

Decision mailed: 5/29/09
Civil Service Commission *MS*

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Kevin O'Loughlin,
Appellant

v. G1-07-282

City of Boston,
Appointing Authority

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Commissioner: Daniel M. Henderson

DECISION

Through a timely filed appeal made pursuant to the provisions of G.L.c. 31, §2(b), the Appellant, Kevin O'Loughlin (hereinafter Mr. O'Loughlin or Appellant), seeks review of the Personnel Administrator's of the Human Resources Division, (hereinafter HRD) decision to accept the reasons of the Boston Police Department (hereinafter Appointing Authority or BPD) bypassing him for original appointment to the position of police officer. The Appellant filed a timely appeal at the Civil Service Commission.

A full hearing was held on February 25, 2008 before Commissioner Daniel Henderson. Three audio tapes were made of the hearing.

Nineteen exhibits and a set of stipulations were entered into evidence at the hearing. Based on these exhibits-stipulations and the testimony of the following witnesses:

For the Appointing Authority:

Julia M. Reade, M.D., Psychiatrist-Consultant, Boston Police Department;

For the Appellant:

Kevin O'Loughlin,

I make the following findings of fact:

1. On December 31, 2006 Mr. O' Loughlin was laid off by the City of Boston due to his position as a municipal police officer with the Boston Municipal Police Department being abolished and he was placed on the HRD reemployment list. Kevin O'Loughlin's name appeared on Certification #70048 as a result (Testimony of Appellant, Stipulation and Exhibit 15).
2. On June 25, 2007, by letter, the Boston Police Department, acting through its Director of Human Resources, notified the Human Resources Division (HRD) of its intent to bypass and the reasons for bypass of Kevin O'Loughlin for the position of police officer with the Boston Police Department. The stated reasons in the letter: that Dr. Julia Reade had concluded the following about him:

In summary, Mr. O'Loughlin appeared significantly happier and less anxious at his second interview, and these changes seem to be related to primarily the resolution of his job status and his familiarity with the BPD process. Although he seems to function well in a highly structured and

predictable situation, Mr. O'Loughlin has fragile coping skills that are not sufficient to manage the stresses encountered as an officer in the Boston Police Department. (Exhibit 1)

3. On July 31, 2007, by letter, the Human Resources Division, (HRD) acting through its Civil Service Unit, notified Mr. O'Loughlin that it had accepted the reasons as given by the Boston Police Department, thereby allowing Boston to appoint an individual who appeared below Mr. O'Loughlin on Certification #70048.

(Exhibit 15, stipulation)

4. Through a letter to Mr. O'Loughlin dated August 1, 2007 Robin Hunt, the BPD's Director of Human Resources, notified Mr. O'Loughlin of his bypass and wrote that Dr. Julia Reade had concluded the following about him:

In summary, Mr. O'Loughlin appeared significantly happier and less anxious at his second interview, and these changes seem to be related to primarily the resolution of his job status and his familiarity with the BPD process. Although he seems to function well in a highly structured and predictable situation, Mr. O'Loughlin has fragile coping skills that are not sufficient to manage the stresses encountered as an officer in the Boston Police Department

(Exhibit 3).

5. Ms. Hunt's letter to Mr. O'Loughlin opened with the following rejection:

I am writing on this occasion to confirm that the results of your psychological screening indicate that you cannot adequately perform the essential functions of the public safety position for which you have applied and a reasonable accommodation is not possible.

(Exhibit 3).

6. The Personnel Administrator rule that applies to the appointing authority's statement of reasons for bypass : "Upon 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 reasons for selection or 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. The certification process will not proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approves reasons for selection or bypass. PAR.08(3) (Administrative notice)

7. The Appellant is a 46 year-old man who was born, raised and educated in the South Boston neighborhood of the city of Boston (Testimony of Appellant).
8. He is a graduate of the Massachusetts Criminal Justice Training Academy and worked for the Boston Municipal Police Department, (BMPD) from 1990 until the position was abolished on December 31, 2006. He began his career with the Boston Municipal Police Department in 1990-and worked until 1992 as an unarmed site officer. Thereafter he worked as a sworn police officer (Testimony of Appellant).
9. He holds a bachelor's degree in criminal justice from UMass Boston which he earned while working full-time as a member of the Boston Municipal Police Department (Testimony of Appellant).

10. When the BMPD was abolished he “stepped down” to the position of an unarmed site officer or security officer. He worked in that capacity from January 1, 2007 until sometime in March 2007 (Exhibit 12 and Testimony of Appellant).
11. The Appellant has worked as a member of the Boston Housing Authority’s Police Department since March 2007 (Testimony of Appellant). Prior to his being offered a position as a BHA police officer Mr. O’Loughlin was subjected to a psychological screening examination, given by Dr. John A. Greene, which he undertook and passed. Dr. Greene is the chief consultant to the Boston Fire Department for psychological evaluations and an associate professor of psychiatry at the Boston University School of Medicine (Exhibit 13).
12. When the Appellant was employed as a member of the Boston Municipal Police Department he held a number of assignments, including working as a Field Training Officer and being assigned to the BHA’s police department for several years (Testimony of Appellant).
13. Overall, the Appellant has 16 years of law enforcement experience within the City of Boston, much of it working the high crime public housing projects managed by the Boston Housing Authority (Testimony of Appellant).
14. While a member of the BMPD Mr. O’Loughlin interacted daily with members of the Boston Police Department. In his position as an officer with the Boston Housing Authority he continues to interact daily with members of the BPD who often report to the same crime scenes and calls for service that Mr. O’Loughlin reports to (Testimony of Appellant).

15. Mr. O’Loughlin’s assignments vary by shift and some evenings he may work in Charlestown and some in Roxbury. His assignments take him across the city and he is often the only officer patrolling a particular project at night. He confronts daily, the same type of crime that a BPD police officer confronts, including disturbances, domestic matters, assaults, homicides, drugs and fire arms violations. O’Loughlin interacts with or performs police duties with Boston Police Officers on a daily basis. (Testimony of Appellant).
16. Mr. O’Loughlin clearly remembered his first interview (2006) with Dr. Marcia Scott. That interview took a total of approximately 5 minutes. Dr. Scott started out with the wrong file. He pointed out that she had the wrong file and it took her a few minutes to locate his file. She then briefly described the test results and showed him a chart. Then, Dr. Scott summarily stated: “You’re on medication, so you’ll have to go for a second opinion.” That concluded the interview. (Testimony of Appellant).
17. Mr. O’Loughlin also clearly remembered his next interview (2007) with Dr. Marcia Scott. That interview also took a total of approximately 5 minutes. Then, Dr. Scott summarily stated: “You have to go for a second interview because of the medication and you did a second opinion the last time.” That concluded the interview. (Testimony of Appellant).
18. Mr. O’Loughlin was evaluated by Marcia Scott, M.D., the second time on March 27, 2007 (Exhibit 18). Despite the fact that she noted in her report that Mr. O’Loughlin was working as a police officer for the BHA, she concluded that “inadequate coping traits would interfere with his ability to manage stress in the

job of an armed police officer” which position he held at the time Dr. Scott so concluded. Dr. Scott admitted inconsistently in her report that “he has worked adequately...in his past and current job;” She also reported that “His communication is coherent and relevant.” She also reported that “he expressed puzzlement at the rejection, [since] “... he’d never had trouble at work and it was ‘the same work.’” Dr. Scott’s report appears to be at least partially computer generated. Dr. Scott failed to appear as a witness at this Commission hearing. (Administrative notice, Exhibit 18).

19. Dr. Scott did not discuss in her interviews with O’Loughlin; any traits he had that obviated or obstructed his ability to perform the functions of a police officer. She did not discuss the subject of functions or essential functions of a police officer or that he might be unable to perform such functions. She did not raise the subject of providing any reasonable accommodation to him that would enable him to perform the functions of a police officer.(Exhibits, testimony, testimony of Appellant)

20. Neither Dr. Scott nor Dr. Reade audio record nor video tape their screening interviews. Although Dr. Reade does record at least some her forensic interviews for the Courts. (Administrative notice, testimony of Dr. Reade)

21. Dr. Scott has referred approximately 200-300 applicants to Dr. Reade for a second level screening. Of those applicants, Dr. Reade found approximately 5% to 20% (i.e., about 10 to 60 of them) fit to be a Boston police officer and had found 80% to 95% unfit (i.e., from 160 to 285 of them). For the past three years, the statistics show:

<u>Referred for Second Interview</u>	<u>Recruits Qualified</u>	<u>Recruits Disqualified</u>
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Fall 2005	16	0	16
Spring 2006	38	5	33
Fall 2006	44	12	32
Summer 2007	50	6	44

(Administrative notice of Testimony of Dr. Reade and Exhibit 21 in Roberts v Boston Police Dept. No. G1-06-321, decision on September 25, 2008, hearing and testimony on June 23, 2008)

22. Mr. O’Loughlin was then sent to Julia Reade, M.D. a Psychiatrist who performed a second-level opinion interview of the Appellant for the second time, on April 23, 2007. Dr. Reade only sees candidates who have received an unfavorable opinion from Dr. Scott. (Testimony of Dr. Reade and Appellant and Exhibit 9).
23. Dr. Reade is a board certified psychiatrist who consults with a number of police departments where she performs second-level opinion evaluations and fitness for duty examinations. She has performed second-level opinion services for the BPD for approximately 10-12 years. (Exhibit 7 and Testimony of Dr. Reade).
24. Dr. Reade testified that she applies the same standard when reviewing a candidate seeking to become a Boston Police Officer that she does for one seeking to be a Brookline Police Officer, or a police officer in any other town where she performs second opinion evaluations. She further testified here and in the *Coutts* appeal that there is only one medical-psychological standard for the position of police officer (Testimony of Dr. Reade, administrative notice).
25. Dr. Reade testified in the *Boutin* appeal to the following regarding her purpose in psychological screening. She phrases her mission not in terms of identifying disqualifying conditions but instead: “to make sure candidates who are being sent to the Academy have the requisite psychological skills and resilience and the traits

that would make them most likely to be successful and constructive police officers.” She also described her mission and purpose in similar language in the Coutts appeal. (See. Jessica Boutin v Boston Police Department, No. G1-06-139 & G1-07-317, page 25, allowed January 29, 2009, and Kelley Coutts v Boston Police Department, No. G1-07-277, allowed May 7, 2009. (administrative notice)

26. Mr. O’Loughlin was psychologically evaluated by Psychologist John A. Greene, Ph.D, in December, 2006. Written tests were administered, including the MMPI-2 and the Appellant was interviewed. The results found the Appellant to be “psychologically fit to be a Police Officer”. (Exhibit 13, testimony of Appellant)
27. Mr. O’Loughlin has been in treatment with a Psychiatrist, Dr. Geoffrey Linburn M.D. for trichotillomania, depression and anxiety attacks who has prescribed several psychotropic medications which Mr. O’Loughlin continued to take. Dr. Linburn stated an opinion that to his knowledge that the medications did not impair his work capacity as a police officer. Mr. O’Loughlin also continued to see a therapist regularly. Dr. Reade was aware of all of these circumstances and Dr. Linburn’s opinion. Dr. Reade expressed satisfaction that O’Loughlin should continue in this treatment with Dr. Linburn and the therapist for these conditions. (Exhibit 14, Testimony of Dr. Reade)
28. Dr. Reade testified to two prior candidates who were in a similar situation to Mr. O’Loughlin in which she recommended that they not be bypassed. Those two candidates in the 2004-2006 time frame did have psychiatric conditions for which they were treated by a psychiatrist with psychotropic medications. She recommended to the BPD then that they not be bypassed and should continue in

treatment with the suggestion that they notify the BPD upon any change in diagnosis or type or amount of medications taken. Dr. Reade viewed her recommendation in these two cases to be an “accommodation”. (Testimony of Dr. Reade)

29. Mr. O’Loughlin was moved forward through the recruit process including being put through the BPD’s psychological screening process for the first time, beginning on or about October 30, 2006. This process was done in conformance with the “Boston Police Department-Proposed Psychological Screening Plan” (Testimony of Dr. Reade, Exhibits 5, 6, 9&10).
30. The Commonwealth’s personnel administrator (HRD) has established Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel HRD regulations, for police officers, establish two disqualifying categories of psychiatric medical conditions:
- “Category A Medical Condition” is a “condition that would preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others.” Category A “psychiatric” medical conditions include “disorders of behavior, anxiety disorders, disorders of thought, disorders of mood, disorders of personality”.
 - “Category B Medical Condition” is a “condition that, based on its severity or degree, may or may not preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others.” Category B “psychiatric” medical conditions include “a history of any psychiatric condition, behavior disorder, or substance

abuse problem not covered in Category A. Such history shall be evaluated based on that individual's history, current status, prognosis, and ability to respond to the stressors of the job” and “any other psychiatric condition that results in an individual not being able to perform as a police officer.” (administrative notice)

31. The BPD, in this matter, followed its “Boston Police Department-Proposed Psychological Screening Plan”, which it claims was properly approved by the personnel administrator, (HRD). The “Boston Police Department-Proposed Psychological Screening Plan” requires that every potential Boston police officer recruit that is given a conditional offer employment, including the Appellant, must take the MMPI-2 and PAI written exams, then meet with the BPD 1st Level Psychiatrist-screener, (Dr. Marcia Scott). If the 1st Level screener determines that are “areas of specific concern”, in need of further review and exploration, the candidate is referred to Dr. Julia M. Reade, who is under contract with the BPD, for a 2nd Level Screening interview and opinion. In this case, Dr. Scott, the 1st Level screener, had given the Appellant an unfavorable assessment after his interview in March, 2007. (Exhibits 1, 3, 11, 18, 19, Testimony of Dr. Reade)
32. Dr. Reade testified that her 2nd level opinion compared to Dr. Scott's is “really variable” and that she has a different opinion or conclusion on psychological fitness, than Dr. Scott from 5% on up to 20% of the candidates interviewed. However, she only sees candidates unfavorably assessed by Dr. Scott. Neither Dr. Scott nor Dr. Reade record or tape their candidate interviews and Dr. Scott did not testify at this hearing. (Exhibits 9, 10, 18, 19, Testimony of Dr. Reade)

33. The BPD followed its “Boston Police Department-Proposed Psychological Screening Plan”, which it claims was properly approved by the personnel administrator, (HRD), prior to its implementation in this case. However, the plan is still entitled “proposed” instead of approved. Dr. Reade was asked on direct examination in her testimony on January 28, 2008 in Coutts v Boston Police Department, No. G1-07-277- Q. If this plan had been approved by HRD? To, which she answered –A. “That’s my understanding?” The BPD also offered as support of its claim, an affidavit by Sally McNeely, Director of the Organizational Development Group of HRD, dated October 13, 2006. However, this affidavit states the following: 3. “Appointing authorities must obtain written approval from HRD for their screening plan before they can utilize it. HRD cannot accept as a reason to find a candidate unqualified for appointment the results of psychological screening conducted utilizing a proposed plan prior to its approval.” The affidavit further states: 6. “In or around late July 2004, in a telephone conversation with Edward Callahan, I gave verbal approval for the Boston Police Department to proceed with the psychological screening of current police officer candidates pursuant with the submitted psychological screening plan”. A problem raised by this affidavit is that it clearly states that written approval [by the personnel administrator, HRD] is necessitated prior to utilization of the plan and only verbal approval was given here. Another problem is that the “submitted psychological screening plan” is not sufficiently identified by date, signature, attachment or title. The affidavit could be referencing another psychological screening plan. The

Affiant, Sally McNeely did not appear and testify in this matter. (Administrative notice, Exhibit 11, testimony of Dr. Reade)

34. The term “Rules” as defined and used in the civil service law is “the rules promulgated by the personnel administrator pursuant to civil service law,” G.L. c. 31§ 1. Any new rule of the administrator and any amendment to an existing rule shall not be effective until after a public hearing... and until such change has been reviewed by the Civil Service Commission pursuant to G.L. c. 31§ 4. This statutory process obviously requires rules and proposed rule changes to be written. The personnel administrator regularly publishes in writing; his or her rules under the title “Personnel Administration Rules” (PAR) with periodic amended versions. (administrative notice)
35. The personnel administrator as a matter of practice publishes in written form any important relevant information or regulations or changes thereto and provides written notice to the public or relevant parties. The personnel administrator’s (HRD) Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel which are the applicable standards here, were revised in 2007. Paul Dietl, the personnel administrator, sent a written and signed memo to all the Chiefs of all Municipal Police and Fire Departments, on November 9, 2007 that the revised standards would be effective September 7, 2007. That memo, with the revised standards, effective September 7, 2007 was entered as an exhibit (Ex. 15) in another appeal hearing, Shawn Roberts v Boston Police Dept. G1-06-321 decision, appeal allowed, September 25, 2008. The

- previous standards, effective from June 3, 2005 until September 7, 2007 were also entered as an exhibit in that appeal. (Ex.14). (administrative notice)
36. The BPD's "Boston Police Department-Proposed Psychological Screening Plan", was identified as being utilized by Dr. Reade and Dr. Scott for the psychological screening and profiling of the Appellant and the basis of her disqualification and bypass for appointment. This psychological screening plan was not properly approved and authorized by the personnel administrator (HRD) for use prior to its utilization for this bypass. Therefore, the reasons for the Appellant's bypass resulting from the BPD's application of the "Boston Police Department-Proposed Psychological Screening Plan" are deemed incapable of being accepted by the personnel administrator, HRD.(administrative notice, Exhibit 11, exhibits and testimony)
37. Mr. O' Loughlin did take the BPD's set of two written psychological tests, (MMPI-2 and PAI) on two occasions, pursuant to the "Boston Police Department-Proposed Psychological Screening Plan". The first time on November 5, 2006 and the second time on March 3, 2007. Dr. Reade found his 2006 test results to be "unremarkable". There were no "critical themes" except an indication that "might signal dysfunction that... could be associated with difficulties at work." In the 2007 tests there was "only one work dysfunction indicator... reluctant or not liking to make decisions or assign work to others." (Exhibits 5, 6, 16& 17, testimony of Dr. Reade)
38. As part of that psychological screening, Mr. O'Loughlin took the MMPI-2, a written test of 500+ questions and the PAI, a written test of 300+ questions, On

March 3, 2007. The Appellant's answers or endorsements were assessed in the MMPI-2 test and subsequently a Law Enforcement Interpretive Report was generated by a proprietary computer software program. Dr. Reade did not base her opinion of unfitness on the results of these two tests. (Exhibit 16, 17, testimony of Dr. Reade).

39. The personnel administrator's (HRD) Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel, effective until September 7, 2007, mandated a per se disqualification of any candidate with a Category A medical condition. However, those standards only called for a disqualification for a Category B medical condition "that is of sufficient severity to prevent the candidate from performing the essential functions of a police officer without posing a significant risk to the safety and health of him/herself or others." (administrative notice)
40. Dr. Reade testified in the Coutts case that the BPD's psychological screening process is aimed "to try to screen out individuals with active psychiatric or substance abuse disorders and problems that would either need treatment or impair the individual's ability to function adequately as a police officer." Dr. Reade testified that the screening purpose was also to look for disqualifying conditions and for "individuals with some psychological traits that might be enduring or might be just in the short-term but that would also get in the way of the individual's ability to function well as a police officer." (Administrative notice, testimony of Dr. Reade in Coutts appeal)

41. Dr. Reade testified further in the Coutts appeal that the BPD psychological screening also looked for *positive traits*; to “look at kind of big domains of police officer functioning” and to try to determine “...would that person have the traits and experience necessary to function well as a police officer? “...to look for particular traits and abilities.” “I look at the individual’s traits as they relate to these six (6) domains.” (Administrative notice testimony of Dr. Reade in Kelley Coutts v Boston Police Department, No. G1-07-277, allowed May 7, 2009.)
42. Dr. Reade also testified in the Coutts case that these two written tests gauge the individual’s answers or endorsements as collected in “domain” groups or categories of traits or proclivities related to police work. These answers as grouped by domain or scales are then charted, graphed, scored and profiled in comparison to the answers or endorsements of a “normative” group. “The different clinical scales of the MMPI-2 look at their traits and proclivities. It looks [for], sort of what’s in their bag of tricks.” The MMPI-2 test was originally constructed in the 1940’s with the purpose of “trying to measure psychological functioning” by “trying to tease-out essential elements of a personality.” Since its inception the MMPI-2 has been “normed and renormed” several times. The last time it was renormed was in the 1990’s. In this case the comparative or normative group used, is that of public safety officers who have subsequently successfully completed training and their probationary employment period. (Administrative notice testimony of Dr. Reade in the Coutts appeal)

43. Dr. Reade testified that the PAI test compared to the MMPI-2 test picks up “more shades of grey” or “more subjective expression”. It picks up “vulnerability, concerns, problems or “...more emotional functions.” (Testimony of Dr. Reade)
44. However, Dr. Reade testified in the Coutts case regarding these two tests that: “... any test has limits” and that sometimes the tests results may be “invalidated” due to the test-taker being “so defensive” or “unwilling to admit any failings”, being “too cautious” or “too defensive” or “unwilling to admit their human shortcomings and failures”. Test responses or endorsements may also be invalidated due to test taker confusion or misunderstanding of the question. Some questions are designed to be confusing, for instance by stating double negatives etc. Some questions call for “very obvious” responses while others are “very subtle”. (Administrative notice testimony of Dr. Reade in the Coutts appeal)
45. Dr. Reade testified in the Coutts case that her 1-hour 2nd level interview of the candidates take place at her private Chestnut Hill office and that the candidates are “generally quite anxious” when they appear for these interviews since “the stakes are quite high” and “their employment is hanging in the balance”. Dr. Reade testified; “I only see people Dr. Scott has raised concerns about”(Administrative notice of Testimony of Dr. Reade in Coutts appeal)
46. Dr. Reade testified that she tries her best to overcome the candidates’ interview anxiety by explaining the process and trying to place them at ease. However, there is no accurate measure of her success in this endeavor without an audio-video recording of the interview. The actual dynamics of the personality-interaction between the professional interviewer and the lay person interviewee is also

difficult to gauge. There may be at play in these interviews what might be called, an actor-observer effect. That effect is the tendency to attribute one's own behavior to situational factors but the other's behavior to dispositional factors.(Administrative notice, reasonable inference, testimony of Dr. Reade)

47. Dr. Reade admitted in the Coutts case that her interview-evaluation was subjective and that a different psychiatrist, based on either the data or the interview-evaluation, might very well reach a different conclusion regarding [the candidate's] Ms. Coutts' fitness to work as a police officer. Dr. Reade also admitted that an Interviewee was not likely to change psychologically over the period of three-four months. (Administrative notice of testimony of Dr. Reade in Coutts appeal).

48. Dr. Reade testified that she was concerned with Mr. O'Loughlin's honesty and willingness to be forthcoming with his superiors regarding his use of prescription drugs. Mr. O'Loughlin was prescribed Seroquel by his physician, Dr. Linburn and voiced concern to his prescribing physician that such a drug would show up in any drug test administered by his employer, the Boston Municipal Police Department. Dr. Reade wrongfully assumed that Mr. O'Loughlin did not notify his employer of his use of this prescription drug. She wrote in her summary of her interview with O'Loughlin that "(h)e expressed concern about revealing his medication use at work, with specific worry that the drugs he takes might 'compromise his performance, show in urine.'" (Testimony of Dr. Reade and Exhibits 10, 14).

49. Dr. Reade did not discuss with Mr. O'Loughlin the subject of his informing his employer about his use of medication. Rather she was referring to her review of the session notes of the physician that prescribed those medications to him (Testimony of Reade and Exhibit 10). Dr. Reade incorrectly assumed and wrongfully concluded that Mr. O'Loughlin did not disclose his use of prescribed psychotropic drugs to his employer based on her review of session notes and her failure to inquire of Mr. O'Loughlin (Testimony of Reade and Appellant).
50. Mr. O'Loughlin testified that as a member of the Boston Municipal Police Department he was subject to the Boston Police Department's Rule 111 regarding drug use. Mr. O'Loughlin testified that Rule 111 required him to notify his superiors of any prescription drugs he was taking and that he did so notify them. He was also subjected to regular drug testing pursuant to the CBA, which would be an added incentive to disclose. Dr. Reade acknowledged that she did not ask O'Loughlin if he had reported his prescription drug use as required. Rather, she only assumed that he did not report the use. She based this assumption solely on her review of his notes with his physician. However, she did not bother to clarify the matter by asking him about it at the interview. (Testimony of Appellant and Dr. Reade).
51. Dr. Reade repeatedly failed to inquire of Mr. O'Loughlin during his interview into areas that she used as the basis of her disqualification. Rather, she made assumptions, a number of which were false. Specifically, Dr. Reade assumed that he exhibited low self-esteem when he referred to his new job with the Boston Housing Authority as a security guard rather than a police officer. When in fact,

Mr. O'Loughlin had truthfully reported on the date he filled out and signed the application that he was a security officer with the Boston Protective Services and not a Police Officer with the BHA as he did not begin that position until several weeks after he filled out the form. She further wrongfully concluded that his elevated mood at the interview she conducted was due to the resolution of his job concerns since he had just begun working with the BHA (Testimony of Reade and Appellant).

52. Dr. Reade giving conflicting testimony about the Appellant's satisfaction with his job at the BHA. She wrote in her disqualifying letter that having his job uncertainty removed was a major lift to the Appellant's mood (Exhibit 3). But she testified that O'Loughlin had told her that he was concerned about the new job as there was a great deal of uncertainty surrounding his future there, that he saw it as temporary and was continuing to apply to other police departments (Testimony of Reade).

53. Mr. O'Loughlin testified that he answered every question that Dr. Reade asked him fully and honestly. He repeatedly told her that as a Boston Police Officer he would be pretty much doing what he had been doing as a BMPD and BHA police officer. However, Dr. Reade did not want to talk about the BPD police officer functions or duties. Dr. Reade instead, kept bringing- up, to the Appellant's discomfort, "childhood issues" and alcohol abuse during the interview. (Testimony of O'Loughlin)

54. Dr. Reade repeatedly drew negative conclusions about the Appellant from documents and incomplete information and refused to inquire of Mr. O'Loughlin

- to address any issues despite his availability for such questioning at his interview.
(Exhibits and testimony)
55. Dr. Reade incorrectly assumed that he put down an incorrect job title on his application. Dr. Reade incorrectly assumed that he did not disclose his use of psychotropic drugs to his employer. She held both of those erroneous assumptions against him when she concluded that he was unfit to be a police officer (Testimony of Reade).
56. In direct contradiction to her previous testimony before this Commission Dr. Reade testified that Mr. O'Loughlin could be qualified to work as an armed police officer for the Boston Housing Authority but not as an armed police officer for the Boston Police Department. She did not offer any specific reason or explanation for her conclusion (Testimony of Dr. Reade).
57. Dr. Reade made negative findings and conclusions regarding the Appellants, while ignoring his long-term performance as a police officer, as part of a pre-textual or pre-determined decision to bypass him.(Exhibits and testimony)
58. Mr. O'Loughlin is someone who at the age of 42 recognized a problem he was having in his life and made a mid-course correction by addressing his use and abuse of alcohol. He regularly attends A.A. meetings and twice a week attends meetings at the Boston Police Department's Stress Unit (Testimony of Appellant).
59. He has been alcohol free since he entered A.A. in the summer of 2004 and is focused on his recovery and uses A.A. as a means to maintain his sobriety and deal with issues in life. His Sobriety was also confirmed by the personal references listed in his application. (Testimony of Appellant, Exhibit 4).

60. O’Loughlin, in the summer of 2004, began attending A.A. and sought help in the “Boston Police Stress Unit” with Bernie Kelly of that unit. Prior to that, O’Loughlin would deal with stressors in his life in less healthy ways such as drinking alcohol. However, he identified this problem on his own and sought out help on his own. He also began regular therapy sessions about that time. He never abused alcohol so that it affected his on-the-job performance or his ability in any way to report for duty. He did not drink on duty or before reporting for duty. He has not consumed any alcohol since the summer of 2004. His Sobriety was also confirmed by the personal references listed in his application. (Testimony of Appellant, Exhibit 4).
61. Mass.G.L.c.31, §50 prohibits the employment of any person in a civil service position who *is* “habitually using intoxicating liquors to excess” or who has been “convicted of any crime” within one year (except for certain misdemeanors or other offenses where the fine imposed is not more than \$100 or the incarceration is less than six months, in which case the appointing authority may, in its discretion, employ such person). (Administrative notice)
62. Mr. O’Loughlin has undertaken self-correcting measures and has increased his ability to manage stress in his life. Mr. O’Loughlin is healthier, happier and someone who works everyday as an armed police officer patrolling the housing projects throughout the City of Boston and he sincerely wishes to become a Boston Police Officer. (Testimony of Appellant).
63. However, Dr. Reade testified that she had a concern about how solid his sobriety is and “how solid his coping skills are”. She expressed her belief “...that it is not

simply the absence of drinking that concerns me, it is the psychological underpinnings of an individual, how fragile, how sturdy is that person, how much support does that person need, how resilient is that person. In Mr. O'Loughlin's case, he clearly has shown admirable persistence and dedication to not drinking, but, in my opinion he is clearly in the process of developing the kind of psychological resilience necessary to make this less an issue of not drinking and more an issue of managing his mood and modulating his anxiety in a way that he can cope with, not just everyday stressors, but big life stressors and the kinds of stressors that are encountered by Boston Police Officers." This standard used by Dr. Reade is vague and clearly subjective. (Testimony of Dr. Reade)

64. Despite Dr. Reade claiming that she was familiar with the facts that the Appellant had actually satisfactorily performed the duties and function of a police officer for 14 years, (1992-2006), and that his supervisor viewed him as being "responsible" and "who fulfilled his commitments."; she still withheld an approving opinion of him being able to continue performing those duties and functions in the future. (Testimony of Dr. Reade)

65. Dr. Reade couched her disapproving opinion in subjective, vague and qualified terms and descriptions, such as: "I'm worried about his ability to deal with the uncertainty and anxiety that comes with that [BPD police officer duties],"and "But this is a man that does better with structure and routine." and "I also worried about and worry about what tools he has to manage his stress, his-sort of outside the job" and "How stable his mood would be." (Testimony of Dr. Reade)

66. Dr. Reade admitted that she has never been employed as a police officer and that she has never had any first hand or observational experience as a police officer, for instance in a “ride-along” setting. Yet, she opined regarding the Appellant’s AA and therapy efforts: “I’m happy that he’s complying and that he’s taking all, he’s using all the support system that, you know, to his own advantage. What concerns me is that, in my view and in the clinical literature, that signals a kind of frailty and vulnerability and a need for additional support. That concerns me as a clinician.” This testimony is contrary to Dr. Reade’s stated concern in the *Boutin* appeal (CSC decision January 29, 2009) in which she criticized Boutin for not seeking out or receiving therapy or treatment for some unidentified psychological condition. A “Catch 22” situation for the candidates is presented by Dr. Reade’s fluctuating attitude, when comparing her testimony in these two appeals, e.g. Dr. Reade may derive a negative inference from two opposing circumstances; either seeking or failing to seek therapy or treatment. (Administrative notice, testimony of Dr. Reade)

67. The Boston Police Department did not produce any evidence regarding its exploration of or offer of or attempt to provide any “reasonable accommodations” to Mr. O’Loughlin, due to his alleged “disability” or mental limitation, so that he could perform the duties of a Boston Police Officer. This could be considered an act of employment discrimination or the denial of an employment opportunity to a job applicant who is an otherwise qualified individual with an alleged disability. This appears to possibly be a violation of the so called “Americans with

Disabilities Act of 1990” (“ADA”). (Administrative notice Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq., Exhibit 3).

68. Under the ADA, a disability is: (A) a physical or mental impairment that substantially limits one or more of the major life activities . . . (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. §§ 12102(2)(A) and Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000)

(Administrative notice)

69. See 28 C.F.R. § 35.104 (“The phrase physical or mental impairment includes ... drug addiction, and alcoholism.”); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1187 (9th Cir.2001) (stating that alcoholism is a protected disability under ADA); Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1185 (6th Cir.1997) (“There is no dispute that alcoholism is a disability within the protection of the ADA.”).

(Administrative notice)

70. Dr. Reade had several voluminous documents available to review regarding the Appellant’s employment and medical/psychological background including his student officer application, the BPD health history questionnaire and the results of the BPD medical exam which included drug screening. Dr. Reade did review the Appellant’s BPD summary investigative report for this matter.(Administrative notice, Exhibit 4, testimony of Dr. Reade)

71. Mr. O’Loughlin appeared before the Commission and testified. His dress and demeanor were appropriate. He is a big man, in the 6’2” to 6’3” 240 lb range. He exhibited a very good memory. He testified in a relaxed but appropriate manner. His presentation is matter-of-fact and somewhat flat but not depressed or

ineffectual in any way. Dr. Reade found him to be a kind, likeable and responsible man and I don't disagree with that assessment. He admitted to being very nervous at Dr. Reade's first interview simply because it was a second-level interview with potentially bad consequences. He was open and straight-forward in his answers. He was more relaxed at Dr. Reade's second interview simply because he had a permanent job at that time. He answered all of Dr. Reade's questions honestly and fully. Dr. Reade did not discuss the subjects of "reasonable accommodations or the "functions or duties of a police officer". He admitted expressing some concern to Dr. Reade over the required reporting of his prescription drug use and its potential of affecting his duty assignments with the BPD. He expressed a strong and sincere desire to be a Boston Police Officer. He told Dr. Reade that his job was very similar to that of a Boston Police Officer. He told her that there is a shooting virtually every shift in his assigned district and the BPD acts as his back-up on approximately 50% of his calls. He deals with many of the same crimes that the BPD deals with. He made good eye contact and answered clearly and responsively, without hesitation. His presentation and demeanor was poised, calm and appropriate during his testimony and during Dr. Reade's testimony of sometime uncomplimentary characterizations. He withstood detailed cross-examination with calm and ease. His straight-forward testimony and detail of specific facts rang true. I observed his appearance and his manner of testifying and I credit his testimony as truthful and accurate. He is a very credible witness. (Testimony and demeanor of Appellant)

72. Dr. Reade appeared and testified. I find her testimony on the material and relevant facts to be only minimally reliable. I find that her memory of the details of the interview of the Appellant was faulty. The results of her second-level interview are strongly influenced if not predetermined by the results of Dr. Scott's prior interview. Dr. Reade focused in the interview on some childhood issues and his prior abuse of alcohol, prior to 2004. Dr. Reade also focused on his use of AA, therapy and other supports on which to characterize and form conclusions regarding their possible psychological impact on him. However, Dr. Reade conversely minimized or ignored O'Loughlin's actual 14-16 year performance as a BMPD and BHA police officer up until 2006. Dr. Reade's virtual omission of this relevant and recent verifiable history of performance is inexplicable. Dr. Reade's characterization and portrayal of his behavior and statements during the interview, in her testimony and her reports is inaccurate and misleading and contrary to what the Appellant, a credible witness, testified actually occurred. O'Loughlin's presentation and demeanor at this Commission hearing was appropriate in all respects. What Dr. Reade claimed to have observed of O'Loughlin during the interview was not observed by this hearing officer at his Commission hearing testimony. Dr. Reade concluded her report on the Appellant after her second interview with him, as follows: "Although he seems to function well in a highly structured and predictable situation, Mr. O'Loughlin has fragile coping skills that are not sufficient to manage the stresses encountered as an officer in the Boston Police Department." However, she offered no real life, job related example to support that drastic conclusion. Dr. Reade's second level

opinion is the fundamental issue and it is substantially founded on her 1 hour interview of the Appellant. That reason alone calls for a clear and accurate record of that interview. An audio-video recording of the interview would have been the best, if not the only method of preserving a true and accurate record of it. I find Dr. Reade's report and testimony to be insufficient and/or unreliable in supporting the foundational facts of her second level opinion. (Exhibits, testimony, testimony and demeanor of Dr. Reade, Exhibits 10, 19)

73. Where there is a conflict between the testimony of the Appellant and Dr. Reade regarding relevant factual matters, I credit the testimony of the Appellant. (Exhibits, testimony and demeanor)

74. There have been a series of appeals heard at the Commission involving the bypass of the Appellants by the Boston Police Department for psychiatric reasons, based primarily on the opinions of Dr. Scott as the first level screener and Dr. Reade as the second level screener. The decisions in the following five appeals were allowed with remedial orders issued precluding Dr. Reade and Dr. Scott from participating in any subsequent psychiatric screening of the Appellants. Those appeals are: Kerri Cawley v Boston Police Department, No. G1-06-95, allowed November 22, 2006. Shawn Roberts v Boston Police Department, No. G1-06-321, allowed September 25, 2008. Jessica Boutin v Boston Police Department, No. G1-06-139 & G1-07-317, allowed January 29, 2009, Daniel Moriarty v Boston Police Department, No. G1-05-442, allowed April 9, 2009 and Kelley Coutts v Boston Police Department, No. G1-07-277, allowed May 7, 2009. (administrative notice)

CONCLUSION:

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

Pursuant to G.L. c. 31, § 2(b) bypass cases are to be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991) and See G.L. c. 31, § 43.

Appointing Authorities are expected to exercise sound discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The appointing authority may also decline to make any appointment. See Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv. 348 Mass. 184, 187-193 (1964). See also Corliss v. Civil Serv. Commrs. 242 Mass. 61, 65; (1922) Seskevich v. City Clerk

of Worcester, 353 Mass. 354, 356 (1967); Starr v. Board of Health of Clinton, 356 Mass. 426, 430-431 (1969). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-572 (1940). A judicial judgment should "not be substituted for that of . . . [a] public officer" who acts in good faith in the performance of a duty. See M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-272." Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, (1971)

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." Town of Falmouth v. Civil Service Commission, et al, 447 Mass. 814 (2006), quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of CivilServ. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. City of Cambridge, 43 Mass. App. Ct. at 304. Basic merit standards require that an employer not act in a pre-textual manner when taking a personnel action such as reviewing suitable candidates for hire.

Mr. O'Loughlin has been a life-long resident of the City of Boston was an employee of the City of Boston and the Boston Municipal Police Department for some 14-16 years prior to his job as a municipal police officer being abolished. He had no

disciplinary history during that time. He has neither a criminal history nor any driving infractions. He graduated from the Massachusetts Criminal Justice Training Academy and worked as police officer in the City of Boston for the Boston Municipal Police Department and the BHA for more than 14 years. For a number of years of his tenure with the BMPD he was assigned to the Boston Housing Authority. He currently performs the duties of an armed police officer with the Boston Housing Authority

Mr. O'Loughlin presented himself before the Commission as a likeable, well-mannered person with a sincere desire to continue serving his community as a police officer. This characterization was also made by Dr. Reade.

He is someone with an unblemished employment record of performance of the duties of a police officer, for which he was specially trained. He understands his role in a rigidly structured or quasi-military environment, such as a police department is, and as someone who for more than 14 years has successfully undertaken the duties of a police officer within the City of Boston and who continues to successfully undertake such duties with the BHA Police Department. Even with the heightened scrutiny that is rightly imposed upon police officers, Police Commr. of Boston v. Civil Serv. Commn., 22 Mass. App. Ct. 364, 370-371 (1986), Mr. O'Loughlin is capable of performing the duties of a Boston Police Officer and that has been established as a matter of record.. In fact, what should be required of a candidate for the position of police are the same qualities that Mr. O'Loughlin has exhibited over the course of his sixteen to eighteen year law enforcement career.

Further the Appointing Authority has put forth evidence of minor and inconsequential reasons or future projections to justify a psychological by-pass

(Testimony of Dr. Reade). In fact, the stated examples or reasons relied upon by Dr. Reade were proven to be factually incorrect and based on erroneous assumptions made by Dr. Reade (Testimony of Reade).

Mr. O'Loughlin served the City as a police officer for a substantial period of time prior to his position being abolished. Dr. Reade's failure to take into full account Mr. O'Loughlin's past experience as a municipal police officer and the fact that he was at the time of their interview successfully undertaking the duties of an armed police officer when assessing his current and future ability to perform the duties of a police officer is inexplicable. (Testimony of Reade). Dr. Reade testified that Mr. O'Loughlin's qualification as a member of the BHA police department had no bearing on his fitness to serve as a member of the BPD. However, this conclusion is contrary to her previous testimony and the applicable law that there is but one standard for a police officer, regardless of the community. Dr. Reade's conclusion of O'Loughlin's lack of fitness to serve as a member of the BPD is vague, arbitrary and violates the basic merit principles upon which the civil service system is founded. See G.L.c. 31, § 1 and Cambridge, 43 Mass. App. Ct. at 304.

Furthermore, Dr. Reade's dismissal of the objective testing administered by the Appointing Authority, namely the MMPI-2 and the PAI, as "unremarkable", and which did not disqualify O'Loughlin, is further proof of the arbitrariness of her conclusion. Dr. Reade chose to ignore the results of the only objective tests because O'Loughlin had taken them too frequently within the recent past as part of the numerous background exams he underwent in his effort to become a Boston Police Officer. However, Psychologist John A. Greene, PhD., found the Appellant psychologically fit to be a police

officer, after an evaluation in December, 2006. This left only Dr. Reade's subjective review, as Dr. Reade also chose to ignore other supporting objective criteria. Since Dr. Reade refused to acknowledge the relevance of the most objective fact of his ability to serve as a police officer, his prior and current successful service as an armed police officer, the arbitrariness of Dr. Reade's conclusions are obvious. Such a decision is contrary to Basic Merit Principles as all candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

The reasons as given for the bypass were nebulous and unsubstantiated opinion, unsupported in his long-term performance history and therefore inconsequential to the ability of the Appellant to actually continue performing as a police officer in the City of Boston. In many cases, the claimed reasons were factually incorrect and further undermined by Dr. Reade's sometimes self-contradictory testimony. One of many examples was Dr. Reade's contradiction between her written reasons for the bypass and the oral testimony she gave at the hearing regarding the basis for Mr. O'Loughlin's improvement in his mental health state. Dr. Reade wrote in her disqualifying letter that having his job uncertainty removed was a major lift to the Appellant's mood (Exhibit 3). Yet his testimony, correctly pointed out, that O'Loughlin was uncertain about his future with the BHA because of the temporary nature of the position. This was just one more example of where Dr. Reade's disqualification of O'Loughlin was preordained and she was merely trying to fit the facts into her conclusion. Dr. Reade's track record of

invariably adopting Dr. Scott's first level conclusion of unfitness is yet another substantiation of predetermined results in these matters.

Dr. Reade clearly stated that part of the process she employs is to look for and to identify positive traits that would qualify a candidate as a likely successful police officer. Dr. Reade testified in the *Boutin* appeal to the following regarding her purpose in psychological screening. She phrases her mission not in terms of identifying disqualifying conditions but instead: "to make sure candidates who are being sent to the Academy have the requisite psychological skills and resilience and the traits that would make them most likely to be successful and constructive police officers." She also described her mission and purpose in similar language in the *Coutts* appeal. (See. *Jessica Boutin v Boston Police Department*, No. G1-06-139 & G1-07-317, page 25, allowed January 29, 2009, and *Kelley Coutts v Boston Police Department*, No. G1-07-277, allowed May 7, 2009. (administrative notice))

The Appointing Authority wrote in its letter to Mr. O'Loughlin that he was incapable of performing the essential duties of a police officer and that no accommodation could be made which would allow him to do so (Exhibit 2). Nowhere in the record did the Appointing Authority explain what essential duties were that the Appellant could not undertake. Furthermore, Dr. Reade testified that she was never asked to review his candidacy to see if there were any accommodations that could be made. There were no discussions between the BPD and Dr. Reade regarding the providing of any accommodations for Mr. O'Loughlin.

The BPD has failed to produce any evidence that it received prior written approval for its psychological screening plan and examination as required by HRD. It further failed to investigate or offer any accommodations to O'Loughlin.

The BPD bypassed a person with a recognized disability under the ADA and did not explore or offer any accommodations for him (Testimony of Reade, Appellant). Such an action violates the ADA, 42 U.S.C. §§ 12102(2)(A) and Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000) See 28 C.F.R. § 35.104 ("The phrase physical or mental impairment includes ... drug addiction, and alcoholism."); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1187 (9th Cir.2001) (stating that alcoholism is a protected disability under ADA); Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1185 (6th Cir.1997) and Basic Merit Principles. As such it is a decision that can not stand. See G.L.c. 31, § 1 and Cambridge, 43 Mass. App. Ct. at 304.

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001). "Abuse of discretion occurs . . . when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and improper factors are assessed but the [fact-finder] makes a serious mistake in weighing them." E.g., I.P.Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir.1998).

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a by-pass decision, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an

expert's opinion is based are grounded on an adequate foundation, either by establishing "general acceptance in the scientific community" or by showing that the evidence is "reliable or valid" through an alternative means, e.g., Canavan's Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) citing Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by "education, training, experience and familiarity" with special knowledge bearing on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990).¹

Experts' conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. See, e.g., Turners Falls Ltd. Partnership v. Board of Assessors, 54 Mass.App.Ct. 732, 737-38, 767 N.E.2d 629, 634, rev. den., 437 Mass 1109, 747 N.E.2d 1099 (2002). As a corollary, when the fact-finder is presented with conflicting expert evidence, the fact-finder may accept or reject all or parts of the opinions offered. See, e.g., Ward v. Commonwealth, 407 Mass. 434, 438, 554 N.E.2d 25, 27 (1990); New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 467-73, 420 n.E.2d 298, 305-308 (1891); Dewan v. Dewan, 30 Mass.App.Ct. 133, 135, 566 N.E.2d 1132, 1133, rev.den., 409 Mass. 1104, 569 N.E.2d 832 (1991).

No specific degree of certitude is required for expert testimony and it may be accepted if the opinion is "reasonable" and expressed with sufficient firmness and clarity. See, e.g., Commonwealth v. Rodriguez, 437 Mass. 554, 562-63, 773 N.E.2d 946, 954

¹ As to the latter point, the Commission's notes that it is granted broader discretion in the admission of evidence than permitted in the Massachusetts courts. Compare G.L.c.30A, §11(2) with Department of Youth Services v. A Juvenile, 398 Mass. 516, 531, 499 N.E.2d 812, 821 (1986).

(2002); Bailey v. Cataldo Ambulance Service, Inc., 64 Mass.App.Ct. 228, 235, 832 N.E.2d 12, 11-18 (2005); Resendes v. Boston Edison Co., 38 Mass.App.Ct. 344, 352, 648, N.E.2d 757, 763, rev.den., 420 Mass. 1106, 651 N.E.2d 410 (1995). So long as the expert's opinion is sufficiently grounded in the evidence, but certain facts were unknown or mistakes were made in some of the expert's assumptions that generally goes to the weight of the evidence. Commonwealth v. DelValle, 443 Mass. 782, 792, 824 N.E.2d 830, 839 (2005); Sullivan v. First Mass. Fin. Corp., 409 Mass. 783, 79-92, 569 N.E.2d 814, 819-20 (1991). However, "it is also a familiar principle that testimony may not rest wholly on conjecture, and that is no less the case when the conjecture flows from the mouth of an expert. [Citations] Qualification as an expert does not confer a license to spout nonsense." Fourth Street Pub, Inc. v. National Union Fire Ins. Co., 28 Mass.App.Ct. 157, 547 N.E.2d 935, 939 (1989) (Kass.J., dissenting), rev.den., 406 Mass. 1104, 550 N.E.2d 396 (1990). See also Board of Assessors v. Odgen Suffolk Downs, 398 Mass. 604, 606-607, 499 N.E.2d 1200, 1202-1203 (1986) (expert testimony stricken which blatantly overlooked critical facts)

Applying these applicable standards in the circumstances of the present case, the Commission concludes that the BPD's bypass of Mr. O'Loughlin for appointment to the position of Boston police officer did not comport with basic merit principles resulting in harm to his employment status through no fault of his own.

The rules under which the BPD may justify a bypass for medical reasons, including psychiatric conditions, are spelled out by HRD's "Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel" Those regulations in the relevant sections state: The standards for a "Category A" medical

condition, which is an automatic disqualifying condition, requires proof that a police officer applicant carries a psychiatric diagnosis of certain specific psychiatric “disorders”, as defined by the regulations. A disqualifying “Category B” psychiatric medical condition includes (a) any “history” of a “psychiatric condition, behavior disorder, or substance abuse problem not covered by Category A”, which “may or may not” be disqualifying depending on its “severity and degree”, based on that individual’s “current status, prognosis, and ability to respond to the stressors of the job” and (b) “any other psychiatric condition that results in an individual not being able to perform as a police officer.”

The evidence here establishes and the BPD does not claim otherwise that Mr. O’Loughlin does not carry, and has never been diagnosed with any “Category A” or “Category B” psychiatric or behavior disorder contained within the HRD Regulations, has no history of any such disorders, and has no history of substance abuse problems within the meaning of the HRD Regulations. The Appellant has been sober and alcoholically abstinent since the summer of 2004. cf. Adesso v. City of New Bedford, 20 MCSR 426 (2007) (multiple hospitalizations and treatment for substance abuse and schizophrenia); Melchionno v. Sommerville Police Dep’t, 20 MCSR 443 (2007) (diagnosis of Schizotypal Personality Disorder and repeated, bizarre job-related problems); Hart v. Boston Police Dep’t, 19 MCSR 397 (2006) (history of substance abuse and prior treatment); Lerro v. Boston Police Dep’t, 19 MCSR 402 (history of Obsessive Compulsive Disorder and treatment for Acute Stress Disorder); Mitchell v. Marblehead Fire Dep’t, 19 MCSR 23 (history of bipolar disorder and substance abuse).

It has also been found that the BPD's "Boston Police Proposed-Psychological Screening Plan" was identified as being utilized by Dr. Reade and Dr. Scott for the psychological screening and profiling of the Appellant and the basis of his disqualification and bypass for appointment. This psychological screening plan was not properly approved and authorized by the personnel administrator (HRD) for use prior to its utilization for this bypass. Therefore, the reasons for the Appellant's bypass resulting from the BPD's application of the "Boston Police Department-Proposed Psychological Screening Plan" are deemed incapable of being accepted by the personnel administrator, (HRD)

The Commission accepts the premise that: An applicant may be disqualified for having a Category B "psychiatric condition" so long as the applicant has a "psychiatric condition" which has manifested itself by a preponderance of scientifically reliable and credible proof of deficient mental health behavior, but not necessarily proof of a psychiatric "disorder" found within the relevant HRD regulations. Should the occasion present itself in future cases, the Commission may consider further refinement of this definition, as well as further inquiry into the scientifically appropriate role of clinical interview impressions and standardized testing in the evaluation process, with a view to seeking greater clarity on these subjects that will preserve the balance necessary to respect the legitimate purposes of a PSP screening while promoting requirements of the basic merit principle that eschews public employment decisions when they are arbitrary and capricious or incapable of fair and objective substantiation.

On the evidence presented here, the Commission is satisfied that the BPD clearly failed to carry its burden to justify bypassing Mr. O'Loughlin because of a disqualifying Category B "psychiatric condition".

The disapproving first-level screening by Dr. Scott is a pre-requisite to a second-level screening by Dr. Reade. Dr. Reade reviews and relies on Dr. Scott's report. This preliminary step in the process improperly infected the screening process with a pre-disposition to disqualify Mr. O'Loughlin. Both Dr. Scott and Dr. Reade appeared to have misstated, misremembered or mischaracterized the interview questions and responses to the detriment of the Appellant. Mr. O'Loughlin is found to be a very credible witness with a very good memory. Dr. Reade is found to be an unreliable witness on the relevant and material issues and Dr. Scott did not testify here. Both Dr. Scott and Dr. Reade demonstrated an unacceptable lack of objectivity in their emphasis and omissions. While the ultimate decision to by-pass Mr. O'Loughlin does not rest on Dr. Scott's conclusions, the fact remains that, had Mr. O'Loughlin received a fair and objective first-level screening, more likely than not, he would not have needed to be passed on to Dr. Reade. The consequences that flow from a flawed first-level screening are exacerbated by the historical record that Dr. Reade will invariably,(80-95%) follow Dr. Scott's determination in her own second level evaluation.

The second-level screening, Dr. Reade failed to establish a sufficient and credible case for her sole reason as stated in the bypass letter for finding the Appellant psychologically unfit to serve as a police officer that: "Although he seems to function well in highly structured and predictable situations Mr. O'Loughlin has fragile coping skills that are not sufficient to manage the stresses encountered as an officer in the Boston

Police Department” The BPD is restricted to this stated reason. It cannot later attempt to introduce other reasons; for instance, alcohol abuse, a named psychological condition, medication use or concealment of such. Review and determination by the Commission of such later claimed reasons is beyond the purview of the Commission, not having been previously presented to and approved by HRD. See PAR. 08(2) (3).

Dr. Reade pointed to no convincing situational example that any of Mr. O’Loughlin’ behavior – outside the interview itself – supported her conclusions. Mr. O’Loughlin effectively rebutted Dr. Reade’s conclusion by repeatedly stating and describing the duties and functions of a police officer, which he has performed daily over many years. Indeed those duties are similar if not identical to those performed by a Boston Police Officer. Dr. Reade testified and reported in couched and qualified terms in expressing her opinions and conclusions. Similarly, Dr. Reade’s expressed “concern” and used the words “possible” and “may” to describe indefinite results. Her view of Mr. O’Loughlin’ current “level of anxiety” is based heavily upon her subjective observations of him during the interview and little in the way of objective real-world context. Dr. Reade’s conclusions and opinion of Mr. O’Loughlin’ interview presentation and resulting psychological fitness is very near the opposite of what this hearing officer observed and concluded at this hearing. Mr. O’Loughlin’s lengthy, documented history is contrary to Dr. Reade’s assessment.

The BPD wrote in its letter to Mr. O’Loughlin that he was incapable of performing the essential duties of a police officer and that no accommodation could be made which would allow him to do so (Exhibit 1). Nowhere in the record did the

Appointing Authority produce reliable evidence on or explain what those essential duties the Appellant could not undertake or any mention of attempted accommodation..

The BPD in bypassing the Appellant for appointment due to some level of psychiatric limitation or disability opens itself up to the consequential obligation to make “reasonable accommodations” to him to facilitate his employment. The Boston Police Department did not produce any evidence regarding its exploration of or offer of or attempt to provide any “reasonable accommodations” to Mr. O’Loughlin, due to his alleged “disability” or mental limitation, so that he could perform the duties of a Boston Police Officer. This could be considered an act of employment discrimination or the denial of an employment opportunity to a job applicant who is an otherwise qualified individual with an alleged disability. This appears to be a possible violation of the so called ADA, “Americans with Disabilities Act of 1990”. (Administrative notice Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.)

Considering the fact that the BPD’s psychiatrists found no reliable historical evidence or any objective reason to conclude that Mr. O’Loughlin could not successfully perform the duties of an armed police officer and also found no disqualifying mental impairment, it is clear that the Appointing Authority has failed to establish sound and sufficient reasons for this by-pass.

Mr. O’Loughlin served the City as a police officer for a substantial period of time prior to his position being abolished. Dr. Reade’s failure to take into account Mr. O’Loughlin’ past experience and performance as a municipal police officer when assessing his current and future ability to perform the duties of a police officer is inexplicable.

Dr. Reade herself testified that Mr. O'Loughlin very may well have been deemed fit to serve had he been examined by another physician. Such a subjective review is arbitrary and violates the basic merit principles upon which the civil service system is founded. See G.L.c. 31, § 1 and Cambridge, 43 Mass. App. Ct. at 304.

A further objective finding is his prior long-term, successful service as an armed police officer. When these objective findings are compared to the subjective findings, there is even less support for the conclusions and opinion of Dr. Reade. The overall approach to Mr. O'Loughlin' psychiatric screening by Dr. Reade bears the earmarks of capriciousness if not bias.

The reasons as given for the bypass by the BPD were nebulous and unsubstantiated opinion with no historical support and inconsequential to the ability of the Appellant to perform as a Boston Police Office.

After considering all the testimony and evidence in the record, I conclude that the Boston Police Department did not have sound and sufficient reasons for bypassing the Appellant, Kevin O'Loughlin, for selection as a police officer in the City of Boston.

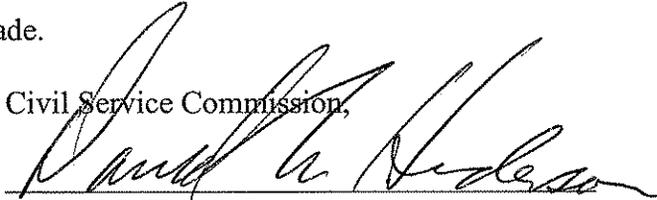
In so finding I have made credibility findings of the witnesses that appeared before me. Those findings are reflected in my findings of fact and as noted above. These credibility findings are based on my observations of the witnesses and their testimony, including their responses under direct and cross-examination.

For all of the above reasons, the appeal under Docket No. G1-07-278 is hereby *allowed*.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs that name of the Appellant, Kevin O'Loughlin be placed at the top of

the eligibility list for original appointment to the position of Police Officer so that his name appears at the top of any current certification and list and/or the next certification and list from which the next original appointment to the position of Police Officer in the Boston Police Department shall be made, so that he shall receive at least one opportunity for consideration from the next certification for appointment as a BPD police officer. The Commission further directs that, if and when Kevin O'Loughlin is selected for appointment and commences employment as a BPD police officer, his civil service records shall be retroactively adjusted to show, for seniority purposes, as his starting date, the earliest Employment Date of the other persons employed from Certification #70048, (June 25, 2007). Finally, the Commission directs that the BPD may elect to require Kevin O'Loughlin to submit to an appropriate psychiatric medical screening in accordance with current HRD regulations (1) in the ordinary course of the medical examination process or (2) immediately upon receipt of a certification in which her name appears, as a condition to further processing of her application for appointment. In either case, such screening shall be performed, de novo, by qualified professional(s) other than Dr. Scott or Dr. Reade.

Civil Service Commission,


Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Henderson-Yes, Marquis-No, Stein-Yes and Taylor-Yes, Commissioners) [Bowman absent], on May 28, 2009.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Joseph G. Donnellan, Atty.

Sheila Gallagher, Atty.

John Marra, Atty. (HRD)