatrist in Boston whom Mr. Roberts said found "nothing wrong" with him. The details of this evaluation are sketchy, but I do credit, as relevant to Mr. Roberts' state of mind in the 2006 by-pass cycle, the testimony that he did make the effort to see this psychiatrist and did receive an opinion that disagreed with the BPD screeners' diagnoses. (*Testimony of Roberts*)

CONCLUSION

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

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

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

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

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

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

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a by-pass decision, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert's opinion is based are grounded on an adequate foundation, either by establishing "general acceptance in the scientific community" or by showing that the evidence is "reliable or valid" through an alternative means, e.g., Canavan's Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) *citing* Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by "education, training, experience and familiarity" with special knowledge bearing on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.23d 386, 388 (1990).[5]

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

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

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

Mass.App.Ct. 157, 547 N.E.2d 935, 939 (1989) (Kass.J., dissenting), rev.den., 406 Mass. 1104, 550 N.E.2d 396 (1990). See also Board of Assessors v. Odgen Suffolk Downs, 398 Mass. 604, 606-607, 499 N.E.2d 1200, 1202-1203 (1986) (expert testimony stricken which blatantly overlooked critical facts)

Applying these applicable standards in the circumstances of the present case, the Commission concludes that the BPD's bypass of Mr. Roberts for appointment to the position of Boston police officer did not comport with basic merit principles resulting in harm to his employment status through no fault of his own.

The rules under which the BPD may justify a bypass for medical reasons, including psychiatric conditions, are spelled out by HRD's regulations for "Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel" (the HRD Regulations) and incorporated into the BPD's Psychological Screening Plan (PSP). (*Exhibits 13 & 14*) The standards for a "Category A" medical condition, which is an automatic disqualifying condition, requires proof that a police officer applicant carries a psychiatric diagnosis of certain specific psychiatric "disorders", as defined by the DSM-IV. [HRD Regulations, §10(6(o)(1)]. A "Category B" psychiatric medical condition includes (a) any "history" of a "psychiatric condition, behavior disorder, or substance abuse problem not covered by Category A", which "may or may not" be disqualifying depending on its "severity and degree", based on that individual's "current status, prognosis, and ability to respond to the stressors of the job" [HRD Regulations, §10(6)(o)(2)(a)] and (b) "any other psychiatric condition that results in an individual not being able to perform as a police officer." [HRD Regulations, §10(6)(o)(2)(b)].

The evidence here establishes that Mr. Roberts does not carry, and has never been diagnosed with any "Category A" or "Category B" psychiatric or behavior disorder contained within the DSM-IV, has no history of any such disorders, and has no history of substance abuse problems within the meaning of the HRD Regulations. cf. Adesso v. City of New Bedford, 20 MCSR 426 (2007) (multiple hospitalizations and treatment for substance abuse and schizophrenia); Melchionno v. Sommerville Police Dep't, 20 MCSR 443 (2007) (diagnosis of Schizotypal Personality Disorder and repeated, bizarre job-related problems); Hart v. Boston Police Dep't, 19 MCSR 397 (2006) (history of substance abuse and prior treatment); Lerro v. Boston Police Dep't, 19 MCSR 402 (history of Obsessive Compulsive Disorder and treatment for Acute Stress Disorder); Mitchell v. Marblehead Fire Dep't, 19 MCSR 23 (history of bipolar disorder and substance abuse).

Thus, the justification for bypassing Mr. Roberts turns on whether the evidence supports a conclusion that he fits one of the "Category B" definitions of a "psychiatric condition" of sufficient severity and degree to disqualify him to serve as a police officer.

A "psychiatric condition" would seem to be virtually synonymous with a mental or emotional "disorder". See, e.g., MERRIAM-WEBSTER'S MEDICAL DICTIONARY (2002) ("psychiatric" means "dealing with cases of mental disorders"); AMERICAN HERITAGE DICTIONARY (2006) ("psychiatry" means "the branch of medicine that deals with the diagnosis, treatment and prevention of mental and emotional disorders"). The experts who testified, however, all seem to use the term more broadly to encompass behavior that does not necessarily qualify as a "disorder". Dr. Beck defined a Category B disqualifying "psychiatric condition" to mean evidence of "some aspect of a person's behavior or trait

that appears over a range of circumstances or in a variety of situations", either in the "historical past" [§10(6)(o)(2)(a)] and/or the "historical present" [§10(6)(o)(2)(b)]. This interpretation is substantially similar to Dr. Reade's distinction between "enduring traits" that she saw to be disqualifying and a "bump in the road" or a diagnosed mental disorder whose symptoms are "in remission" that she would not consider disqualifying. (*Testimony of Beck; Reade*)

The Commission accepts this premise. An applicant may be disqualified for having a Category B "psychiatric condition" so long as the applicant has a "psychiatric condition" which has manifested itself by a preponderance of scientifically reliable and credible proof of deficient mental health behavior, but not necessarily proof of a psychiatric "disorder" found within the DSM-IV. Should the occasion present itself in future cases, the Commission may consider further refinement of this definition, as well as further inquiry into the scientifically appropriate role of clinical interview impressions and standardized testing in the evaluation process, with a view to seeking greater clarity on these subjects that will preserve the balance necessary to respect the legitimate purposes of PSP screening while promoting requirements of the basis merit principle that eschews public employment decisions when they are arbitrary and capricious or incapable of fair and objective substantiation.

On the evidence presented here, the Commission is satisfied that the BPD clearly failed to carry its burden to justify bypassing Mr. Roberts because of a disqualifying Category B "psychiatric condition".

First, the first-level screening by Dr. Scott was improperly infected with a perfunctory, pre-disposition to disqualify Mr. Roberts. Even Dr. Reade discounted Dr.

Scott's most serious concerns about Mr. Roberts. Dr. Scott's analysis of the MMPI-2 and PIA test results were flawed. Her argumentative "gotcha" interview technique demonstrated an unacceptable lack of objectivity. While the ultimate decision to by-pass Mr. Roberts does not rest on Dr. Scott's conclusions, the fact remains that, had Mr. Roberts received a fair and objective first-level screening, more likely than not, he would not have needed to be passed on to Dr. Reade. The consequences that flow from a flawed first-level screening are exacerbated by the historical record that Dr. Reade very rarely gives a favorable report on BPD candidates who are sent to her for evaluation.

Second, at the second-level screening, Dr. Reade failed to establish a credible case for her conclusion that Mr. Roberts suffers from "extreme anxiety, with attendant distortion of his thinking and behavior" and that he "does not understand, in my opinion, the severity of his symptoms". Dr. Reade pointed to no convincing situational example that any of Mr. Roberts behavior – outside the interview itself – supported her conclusions, save for the single episode at St. Anselm's in 1998, and the preponderance of the evidence indicates Mr. Robert's difficulty in attending to his studies in 1998 was more likely than not, a "bump in the road" than an "enduring trait" (to use her terms). Similarly, Dr. Reade's "concern" about Mr. Roberts' current "level of anxiety" is based heavily upon her subjective observations of him during "this [2006] interview as well as the prior interview with me" and little in the way of objective real-world context.

Third, there are simply too many flaws in the analysis of the little "data" upon which Dr. Reade purported to rely. For example: (1) Dr. Reade's conclusions were based, in part, on a flawed interpretation of Mr. Roberts's MMPI-2 and PIA test results which, as noted above, actually show him to be a "solidly" normal candidate for police officer; (2)

Dr. Reade relied on a number of unsupported and speculative factual assumptions about Mr. Roberts' employment, which are demonstrably false (unsubstantiated criticism of performance as a cadet and his interest in a police job in NY, and speculation about his bartending jobs); (3) Dr. Reade gave virtually no weight to Mr. Roberts' extremely positive employment and personal references (indeed, she was not even provided with full documentation of his BPD application for review); (4) Dr. Reade's perception of Mr. Roberts' lifestyle choices (to live at home, cultivate old friendships and casual dating relationships, defer completion of his college studies and pursue supposedly "safe" and "structured" work), all purporting to indicate a dysfunctional mental health condition, were not supported by the evidence, were substantially refuted by the opinion testimony of others, and are not worthy of any substantial weight; (5) Dr. Reade's conclusion that a connection exists between Mr. Roberts behavior that lead to his flunking out of St. Anselm's College and his unfinished degree at Mass Bay Community College was refuted by the evidence and is not credible; (6) Dr. Reade's interview impressions of Mr. Roberts as an extremely anxious man who could not acknowledge or cope with his anxiety is refuted by the evidence, especially the evidence of his successful employment history and personal references, as well by as his performance at the hearing; (7) the credible evidence failed to establish any enduring patterns of behavior by Mr. Roberts in any situational setting that supported Dr. Reade's interview impressions that he "distorts his thinking and interpersonal relations" (and, in fact, the weight of the evidence demonstrates Mr. Roberts sound judgment in a variety of stressful workplace and personal experiences); and (8) Dr. Reade appeared to take unwarranted personal offense

at Mr. Roberts' "forceful" rejection of any suggestion that he was suffering from depression (on which he is supported by three mental health professionals).

The final issue to consider is the appropriate relief to be granted to the Appellant, who seeks reinstatement to his conditional offer of employment, asks to be deemed to have satisfied the psychological screening requirements for appointment, and seeks appointment to the next available slot in the Boston Police Academy. Alternatively, the Appellant proposes tailored relief, to exclude participation by either Dr. Scott or Dr. Reade in any future psychiatric screening of Mr. Roberts.

The Commission notes the high stakes nature of a police officer's job and the dangerous and stressful nature of the work, where split-second decisions can impact the safety of the officer as well as other public safety personnel and the public. The Commission also appreciates that pursuant to Chapter 31, Section 61 of the General Laws, a person appointed to a permanent police officer position must "actually perform the duties of such position on a full-time basis for a probationary period of twelve months before he shall be considered a full-time tenured employee in such position." The Appeals Court has noted:

> "With respect to police officers . . . the Legislature recognized the special need of a prolonged probationary period . . . . Courage, good judgment, and the ability to work under stress in the public interest and as part of an organization are qualities that are not quickly perceived. The policy of the statute is to ensure sufficient time for a careful determination whether they are present in sufficient degree."

City of Leominster v. International Bhd., Local 338, 33 Mass.App.Ct. 121, 127, 596 N.E.1032, 1035, rev.den., 413 Mass. 1106, 600 N.E.2d 1000 (1992). See also Kilmartin v. Lowell Police Dep't, 10 MCSR 89 (1997); Lucero v. City of Revere, 8 MCSR 200 (1995); Whalen v. City of Quincy, 7 MCSR 271 (1994).

The facts of this case leave little doubt that Mr. Roberts is a "solidly" normal candidate for the position of Boston Police Officer and the Commission is skeptical that any fair and objective psychiatric medical evaluation reasonably could come to the opposite conclusion. On balance, however, given the high-stakes nature of the position, this Commission will not dictate the future decision as to the fitness of any candidate selected for appointment as a police officer, although it appears the Commission has done so on at least one occasion in the past. See Funaro v. Chelmsford Fire Dep't , 7 MCSR 29 (1995). The extended probationary period required to test public safety officers for their "courage, good judgment and ability to work under stress" certainly provides an additional safety valve for weeding out unfit candidates, but it does not substitute for the value of a properly applied psychiatric medical screening as the first line of scrutiny (although it may speak to the appropriate degree of severity and certainty to which the psychiatric screener needs to apply before "ruling out" a candidate). Accordingly, the Commission will not order the future selection process truncated in this case.

The Appellant's requested alternative relief, however, does have merit. As this case illustrates, good reason exists to doubt that an applicant, such as Mr. Roberts, once by-passed for having a disqualifying "psychiatric condition", faces a level playing field when sent for a subsequent evaluation by the same screeners who found him unfit previously. This case is not the first time the Commission found such a process troubling under the merit principle of the Civil Service Law. See Cawley v. Boston Police Dep't, 19 MCSR 389 (2006), aff'd sub nom, Boston Police Dep't v. Cawley, Suffolk Superior Ct., Docket No. SUCV2006-5331 (2008); Massiello v. Town of Framingham, 15 MCSR 6 (2002); Gerakines v. Town of North Reading, 12 MCSR 30 (1999)

The Commission does not mean necessarily to impugn the overall integrity of the BPD screening process or its screeners, but it seems inescapable to conclude from the evidence that Mr. Roberts ought not be forced to run the same gauntlet that has twice tripped him up through no fault of his own. In fairness to both the screeners and Mr. Roberts, should further psychiatric medical evaluations of him be deemed necessary, it must be performed afresh by new screener(s). The Commission suggests that the BPD also might benefit from considering the feasibility of establishing a panel of screeners to mitigate the type of problem that arose in this, and other, similar appeals.

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 name of the Appellant, Shawn Roberts 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 BPD police officer. The Commission further directs that, if and when Shawn Roberts is selected for appointment and commences employment as a BPD police officer, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification 260616. Finally, the Commission directs that the BPD may elect to require Shawn Roberts to submit to an appropriate psychiatric medical screening in accordance with current BPD 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. In either case, such screening shall be performed, de novo, by qualified professional(s) other than Dr. Scott or Dr. Reade.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on September 25, 2008.

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:
Leah Barrault, Esq. (Appellant)
Tara Chisholm, Esq. (Appointing Authority)
John Marra, Esq (HRD)