

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
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THOMAS ROWLEY,

Appellant

v.

BOSTON POLICE DEPARTMENT,

Respondent

CASE NO: G1-10-349

Appearance for Appellant:

Joseph Sulman, Esq.
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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Thomas Rowley, 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. Rowley 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 January 18, 2012 at the offices of the Commission and was digitally recorded. Twenty-seven (27) exhibits were entered into evidence at the hearing and (2) two additional exhibits (P.H. Exhs. 28 & 29) were submitted thereafter by the BPD. BPD called one witness and Mr. Rowley testified on his own behalf. Both parties subsequently submitted proposed decisions.

FINDINGS OF FACT

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

The Appellant

1. Mr. Rowley is an unmarried resident of Brighton, Massachusetts. He grew up in Boston, graduated from Don Bosco High School, and earned a Bachelor of Science degree with a double major in criminal justice and psychology from UMASS Amherst in 1995. (*Exhs. 1 & 2; Testimony of Appellant*)

2. In 2001, Mr. Rowley was hired by the Atlanta, Georgia Police Department where he served as a sworn police officer for five years. He resigned his position and returned to Boston in 2006 to be closer to his family, particularly his sick parents. His father subsequently passed away. (*Exhs. 1, 2, 11, 19, 28 & 29; Testimony of Appellant*)

3. In order to be hired as a police officer with the Atlanta Police Department, Mr. Rowley was required to pass a written test, a background check, a polygraph test, a medical examination and a psychological screening consisting of a written test and interview. (*Testimony of Appellant*)

4. As an Atlanta police officer, Mr. Rowley performed all of the duties associated with a major metropolitan city police officer, often interacting with the public in high stress situations. His responsibilities included responding to 911 calls, engaging in foot and mobile patrols, community policing activities, making traffic stops and arrests, transporting and interrogating prisoners, interviewing witnesses, counseling victims, and providing security details. His duties required that he carry a weapon which he drew in the line of duty on occasion, but never discharged. He worked his last two and a half years of service in Zone 1, which had Atlanta's highest reported crime rate. (*Exhs. 1, 21 & 29; Testimony of Appellant*)

5. Mr. Rowley's superiors in the Atlanta Police Department consistently rated his performance positively. His final annual personnel evaluation in 2005 rated him "highly effective" overall and "outstanding" in maintaining equipment and knowledge and adherence to department policy and procedures. (*Exhs. 1, 20 through 23 & 28; Testimony of Appellant*)

6. Mr. Rowley has a standing offer to return to duty with the Atlanta Police Department. (Testimony of Appellant)

7. In addition to passing a psychological screening prior to his employment in Atlanta, Mr. Rowley went through a psychological assessment for employment with the Boston Housing Authority in 2009, which included two written tests and an interview with a psychologist who found "NO EVIDENCE FOR THE EXISTENCE OF A SERIOUS PSYCHOLOGICAL DISORDER, which would render [Mr. Rowley] unable to perform the duties of an Investigator/Police Officer." (*Exh. 17*)

8. Mr. Rowley also submitted to psychological assessments in connection with various other applications for employment, including the Norfolk County Sheriff's Department (2008), St. Petersburg, Florida Police Department (2004), Cobb County Georgia Police Department (2004). None of those evaluations found any basis for disqualification. (*Exhs 1 & 29*)

9. After returning to Boston, Mr. Rowley worked for Faulkner Hospital in Boston. He was initially hired as a security guard and was later assigned the duties of a medical courier. He was highly regarded by his superiors and had no discipline issues reported. He left the Faulkner Hospital job in 2009 for lack of work (insufficient hours to qualify for a per diem position). He was unemployed at the time of his application for employment with the BPD that is the subject of the present appeal. (*Exhs. 1, 24 through 27; Testimony of Appellant*)

BPD Psychological Screening Process

10. 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.13*)

11. 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. 13, p. 5*) (*emphasis added*)

12. 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. 13, p.16*)

13. 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*)

14. 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 (PIA). 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.14*

15. On July 1, 2010, BPD's 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.15*)

16. 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.15*)

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. Johnson*)

17. HRD formally approved the BPD's revised plan for psychological screening of candidates on June 30, 2011. (*Exh.15*)

The Appellant's Applications for Appointment to the BPD

18. Mr. Rowley first applied for appointment as a BPD police officer in 2008. His application and background investigation disclosed "no concerns" and he was offered employment, subject to passing the medical examination and psychological screening. (*Exh. 19 & 28*)

19. The first level screener, BPD staff psychiatrist Dr. Marcia Scott, and the second level screener, psychiatrist Dr. Julia Reade, found Mr. Rowley was an "intelligent" man who was "conscientious", "rule following", and "motivated" who had "worked as a police officer, apparently without incident." Both psychiatrists, however, found him unacceptable for employment by the BPD, primarily because they found his interview performance stiff and personally off-putting, and his offer of employment was withdrawn. (*Exhs.10, 11 & 19*)²

20. Mr. Rowley appealed to the Commission from the BPD's decision to bypass him. He also filed charges of employment discrimination with the Massachusetts Commission Against Discrimination. The parties later settled the dispute for procedural reasons. By unpublished decision, dated May 20, 2009, the Commission issued a Decision granting "Chapter 310 relief" to Mr. Rowley 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 another consideration for

² Dr. Scott's report described Mr. Rowley as a "large but also overweight and imposing man" with "no definition between shoulders and head. A large but still relatively small head resting on a huge body gave him an imposing look." She said he "didn't understand his feelings" and could not provide her with sufficiently detailed explanation for her questions about his school years, his employment record and, as to his social life that centered on his family, "what kind of girl he was looking for [in a relationship]?" This led to her conclusion that he was "socially isolated, unable to make relationships . . and unable to use his obvious intelligence or his buried feelings to persuade or influence others." Dr. Reade's report stated that her one "grave" concern was his "interpersonal presentation, which was wooden, flat and borderline bizarre in three different interviews in this application process. His manner was consistently stiff and off-putting. Mr. Rowley behaved "robotically" and had "machine gun-like delivery" with "no indication of relatedness to other human beings" and "difficulty observing ordinary social cues." (*Exhs. 10 & 11*)

appointment as a BPD police officer. (*Exh. 19; Rowley v. Boston Police Dep't, CSC No. G1-10-02*)

21. Mr. Rowley's name appeared on Certification No. 290999 issued by HRD to BPD in April 2010 and he again completed the required Student Officer Application. Mr. Rowley included with his Student Officer Application the required neighborhood and character letters of reference, all of which were uniformly positive. These included references from the Atlanta Police Department and Faulkner Hospital. (*Exhs. 1, 18, 21 through 27*)

22. Donald Brown, a former Atlanta Chief of Police, described Mr. Rowley as a "dedicated" and "honest" police officer who was "definitely [a] team player" and "always punctual and dependable". He had a "cool head" and a "lot of common sense". Chief Brown "hated to see him go".(*Exh. 22; Testimony of Appellant*)

23. Atlanta Police Sergeant William Ricker, who supervised Mr. Rowley, echoed the Police Chief's assessment of his dependability, teamwork, and ability to manage the stress of the job of a patrol officer. Sgt. Ricker knew of no traits that would represent any impediment to recommending him for appointment as a Boston Police Officer. (*Exh. 21*)

24. Mr. Rowley's supervisors at Faulkner Hospital said he was "very dependable" and "a pleasure to work with", "a team player" who "does what's asked and needs minimal supervision." He showed "great skills with others" and "was able to manage a very busy E.D. and Psych Ward, and was "successful in diffusing situations with violent patients without incident." (*Exhs. 24 through 27*)

25. The BPD's routine background investigation was conducted by Detective Michael Kane, and disclosed no criminal record and two traffic citations, a 2009 incident for which he

was found not responsible, and a second that was pending. Mr. Rowley subsequently reported to the BPD investigator that he was found not responsible for that incident as well. (*Exhs. 1 & 2*)

26. Detective Kane's report listed Mr. Rowley's uniformly positive employment and personal references, including the opinion of his supervisor at Faulkner Hospital that he had "Great social skills with others" and his "very good performance" as an Atlanta Police Officer. Detective Kane found Mr. Rowley "very cooperative with all requests and has responded quickly." He noted, however, that Mr. Rowley "seems robotic in his response both in person and on the phone", that Mr. Rowley's apartment was "disorganized and messy" and reported some discomfort with Mr. Rowley's attitude during the home interview. (*Exh.2*)

27. As part of the background investigation, the investigator obtained copies of Mr. Rowley's annual performance evaluations while employed as an Atlanta police officer, which had rated him "Highly Effective". (*Exh. 20*)

28. Upon completion of the background investigation and a review of his entire application packet, on September 10, 2010, the BPD again extended a conditional offer of employment to Mr. Rowley, subject to another medical and psychological screening. (*Exh.3*)

29. Mr. Rowley took the two written psychological tests prescribed by the BPD revised psychological screening plan, the MMPI-2RF and the PIA. (*Exhs. 4 & 5*)

30. The test report of the results on the MMPI-2RF indicated that Mr. Rowley "presented himself in a very positive light by denying several minor faults and shortcomings that most people acknowledge." This level of "under-reporting" is uncommon but, may to some extent, simply reflect a background stressing traditional values.³ Apart from this caution, the MMPI-2RF disclosed "no indications of somatic, cognitive, emotional, thought or behavioral dysfunction"

³ Mr. Rowley received a strict Catholic upbringing and education. (*Exhs.,1, 2, 18; Testimony of Appellant*)

and indicated no “specific psycho diagnostic recommendations”. The test profile indicated a person who was “well-intentioned and trustworthy”, perhaps “overly trusting.” (*Exh. 4*)

31. The PIA test report rated Mr. Rowley’s at “low risk” for being “poorly suited” for a job in law enforcement, and low risk for job-related behavioral issues, including problems of integrity, anger management, alcohol use concerns, illegal drug use concerns or substance abuse proclivity. Mr. Rowley fit a profile of “Warm Control”, a category that fits 70% of public safety applicants. His scores indicated a person who was “generally friendly, extraverted, and quick to help others who need help.” His elevated PIA score on the Positive Impression Management (PMI) scales also suggested Mr. Rowley attempted to place himself in a positive light and minimize negative information about himself, but those scores, and all of his “substantive” scores were consistent with norms of public safety officers. (*Exh. 5; Testimony of Dr. Johnson*)

32. The written test results are not appropriate to use as the sole basis for determining the psychological fitness of an applicant. (*Exhs. 4 & 5; Testimony of Dr. Johnson*)

33. On September 22, 2010, Mr. Rowley was sent to see Dr. Marcia Scott who conducted his first level screening for the second time. The interview lasted about 10 minutes. Dr. Scott did not have Mr. Rowley’s file with her at the time of the interview. Dr. Scott asked Mr. Rowley to explain what he had done about the “problems” she had found with his ability to do the job of a police officer previously, to which he said she was “wrong” and that he “did the job for five years in Atlanta.” She told him this experience was “meaningless” and her opinion of him had not changed. Mr. Rowley left this interview very upset. (*Exhs 1 & 8; Testimony of Appellant*)

34. Dr. Scott’s report said he “appears huge, a small head on a large overweight body” and behaved in an “odd, tantrum like” manner. She concluded that he “cannot focus on a problem or

relate effectively because his energy is spent controlling his anxiety and his thinking . . . blaming the economy for all of his problems taking no responsibility” and “these mental impairments” prevented him from performing as an armed police officer. (Exh. 8; Testimony of Appellant)⁴

35. On October 29, 2010, Mr. Rowley saw Dr. Ronn Johnson, Ph.D, for a second level screening interview. 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, primarily as a “first level” screener, 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 such pre-employment screenings in his career. (*Exh. 17; Testimony of Dr. Johnson*)

36. Dr. Johnson receives the candidates’ test results and the first-level screener’s report along with the candidates’ Student Officer Application packets before beginning his scheduled interviews. (*Testimony of Dr. Johnson*)

37. After completing the oral interview, Dr. Johnson gave Mr. Rowley a set of written questions which he was required to answer in writing. These questions included:

- “Write at least two paragraphs that explain why you believe that you are qualified for the applied for BPD position.”
- Please explain in detail what you have done to address about the problems related to doing this job that were contained in the information you received”
- Please explain exactly what it is you do on the weekends?”
- “Identify and explain everything that Dr. Scott wrote about you that were not true in your psychological evaluation”

In response to these questions, Mr. Rowley explained his duties as a sworn police officer in Atlanta. He said “I don’t believe I have any problems when it comes to performing the functions of the job.” He listed his weekend activities to include going to the beach, sporting events, and

⁴ Dr. Scott did not testify at the Commission hearing. I give no weight to her uncorroborated subjective interview impressions.

nightclubs where a friend performs in a band, working out, and nature photography. He gave an extensive and detailed critique of his interview with Dr. Scott. (*Exh.29; Testimony of Appellant*)

38. In his report issued the next day, Dr. Johnson itemized the “concerns” about Mr. Rowley stated in Dr. Scott’s report. He commented on the test scores that indicated “under reporting” of faults. His report of the interview focused on his appearing “inflexible”, “irritable” and “anxious” with an “unmistakable trace of anger and resentment in his voice”, and his “using every opportunity to stress the point of the absence of any behavior disorder.” He called out the fact that Mr. Rowley had written to Det. Kane and reported his disgust with his treatment by Dr. Scott in no uncertain terms, which he followed up with a formal discrimination complaint. (*Exh. 9: Testimony of Dr. Johnson & Appellant*)

39. Dr. Johnson concluded:

There is current evidence of a Category B behavior disorder. There is a well-established pattern of behavior and thinking that would significantly interfere with this recruit’s ability to consistently perform the duties and manage the stress of an armed police officer with BPD. The areas where this recruit is expected to experience difficulties includes, acceptance of criticism, avoidance of substance abuse (i.e. alcohol), emotional regulation, managing stress, and quality of judgment. The recruit has a variety of behavior disorder vulnerabilities. Mr. Rowley . . . is intoxicated at least once a week, and has had at least a dozen hangovers. His use of alcohol is consistent with binge drinking pattern. The recruit also fails to exercise proper restraint of his anger during situations where he is under evaluation scrutiny. There are serious questions about his ability to display an effective command presence while responding to scene management situations where he is expected to restore calm in a civilian setting. Instead, his emotions are expected to override intellect. Under these distressing circumstances Mr. Rowley can be anticipated to come across as disrespectful and rude even under benign situations. His blame-avoidance and defensiveness are fueled by reflexive emotional reactions. The quality of his judgment is projected to erode to impermissible levels for anyone attempting to function as a peace officer. . . . [T]his applicant is NOT RECOMMENDED as suitable for hire”

(*Exh.9*)

40. Dr. Johnson acknowledged at the Commission hearing that Mr. Rowley did not have a history of any “psychiatric condition”. He held to his opinion that Mr. Rowley suffered from a

Category B “behavioral disorder”, which was a “catchall” that did not require finding such a history of any specific psychiatric condition. He did not provide any more specific clinical definition of the behavior disorder. (*Testimony of Dr. Johnson*)

41. Dr. Johnson believed that Mr. Rowley’s duties as an Atlanta police officer had been limited mainly to custody and transporting prisoners. Although Mr. Rowley had informed Dr. Johnson of the full extent of his duties in Atlanta, Dr. Johnson did not recall even that the Appellant was an armed officer. Even after it was pointed out on cross-examination that Mr. Rowley’s duties had encompassed all the typical duties of a sworn officer in a major metropolitan police force, Dr. Johnson still did not believe that experience in Atlanta was of much significance in considering whether he was psychologically fit to perform as a BPD police officer. (*Exhs. 1, 2, 19; Testimony of Dr. Johnson & Appellant*)

42. Dr. Johnson supported his opinion that Mr. Rowley was probably a binge drinker solely by reference to the responses he said he had received during the oral interview, specifically that Mr. Rowley reported “going to bars or clubs”, once had five or more drinks at one sitting six months earlier on St. Patrick’s Day, had about a dozen hangovers since taking his first drink as a teenager and was “intoxicated” about once a week. (*Testimony of Dr. Johnson*)

43. In fact, Mr. Rowley drinks alcohol in moderation. He does not get intoxicated once a week and never told Dr. Johnson that he did so. He did tell Dr. Johnson he may have been intoxicated five times “in my life”, mainly during his college day, when he would drink alcohol about once a week.

44. Dr. Johnson agreed with the definition of binge drinking prescribed by the National Institute on Alcohol Abuse and Alcoholism, i.e., a “pattern” of alcohol consumption that brings the blood alcohol concentration (BAC) level to 0.08% or more”, which usually corresponds to

five or more drinks on a single occasion for men, generally within a 2 hour period. Dr. Johnson could point to no instance other than the one on St. Patrick's Day on which Mr. Rowley had consumed alcohol in a manner that met this definition. Dr. Johnson also agreed a dozen hangovers over a 15 year period did not necessarily indicate a drinking problem. He provided no other specific evidence that controverted Mr. Rowley's work record, background investigation and personal and professional references, all of which were devoid of any history of problems with alcohol. (*Testimony of Dr. Johnson. See <http://www.cdc.gov/alcohol/faqs.htm>[referred to in testimony]*)

45. Mr. Rowley was a credible witness who demonstrated a good memory for events. He gave testimony that was deliberate, concise and responsive, with appropriate eye contact. He described with remarkable accuracy the written questionnaire that Dr. Johnson typed up on his laptop computer during the interview and gave to Mr. Rowley to complete; although he had not seen that document for two years. He was clearly nervous, although not unduly so, and freely acknowledged it to me when I asked about his state of mind. His demeanor showed respect at all times, even when describing what he clearly perceived as gross mistreatment at the hands of the BPD psychological screeners. (*Testimony of Appellant*)

46. In December 13, 2010, the BPD's Director of Human Resources wrote to Mr. Rowley, quoting Dr. Johnson's conclusion stated above and informing Mr. Rowley that the BPD had withdrawn its offer of employment. This appeal duly ensued. (*Exh. 16; Claim of Appeal*)

. LEGAL STANDARD

Bypass appeals are 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).

ANALYSIS

The BPD has failed to prove by a preponderance of the evidence that Mr. Rowley possessed a disqualifying psychiatric condition that justified the decision to bypass him for appointment to the position of BPD Police Officer.⁵

First, it is undisputed that Mr. Rowley 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 a psychological evaluator offer his or her subjective “concerns” about a candidate’s interview performance or past conduct that the BPD already knew about and found not to be disqualifying. In Goff v. Fall River Police

⁵ The Appellant argued that the BPD improperly used its 2010 screening process to disqualify Mr. Rowley before HRD had approved it and 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.

Dep’t, CSC No. G1-12-263, 26 MCSR --- (2013) citing Roberts v. Boston Police Dep’t, 21 MCSR 536 (2008), the Commission 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.”

Moreover, under HRD’s Medical Guidelines, a candidate’s psychiatric condition must 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. Rowley 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. Rowley 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 “questions” based almost entirely on Mr. Rowley’s interview performance and “cautionary flags” raised in his test results that purportedly would lead him to “struggle” to perform as a police officer, an opinion he based on no specific examples, much less any pattern, of dysfunctional behavior. Moreover, Dr. Johnson never opined that Mr. Rowley’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, particularly given his “highly effective” rating as an Atlanta police officer.

Third, Dr. Johnson’s subjective impressions are wholly implausible in view of the BPD recruit investigator’s findings and other facts in the record about Mr. Rowley which Dr. Johnson either failed to consider or chose to overlook or simply got wrong. For example, Dr. Johnson erroneously believed that Mr. Rowley’s work in Atlanta was essentially to transport prisoners; he did not know Mr. Rowley carried a firearm; and he erroneously believed a psychological screening was not necessary to get that job. Similarly, Dr. Johnson’s conclusion that Mr. Rowley was at risk for substance abuse because he got drunk once a week is not credible. There is no evidence of such behavior, or support for such a conclusion, found anywhere in this record.

In sum, Dr. Johnson impermissibly found Mr. Rowley unfit solely because of his dislike of Mr. Rowley’s interview style, his erroneous opinion about his use of alcohol, and disdain for Mr. Rowley’s having complained to the BPD investigator about how he was treated by his colleague, Dr. Scott (the only specific “behavior” that Dr. Johnson could point to in the record to support his opinion outside of the interview and test results). This record plainly falls short of the evidence required to prove the existence of a disqualifying psychiatric condition that puts a candidate or others at risk of harm to their health or safety.

CONCLUSION

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the name of the Appellant, Thomas Rowley, shall be placed at the top of the all 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. Rowley is selected for appointment and commences employment as a BPD police officer, his civil service records shall be retroactively adjusted to show, for

seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification 290999. Finally, the BPD may elect to require Mr. Rowley 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 a mental health professional who has previously performed a first level or second level screening of Mr. Rowley.

For all of the above reasons, the appeal of the Appellant Thomas Rowley under Docket Nos. G1-10-349 must be and hereby is ***allowed***.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on August 8, 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)(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, Notice to:

Notice to:

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