

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

GARY MORLEY,  
Appellant

v.

G1-16-096

BOSTON POLICE DEPARTMENT,  
Respondent

Appearance for Appellant:

Jane DePalma, Esq.  
P.O. Box 4094  
Dedham, MA 02027

Appearance for Respondent:

Katherine Sarmini Hoffman, Esq.  
Boston Police Department  
Office of the Legal Advisor  
One Schroeder Plaza  
Boston, MA 02120

Commissioner:

Christopher C. Bowman<sup>1</sup>

**DECISION**

On May 17, 2016, Gary Morley (Mr. Morley), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to bypass him for original appointment to the position of police officer. On May 24, 2016, I held a pre-hearing conference at the offices of the Commission, which was followed by a full hearing at the same location on July 26, 2016.<sup>2</sup> The witnesses, with the exception of Mr. Morley, were sequestered. The full hearing was digitally recorded and both

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Brendan Rimetz in drafting this decision.

<sup>2</sup> 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.

parties received a CD of the proceeding.<sup>3</sup> On August 25, 2016, the parties submitted post-hearing briefs in the form of proposed decisions.

## **FINDINGS OF FACT:**

Twenty-eight (28) exhibits were entered into evidence at the full hearing. Additional documents submitted after the hearing by the BPD at my request were marked as Exhibit 29.

Based on the documents submitted and the testimony of the following witnesses:

*For the BPD:*

- Dr. Andrew Brown, Psychiatrist;
- Catherine Michaud, Assistant Director of the BPD's Human Resources Department;

*For Mr. Morley:*

- Gary Morley, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, a preponderance of evidence establishes the following findings of fact:

1. Mr. Morley is thirty-two (32) years old. He is engaged and lives with his fiancé in Dorchester, Massachusetts. He graduated from Athol High School in 2002. (Testimony of Mr. Morley and Exhibit 1)
2. Mr. Morley has been employed as a federal police officer with the Department of Veteran Affairs (VA) at the VA Hospital in Jamaica Plain since 2011. His current supervisor at the VA describes Mr. Morley as “... a good candidate for police officer. He is intelligent, engaging and focused ... [he] has great inter-personal skills which he uses generously with

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<sup>3</sup> 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. If such an appeal is filed, this CD should be used to transcribe the hearing.

veterans and other clients. He handles stress well and is easily approachable. He is a true professional.” (Exhibit 3)

3. Since 2007, Mr. Morley has also been a team leader or squad leader for the Military Police Academy. A former supervisor describes Mr. Morley as “ ... hardworking and diligent. He had a great ability to solve problems and tried to be proactive about everything. This characteristic endeared him to all members of his unit.” (Exhibit 3)
4. In 2002, Mr. Morley enlisted in the Army National Guard. During his service in the Army National Guard, he has attained the rank of Staff Sergeant and was deployed on active military duty on four (4) occasions. (Testimony of Mr. Morley and Exhibit 1)
5. In 2003, at age 19, Mr. Morley was deployed to Afghanistan for nine (9) months where he was responsible for outer perimeter security and base security. (Testimony of Mr. Morley)
6. In 2007 and 2008, Mr. Morley was deployed to Iraq for one (1) year where he was responsible for providing security detail to the Iraqi President and other senior Iraqi officials. (Testimony of Mr. Morley)
7. In 2009 and 2010, Mr. Morley was again deployed to Iraq for one (1) year where he was part of a military training team. (Testimony of Mr. Morley)
8. In 2012 and 2013, Mr. Morley was deployed to Qatar for eleven (11) months where he was responsible for base security. (Testimony of Mr. Morley)
9. Mr. Morley’s military records show that he received several medals, certificates and commendations while on active duty. (Exhibit 3, Page 6)
10. By memorandum dated October 18, 1999, the General Counsel for the Department of Veteran Affairs opined that:

A. “‘Engaged in combat with the enemy’” has never been defined by any applicable statute or regulation.”

- B. “The phrase ‘engaged in combat with the enemy’ may be distinguished from language in other statutes authorizing certain benefits based on service ‘in a theater of combat operations’ ... or ‘in a combat zone’”. (emphasis added)
- C. “The ordinary meaning of the phrase ‘engaged in combat with the enemy’ requires that the veteran have taken part in a fight or encounter with a military foe or hostile unit or instrumentality”. (emphasis added)
- D. “Based on the plain language of section 1154(b), we conclude that the phrase ‘engaged in combat with the enemy’ requires that the veteran have personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality.” (emphasis added)

(Exhibit 26: VA Memorandum OPGCPREC 12-99 re: “Determinations as to Whether a Veteran ‘Engaged in Combat With the Enemy’ for Purposes of 38 U.S.C. § 1154 (b)”)”)

11. Although Mr. Morley has served four tours of duty (in Iraq, Afghanistan and Qatar), he has never engaged in combat with the enemy. Mr. Morley knows infantrymen who have had to engage in gunfire with the enemy and lost life and limb, who he believes did indeed engage in combat with the enemy, but he has never believed that any of his experiences were comparable or met the definition of engaging in combat with the enemy. (Testimony of Mr. Morley)
12. While serving on active military duty, Mr. Morley has experienced many dangerous incidents, including three (3) described during his testimony before the Commission, but he has never considered these incidents to constitute engaging in combat with the enemy. (Testimony of Mr. Morley)
13. While deployed in Afghanistan in 2003, Mr. Morley resided in barracks across the street from German soldiers. He had worked side-by-side with many of these German soldiers during his deployment. Upon completing their tour of duty, approximately 40-45 of these German troops boarded a bus to begin their journey home. After travelling approximately ½

mile, the bus was struck by a suicide bomber. Mr. Morley believes that most of these German troops were killed or seriously injured. Mr. Morley heard and felt the blast, but was approximately ½ mile away in his barracks when the attack occurred. Mr. Morley's leadership ordered him to a hillside to serve as a lookout while helicopters arrived and the dead and injured were treated and/or removed from the scene. (Testimony of Mr. Morley) Mr. Morley became dazed and suffered an alteration of consciousness as a result of this incident. (Exhibit 5)

14. During Mr. Morley's 2007-2008 deployment in Iraq, the compound that he was stationed in was hit by a rocket. The rocket struck a wall that separated the buildings in the compound from the outside environment. Mr. Morley was about 20 feet from the explosion. (Testimony of Mr. Morley) The force of the explosion knocked him to the ground. (Exhibit 5)
15. In 2010, while deployed in Iraq, while travelling in a convoy, a grenade hit a median approximately 15 feet from the convoy. Nobody was injured and the convoy carried on. (Testimony of Mr. Morley)
16. As referenced above, Mr. Morley has never considered these incidents to constitute engaging in combat with the enemy as he never exchanged gunfire with the enemy. In Mr. Morley's opinion, these incidents "were not even close" to constituting him being engaged in combat with the enemy. (Testimony of Mr. Morley)
17. From 2008 – 2015, Mr. Morley received various medical services from the VA including periodic (usually annually) health assessments; screenings to determine if he is eligible for a disability rating; testing for sleep apnea; pre-employment screening for the VA police officer position; and various visits for other medical-related reasons. (Testimony of Mr. Morley and Exhibits 5 -15)

18. As discussed in more detail in later findings, Mr. Morley, after receiving a conditional offer of employment from the BPD, turned over more than two hundred (200) pages of VA-related medical documents to the BPD's Occupational Health Services Unit (OHSU) for this time period. I have reviewed the documents in their entirety. (Exhibits 5 – 15)
19. A review of those documents shows repetitive language in multiple entries stating: "OEF / OIF veteran is a combat veteran who served in a designated combat zone after November 11, 1998." (Exhibit 5) As referenced in Finding #10, the VA has concluded that: "The phrase 'engaged in combat with the enemy' may be distinguished from language in other statutes authorizing certain benefits based on service 'in a theater of combat operations' ... or 'in a combat zone'." (emphasis added) (Exhibit 26)
20. A review of those documents also shows, in part, that the periodic assessments included a Post Traumatic Stress Disorder (PTSD) "screening test" consisting of the following four (4) questions:
1. Have had any nightmares about it or thought about it when you did not want to?
  2. Tried hard not to think about it or went out of your way to avoid situations that remind you of it?
  3. Were constantly on guard, watchful or easily startled?
  4. Felt numb or detached from others, activities, or your surroundings?
- (Exhibit 5)
21. Mr. Morley was asked these PTSD screening questions on at least two (2) occasions, including in 2011 and 2013. In 2011, the VA medical documents state: "A PTSD screening test (PTSD 4Q) was positive (score = 3). In 2013, the VA medical documents state: "A PTSD screening test (PTSD 4Q) was negative (score = 1)". (Exhibit 5)

22. The 2011 screening was completed via phone by a VA social work case manager who completed “progress notes” which were included in the VA documents that Mr. Morley provided to the BPD. Mr. Morley’s participation in this screening -- and part of what was written in the progress notes from this screening -- would later be used by the BPD to attempt to show that Mr. Morley was untruthful. (Exhibit 5)

23. Given the BPD’s heavy reliance on this 2011 screening, and the progress notes associated with it, I include the social work case manager’s notes verbatim below:

“SW completed case management screening over the phone.

S/O: Veteran served in both Iraq and Afghanistan (2003 and 2010). He reports significant re-adjustment concerns, such as headaches and relationship difficulties. He reports ‘I have trouble keeping relationships with women when they get good...I don’t know what that means.’ He reports ‘my sister has been telling me I should talk to someone...I have been wanting to do counseling for a long time.’ He also stated ‘I feel like I studder now....and my thoughts are jumbled.’ Pt. attributes these difficulties to his most recent deployment in 2010, where he endured blasts at close proximity and a vehicle accident. Consult to polytrama submitted today. Pt. is currently working full-time at JP VA, and lives in Athol, MA. He expressed concern about being both an employee and a patient at the VA, particularly about being seen by mental health. SW informed veteran of HIPPA policy and notified him that no one other than his VA providers should be looking at his VA medical record.

A: PTSD and TBI screens positive. Depression and AUDIT-C screens negative. Vet sounded responsive w/bright affect. Thinking appears logical and linear, goal & future oriented. No evidence of psychotic or delusional thinking. Vet denies any SI/HI at this time.

PLAN: Consult submitted to CRV and polytrauma, per patient request. Provided veteran with resource sheet, and patient call center info. Veteran will benefit from OEFOIFOND case management services. He was provided with program contact info, and encouraged to call if he has questions / concerns.” (Exhibit 5, p. 145)

24. In July 2011, the VA determined that Mr. Morley had a Service-Connected (SC) disability rating of 60% including ratings for PTSD, Bursitis, Limited Flexion of Knee, Inguinal Hernia, Tinnitus and Limited Motion of Ankle. The rating for Traumatic Brain Injury (TBI) was listed by the VA as “0%”. (Exhibit 5, p.67)

25. From July 2011 to January 2012, there are a series of notes recorded in the VA documents regarding Mr. Morley, including the following notes:

1. In July 2011, the notes state that a VA representative spoke to Mr. Morley to schedule his "TBI neuropsych evaluation" and Mr. Morley stated that he was only available on Tuesdays.
2. Later in July 2011, the notes indicate that a VA representative, after consulting with a physician, decided to defer the TBI evaluation, stating: "Patient has recently indicated a desire to initiate mental health treatment, possibly through a Vet Center in order to separate his job at JP from his place of treatment. If his cognitive concerns persist despite an adequate period of mental health treatment and improved mood, the team will discuss a plan for neuropsychological assessment as patient may prefer to have this completed outside the VA given the sensitive nature of the evaluation. Dr. [redacted] will see the patient for f/u and will discuss further with the team."
3. In December 2011, the notes state: "Outreach call to veteran in an effort to schedule f/u with BO RMS POLYTRAMA to discuss treatment recommendation. Request callback ..."
4. In January 2012, the notes state: "Patient has not responded to efforts by the Polytrauma clinic to schedule a f/u visit with the team physician to determine whether he wishes to pursue services within the VA, including neuropsychological evaluation. This consult will therefore be discontinued at this time. Should the patient contact the clinic in the future and wish to pursue neuropsychological evaluation through this clinic, a new consult will need to be submitted."  
(Exhibit 5, p.68)

26. On April 16, 2015, Mr. Morley participated in a sleep apnea test conducted by the VA. The VA concluded that Mr. Morley did not suffer from sleep apnea, but recommended the following to him: "weight loss, aerobic exercises as tolerated, abstinence from alcohol, and good sleep hygiene." (Exhibit 5, p. 35)

27. On April 22, 2015, the state's Human Resources Division (HRD) issued Certification No. 02742 to the BPD, from which the BPD would appoint seventy (70) police officers. Mr. Morley's name appeared near the top of the Certification, based on his civil service examination score of 98 and his disabled veteran status. (Stipulated Facts)



28. Mr. Morley's status as a disabled veteran was listed on the Certification as "DV". (HRD Information Packet)
29. Mr. Morley signed the Certification as willing to accept appointment, attended an orientation, filled out a student officer application and was subject to a background investigation required of all candidates. (Stipulated Facts; Testimony of Mr. Morley and Ms. Michaud)
30. When completing his student officer application, Mr. Morley disclosed that, approximately ten (10) years ago, he was arrested for driving under the influence. Mr. Morley also provided a detailed history of his driving record, which included various citations and one (1) license suspension between 2003 and 2010. (Exhibit 1)
31. Mr. Morley's Board of Probation Report (BOP), which was reviewed by the background investigator, shows that the OUI charge was continued without a finding (CWO) in July 2005 and dismissed in July 2006. (Exhibit 2)
32. The background investigation also included inquiries with current and prior employers, neighbors, personal references, a home visit and interview with Mr. Morley and a review of his credit history, military records and residency documentation. (Exhibit 3)
33. In addition to the positive references from his employers, referenced above, the background investigator also received positive references from his neighbors who described Mr. Morley as "friendly, a nice neighbor and/or a gentleman". (Exhibit 3)
34. One of the references provided by Mr. Morley is his roommate, a Boston firefighter who is a First Lieutenant in the National Guard and has known Mr. Morley for eight (8) years. He described Mr. Morley as "fiercely loyal and honest" and someone who "always displays great character and leadership." (Exhibit 3)

35. Another personal reference, the General Manager of a Boston Sports Club, has known Mr. Morley for twenty (20) years. He stated the following regarding Mr. Morley: “His friends are mostly veterans who are now firefighters, police officers and state troopers. They have contributed in keeping the applicant grounded and in tune with himself. The applicant is loyal to a fault. He would get up from whatever he is doing to help a friend in need. He is trustworthy and dependable.” (Exhibit 3)
36. Subsequent to the completion of the background investigation, the BPD convenes a “roundtable” to review the candidacy of each applicant. The roundtable consists of: a sergeant detective from the recruit investigation unit; the Deputy Director of Internal Affairs; a representative from the BPD’s Human Resources Department; the Director the BPD’s Occupational Health Services Unit (OHSU); and an attorney from the BPD’s Legal Department. (Testimony of Ms. Michaud)
37. After reviewing the candidacy of Mr. Morley on or about June 3, 2015, the roundtable decided to extend him a conditional offer of employment. (Testimony of Ms. Michaud)
38. By letter dated June 22, 2015, the BPD notified Mr. Morley that:
- “I am pleased to extend you a Conditional Offer of Employment for the position of Boston Police Officer. If you pass the medical examination and the psychological screening component of the medical examination, and if there are sufficient vacancies, we will be pleased to have you join the Boston Police Department.
- .... If you meet the medical standards as promulgated by the Commonwealth’s Human Resources Division, you will be required to undergo psychological screening and a physical abilities test.
- Please be aware, that this is **not** a final offer of employment. A final offer of employment will be offered to you if you successfully complete the medical / psychological processing **and** your name is high enough on the civil service certification to be selected.” (**emphasis in original**) (Exhibit 4)

39. On July 26, 2015, Mr. Morley, as part of the BPD's medical screening, completed a "Health History Questionnaire" (Exhibit 16)
40. The first part of the BPD health questionnaire asks the candidate to provide a "family history" listing the "age" and "general health" of the applicant's father, mother, brothers, sisters, spouse and children. If the family member is deceased, the applicant must provide the age at death and the cause of death. (Exhibit 16)
41. The second part of the BPD health questionnaire contains the following heading followed by a list of three-hundred (300) medical conditions:
- "Have you ever had or have you now any of the following? (*This includes any treatment received, any evaluations done, any problems with any of the following.*) Check every one of the following in the appropriate block. You will find attached a form marked "EXPLANATIONS". If you answer "yes" to any of the following questions, please list the appropriate question number on the "EXPLANATIONS" page and explain your "yes" answer. (*emphasis in original*)
42. The next sections of the BPD's health questionnaire contain 47 individual questions for which the candidate must reply "yes" or "no". (Exhibit 16) Catherine Michaud, who served as the BPD's Director of Human Resources for part of this hiring cycle after Ms. Taylor left the position, acknowledged that a candidate could reasonably conclude that the heading in the first section (regarding the first 300 conditions) may not apply to the next 47 conditions as the candidate is being asked to respond to 47 stand-alone questions. (Testimony of Ms. Michaud)
43. For example, Question #338 asks:
- "Have you **ever** had a CAT Scan, MRI or other special tests?  
\_\_\_\_\_ YES \_\_\_\_\_ NO" (**emphasis added**) (Exhibit 16)
44. Question #345 asks:

“Do you drink alcoholic beverages? (average # drinks/day \_\_\_\_)  
(average # drinks/week \_\_\_\_ ) \_\_\_\_ YES \_\_\_\_ NO” (Exhibit 16)

45. In regard to Question #345, which Mr. Morley completed on July 26, 2015, he checked

“NO” and wrote “0” in both blanks. (Exhibit 16)

46. On July 26, 2015, Mr. Morley was not drinking alcoholic beverages, consistent with the recommendation from the physician who conducted the sleep apnea test, and because he was preparing to go through the BPD’s application process. (Testimony of Mr. Morley and Exhibit 5, p. 104)

47. Question #321 asks: “Have you ever filed a compensation claim or received benefits as a result of an industrial injury or disease?” Mr. Morley checked “YES” and, on the “explanations” attachment, disclosed that he was receiving “VA benefits.” (**emphasis added**) (Exhibit 16)

48. Mr. Morley made a total of sixteen (16) entries on the “explanations” attachment, including the following:

- “ankle trouble/pain/injury – yes, strained right ankle after mis-stepping out of a **military vehicle**”;
- “neck-yes, **ground defense training event**. Collar twisted around the neck until a ‘cracking noise’. Medical analysis came back as bruised neck and vocal cords.”
- “ringing in the ears-yes, due to constant firing on the ranges **from the military** and civilian police career.” (**emphasis added**) (Exhibit 16)

49. Exhibit 18, submitted by the BPD, is a copy of Mr. Morley’s “Commonwealth of Massachusetts Human Resources Division Medical Examination Form Initial-Hire Medical Standards” form. The form states: “This form is to be used for all medical examinations performed pursuant to the Medical and Physical Fitness Standards, Regulations for Public

Safety Personnel ...” Parts of this form are to be completed by the “examinee” (Mr. Morley) and other parts are to be filled out by medical examiner. (Exhibit 18)

50. As part of this medical examination form, Mr. Morley again indicated that he had filed for disability benefits, and also indicated that he was now receiving disability benefits. (Exhibit 18, Page 3)

51. Pages 4 and 5 of the medical examination form contain sections that are to be completed by the medical examiner who, in this case, was a nurse practitioner (NP) employed by the BPD. At the bottom of page 4, the NP made a series of hand-written notes, which I infer were taken contemporaneously with the medical examination, based on questions she was asking Mr. Morley. Those hand-written notes explicitly reference Mr. Morley’s four (4) military deployments and his VA disability rating. (Exhibit 18)

52. If an applicant successfully completes the medical examination, the applicant is then referred for a psychological evaluation. (Testimony of Ms. Michaud) The BPD’s Director of Occupational Health Services Unit (OHSU) passes the recruit’s file to the first-level psychological screener, who, in this case, was Dr. Andrew Brown. (Testimony of Dr. Brown)

53. Dr. Brown has served as a consulting psychiatrist for the BPD from 2006 to 2011 and the lead psychiatrist from 2011 to the present. He is also the consulting psychiatrist for several other Massachusetts communities and has performed over 1,000 psychiatric pre-employment screenings (Testimony of Dr. Brown and Exhibit 25)

54. Dr. Brown is responsible for conducting the first-level psychiatric screening for BPD recruit candidates. (Testimony of Dr. Brown)

55. Dr. Brown was provided with the following information regarding Mr. Morley:

1. The Student Officer Application;
2. The background investigator's report;
3. The BOP report;
4. The 200+ pages of medical records from the VA;
5. The 347-question completed medical questionnaire.
6. The results of BPD's medical screening examination.

(Testimony of Dr. Brown)

56. Often times, the physician who completes the recruit's medical examination, or an OHSU administrative staff member, will "tag" items from the medical screening as an indicator that the item should be pursued as part of the psychiatric screening completed by Dr. Brown.

Sometimes this "tagging" takes the form of post-it notes and other times it is verbally conveyed to Dr. Brown. (Testimony of Dr. Brown)

57. Dr. Brown does not recall any items being "tagged" by the medical staff in regard to Mr. Morley. (Testimony of Dr. Brown)

58. As part of the psychological screening process, recruits are required to complete two (2) written, computer scored psychological tests – the Minnesota Multiphasic-Personality Inventory – 2 (MMPI-2RF), and the Personality Assessment Inventory (PAI). In addition, candidates are required to complete a "personal data questionnaire", all of which Mr. Morley completed on September 12, 2015, almost two (2) months after completing OHSU medical questionnaire. (Exhibits 17, 19, 20)

59. In addition to such questions as "Do you see your parents, siblings, regularly?", the personal data questionnaire asks 111 questions in which the recruit must check "yes" or "no". (Exhibit 17)

60. Among the 111 questions that the BPD requires a “yes” or “no” answer to are the following:

- 14. What was the age of your last physical fight?
- 40. In the past year, how often have you had an alcoholic beverage?
- 41. In the past year, how many drinks did you have on a day when you were drinking?
- 43. What is the most drinks you have ever had at one occasion in the past two years?
- 55. What illegal drug have you bought in the past 10 years?
- 70. How many cups of coffee a day do you drink?
- 71. How much sugar do you use in your coffee or tea?

(emphasis added)

(Exhibit 17)

61. It is impossible to follow the BPD’s instructions and answer the above-referenced questions with a “yes” or “no” answer. (Administrative Notice)

62. Mr. Morley’s responses to these questions were as follows:

- 14. What was the age of your last physical fight?

*Wrote the letters “NA”*

- 40. In the past year, how often have you had an alcoholic beverage?

*Put an “X” in the “Yes” box*

- 41. In the past year, how many drinks did you have on a day when you were drinking?

*Wrote the number “3”*

- 43. What is the most drinks you have ever had at one occasion in the past two years?

*Wrote the number “6”*

- 55. What illegal drug have you bought in the past 10 years?

*Put an “X” in the “No” box*

70. How many cups of coffee a day do you drink?

*Wrote the number "1"*

71. How much sugar do you use in your coffee or tea? (Exhibit 17)

*Put an "X" in the "No" box*

(Exhibit 17)

63. In the "Explanations" section, Mr. Morley wrote the following explanation regarding his response to Question #40 above: "Not very often, only special occasions." (Exhibit 17)

64. At the time Mr. Morley filled out the questionnaire on September 12, 2015, he was occasionally having a glass of wine while watching a movie at home with his fiancé.  
(Testimony of Mr. Morley)

65. The MMPI-2 RF report, which is based entirely on responses to the multiple choice questions, stated in part that Mr. Morley "presented himself in an extremely positive light by denying many minor faults and shortcomings that most people would acknowledge ... He also presented himself s remarkably well-adjusted. The reported level of adjustment is rare in the general population." (Exhibit 19)

66. The PAI results indicated that Mr. Morley was at "low risk (11%) for receiving a poorly-suited rating. (Exhibit 20) Overall, Dr. Brown understood the PAI results to show no "yellow or red flags" regarding Mr. Morley's candidacy. (Testimony of Dr. Brown)

67. PAI Question #334, which Dr. Brown found noteworthy, states: "My drinking has never gotten me into trouble." (Exhibit 20) Mr. Morley, when responding to this statement, thought back to his OUI approximately ten (10) years ago, along with the fact that his drinking had not gotten him into trouble since, and concluded that the most accurate response



was “somewhat true.” (Testimony of Mr. Morley) Dr. Brown concluded that Mr. Morley should have answered “false” based on his OUI. (Testimony of Dr. Brown)

68. On September 17, 2015, Dr. Brown conducted a forty-five (45) minute face-to-face interview with Mr. Morley. Dr. Brown took hand-written notes during the interview and later transcribed them into a written report. He did not retain the hand-written notes. (Testimony of Dr. Brown and Exhibit 21)

69. Although he does not remember the exact question he posed to Mr. Morley during the interview, Dr. Brown believes he asked Mr. Morley one of the following two questions: a) whether he (Mr. Morley) had “seen” combat while on active duty in the military; or b ) whether Mr. Morley had “engaged in” combat while on active duty in the military. (Testimony of Dr. Brown)

70. Regardless of the form of Dr. Brown’s question, Mr. Morley answered “no; not really” consistent with his belief –then and now – that he never personally engaged in combat while on active military duty. Mr. Morley told Dr. Brown that he (Dr. Brown) would be surprised how many active military duty troops do not personally experience combat while on deployment in Iraq and Afghanistan. (Testimony of Mr. Morley)

71. Mr. Morley was also asked by Dr. Brown about his OUI from approximately ten (10) years ago. Mr. Morley told Dr. Brown “I no longer drink and drive”. Mr. Morley did not tell Dr. Brown that he only had two (2) drinks prior to be arrested for OUI. (Testimony of Mr. Morley)<sup>4</sup>

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<sup>4</sup> Dr. Brown and Mr. Morley offered conflicting testimony on these points. Dr. Brown testified that Mr. Morley stated that: 1) he no longer drinks [at all]; and 2) initially stated the he had only had two (2) drinks prior to be arrested for OUI and then, several minutes later, stated it was five (5) or six (6) drinks. Mr. Morley testified that he told Dr. Brown that he does not drink *and drive* any longer. Further, Mr. Morley testified that he never told Dr. Brown that he only had two (2) drinks prior to be arrested for OUI, but, rather, has always maintained that he had five (5) or six (6) drinks. After listening (and re-listening) to their testimony, I have credited Mr. Morley’s testimony for the following reasons. First, Mr. Morley’s testimony simply rang more true to me. Second, it was

72. After meeting with Mr. Morley, Dr. Brown reviewed the 200+ pages of VA records that Mr.

Morley had provided to the BPD's OHSU, who then provided those records to Dr. Brown.

Although Dr. Brown did not review these documents until after the interview with Mr.

Morley, he received these documents prior to the interview. (Testimony of Dr. Brown)

73. Dr. Brown never concluded that there was any psychological condition or disorder that

would prevent Mr. Morley from performing the duties and responsibilities of a police officer.

(Testimony of Dr. Brown)

74. Rather, after reviewing the VA medical records, Dr. Brown ultimately wrote, in an undated

document titled "Psychiatric Evaluation to Assess Risk Associated with Mental Disorders",

that a second-level psychological screening was required because:

1) "the applicant's reports to this writer [Dr. Brown] were significantly discrepant with the history reflected in the applicant's medical records. There were numerous and significant inconsistencies in this regard including:

a) the applicant's report that he had no exposure to combat. **The medical records indicate significant combat exposure, to the extent that a diagnoses of TBI and PTSD had been rendered in the context of reports of such exposure to other medical authorities. (*emphasis added*)**

b) the applicant's report that he had never sought any type of mental health treatment.

The medical records reflect that the **insured** had sought mental health treatment and

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clear, to me, that Dr. Brown was understandably relying on an undated report that he had prepared regarding the interview. It was unclear to me when Dr. Brown actually prepared this document, but, based on the content, it was certainly *after* he went back and reviewed various documents that reference questions asked at different times about quantity of drinks consumed. For this reason, it would have been helpful to have Dr. Brown's contemporaneous hand-written notes of the interview, as opposed to the document he later transcribed. Without that, it was difficult for me to determine if Dr. Brown's recollection was what was actually said by Mr. Morley *during their interview* regarding these matters. Third, it was puzzling, at least to me, why, if faced with a "contradiction" [5 or 6 drinks v. 2 drinks], Dr. Brown would not point out the purported contradiction and ask Mr. Morley to address it during the interview. For all of these reasons, I credited Mr. Morley's testimony regarding this matter.

that prior to seeking such treatment he had considered it for many years. The applicant's reports to this writer were significantly inconsistent with such a history, as the applicant emphasized that even the minimal contact with mental health clinicians that was mandated by his employer (i.e., the National Guard) was not necessary to him and largely irrelevant as far as he was concerned. The applicant specifically reported that he had never consulted any mental health professional or counselor for any reason;

- c) the applicant's portrayal of himself as completely symptom-free and as completely problem-free in the context of this writer's face to face evaluation, on the one hand, while **the applicant has portrayed himself** as significantly symptomatic (**and even 'disabled'**) on the basis of a psychiatric diagnosis (i.e. 'PTSD') in the context of his presentation to the VA, on the other. (**emphasis added**)
- 2) the applicant's behavior around alcohol – and the risks associated with the applicant's history of an alcohol-related incident – are impossible to assess because the applicant has given significantly inconsistent reports regarding the extent of his alcohol use both historically and at present.”

“While there is a lack of clarity with regard to whether the above-mentioned significant and numerous inconsistencies are attributable exclusively to problems in the domain of integrity or attributable to some other unidentified psychic process, they reflect the presence of significant risk relative to this applicant's capacity to consistently deliver credible reports.”

(Exhibit 21)

75. On Page 4 of Dr. Brown's report, he wrote: "The applicant reported that he had never consulted a mental health professional **beyond annual and routine evaluations that are mandated for all his colleagues in the National Guard.** The applicant explained that all of his colleagues have to undergo a screening evaluation as part of their job requirements. He stated that he did not find it particularly useful to see these mental health professionals but he noted that it was useful to his employer and that **he understood the rationale behind such evaluations.** (**emphasis added**) (Exhibit 21)
76. The document prepared by Dr. Brown also cites approximately twelve (12) entries in Mr. Morley's VA medical records from 2011 to 2015 which, according to him, show inconsistencies. (Exhibit 21)
77. For example, one of the VA entries cited in the document prepared by Dr. Brown was: "02/23/12: Applicant '**exposed to blast explosion** during his 3 tours of duty ... has mild TBI...' " (**emphasis added**) (Exhibit 21) According to Dr. Brown, this shows that Mr. Morley was ***exposed to combat*** and that Mr. Morley's response to him during the interview was inconsistent. (Testimony of Dr. Brown)
78. Dr. Brown, after reviewing Mr. Morley's VA medical records, did not speak with Mr. Morley and/or give him an opportunity to address what he (Dr. Brown) had concluded were inconsistencies. (Testimony of Dr. Brown)
79. Dr. Brown spoke with Ian MacKenzie, the BPD's Director of Occupational Health Services Unit, and told him of the alleged inconsistencies and why he (Dr. Brown) was recommending a second-level psychological screening. (Testimony of Dr. Brown)

80. Dr. Brown was told by Mr. MacKenzie that, since the issues being raised by Dr. Brown related to a lack of truthfulness, and not a medical question, a second-level psychiatric review was not appropriate. (Testimony of Dr. Brown)<sup>5</sup>

81. The BPD did not call Mr. Mackenzie as a witness.

82. Mr. Mackenzie never contacted Mr. Morley regarding his (Mr. Mackenzie's) conclusion that Mr. Morley was untruthful. (Testimony of Mr. Morley)

83. On October 22, 2015 at 10:21 A.M., Mr. Mackenzie sent an email to members of the BPD Roundtable stating:

“Good Morning:

Please find the attached two<sup>6</sup> documents concerning untruthfulness during the medical process.

The two documents contain medical information and should be treated as highly confidential. Under no circumstances should they be distributed outside this group.

....

... Mr. Gary Morley (a Veteran in the top group), denied **serving in active combat** that is well documented in his VA records, denied a medical condition for which he is receiving a 30% disability rating from the VA, and misrepresented his alcohol consumption. (**emphasis added**)

I recommend that these candidates have their condition (sic) offers withdrawn and they be bypassed for untruthfulness.”

Respectfully submitted,

Ian Mac” (Exhibit 29)

84. The document attached to Mr. Mackenzie's email to the Roundtable was dated October 21, 2015 and had the heading “RECRUIT CANDIDATE – NOTE TO MEDICAL FILE”. Page 1 of the Mackenzie “Note to Medical File” (Mackenzie Notes) contains eight (8) paragraphs.

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<sup>5</sup> I asked Dr. Brown if he (Dr. Brown) ever reached the conclusion that Mr. Morley was “untruthful”. He answered “no”. I asked Dr. Brown if he ever told Mr. MacKenzie that Mr. Morley was “untruthful”. He answered “no”.

<sup>6</sup> The email referenced two police officer applicants. References to a second candidate have been redacted.

Page 2 of the Mackenzie Notes includes the heading “Recruit Candidate Gary Morley answered ‘NO’ to the following questions, with a list of questions of statements from the “health history form”, the “state medical examination form” and the “Department’s Personal Data Questionnaire.” (Exhibit 22)

85. The Mackenzie Notes state in relevant part:

“On Wednesday, October 16, 2015<sup>7</sup> Police Recruit Candidate Gary Morley met with Dr. Andrew Brown in the Occupational Health Services Unit for the purpose of conducting a pre-employment psychological interview. This interview is part of the recruitment process and is attended individually by every applicant who is offered conditional employment.”

...

During the course of his interview with Dr. Brown, Mr. Morley stated that he had no exposure to combat in his service with the Army National Guard. However medical records provided by Mr. Morley indicate significant combat exposure, that resulted diagnoses (sic) of traumatic brain injury (TBI) and post traumatic stress disorder (PTSD). (emphasis added)

An office note from 06/03/11 states, *‘Pt. attributes these difficulties to his most recent deployment in 2010, where he endured blasts at close proximity and a vehicle accident.’* An office note from 01/10/2013 states, “Also wanted to document prev exposure to blasts on a prev deployment on 21 Apr 2009 and 23 May 2009.

In addition, Mr. Morley stated that he had never consulted any mental health professional or counselor for any reason. However, he currently has a 30% service related disability for post traumatic stress disorder.

According to Dr. Brown, the (sic) Mr. Morley portrays himself as symptom free for the purpose of this interview, yet portrays himself as significantly symptomatic in the context of a psychiatric diagnosis for PTSD in his presentation to Veterans Affairs.”

Finally, on the Department’s Health History Form (Q345), Mr. Morley denies drinking any alcoholic beverages. However, in his explanation to Questions 40 and 41 of the Department’s Personal Data Questionnaire, Mr. Morley states that he does not drink often, only on special occasions, and on those occasions he usually has three drinks.”

(Exhibit 22)

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<sup>7</sup> Dr. Brown’s interview of Mr. Morley took place on September 17, 2015, not October 16<sup>th</sup>.

86. As referenced above, Mr. Mackenzie's email was sent on October 22, 2015 at 10:21 A.M.

(Exhibit 29)

87. On October 22, 2015 at 10:44 A.M., a Sergeant Detective from the Recruit Investigation Unit

(RIU) sent a reply stating, "Received. Thank you Ian." (Exhibit 29)

88. On October 22, 2015 at 4:37 P.M., the Roundtable member from the BPD's legal office sent a reply email to Mr. Mackenzie.<sup>8</sup> (Exhibit 29)

89. On October 22, 2015 at 7:33 P.M., a sergeant detective from the RIU sent an email to the legal representative on the Roundtable stating:

"I'm OK with the recommendations on these two candidates. Can you keep us posted at RIU if there are others who may be bypassed as well. We're trying to put together an updated file in our office to keep track of any candidate changes in their status during the medical-psyche (sic)-PAT Process."

(Exhibit 29)

90. On October 23, 2015 at 8:29 A.M., Cathy Michaud sent an email to the legal representative, copied to other members of the roundtable, asking: "RIU, Any concerns with the bypass?

Otherwise, I will get those letters out today."

(Exhibit 29)

91. On October 23, 2015 at 9:16 A.M., the Roundtable legal representative forwarded the sergeant detective's email reply from the previous day to Cathy Michaud, stating, "I realized this was only sent to me."

(Exhibit 29)

92. On October 23, 2015 at 10:50 A.M., the sergeant detective sent an email to Cathy Michaud stating: "Cathy we're all set. No concerns. I relayed that thought to [legal representative] last night."

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<sup>8</sup> Other than the words "Thanks Ian", the BPD redacted the content of this email reply claiming it is "attorney client privileged."

(Exhibit 29)

93. In a letter dated October 26, 2015, the BPD notified Mr. Morley that his conditional offer of employment was rescinded. The letter stated:

“Dear Gary Morley:

Recently a conditional offer of employment was extended to you, to enter the hiring process to become a Boston Police Officer. In that letter it states that the *Boston Police Department reserves the right to rescind this conditional offer of employment should information become available that your appointment as a Boston Police Officer would not be in the public interest. (emphasis in original)*

Based on untruthful information that was given during your medical screening, we are rescinding the conditional offer of employment. A final offer of employment will not be granted and a bypass letter will be mailed to you soon with details surrounding these findings.

Sincerely,

Cathy Michaud  
Assistant Director of Human Resources”  
(Exhibit 23)

94. Approximately five (5) months later, in a letter dated March 18, 2016, the BPD provided Mr. Morley with a bypass letter, which included the reasons for bypass and his appeal rights. The letter stated:

“Dear Boston Police Recruit Applicant:

Enclosed please find a copy of a letter from the Boston Police Department stating the selection reasons associated with the candidate(s) appointed below your name from the above-mentioned certification for the position of police officer. Civil Service requires that employers send these letters. In addition, below are reasons associated with your bypass.

The Department has significant concern regarding untruthful information you provided during the medical screening portion of your application for hire. During your pre-employment psychological interview, you stated that you had no exposure to combat in your service with the Army National Guard. However, medical records you provide indicate significant combat exposure that resulted in a diagnoses of traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD). You also stated you had never consulted any mental health professional or counselor for any reason, however, you currently have a 30% service disability rating for post-traumatic stress disorder. On your health history form, you deny



drinking any alcoholic beverages. However in your explanation to questions on the Department's Personal Data Questionnaire you state that you do drink occasionally and have approximately three drinks on these occasions.

The Boston Police Department has a zero tolerance for untruthfulness. Being truthful is an essential function to the position of Police Officer, and the Department finds your untruthfulness to be an undesirable quality for a potential police officer.

For the reasons cited above, the Boston Police Department finds you ineligible for appointment as a Boston Police Officer at this time. You have a right to appeal this determination by filing your appeal, in writing, within sixty calendar days of receipt of this notice. Appeals should be sent to the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. You can also visit the Commission's website at [www.mass.gov/csc](http://www.mass.gov/csc) to download an appeal form and receive information regarding filing fees. Please file a copy of this correspondence and all enclosures along with your appeal.

Sincerely,

Cathy Michaud  
Acting Director of Human Resources"

(Exhibit 24)

95. Prior to sending the March 18<sup>th</sup> letter, Ms. Michaud<sup>9</sup> did not speak with Dr. Brown or Mr.

Morley nor did she review any of the documents referenced in the letter. Rather, she relied solely on the email attachment sent by Mr. Mackenzie. Other than Mr. Mackenzie, Ms.

Michaud is unaware if any other member of the roundtable spoke with Dr. Brown or Mr.

Morley or reviewed the documents referenced in the bypass letter. (Testimony of Ms.

Michaud) I infer they did not. Ms. Michaud does not know if Mr. Mackenzie reviewed the actual documents referenced in the bypass letter or, rather, relied on the representations of

Dr. Brown. (Testimony of Ms. Michaud)

96. On May 17, 2016, Mr. Morley filed an appeal with the Commission. (Stipulated Fact)

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<sup>9</sup> To ensure clarity, I found the testimony of Ms. Michaud to be thoughtful, straightforward and highly credible. She listened carefully to the questions posed to her and carefully reviewed referenced documents before providing her candid recollection of what occurred.

## *Legal Standard*

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. at 259, citing Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304. "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, § 1.

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 at 304. 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).

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. 814, 824-826 (2006) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. Beverly. The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining

whether there was “reasonable justification” shown. Such deference is especially appropriate with respect to the hiring of police officers. In light of the high standards to which police officers appropriately are held, appointing authorities are given significant latitude in screening candidates. Beverly citing Cambridge at 305, and cases cited.

The role of the psychiatrist conducting a pre-employment evaluation for police officers in civil service communities is ... “narrowly circumscribed. [His] sole task [is] to determine whether [the candidate] [has] a psychiatric condition that [prevents him] from performing, even with reasonable accommodation, the essential functions of the job.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680 (2012).

#### *Analysis*

The BPD has not met its burden to establish reasonable justification to bypass Mr. Morley for original appointment as a Boston police officer. Rather, as a result of an incomplete and flawed review process, the Boston Police Department reached the unsupportable conclusion that Mr. Morley was untruthful. In doing so, they have overlooked the qualifications of a candidate whom the BPD found worthy of a conditional offer of employment, and whose life has been defined by service, honor and valor.

Since the age of 19, Mr. Morley has been deployed on active military duty on four separate occasions -- to Iraq, Afghanistan and Qatar. Despite the inherently dangerous nature of these deployments, Mr. Morley does not equate his service to those of his comrades who did engage in combat. He spoke eloquently during his testimony before the Commission about fellow soldiers, including infantrymen, who had lost life and limb while engaged in combat, including the exchange of gunfire. To me, it was plain that Mr. Morley cared deeply about not overstating his own experiences, including whether he had personally engaged in combat. In short, Mr. Morley

did not, during a 45-minute interview with Dr. Brown, suddenly decide to downplay his military experience as part of some strategic, sinister effort to pass a psychological screening, as suggested here. Rather, he simply conveyed his honest, long held belief that he had never personally engaged in combat while in the military, which appears to be consistent with the VA's own definition of what constitutes engaging in combat with the enemy.

By applying his own layperson definition of combat, Dr. Brown, who, like me, has never served in the military, or, prior to this proceeding, was not aware of the VA's definition of engaging in combat with the enemy, reached a starkly different conclusion. Despite the consequential nature of the inquiry, and the serious charge of untruthfulness that would follow from it, Dr. Brown was not able to say with certainty what question he actually posed to Mr. Morley regarding combat. During his testimony, Dr. Brown appeared somewhat perplexed as to why the exact wording of his question was important, stating that Mr. Morley surely understood the "gist" of his inquiry. For the purposes of this decision, I have accepted Dr. Brown's own testimony that he may have asked Mr. Morley if he had ever "engaged in combat". Consistent with his long held belief, referenced above, Mr. Morley replied "no, not really" and told Dr. Brown that he (Dr. Brown) would be surprised how many soldiers serving in Iraq and Afghanistan do not actually engage in combat. For Mr. Morley, it was a straightforward, inconsequential part of a psychological interview. It appears that, for Dr. Brown, the answer was a yellow flag that was "inconsistent" with Mr. Morley's status as a disabled veteran, triggering heightened scrutiny of Mr. Morley's medical records from the VA.

The findings provide a detailed chronology of what occurred next, including Dr. Brown's post-interview review of Mr. Morley's VA medical records and the BPD's medical screening records. In an apparent effort to show that Mr. Morley was indeed "engaged in combat", Dr.

Brown cites multiple references in the VA records stating that Mr. Morley, while deployed, was “exposed to blasts”. It is clear that Dr. Brown equated “exposed to blasts” to “engaged in combat” and, thus, assumed that Mr. Morley’s answer to him regarding combat during the interview was “inconsistent” with the VA medical records. This assumption is apparent throughout Dr. Brown’s report as well as his testimony before the Commission.

Mr. Mackenzie took Dr. Brown’s assumption a step further and, in his (Mr. Mackenzie’s) memorandum to the Roundtable, *explicitly* stated that “... medical records provided by Mr. Morley indicate significant **combat** exposure, that resulted (sic) diagnoses of traumatic brain injury (TBI) and post traumatic stress disorder (PTSD).” It is unclear what, if any, VA medical records Mr. Mackenzie looked at in making this conclusion, as he was not called as a witness by the BPD to provide sworn testimony, despite being the person relied on by the Roundtable to conclude that Mr. Morley was being untruthful.

Dr. Brown’s only cite to the word “combat” from the VA records in his 7-page report is the VA’s reference to Mr. Morley as a “combat veteran” who served “in a combat zone.” As stated in the findings, however, the VA distinguishes the phrase “engaged in combat with the enemy” from language authorizing certain benefits based on service ‘in a theater of combat operations’ ... or ‘in a combat zone’”. I infer that Mr. Mackenzie, similar to Dr. Brown, was not aware of this distinction.

Weaved throughout Dr. Brown’s report and Mr. Mackenzie’s notes is their apparent (false) assumption that, if a person receives a disability rating from the VA, and more specifically, receives a disability rating for PTSD, he / she must have engaged in combat. If that assumption was true, *any* disabled veteran, such as Mr. Morley, who states that he was not engaged in

combat, would be making an untruthful statement, thus making him/her “*ineligible* for appointment as a Boston Police Officer.”

That mindset is troubling and effectively turns the statutory *preference* for disabled veterans on its head. Since first being enacted in 1884, the civil service law has provided a preference for veterans, stating that the civil service rules must provide “for giving preference in appointments to office and promotions in office (other qualifications being equal) to applicants who served in the army or navy of the United States in time of war and have been honorable discharged therefrom.” (St. 1884, c. 320, Section 14, Sixth) The provision granting preference for disabled veterans, placing them ahead of veterans, was added in 1922. (St. 1922, c. 463) In a case dealing with the constitutionality of the veteran’s preference and the disabled veteran’s preference with respect to appointments in the civil service, the SJC, in Hutcheson v. Director of Civil Service & others, 361 Mass. 480 (1972) opined about the legislative intent of the additional disabled veterans preference, stating, in relevant part, “We think Dr. Hutcheson understates the impact of the preference for disabled veterans as an inducement to patriotic service. The Legislature might conclude that men who are willing and indeed eager to serve in the armed forces in time of war may hesitate in their view of their obligations to their dependents and the risks of disabling injury, whether from combat, from training accident, or from other causes. The Legislature might think that a practice of preference for disabled veterans would mitigate such hesitation, to the common benefit. Moreover, having identified a class which should be preferred on other grounds, we think the Legislature may properly take into account the factor of need, ‘to make more equal the race of life,’ so long at least as it provides safeguards to insure that the efficient operation of the public service will not be impaired.” Citing Sullivan v.

Hoberman, 34 App. Div. 2d (N. Y. ) 6, 11, affd. 28 N.Y. 2d, 667; and Wilczynski v. Harder, 323 F. Supp. 509, 520 (D. Conn).

Here, Mr. Morley accepted the risk of – and incurred – certain injuries that resulted in him receiving a disability rating from the VA. That designation was – and is – intended to be a badge of honor providing Mr. Morley with a preference for his patriotic service. The BPD, after issuing a conditional offer of employment, is entitled to conduct a medical (and physical) examination to ensure that Mr. Morley, and all other candidates, are able to perform the essential functions and duties of a police officer. They cannot, however, make false assumptions about why Mr. Morley was designated as disabled and use those false assumptions to deem Mr. Morley as being untruthful, as occurred here.

That leads to the next unsupported allegation of untruthfulness, in which the BPD wrote in a letter to Mr. Morley: “You also stated that you had never consulted any mental health professional or counselor for any reason, however you currently have a 30% service related disability for post-traumatic stress disorder.” This allegation was contained in the bypass letter penned by Ms. Michaud, who never spoke with Dr. Brown or Mr. Morley and never reviewed the report prepared by Dr. Brown. Rather, it appears to be based on the “notes to medical file” prepared by Mr. Mackenzie, who Ms. Michaud also did not speak with. Mr. Mackenzie, who was not called as a witness, in preparing his notes, apparently relied on Dr. Brown’s 7-page written report, which was transcribed from hand-written notes which Dr. Brown subsequently discarded. Dr. Brown’s 7-page report *actually* states the following:

“The applicant reported that he had never consulted a mental health professional **beyond annual and routine evaluations that are mandated for all his colleagues in the National Guard.**” The applicant explained that all of his colleagues have to undergo a screening evaluation as part of their job requirements. He stated that he did not find it particularly useful to see these mental health professionals **but he noted that it was useful to his employer**

**and that he understood the rationale behind such evaluations."**  
**(emphasis added)**

As part of these VA evaluations, *which he specifically referenced in his interview with Dr. Brown*, Mr. Morley was given a disability rating based, in part, on PTSD. It is clear that the members of the roundtable, who made the decision to revoke Mr. Morley's conditional offer of employment via a series of brief email exchanges, did not have the benefit of Mr. Morley's complete statement, and did not know that he did reference these evaluations to Dr. Brown.

In their post-hearing brief, the BPD also effectively asks the Commission to expand the stated reasons in the bypass letter (in which they allege that Mr. Morley was untruthful by allegedly stating that he had never *consulted* any mental health professional or counselor for any reason) and find Mr. Morley untruthful for stating that he never "*sought treatment*" from a mental health professional. The BPD is limited to those reasons outlined in the bypass letter dated March 18, 2015. That letter details two (2) very specific instances relative to its claim that Mr. Mr. Morley was untruthful. PAR.08(4) is clear and requires "a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked .... Such statement shall indicate all ... reasons for bypass on which the appointing authority intends to rely or might, in the future, rely to justify the bypass." Even if I were to consider this new reason, the BPD, in an attempt to prove this allegation, refers back to VA records regarding the 2011 phone interview in which the social work case manager noted, among other things, that Mr. Morley's thoughts were jumbled as well as Mr. Morley's statement that his sister had told him that he should "talk to someone" about "trouble keeping relationships with women when they get good." Apparently, the social work case manager subsequently scheduled a counseling appointment for Mr. Morley, which was later canceled. First, this allegation was not cited in the bypass letter sent to Mr. Morley. Second, the allegation here relies on the BPD's review of Mr. Morley's medical records from



the VA and an expectation that he is supposed to recall a phone call, *four years prior*, in which, while in his 20s, he may have referenced trouble maintaining relationships with women. This is beyond absurd. It is likely that Mr. Morley, now 32, busy making plans to marry his fiancé, long ago forgot about this brief phone conversation, and whether or not he allegedly agreed to have a counseling appointment scheduled on his behalf. It does *not* show that Mr. Morley was untruthful.

Similarly, the BPD, although not listed in the bypass letter, sought, as part of this hearing, to show inconsistencies between Mr. Morley's responses on the BPD health history questionnaire and what he reported to the VA. Again, while I find those reasons to be outside the scope of the reasons cited in the bypass letter, the evidence presented by the BPD is not persuasive. For example, the BPD, in its post-hearing brief, argues that Mr. Morley was untruthful because he failed to check "yes" (on the checklist of hundreds of ailments) regarding "headaches" yet, according to the BPD, his VA records show that he complained of *severe headaches*. What the BPD *fails to state*, however, is that Mr. Morley, on that same BPD questionnaire checked "yes" regarding "migraines", a form of *severe headaches*. Given that he acknowledged having migraines, and given that *Mr. Morley* provided the BPD with all of his VA medical records, it is just plain silly to argue that this is evidence of untruthfulness.

Finally, the BPD alleges that Mr. Morley was untruthful when responding to questions about his alcohol consumption. The BPD's bypass letter states the following: "On your health history form, you deny drinking any alcoholic beverages. However, in your explanation to questions on the Department's Personal Data Questionnaire you stated that you do drink occasionally and have approximately three drinks on these occasions." (emphasis added) The conclusion by the BPD that Mr. Morley stated that he drinks occasionally and has approximately three drinks on

these occasions is based on his response to the following two questions in the Department's Personal Data Questionnaire:

"40. In the past year, how often have you had an alcoholic beverage?

41. In the past year, how many drinks did you have on a day when you were drinking?"

Despite only being given the option of checking yes or no to these questions, which cannot be answered with a yes or no reply, Mr. Morley checked "yes" to question 40; and wrote the number "3" in the "yes" box for Question 41. In the "Explanations" section, Mr. Morley wrote the following explanation regarding his response to Question #40 above: "Not very often, only special occasions." From this, the BPD reached the conclusion that Mr. Morley drinks occasionally and has 3 drinks *on these occasions* when Question #41 actually only refers to "on a day". Put simply, the BPD decided to interpret the answers to its own ambiguous questions in a way that paints Mr. Morley as untruthful. Further, the bypass letter fails to state that the Department's Personal Data Questionnaire was completed by Mr. Morley in September 2015, two months *after* completing the health history form in July 2015. In July 2015, Mr. Morley, as he referenced in his credible testimony, was not drinking alcohol, consistent with a physician's recommendation as part of a then-recently completed sleep apnea test, recommendations which were explicitly stated in the VA medical records provided to the BPD.

For all of the above reasons, the BPD has not shown, by a preponderance of the evidence, that Mr. Morley provided untruthful information during the medical screening process, the sole reason for rescinding his conditional offer of employment and bypassing him for appointment as a police officer in favor of sixty (60) other candidates ranked below him on the civil service Certification.

That turns to the issue of the relief to be ordered here. The Commission's power of relief is derived from St. 1976, c. 534, s. 1, as amended by St. 1993, which states, in relevant part: "If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights ...".

The most common type of relief ordered by the Commission regarding bypass appeals is to order the placement of the candidate's name at the top of the next Certification to ensure reconsideration and to order a retroactive civil service seniority date, if and when the candidate is appointed. The Commission, however, has broad discretion regarding the appropriate relief to be granted based on the circumstances regarding each appeal. See Boston Police Dep't v. Kavelski, 463 Mass. 680 (2012) (nothing in the HRD rules requires further [psychological] screening after BPD candidate had successfully appealed a psychological bypass decision); Mulhern v. Civ. Serv. Comm'n & Mass. Bay Transportation Authority, 57 Mass. App. Ct. 920 (2003) ("The remedy to be accorded a plaintiff is a matter within the commission's discretion and will rarely be overturned") citing Bielawski v. Personnel Administrator of the Div. of Personnel Admn., 422 Mass. 459, 464, n. 11, 465 (1996) and Thomas v. Civil Serv. Commn., 48 Mass. App. Ct. 446, 451 (2000).

I considered several factors in regard to the appropriate relief regarding this particular appeal.

First, the decision to bypass Mr. Morley occurred after he received a conditional offer of employment. Prior to issuing the conditional offer of employment, the BPD, or more specifically, the Roundtable, was prohibited from asking Mr. Morley about any handicap or disability. "The purpose of this restriction is to isolate consideration of an applicant's job qualifications from any consideration of his/her medical or disability-related condition." (Boston

Police Department v. Kavaleski & Civ. Serv. Comm'n & Kavaleski v. Reade & City of Boston, Suffolk Sup. Ct. No. 09-4978-C (2014)) citing guidelines from the Massachusetts Commission Against Discrimination (MCAD).

Here, at least one member of the Roundtable (Mr. Mackenzie) has now accessed, and to some extent, reviewed the medical records of Mr. Morley. Further, the other members of the Roundtable have been provided with detailed information (via Mr. Mackenzie's email) about Mr. Morley's medical information, including the specific medical reasons related to his disability rating from the VA<sup>10</sup>, which would be problematic if the Commission were to simply order that Mr. Morley's name be placed at the top of the next Certification and be reconsidered (effectively a "do over" starting from the beginning, with a new background investigation, etc.) For example, if the BPD were to, as part of a subsequent hiring cycle, determine that Mr. Morley's OUI and driving record were now sufficient to justify a bypass, it would be impossible to know if the Roundtable's decision was influenced by their knowledge of Mr. Morley's medical history and disability, the precise conundrum that the MCAD guidelines are meant to prevent.

Second, I considered the seriousness of the BPD's missteps here. See generally, Bielawski, regarding whether the Commission's remedy "... correspond[ed] in tone and vigor with its rebuke of the appointing authority ...". An allegation of untruthfulness, particularly when made against a law enforcement officer or candidate, should be made with an appropriate level of seriousness and due diligence. Here, without even *convening*, members of the BPD's roundtable, through a series of quick email exchanges, impugned the integrity of Mr. Morley by accepting, at face value, written notes which, on key issues, omitted or misstated information. With minimal effort, the members of the Roundtable could have taken any or all of the following

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<sup>10</sup> It is unclear to me why Mr. Mackenzie, who coordinates the medical and psychological screening for the BPD, would participate in a pre-conditional offer of employment to begin with.

steps: 1) convened and discussed Mr. Mackenzie's allegations; 2) reviewed the actual source documents referenced in Mr. Mackenzie's notes; 3) initiated a discretionary interview, an accepted practice at the BPD, allowing Mr. Morley, who served four tours of duty, to directly address the allegations of untruthfulness, including his understanding of engaging in combat. Unfortunately, none of these reasonable steps were taken here.

The Commission has, based on the circumstances in a particular appeal, customized and ordered more than the traditional relief referenced above. In Funaro v. Chelmsford Fire Dep't, 8 MCSR 29, the Town was precluded from rescinding a conditional offer to candidate for firefighter after invalid rejection of reason for psychological disqualification except for circumstances arising after original offer. In Dunn v. Boston Police Dep't, CSC Case No. G1-14-80 (2012), the parties negotiated an agreed form of relief that permitted Mr. Dunn to be processed into the next police academy, subject only to allowing BPD to update his background and medical records.

After careful review and consideration, I have concluded that the appropriate relief here is as follows:

1. To ensure that other potential employers making inquiries are provided with a complete and accurate portrayal of Mr. Morley, the BPD shall, forthwith, add this Commission decision to any personnel records that it maintains regarding Mr. Morley.
2. The state's Human Resources Division (HRD) shall place Mr. Morley's name at the top of any future Certification for Boston Police Officer issued to the Boston Police Department and his name shall remain there until such time as he has been bypassed or appointed.
3. Subject only to the BPD updating the background investigation for the time period that has transpired since the most recent background investigation was completed, Mr. Morley's conditional offer of employment shall be reinstated.

4. In any future consideration of Mr. Morley for appointment as a BPD Police Officer, the BPD shall not bypass him as a result of any facts or circumstances in his background which it had knowledge of prior to notifying him that he had been bypassed for appointment on March 18, 2016.
5. Should the BPD identify additional reasons for not granting Mr. Morley a conditional offer of employment, he shall be granted a discretionary interview to address those issues.
6. Should Mr. Morley be granted a conditional offer of employment, the BPD shall take all appropriate steps to ensure that the medical examination is conducted independently.
7. Any psychological screening shall be conducted de novo by mental health professionals that had no role in the screening process from the current hiring cycle.
8. If and when Mr. Morley is appointed as a Boston Police Officer, he shall receive a retroactive civil service seniority date the same as those candidates appointed from Certification No. 02742.

### *Conclusion*

Mr. Morley's appeal under Docket No. G1-16-096 is hereby ***allowed***. He shall be granted all of the relief referenced in this decision.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Stein and Tivnan, Commissioners [Ittleman – Absent]) on September 29, 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:  
Jane Depalma, Esq. (for Appellant)  
Katherine Sarmini Hoffman, Esq. (for Respondent)  
John Marra, Esq. (HRD)