COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

EMMANUEL ANDUJAR,
Appellant

v.

G1-17-003

CITY OF HOLYOKE,
Respondent

Appearance for Appellant:

Timothy J. Ryan, Esq.
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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION

On January 8, 2017, Emmanuel Andujar (Mr. Andujar), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Holyoke (City) to bypass him for original appointment to the position of reserve police officer in the City's Police Department. On January 25, 2017, I held a pre-hearing conference at the Springfield State Building in Springfield, MA, which was followed by a full hearing at the

same location on April 26, 2017.[1] The full hearing was digitally recorded and both parties received a CD of the proceeding.[2] On June 16, 2017, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Nineteen (19) exhibits were entered into evidence (Respondent Exhibits 1-18 and Appellant Exhibit A). Based on the documents submitted and the testimony of the following witnesses:

For the City:

- Manuel Reyes, Lieutenant, Holyoke Police Department;
- Garry M. Bombardier, M.D., Medical Review Officer, Holyoke Medical Center;
- James Neiswanger, Police Chief, Holyoke Police Department;

For Mr.Andujar:

- Emmanuel Anduar, Appellant;

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

1. Mr. Andujar is twenty-four (24) years old. He is a high school graduate; a resident of Holyoke; has completed some college courses; and is fluent in Spanish. He has served in the United States Marine Corp Reserves as an Infantry Officer since July 2015. He began employment as a machine operator at a local company in January 2017. (Testimony of Mr. Andujar)

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

[2] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

2. Mr. Andujar played football in high school, competed in a Golden Gloves Boxing competition, making it to a National Tournament and currently practices Brazilian jiu-jitsu. (Testimony of Mr. Andujar)

Stipulated Facts

3. On April 25, 2015, Mr. Andujar took the civil service examination for police officer and received a score of 91.
4. On November 1, 2015, the state's Human Resources Division (HRD) established an eligible list of candidates for Holyoke police officer.
5. On December 24, 2015 and January 25, 2016, HRD, at the request of the City, sent Certification No. 03394 to the City, from which the City ultimately appointed sixteen (16) reserve police officers.
6. Mr. Andujar was ranked 9th among those candidates willing to accept appointment as a reserve police officer on Certification No. 03394.
7. Of the sixteen (16) candidates appointed by the City as reserve police officers, eleven (11) were ranked below Mr. Andujar.
8. The City bypassed Mr. Andujar for testing positive for anabolic steroids.

Findings Related to Testing Positive for Anabolic Steroids

9. Mr. Andujar successfully completed the Department's background investigation, received a conditional offer of employment, and proceeded to the medical and psychological screening portion of the Department's hiring process. (Testimony of Reyes)
10. Dr. Garry M. Bombardier, M.D. is employed by Holyoke Medical Center, Medical Director for the Work Connection where he is a Medical Review Officer (MRO) and has been trained and certified by the American Association of Medical Review Officers since 2004. He

recently renewed his MRO certification in March 2017. Dr. Bombardier has been conducting urinalysis drug screening since 2004. Although he only recently began drug screening for current employees of the City of Holyoke Police Department, he has been screening new hires for the department since 2004. (Testimony of Dr. Bombardier)

11. Holyoke conducts urinalysis testing for the presence of steroids and has done so since Spring 2016. The testing of samples provided by the donor is not performed at the Work Connection. Until September 2016, samples were sent to Quest Diagnostics. Beginning in September 2016, samples were sent to LabCorp for testing. Currently, the laboratory tests for approximately 25 different synthetic anabolic steroids. (Testimony of Dr. Bombardier and Exhibits 3 and 7)

12. On August 19, 2016, Mr. Andujar provided a urine sample to screen for the presence of anabolic steroids. The chain of custody for the sample is documented in the Forensic Drug Testing Custody and Control Form. The form contains a signed statement from Mr. Andujar acknowledging that the urine specimen he provided was sealed with tamper-proof seals in his presence. Once the testing is completed, Quest Diagnostics sends the test results to Dr. Bombardier for his review. (Testimony of Dr. Bombardier and Exhibit 7)

13. Once he receives a positive drug screen result from the lab, Dr. Bombardier is responsible for determining if there is a legitimate explanation for that result. This is accomplished by interviewing the sample donor by phone to try and ascertain any medical or other explanation for the positive drug screen result. After the donor provides an explanation, Dr. Bombardier uses the best resources he has available to determine if the donor's explanation for the positive result is plausible. If no legitimate explanation is given, Dr. Bombardier reports the positive result to the requesting agency. (Testimony of Dr. Bombardier)

14. The test results reported by Quest Diagnostics was positive for anabolic steroids. Positive for Quest is a ratio of testosterone to epitestosterone of greater than 6 to 1. Mr. Andujar's testosterone to epitestosterone was greater than 6 to 1, which yielded a positive result for anabolic steroids. (Testimony of Dr. Bombardier and Exhibit 3)
15. Every person's testosterone level is unique to them, but *epitestosterone* is a separate compound made in the body in a level roughly equal to that individual's testosterone level. Therefore, the levels of testosterone among individuals may vary, but the ratios of testosterone to epitestosterone will be about the same, usually around one (1) to one (1), which is reported as one (1). (Testimony of Dr. Bombardier)
16. After receiving a positive anabolic steroid test result from Quest Diagnostics, Dr. Bombardier contacted Mr. Andujar to determine if there was authorized use. If there was authorized use, the test would have been reported as negative. (Testimony of Dr. Bombardier)
17. Unauthorized use of anabolic steroids is use that is not authorized by a physician and is not being used for a medical reason such as the treatment of anemia or low testosterone. (Testimony of Dr. Bombardier)
18. After the positive test result Dr. Bombardier had numerous conversations with Mr. Andujar in order to determine if the positive anabolic steroid result was due to authorized or unauthorized use. Upon questioning, Mr. Andujar informed Dr. Bombardier that he did not take steroids, was only taking over the counter supplements and was not taking shots of testosterone. (Testimony of Dr. Bombardier)
19. After discussing the positive results, Mr. Andujar met with Dr. Bombardier and showed him the supplements he was taking. (Testimony of Dr. Bombardier)

20. Mr. Andujar met with the doctor and brought in a bag containing the supplements he was taking. Said supplements were Built Mass Phase 2, Humanofort, GHrowth, and T-Bomb all of which were purchased at Absolute Nutrition in Chicopee Massachusetts. (Testimony of Appellant and Exhibit 13) When Mr. Andujar met with Dr. Bombardier, he read the label of Built Mass Phase 2. After reading the bottle, Mr. Andjuar informed Dr. Bombardier that a warning on the bottle read, "The product may elevate hormone levels which could produce a positive result if you are subject to steroid testing." (Testimony of Mr. Andujar)
21. Mr. Andjuar was not aware of the warning prior to submitting a drug screening sample on August 19, 2016. (Testimony of Mr. Andujar)
22. If a drug screening is positive for anabolic steroids, an additional "carbon isotope test" can be done in order to determine the levels of carbon 12 and carbon 13. Synthetic steroids are plant-based. Plants have more carbon 12 and humans have more carbon 13. If the carbon 12 ratio is too high, then it is positive for exogenous testosterone which is not made in the body. If the carbon 12 ration is not too high the testosterone was made in the body. (Testimony of Dr. Bombardier)
23. After the positive result for anabolic steroids, Dr. Bombardier requested that a carbon isotope test be performed. After Sports Medicine Research & Testing received the sample, Dr. Bombardier received a call informing the lab indicating that there was not enough urine to perform the test and it could not be done. (Testimony of Dr. Bombardier and Exhibit 5)
24. Mr. Andujar gave a single-sample on August 19, 2016 and after the drug screening performed by Quest Diagnostics, there was not enough urine left to conduct the isotope test. (Testimony of Dr. Bombardier)

25. Dr. Bombardier later learned that the test was performed by an overly enthusiastic lab technician at Sports Medicine Research & Testing who added water to the sample which resulted in a negative isotope test. (Testimony of Dr. Bombardier)
26. Dr. Bombardier testified that after he received a call from Sports Medicine Research & Testing regarding the lab error, he contacted the Police Chief, informed him of the circumstances surrounding the isotope test, and asked the Chief if he wanted to count the first urine test (screening) as a positive. The Chief stated he did not want to treat the screening as a positive and wanted to redo the test completely. (Testimony of Dr. Bombardier)
27. The anabolic steroid screening was started from the beginning and Mr. Andujar submitted a second urine sample on September 22, 2016. The split-sample was sent to LabCorp and was screened for anabolic steroids. (Testimony of Dr. Bombardier)
28. The second screening test also came back as positive for anabolic steroids. Mr. Andujar's test results showed an extremely elevated ratio of testosterone to epitesosterone with a ratio of 60.8 to 1. This is 60 times higher than the expected normal ratio of 1 to 1 and 10 times more than the acceptability level of 6 to 1. (Testimony of Dr. Bombardier and Exhibit 7)
29. Due to the positive anabolic steroid result, LabCorp sent the split-sample to UCLA Olympic Analytical Laboratory Department of Pathology and Laboratory Medicine for a carbon isotope test. The result of that test was "Adverse" which indicates the results are consistent with the administration of a steroid. A "Negative" result would have indicated the results were consistent with an endogenous origin. (Testimony of Dr. Bombardier and Exhibit 8)
30. After receiving the results of the second test, Dr. Bombardier spoke with Mr. Andujar who was adamant that he did not take steroids. (Testimony of Dr. Bombardier)

31. After the second positive drug screening and carbon isotope test, Mr. Andujar began to research the supplements he was taking. He found that one of the ingredients in Built Mass Phase 2 was Dymethazine (DMZ). Appellant admitted that DMZ is a steroid and is present in one of the supplements he was taking. Mr. Andujar did not know, prior to submitting to the drug screenings, that DMZ is a steroid. (Testimony of Appellant and Exhibit A)
32. Mr. Andujar did not immediately stop taking Build Mass Phase 2 or any of the supplements he was taking after the first positive test result as he was not 100% sure that the test was positive for steroids and a second test was going to be performed. Mr. Andujar did not stop taking the supplements until Dr. Bombardier notified him of the positive isotope test result on December 5, 2016. (Testimony of Appellant)
33. Dr. Bombardier does not think that one of the supplements that Mr. Andjuar stated that he was taking, Built Mass Phase 2, would cause a positive result as high as 60 to 1; however, he did not know for sure. (Testimony of Dr. Bombardier)
34. Dr. Bombardier is not an expert in the field of steroids. After speaking with and receiving additional information from Mr. Andujar, Dr. Bombardier spoke with two doctors, one who did the testing in Utah for him to discuss the type of testosterone that was in the urine and the other was a doctor from Medtox who was in charge of the steroid unit there. (Testimony of Dr. Bombardier)
35. The first doctor told Dr. Bombardier that the over the counter medicines that are testosterone boosters actually would not result in a positive testosterone test and that the substance would be excreted from the body in the urine. The doctor at Medtox stated that synthetic anabolic steroids are not regulated or researched well and it is difficult to determine what is in them. (Testimony of Dr. Bombardier)

36. When a person takes anabolic steroids via a paste or shot, they stay in the system for a very short time. Further, in order to have a second positive test result a month later, the person would have had to continue to take anabolic steroids. (Testimony of Dr. Bombardier)
37. James Neiswanger has been the Chief of Police in Holyoke for 6 years. Prior to his current position, he was an officer in Manchester Connecticut for 25 years and an officer in New Hampshire for 2 years prior to that. (Testimony of Chief Neiswanger)
38. The use of illegal drugs is not tolerated by the Holyoke Police Department. Further, all new hires are drug tested and everyone, including current employees, have been tested for steroids since Spring 2016. (Testimony of Chief Neiswanger)
39. One reason the Department began testing for steroids is that they are prevalently used in the police profession and have been shown to cause a change in behavior. Specifically, people taking steroids tend to become over-aggressive. (Testimony of Chief Neiswanger)
40. The other reason the Department began testing for steroids is due to the fact that anabolic steroids are a Schedule III Substance and are illegal when taken without a prescription. (Testimony of Chief Neiswanger and Exhibits 15 and 16)
41. Chief Neiswanger has never hired an applicant who failed a drug test. (Testimony of Chief Neiswanger)
42. Mr. Andjuar has been randomly drug tested by the Marines approximately 3 or 4 times. The last time he was drug tested by the Marines was March 2017. Prior to March 2017, Appellant testified that he was previously drug tested in February 2016. He did not know if he was tested for steroids, and was not informed of a positive test. (Testimony of Appellant)

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, 256 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. 300 (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 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) and ensuring that the appointing authority conducted an "impartial and reasonably thorough review" of the applicant. 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).

Analysis

Mr. Andujar was a good witness. He was sincerely polite and professional throughout the appeal process and appears to have all of the characteristics necessary to serve in the important position of reserve or regular Holyoke police officer. The City apparently agreed with that assessment, having offered Mr. Andujar a conditional offer of employment after conducting a thorough background investigation.

However, an appointing authority is justified in bypassing a candidate for police officer (or reserve police officer) who tests positive for using anabolic steroids. Here, the City took some fairly extraordinary steps to ensure that Mr. Andujar was treated fairly during the drug screening process. Rather than rely on the first urine test showing a positive result for anabolic steroids, the City, at its own expense, had a carbon isotope test performed to confirm that the elevated testosterone to epitestosterone ratio was not the result of elevated *endogenous* testosterone (which would not be caused by the use of taking anabolic steroids), as opposed to *exogenous* testosterone. After there was a problem with that carbon isotope test, the City, again at its own expense, began the process anew and conducted a new initial urine test and carbon isotope testing using new laboratories. These new tests effectively confirmed that Mr. Andujar had tested positive for using anabolic steroids.

Mr. Andujar argues that, even assuming that the testing is accurate, it was likely caused by the taking of supplements, which, unbeknownst to him, may have ingredients that result in testing positive for anabolic steroid use. Even if true, Mr. Andujar suspected that this may be the reason

for the positive test result as of August 2016. Yet, he continued to take these same supplements for several weeks, including the time period immediately preceding the second testing process.

Conclusion

For all of the above reasons, Mr. Andujar's appeal under Docket No. G1-17-003 is hereby ***denied.***

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso – Absent]) on January 3, 2018.

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:
Timothy J. Ryan, Esq. (for Appellant)
Amber M. Gould, Esq. (for Respondent)