COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL GANNON,
Appellant
v.

G1-12-329

BOSTON POLICE DEPARTMENT,
Respondent

Appearances for Appellant:

Gerard A. Malone, Esq.
Christine I. Wetzel, Esq.
Malone & Associates, P.C.
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Haverhill, MA 01830

Appearances for Respondent:

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Boston Police Department
1 Schroeder Plaza
Boston, MA 02120

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Commissioner:

Cynthia Ittleman

DECISION

On November 28, 2012, the Appellant, Michael Gannon ("Appellant" or "Mr. Gannon"), pursuant to G.L. c. 31, §2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department ("Respondent" or "Department") to bypass him for original appointment as a full-time permanent police officer. A prehearing conference was held at the Commission on January 15, 2013. The Respondent filed a Motion for Summary Decision ("Motion") on or about February 1, 2013. The Appellant filed an opposition to the Motion on February 12, 2013. A hearing on the Motion was held on February 19, 2013.

The hearing on the Motion was digitally recorded and both parties were provided with a CD of the hearing. The Motion was denied on October 9, 2013. I conducted a full hearing in this case on March 17 and 26, 2014.[1] The Appellant filed a Motion to Exclude Results of Hair Drug Test, which motion was denied at the hearing. The hearing was digitally recorded and both parties were provided with a CD of the hearing.[2]

At the full hearing, Exhibit 15, an article entitled, "External Contamination of Hair with Cocaine: Evaluation of External Cocaine Contamination and Development of Performance-Testing Materials," Journal of Analytical Toxicology, Vol. 30, October 2006, was entered into the record de bene, pending my receipt of the parties' witnesses' affidavits and my determination whether it would be fully entered into the record. Also at the full hearing, the parties referenced a final report regarding a federally funded grant, "Analysis of Cocaine Analytes[3] in Human Hair II: Evaluation of Different Hair Color and Ethnicity Types," by Jeri D. Ropero-Miller and Peter R. Stout, June 2011. Full entry into the record was contingent upon production of the full report, which was provided post-hearing and is marked Exhibit 15C. On April 16, 2014, I received Dr. Cairns' affidavit (marked Exhibit 15A) addressing Exhibits 15 and 15C for the Respondent. On April 28, I received Dr. Benjamin's affidavit (marked Exhibit 15B) addressing Exhibits 15 and 15C for the Appellant. Based on the parties' affidavits and the complete final report of the federally funded grant, Exhibits 15 and 15C are fully entered into the record.

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with G.L. Chapter 31, or any Commission rules, taking precedence.
[2] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.
[3] I take administrative notice that analytes are defined as "a chemical substance that is the subject of chemical analysis." http://www.merriam-webster.com/dictionary/analyte

On May 20, 2014, the Respondent submitted a Motion to Strike Paragraph 19 of Dr. Benjamin's affidavit. On May 22, 2014, the Appellant submitted an opposition. Based on the reasons stated in the Appellant's opposition in part, as well as the parties' examination of each other's witnesses and both parties' affidavits regarding Exhibit 15, the Respondent's Motion to Strike Paragraph 19 is denied.

Post-hearing, on April 2, 2014, but prior to the submission of the parties' post-hearing briefs, the Appellant moved to require that the Respondent produce the results of the Appellant's 2012 hair drug test results, which the Appellant had sought in discovery and which the Respondent indicated it would produce but did not. The Respondent filed an opposition, the Appellant filed a reply and moved to exclude Exhibit 9 (documents related to a 2010 drug test that the Appellant obtained on his own behalf) and the Respondent filed a surreply. On April 18, 2014, I granted the Appellant's request regarding the 2012 hair drug test results, allowing the parties to submit an affidavit from their respective expert witnesses to comment on the 2012 test results; denied the Appellant's request to strike Exhibit 9; and ordered the Respondent to produce documents relating to drug tests performed on the Appellant in relation to his position as a Boston police cadet applicant and as a cadet, allowing the parties to submit an affidavit from their respective expert witnesses to comment thereon. As a result of this, and a subsequent order, the Respondent produced a one (1)-page document for each of the Appellant's tests in 2006 and 2007 and additional documents for the Appellant's 2008 and 2012 tests. The Respondent reported that the record retention policy of Psychemedics Corporation ("Psychemedics"), the testing company, provided no additional information regarding the 2006 and 2007 tests.

Neither party filed expert witness affidavits concerning the additional documents produced. However, the Respondent averred that the only relevant test result is from the 2010

test performed at the behest of the Respondent and that the other test results should not be admitted into evidence. On May 16, 2014, the Appellant submitted a response to the documents filed by the Respondent, noting that the added documents filed regarding the 2008 and 2012 test results are similar to the ones produced by the Respondent regarding the 2010 test results on the test obtained by the Appellant in 2010 but that the information produced regarding the 2006 and 2007 test results provide only limited numerical information without any supporting documentation. Nonetheless, the Appellant averred that the limited information is consistent with the results of the 2010 test that the Appellant obtained and the 2008 and 2012 test results, showing that he tested negatively for all tested drugs in five (5) tests between 2006 and 2012. The Appellant further continued to object to Exhibit 9, the documents produced by the Respondent regarding the results of the 2010 test he obtained, and averred that they should be given no weight since the Respondent obtained the information from Psychemedics in violation of the Appellant's private and confidential health information under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") without a release, a subpoena or order. Reviewing the documents submitted, the parties' positions thereon and in view of the fact that the Appellant offered into evidence documents of the 2010 drug test results of the test that he obtained (Exhibit 12), the additional documents produced by the Respondent after the hearing pursuant to the Commission's orders are marked and entered into the record as Exhibits 16A, 16B, 17A – 17E. (*See* fn 3, *infra.*) As indicated at the full hearing, all exhibits are given the weight they are due with appropriate consideration given to the parties' arguments about the weight they are to be assigned.

On May 23, 2014, the parties filed post-hearing briefs. As indicated herein, the appeal is allowed.

FINDINGS OF FACT:

Twenty-five (25) exhibits[4] were entered into evidence at the hearing and pursuant to subsequent orders. Based on these exhibits, and the weight they are given, the testimony of the following witnesses:

Called by the Boston Police Department:

- Devin Taylor, Director of Human Resources, Boston Police Department
- Ian McKenzie, Director of the Occupational Health Unit, Boston Police Department
- Dr. Thomas Cairns, Senior Scientific Advisor, Psychemedics[5]

Called by the Appellant:

- Michael Gannon, Appellant
- Dr. David Benjamin, Ph.D., Clinical Pharmacologist & Forensic Toxicologist
- Joan Gannon, Appellant's Mother
- Michael Gannon, Appellant's Father

and taking administrative notice of all matters filed in the case[6] and pertinent rules, statutes, regulations, case law[7], policies, and reasonable inferences from the credible evidence and

[4] Exhibits 1 through 14 were included in the record at the hearing. Exhibit 14 is a stipulation. Exhibit 15 was entered de bene, as noted above, and fully entered subsequently as noted herein. The following documents were subsequently marked and entered into the record (*see* Commission post-hearing orders noted, *supra*):
16A – a one (1)-page Medical Review Officer Report of Dr. Benjamin H. Hoffman, at Concentra Health Solutions, to the Respondent regarding the Appellant's hair drug test results from Psychemedics in 2008;
16B - a one (1)-page Medical Review Officer Report of Dr. Eleanor Gilbert, at Concentra Health Solutions, to the Respondent regarding the Appellant's hair drug test results from Psychemedics in 2012;
17A - a one (1)-page Psychemedics hair drug test result report regarding Appellant's August 4, 2012 test and certain unsigned "Screen data sheets" on Psychemedics letterhead;
17B - a one (1)-page Psychemedics hair drug test result report regarding Appellant's August 14, 2008 test and certain unsigned "Screen data sheets" on Psychemedics letterhead;
17C – a brief numerical chart of hair drug test cut-off numbers for several drugs, including cocaine, in 2006, 2007, 2008 and 2012, not on Psychemedics letterhead but referred to by Respondent in an email message it received from Psychemedics;
17D - a one (1)-page Psychemedics hair drug test result report regarding Appellant's November 6, 2006 test; and
17E – a one (1)-page Psychemedics hair drug test result report regarding Appellant's September 30, 2007 test.

[5] Dr. Cairns appeared and testified via electronic media as he was unavailable in Boston during this hearing. I was able to view and hear Dr. Cairns similarly to witnesses who testify in person at the Commission.

assigning such evidence the weight it is due; a preponderance of credible evidence establishes the following facts:

General Background

1. At the time of the full hearing in this case in 2014, the Appellant was thirty (30) years old; he was living with his girlfriend at his parents' home. He has lived in Boston his whole life, attended high school in Boston and attended the University of Massachusetts Boston campus for approximately two (2) years. (Testimony of Appellant) His father is a long time member of the Boston Fire Department. (Testimony of Appellant's Father) From September 2004 to December 2006, the Appellant worked at the Curley Community Center ("CCC") in Boston. In December of 2006, the Appellant began the recruit process for the Boston police cadet program. A supervisor from his employer at the CCC submitted a glowing recommendation in support of the Appellant's cadet application, as did two other references, one of whom was a retired judge, who have known him for a long time and stated either that the Appellant has never used illegal drugs or that they were not aware of any drug use by the Appellant. The Appellant was

[6] This includes redacted Certification 202869, produced by HRD, on which the Appellant's name appears following the 2011 police officer exam.

[7] It includes, without limitation, Commonwealth v. Christina Martin, 427 Mass. 816 (1998), as requested by the Appellant at the full hearing; In Re: Boston Police Department Drug Testing Appeals , 26 MCSR 73 (2013)(repeatedly referenced by the parties and witnesses at hearing); Boston Police Department v. Civil Service Commission and others, Suffolk Superior Court C.A. No. 13-1250-A, *consolid.* No. 13-1256-A)("Conclusion and Order- For the reasons stated, the Plaintiff Boston Police Department's Motion for Judgment on the Pleadings id DENIED, and the Defendant Boston Police Officers' Motion for Judgment on the Pleadings is ALLOWED in part and DENIED in part. The Court orders entry of JUDGMENT that the Civil Service Commission's decision is AFFIRMED in all respects except as to the remedy afforded to Officers Beckers, Jones, McGowan, Harris, Washington, and Downing, which is modified such that the Boston Police Department is ORDERED to reinstate those officers with full back-pay and benefits as of the date of each officer's discharge." October 6, 2014)(appeal pending in Massachusetts Appeals Court, No. 2015-P-0330)("Boston Hair Drug Test Appeals"); Gannon v. Boston Police Department, G1-11-309 (appeal withdrawn); and Gannon v. Boston Police Department, G1-13-181 (pending; I note that Exhibit 13 in the instant appeal, G1-12-329, is the notice of bypass issued to the Appellant regarding his appeal G1-13-181).

hired as a cadet and began working in the cadet program in January 2007. The Appellant has friends who work in the Department. (Testimony of Appellant; Exhibits 11 and 14)

2. While a cadet, the Appellant worked in the BPD legal department for eight months, following which he worked in the BPD homicide unit. The Appellant was the only cadet working in the homicide unit at the time. His direct supervisor at the cadet program was Deputy Superintendent Merner. The Appellant's goal was to become a BPD Officer. (Gannon Testimony; Exhibit 14 (Stipulation)) Then-BPD Human Resources ("HR") Director, Robin Hunt, sent letters to the Appellant while he was a cadet noting his perfect attendance in 2008 and 2009 and his involvement in a program titled Cops for Kids with Cancer. (Exhibits 11 and 14; Testimony of Appellant)
3. Two years of service provides cadets a preference for consideration in appointment of Boston Police Officers. (Testimony of Appellant) The Department's Police Commissioner may appoint five (5) or one-third, whichever is greater, to the Department. St. 1984, c. 277, s. 1; St. 1979, Chapter 560, s. 2. (*See* Finn v. Boston Police Department, Docket No. G1-05-441 regarding the history of the Boston cadet program)
4. Cadets were required to be tested for illegal drug use. As a cadet applicant and as a cadet, the Appellant was tested once each in 2006, 2007 and 2008.[8] Psychemedics performed the hair drug testing on each of these three (3) occasions and on each occasion,

[8] The Respondent produced an entire litigation data packet regarding the March 27, 2010 hair drug test that the Appellant had taken. Asked to produce the same information for the hair drug tests that the Appellant took in 2006, 2007 and 2008, as well as the 2012 hair drug test that the Appellant took, Psychemedics, through the Respondent, reported that certain information was unavailable relating to the 2006 and 2007 tests because they are beyond the Psychemedics document retention period and are no longer available. In addition, Psychemedics created a small chart (Exhibit 17C) providing the cocaine/cutoff information pertaining to these tests, stating that for the 2006 test the cocaine/cutoff was 96.0/58.0; for the 2007 test, the cocaine/cutoff was 87.8/60.8; for 2008 the cocaine/cutoff was 95.4/56.7; and for 2012 the cocaine/cutoff was 96.9/68.1. These numbers appear to indicate that the Psychemedics cocaine/cutoff changed over the years but, without context, there is little else to be learned from them. With regard to the 2012 hair drug test that the Appellant took, Psychemedics produced a one-page test result report and certain Screen Data sheets but not the entire litigation data package, which it provided for the March 27, 2010 test.

the Appellant tested negative for illegal drug use. The Psychemedics one-page summary of the drug test results states, "A 'negative' result means that the drug was not detected in an amount that meets or exceeds the cutoff." The cutoff in the Appellant's hair drug tests in each of those three (3) years, as well as in the Appellant's hair drug tests performed by Psychemedics in 2010 and 2012 deemed a test result positive for cocaine if the test results were 5 nanograms ("ng") of cocaine per 10 milligrams ("mg") of hair and above. (Stipulation; Testimony of Appellant; Exhibits 14 (stipulation), 16A, 16B, 17A, 17B, 17D and 17E)[9]

5. In July 2009, the cadet program was closed for financial reasons and the cadets were laid off, including the Appellant. At that time, the cadets were on hold, waiting to be called for processing to be considered for appointment to the position of Boston Police Officer. (Exhibits 11 and 14; Testimony of Appellant)
6. There is no indication that the Appellant had a criminal record. (Administrative Notice)
7. In addition to the instant appeal, the Appellant has filed two (2) other appeals with the Commission regarding his job applications to the Respondent: G1-11-309 and G1-13-181. (Administrative Notice)

Appellant's 2011 Appeal (G1-11-309)

8. The Appellant took and passed the civil service examination for police officer in April 2009. The Department submitted a requisition to the state's Human Resources Division ("HRD") for a Certification. HRD subsequently issued Certification 20233, on which the Appellant's appeared. (Administrative Notice: Docket No. G1-11-309)

[9] Psychemedics has used different cutoffs in the past. *See, e.g.*, Boston Hair Drug Test Appeals, D-01-409, et al, p. 32 (26 MCSR 73 (2013)).

9. As part of the hiring process related to the 2009 exam, the Appellant took a pre-employment hair drug test on March 27, 2010, submitting a head hair sample that was submitted to Psychemedics for testing.[10] (Testimony of Mackenzie, Taylor, Cairns, Appellant; Exhibit 14; Administrative Notice: Docket No. G1-11-309)
10. After testing the Appellant's hair sample, Psychemedics sent the test results to Roberta Mullen at the Department and to Dr. Ben Hoffman, a Department Medical Review Officer (MRO) at Concentra Health Services, stating that the Appellant had tested positive for cocaine. (Testimony of Dr. Cairns; Exhibits 3, 4, 6, 13) Specifically, the Appellant's test result was listed as 12.2 nanograms ("ng") of cocaine per 10 milligrams ("mg") of hair, exceeding the Psychemedics 5 ng per 10 mg cutoff. (Exhibit 6, p. 4) At that time, Psychemedics only contacted the Department when a candidate tested positive in the hair drug test, not when the test result was negative. (Testimony of Cairns)
11. On April 20, 2010, Dr. Eleanor Gilbert, another Department MRO, called the Appellant and left a message for him. The Appellant returned Dr. Gilbert's call the same day. Dr. Gilbert told the Appellant that his hair drug test results were positive for cocaine. The Appellant was shocked. Dr. Gilbert asked the Appellant if he had any medical procedures done recently and the Appellant stated that he did not and that the test results must be a mistake. Dr. Gilbert said that she could not say anything else about the test results. (Testimony of Appellant)
12. Immediately after the Appellant spoke to Dr. Gilbert, he called his parents and they decided to have another drug test done right away. They called the Probation Department of the South Boston Division of the Boston Municipal Court, which told the Appellant to

[10] Since it appears that the Appellant was given the hair drug test early in this hiring process, it is unknown if his name would have been reached on the Certification and, therefore, whether he would have been bypassed.

come to the Probation Department the next day. On April 21, 2010, the Appellant went to the Probation Department, paid $50 for a hair drug test, Probation Officer Molar took a hair sample using a process like the one used at the Boston Police Department and submitted it to Psychemedics for testing. The result of the April 21, 2010 test was negative. (Testimony of Appellant, Cairns, Benjamin; Exhibits 2, 3, 4,6, 13)

13. Dr. Gilbert stamped or electronically signed her name on two (2) MRO (Exhibits 3 and 13) reports for the Appellant's March 27, 2010 hair drug test. The reports are similar, though not identical. Exhibit 13 is on Concentra stationary and Exhibit 3 is not. Although both MRO reports state that the Appellant tested positive for cocaine, Exhibit 3 indicates that there was a screen of 5 ng per 10 mg and a confirmation result of 5 ng of cocaine per 10 mg of hair, which are the hair drug test cutoff numbers; it does not report that the test found that the Appellant's test result was above the cutoff level. Exhibit 13 has no confirmation number and does not report that the test found that the Appellant's test result was above the cutoff level. Both reports state in the "comments" section: "No B Sample received." (Exhibits 3 and 13) Shown the MRO reports in Exhibits 3 and 13 in 2010, Mr. Mackenzie indicated that they both state that the result was positive for cocaine but he has not seen two different MRO reports for the same person before that are different like Exhibits 3 and 13. (Testimony of Mackenzie)

14. The Psychemedics summary of procedures and results in the litigation data package for the Appellant's March 27, 2010 hair drug test states,

    1. The sample was accessioned at the laboratory on 02 April 2010. Both the tamper-evident integrity seal on the collection pouch, (initialed and dated by the test subject), and the seal on the Sample Acquisition Card, (SAC), were intact. The subject's initials on the SAC certify that the sample is from the subject, was cut close to the skin, that the subject observed the enclosure of

the sample in the SAC, and that the subject consents to the testing of the sample.

2. The sample was designated with a Laboratory Accession Number (LAN) [xxxxxxxxx] for identification purposes. A portion of the sample with LAN [xxxxxxxxx] was liquefied through digestion and screened by Radioimmunoassay, (RIA), and the sample was determined to be presumptive positive for cocaine.
3. Another portion of the sample with LAN [xxxxxxxxx] was then washed to decontaminate the sample, and the wash analyzed by RIA to demonstrate that decontamination procedures were effective.
4. This portion of the sample with LAN [xxxxxxxxx] was then washed to decontaminate the sample, and the wash analyzed by RIA to demonstrate that decontamination procedures were effective.
5. Analysis by LC/MS/MS identified and confirmed the presence of Cocaine at 12.2.ng/10mg hair and a Cocaine metabolite, Benzoylecgonine (BE) at 0.8 ng./10 mg hair. The presence of this metabolite, in addition to the presence of Cocaine above cutoff, establishes that the subject has ingested Cocaine.
6. On 05 April 2010, after a Certifying Scientist review, the sample with LAN [xxxxxxxxx] was reported Positive for Cocaine to MRO Dr. Ben Hoffman. (Exhibit 6, p. 3)(emphasis in original)

15. The Appellant was not hired from Certification 202233 and he filed an appeal on October 20, 2011, which was docketed as G1-11-309 by the Commission. There is nothing in the Commission's file in appeal G1-11-309 indicating that the Department sent the Appellant a letter stating that he was not selected or that he had been bypassed. However, the parties stipulate that the Appellant was not selected or bypassed in 2011 because he was in the last tie group on this Certification. The parties further stipulate that the Appellant withdrew appeal G1-11-309. On December 27, 2011, the Commission issued a decision dismissing appeal G1-11-309 based on the Appellant's voluntary withdrawal. (Exhibit 14; Testimony of Appellant; Administrative Notice)

Appellant's 2013 appeal (G1-13-181)

16. The Appellant took and passed the civil service examination for police officer in April 2011. In or about March, 2013, the Department requested two Certifications from the eligible list relating to the 2011 police officer exam to fill sixty-five (65) police officer

positions, which included fifty-five (55) from the main list and ten (10) from a female list. HRD issued Certifications 00746 and 00747, respectively in May, 2013. Mr. Gannon's name appeared on Certification 00746 and he was ranked 54th. (Administrative Notice regarding G1-13-181): Department's October 29, 2013 email, HRD August 27, 2013 packet provided to the Commission and the parties)[11]

17. The Appellant filed an appeal, docketed as G1-13-181 by the Commission, on August 13, 2013 stating that he had been bypassed because of a "previously failed drug test". On August 27, 2013, the Department filed a Motion to Dismiss averring that the appeal was premature because it had not yet made hiring decisions. On October 15, 2013, a hearing was held on the Motion to Dismiss. (Administrative Notice)

18. On February 7, 2014, the Respondent wrote to the Appellant stating that he was being bypassed because of a positive cocaine test result in the March 27, 2010 drug test he had taken as part of the hiring process at that time. The February 7, 2014 letter states,

> **RE: Certification #00746**
> 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 out. In addition, below are reasons associated with your bypass.
> On March 27, 2010 you were administered a hair drug test which was analyzed by the Psychemedics Corporation. The results indicate you tested positive for the use of cocaine. Dr. Eleanore (sic) Gilbert, Medical Review Officer, of Concentra Health Services then confirmed the positive test result.
> 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

[11] Ms. Taylor testified in the instant case, G1-12-329, that the Department requested and received an extension of the eligible list from HRD relating to the 2011 police officer exam which list would have otherwise expired. *See* G.L. c. 31, s. 25.

Commission's website at www.mass.gov.csc (sic[12]) 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,
Devin E. Taylor
Director of Human Resources
(Exhibit 13)(emphasis in original)

19. Appeal G1-13-181 is still pending.[13] (Administrative Notice)

Appellant's 2012 Appeal (G1-12-329 – instant appeal)

20. Between appeal G1-11-309 and appeal G1-13-181, the Appellant filed the instant appeal. (Administrative Notice)

21. The Appellant took and passed the civil service exam for police officer on April 30, 2011. (Exhibit 14 (Stipulation))

22. Ms. Robin Hunt was HR Director at the Department from 2005 until the summer of 2013 and she was involved in the hiring process related to the 2009 and 2011 police officer exams. During Ms. Hunt's tenure, the Department would re-appoint candidates who had been selected in a previous hiring cycle but who did not complete the academy because of an injury incurred at the academy. In August 2013, Ms. Taylor was appointed Director of Human Resources at the Department. The Department no longer re-appoints candidates as it did during Ms. Hunt's tenure. Since the full hearing in this instant matter was not conducted until 2014, Ms. Taylor testified as the HR Director since Ms. Hunt was no longer in the position. Ms. Taylor was hired by the Department in 2001 and she became the Assistant HR Director beginning in 2008. As Assistant Director during the hiring process related to the 2009 and 2011 police officer exams, Ms. Taylor had "slight" involvement in both of those hiring processes but she reviewed the 2012 hiring process in

[12] The correct website is www.mass.gov/csc. Entering www.mass.gov.csc yields a message stating "This webpage is not available."
[13] The parties agreed to withhold action in G1-13-181pending a decision in the instant case.

preparation for her testimony at the full hearing. The Department does not consider any candidates after they have tested positive for drugs of abuse. (Testimony of Taylor; hearing on the Department's Motion for Summary Decision)

23. As HR Director, Ms. Taylor is responsible for all human resource matters, all personnel transactions, attendance and records, including medical records. She was not aware if the policy providing for the re-appointment of candidates who were injured in a prior academy was a written policy. (Testimony of Taylor)

24. Ian Mackenzie is the Director of the Occupational Unit at the Department and reports to Ms. Taylor. There are ten (10) people in his Unit. He was appointed to the position in October 2013 so that he was not working there during the 2011 and 2012 hiring processes. Prior to working in the Department, Mr. Mackenzie worked in the Boston Fire Department. The Boston Fire Department conducts drug testing using urine samples. In the Police Department, he was given a Psychemedics training CD to learn about the Department's hair drug testing process. Mr. Mackenzie has had no previous experience with hair drug testing. Department trainees are required to pass the computer training test with a minimum score of 80. Mr. Mackenzie took and passed the test on the computer in his office. Mr. Mackenzie has also been trained by Concentra, the entity that performs the MRO function regarding hair drug tests. From his training, Mr. Mackenzie is aware that hair for the hair drug test may be taken from different parts of the body, although the preference is to obtain hair samples from the head. Only <u>one</u> hair sample is taken for recruits. He is familiar with the Psychemedics cutoffs and is aware that they are used to distinguish between someone who abuses drugs for a brief period as opposed to someone with longer exposure. His staff follows the chain of custody prescribed by Psychemedics.

He receives both positive and negative test results. If there are positive results, he asks Psychemedics for the specific levels of drugs detected. In his brief time at the Department, he has not known of any candidate who has tested positive for drugs who has continued in the hiring process. (Testimony of Mackenzie)

25. In or about March 2012, the Department submitted a request to HRD to fill forty (40) [14]police officer vacancies. HRD issued Certification 202869 in April 2012. The Appellant's name did not appear on Certification 202869 at this time. In June 2012, BPD increased the number of positions to be filled to between sixty (60) and approximately seventy (70)[15] and asked HRD for additional names for Certification 202869. Later in June 2012, HRD issued additional names for this Certification. The Appellant's name appeared on this expanded, June 2012 Certification. (Testimony of Taylor; Administrative Notice: Department's Motion for Summary Decision (denied), including affidavit of Robin Hunt, then-Department HR Director, and Certification 202869 issued in April 2012 and June 2012. (Appellant's Opposition to Motion for Summary Decision)
26. The Appellant's name appeared in the first tie group, on p. 5 of the June 2012 Certification 202869. The Appellant took a hair drug test on August 4, 2012; the test result was negative. Another candidate was tied with the Appellant and he was selected. The names of two (2) other candidates were ranked below the Appellant, in the second tie

[14] The Department first asked HRD for a Certification to fill thirty (30) police officer positions from the main list and requested a Spanish-speaking list. HRD denied the Department's request for a Spanish speaking list. Instead, HRD initially issued Certification 202869 to fill forty (40) police officer positions. (Administrative Notice: Department email, October 29, 2013, G1-13-181)

[15] The exact number of appointments to be made is unclear. Neither the Department's Motion for Summary Decision nor Exhibit 1 (Affidavit of Robin Hunt, then-Director of Department Human Resources) indicate the number of appointments to be made. Exhibit 2 to the Motion, which is Certification 202869, dated 4/26/12, indicates that forty (40) candidates were to be selected and Exhibit 3 to the Motion, which is the 6/28/12 iteration of the same Certification, indicates that sixty (60) were to be selected. Further, in an email message from the Department dated February 19, 2013, the Department stated that seventy (70) were to be selected. Administrative Notice.

group, on pages 22 and 23 of the June 2012 Certification, respectively, and they were selected. Another candidate who previously did not complete the police academy was not on the April 2012 or the June 2012 Certification but he was selected. (Testimony of Taylor; Administrative Notice: Department's Motion for Summary Decision (denied), including affidavit of Robin Hunt, then-Director of Human Resources at the Department, and Certification 202869 issued in April 2012 and June 2012; Appellant's Opposition to Motion for Summary Decision; Exhibits 16B and 17A)

27. In early January 2013, the Respondent sent sixty-seven (67) candidates to the Boston Police Academy, not including the Appellant. (Exhibit 14 (Stipulation[16]))

28. By letter dated January 25, 2013, the Respondent informed the Appellant,

> Civil Service Certification Number: 2020869
> Dear Recruit Officer Applicant:
> You have reported to this community that you were willing to accept employment as a Boston Police Officer. At this time you have not been appointed as you were in a group of applicant who were all tied with the same score and you were one of the applicants not selected. Should you be reached on the civil service list in the future, you will be processed again by this Department.
> Thank you for your interest and participation.
> Sincerely,
> Robin W. Hunt
> Director of Human Resources
> (Exhibit 7[17])

29. The Appellant filed the instant appeal at the Commission on November 28, 2012. (Administrative Notice)

Hair Drug Tests

30. Psychemedics is a publicly traded company. Ninety-five (95) percent of its business involves hair drug testing. (Testimony of Cairns)

[16] Ms. Taylor testified that sixty-eight (68) candidates had been sent to the Academy.
[17] The letter is dated January 25, 2012, which the Department acknowledged, orally and in writing, is an error and should be dated January 25, 2013. *See* Respondent's February 19, 2013 email message.

31. Dr. Thomas Cairns is a biochemist and toxicologist who is the Senior Scientific Advisor for Psychemedics, whose offices are located in Culver City, California. He obtained his doctorate degree in 1990 at the University of Scotland in Glasgow. He has been an adjunct professor at the University of California and University of Southern California. He has worked at the Federal Drug Administration ("FDA") as a senior scientist and Director of the National Center for Toxicology Research and at Psychemedics, where he is actively involved in hair drug testing. He has been associated with Psychemedics since approximately 1989. He has published between twenty (20) and thirty (30) peer reviewed publications regarding hair drug testing and received numerous awards related to his field. He has made presentations on hair drug testing to professional societies and has been professionally involved in the field of hair drug testing since the 1980s. He has a license to practice forensic pharmacology in New York. He has testified in New York trials about hair drug testing, as well as in arbitrations, and employment scenarios. By dint of his education, training and considerable professional experience involving hair drug testing, Dr. Cairns qualifies as an expert in this case. (Testimony of Cairns; Exhibit 8) As with nearly all, if not all experts, he has an interest in the outcome of this case. However, he has an added interest in that hair drug testing is how he earns an income and that Psychemedics performed all five (5) of the hair drug tests the Appellant has taken while seeking a career in law enforcement for the Respondent. (Administrative Notice)
32. Dr. Benjamin is a clinical toxicologist and pharmacologist. He earned his doctorate at the University of Vermont College of Medicine in 1972. He was a fellow, similar to a resident at the University of Kansas Medical Center, which is well known in his field. For more than a decade, Dr. Benjamin worked for a pharmaceutical company, working

worked with physicians to develop new medicines and to obtain FDA approval. Since 1986, he has worked on his own. Between sixty (60) and eighty (80) percent of his profession involves litigation. Among other cases, he has been involved in cases involving hospital prescription medicine problems. He is, or has been, an adjunct faculty member at the Northeastern University Pharmacy Department, at Tufts Medical School and at Harvard School of Public Health regarding chemical exposures and addressed a variety of professional associations on his expertise. He has written numerous articles on his specialties. He worked on the development of hair drug testing in the Boston Police Department in association with a law firm that represents Boston police officers and their union. Given the overwhelming amount of his professional involvement in related litigation, Dr. Benjamin clearly earns much of his income by providing expert testimony, as he did in this case[18] and, therefore, he has the same interest as most expert professionals involved in litigation. In addition to hair drug testing, Dr. Benjamin is familiar with similar testing of urine, blood, spinal fluid, fingernails and bile. By dint of his education, training and considerable professional experience, Dr. Benjamin is qualified as an expert in this case to opine about the hair drug testing process at issue. That Dr. Benjamin has not conducted hair drug testing performed by Psychemedics does not undermine his ability to assess the chemistry involved as he is familiar with its protocols and the test results here, including Exhibit 6 (the Psychemedics packet regarding the Appellant's March 27, 2010 test). Dr. Benjamin questions the reliability of the Psychemedics hair drug testing process and its ability to discern environmental

[18] Dr. Benjamin stated that he was not being compensated for testifying on the second day of this hearing. (Testimony of Benjamin)

exposure from actual ingestion of cocaine, stating that the Psychemedics test can result in false positives. (Testimony of Benjamin; Exhibit 10)

33. Psychemedics tests hair for drugs such as cocaine, opiates, amphetamines, and marijuana. Its laboratories are licensed in approximately twenty-two (22) states. State regulatory authorities inspect Psychemedics laboratories on an on-going basis. Psychemedics' clients include corporations, law enforcement entities (though not the military) and high schools. The New York City Police Department is one of its clients. The company tests the presence of illicit drugs regardless of the way they enter the user's body; the bloodstream feeds drugs to the user's liver, where it is then metabolized, making it water soluable and producing a metabolite. (Testimony of Cairns) Benzoylecgonine ("BE") is one of the key cocaine metabolites. The metabolite concentrations should also be present at 5% or more. (Testimony of Cairns; *see also* Boston Hair Drug Test Appeals, D-01-1409 et al, p. 26 (26 MCSR 73 (2013)) The drugs are dispersed throughout the body, including to hair follicles, which trap the drugs. (Testimony of Cairns)

34. Psychemedics' hair drug testing begins with the Respondent obtaining hair drug samples from the police candidates, which process must follow an explicit chain of custody, with the applicant and the person who takes the hair sample signing and initialing the appropriate forms and envelope in which the applicant's hair sample is placed. If there is a problem with the chain of custody, it is invalid and the client is thus informed. The applicant's sample is assigned a nine-digit number with a bar code which is verified at various points in the process. The first test performed by Psychemedics on a hair drug sample, and performed here, is a radioimmunoassay ("RIA"), which is referred to as presumptive testing, as opposed to a confirmatory test. If the test result is positive for

one of the drugs tested, as it was in the Appellant's March 27, 2010 test, Psychemedics performs a confirmatory test. With regard to the Appellant's March 27, 2010 hair drug test, the confirmatory test that Psychemedics used involved a detailed washing of a second part of the hair sample and subjecting the wash to an RIA. The remaining hair was examined by Liquid Chromatography/Mass Spectrometry/Mass Spectrometry ("LC/MS/MS"). If an applicant is determined to have more than 5 ng of cocaine per 10 mg of hair at least a 5% BE concentration, Psychemedics reports it to its client's MRO, which reviews the results and contacts the person who submitted the hair sample to inquire if there are any medical reasons for the presence of the detected drug. Thereafter, the MRO submits his or her conclusion about the drug test result to the Respondent. (Testimony of Cairns) However, Psychemedics' clients are also informed, "[a] 'Negative' result means that the drug was not detected in an amount that meets or exceeds the cutoff." (Exhibit 4)[19]

35. RIA in a hair drug test is a relatively inexpensive test to perform. (Testimony of Benjamin and Cairns) RIA hair drug testing can produce false positives. (Testimony of Benjamin)[20] LC/MS/MS is another type of confirmatory test; it is the most reliable confirmatory hair test and more expensive than RIA. (Testimony of Benjamin and Cairns).

36. According to an article entitled, "External Contamination of Hair with Cocaine: Evaluation of External Cocaine Contamination and Development of Performance-Testing

[19] Psychemedics' standard operating procedures are confidential. As a result, we rely on the expert testimony, the literature referenced, as well as the litigation data package, produced here only regarding he Appellant's March 27, 2010 hair drug test performed at the request of the Respondent, and the limited documentation produced regarding the Appellant's other hair drug tests. *See* Boston Hair Drug Test Appeals, D-01-1409, et al, p. 42 (26 MCSR 73 (2013)).

[20] *See* Boston Hair Drug Test Appeals, D-01-1409, et al, p. 46 (26 MCSR 73 (2013)).

Materials," by Peter R. Stout[21], Jeri D. Ropero-Miller, Michael R. Baylor and John M. Mitchell, Center for Forensic Sciences, Research Triangle Institute ("RTI"), North Carolina, Journal of Analytical Toxicology, Vol. 30 (October 2006), RTI was directed to " … conduct a pilot hair performance testing (PT) under the National Laboratory Certification Program (NLCP). The purpose of this pilot was to develop quality assurance testing materials in support of anticipated changes in Federal Drug-Free Workplace testing programs." (Exhibit 15 at 490). The article states further that, "[t]esting for drugs in hair has evolved to the point that the identity of the drug found is less of an issue than the explanation of its origin. The risk for environmental contamination alone to produce a positive drug hair test result is not clear. All mechanisms by which drug (sic) is incorporated into hair are not fully understood." (Id. at 491) In addition, it states, "[t]he issue of environmental contamination is further confounded by evidence that incorporation rates of drugs vary in hair with different melanin and protein content." (Id.) Moreover, the article states, "[r]egardless of the decontamination procedure employed, the efficacy of decontamination washes is debatable." (Id.) The article concludes,

> It appears that it will be difficult to develop hair PT [performance tested] samples that will demonstrate that all cocaine analytes applied to hair by dry transfer can be removed from hair by current decontamination procedures. Also, the large variability in results from samples decontaminated by laboratories using different decontamination strategies suggest that reinstating the use of these strategies will increase the variability in the current pilot PT program. … External contamination of hair with powdered COC [cocaine] HCl resulted in the presence of COC, BE [benzoylegonine], CE [cocaethylene], and, to a lesser extent, NCOC [norcocaine] that was resistant to removal over 10 weeks of model hygienic treatment and laboratory decontamination. The presence of trace quantities of CE and NCOC in the COC used in the study confounded the use of ratios, cutoffs, and other mathematical criteria to distinguish a contaminated sample. …Within

[21] Mr. Stout was involved in 2006 a hair drug test study referenced in Boston Hair Drug Test Appeals, D-01-1409, et al, p. 60 (26 MCSR 72 (2013)).

> the small sampling of hair types used in the study, there did not appear to any simple relation of concentrations of COC, BE, CE, or NCOC with total melanin suggesting that the in vitro binding and retention of drugs is a complex function of melanin and other hair components. Contamination of the surface of hair may result in the incorporation of analytes into the hair without wetting the hair. The addition of moisture to the hair as artificial sweat markedly increased the concentrations of drug in the hair. Once the analytes were absorbed into the hair, they were resistant to removal by shampooing the hair and/or current laboratory decontamination wash procedures.
> (Id. at 499)

37. "Analysis of Cocaine Analytes in Human Hair II: Evaluation of Different Hair Color and Ethnicity Types," is a final report written by Jeri D. Ropero Miller and Peter R. Stout, dated June 2011, pertaining to a federally funded grant in this regard. (Exhibit 15C)("June 2011 Grant Analysis")

38. The June 2011 Grant Analysis concludes, in part,

> Environmental exposure of drugs continues to be a concern for hair drug testing studies, child protection services, probation and parole, and the criminal justice system. It is essential to the validity of hair drug testing that a drug user can be easily identified in comparison to an individual who has not ingested the drug, but may have been unknowingly or knowingly (e.g. narcotics officer) exposed to a drug in their environment. It is also important to determine 1) if an individual with a given type of air color or ethnicity type has a greater susceptibility to a positive hair drug test subsequent to environmental exposure; 2) if hygienic treatments affect the positive hair drug test results; 3) if susceptibility of hair to drug environmental exposures can be qualitatively determined through hair characterization studies, such as morphological analysis using microscopy techniques; and 4) if laboratory decontamination procedures can minimize the effects of environmental exposure enough to property identify a drug user from an environmental contaminated individual. …
>
> The results of this study are consistent with RTI's [Research Triangle Institute] previously published results for contamination of hair with pharmaceutical-grade COC (Stout et al., 2006) …The COC analytes were resistant to removal by hygienic treatment or by laboratory decontamination; however, there was a significant decline in the content of COC over the course of the study. …
>
> Overall, the extended phosphate decontamination resulted in far fewer positive hair results at early time points, but it did not entirely eliminate positive results. …
>
> As Schaffer and colleagues (2007) have noted in several publications (Cairns et al., 2004a; 2004b), they have applied various ratios of compounds and

> used various mathematical calculations using the amounts of a drug found in the last wash solution. As noted by Kidwell and Smith (2006), this wash criterion has evolved over the years. The proposed Mandatory Guidelines (SAMHSA, 2004) do not have a provision for the use of such criteria, but our results indicate that use of such a wash criterion in hair drug testing may be a needed layer of separated a drug-user from a non-user. …
>
> The application of a decontamination wash and wash criterion may also assist with the elimination of a 'color bias' or 'ethic (sic) bias' because this simple and conservative 'clinical or assessment adjustments' (sic) may be enough to modify 'the threshold values and negate the hair color contribution,' as proposed by Miecakowski and colleagues (2007). Since the outcome of possible multiple biases is not known, further research is needed to determine whether the variables can be adequately controlled and resolved through analytical techniques employed for hair testing for drugs of abuse. …
> (Id. at 71-75)

39. The Appellant's hair drug test performed by Psychemedics at the request of the Respondent on March 27, 2010 involved a hair sample taken from his head that was 3.2 cm long, which would indicate whether there was cocaine use within the seventy-five days prior to the drug test. The chain of custody of the hair sample was intact.[22] The Appellant's hair drug test result for the drug test administered at the request of the Respondent on March 27, 2010 was 12.2ng per 10mg and contained 8% BE metabolite concentration. Psychemedics uses the industry standard variability rate of +/-20% in its testing. (Testimony of Cairns; Exhibits 4 and 6)

40. On April 21, 2010, one day after the Appellant was informed by Dr. Gilbert that he had tested positive for cocaine on the test performed at the behest of the Respondent, the Appellant went to the South Boston District Court Probation Department and provided a hair sample 2cm long for another hair drug test, which test was performed by Psychemedics. A hair sample that is 2 cm long indicates whether there was drug use forty-five (45) days prior to submission of a hair sample for the drug test. Since twenty-

[22] A hair sample 3.9 cm long indicates whether there was cocaine use within the ninety (90)-days prior to the drug test. (Testimony of Cairns)

five (25) days elapsed between March 27, 2010 and April 21, 2010, 26% of the April 21, 2010 sample contained hair from the March 27, 2010 sample. The chain of custody of the April 21, 2010 hair sample was intact. The April 21, 2010 test result was negative for cocaine, as well as other drugs. (Testimony of Cairn; Exhibit 12) Prior to being informed of the positive result of the March 27, 2010, the Appellant cut his hair as he keeps it short. (Testimony of Appellant)

Applicable Law

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

The appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is "done upon adequate reasons sufficiently supported by credible evidence when weighed by an unprejudiced mind, guided by common sense and correct rules of law." Comm'rs of Civil Serv. v. Mun. Ct.,

359 Mass. 211, 214 (1971)(quoting Selectman of Wakefield v Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

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

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010)(citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006)). The Commission is to ensure that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. Id. An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. Busa v. Fall River Police Department, 27 MCSR 552 (2014)(citing Beverly, 78 Mass.App.Ct. 182, 189 (2010)). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." Town of Burlington, 60 Mass.App.Ct. 914, 915 (2004). An appointing authority "should be able to enjoy more freedom in deciding whether to appoint someone as a

new…officer than in disciplining an existing tenured one." City of Attleboro v. Mass. Civil Serv. Comm'n, BRCV2011-00734 (MacDonald. J.) citing Beverly at 191.

Especially when it comes to an applicant for a sensitive public safety position, "the Commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was 'reasonable justification' shown… Absent proof that the [appointing authority] acted unreasonably…the commission is bound to defer to the [appointing authority's] exercise of its judgment that 'it was unwilling to bear the risk' of hiring the candidate for such a sensitive position". Beverly at 190-91. *See also*, Reading v. Civil Service Comm'n, 78 Mass.App.Ct. 1106 (2010) (Rule 1:28 opinion); Burlington v. McCarthy, 60 Mass.App.Ct. 914 (2004)(rescript opinion). Further, "An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion." McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 474 (1995). "Police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens." Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

With respect to hair drug testing in the field of law enforcement, the Commission issued its decision in the Boston Hair Drug Test Appeals, D-01-1409, et al (26 MCSR 73 (2013)). Written by Commissioner Stein, the decision provides a lengthy, detailed and scholarly analysis of hair drug testing by Psychemedics of tenured police officers which has been upheld in substance, in part, thus far by the Superior Court and is currently pending further review in the Appeals Court. In summary, Commissioner Stein wrote,

> The present state of hair testing for drugs of abuse, while potentially useful in clinical assessment settings, and in the context of child custody, criminal probation and pre-employment hiring decisions, does not meet the standard of reliability necessary to be routinely used as the sole grounds to terminate a tenured public employee under just cause standards governing civil service employees under Massachusetts law.

Hair testing for drugs of abuse has not achieved general acceptance within the scientific or law enforcement communities. There are no universal industry standards controlling the performance of such testing. Save for general agreement that a level of 5ng/10mg of cocaine (plus some less uniformly-agreed level of metabolite) is the minimum concentration indicative of a low-level user, there are no uniform benchmarks for interpreting test results. Of the several laboratories that now offer hair testing to employers, the testing methods vary from laboratory to laboratory. While some parameters (cutoffs, decontamination procedures, etc.) are described generally in published literature, substantial parts of the methodologies are hidden behind claims of competitive proprietary interest and cannot be replicated by others. There is a dearth of judicial precedent for allowing an employer to terminate an employee, and especially a tenured public employee, solely on the basis of a positive hair test. The BPD appears to have been the first major municipal police department to begin hair testing of its sworn officers in 1999, and remained the only such department to rely on hair testing in disciplinary matters until the NYPD began a similar testing program in 2009.

Although a lack of unanimity of opinion does not necessarily preclude a finding of general acceptance, especially as to a new scientific method, the criticism from sources such as the FBI Laboratory who have no proprietary interest in any one laboratory testing process, represents more than merely one side of a legitimate scientific debate. In particular, the scientific evidence is compelling that no proven level of any cocaine metabolite has been identified that is conclusive of ingestion. Despite more than a decade of study and a clear federal policy against drugs in the workplace, SAMHSA has declined to approve hair testing as a modality for detection of illicit drugs by employees of the federal government and those employed in the private sector that are subject to federal oversight. Persuasive, credible evidence also demonstrates that further appropriate controlled population studies and research is needed to: (a) identify the composition and levels of cocaine material present in, and transferred from the environment to nonusers, particularly law enforcement officers, as opposed to users; (b) identify, if possible, a definitive metabolite marker of ingestion; and (c) complete a scientifically-grounded assessment of the efficacy of so-called "avoidance techniques" and other conscious and unconscious factors that influence hair test results. This information is essential before any specific laboratory-tested decontamination procedures and test protocols (including those of Psychemedics) are likely to be accepted as scientifically reliable to the degree that, when applied in a real-world disciplinary scenario, a positive test reading is, and can only be, due to ingestion of an illicit drug.

In sum, given the uncertainty about the efficacy of current decontamination strategies and metabolite criteria to rule out all real-world contamination scenarios, hair test results cannot be used in rote fashion as a conclusive and irrefutable means to terminate a BPD officer on the premise that such testing is 'generally accepted' as reliable.

(Id. at 107-08)(emphasis in original)

As indicated in the Commission's decision in Boston Hair Drug Test Appeals, since 2007 the hair testing procedures for tenured police officers include,

> Simultaneous collection of three separate hair samples, two to be sent to Psychemedics and one kept in secure storage by BPD;

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

Expert conclusions are not binding on the Commission, as the trier of the facts, which may decline to adopt them in whole or in part and give them such weight as they deserve. *See, e.g.*, Police Dep't of Boston v. Kavaleski, 460 Mass. 680, 694-695 (2012); Commonwealth v. Gaynor, 443 Mass. 245, 266 (2005); Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, *rev. den.*, 437 Mass. 1109 (2002). *See also* Ward v. Commonwealth, 407 Mass. 434, 438 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73 (1981); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, *rev.den.*, 409 Mass. 1104 (1991).

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

> If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification] ... the appointing authority shall immediately file ... a written statement of his reasons for appointing the person whose name was not highest.

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

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

> be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. …
> (Id.)

Analysis

The reason given by the Respondent in its January 25, 2013 letter to the Appellant for not selecting him from the 2012 Certification 202869 was, in part, "At this time you have not been appointed as you were in a group of applicants who were all tied with the same score and you were on of the applicants not selected. Should you be reached on the civil service list in the future, you will be processed again by this Department." Exhibit 7. Since the letter states that the Appellant was not selected, it does not constitute a bypass letter. Had it been a bypass letter, the Department would be obliged to state the reasons for the bypass, under PAR.08(4), and it would be precluded from raising thereafter reasons therefor other than those stated in the bypass letter.

The Department has argued that the Appellant was not bypassed although four candidates were selected based not on their rankings on Certification 202869 but because they had been previously appointed, attended the academy and sustained injuries during the academy and were unable to complete the training and begin their uniformed employment at the Department. As a courtesy, the Department states, it afforded such candidates one more opportunity in the form of a re-appointment. The Appellant avers that this violates civil service law. The Appellant concedes that one of the four who were selected did not bypass him since he was in the same tie group as the Appellant. However, the Appellant asserts that two other candidates bypassed him because their names appeared in the tie group below the Appellant's tie group on Certification 202869. Finally, the Appellant states that he was bypassed by another candidate who was selected despite the fact that his name did not appear anywhere on Certification 202869.

The affidavit of Ms. Hunt, who was, at pertinent times, HR Director at the Department, verifies that during her tenure as HR Director the Department offered such re-appointments to candidates who were injured in the prior academy. However, Ms. Taylor, who was appointed HR Director when Ms. Hunt left the Department, after most of the actions at issue here occurred, testified that she was aware that this policy had existed, that she did not believe that this policy was in writing, but that, in any event, the Department no longer applies this policy.[23] It was appropriate for the Department to abandon this policy as it should not have been established in the first place. The purpose of an eligible list and Certification is to ensure that all candidates compete fairly by taking the police officer exam, eligible candidates are assigned a rank based upon their objective exam scores, candidates are provided appropriate credit for their education and experience, as well as any applicable statutory preference the Legislature has established in G.L. c. 31 and HRD has deemed appropriate. To either allow someone who has not taken the exam or who has taken the exam but scored lower than other candidates but is hired nonetheless, defeats the whole purpose of the exam and statutory preferences. In applying its re-appointment policy in regard to Certification 202869, the Department bypassed the Appellant, selecting three other candidates instead, based not on their rankings on Certification 292869, according to the Respondent, but based on their selection at another time and having been injured at the academy, although they were, in fact, ranked in the tie group below the Appellant's tie group or were not on the Certification at all. Having selected candidates who were ranked lower than the Appellant or were not on the Certification, the Respondent bypassed the Appellant.

[23] In Dottin v. Boston Police Department, G1-11-41, the Appellant had been injured at an academy and given an additional consideration subsequently. However, the Appellant was granted the additional consideration after the eligible list had expired but he failed a psychological examination. On January 25, 2013, the Commission granted the parties' motion for relief under Chapter 310 of the Acts of 1993. As noted above, the Respondent has since ceased consideration of applicants based on their having been injured at a previous academy and not on the rank on an eligible list. Unlike Mr. Dottin, Mr. Gannon's name appeared on the pertinent eligible lists.

At the Commission full hearing, however, the Respondent presented documents and lengthy testimony, including an expert witness, to aver that regardless of whether the Appellant had been bypassed based on the appointment of candidates who were below him on the list or not even on the list, his 2012 non-selection was based on his March 27, 2010 positive hair drug test result, which is reliable and supported by the Commission's decision in the Boston Hair Drug Test Appeals. In its post-hearing brief, the Respondent also argued the evidence and the law in this regard. Further, the Respondent presented testimony that its policy is that it never hires a candidate who once tested positive for drugs.

Similarly, at the Commission hearing the Appellant presented documents and lengthy testimony, including an expert witness, to aver that the hair drug test taken at the request of the Respondent in 2010 is unreliable and he argued that he never used cocaine. Evidence was also admitted relating to the results of hair drug tests that the Appellant had taken on other occasions (all of which tests were performed by Psychemedics) which test results were negative. In his post-hearing brief, the Appellant also argued the evidence and the law in this regard. In addition, the Appellant asserted that he was wrongly bypassed in 2011 (regarding appeal G1-11-309 and Certification 202233) based on the positive March 27, 2010 hair drug test result because he took another hair drug test the day after the Department MRO called him about the positive drug test result, the new drug test was processed by Psychemedics and the result was negative. The Appellant further argued that the Department failed to inform him of the negative drug test result in the instant appeal and did not produce the result until he asked the Commission to order the Department to produce it.

There is no evidence regarding the Appellant's 2011 (G1-11-309) appeal stating that he was not selected because of a positive drug test result; rather, the Respondent averred that the

Appellant was not selected because he ranked in the lowest tie on Certification 202233. The Respondent's non-selection letter in 2013 (regarding the instant appeal, G1-12-329) sent to the Appellant stated that that the Appellant was not selected because he was in a tie group, not that the Appellant tested positive for cocaine in 2010. It wasn't until the Respondent issued a bypass letter to the Appellant in 2014 regarding the 2013 hiring cycle (regarding G1-13-181) that the Respondent informed the Appellant that he was not selected based on the 2010 positive hair drug test result. The end result is that the Appellant has not been hired, according to the Respondent, because he failed a drug test in 2010 and yet this is the Appellant's first opportunity to challenge this basis of his non-selection.

Dr. Cairns, of Psychemedics, whose tests are involved here, testified in the instant case as an expert and as an expert in the Boston Hair Drug Test Appeals, in support of Psychemedics' hair drug testing. Dr. Benjamin testified in the instant case as an expert but not in the Boston Hair Drug Test Appeals, stating here that Psychemedics' hair drug tests are unreliable. Having taken administrative notice of the Boston Hair Drug Test Appeals, I note that the testimony of Dr. Cairns and Dr. Benjamin in this case regarding the reliability of Psychemedics' hair drug testing is similar in substance to the supporting and opposing expert views offered in Boston Hair Drug Test Appeals.[24] In addition, as in Boston Hair Drug Test Appeals, in the instant case the Respondent produced a litigation data package regarding the hair drug test based upon which the Respondent chose not to hire the Appellant.[25] (Exhibit 6) The parties produced and referenced a study report and an article here that were not adduced into evidence in the Boston Hair Drug Test Appeals but address issues similar to those raised in the Boston Hair Drug Test

[24] Dr. Benjamin adds in the instant case that the wash of a second part of the Appellant's hair sample in the March 27, 2010 test was tested by RIA when it should have been tested by LC/MS/MS, which is the more accurate test. (Testimony of Benjamin)

[25] The "litigation data package" is the information Psychemedics agreed to produce in the Boston Drug Test Appeals, with other information, such as its standard operating procedures, kept confidential.

Appeals. In sum, given the commonality of issues and evidence in the two cases, I find no reason to disturb the precedent established in Boston Hair Drug Test Appeals regarding the reliability of hair drug tests.

As noted above, the Boston Hair Drug Test Appeals Commission decision also found, *inter alia*, that hair testing for drugs of abuse, "while *potentially useful*" in certain scenarios, including pre-employment hiring decisions, it "does not meet the standard of reliability necessary to be routinely used as the sole grounds to terminate a tenured public employee …." (Id. at 107-08)(emphasis in original)(*emphasis added)* Prior to using hair drug testing to ascertain whether tenured police officers were abusing drugs, the Respondent used the test to assess police candidates. Although the record does not indicate the all of the cutoffs, metabolite concentrations and number of hair samples in hair drug testing for police officer candidates prior to 2007, we know that in 2007, the Respondent established the 5ng/10mg, 5% concentration and three hair sample standards for tenured employees. Here, the Respondent applied the same cutoff to the Appellant's March 27, 2010 test as a tenured police officer. However, the Respondent took only one hair sample, not the multiple samples it takes for tenured employees. Having found in Boston Hair Drug Test Appeals that the hair drug test is insufficiently reliable in one context, such as testing of tenured employees, the Commission's decision in Boston Hair Drug Test Appeals cannot be construed to provide that a test result with less reliability is applicable in another context, such as pre-employment testing. Rather than further decreasing the test's reliability, the Respondent may, for example, consider whether the same test procedure should be used to justify a pre-employment bypass as the Respondent uses in discipline decisions for tenured employees.

There are a number of additional factors to be considered in this case. First, the two MRO reports for the March 27, 2010 test reports are conflicting, with one failing to report a confirmatory test and neither indicating that the test results exceeded the 5ng/10mg cutoff. Second, unlike the appellants in the Boston Hair Drug Test Appeals, the Appellant here does not argue that he tested positive because of external contamination. To the contrary, the Appellant ardently, repeatedly and credibly insists that he has never used cocaine and that his friends (some of whom are Boston Police Officers) do not use drugs. Third, on the day that MRO Dr. Gilbert informed the Appellant on April 20, 2010 that he had tested positive in the March 27, 2010 drug test requested by the Department, the Appellant made arrangements that day to be re-tested at the South Boston Court Probation Department and he was tested one day later, suggesting that the Appellant was not seeking to delay a re-test in the hope of avoiding detection of drug abuse. In fact, the Appellant had no way of knowing when the MRO would call and inform him of a positive drug test result and, therefore, to plan to be re-tested in the hope of obtaining a negative result. Interestingly, the Appellant's hair sample taken at the South Boston District Court Probation Department on April 21, 2010 was tested by Psychemedics, as were all of his other hair drug tests, and the result was negative. In his testimony, Dr. Cairns suggested that there is no way to know if the South Boston District Court Probation Department properly processed the Appellant's April 21, 2010 hair sample. However, Dr. Cairns testified, and Exhibit 6 indicates that the April 21 sample custody process was "intact". Further, since Psychemedics processed the Appellant's April 21, 2010 sample from the Court Probation Department, it appears that even if there was a shortcoming or other misstep in the sample collection and custody process, it did not preclude Psychemedics from conducting the hair drug test on the Appellant's April 21 hair sample. Further, the two MRO reports for the March 27, 2010

Further, there is more than one hair drug test in the record. The Appellant had hair drug tests in 2006, 2007, 2008, on April 21, 2010 and in 2012. All of the Appellant's hair drug tests were performed by Psychemedics; all but the results of the March 27, 2010 test were negative. The Respondent avers that the only relevant test result is the positive result in the March 27, 2010 test. The Appellant argues that the positive hair drug test result from his March 27, 2010 test is invalid, on one hand, because the results in all of the other hair drug tests were negative and/or, on the other hand, because the March 27, 2010 test was invalid and/or unreliable. While the Appellant's hair drug test results in 2006, 2007, 2008, on April 21, 2010 and in 2012 were negative, there is less information provided for them than the positive March 27, 2010 test result. (Exhibits 6 and 16A – 17E) As noted above, Exhibit 6, the litigation data package for the March 27, 2010 positive test result includes the Summary of Procedures, signed chain of custody records at different points in the process, "Screen" data sheets signed by Psychemedics personnel and various graphs of the test results. The Respondent reported that Psychemedics was unable to produce all of the litigation data package for the 2006 and 2007 test results because of the Psychemedics' record retention schedule and, instead, Psychemedics produced the one-page test result for those years and for 2008 and 2012 it produced the one-page test result and unsigned Screen data sheets. Since Psychemedics produced the litigation data package for the March 27, 2010 test, it cannot be said that the litigation data package for the Appellant's 2012 test was also unavailable because of Psychemedics' record retention schedule. Not having the same information for each test precludes further assessment of the hair drug test's reliability.

Since the Boston Hair Drug Test Appeals Commission decision was issued, which involved the termination of police officers, the Commission has issued one bypass decision that addressed hair drug testing. In Lecorps v Department of Correction, G1-12-207 (December 19,

2013), the Appellant appealed his bypass based on a hair drug test in which he tested positive for marihuana. The Appellant averred that he innocently ingested marijuana when he ate pastries at a party prior to the drug test. The Commission found,

> …it is simply not credible that he ingested marihuana without knowing it. In addition, he testified that he found out about the marihuana in the pastries a few days after the party. Therefore, at the time the Appellant tested at AOHR in May, 2012, he was well aware that he had reportedly ingested marijuana previously. If he had sincere concerns about having innocently ingested marijuana he would have disclosed it at the time of the test. Instead, he did not report it until he received the drug test results. …
> (Id.)

In addition, Mr. Lecorps did not have himself re-tested for drugs until nearly one month after he was disqualified from DOC employment, which was approximately four months after he ingested marihuana, thereby undermining Mr. Lecorps credibility. The Commission determined,

> … However, if appointing authorities are to base bypass decisions on hair drug test results, they need to address the applicable factors identified in the BPD Drug Test Appeals and provide appropriate evidence in support thereof. Upon establishing such proof, appointing authorities will have established reasonable justification for their bypass decisions. Bypass appellants may challenge the veracity of hair drug testing generally or with regard to the testing of their hair sample specifically but, as in the ruling in the BPD Drug Test Appeals, a "brownie defense" will not undermine the appointing authority's reasonable justification based on an adequately supported hair drug test result.
> (Id.)

While denying the appeal, the facts of which are readily distinguishable from Mr. Gannon's instant appeal, the Commission found that the DOC had not addressed the factors found in the Boston Hair Drug Test Appeals Commission decision. Specifically, the Commission concluded in Lecorps that,

> For example, DOC has not established a standard for the amount of a drug detected in a drug test that constitutes a positive test result in either a urine or hair sample. Neither does DOC utilize a re-test or "safety-net" test when a preemployment test result is positive. Moreover, the Ruling states that marijuana is not absorbed into hair similarly to cocaine and, therefore, a hair drug test for marijuana may be ineffective, or at least less effective, at detection than a hair drug test for cocaine. Thus, DOC's use of "positive" and "negative" drug test results, without more, are not wholly adequate indicators of drug use.

Lecorps v Department of Correction, G1-12-207 (December 19, 2013)(emphasis added)

In Henderson v Lynn Fire Department, G1-13-1(July 24, 2014), the Commission adopted the recommended decision of Magistrate James Rooney to denial the appeal. The appeal challenged a number of the appointing authority's reasons for bypassing him, including having tested positive on a hair drug test. The bypass letter sent to Mr. Henderson states,

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

This decision is distinguishable from the instant case in many ways, not the least of which is that Mr. Henderson admitted his use of marijuana, was allowed to be re-tested, he waited a month before being re-tested, and he had a CORI that included arrests for marijuana, unlike Mr. Gannon's appeal.

The remaining issue in the instant case involves the Respondent's statement that it "never" hires a candidate who tested positive once in a hair drug test. Appointing authorities have abundant discretion in bypass determinations but not complete discretion. When, as here, a drug test is deemed insufficiently reliable for the purposes of rendering an employment decision based entirely on the drug test result and a different and/or flawed process is used in the course

of drug testing, it is inappropriate to preclude a candidate who has tested positive once from being considered employment for all times. Although there is no criminal record in this case, this issue presented by the Respondent's policy to "never" hire someone who once tested positive for drugs is somewhat analogous to bypass appeals involving police officer candidates with criminal histories. In Rodriguez v Greenfield Police Department, G1-15-1, for example, the Commission held,

> … an applicant's arrest record, even where there is no conviction, is entitled to some weight by the appointing authority in making its decision. … However, in relying on a candidate's arrest record, the appointing authority is obligated to produce sufficient substantiation of the facts underlying those charges. Additionally, in order for an appointing authority to rely on a record of prior criminal conduct as the grounds for bypassing a candidate, there must be a sufficient nexus between the prior misconduct and the candidate's current ability to perform the duties of the position to which he seeks appointment. The amount of time that has passed since the misconduct occurred, the nature of the offenses, and the evidence of the candidate's subsequent record are factors that should be taken into account on a case-by-case basis.
> (Id. at 8)(citations omitted)

Under the circumstances in the instant case, the Department should set an appropriate time period during which a candidate's positive hair drug test result will preclude that candidate from being considered for employment.

Conclusion

For these reasons, Mr. Gannon's appeal under Docket No. G1-12-329 is hereby allowed. Pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, the Commission hereby orders the Human Resource Division, or the Boston Police Department in its delegated capacity to take the following action:

- Place the name of Michael Gannon at the top of the current or future certifications for the position of permanent full-time police officer within the Boston Police Department until he is selected or bypassed.

- In the event that Mr. Gannon is selected for appointment, he shall receive a retroactive civil service seniority date for civil service purposes only, the same as

those individuals appointed from Certification No. 202869. This retroactive civil service seniority date shall not entitle Mr. Gannon to any additional compensation or benefits, including creditable service for purposes of retirement.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Esq.
Commissioner

By a vote of the Civil Service Commission (Ittleman, McDowell, Stein and Tivnan, Commissioners [Bowman, Chairman – not participating) on October 29, 2015.

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:
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Christine I. Wetzel, Esq. (for Appellant)
Meryum Khan, Esq. (for Respondent)
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