

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MELISSA PINCKNEY,
Appellant

v.

G1-08-312

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

Nikki Sanders, Esq.
Law Offices of Nikki Sanders
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Boston, MA 02108

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31 s. 2(b), the Appellant, Melissa Pinckney, (hereinafter "Pinckney" or "Appellant"), seeks review of the Human Resources Division's (hereinafter "HRD") decision to accept reasons proffered by the Respondent-Appointing Authority, Boston Police Department (hereinafter "Department" or "Appointing Authority"), for the bypass of 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 the use of anabolic steroids during the medical portion of the Department's pre-employment screening process. A full hearing was held

on October 30, 2009, at the offices of the Civil Service Commission. The hearing was digitally recorded and two (2) CDs were made of the proceeding. The parties submitted post-hearing briefs on December 15, 2009.

FINDINGS OF FACT

Thirteen (13) exhibits were entered into evidence on the day of the hearing. Three letters penned by Dr. Laura Tremblay on April 17th, December 11th, and December 30th, 2008, were also included in the record and I have marked them as Exhibits 14A, 14B and 14C respectively. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Robin Hunt, Director, Human Resources, Boston Police Department;
- David Roston, M.D., Medical Review Officer, AllOne Health;

For the Appellant:

- Laura Tremblay, M.D., Harvard Vanguard Medical Associates;
- Melissa Pinckney, Appellant;

I make the following findings of facts:

1. The Appellant is a twenty-six (26) year old female from Boston who has been employed with the Boston Transportation Department in the Special Police Division as a Parking Enforcement Officer for four (4) years. (Exhibit 1) She attended Southeastern College from 2002 to 2003 and is currently a student at UMASS Boston. (Exhibit 1 and Testimony of Appellant)
2. The Appellant's name first appeared on Certification No. 271118, which the Department requested from HRD in the Winter 2007, for the position of permanent full-time female police officer for the Spring 2008 Academy class. (Testimony of Robin Hunt and Exhibit 4)

3. Robin Hunt testified on behalf of the Department at the hearing of this matter. She has been the Director of the Department's Human Resources Unit since 2005 and has been an employee of the Department since 1999. Prior to becoming the Director, Ms. Hunt was the Deputy Director of Human Resources and prior to that she was the Director of Employment Services. As the Director of Human Resources, Ms. Hunt's responsibilities include the oversight of various units, managing attendance, personnel records, and hiring for both sworn and civilian positions. (Testimony of Robin Hunt)
4. Ms. Hunt explained the hiring process in order to become a Boston Police officer. In the first phase, the Department considers a candidate's entire background, including but not limited to, the applicant's criminal history, RMV driver history, military history, employment history, residency, etc. Once the background investigation is completed, a conditional offer of employment is extended to select applicants subject to successful completion of the medical and psychological portions of the screening process. This second phase of the screening process includes a medical examination, which consists of a physical, lab work, a urinalysis, and both a written and oral psychological screening. Each applicant must pass the medical and psychological screening portions of the hiring process before being admitted to the Academy. The Department considers each candidate on their own merit, on a case by case basis. (Testimony of Hunt)
5. Ms. Hunt was a good witness and I credit her testimony. She is the consummate professional and appears to have a sincere desire to ensure a fair and objective hiring process within the Boston Police Department. She did not show any personal bias

against the Appellant nor was it shown that she had any ulterior motive for recommending her non-selection as a Boston police officer. (Testimony, demeanor of Hunt)

6. The Appellant successfully completed the Department's background investigation, received a conditional offer of employment, and proceeded to the medical and psychological screening portion of the Department's hiring process. (Testimony of Hunt)
7. David Roston, M.D. (hereinafter "Dr. Roston") testified on behalf of the Department. Dr. Roston has been board certified in internal medicine since 1987. He currently works as a Medical Review Officer (MRO), and has been trained and certified by the American Association of Medical Review Officers since 1994. He recently renewed his MRO certification in April 2009. Dr. Roston is employed by AllOne Health, the company the Department uses to conduct urinalysis drug screening for the use of steroids. (Testimony of Dr. Roston and Exhibits 6, 7 and 8)
8. Dr. Roston was a credible and unbiased witness. His statements were based on his actual knowledge regarding how to read and interpret urinalysis drug screening results such as those reported regarding the Appellant. I credit his testimony. (Testimony of Dr. Roston)
9. The testing of the sample provided by the donor is not performed at the AllOne Health facilities. The sample is sent to LabCorp and LabCorp sends the sample to the University of Virginia Medical Center, where the testing is performed. (Testimony of Dr. Roston)

10. On March 28, 2008, the Appellant provided a urine sample to screen for the presence of anabolic steroids. The chain of custody for the sample is documented in the litigation packet provided by the lab. The first page of this packet contains a signed statement from the Appellant acknowledging that the urine specimen she provided was sealed with tamper-proof seals in her presence. Once the testing is completed, LabCorp sends the test results to Dr. Roston for his review. (Testimony of Dr. Roston and Exhibits 3 and 9)
11. Once he receives a positive drug screen result from the lab, Dr. Roston is responsible for determining if there is a legitimate explanation for that result. This is accomplished by interviewing the sample donor by phone to try and ascertain any medical or other explanation for the positive drug screen result. After the donor provides an explanation, Dr. Roston uses the best resources he has available to determine if the donor's explanation for the positive result is plausible. If no legitimate explanation is given, Dr. Roston reports the positive result to the requesting agency. (Testimony of Dr. Roston)
12. Dr. Roston testified that every person's testosterone level is unique to them, but that *epitestosterone* is a separate compound made in the body in a level roughly equal to that individual's testosterone level. Therefore, the levels of testosterone among individuals may vary, but the ratios of testosterone to epitestosterone will be about the same, usually around one (1) to one (1), which is reported as one (1). (Testimony of Dr. Roston)
13. On April 5, 2008, Dr. Roston reviewed the Appellant's drug screen results, which were reported to him by LabCorp. The Appellant's test results showed an extremely

elevated ratio of testosterone to epitestosterone, which indicates the presence of anabolic steroids. A normal ratio of testosterone when compared to epitestosterone would be one (1) to one (1), which is reported as one (1). A six (6) to one (1) ratio, or six (6) is very unusual and outside the normal range, but still acceptable. The Appellant's ratio was nine point seven (9.7) to one (1), or nine point seven (9.7). Dr. Roston testified that this is well beyond the acceptable range and indicative of anabolic steroid use.

(Testimony of Dr. Roston and Exhibit2)

14. Dr. Roston testified that he has observed patients with elevated levels of testosterone.

Those patients can exhibit excessive hairiness, an increase in muscle mass, and changes in their menstrual cycle (for women). He also testified that these individuals may not exhibit any outward indicators at all. (Testimony of Dr. Roston)

15. After receiving the Appellant's positive drug screen result, Dr. Roston contacted the Appellant to discuss possible explanations for the result. The Appellant reported that she was taking over the counter vitamins and Sudafed prior to providing the urine sample for the drug screen. (Testimony of Dr. Roston and the Appellant)

16. After speaking to the Appellant, Dr. Roston conducted an internet search for research articles regarding any potential relationship between Sudafed and testosterone. He was looking for some authority that indicated that Sudafed could be synthesized in the body to become testosterone or that Sudafed could interfere with the drug screen results. Dr. Roston was unable to find any relationship between Sudafed and testosterone and was similarly unable to find any indication that Sudafed could interfere with the drug screen result. (Testimony of Dr. Roston)

17. After reviewing multiple research articles and analyzing the chemical structures of both testosterone and pseudoephedrine (the active ingredient in Sudafed), Dr. Roston concluded that Sudafed could not have been synthesized into testosterone and it could not have interfered with the drug screen results. (Testimony of Dr. Roston)
18. Dr. Tremblay testified on behalf of the Appellant in the hearing of this matter. She is a doctor of internal medicine at Harvard Vanguard Associates and she is the Appellant's primary care physician. Dr. Tremblay testified that she has never been trained, nor is she certified as a MRO. (Testimony of Dr. Tremblay)
19. Dr. Tremblay testified that she has seen the Appellant for doctor's appointments approximately three (3) times in total. All three of these appointments took place after the Appellant received the positive drug screen result from the Department. (Testimony of Dr. Tremblay)
20. Dr. Tremblay testified that, based on a review of her office records, the Appellant called in and spoke with her Nurse Practitioner about a complaint of congestion and was told to take Sudafed on March 25, 2008, three (3) days before she provided the urine sample to test for anabolic steroids. (Testimony of Tremblay and Exhibit 9)
21. Dr. Tremblay testified that the Appellant did not show any outward signs of using anabolic steroids such as abnormal hair growth. (Testimony of Dr. Tremblay)
22. Dr. Tremblay testified that in her practice she has treated women with mildly elevated levels of testosterone. She does not test these individuals to determine what their corresponding levels of epitestosterone are and does not know what their ratios of testosterone to epitestosterone would be. She indicated that these women typically have abnormal hair growth and irregular periods. Dr. Tremblay testified that it is

possible with erratic and infrequent use of steroids that a woman would not exhibit any outward signs such as abnormal hair growth, etc. (Testimony of Dr. Tremblay)

23. On April 17, 2008, Dr. Tremblay penned a letter addressed to “To whom it may concern” which stated:

“This letter is to verify that Ms. Melissa N Pinckney was seen by me today at Harvard Vanguard Medical Associates. I am aware that she tested positive for an elevated testosterone / epitestosterone ratio on urine testing through your lab. I strongly believe that she is NOT doping with testosterone. I suspect that the sudafed, which she was taking for congestion at the time of the testing, caused the abnormal test result. She now has been off the Sudafed for approximately 3 weeks. I am repeating the urine testing today, along with additional blood tests. I am happy to fax those results to you, once they are available.” (Exhibit 14A)

24. Dr. Roston testified that in preparation for this hearing, he reviewed the above-referenced letter from Dr. Tremblay. Dr. Roston explained that in his professional opinion and based upon his research, he did not find Dr. Tremblay’s explanation plausible. He could not find any independent source to corroborate Dr. Tremblay’s theory. She did not provide any authority in the letter Dr. Roston reviewed to support her theory that the Sudafed had affected the test results. (Testimony of Dr. Roston)

25. In response to a question from this Commissioner, Dr. Tremblay testified that she has no knowledge of whether the chemical compositions of Sudafed and testosterone are similar. She also has no knowledge of whether Sudafed could interfere with a drug screen test to cause a positive result. (Testimony of Dr. Tremblay)

26. Based on Dr. Tremblay’s own testimony and that of Dr. Roston, I give no weight to Dr. Tremblay’s April 17, 2008 letter in which she wrote that she suspected that the Appellant’s use of Sudafed caused the abnormal test result. (Testimony of Dr. Tremblay and Dr. Roston and Exhibit 14A)

27. On the same day that Dr. Tremblay penned the above-referenced letter (April 17, 2008), she conducted a blood test for testosterone on the Appellant. According to Dr. Tremblay, the results of the test revealed that the Appellant's testosterone level was "normal" (Testimony of Dr. Tremblay)
28. I give no weight to Dr. Tremblay's testimony that the Appellant's testosterone level was "normal". As referenced above, the levels of testosterone among individuals may vary, but the *ratios* of testosterone to *epitestosterone* will be about the same, usually around one (1) to one (1), which is reported as one (1). This ratio determines whether the individual has a positive or negative test result regarding the presence of anabolic steroids. Thus, Dr. Tremblay's testimony that the Appellant's *testosterone* level was "normal" has no bearing on her positive drug test result. Further, Dr. Tremblay does not routinely test for epitestosterone and she is not familiar with the ratio of testosterone to epitestosterone.
29. Either on April 17, 2008 or April 18, 2008, Dr. Tremblay ordered a twenty-four (24) hour urine collection, which would test for both testosterone and epitestosterone. The Appellant was given a container to take home to collect her own urine for a twenty-four (24) hour period. Dr. Tremblay testified that this is an unsupervised sample and there is no chain of custody because the Appellant is responsible for collecting the sample at home and returning it to the facility for analysis after twenty-four (24) hours. According to Dr. Tremblay, the ratio of testosterone to epitestosterone was .8 (as compared to the 9.7 ratio reported by LabCorp on a sample that was provided on March 28, 2008). (Testimony of Dr. Tremblay and Exhibits 12 and 13)

30. Exhibit 13 is the document that contains the .8 ratio referenced by Dr. Tremblay. The document states that the “result date” was 7/25/2008, but also states “**CORRECTED RESULT**”; previously reported as 6 on 5/15/08 at 14:34”. There was no explanation provided at the hearing regarding this discrepancy. (Exhibit 13)
31. I give no weight to the results of the urine screening facilitated by Dr. Tremblay on April 17, 2008 or April 18, 2008 for the following reasons. First, I am not satisfied with the chain of custody. Second, even if there were no chain of custody issue, there was no evidence presented to show that it invalidates the results from the sample given over two weeks earlier. For example, there was no testimony given regarding how long an elevated ratio would exist if an individual used anabolic steroids and then stopped using them for a 2-week period. Finally, the unexplained discrepancy between the initial ratio of 6 on May 15, 2008 and the revised ratio of .8 on July 25, 2008 raises questions about the validity of the test. However, even if this discrepancy could be explained, the first two reasons listed above would still lead me to give no weight to these test results.
32. The Appellant testified that she has never used steroids, she does not know what they look like and that she would not even know how to use them. She testified that prior to giving the urine sample on March 28, 2008, she was taking Sudafed, vitamins and birth control pills. (Testimony of Appellant)
33. Viewed independently, the Appellant offered compelling testimony that she has never used anabolic steroids. While the Appellant was an earnest witness, her testimony was not supported or bolstered by other facts. Dr. Tremblay’s tests were not reliable and, even if they were, did not show that the test based on a sample taken over two

weeks earlier were invalid. Further, Dr. Tremblay was unable to provide any evidence to show that the Appellant's use of Sudafed had, as suggested in her written letter, impacted the results of the drug screening tests by LabCorp. For these reasons, I give more weight to the Department's positive test results than the testimony of the Appellant.

CONCLUSION

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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). However, 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, 43 Mass. App. Ct. at 304.

Based on all of the reasons cited in the findings, I conclude that the BPD has shown, by a preponderance of the evidence, that it had reasonable justification to bypass the Appellant for the position of police officer.

The Department reviews each and every candidate’s suitability for appointment to its force which includes the candidate’s application and an extensive background investigation to determine his or her character and fitness. Once this is completed, the Department screens each candidate to ensure that they are both physically and psychologically fit for the position of police officer. This medical screening involves a physical examination, lab work, and a urinalysis as well as both a written and oral psychological assessment. Candidates must successfully complete each part of the medical screening process before being allowed to take the Physical Abilities Test (PAT) and finally being admitted to the Academy. It is reasonable for the Department to bypass a candidate for appointment if she tests positive for the use of an illegal substance during her pre-employment screening process

Here, the Department has provided reasonable justification for bypassing the Appellant for appointment due to her positive drug screen for the use of anabolic steroids during the Department's pre-employment screening process. As Robin Hunt testified, it is the Department's policy not to consider applicants who have tested positive for an illegal substance. The Appellant was given an opportunity to provide alternate explanations for the positive drug screen result and she was unable to do so. Consequently, the positive result was reported by a trained MRO directly to the Department.

The Department, through documentary evidence and credible testimony of a trained and seasoned medical review officer, demonstrated why the Appellant's drug screen result was positive. It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Dr. Roston explained why the only explanation, offered by both the Appellant and her primary care physician, for the positive test result was not plausible. Before reporting the positive test result to the Department, Dr. Roston did research and attempted to find any

medical authority that would support the Appellant's explanation that the Sudafed she had taken had interfered with the test results and he was unable to do so.

The Appellant was unable to provide any evidence to refute the positive drug screen as reported by Dr. Roston. Her primary care physician, Dr. Tremblay theorized that the Sudafed that the Appellant had taken had somehow caused the positive test result. However, Dr. Tremblay testified that she is not trained as a MRO to review the results of these types of drug screens. She also testified that she is unfamiliar with the chemical compositions of Sudafed and testosterone and has no knowledge of whether Sudafed could interfere with a drug screen to cause a positive result. Further, the subsequent drug screening tests facilitated by Dr. Tremblay were not reliable, including one test in which the sample was given under unsupervised conditions with no chain of custody.

While the Appellant was a compelling witness, no other facts or evidence bolstered her testimony. I give more weight to the positive test results administered by LabCorp and the testimony of Dr. Roston. Finally, I conclude that there is no evidence of any political considerations, favoritism and/or bias that would warrant the Commission's intervention.

For all the above reasons, the Appellant's appeal under Docket No. G1-08-312 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman, Marquis, Taylor and Stein Commissioners [Henderson, Commissioner – No]) February 25, 2010.

A true record. Attest:

Commissioner

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

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

Notice:

Nikki Sanders, Esq. (for Appellant)
Amanda Wall, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)