COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
617) 727-2293

CRYSTAL BERRIOS,
Appellant

v.

G1-12-81

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant: Crystal Berrios, *Pro Se*

Appearances for Respondent: Nicole Taub, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Helen Litsas, Esq.
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Commissioner: Cynthia A. Ittleman

DECISION

Pursuant to the provisions of G.L. c. 31 s. 2(b), the Appellant, Crystal Berrios ("Berrios" or "Appellant"), filed the instant appeal at the Civil Service Commission ("Commission") on March 1, 2012 seeking review of the decision of Boston Police Department (hereinafter "Department" or "Appointing Authority") to bypass the Appellant for original appointment to the position of Boston police officer. The reason proffered by the Department for the bypass was that the Appellant tested positive for

cocaine in the hair drug test portion of the Department's pre-employment screening process.

A prehearing conference was held in this case at the office of the Commission on April 17, 2012. On March 6, 2013, the Commission issued a procedural order in this and similar cases stating that on March 5, 2013, the Commission published a decision involving a number of consolidated appeals by former Boston Police Department officers who had been terminated for having failed a hair drug test and that a status conference would be held in regard to the instant bypass appeal and certain other such cases involving hair drug test results to discuss implications of the mixed results of the termination cases allowing some of the consolidated appeals with certain backpay and denying others. Boston Police Department Drug Testing Appeals ("D" Cases), Case Nos. D-01-1409, et al (26 MCSR 73 (2013))("Boston Hair Drug Test Appeals"), Boston Police Department v. Civil Service Commission et al, Superior Court Civil Action No. 13-1250-A *consolidated with* No. 13-1256-A (October 6, 2014)(affirming the Commission's decision "in all respects except as to the remedy afforded to Officers Beckers, Jones, McGowan, Harris, Washington, and Downing, which is modified such that the Boston Police Department is ordered to reinstate those officers with full back-pay and benefits as of the date of each officer's discharge." (p.26)); Boston Police Department v. Civil Service Commission, et al., *consolidated with* Preston Thompson, et al., v. Civil Service Commission and Boston Police Department, Appeals Court, Docket No. 2015-P-0330 (further appellate review pending) The Commission held a status conference on the instant appeal on April 1, 2013 at the Commission office.

A full hearing was held in this case on October 2, 2013 at the office of the Commission.[1] The hearing was digitally recorded and copies of the recording were sent to the parties.[2] The parties submitted post-hearing memoranda. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Ten (10) exhibits were entered into evidence on the day of the hearing. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Roberta Mullan, Director, Occupational Health Services Unit, Boston Police Department;

For the Appellant:

- Crystal Berrios, Appellant;

and taking administrative notice of all matters filed in the case; pertinent statutes, regulations, guidelines, policies and caselaw, including, without limitation, the decisions in the Commission's decision in Boston Hair Drug Test Appeals (*supra*); the parties' stipulations; and the parties' post-hearing memoranda; and drawing reasonable inferences from the credible evidence; a preponderance of the evidence establishes as follows:

1. At the time of the hearing in this case, the Appellant was in her late 20's, she was single, resided in Dorchester and was employed at Target, where she had been working for approximately five (5) years. The Appellant has completed an Associates

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.
[2] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. Although the Commission recorded the hearings in this case, the parties engaged a stenographer who recorded and transcribed the recordings of the proceedings and agreed that the stenographer's recordings and transcriptions would constitute the official record of the hearings.

Degree in Criminal Justice at Bunker Hill Community College. She attends Roxbury Community College and would like to obtain a Bachelors Degree at the University of Massachusetts in Boston. (Testimony of Appellant; Ex. 1)

2. Prior to her employment at Target, the Appellant worked at a number of other places of employment including Longwood Security, Auto Zone, Scales Security, Black Valley Security and the U.S. Transportation Security Administration ("TSA"). As part of the pre-employment process for each of these entities, the Appellant was required to submit to urine drug testing. The tests were used to detect cocaine, marijuana, and other illegal drugs. The Appellant passed each urine drug test. (Testimony of Appellant; Ex. 1)
3. The Appellant took and passed the April 25, 2009 civil service exam for the position of police officer. On March 16, 2010, the state's Human Resources Division ("HRD") established an eligible list of those who took and passed the 2009 police officer exam. (Stipulation)
4. Within approximately two months of the date that HRD established the eligible list for the 2009 exam results; the Department apparently asked HRD for a Certification in order to hire police officers; HRD issued a certification; the Appellant was notified that her name appeared on the Certification; and she signed the Certification and submitted a completed employment application on May 2, 2010.[3] (Exhibit 1; Administrative Notice)

[3] As in most appeal cases, after the Commission receives a bypass appeal, and prior to the prehearing conference for such an appeal, the Commission sends an email message to HRD asking for documentation pertaining to pertinent hiring cycle. At the prehearing conference, the Commission provides copies of the HRD documents it receives in this regard to the parties. In the instant case, HRD provided information about a Certification on which the Appellant's name appeared in September 2011, not in 2010. However, Exhibit 1 is an employment application the Appellant completed on May 2, 2010 and a "File Update" thereto.

5. The Appellant withdrew her May 2, 2010 application when a Detective told her to do so because insufficient time had passed since she submitted a timesheet to a previous employer requesting payment for more hours than she had worked, although she subsequently repaid the previous employer. (Testimony of Appellant) Specifically, as the Appellant disclosed in her application, in or about July 2007, she "[f]or no reasonable excuse I added more hour's the I actually worked and my boss didn't notice and signed it. But when it came back is when he realized it and called me in his office to speak of it. Being that it was a temp job and he didn't want to fire me over a stupid mistake of mines he asked if we can agree on mutual agreement and I left." (sic)(Ex. 1) On her application, the Appellant accordingly answered "yes" in the boxes on the application that asked "Have you ever … [l]ied to an employer about the number of hours you worked?", "[h]ave you ever [b]een paid for hours that you did not work?" and "[have you, in the past ten (10) years …[l]eft a job by mutual agreement under unfavorable circumstances?" (Ex. 1)
6. The Department requested a Certification of candidates from HRD on August 19, 2011 in order to fill twenty-nine (29) vacancies. On September 2, 2011, HRD issued Certification No. 202233 to the Department, on which the Appellant was ranked in the twenty-seventh (27^{th}) tie group. (Stipulation)
7. At or about the time that interested candidates submit their completed applications, the Department obtains the candidates' hair samples to submit to Psychemedics, a company with which the Department has contracted to perform hair drug tests of candidates (as well as uniformed employees), in order to eliminate candidates who use illegal drugs. The Department conducts a background investigation of candidates

who pass the drug test and it interviews appropriate candidates. If the Department gives a candidate a conditional offer of employment, the candidate is subjected to a Physical Abilities Test, a psychological screening and a medical examination. (Testimony of Mullan; Administrative Notice)

8. On September 15, 2011, the Appellant submitted a "File Update" to the Department, in order to supplement the information she had provided on the employment application that she submitted to the Department in 2010 and to be considered for employment. (Testimony of Appellant; Ex. 1)

9. On September 24, 2011, the Appellant appeared at the Department in order to submit to a hair sample for the Department's preemployment hair drug test. The Department's Occupational Health Unit ("Health Unit") is involved in the process of obtaining hair samples for hair drug testing. Roberta Mullan is the Director of the Health Unit. Ms. Mullan has been in charge of the Health Unit since 1985. The Health Unit is also involved in other pre-employment testing. Ms. Mullan supervises seven (7) support staff, two (2) physicians and a nurse practitioner. Ms. Mullan reports to Devin Taylor, the Director of the Department Human Resources office, and Ned Callahan, the Bureau Chief. (Testimony of Ms. Mullan)

10. The Department has been using hair drug testing for candidates since approximately 1998. Earlier, the Department relied upon urine testing to detect use of illegal drugs. Ms. Mullan was involved in the process that led to the Department's decision to engage Psychemedics to conduct hair drug tests. At that time, Psychemedics was the only company performing such tests. Urine drug tests indicate drug use only up to 24 or 48 hours prior to the test whereas hair drug testing can detect illegal drug use up to

ninety (90) days prior to the test. Ms. Mullan does not know what licensing requirements there are for Psychemedics but she believes that Psychemedics has whatever licenses it needs, otherwise it would not be in business. (Testimony of Ms. Mullan)

11. Ms. Mullan has been trained to obtain hair samples, as has Nurse Mary Benoit at the Health Unit who took the Appellant's hair sample on September 24, 2011. Ms. Benoit did not testify at the Commission hearing. The Psychemedics hair drug test tests for cocaine, marijuana, amphetamines, opiates and other illegal drugs. Psychemedics sets the cut-off levels to determine if someone has used illegal drugs. For cocaine, the cut-off level is 5 nanograms ("ng") per 10 milligrams ("mg") and a sufficient level of a metabolite level, indicating ingestion of cocaine. Test results higher than the cut-off levels are deemed positive. The optimum place from which to take a hair sample is from the back of the head. Although two hair samples are obtained from uniformed employees for their annual hair drug test, only one hair sample is taken from candidates.[4] Asked the reason for that only one hair sample is taken, Ms. Mullan stated that it was sufficient. (Testimony of Ms. Mullan; Ex. 3)
12. The process for obtaining the sample is that the trained Health Unit personnel cuts an appropriate sample of the candidate's hair, sections it, assesses how much hair has been taken, captures the hair in aluminum foil, and puts the hair into a packet in full view of the candidate. The candidate then fills out the applicable forms. If this process is not followed and appropriately documented, Psychemedics would not test

[4] I note that for uniformed employees of the Department, who are subject to annual drug testing and discipline if their test results are positive, two hair samples are taken. (Discipline Hair Drug Decision)

the sample. The Health Unit then sends the sample to Psychemedics. (Testimony of Ms. Mullan)

13. Upon completion of the hair drug test, Psychemedics sends the test results to a Medical Review Officer ("MRO") contracted to the Department. Dr. Eleanor Gilbert was the MRO who reviewed the results of the Appellant's hair drug test. Dr. Gilbert did not testify at the Commission hearing. It is the job of the MRO to review the test results to see if the results are negative or positive and, if the results are positive, the MRO contacts the candidate to inquire if the candidate has had a recent medical procedure and/or is taking a prescription that could possibly affect the hair drug test. Upon the MRO's determination of a positive test result, the MRO sends the Department a form with that information and the candidate is not considered further.[5] The Department has "never" continued to consider a candidate with a positive hair drug test result. (Testimony of Ms. Mullan)
14. The Respondent submitted the affidavit of Thomas Cairns, Ph.D., DSc., in support of Psychemedics' hair drug testing process. At the time of the Commission hearing, Dr. Thomas Cairns was a Senior Scientific Advisor of Psychemedics; he has held other positions at Psychemedics. He has been involved in hair drug testing for more than twenty-five (25) years. Dr. Cairns has held a number of academic appointments, been a member of a number of professional associations, written or otherwise contributed to many publications, and received rewards from the U.S. Department of Health and Human Services during his many years of work at the U.S. Food and Drug Administration. (Ex. 7) Dr. Cairns did not testify at the hearing in this case and,

[5] It is uncertain whether the MRO notifies the Department if the test result is negative.

therefore, I was prevented from assessing his expertise and credibility here and the Appellant was unable to cross-examine him.[6] (Administrative Notice)

15. Dr. Cairns' affidavit provides additional information about Psychemedics' hair drug test stating, in part,

> "Psychemedics uses 1) an initial immunoassay test followed by 2) a confirmation test by gas chromatography mass spectrometry mass spectrometry ('GC/MS/MS')(for Marijuana), GC/MS (for phencyclidine), or liquid chromatography mass spectrometry mass spectrometry ('LC/MS/MS') (for cocaine, opiates and amphetamines). … No initial specimen is considered positive unless a positive result for the same drug occurs under both the screen and confirmation tests. …
> When a (sic) individual' s ('donor's' or 'subject's') hair sample is collected, the test subject is first identified, the sample is given a subject identification number, information documenting the collection, including the collector's identity is filed in on a Psychemedics multi-copy Chain of Custody Form ('CCF') and on the Sample Acquisition Card ('SAC'). The subject identification number is also entered on the SAC. The collector takes the hair sample by cutting the hair close to the skin with scissors and, in the presence of the test subject, places the sample in an aluminum foil packet, then folds the packet and places it in the SAC. The collector seals the SAC with a tamper-resistant plastic integrity seal, and initials and dates the seal. The test subject then initials a statement on the SAC acknowledging that the sample was taken from him. The SAC is then placed in a tamper-resistant plastic pouch together with the top copy of the CCF, and the pouch is sealed and initialed by the test subject. Samples are forwarded by overnight carriers to Psychemedics. The donor, collector, and employer are able to retain a copy of the CCF bearing the Donor's name and signature."
>
> (Ex. 7; *see also* Ex. 5)

16. Psychemedics tested the Appellant's hair sample collected by Ms. Benoit. (Exs. 4, 5, 6, 7)

17. The packet submitted by the Department to Psychemedics for the Appellant's hair sample was intact. The length of the Appellant's hair that was tested was 3.9 cm

[6] The Department did not offer any other expert testimony regarding the hair drug test here. Dr. Cairns has testified at the Commission regarding appeals brought by other candidates against the Department. In fact, on one occasion, he testified remotely, using Skype. The *pro se* Appellant did not present an expert witness in an effort to dispute the validity of the Psychemedics hair drug test. (Administrative Notice)

long, indicating that the sample reflected a period of approximately ninety (90) days prior to the September 24, 2011 collection date. The sample was assigned the sample laboratory access number ('LAN') 117311633. (Ex. 7)

18. "A portion of the [Appellant's] sample was liquefied through digestion and screened by radioimmunoassay ('RIA'), and the sample was determined to be presumptive positive for cocaine … Another portion of the sample with LAN117311633 was then washed to decontaminate the sample, and the wash was analyzed by RIA … This portion of the sample was liquefied through digestion and subjected to confirmation testing by LC/MS/MS. Analysis by LC/MC/MC identified and confirmed the presence of cocaine at 17.1 ng/10mg hair, and the cocaine metabolite, Benzoylecgonine ('BE') at 1.3 ng/10 mg hair. …" (Ex. 7; *see also* Exs. 4, 5 and 6)
19. Asked if she understood the scientific parts of Dr. Cairns' affidavit, Ms. Mullan stated that she did not. (Testimony of Mullan) I find Ms. Mullan credible in that she testified in a straight forward manner based on her considerable personal knowledge and experience with Department occupational health unit and as Director of the unit and because she acknowledged that she could not assess information contained in Dr. Cairns' affidavit relating to the science involved in Psychemedics' hair drug testing and the specific type of licensing involved therein. Psychemedics submitted its hair test results for the Appellant's hair sample to the Department's MRO. (Ex. 7)
20. MRO Dr. Gilbert received Psychemedics' test result for the Appellant on September 29, 2011. (Ex. 3)
21. On or about September 29, 2011, Dr. Gilbert called the Appellant regarding the Appellant's hair drug test results. Since the Appellant was not home when Dr.

Gilbert called her, Dr. Gilbert left her a voicemail message. The Appellant returned Dr. Gilbert's call and asked to be re-tested. Dr. Gilbert told the Appellant to contact the Department. (Testimony of Appellant)

22. On or about October 3, 2011, Dr. Gilbert reported to the Department that the Appellant's hair drug test was positive for cocaine although the MRO report she signed failed to indicate the level of cocaine present. (Ex. 3)
23. The Appellant called the Department to ask to be re-tested. The Department informed her that she could file an appeal at the Commission. (Testimony of Appellant)
24. In early October 2011, the Appellant contacted Dr. Angela Leung, her physician of approximately eight (8) years, to ask if she could obtain a hair drug test. Dr. Leung told her that the only test available in connection with her medical office was a urine test. (Testimony of Appellant)
25. The Appellant asked Dr. Leung if the two medications she had been taking, calcium/vitamin D[7] and cabergoline, could affect her drug test result. Dr. Leung told her that the medications would not affect her drug test result. (Testimony of Appellant; Ex. 10)
26. The Appellant scheduled to take the urine test at Boston Medical Center on October 11, 2011 and did so. When providing the urine sample, the door to the room where the Appellant provided the urine sample was left ajar for observation. (Testimony of Appellant)
27. The Appellant's urine test report was negative for amphetamines, barbiturates, cocaine, opiates and benzodiazepine and report, states,

[7] The Appellant is no longer taking the Calcium/Vitamin D medication. (Testimony of Appellant)

> "This is a screening assay only and the results are reported as presumptive positive or negative, using a cutoff concentration of 1000 ng/ml. Results are to be used for clinical evaluation only. Confirmation testing was not performed."
> (Ex. 9)

28. The Department uses urine testing in limited circumstances, such as a follow-up after hair drug testing, if there is a reasonable suspicion that an officer is impaired, or for steroids. (Testimony of Ms. Mullan)

29. By the end of the Department's hiring process involving the 2009 police officer exam, it had hired twenty-nine (29) candidates, not including the Appellant. Nine (9) of the candidates who were hired ranked below the Appellant on Certification No. 202233. (Stipulation)

30. By letter dated January 23, 2012, the Department informed the Appellant, *inter alia*, that candidates ranked lower than on Certification 202233 had been selected and that she had been bypassed for selection for the following reason,

> "On September 24, 2011, you were administered a hair drug test which was analyzed by the Psychemedics Corporation. The results indicate you tested positive for the use of cocaine. Dr. Eleanor Gilbert, Medical Review Officer of Concentra Health Services, then confirmed the positive test result."
> (Ex. 8)

The January 23, 2012 letter also informed the Appellant that she could appeal the Department's decision at the Commission. (Id.)

31. The Appellant filed the instant appeal at the Commission on March 1, 2012. (Administrative Notice)

32. In her post-hearing memorandum, the Appellant reiterates her testimony stating, in pertinent part, "I again plead 'Not Guilty' to the charges in which I am being bypassed for employment as a Boston Police Officer. I simply ask to be allowed to

retake the drug test. I do not believe that there is any way on my behalf that it could have came back positive for such results."(sic)(Appellant's Post-Hearing Memorandum) I find the Appellant's credibility to be limited based on the facts that 1) neither during her testimony, nor in her post-hearing memorandum did the Appellant straightforwardly deny that she ingested cocaine and 2) just three (3) years or so prior to her 2010 application to the Department, she falsified her timesheet at one job, she was paid for the time that she did not work, she had to re-pay her employer and she left the job by "mutual agreement".

DISCUSSION

Applicable Law

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300, 304 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv.

Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Comm'rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971)(quoting Selectman of Wakefield v Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). *See* Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010)(citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006)). The Commission is to ensure that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. Id. An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. Busa v. Fall River Police Department, 27 MCSR 552 (2014)(citing Beverly, 78 Mass.App.Ct. 182, 189 (2010)). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited. "It is not for the

Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." Town of Burlington, 60 Mass.App.Ct. 914, 915 (2004). An appointing authority "should be able to enjoy more freedom in deciding whether to appoint someone as a new…officer than in disciplining an existing tenured one." City of Attleboro v. Mass. Civil Serv. Comm'n, BRCV2011-00734 (MacDonald. J.) citing Beverly at 191.

Especially when it comes to 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". Beverly at 190-91. *See also*, 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). Further, "An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion." McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 474 (1995). "Police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens." Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

With respect to hair drug testing in the field of law enforcement, the Commission issued its decision in the Boston Hair Drug Test Appeals, *supra*. Written by Commissioner Stein, the decision provides a detailed analysis of hair drug testing by Psychemedics of tenured police officers which has been upheld in substance, in part, thus

far by the Superior Court and is currently pending further review in the Appeals Court.

Since 2007, the Department hair drug testing procedures for tenured Boston police officers include,

> "Simultaneous collection of three separate hair samples, two to be sent to Psychemedics and one kept in secure storage by BPD;
>
> Set a specific cut off threshold for a positive test for cocaine by Psychemedics as: (2) a minimum of 5ng/10mg of cocaine; and (b) contains 1.0ng of norecocaine or a benzoyleconine/cocaine ratio of 5% or greater;
>
> Require that both Psychemedics samples must test above the specified cut-off threshold and test within 30% of each other to receive a positive test, a procedure known as 'double confirmation' testing;
>
> Permit an officer to have the third sample tested at his/her expense by Quest Laboratories for presence of the drug at that laboratory's 'limit of detection' (defined as 50pg/mg for all drugs except marihuana (which is 0.05 pg/mg)"
>
> (Boston Hair Drug Test Appeals, D-01-1409, p. 23 (26 MCSR 73 (2013)(footnotes and citations omitted; emphasis added); *see also* id., p. 37)

Commission Stein summarized his findings with regard to hair drug testing as follows,

> "The present state of hair testing for drugs of abuse, while potentially useful in clinical assessment settings, and in the context of child custody, criminal probation and pre-employment hiring decisions, does not meet the standard of reliability necessary to be routinely used as the sole grounds to terminate a tenured public employee under just cause standards governing civil service employees under Massachusetts law.
>
> Hair testing for drugs of abuse has not achieved general acceptance within the scientific or law enforcement communities. There are no universal industry standards controlling the performance of such testing. Save for general agreement that a level of 5ng/10mg of cocaine (plus some less uniformly-agreed level of metabolite) is the minimum concentration indicative of a low-level user, there are no uniform benchmarks for interpreting test results. Of the several laboratories that now offer hair testing to employers, the testing methods vary from laboratory to laboratory. While some parameters (cutoffs, decontamination procedures, etc.) are described generally in published literature, substantial parts of the methodologies are hidden behind claims of competitive proprietary interest and cannot be replicated by others. There is a dearth of judicial precedent for allowing an employer to terminate an employee, and especially a tenured public employee, solely on the basis of a positive hair test. The BPD appears to have been the first major municipal police department to begin hair testing of its sworn officers in

> 1999, and remained the only such department to rely on hair testing in disciplinary matters until the NYPD began a similar testing program in 2009.
>
> Although a lack of unanimity of opinion does not necessarily preclude a finding of general acceptance, especially as to a new scientific method, the criticism from sources such as the FBI Laboratory who have no proprietary interest in any one laboratory testing process, represents more than merely one side of a legitimate scientific debate. In particular, the scientific evidence is compelling that no proven level of any cocaine metabolite has been identified that is conclusive of ingestion. Despite more than a decade of study and a clear federal policy against drugs in the workplace, SAMHSA has declined to approve hair testing as a modality for detection of illicit drugs by employees of the federal government and those employed in the private sector that are subject to federal oversight. Persuasive, credible evidence also demonstrates that further appropriate controlled population studies and research is needed to: (a) identify the composition and levels of cocaine material present in, and transferred from the environment to nonusers, particularly law enforcement officers, as opposed to users; (b) identify, if possible, a definitive metabolite marker of ingestion; and (c) complete a scientifically-grounded assessment of the efficacy of so-called "avoidance techniques" and other conscious and unconscious factors that influence hair test results. This information is essential before any specific laboratory-tested decontamination procedures and test protocols (including those of Psychemedics) are likely to be accepted as scientifically reliable to the degree that, when applied in a real-world disciplinary scenario, a positive test reading is, and can only be, due to ingestion of an illicit drug.
>
> In sum, given the uncertainty about the efficacy of current decontamination strategies and metabolite criteria to rule out all real-world contamination scenarios, hair test results cannot be used in rote fashion as a conclusive and irrefutable means to terminate a BPD officer on the premise that such testing is 'generally accepted' as reliable."
> (Id. at 107-08)(emphasis in original)

As a result of these concerns, it was determined that in such discipline appeals,

> " …the Commission must review each Appellant's test results, together with other probative evidence to decide, as in any Section 43 *de novo* appeal, whether, or not the [Department] met its burden to prove misconduct (i.e., ingestion of illicit drugs) by a preponderance of evidence as to each individual Appellant …."
> (Id., p. 114)

Since the Boston Hair Drug Test Appeals Commission decision was issued, which involved the termination of police officers, the Commission has issued a bypass decision that addressed hair drug testing. In Henderson v Lynn Fire Department, 27 MCSR 443 (2014), the Commission adopted the recommended decision of Magistrate James Rooney

to deny the appeal. The appeal challenged a number of the appointing authority's reasons for bypassing him, including having tested positive on a hair drug test. The bypass letter sent to Mr. Henderson stated,

> "The background investigation has revealed a pattern of conduct which indicates unsuitability for public safety work; irresponsibility, a disregard for the law, and poor judgement, which related to your suitability to become a Firefighter.
>
> Your CORI showed multiple charges for possession of marijuana. You admitted using, and testing positive for marijuana as recent[ly] as 2011, despite taking the Firefighter exam in April 2010. During the interview you did not take responsibility for past drug use but attempted to minimize involvement and blame incidents on the actions of associates.
>
> Employment history in similar occupation; You stated that you were let go in 2008 by Boston Public Health Commission because your clinical skills were not up to Boston EMS standards.
>
> In your interview you displayed a consistent pattern of evasiveness when confronted with negative aspects of your background. You did not take responsibility for past drug use but attempted to minimize your involvement and blame the incidents on the actions of associates. You demonstrated a consistent pattern of evasiveness when confronted with negative aspects of your background and failed to take responsibility for adverse actions in you (sic) past."
> (Id.)

In this decision, the appellant admitted his use of marijuana, was allowed to be re-tested, he waited a month before being re-tested, and he had a CORI that included arrests for marijuana.

In Gannon v. Boston Police Department, 28 MCSR 541 (2015)(pending judicial review) the appellant, like the Appellant in the instant case, challenged the Department's hair drug test conducted by Psychemedics. Gannon averred that the Department erroneously bypassed him based on a positive (for cocaine) hair drug test result from a previous hiring cycle; that the MRO report for the test result was flawed; that the day after he was told he tested positive for cocaine in the previous hiring cycle, he obtained another hair drug test that was also tested by Psychemedics and the result was negative;

and that Gannon had taken and passed a Psychemedics hair drug test in the then-current hiring cycle as well as the years he was a Boston police cadet. Gannon had no criminal record. The Commission, in a 4-0-1 decision, found that the Respondent took only one hair sample in that case, not the multiple samples it takes for tenured employees and that,

> "Having found in Boston Hair Drug Test Appeals, that the hair drug test is insufficiently reliable in one context, such as testing of tenured employees, the Commission's decision in Boston Hair Drug Test Appeals cannot be construed to provide that a test result with less reliability is applicable in another context, such as pre-employment testing. Rather than further decreasing the test's reliability, the Respondent may, for example, consider whether the same test procedure should be used to justify a pre-employment bypass as the Respondent uses in discipline decisions for tenured employees."
>
> (Id. at 33)

Four members of the Commission concluded in Gannon,

> "When, as here, a drug test is deemed insufficiently reliable for the purposes of rendering an employment decision based entirely on the drug test result and a different and/or flawed process is used in the course of drug testing, it is inappropriate to preclude a candidate who has tested positive once from being considered employment for all times. Although there is no criminal record in this case, this issue presented by the Respondent's policy to "never" hire someone who once tested positive for drugs is somewhat analogous to bypass appeals involving police officer candidates with criminal histories. In Rodriguez v Greenfield Police Department, G1-15-1, for example, the Commission held,
>
> > '… an applicant's arrest record, even where there is no conviction, is entitled to some weight by the appointing authority in making its decision. … However, in relying on a candidate's arrest record, the appointing authority is obligated to produce sufficient substantiation of the facts underlying those charges. Additionally, in order for an appointing authority to rely on a record of prior criminal conduct as the grounds for bypassing a candidate, there must be a sufficient nexus between the prior misconduct and the candidate's current ability to perform the duties of the position to which he seeks appointment. The amount of time that has passed since the misconduct occurred, the nature of the offenses, and the evidence of the candidate's subsequent record are factors that should be taken into account on a case-by-case basis.
> > (Id. at 8)(citations omitted)'

> Under the circumstances in the instant case, the Department should set an appropriate time period during which a candidate's positive hair drug test result will preclude that candidate from being considered for employment."
> (Gannon v. Boston Police Department, 28 MCSR 541, 553 (2015)

Bypass appeals are governed by G.L. c. 31, s. 27, which provides, in pertinent part:

> "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] ... the appointing authority shall immediately file ... a written statement of his reasons for appointing the person whose name was not highest."
> (Id.)

PAR.08(4), promulgated by HRD to implement this statutory requirement, provides, in part:

> "(4) [u]pon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category. Such statement shall indicate all positive reasons for selection and/or negative reasons for bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. …"
> (Id.)

Respondent's Argument

The Department avers that it had reasonable justification to bypass the Appellant. Specifically, it asserts that the Appellant tested positive for cocaine in a hair drug test that the Department has used for a lengthy period of time and that the Department "never" considers a candidate after he or she tests positive for illegal drug use as indicated by the hair drug test. It further asserts that although there is abundant evidence in support of the hair drug test, " … the Department need not provide evidence of Psychmedics' test reliability because its drug detection techniques are generally recognized as scientifically

reliable, and accordingly, no scientific evidence of their reliability must be provided for their admissibility." Respondent's Post-Hearing Memorandum, p. 16. Further, the Respondent argues that courts in a number of other jurisdictions have accepted its reliability. Therefore, the Department states,"[a]ccordingly, I (sic) the drug test results considered by the Department in bypassing the Appellant are reliable on their own and do not require further scientific proof or expert testimony in support thereof." Id. at 17. In addition, the Department asserts that, as established by the affidavit of Dr. Cairns and the credible testimony of Ms. Mullan, the Appellant's hair sample was collected by trained Department personnel, that the hair sample was sufficient to detect drug use over a ninety (90)-day period, that the chain of custody of the hair sample was intact, that Psychemedics conducted the hair drug test according to its practice, that the test result indicated that the Appellant tested positive for cocaine, and MRO Dr. Gilbert confirmed the positive test result. The Department states that the Appellant's urine test results, which are negative, are not as accurate and reliable as a Psychemedics' hair drug test for a number of reasons, such as: urine testing does not use the type of testing involved in Psychemedics' hair drug test, the urine test was taken long after the hair drug test by which time the cocaine found in the Appellant's hair sample could have dissipated, the urine test was not confirmed, the urine sample may have been adulterated, and there is no chain of custody indicated in processing the urine sample. Finally, the Department questions the Appellant's credibility since she falsified timesheet reports to an employer.

Appellant's Argument

The Appellant repeatedly asserts that all she has asked for all along is to be able to re-take the hair drug test because she does not believe there is "any way" that the test

result could be positive. She states that she has taken urine drug tests as part of pre-employment checks when she applied for a number of jobs and the results have always been negative. In addition, the Appellant argues that when she was informed that the hair drug test result performed by Psychemedics for the Department was positive for cocaine, she asked the MRO and the Department to be re-tested. When her requests were denied, the Appellant avers that she took the initiative to be retested, contacting her physician at Boston Medical Center to have a drug test performed. The Appellant asserts that she was told that the only drug test available at the Boston Medical Center was a urine test. The Appellant scheduled and took the urine test shortly thereafter. The test result was negative. Therefore, the Appellant asks the Commission to grant her bypass appeal.

Analysis

The Respondent has established by a preponderance of evidence in this instance that it had reasonable justification to bypass the Appellant. The Appellant tested positive for cocaine in the hair drug test to which she submitted while being considered for employment at the Department. The Respondent only used one hair sample to reach this conclusion, unlike the multiple hair samples used in testing tenured employees. However, the Appellant's hair drug test result is significant in that it indicates that she her hair sample contained 17.1 ng/10mg cocaine, which is more than three times the Psychemedics cutoff of 5ng/10mg, and 1.3 ng/10mg of the cocaine metabolite benzoyleconine, also significantly exceeding the Psychemedics standard of 1.0ng of norecocaine or a benzoyleconine/cocaine ratio of 5% or greater. These ratings exceed the ratings of all ten (10) of the appellants in the Boston Hair Drug Test Appeals, strongly suggesting that even if the test is flawed, the Appellant's test result is so significant that

the likelihood of a false positive of this degree is very low. *See* Boston Hair Drug Test Appeals, pp. 114-127.

Further affecting this appeal is the Appellant's credibility, which was significantly undermined on two accounts. Specifically, the Appellant admits that within a couple of years of her application to the Department, she falsified her timesheets and received payment for hours that she did not work. Indeed, the Appellant withdrew her initial employment application at the Department when a background investigator suggested that she do so in view of the fact that she had falsified her timesheets. The Appellant's employer at the time discovered the problem, required her to re-pay the employer and the Appellant agreed to leave the employer rather than be terminated. In addition, the Appellant's credibility was undermined by asserting that she wanted to be re-tested, rather than declaring that she had never used cocaine, unlike the appellant in Gannon.

A number of other factors in this case also support the conclusion here. Although the Appellant obtained a urine drug test relatively soon after she was informed that her hair drug test result was positive and the urine drug test result was negative, a urine test detects ingestion only within the previous 24 to 48 hours whereas the hair drug test in this case detects ingestion within the previous 90 days. As a result, by the time that the Appellant took the urine drug test, any drugs previously ingested may well have dissipated. Also, the urine test result specifically indicates that the result was not confirmed. Further, the Appellant's own physician indicated that the drug test would not be affected by medications she was taking. In addition, unlike in the Gannon case, the Appellant here was not bypassed based on a hair drug test result from a previous application for employment but for her current application.

This is not to say that the Department's case was not flawed. The Department did not present the testimony of a hair drug test expert, the testimony of the MRO whose report (which was flawed) approved the test results, or the testimony of the Department personnel who took the Appellant's hair sample. In addition, the Department here provided the affidavit of Dr. Cairns regarding the Appellant's hair drug test, asserting therein that, "[t]he science of hair testing for drugs of abuse has received consensus and is generally accepted in the scientific community as being reliable and accurate[]" (Ex. 7), notwithstanding the Commission's decision to the contrary in Boston Hair Drug Test Appeals. While Dr. Cairns testified in Boston Hair Drug Test Appeals and in Gannon, he did not testify here. An affidavit alone cannot establish expertise as it precludes the Commission from assessing the proposed expert's knowledge and credibility and it precludes the Appellant from inquiring of the proposed expert. In a case in which the level of cocaine found in a candidate's hair is closer to the Psychemedics cut-offs than the level found in the Appellant's test results in the instant case, and the candidate presented credible evidence to support the conclusion that the test was a false positive, such flaws could yield a different result. The Commission decides each case based on its own merits, the evidence adduced, and in view of the applicable law. Having weighed the evidence and considered the Appellant's credibility in this case, the BPD has provided reasonable justification to bypass Ms. Berrios.

Conclusion

For all the above reasons, the Appellant's appeal under Docket No. G1-12-81 is hereby ***denied.***

Civil Service Commission

/s/ Cynthia A. Ittleman

_____

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman, Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 3, 2016.

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)(l), 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, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Crystal Berrios (Appellant)
Nicole I. Taub, Esq. (for Respondent)
Helen Litsas, Esq. (for Respondent)
John Marra, Esq. (HRD)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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CRYSTAL BERRIOS,
Appellant

v. G1-12-81

BOSTON POLICE DEPARTMENT,
Respondent

CONCURRING OPINION OF CHRISTOPHER BOWMAN

I concur with the conclusion to affirm the BPD's decision to bypass the Appellant here.

To ensure clarity, however, I also believe that the drug testing protocol used here was sufficiently reliable in the context of pre-screening potential job applicants.

Further, I do not believe that the BPD should be required to provide expert testimony regarding the reliability of hair drug testing each time a bypass appeal is filed with the Commission that involves a positive result from a hair drug test.

/s/ Christopher Bowman
Chairman
March 3, 2016