

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JOSE ARAUJO,

Appellant

v.

CASE NO: G1-11-42

BOSTON POLICE DEPARTMENT,

Respondent

Appearance for Appellant:

Michael Rabieh, Esq.,
Lichten & Liss-Riordan, P.C.
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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Jose Araujo, duly appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31, §2(b), from a decision by the Boston Police Department (BPD), as delegated authority of the Personnel Administrator of the Massachusetts Human Resources Division (HRD), to bypass Mr. Araujo for original appointment to the position of Boston Police Officer based on the results of a pre-employment psychological screening. A full hearing was held on December 7 and 28, 2011 at the offices of the Commission and was digitally recorded. Twenty-four (24) exhibits were entered into evidence at the hearing. BPD called one witness and Mr. Araujo called one witness and testified on his own behalf. The witnesses were not sequestered. Both parties subsequently submitted proposed decisions.

FINDINGS OF FACT

Based upon the Exhibits; testimony of the Appellant, Dr. Ronn Johnson, Ph.D. and Dr. Mark Schaefer, Ph.D., and inferences reasonably drawn from that evidence as I find credible, I make the findings of fact set forth below.

The Appellant

1. Jose Araujo is a long-time Boston resident who lives with his wife and young son in Dorchester. He was born in Cape Verde and immigrated to Boston, where his parents previously moved, in 1989. He graduated from the Boston Public Schools and received a bachelor's degree in finance and economics from UMASS Amherst in 2001. He speaks five languages, including Cape Verdean, Spanish and Portuguese. (*Exhs. 2 & 23; Testimony of Appellant*)

2. After college, Mr. Araujo took a job as a mutual fund accountant for State Street Bank in Boston and left after one year to start up his own computer business, which he initially ran from the basement of his home and later relocated to its present location on Geneva Avenue in Dorchester. The business has been in continuous operation and is now known as Computers-for-All. It sells custom-built computers and repair service. It is profitable. He also owns and manages a successful laundromat business in Dorchester, which he bought out of bankruptcy in 2006. (*Exhs. 2, 21 & 23; Testimony of Appellant*)

3. Over the years, Mr. Araujo has been required to deal with difficult customers in both his computer business and at the laundromat, which has required good interpersonal skills to understand and solve a customer's problem. (*Exh. 2; Testimony of Appellant*)

4. In 2006, Mr. Araujo was appointed as a constable for the City of Boston. He provides services to the Massachusetts Department of Revenue's child support enforcement division. He is licensed by the BPD to carry a firearm, which he has drawn on occasion in the course of his

duty as a constable but has never discharged the weapon. As a constable, he has called upon BPD officers for support and has worked alongside them and with a partner on occasion. (*Exhs. 2 & 20 & 21; Testimony of Appellant*)

5. Mr. Araujo has been involved with his community through a number of organizations, including the Bird Street Youth Center, where he sponsors athletic teams and provides discount laundry services, and Boston Main Street, a program established by the City of Boston to assist local business owners with crime issues and city services. (*Exh. 21; Testimony of Appellant*)

BPD Psychological Screening Process

6. The BPD conducts the psychological screening of police officer candidates pursuant to the terms of HRD's Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel, which are described in HRD's Physician's Guide – Initial-Hire Medical Standards (HRD Medical Standards). (*Exh.6*)

7. The HRD Medical Standards state:

“Each municipal police department shall establish and implement a pre-placement medical evaluation process for candidates. During medical evaluation, *the physician shall evaluate each individual to ascertain the presence of any medical conditions* listed in these standards, or any medical conditions not listed *which would prevent the individual from performing the essential job functions without posing significant risk. It is our intent to encourage the use of professional judgment regarding medical conditions that are not specifically listed.* A candidate shall not be certified as meeting the medical requirements of these standards if the physician determines that the candidate has any Category A medical condition specified in these standards. Furthermore, *a candidate shall not be certified as meeting the medical requirements of these standards if the physician determines that the candidate has a Category B medical condition that is of sufficient severity to prevent the candidate from performing the essential functions of a police officer without posing a significant risk to the safety and health of him/herself or others.*”

(*Exh. 6, p. 5*) (*emphasis added*)

8. Category A and Category B “Psychiatric” medical conditions are defined as follows:

Category A medical conditions shall include: a. disorders of behavior, b. anxiety disorders, c. disorders of thought, d. disorders of mood, e. disorders of personality.

Category B medical conditions shall include: a. a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual's history, current status, prognosis, and ability to respond to the stressors of the job, b. any other psychiatric condition that results in an individual not being about to perform as a police officer.

(Exh. 6, p.16)

9. The purpose of a psychological evaluation is to identify job-related psychopathy that “rules out” a candidate from serving as a police officer. A current diagnosis of a mental disorder as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association is sufficient to qualify as a Category A medical condition. A Category B psychiatric condition is manifest by substance abuse or any other job-related patterns of behavior or cognitive dysfunction that are present and justify a clinical judgment that a candidate's current impairment will interfere with his or her ability to perform the essential functions of the job of a police officer. *(Testimony of Dr. Johnson & Dr. Schaefer)*

10. In or about July 2004, BPD submitted, and HRD approved, the BPD's Proposed Psychological Screening Plan, which provided for a three-phase testing and interview process.

Phase I – Administration of two written, computer scored psychological tests – the Minnesota Multiphasic-Personality Inventory – 2 (MMPI-2), and Personality Assessment Inventory (PAI). In addition, candidates are required to complete a biographical history questionnaire.

Phase II – A thirty (30) minute interview performed by the BPD's staff psychiatrist .

Phase III – If the Phase II interview raised any suitability issues, a second “in-depth clinical interview” by a Board Certified Psychiatrist, who generates a comprehensive report. The BPD staff psychiatrist will review this report and concurrence will be recorded.

(Exh.3)

11. On July 1, 2010, BPD Director of Human Resources submitted a revised psychological screening plan to HRD, and requested HRD's review and approval “as soon as possible, as we have begun processing for another recruit class and will soon be required to engage in the psychological and medical screening components.” *(Exh.4)*

12. The revised plan continued the basic three-phase components of the 2004 plan, with three principal substantive changes: (a) the MMPI-2 [Restructured Form] (MMPI-2RF) replaced the MMPI-2 as one of the two written test instruments to be used,¹ (b) the initial or second screening interview could be performed by either a licensed psychiatric or a “doctoral level” psychologist, and (c) a BPD staff psychiatrist was no longer required to document concurrence with a second level screening recommendation. (*Exh.4*)

13. After an initial review, HRD indicated that it did not “see any reason to not approve” the proposed revised plan, so long as HRD received the necessary particulars about the licensed clinicians the BPD planned to employ. Following further exchanges between BPD and HRD, HRD formally approved the BPD’s revised plan for psychological screening of candidates on June 30, 2011. (*Exhs.4 & 5*)

The Appellant’s 2008 BPD Applications

14. Mr. Araujo first was considered for appointment to the BPD in 2008. He completed the required Student Officer Application, went through a background investigation and received a conditional offer of employment. The 2008 application packet was not placed in evidence, but no material differences were identified with the information in the 2010 application packet which is the subject of the present appeal. (*Exhs. 2, 11, 13 & 25; Testimony of Appellant & Dr. Schaefer. See also Araujo v. Boston Police Dep’t, CSC Docket No.G1-09-24*)

15. Mr. Araujo then went through the required pre-employment psychological screening. The BPD’s first level screener, psychiatrist Dr. Marcia Scott, reported that his behavior showed “persistent, inability to conform to basic social rules, or even consider the rules important” and

¹ The MMPI-2RF and the MMPI-2 are substantially similar, with the MMPI-2RF being a new, condensed version. I do not find that the differences in the two versions have any material bearing on this appeal. Both tests involve a series of true-false questions or “items” which are scored in the same categories of clinical scales and both include a series of validity scales that help assess whether the test results suggest that the test taker has consciously or unconsciously skewed the results. (*Testimony of Dr. Schaefer*)

“showed no concern for others” and that, this “dysfunctional and inflexible personality and coping patterns since adolescence . . . would interfere with his ability to perform the duties of an armed police officer.” She referred him for a second level screening. (*Exhs. 7, 8, 9, 11; Testimony of Appellant*)

16. The 2008 second level screening was performed by psychiatrist Dr. Julia Reade, who described Mr. Araujo as a “tall, grim-faced man” who “appeared mildly depressed”. She concurred with Dr. Scott that his “difficulty following rules, respecting authority, seeing his own part in problems or taking responsibility for his decisions and actions” made him “not acceptable for the Boston Police Department.” (*Exh. 13*)

17. Mr. Araujo appealed to the Commission from the BPD’s decision to bypass him as unfit for psychological reasons. After one day of evidentiary hearing (before this Commissioner), the parties reported that they had settled the matter for procedural reasons and the BPD agreed to provide Mr. Araujo the opportunity for another consideration. By unpublished decision, dated May 20, 2009, the Commission entered a Decision granting Chapter 310 relief to Mr. Araujo and, consistent with the parties’ settlement agreement, he was ordered to be placed at the top of the next Certification issued to the BPD for appointment of police officers. (*Araujo v. Boston Police Dep’t, CSC No. G1-09-2009*)

The Appellant’s 2010 BPD Application

18. Mr. Araujo’s name appeared on Certification No. 290999 and he again completed the required Student Officer Application. Mr. Araujo included with his Student Officer Application the required neighborhood and character letters of reference. He did not provide employment records other than from his one year of employment at State Street Bank during 2001-2002, as he has been self-employed since then. (*Exhs. 2 & 23*)

19. Among the references he obtained, Mr. Araujo supplied letters from persons with direct personal knowledge of his ability to handle stressful situations and to defuse tensions when they arose, who provided specific examples, such as an incident when Mr. Araujo was confronted by an angry customer in his computer store who threatened him and was able to calm down the customer. (*Exh. 2*)

20. In his application, Mr. Araujo disclosed, among other things:

- In September 1997, at the start of his freshman year at UMASS Amherst, he was parked on campus when a friend asked him to put a bicycle into the trunk of his car. He assumed the person who had the owned the bicycle owned it but, actually, it had just been stolen. The police arrived, everyone fled except Mr. Araujo and he was arrested for larceny. The case was continued without a finding and dismissed in 1998. Mr. Araujo said he “learned his lesson” not to be too trusting of “bad people”.
- During the summer between his sophomore and junior years, Mr. Araujo was on Blue Hill Avenue, returning home after visiting a friend, when a woman waved him over and started a conversation. She asked if he had any money to pay her and he offered her \$10, which was all he had at the time. The woman turned out to be an undercover police officer and he was arrested for soliciting a prostitute. He was “very ashamed of what he did”. Two weeks later, the charges were dismissed.
- In 2002, Mr. Araujo had failed to keep the insurance on his motorcycle in force. The motorcycle was being repaired when the mechanic took it out for a ride and happened to be stopped, resulting in a citation of him, as the owner. He also disclosed several other older citations and a warning for running a stop sign in 2007.

(*Exh. 2*)

21. Following another background investigation, which included review of his complete driving and criminal history, Mr. Araujo received his second conditional offer of employment, subject to medical/psychological screening and physical abilities testing. (*Exhs. 1 & 21*)

The Appellant’s 2010 Psychological Evaluation

22. In September 2010, Mr. Araujo began the BPD’s psychological screening process for the second time, taking the two prescribed written psychological tests (MMPI-2RF and PAI). His test results largely confirmed the absence of any significant psychological issues. The computerized interpretive report for the MMPI-2RF stated that Mr. Araujo had not produced

elevated scores on any of the seven scales designed as having “critical item content” and there were “no indications of somatic, cognitive, emotional, thought or behavioral dysfunction”. The PAI computerized report stated that he was a “low risk” of being poorly rated for employment “by psychologists with expertise in law enforcement, corrections and public safety screening”. His PAI test profile placed in the “Warm Control” quadrant, which is similar to the profile of 70% of all public safety applicants and is typical of a person who is “generally friendly, extraverted, and quick to help others who need help.” The tests results disclosed no indication of any anger management, substance abuse proclivity or alcohol or illegal drug use concerns. (*Exhs.14, 15, 18 & 25; Testimony of Dr. Johnson & Dr. Schaefer*)²

23. Mr. Araujo’s MMPI-2RF test scores did show mildly-elevated scores on scales that measure a subject’s “defensiveness” in taking the test, suggesting that the test taker has tried to put him/her in a positive light and minimized acknowledging deficiencies, even the most common faults. His scores did not invalidate the test results. Moreover, when compared to a group of employed law enforcement officers who had taken the same PAI test, his scores showed that he was more likely than most pre-employment test-takers to acknowledge past problematic behavior. (*Exhs.14,15,18, 20 & 25; Testimony of Dr. Johnson & Dr. Schaefer*)

24. Both Dr. Johnson and Dr. Schaefer agreed that the written psychological test results, alone, are not sufficient to disqualify a candidate. (*Testimony of Dr. Johnson & Dr. Schaefer*)

25. On September 16, 2010, Mr. Araujo saw Dr. Marcia Scott for the second time, who performed another Phase II first level screening which lasted less than 15 minutes. Mr. Araujo remembers clearly that Dr. Scott began by asking him: “Why are you here?” When he refused to

² Dr. Johnson’s report suggested that Mr. Araujo’s PAI test scores “suggests concerns about his intoxicant use patterns”, but he acknowledged at the Commission hearing that this conclusion was based on his erroneous interpretation of the relevant test scales. The PIA report actually reported that Mr. Araujo’s test results put him at “low” risk for alcohol and drug abuse. (*Exhs. 15, 18, 20 & 25; Testimony of Dr. Johnson & Dr. Schaefer*)

acknowledge that he suffered from the psychological problems that she and Dr. Reade had identified in their 2008 reports (“It was wrong, that’s why I appealed it”), she said: “So are you calling Dr. Reade and me liars?” She told Mr. Araujo that his psychological test results were “invalid”. She did not ask about his recent work history or life experiences. Dr. Scott did not testify at the Commission hearing. (*Exh.16; Testimony of Appellant*)

26. Mr. Araujo’s Phase III interview was conducted by Dr. Ronn Johnson, Ph.D. on October 23, 2010. Dr. Johnson is a licensed clinical psychologist who is employed as an associate professor of psychology at the University of San Diego. He performs pre-employment and fitness for duty psychological evaluations for approximately twenty (20) law enforcement agencies, including the San Francisco, Los Angeles and New York police departments. He estimated that he has done approximately 11,000 pre-employment screenings in his career. (*Exh. 17; Testimony of Dr. Johnson*)

27. Dr. Johnson began performing pre-employment screenings for the BPD in July 2010. As of the date of the Commission hearing, he had performed between 100 to 150 second-level screenings of BPD candidates. He generally agrees with the first-level screener in finding a candidate unsuitable for employment. (*Testimony of Dr. Johnson*)

28. Dr. Johnson come to Boston to interview BPD candidates, seeing approximately six to eight candidates, back-to-back, over a twelve to fourteen hour day. He receives the candidates’ test results and the first-level screener’s report prior to arriving in Boston. He is provided the candidates’ Student Officer Application packets when he arrives at BPD headquarters several hours before beginning his scheduled interviews. (*Testimony of Dr. Johnson*)

29. Dr. Johnson provided Mr. Araujo with a 71 item questionnaire which he completed prior to meeting with Dr. Johnson for about 30 minutes. The interview focused on Mr. Araujo’s

“contacts with the legal authorities” and his use of drugs and alcohol. Mr. Araujo was not asked to describe his work in running his computer and laundromat businesses or his work as a constable. (*Exhs.18 & 22; Testimony of Appellant & Dr. Johnson*)

30. The next day, October 24, 2010, Dr. Johnson submitted his written report which stated:

“In this examiner’s opinion, the psychological findings are anticipated to have an overriding negative impact on the recruit’s ability to fulfill essential job-relevant functions. There are several areas associated with the police officer position that this recruit is likely to struggle to perform at a satisfactory level. The counterproductive behaviors exceed the positive ones. The work areas where this recruit is expected to experience difficulties . . . [with] substance abuse, compliance with the law, integrity, quality of judgment and teamwork.”

“There is current evidence of a behavioral disorder or current mental impairment. This well-established pattern of behavior and thinking is expected to significantly interfere with this recruit’s ability to consistently perform the duties and manage the stress of an armed police officer. There are serious doubts about this recruit’s ability to engage in productive heated give-and-take exchanges with emotional citizens who may accuse him of bad intentions. He is someone who is uncomfortable with criticism and may over-react during scene management situations where he is expected to restore a sense of calm and order.”

“Mr. Araujo was evasive and unforthcoming about many aspects of his history . . . He repeatedly made excuses for any of his previous ill-advised decisions and usually externalized blame (i.e. setup for arrest of soliciting). . . . [T]here is greater likelihood of job-related integrity and anger management problems that are anticipated to plaque [sic] him as a police officer.”

“The mistakes stemming from his thinking and reasoning . . . is expected to significantly interfere with his ability to realistically assess situations, examine his reasoning in making decisions, take responsibility for his role in problems that arise, and utilize feedback and support. . . . [T]his applicant is NOT RECOMMENDED as suitable for hire as an armed police officer with the Boston Police Department.”

(*Exh. 18*) (*emphasis added*)

31. On December 13, 2010, the BPD’s Director of Human Resources, Robin Hunt, wrote to Mr. Araujo, informing him that the results of the psychological screening “indicate that you cannot adequately perform the essential functions” of a BPD police officer and “a reasonable accommodation is not possible.” The letter repeated verbatim the conclusions from Dr.

Johnson's report quoted above and stated "Dr. Marcia Scott, M.D., the Boston Police Department's Consulting Psychiatrist concurred with this assessment." (*Exh. 1*)

32. On February 10, 2011, Mr. Araujo duly appealed to the Commission from the BPD's decision to by bypass him. (*Claim of Appeal*)

Dr. Johnson's Testimony

33. Although he had not so stated explicitly in his report, Dr. Johnson opined at the Commission hearing that Mr. Araujo has a Category B "behavior disorder". He could not define the disorder he had in mind other than in terms of "poor judgment and the ability to see self in a situation, ability to accept responsibility for misconduct when it's clearly identified." He could offer nothing on which he based his opinion other than the documented "incidences associated with legal contacts where he was arrested for the transporting of the bicycle, the solicitation of the prostitute, and the violation of compulsory insurance." In particular, Dr. Johnson cited Mr. Araujo's allegedly calling the solicitation arrest more of a "set up" than a situation where he was out looking for sex, as demonstrating an inability to accept responsibility and an unwillingness to grow and mature." (*Testimony of Dr. Johnson & Dr. Schaefer*)

34. Dr. Johnson demonstrated little present recollection of the details of Mr. Araujo's work history. He gave no plausible rationale for focusing his report and his testimony on the three prior episodes in Mr. Araujo's personal life disclosed in his application while discounting all the data he was provided that tended to show that Mr. Araujo had no problems with any real world "anger management" issues, had a good track record of "teamwork" and disclosed no issues in handling stress in his work experiences or family life over the past decade. He provided no basis to infer that Mr. Araujo ever used illegal drugs or abused alcohol. (*Exhs 1, 2, .23; Testimony of Dr. Johnson*)

35. It was also clear from Dr. Johnson's testimony that his conclusions were materially influenced by the assessments of Dr. Scott, who had reported, among other things, that he was "quick to use denial" during the interview and had "glared" at her. He was the only witness called to testify by the BPD. He had no personal knowledge to substantiate the reliability or truth of those parts of Dr. Scott's report on which he relied. (*Testimony of Dr. Johnson*)

Dr. Schaefer's Testimony

36. Dr. Mark Schaefer is a licensed clinical and forensic psychologist who has performed pre-employment psychological screenings for approximately thirty years for about a dozen Massachusetts police departments (400-500 screenings) and fire departments (300-400 screenings), including the municipalities of Cambridge, Framingham and Lynn. He has also been retained to evaluate appellants in fifteen civil service appeals of bypass decisions on behalf of police officer candidates. He declined to testify in five of those cases because he agreed with the bypass determination. (*Exh. 19; Testimony of Dr. Schaefer*)

37. Dr. Schaefer examined Mr. Araujo at the request of his counsel after the BPD bypassed him in 2008 and, again, in 2010. On both occasions, Dr. Schaefer conducted a thorough review of Mr. Araujo's BPD application packet and psychological tests results, conducted in-depth interviews and prepared detailed report of his findings. He concluded that "[t]here is simply no indication that Mr. Araujo suffers from a behavior disorder or mental impairment". He found no evidence of psychiatric grounds to disqualify Mr. Araujo from employment as a BPD police officer. (*Exhs. 20 & 25: Testimony of Dr. Schaefer*)

38. In particular, Mr. Araujo had "answered all questions put to him without hesitation" and "fully acknowledged past problem areas" during both interviews. He "was able to describe in an articulate and clear fashion . . . the various responsibilities which he has running two businesses

and also working as a constable. . . .[T]here is now ample data that Mr. Araujo has placed himself in situations, in which he must deal with the public on a regular basis, and there was no indication, cited by any source, that he has difficulties in handling criticism or effectively managing the day-to-day problem solving that is an integral part of these jobs.” (*Exh 20; Testimony of Dr. Schaefer*)

39. Dr. Schaefer acknowledged Mr. Araujo’s prior “brushes with the courts” but based his opinion on the undisputed fact that, save for the fine Mr. Araujo paid for a compulsory insurance violation in 2002, his two criminal incidents occurred while he was in college, and since then he “had no further problems of any sort.” He also relied on such additional facts, which also were not controverted, that Mr. Araujo:

- has been in a long standing stable relationship with his wife and started a family
- owns a home with his brother who is a BPD police officer
- speaks five languages which demonstrates an ability to communicate with a diverse number of different ethnic groups
- persists in his desire to become a police officer despite significant frustration and disappointment

(*Exhs. 20 & 25: Testimony of Dr. Schaefer*)

40. Dr. Schaefer took issue with Dr. Johnson’s selective interpretation of certain of the psychological test results. He provided a credible explanation for the few “elevated” scales on the tests that, while “suggesting some minimization of faults”, did not reach a significant level and should be expected of many pre-employment applicants, as illustrated by comparably elevated PAI scores reported for a sample group of hired, post-probationary police officers who had taken the same test. He agreed that test results are not the sole basis for a psychological opinion that would rule out a candidate. He found significant that the MMPI report on Mr. Araujo stated that there were “no indications of somatic, cognitive, emotional, thought or

behavioral dysfunction” and the PAI test report rated him “low risk” as “poorly suited” for employment in law enforcement. (*Exhs. 14,15 & 20: Testimony of Dr. Johnson*)

41. Dr. Schaefer also found nothing contained in Dr. Johnson’s report or his testimony that identified or described any Category B “psychiatric condition” or “behavior disorder” that Mr. Araujo currently had as defined within the HRD Medical Guidelines. (*Testimony of Dr. Schaefer*)

42. Dr. Schaefer doubted that Dr. Johnson could avoid the problem of candidates’ blending together by his practice of interviewing BPD recruits in batches of as many as eight per day, from morning to evening, with only a minimum amount of time to review all of the recruits’ files (other than the test scores and the first level screener’s reports). Dr. Schaefer’s own practice has been to limit the number of pre-employment screenings he does to no more than four in a day for this reason. (*Testimony of Dr. Schaefer*)

Appellant’s Testimony

43. During his appearance at the Commission hearing, Mr. Araujo presented as confident, cordial and sincere. He speaks slowly in a resonant, low-pitched voice and maintained good eye contact while testifying. I perceived no sign of exaggeration or prevarication. In particular, he demonstrated good, credible present memory about the interviews conducted by Dr. Scott and Dr. Johnson. (*Testimony of Appellant*)

44. Mr. Araujo described his role as a constable working with the Massachusetts Department of Revenue, Child Support Unit, his mostly positive evaluation for his one-year employment with State Street Bank, his two successful businesses, and his community involvement. He provided a clear and convincing factual explanation of the two encounters with the law that occurred while he was a college student that was consistent with the description that he

previously had provided to the BPD and demonstrated that he accepted responsibility for his behavior on those occasions. In particular, he plausibly explained that his description of the encounter with the undercover officer as “more of a set up” did not mean that he denied responsibility for his actions, but that he meant he wasn’t “looking for sex” and stopped only because the woman had waved him down. (*Exhs 2 &.23; 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 . . . a written statement of his reasons for appointing the person whose name was not highest.”

The task of the Commission when 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 decision to bypass the candidate 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. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (discussing preponderance of the evidence test); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (same)

“In determining whether [an appointing authority] has shown reasonable justification for a bypass, the commission’s primary concern is to ensure that the appointing authority’s action comports with ‘basic merit principles,’ as defined in G.L.c.31,§1.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass’n of Minority Law Enforcement

Officers v. Abban , 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. E.g., Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if “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.”)

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 (2001) However, it is the purview of the hearing officer to determine the credibility of 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) (decision relying on an assessment of the relative credibility of witnesses cannot be made by someone who was not present at the hearing)

When an appointing authority relies on expert opinion of a pre-employment psychological evaluation as the justification for a bypass decision, the Commission is mindful that the function of the psychological screening process is “narrowly circumscribed”, i.e., the psychological screener’s “sole task [is] to determine whether [the candidate] had a psychiatric condition that

would prevent [the candidate] from performing, even with reasonable accommodation, the essential functions of the job.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 694 (2012). The role of the psychological evaluation is to ascertain whether the candidate’s “history, current status, prognosis and ability to respond to the stressors of the job” affirmatively prove the existence of a specific “disqualifying” psychiatric condition; it is not sufficient for the evaluator to find a candidate’s psychological profile “not inconsistent” with a disqualifying condition or one the evaluator thought “may” be present and it is not appropriate for the evaluator to look for the presence of “qualifying traits” or to make “substantially subjective determinations” about a candidate’s suitability for police work. Id., 463 Mass. at 692-695.

The opinions of expert witnesses have no special “magic qualities” and the Commission, as the trier of the facts, may decline to adopt them in whole or in part and may give them such weight as they deserve. See, e.g., Police Dep’t of Boston v. Kavaleski, 460 Mass. 680, 694-695 (2012) and cases cited; Commonwealth v. Gaynor, 443 Mass. 245, 266 (2005); Ward v. Commonwealth, 407 Mass. 434, 438 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73 (1891); Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732,737-38, rev. den., 437 Mass. 1109 (2002). Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, rev.den., 409 Mass. 1104 (1991).

Applying these principles to the facts of the present appeal, the BPD has failed to prove by a preponderance of the evidence that Mr. Araujo possessed a disqualifying psychiatric condition that justified the decision to bypass him for appointment to the position of BPD Police Officer.³

³ The Appellant argued that the BPD improperly used its revised screening process to disqualify Mr. Araujo before it had been approved by HRD, that the HRD Medical Guidelines and the BPD’s then approved version did not authorize a psychologist, rather than a physician, to determine whether the candidate was medically unfit, and, therefore, the BPD’s bypass decision is invalid on those grounds. In general, the Commission defers to the reasoned decisions of HRD on such technical matters, and this appeal presents no reason to address these questions as the remedy for any such procedural error, if any, would not differ from the remedy to be ordered here on the merits.

First, it is undisputed that Mr. Araujo does not suffer from, and has never been diagnosed with or treated for, a Category A psychiatric condition that would constitute an automatic disqualification for appointment.

Second, while there is some room for consideration of a recruit's history of risky behavior in the context of a separate search for evidence of a current Category B medical condition, the HRD Medical Guidelines clearly require more than simply having an evaluator offer his or her subjective "concerns" drawn from selected episodes of candidate's past conduct that the BPD already knew about and found not to be disqualifying. The Commission has construed a Category B medical condition to mean:

"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." (emphasis added)

See Goff v. Fall River Police Dep't, CSC No. G1-12-263, 26 MCSR --- (2013) citing Roberts v. Boston Police Dep't, 21 MCSR 536 (2008). This interpretation is consistent with the testimony of both psychologists in the present appeal to the effect that a disqualification for a psychiatric medical condition must turn on current evidence of some identifiable clinically-defined dysfunctional "enduring traits", not merely episodes, in a candidate's history.

Under HRD's Medical Guidelines, a candidate's psychiatric condition must also be of "sufficient severity to prevent the candidate from performing the essential functions of a police officer without posing a significant risk to the safety and health of him/herself or others."

Finally, the BPD's screening plan requires that a candidate's condition must be one that cannot be ameliorated by "reasonable accommodation." Goff v. Fall River Police Dep't, CSC No. G1-12-263, 26 MCSR --- (2013)

Although Dr. Johnson recited that Mr. Araujo showed "current evidence of a Category B "behavioral disorder", he never supported that opinion by identifying any such disorder. I find no credible evidence that Mr. Araujo currently has, or ever did have, any such unidentified Category B behavior disorder or psychiatric condition. Indeed, Dr. Johnson couched his opinions as "concerns" and "serious doubts" about Mr. Araujo's poor judgment and behavior that he believed would lead him to "experience difficulties" and "struggle to perform" as a police officer, an opinion he based on two examples of "blame avoidance" and "failure to accept responsibility" while in college and the 2002 lapse of his motorcycle insurance. Dr. Johnson never opined that Mr. Araujo's unspecified behavior disorder put his safety or the safety of others at risk were he appointed as a police officer and, even if he had, I find no credible basis to believe he was such a risk.

Third, Dr. Johnson's subjective impressions are wholly implausible in view of the BPD recruit investigator's findings and other undisputed facts about Mr. Araujo's history. Both of the two criminal cases in which Mr. Araujo was involved were thoroughly investigated by experienced BPD officers, flagged in the investigator's report and fully considered by the BPD, individually, in combination and collectively, with all of his other prior history, before BPD decided twice to offer him an appointment as a BPD police officer. The BPD investigator was also fully aware of Mr. Araujo's driving record, including the 2002 failure to maintain insurance on his motorcycle and did not even flag that history in his investigative report as a matter of any current "concern" to the BPD whatsoever. Also, Dr. Johnson's conclusions were based on

assumptions and inferences that were shown to be erroneous, such as his misinterpretation of the SUI test scales and Mr. Araujo's employment record at State Street Bank, and his dubious assumptions drawn from Mr. Araujo's interview responses, such as concluding Mr. Araujo's choice of words that he was "not an alcohol person" implied just the opposite. I also take note of Dr. Schaefer's criticism of Dr. Johnson's practice of seeing multiple applicants back-to-back with limited time to absorb the contents of their extensive BPD Student Officer employment packages. I infer that that this practice probably contributed to Dr. Johnson's limited knowledge of, and failure to consider, many relevant facts contained in this record about Mr. Araujo's history that patently were not consistent with his psychological "concerns", and which data reasonably deserved to have been explored and accounted for more thoroughly in order to reach a fair and credible assessment.

Fourth, although Dr. Johnson claimed not to have relied on the prior bypass evaluations, in fact, his evaluation report quoted at length from Dr. Scott's first level screening reports and he acknowledged having reviewed the prior reports by Dr. Scott and Dr. Reade, as well as the 2008 test results and used them to shape his own evaluation. Mr. Araujo persuaded me that Dr. Scott was clearly pre-disposed to disqualify him the second time around, and that most of her hearsay statements referenced by Dr. Johnson lacked sufficient indicia of reliability or credibility to be given any weight. This evidence, together with the likelihood that Dr. Johnson's evaluation techniques led him to "blend" his impressions of the candidates he saw, leads me to conclude that Dr. Johnson failed to provide Mr. Araujo with the unbiased "fresh look" that he was obliged to give him.

Relief to be Granted

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the name of the Appellant, Jose Araujo, shall be placed at the top of future certifications for original appointment to the position of Police Officer in the BPD until he is selected for appointment or bypassed. If and when Mr. Araujo is selected for appointment and commences employment as a BPD police officer, his civil service records shall be retroactively adjusted to show, for civil service seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification 290999. Finally, the BPD may elect to require Mr. Araujo to submit to an appropriate psychiatric medical screening in accordance with current BPD policy; provided, however, that such screening shall be performed, de novo, by qualified professional(s) selected by the BPD other than mental health professionals who have previously performed a first level or second level screening of Mr. Araujo.

For all of the above reasons, the appeal of the Appellant, Jose Araujo under Docket Nos. G1-11-42 is hereby *allowed*.

Civil Service Commission

Paul M. Stein
Commissioner

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman [ABSENT]; Ittleman [YES], Marquis [NO], McDowell [YES] and Stein [YES], Commissioners on July 25, 2013.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Michael Rabeih, Esq.(for Appellant)
Amanda Wall, Esq. [for Appointing Authority]
John Marra, Esq. [HRD]