

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

FRANCESCO D'AMATO,
Appellant

v.

CASE NO: G1-09-237

BOSTON POLICE DEPARTMENT,
Respondent

Appellant (Pro Se):

Francesco D'Amato

Attorney for the Respondent:

Sheila B. Gallagher, Esq.
Boston Police Dep't – Office of Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Paul M. Stein

DECISION

The Appellant, Francesco “Frank” D’Amato, duly appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31, §2(b), from a 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 Mr. D’Amato for original appointment to the position of Boston Police Officer, due to his failure to meet medical standards and for non-disclosure of medical records. A full hearing was held on November 10, 2009 and January 26, 2010, at the offices of the Commission. Thirty-four (34) exhibits were entered into evidence at the hearing.¹ BPD called four witnesses and Mr. D’Amato testified on his own behalf. The witnesses were not sequestered. The hearing was digitally recorded. Both parties subsequently submitted proposed decisions.

¹ During the hearing, Mr. D’Amato moved to impound his medical records which the BPD opposed. The motion was taken under advisement and was allowed, in part by Interim Decision dated April 8, 2010 as modified on Motion for Reconsideration on April 23, 2010. For the reasons explained in the Interim Decision, Exhs.16, 19, 19A, 20, 21, 22 & 28 are declared confidential personal & medical information which shall be maintained in a separate folder not subject to public disclosure except upon further order of the Commission or other lawful authority.

FINDINGS OF FACT

Based upon the Exhibits; testimony of the Appellant and four BPD personnel [Human Resources Director Robin Hunt; Assistant Director, Occupational Health Services Unit, Jennifer Dunford; Nurse Practitioner Zelma Greenstein and Dr. Kristian Arnold, MD]; and inferences reasonably drawn from that evidence as I find credible, I make the findings of fact set forth below.

1. Mr. D'Amato is a disabled United States Army veteran who was born in Italy (Italian is his native language) and resides in Boston, MA. In 2007, he took and passed the open competitive examination for the position of Boston Police Officer and his name was placed on the civil service eligible list for that position. (*Exhs 12, 16 & 32-ID; Testimony of Appellant*)

2. Mr. D'Amato's name appeared on Certification #271116, dated November 16, 2007, requested by the BPD. He signed the Certification as willing to accept and began the application process to become a BPD Police Officer. (*Exh.1, 32-ID; Testimony of Appellant*)

3. Mr. D'Amato successfully passed the BPD's initial screening process, which consisted of a full background check, including but not limited to, the applicant's criminal history, RMV driver history, military history, employment history, residency, and personal references. On March 13, 2008, the BPD extended him a conditional offer of employment, contingent upon his successful completion of the medical/psychological component of the hiring process. (*Testimony of Hunt*)

4. The medical/psychological evaluation process is conducted under the auspices of the BPD Occupational Health Services Unit (OHSU). Roberta Mullan is the OHSU Director and Jennifer Dunford is the Assistant Director, a position she has held for about three years (i.e., beginning in approximately 2007). (*Testimony of Hunt & Dunford*)

5. Ms. Dunford has responsibility to administer drug tests and to collect medical records from recruits as they go through the OHSU medical examination process. She explained that recruits are advised at the very outset of the application process to review the Medical Standards for Municipal Public Safety Personnel, which are available on-line, and to begin to assemble their medical records immediately. In particular, applicants are advised in writing:

If you have EVER had any condition, injury, treatment, hospitalization or surgery for any condition listed in the Medical Standards, you are advised to obtain ALL medical records pertaining to any and all related medical evaluations, examinations . . . or treatment You are advised to obtain those NOW! In case you receive a Conditional Offer of Employment. Once Conditional Offers are sent out, there may not be enough time in which to obtain any further documentation necessary for final medical review. Please obtain every record that you can *now* even if you think it is insignificant and let us decide what is significant in your case! Hospital records must be CERTIFIED RECORDS!!!

(Exh.9 (EMPHASIS in original); *Testimony of Dunford*)

6. On March 22, 2008, Mr. D'Amato met with Zelma Greenstein, the OHSU's Nurse Practitioner, who conducted his pre-employment physical examination at BPD Headquarters. NP Greenstein has been a nurse practitioner for 34 years, and had 22 years of service with the BPD. Prior to the examination, Mr. D'Amato provided her the required OHSU Personal Data Questionnaire, an OHSU Health History, and signed the Consent and Certification on the Medical Examination Form prescribed by HRD. NP Greenstein did not recall receiving any medical records from Mr. D'Amato at that time. (Exhs.5, 11, 12 & 33; *Testimony of Greenstein*)

7. The HRD Medical Examination form contains a privacy notice which authorizes disclosure of the medical information provided by the applicant and states, in bold print:

Knowingly providing false or incomplete answers may result in the rescission of a conditional offer or dismissal if discovered at a later time.

(Exh.5) (*emphasis* in original)

8. Ms. Hunt testified that the BPD takes the matter of truthfulness very seriously. If the BPD learns that a candidate exhibits questionable integrity and the inability to disclose and be

truthful, that is automatic grounds for bypass. (*Testimony of Hunt*)

9. On his Health History form, Mr. D’Amato answered “Yes” to whether he had ever had “Back injury”, “Low back pain”, “Pain in back”, “Shoulder, arm, hand pain”. He stated these conditions do “not presently impair my function or limit my range of motion” and “presently there isn’t any pain”. He acknowledged his 10% veteran’s physical disability. During his physical examination, he readily disclosed further details of these injuries when asked about them. As to the back injury, NP Greenstein’s examination notes state:

“In 1990 - In military, strained back says can never lift heavy objects again, avoid over head work. After 10 yrs. decided to apply for disability although able to work construction work during this time. . . .had MRI – showed “abnormality” but dx not clear. Advised it may get worse in time so accepted 10% Disability. . . .Says back not a problem, occ. backache, self tx [with] ice/heat, motion & time out of work. . .”

NP Goldstein’s examination notes also reported:

- Spinal mobility, alignment - Normal “flexion to floor [w/o] tenderness”
- Upper Extremities, hands – Normal - [Left] shoulder [with] FROM [full range of motion]
- Muscle strength, tone – Normal – “good”

His Laboratory and Diagnostic Tests disclosed a mild hearing and some abnormal chemistry test results. (*Exhs.10, 11 &13; Testimony of Appellant & Greenstein*)

10. NP Greenstein testified that her physical examination did not find any disqualifying issues at the time, but she also testified that she was responsible solely to conduct the physical examination and was not the final decision-maker. She also explained that an individual with a history such as Mr. D’Amato can present differently in an office setting and that the pain experienced by a person with degenerative disc disease can vary and may not be present all the time. She also stated that further review of Mr. D’Amato’s entire medical history was critical to assessing his ability to perform the duties of a police officer. She prepared a written request for further medical information regarding his back and shoulder injuries. The evidence is not

conclusive as to whether Mr. D'Amato received this request on the date of his physical examination or at a later date. (*Exhs. 14 & 14A; Testimony of Appellant & Greenstein*)

11. In accordance with BPD procedure, NP Greenstein forwarded the results of her physical examination, along with the laboratory reports, to Dr. L. Kristian Arnold, MD, with whom BPD has contracted to oversee worker's compensation injuries of BPD police officers as well as certifying the medical fitness of recruits applying to become BPD police officers. Dr. Arnold is a Board Certified physician in emergency and family medicine (but not orthopedic or occupational medicine or neurology). Dr. Arnold had ultimate responsibility for deciding whether Mr. D'Amato could proceed further and take the state administered Physical Abilities Test (PAT). A BPD recruit cannot take the PAT without Dr. Arnold's signature on the Medical Verification Section of the HRD Medical Examination Form, indicating that there are no disqualifications. (*Exhs. 4 & 31; Testimony of Greenstein & Arnold*)

12. On April 6, 2008, after his initial review of Mr. D'Amato's file, Dr. Arnold cleared the abnormalities in hearing loss and chemistry tests as not disqualifying Mr. D'Amato. He did have concern about the reported back and shoulder injuries, and wrote a written request for additional medical records concerning the history of those injuries. (*Exhs. 10 & 15; Testimony of Arnold*)

13. On or about April 10, 2008, Mr. D'Amato provided Ms. Dunham a large volume (approximately 1") of documents pertaining to his back and shoulder injuries, including copies of medical record of treatment at Massachusetts General Hospital, McGovern Physical Therapy Associates, Scott D. Martin, M.D., Spaulding Rehabilitation Hospital and the U.S. Department of Veterans Affairs (VA). These documents were turned over to Dr. Arnold for review. (*Exhs 18 thru 23; Testimony of Appellant, Dunford & Arnold*)

14. In reviewing the medical records provided by the VA, Dr. Arnold underscored certain

entries of concern, which included a clinical note in 2003: “Patient can have symptoms of back pain only intermittently, usually aggravated by strenuous activity (Raking leaves, carrying groceries, etc.)” and the VA’s disability determination in May 2007 which stated: “The veteran must avoid repetitive bending and lifting due to the onset of pain. The veteran concedes that, for the most part, he has satisfactory mobility and has just completed a three month course of physical therapy.” (*Exh18; Testimony of Arnold*)

15. Based on these concerns, Dr. Arnold requested further details about Mr. D’Amato’s back injury. Ms. Dunford relayed this request by letter to Mr. D’Amato which she requested he pick up personally on April 16, 2008. Her letter stated:

“We are requesting all clinical notes after 2003 regarding your back. The VA records you provided us with stated that in January 2007, you had just finished a 3-month course of physical therapy. The January 2007 record stated that you had restrictions but were okay to do deskwork.

“We are requesting that the VA do a current orthopedic evaluation to update their report and determine where you stand functionally. Enclosed please find copies of the Police Physical Ability Test Events and the Boston Police Academy Physical Components that you are to provide the VA with.

“The above must be submitted to us no later than 4/17/08 at 12pm.”

(*Exhs. 8, 24, 25, 30 & 31; Testimony of Dunford & Arnold*)

16. Upon receipt of this third request for medical documentation, Mr. D’Amato proceeded to the VA and secured a doctor’s appointment with Dr. Herman Lee, MD, a VA staff physician, for April 18, 2008.² He returned to the BPD approximately an hour and a half later with certain VA medical records from a 44 page electronic printout of documents that had been provided to him at the VA that day, which included the clinical notes requested by BPD and other materials. He requested an extension of time to submit the doctor’s report until after his appointment with Dr. Lee on April 18, 2008. (*Exhs. 24 & 26; Testimony of Appellant*)

² The VA records also indicate that Mr. D’Amato had made an appointment to see Dr. Lee on October 8, 2008, but no further evidence about that visit was provided. (*Exh.16*)

17. The additional VA records provided on April 16, 2008, included two entries over the past year, which Dr. Arnold noted and underscored:

- Progress Note - 1/13/2007 – “The veteran states that he is constantly aware of discomfort in his lower back that occasionally radiates down the anterolateral aspect of his lower left extremity. He also experiences occasional numbness in the early morning hours when he first begins to bear weight after getting out of bed. . . . He recently completed a three-month period of physical therapy at Spaulding Rehabilitation Hospital on the advice of his physician. The veteran presently has a 10% service connected disability for chronic low back sprain on the basis of ‘disc space narrowing L4-L5 and L5-S1’ His presence today is to seek increase in this current 10% rating. . . . He is unable to tolerate sitting for more than 10 minutes before he must get up and move to relieve the discomfort in his lower back. He is unable to pick up his small children because of his back discomfort. He has learned from experience to avoid repetitive bending or stooping. He states that . . . he has managed to preserve reasonable mobility but pain and difficulty in lifting items is his major problem. . . . his symptoms are quite consistent with repetitive episodes of low back discomfort brought on by heavy lifting, bending and stooping.”
- The veteran concedes that, for the most part he has satisfactory mobility but lacks the required strength demanded of him to perform heavy construction work as he would prefer and has resulted in a much less challenging position as a building inspector. He states that while he does have occasional left sciatica, the majority of his discomfort is centrally located in his lower back.
- Progress Note – 10/10/2007 – Patient self report of “Aching” and “Throbbing” Pain in lower back, with INTENSITY: Present “4”; “Worst Pain Gets: 10 [10=Worst Possible Pain] and “Best Pain Gets: 4” and “Activities affected by pain” include “sleep, appetite, physical activity, concentration and dressing”

(Exh.16; Testimony of Arnold) (emphasis by Dr. Arnold)

18. Dr. Arnold also noted that seven pages from the VA printout were missing (pp.16,19, 20, 31, 33, 39 & 40). Ms. Dunford called Mr. D’Amato, who appeared at BPD with missing page 20 (but apparently not all of the other missing pages) and requested to talk with Dr. Arnold. There was substantial dispute as to the tone and demeanor of Mr. D’Amato as well as the substance of the conversations with Dr. Arnold and Ms. Dunford during this visit. Eventually, Mr. D’Amato provided BPD with all of the missing pages from the April 16, 2008 printout. (Exhs. 16, 17, 26 & 28; Testimony of Appellant, Dunford & Arnold)

19. Page 20 (as well as pages 16, 19, 31, 33 & 39-40) contain progress notes concerning outpatient visits for complaints or concerns about Mr. D'Amato that are unrelated to his back condition (foot infection, smoking cessation and related psychological issues). Mr. D'Amato asserted that he omitted these pages because they were not pertinent to the back injury issues, and Dr. Arnold had led him to believe that he didn't need to provide BPD with such records. Dr. Arnold testified that he does tell recruits that they don't need to provide parts of the medical records that relate to conditions not in dispute, but does not recall doing so in Mr. D'Amato's case. (*Exhs. 17 & 28; Testimony of Appellant, Arnold & Dunford*)

20. In fact, the bottom of page 20 contains the beginning of the first paragraph of the narrative by VA physician John McConville, MD, which continues on pages 21 thru 23 that had been provided earlier, relating a January 13, 2007 progress note regarding Mr. D'Amato. That narrative states:

"Today, I performed a compensation and pension examination upon this . . . veteran who works as a building inspector . . . but previously employed in construction . . . He states that he transferred his job status because of being physically incapable of carrying out the more demanding requirements in the construction business. He found he could no longer lay tile, bend over to dig trenches and could not continue repetitive stooping, bending and heavy lifting. His present activities are much better tolerated and considerably less challenging "

Pages 39-40 of the VA April 16, 2008 printout also contain information about Mr. D'Amato's self-reported back pain in August 2003. (*Exhs. 17 & 28*)

21. Dr. Arnold found the narrative on Page 20 to be "added information to [Mr. D'Amato's] status", in that it attributed Mr. D'Amato's career change to his disability. Mr. D'Amato correctly points out that this narrative does not specifically refer to the back injury, and that next part of the progress note (appearing at the top of page 21), as well as other evidence, indicates that the career change (made three years prior, in early 2005) was more proximately attributed to his shoulder condition, which he further addressed through successful physical therapy at

Spaulding in 2005 and 2006, and elsewhere. I find, however, that Dr. Arnold could reasonably read Dr. Conville's narrative, taken as a whole, to mean that both Mr. D'Amato's back and shoulder problems were factors that contributed to his decision to avoid returning to such a strenuous work environment. (*Exhs. 12, 16, 20, 22 & 26; Testimony of Appellant & Arnold*)

22. On April 18, 2008, Mr. D'Amato provided BPD with a letter from the VA which stated:

"Mr. Frank D'Amato is a patient at the VA Boston HCS. He has the following medical problems:

1. Chronic low back pain.
2. Multiple-level lumbar disc degeneration and narrowing with lumbar spondylosis without radiculopathy.

His work restrictions are to avoid repetitive bending or flexing at the waist.

Sincerely.

/s/ Herman G. Lee, MD

Staff Physician

Primary Care Clinic

(*Exh.27*)

23. On April 23, 2008, BPD OHSU Director Roberta Mullan (who did not testify before the Commission), wrote a memorandum to BPD HR Director Robin Hunt concerning Mr. D'Amato. The gist of the memorandum reviewed the history of Mr. D'Amato's interaction with the OHCU regarding his medical condition, pointing out certain inconsistencies in the information Mr. D'Amato had provided. She also noted the initial omission of the pages from the April 16, 2008 VA printout that he had provided. Ms. Mullan's memorandum implied that she and her staff believed that the omission was intentionally deceitful. (*Exh. 3*)

24. On May 1, 2008, Dr. Arnold made the determination, based on the information in Mr. D'Amato's medical records, that he could not certify Mr. D'Amato's fitness under the requirements under the standards for municipal public safety personnel. In particular, he determined that Mr. D'Amato was medically disqualified under Section IV.6(a)3.b.viii of the "Initial Medical Standards for Municipal Police Officers" contained in HRD's "Physician's

Guide Initial-Hire Medical Standards [HRD Physician's Guide]", namely, a Thoracic/lumbar/sacral Spine "Category B . . . spinal condition that results in an individual not being able to perform the job of police officer." These standards are also promulgated by HRD in the form of "Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel [HRD Physical Fitness Regulations]", the comparable part of the regulation being Section 10(6)2.b.vii. (*Exhs. 4, 6 & 7; Testimony of Arnold*)

25. Medical standards for initial-hire public safety officer are separated into two categories: Category A and Category B. A Category A condition automatically disqualifies an applicant from meeting the medical requirements of becoming a police officer. A Category B condition is not an automatic disqualifier, but it will disqualify an applicant, if the severity or degree of the condition would "preclude an individual from performing the essential job functions of a municipal firefighter or police officer in a training or emergency environment, or . . . present a significant risk to the safety and health of that individual or others." (*Exhs. 6[HRD Physician's Guide Sec. IV(5)] & 7[HRD Physical Fitness Regulations Sec.02]; Testimony of Arnold*)

26. The essential function required to perform the position of a municipal police officer are set forth in Section VI of the HRD Physician's Guide and include such physical activities as breaking up a fight or disturbance, bodily serving as a barrier and making forced entry into a building. The requirements of the PAT for municipal police officers are contained in Section IX of the Physician's Guide, and include, among other things, (1) a "Dummy Drag", which involves dragging a 6', 145 pound dummy over a 25 foot course in 11 seconds, simulating the dragging of a victim or suspect and (b) a "Bag Pull" or "Separation Event", which involves pulling a 75 pound hanging bag to a marked line and touching it to the ground, simulating tasks that require separating one party from another and or controlling situations. The BPD's own

“Physical Activity Description for Full Duty Police Officers” includes:

- Sudden. . . running at full speed for short to moderate distances with no warm up
- Running over uneven terrain
- Physically struggling with agitated, belligerent, combative, uncooperative adults’
- Lifting heavy weights (50%-100% of body weight)
- Carrying heavy weights (50%-75% of body weight)
- Pulling heavy weights (75% to 125% of body weight)
- Weight loaded bending and twisting

(*Exhs. 7 & 8*)

27. On February 3, 2009, BPD notified HRD that it had decided to bypass Mr. D’Amato for two reasons: (1) he failed to meet the medical standards prescribed by HRD and did not pass the required medical examination and (2) he had neglected to provide a complete copy of his medical records and omitted pages that were “critical” to the decision making about his suitability to perform the essential functions of a Police Officer.” By letter dated March 6, 2009, HRD notified Mr. D’Amato that it approved the BPD’s reasons for bypassing him. This appeal duly ensued. (*Exhs.1 & 2; Claim of Appeal; Testimony of Hunt*)

28. Mr. D’Amato testified that he is fit to perform the functions of a police officer as his back condition has stabilized and does not require surgery or active treatment. He offered no medical witnesses but did proffer two documents to support his conclusion: (a) a report from Michele T. Chabot, MD, who examined Mr. D’Amato on September 23, 2009 and found “a normal physical exam” and “no contraindication to him participating in the [PAT]; and (b) copies of HRD documents evidencing that, in or around the fall of 2008, Mr. D’Amato had taken and passed the seven events comprising the municipal firefighter PAT. (*Exhs 29-ID, 34; Testimony of Appellant*)

29. I accepted the evidence concerning Mr. D’Amato’s successful completion of the firefighter’s PAT, although it post-dated the BPD’s bypass decision (but not its notification to HRD), because the test was conducted by HRD within a timeframe sufficiently close to his bypass as to be potentially relevant to the question of his fitness a few months earlier. Upon

reviewing the regulations regarding the police and fire PAT events, however, the two tests clearly are not the same. In particular, there is no counterpart in the firefighter's PAT to the police PAT "Bag Pull" and "Dummy Drag". Moreover, while both jobs can be physically demanding, they patently are not comparable; hence, the reason for two separate sets of Medical Standards, and two different PATs, for each of these civil service positions. (*Exhs. 6, 7 & 34*)

30. Dr. Chabot examined Mr. D'Amato in September 2009, which is too remote in time to be probative of his condition in May 2008. Dr. Chabot's unsworn, hearsay report contains no evidence of the basis of her opinions, the nature of her examination, knowledge of the medical standards in the HRD Physician's Guide or the essential duties of a police officer. All these subjects are crucial to the weight her opinion deserves and, generally, should be tested by cross-examination. Finally, Dr. Chabot's hearsay opinion, even if admissible, should be given little if any weight, based on the credible testimony from NP Greenstein and Dr. Arnold to the effect that a physical examination is merely a snapshot, and must be taken together with the record of patient's complete medical history when attempting to evaluate the status and prognosis of a physical disability or disqualification. (*Exh. 29-ID; Testimony of Greenstein & Arnold*)

31. Mr. D'Amato strenuously denied any deceit on his part in withholding relevant information in the April 16, 2008 VA printout. When the oversight was called to his attention, he thought had responded appropriately. Save for page 40, all the pages he omitted primarily do concern visits unrelated to his back or shoulder condition. He points to the fact that he already made full disclosure of his injuries and disability at all times prior, promptly delivered Dr. Lee's letter and the most "critical" page 20, and it would be "stupid" to believe he would withhold intentionally the little additional information involved (essentially the notes on a 2003 visit on pages 39-40). I credit his testimony on this subject. (*Testimony of Appellant*)

CONCLUSION

This appeal involves a bypass of the Appellant for original appointment to a permanent civil service position. This process is governed by G.L.c.31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator [HRD] a written statement of his reasons for appointing the person whose name was not highest.”

Rule PAR.08(3) of the Personnel Administration Rules, promulgated by HRD to implement this statutory requirement, provides:

“A bypass will not be permitted unless HRD had received a “complete statement . . . that shall indicate all reasons for selection or bypass. . . . No reasons . . . that have not been disclosed to [HRD] shall later be admissible as reason for selection or bypass in any proceedings before [HRD] or the Civil Service Commission. The certification process will not proceed, and no appointments or promotions will be approved, unless and until [HRD] approves reasons for selection or bypass.”

These requirements mean that candidates will be considered according to their relative placement on the certification list, which creates a rank ordering based on their scores on the competitive qualifying examination administered by HRD, along with certain statutory preferences. In order to deviate from this paradigm, an appointing authority must show specific reasons, consistent with basic merit principles, that affirmatively justify picking a lower ranked candidate. G.L.c. 31, §1, §27. See, e.g., Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991). See also MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635(1995),rev.den.,423 Mass.1106(1996)(noting that personnel administrator [then, DPA, now HRD] (and Commission oversight) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with [all] basic merit principles”).

Candidates are entitled to be adequately, fairly and equivalently considered. Evidence of undue political influence is one relevant factor, but it is not the only measure of unjustified decision-making by an appointing authority. The Commission has construed its obligation to prohibit 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). See Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”)

The task of the Commission hearing a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. . . . Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. In performing this function:

“[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after conducting] ‘a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer’ . . . For the commission, the question is . . . ‘whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.’ ”

Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission’s decision to reject appointing authority’s proof of appellant’s failed polygraph test and prior domestic abuse orders and crediting appellant’s exculpatory testimony rebutting that evidence) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential

differences in facts found were insufficient to find appointing authority's justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (same). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding before a "disinterested" Commissioner in context of procedural due process); Bielawski v. Personnel Admin'r, 422 Mass. 459, 466 (1996) (same)

The "preponderance of the evidence test" requires the Commission to conclude that an appointing authority established, through substantial, credible evidence presented to the Commission, 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); 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 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)

An appointing authority may rely on information it has obtained through an impartial and reasonably thorough independent review, including allegations of misconduct obtained from third-party sources, as the basis for bypassing a candidate. See City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189 (2010). There must be a "credible basis for the allegations" that present a "legitimate doubt" about a candidate's suitability, but the appointing authority is not required "to prove to the commission's satisfaction that the applicant in fact engaged in the serious alleged misconduct. . . ." Id., 78 Mass.App.Ct. at 189-90. Especially when it comes to hiring an applicant for a sensitive public safety position, "the commission owes substantial

deference to the appointing authority's exercise of judgment in determining whether there was 'reasonable justification' shown . . . Absent proof that the [appointing authority] acted unreasonably . . . the commission is bound to defer to the [appointing authority's] exercise of its judgment" that "it was unwilling to bear the risk" of hiring the candidate for such a sensitive position. Id., 78 Mass.App.Ct. at 190-91. See also Town of Reading v. Civil Service Comm'n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914,(2004) (rescript opinion); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305 (1997); Massachusetts Dep't of Corrections v. Anderson, Suffolk Sup. Ct. No. 2009SUCV0290 (Memorandum of Decision dated 2/10/10), reversing Anderson v. Department of Correction, 21 MCSR 647, 688 (2008).

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a bypass 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.2d 386, 388 (1990).³

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

³ 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).

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).

When reviewing the Commission's decision, a court cannot "substitute [its] judgment for that of the commission" but is "limited to determining whether the commission's decision was supported by substantial evidence" and must "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . . . This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 242-42 (2006) and cases cited.

Applying these principles to the facts of the present appeal, the BPD has proved by a preponderance of the evidence that it had reasonable justification to bypass Mr. D'Amato for the position of BPD Police Officer for failure to meet medical standards.

The BPD showed, through credible expert testimony, that it made a reasonably thorough independent review of the relevant facts, including numerous clinical notes and other medical history, which form a "credible basis for the allegations" that Mr. D'Amato suffers from a "Category B" medical condition that present a "legitimate doubt" about his suitability to become a BPD Police Officer and established a reasonable justification for his bypass. He has been diagnosed with multiple level disc degeneration and narrowing with lumbar spondylosis without radiculopathy. He has been advised by his treating physician to refrain from repetitive bending or flexing at the waist due to the pain in his lower back. He described the intensity of his back pain,

as recently as October 2007, as sometimes the “worst possible”, and that the pain affects his “sleep, appetite, physical activity, concentration and dressing”. He is reported, as of January 2007, to be “unable to tolerate sitting for more than 10 minutes before he must get up and move to relieve the discomfort in his lower back”, “unable to pick up his small children because of his back discomfort,” and a VA physician opined that “his symptoms are quite consistent with repetitive episodes of low back discomfort brought on by heavy lifting, bending and stooping.” The BPD is fully justified to rely on these (and other) statements from his treating medical professionals who describe limitations on movement that Dr. Arnold reasonably interprets to put Mr. D’Amato at risk in taking the PAT, which does require bending and stooping while pushing and pulling very heavy weights, and to greatly hinder his ability to perform the strenuous essential duties of a police officer who must respond quickly in dangerous and unpredictable situations.

Mr. D’Amato proffered no expert testimony to refute Dr. Arnold’s medical opinion that his medical history demonstrates that he has a Category B medical condition severe enough to warrant a bypass. Mr. D’Amato had little direct evidence, other than his own (admirable) self-confidence in his rehabilitation and current physical fitness, to support his contention that he is medically fit to be a police officer or rebut the credible testimony from BPD’s expert witnesses. The fact that Mr. D’Amato passed a different series of events comprising the firefighter’s PAT, and was “cleared” to take a police PAT after a physical examination performed a month prior to the hearing before the Commission (by a physician who did not testify and whose report fails to disclose her credentials or any information about whether she was familiar with and applied the appropriate standards in the HRD Physician’s Guide and the HRD Physical Fitness Regulations), falls short of the proof required to discredit the BPD evidence.

The Commission has consistently sustained the decision to bypass a candidate for a public safety position under similar circumstances. See Ryan v. Beverly, 20 MCSR 268 (2007)(medical opinion that appellant suffered from a Category B condition was not rebutted by appellant's own opinion to the contrary); Kinney v. Lowell Fire Dep't, 18 MCSR 1 (2005) (evidence of Category A and Category B conditions that rendered appellant unfit to perform the essential functions of a firefighter was not rebutted by a report from another doctor whose knowledge of the essential functions of the job were unknown); Coraminas v. Salem Police Dep't, 15 MCSR 76 (2002) (physical examination and medical records established appellant's "midline low back pain" and lifting restrictions established that her Category B medical condition disqualified her for selection as a police officer); Grenier v. Springfield Fire Dep't, 9 MCSR 107 (1996) (firefighter candidate's Category B medical condition (herniated disc) which "could worsen while performing maneuvers required of a firefighter" disqualified him because "Appointing Authority can not take a chance that [appellant's] condition could . . . put himself and other firefighters, and the public at risk.") cf. Reilly v. Town of Belmont, 14 MCSR 186 (2001) (appellant successfully rebutted opinion that he suffered from a Category B medical condition (lack of stereoscopic depth perception) that disqualified him to be a police officer, by offering expert testimony from a distinguished ophthalmologist who opined that appellant had no such disability and that the opposing physician was not a ophthalmologist, had never examined the appellant, and was not familiar with two of three components required to test depth perception); (Duggan v. Lawrence Police Dep't, 8 MCSR 162 (1995) (medical bypass for Category B medical condition (degenerative disc disease) overturned when appellant produced a timely x-ray and medical report that definitively found "no acute pathology" and physician who recommended disqualification retracted his opinion)

The BPD's contention that Mr. D'Amato's bypass is also warranted for non-disclosure of medical records and untruthfulness is a closer question. As the BPD has proved a legitimate reason for bypassing Mr. D'Amato for failure to meet medical requirements, the Commission need not decide that disputed issue. The BPD is clearly justified to be frustrated with Mr. D'Amato's waiting to the last minute to obtain, and then to trickle out his relevant medical records – especially after informing him at the outset of the application process that he should assemble those records in advance. Nevertheless, the preponderance of the evidence tends to establish that Mr. D'Amato's failure to provide BPD with all the relevant pages from the April 16, 2008 VA printout was due, more likely than not, to the haste with which he responded to the BPD's request for these documents, which he did in about an hour's time or less. It is perplexing, however, at least in hindsight, why Mr. D'Amato did not simply turn over all of the VA printout intact, knowing that time was of the essence and he had already been delinquent in responding to the BPD's prior request for documents. It is also troubling that Mr. D'Amato appeared to minimize his disability when it suits his purpose, and maximize his symptoms when that seems in his interest. Nevertheless, I would find that Mr. D'Amato's behavior in handling the requests for medical records and his assertion to the BPD of remission of his condition, while self-serving and less than prudent or diligent, was not deceitful.

For all of the above reasons, the appeal of the Appellant, Francisco "Frank" D'Amato, al under Docket No. G1-09-237 must be and hereby is *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein Commissioners [Marquis – Absent]) on February 24, 2011

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:

Francesco D'Amato [Appellant]

Sheila B. Gallagher, Esq. [for Appointing Authority]

Martha Lipchitz O'Connor, Esq. [HRD]