

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place
Boston, MA 02108
(617) 727-2293

JESSICA BOUTIN

Appellant

v.

G1-06-139, G1-06-317

BOSTON POLICE DEPARTMENT

Respondent

Appellant's Attorney:

Alan Shapiro, Atty.
Sandulli, Grace, Shapiro, Horwitz &
Davidson, PC
One State Street, Suite 200
Boston, MA 02109
(617) 523-2500
ashapiro@sandulligrace.com

Respondent's Attorney:

Tara Chisholm, Atty.
Office of the Legal Advisor
Boston Police Department
One Schroeder Plaza
Boston, MA
617-343-5034
chisholmt.bpd@ci.boston.ma.us

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Jessica Boutin (hereinafter "Appellant" or "Boutin"), is appealing the decision of the Massachusetts Human Resources Division (HRD) approving two requests of the Respondent/Appointing Authority, Boston Police Department (hereinafter "BPD" or "Appointing Authority"), to bypass her as psychologically unfit for original appointment to the position of Boston

police officer. A full hearing was held by the Commission on January 8, 2008, at the offices of the Civil Service Commission. BPD called one expert witness. The Appellant testified on her own behalf and called one expert witness. Four tapes were made of the hearing, which were subsequently transcribed into a stenographic record of 298 pages. Ten (10) exhibits were entered into the record. Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

Based on the documents entered into evidence as Exhibits 1 through 10, and the testimony of Julia M. Reade, MD, Mark Schaefer, PhD, and the Appellant, Jessica Boutin, I make the findings of fact set forth below:

1. The Appellant's name appeared on Certification #251238 for the position of Boston Police officer. (Exhibit. 1)
2. The Appellant applied for a position with the Boston Police Department and met with the Department's Recruit Investigations Unit. She provided the Department with her Student Officer Application and numerous other documents, including three "Personal Letter of Reference Forms", a "Life Relationship" Form, and three "Supervisor Forms". (Ex. 1)
3. Sergeant Detective Joseph Harris of the Boston Police Department Recruit Investigations Unit undertook the investigation into the Appellant's background. (Ex. 1)
4. The Department extended a conditional offer of employment to the Appellant,

- conditioned upon her successful completion of the medical and psychological screening component of the hiring process. (Ex. 1)
5. Ms. Boutin is a native and life-time resident of Boston, Massachusetts, who was born on December 11, 1977, and thus was 27 years old at the time of her first of four bypasses. (Exhibit 1)
 6. Ms. Boutin was raised in South Boston by her parents. Her mother was very strict and her father had a problem with alcohol, but had ceased drinking about four or five years before Ms. Boutin began interviewing to become a Boston Police Officer. (Boutin Testimony at 260, 263¹; Schaefer Testimony at 170). There is no evidence of any domestic violence in her family. (Boutin Testimony at 280).
 7. Ms. Boutin attended Archbishop Williams High School, from which she graduated in 1995. She attained an Associate's Degree in Criminal Justice from Quincy College in 1997. (Boutin Testimony at 243; Ex's 1-4, BPD Student Officer Application, at 4)
 8. When she was 15 or 16, the Appellant and two others were "arrested" in front of her high school when she protected her sister in a confrontation with students from another school. The Football players and some students from another high school came to Archbishop Williams to start a fight. She went before a Clerk/Magistrate and no criminal process issued. She was not represented by counsel. She was suspended from school for one day but the suspension is not on her school record. (Boutin Testimony at 255).
 9. The Appellant worked for First State Management Group from February, 1998, to May, 2000. She functioned as the assistant to the first vice president of

¹ References are to page numbers of the stenographic transcript of the hearing.

professional liability. (Ex's 1-4, BPD Student Officer Application at 9; Boutin Testimony at 252).

10. Ms. Boutin began employment as a Boston Police Cadet in the Boston Police Department in May, 2000. During her three years as a Cadet, she was assigned to the Bureau of Field Services for six months, Traffic Division for six months, Station B-3 for six months, and Juvenile Detention in Station A-1 for 1 ½ years. In the Bureau of Field Services, she performed office/clerical duties and at times drove the Superintendent to meetings. Assigned to Traffic, she directed traffic. In that capacity she dealt daily with the public, which at times did not follow her instructions. Without a legal right to stop an offender, she called the Lieutenant in charge when necessary. People frequently asked her for directions and complained about the traffic. For her six-month stint in B-3, Ms. Boutin worked at the front desk, took reports involving issues such as missing persons, stolen vehicles, and anything else the Captain needed done. She was normally at the front desk in B-3 by herself, taking 25-30 reports per day from the public. (Boutin Testimony at 246-249).

11. When assigned as a Cadet to the Juvenile Division, at BPD Station A-1, the Appellant worked 10 p.m. to 10 a.m. shifts in-taking and overseeing juvenile prisoners. She took in the prisoners, brought them to their room, explained procedures to them, brought them to shower and change into the required uniform, and then directed them to bed. There was no police officer oversight. Supervision came from a civilian. (Boutin Testimony at 250-252).

12. After finishing the Cadet program in July, 2003, Ms. Boutin began working as a clerk in the City of Boston Registry Division, where she responds to public requests for birth certificates and answers questions from the public at a public window in Boston City Hall four days per week, from 9 a.m. to 4 p.m., and she performs administrative functions on Wednesdays, when the public windows are closed. At times, she is confronted by angry, frustrated citizens when legal considerations prevent her from issuing the data they request. (Boutin Testimony at 243-245)
13. Since 1992, except for her years as a Cadet, Ms. Boutin has worked a second job at Sullivan's, a hot dog/hamburger eatery at Castle Island in South Boston. During the busy months, May through October, she works three nights and all day Saturday's. Between her two jobs, she works seventy (70) hours per week. (Boutin Testimony at 243, 252-254).
14. At no time has Ms. Boutin received any discipline, been fired, or in any way negatively criticized for any of her work on any of her jobs. Despite dealing with the public in many capacities (Cadet, Registry clerk, cook), her employment record is impeccable. (Boutin Testimony at 245, 252, 254).
15. Ms. Boutin lived at her parents' home in South Boston until November, 2006. On her Cadet salary of \$300/week, she was unable to afford to move out. She at times argued with her parents over petty issues, but, as she explained when asked by Dr. Julia Reade, she did not throw things in anger; she answered "No, I'm just a yeller." (Boutin Testimony at 264).

16. In 2005, the Appellant was cited for a failure to stop at a stop sign in South Boston. Upon her appeal, she was found not at fault. (Boutin Testimony at 256). In 2003, she was in a car accident which did not result in her being surcharged. (Boutin Testimony at 257).
17. Prior to the application process to become a Boston Police Officer, the Appellant had never been diagnosed with a mental disorder nor sought treatment from a mental health provider. (Boutin Testimony at 296)

Appellant's Application for Appointment as a Boston Police Officer

18. Ms. Boutin's name appeared on HRD Certification No. 250086, issued in response to BPD's requisition of a list for original appointment to the BPD. [Ex. 1]. Despite qualifying for the position in all other respects, Ms. Boutin was bypassed for the position on November 30, 2005, based on the results of a psychological screening, which had been conducted by Dr. Marcia Scott and Dr. Julia Reade. (Ex. 1).
19. Ms. Boutin was stunned by the news of her bypass, but did not appeal it because, within a matter of days, she received information that she was again being processed for the position. (Boutin Testimony at 265).
20. On April 3, 2006, Ms. Boutin was again bypassed for failure to pass the psychological review, as part of HRD Certification No. 251238. Again, the bypass was based on the opinions of Dr.'s Scott and Reade. (Ex. 2). Ms. Boutin did appeal this second bypass, which was docketed as G1-06-139.

21. On January 19, 2007, Ms. Boutin was again bypassed for failure to pass the psychological review, as part of HRD Certification No. 260618. Again, the bypass was based on the opinions of Dr.'s Scott and Reade. (Ex. 3). Ms. Boutin did not appeal this third bypass.
22. On September 17, 2007, Ms. Boutin was bypassed for a fourth time for failure to pass the psychological review, as part of HRD Certification No. 270048. Again, the bypass was based on the opinions of Dr.'s Scott and Reade. (Ex. 4). Ms. Boutin did appeal this fourth bypass, which was docketed as G1-07-317.
23. In each bypass, the process was essentially similar, generally following the procedures set out in the Boston Police Department Proposed Psychological Screening Plan. (Ex. 5). Ms. Boutin, on each processing, took the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and Personality Assessment Inventory (PAI) psychological tests. She was interviewed first by Dr. Scott, then by Dr. Reade. (Ex.'s 1-4).
24. Dr. Scott is a licensed psychiatrist in private practice with over 50 years experience. She has worked for the BPD for over eight years as its first level psychological screener. (Ex. 7).
25. Dr. Reade is a licensed psychiatrist in private practice with over twenty years' experience and is Board Certified in General Psychiatry and Forensic Psychiatry. Dr. Reade has served as the BPD second-level psychological screener for approximately 10 years. She has consulted for other police departments in Massachusetts, but, besides Boston, has only performed pre-hire screenings for approximately five Environmental Police Officers. (Reade Testimony at 114-115;

Ex. 6). None of her published work has involved police officers. (Reade Testimony at 20², 116).

Overview of BPD's Process for Police Officer Applicant Psychological Screening

26. Psychological screening of an applicant for original appointment as a Boston police officer is authorized by a BPD Psychological Screening Plan (PSP) that appears to have been verbally approved by HRD and in use since July 2004, and which appears to incorporate HRD's own regulations for "Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel", promulgated pursuant to the authority of Mass. G.L.c.31, §61A. (Ex.'s 5 and 10).
27. HRD regulations establish two 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

² As of the time of her testimony in this case, Dr. Reade was preparing to begin pre-screenings for the Brookline Police, but had not yet actually performed any for Brookline. [Reade Testimony at 116].

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." (Ex.'s 5 and 10).

28. The PSP establishes a three-phase process "to identify candidates who may exhibit any evidence of a mental disorder as described in the [HRD regulations] and as recommended by the ... International Association of Chiefs of Police ... which would significantly interfere with the candidate's successful performance of the essential functions or duties of the position of Boston Police Officer. Psychological screening will be administered to all recruits to ensure that each candidate is emotionally and psychologically fit to perform the essential functions of the position of Boston Police Officer." The three phases described in the PSP are:

Phase I - Group administration of the MMPI-2 and PAI

Phase II - Thirty minute clinical interview and mental status examination of each candidate by a BPD psychiatrist covering any questions of possible psychological vulnerability raised by the background investigation, medical history, biographical data and test results, followed by a "roundtable review" with background investigators for any additional data pertinent to the overall evaluation. If the BPD psychiatrist deems the candidate suitable after completion of Phase II, the process is complete; if there are questions, a report is generated for a second opinion by another psychiatrist

Phase III - Review of the Phase II interview process by an independent

psychiatrist, followed by an in-depth clinical interview of any candidate whom the Phase II psychiatrist forwards for a second-opinion, and a final report and recommendation to the BPD, in which the Phase I psychiatrist is required to concur. (Ex.'s 5 and 10).

29. No specific instructions are given to the psychiatrists conducting the first and second level clinical interviews pursuant to the PSP with respect to what information and/or documents may be relied upon. Dr. Scott and Dr. Reade must abide by the PSP in conjunction with their training and experience and utilize the standards set forth by the laws of the Commonwealth (G.L.c.31, §61A and regulations promulgated by HRD pursuant thereto) to determine the psychiatric fitness to perform the duties or manage the stresses of an armed police officer. (Ex.'s 5 and 10).

30. Dr. Reade has performed several hundred second-level pre-screenings for the BPD. She only evaluates candidates whom Dr. Scott has rejected at the first level. Of those she has reviewed, 10-25% she has cleared notwithstanding their rejection by Dr. Scott. (Reade Testimony at 20-21).³

Phase I – Psychological Testing (MMPI-2 and PAI)

31. The MMPI-2 is a second-generation, proprietary written psychological test and widely-used research instrument. The MMPI-2 consists of 567 "items" or statements (e.g., "I am easily awakened by noise", "I don't blame people for trying to grab everything they can get in this world", "I have very few fears compared to

³ Dr. Reade's estimation of a 10-25% pass rate for those she reviewed is slightly greater than the 5-20% figure quantified in *Roberts v. Boston Police Dept.*, G1-06-321 (9/25/08). See *Roberts* at 10.

my friends", "I like making decisions and assigning jobs to others") which the test subject is required to ascribe as being either "True" or "False" as applied to him/her. A subject's answers are recorded and tabulated according to approximately 50 scales and sub-scales in three categories ("validity", "clinical" and "content"), which produce a "profile" that can be compared statistically to the profiles of a sample population of job applicants and a more limited sample of law enforcement job applicants. (Ex.'s 1-4; Reade Testimony at 28; Schaefer Testimony at 177; See Roberts v. BPD, G1-06-321 (9/25/08) (hereinafter Roberts) at 10).

32. The PAI is a proprietary written psychological test published, scored and interpreted by Psychological Assessment Resources, Inc. The PAI consists of 344 "items" as to which the test subject chooses: "True," "Mostly True," "Mostly False," or "False." Similarly to the MMPI-2, PAI test answers are compiled into approximately 30 scale profiles that can be compared statistically to the responses of a sample population of law enforcement applicants, as well as the sub-set of those applicants who go on to be hired and work in law enforcement. (Ex.'s 1-4; See Roberts at 11).

33. The design, administration, scoring and interpretation of psychological tests such as the MMPI-2 and the PAI fall within the professional discipline of psychology, as opposed to medicine and psychiatry. While psychiatrists make use of such tests in their practices, Dr. Reade conceded that a qualified psychologist is the recommended professional with the necessary expertise to which a psychiatrist generally defers when it comes to the subject of psychological testing. The

- evidence also established that no conclusions about psychological fitness should be based solely on the scores of a psychological test. (Reade Testimony at 27, 30, 34, 111; Schaefer Testimony at 196; See Roberts at 11).
34. Dr. Scott did not testify in this proceeding. What methodology she used to analyze psychological test data is not known, based on the record in this case.
35. Dr. Reade reviewed the test data of Ms. Boutin using the computer-generated scoring system and narrative provided by each examination. (Reade Testimony at 122-132). Although she has previously had tests such as the PAI analyzed by a psychologist, Dr. Reade did not do so with any of Ms. Boutin's test results. (Reade Testimony at 132-133).
36. Dr. Mark S. Schaefer, a licensed clinical and forensic psychologist with approximately 30 years experience, has administered psychological screenings, including the MMPI, for police departments in Watertown, Framingham, Lynn, Hull, and Randolph. All of these jurisdictions use the same two-level psychological screening that the BPD uses. In these communities, Dr. Schaefer functions as the first level screener. (Schaefer Testimony at 154-155).
37. Dr. Schaefer was engaged by Ms. Boutin's attorney to review the psychological screening and other data, to interview Ms. Boutin, and to generate a report of his assessment of her psychological fitness to perform as a police officer. Dr. Schaefer met with Ms. Boutin individually in August, 2006 and April, 2007, and with her attorney in October, 2007. (Schaefer Testimony at 157-158). Following these meetings and his review of all the data, he generated a report that the

Appellant “should not be recommended for disqualification as a police officer for the City of Boston.”⁴ (Ex. 8 at 12).

Phase II – Dr. Scott’s First Level Screenings

38. Dr. Scott first met with Ms. Boutin on August 5, 2005. In her report, Dr. Scott claimed that the Appellant had told her that her mother had cancelled her Sweet 16 party because she had broken a rule. (Ex. 1, Scott Report). The Appellant had actually told her that her mother was so strict that she would do something like that, but there had never been a Sweet 16 party even planned for Ms. Boutin. [Boutin Testimony at 260]. Although finding no evidence of “an Axis I mental disorder or current mental impairment,” Dr. Scott rejected her candidacy based on supposed concurrence between the interview and findings on the MMPI. (Ex. 1, Scott Report).
39. On January 12, 2006, Dr. Scott again met with Ms. Boutin for a Level One screening. Again, despite finding “no evidence of a current Axis I mental disorder,” she rejected the Appellant’s application. [Ex. 2, Scott Report]. There was discussion about what had transpired in the screenings from Ms. Boutin’s first bypass. Dr. Scott was troubled by Ms. Boutin’s refusal to take responsibility for having been rejected the first time and for failing to take any action to “clear up the confusion.” (Id.)
40. The third interview of the Appellant by Dr. Scott took place on August 26, 2006. In her report, Dr. Scott cited a “history of rule breaking and aggression as an

⁴ Dr. Schaefer testified that his expression of his positive conclusion in the negative was how he was taught to perform such evaluations. [Schaefer Testimony at 221].

adolescent and as an adult reacted aggressively to turmoil in her home, yelling and becoming a focus of the fighting.” (Ex. 3, Scott Report). In fact, there is no evidence in the record to label Ms. Boutin a rule-breaker and, while she conceded there was some yelling at her house, there was no basis for finding that Ms. Boutin was the “focus of the fighting.” (Boutin Testimony at 264). Dr. Scott also noted the two previous bypasses and cited the second level screening from the previous bypass for the proposition that Ms. Boutin had “ingrained maladaptive personality characteristics associated with impulsivity, aggression, lack of insight and blaming.” For the third time, Dr. Scott rejected Ms. Boutin’s candidacy, again finding “no evidence of an Axis I mental disorder.” (Ex. 3, Scott Report).

41. Dr. Scott’s fourth interview of Ms. Boutin took place on March 20, 2007. Dr. Scott opined, “Testing for the third time over less than 18 months interferes with the usefulness of the tests and both profiles were suppressed by defensiveness.” Based on her report, the bulk of the interview was spent arguing over the legitimacy of the previous testing, with Dr. Scott’s inquiring whether the Appellant had sought help understanding the “problem” raised by the testing, and the Appellant’s explaining that she could not seek help for undiagnosed conditions. Dr. Scott concluded her report with negative conclusions about the Appellant but again cited no specific mental disorders. (Ex. 4, Scott Report).

42. As in the Roberts case, Dr. Scott’s notes reflect pre-disposed animosity towards Ms. Boutin. In her first interview, Dr. Scott described Ms. Boutin’s speech as “Clear, conciliatory.” By the fourth one, “She spoke in a tiny, clipped high-pitched voice,” according to Dr. Scott. Dr. Scott’s references to rule breaking as

an adolescent and aggression as an adult in the third interview are simply not borne out by the record. Dr. Scott's references to the prior rejections in the three interviews subsequent to the first calls into question whether these were each de novo reviews.

Phase III – Dr. Reade's Second Level Review

43. Dr. Julia M. Reade conducted four second-level interviews of Ms. Boutin:

September 8, 2005; January 23, 2006; September 5, 2006; and April 10, 2007.

(Ex's 1-4). In Dr. Reade's view, the BPD employs the psychological screening process in "an effort 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." (Reade Testimony at 16-17). Dr. Reade stated that the "criteria, psychologically speaking, for what would give [her] confidence to pass someone on psychologically into the Academy" were:

"...obviously the first thing is to rule out any psychiatric illness that's untreated or not...managed that would get in the person's way either in terms of safety or judgment or all of those domains that I covered, those six domains. I also want to make sure that the individual doesn't have any kind of active substance use disorder or a substance use disorder that has not been sufficiently treated so that they'd be vulnerable to sliding back into it. Then I look at a whole host of factors. I look at how resilient is this person in terms of managing stress, how well does this person think about information, how clearly can the person tell a story about

some part of his or her life, and it may be that the components of that part of the life aren't so important, but the ability to communicate the information is, how well does that person – is that person able, to some degree, to look at him or herself and say --- assess strengths, limitations, potential vulnerabilities, can that person do a rational and sort of reasonable assessment of how he or she has done in a situation and make mid-course corrections. Is this somebody who can both follow rules, but also work autonomously and make those kinds of complex, split second decisions. Is this somebody who's flexible enough to work with a huge range of humanity and people that they don't understand, but sort of manage their own emotional responses and contain that emotion well enough so that they can think logically. Is this a person who feels confident making decisions and doesn't, you know, sort of second guess him or herself, but also is flexible enough to kind of look back at how he or she has done something and think I could have done it better if I had tried it that other way. How good is a person's problem solving. How well does someone own up to mistakes they've made. Are they someone who see themselves as kind of in charge, yeah, that was a bad call, I kind of blew it there, but next time I think I'm going to pay attention to the following things or is this someone who just always blames other people. If someone makes a mistake, can they own up to it in a reasonable way and then come up with some -- you know, sort of be thoughtful about it. I'm sure there are other components too, but those are the things that come to mind.” (Reade Testimony at 25-27).

44. Dr. Reade testified that she uses a standard format in writing her reviews. For example, the first two paragraphs of her review from the first interview on September 8, 2005, are boilerplate she uses in all her second level opinions. (Reade Testimony at 122). The first two sentences of the third paragraph came from the Appellant's personnel file. The quotations that follow, down to the sentence beginning with "The PAI results..." were taken from the computerized printout of the MMPI-2 results. (Reade Testimony at 123-124). Her statements regarding the PAI results are taken from the PAI computer-generated narrative, not from Dr. Reade's own assessment. (Id. At 126). Her citation to Dr. Scott's report came simply from reading it, not from speaking with Dr. Scott. (Id. At 127).
45. Dr. Reade generated her second report by calling up the first on her computer and amending it. She conceded that, on the second test, Ms. Boutin's "high" risk of job related problems had retreated to "moderate." (Reade Testimony at 129).
46. In her third opinion, Dr. Reade stated that Ms. Boutin "...will not go over bridges or willingly deal with heights." (Ex. 3, Reade at 3). As Dr. Schaefer testified, if someone were actually unable to go over bridges, she would be disqualified as a candidate to become a police officer. (Schaefer Testimony at 229). Ms. Boutin denied making such a statement. (Boutin Testimony at 271).⁵
47. Although conceding that the Appellant's performance on the psychological tests improved, she attributed that improvement to "test saviness [sic]." [Reade Testimony at 107]. She provided no basis for that assessment. Although her fourth Second Level Opinion of the Appellant stated, "the PAI results indicated

⁵ Dr. Reade, for her part, did not really make much of the bridge comment in her review.

moderate risk of integrity, alcohol and substance abuse problems, and high risk of job-related and anger management problems,” she admitted that, according to Item #3 of the PAI, from which she drew those statements, the likelihood of all of those traits was now low, with only the anger management at a moderate level. (Reade Testimony at 130). She opined that Ms. Boutin had invalidated the PAI by her defensiveness, but then conceded that, not being a psychologist, she lacked the expertise to draw that conclusion. (Reade Testimony at 130-131). Dr. Reade also admitted there was a vast difference between the fourth and first MMPI test results; by the fourth, Ms. Boutin no longer spiked for anxiety, depression, or anti-social attitude. Reade Testimony at 135).

48. In her fourth opinion, Dr. Reade went back over previous testing results. She chided Ms. Boutin for her failure to address “any of the issues raised by the previous evaluations related to her, when I listed concerns about her ability to manage stress, her inflexibility and her irritability.” She went on to note the Appellant’s stated intention to continue attempting to become a Boston Police Officer manifested how she failed to understand or “alter the ingrained psychological traits resulting in her three earlier bypasses.” (Ex. 4, Reade Report).

Testimony of Dr. Mark S. Schaefer

49. As previously stated, Dr. Schaefer, a PhD psychologist, is an acknowledged expert in the reading of psychological testing data. Following his review of all

data and three meetings with the Appellant (two alone and one with counsel), he wrote a report of his findings. (Ex. 8).

50. Dr. Schaefer agreed that the first round of testing produced markedly high results on both the psychopathic deviate and mania scales. If he were performing the first level pre-screening review of Ms. Boutin, he too would have rejected her based on the first set of tests, and moved her on for a second level review. (Schaefer Testimony at 162, 175). By the second set of tests, although he still had questions, he probably would have approved her without recourse to the second level screen. (Id. At 191). The third and fourth sets of tests presented a candidate who could “sail through.” (Id. At 176).
51. Like Dr. Reade, Dr. Schaefer does not believe that psychological tests should be used alone to make psychological conclusions about a candidate. He testified that after looking at testing, “you then have to re-loop it into the person. You look at the flesh and blood in front of you and say is that this person.” (Schaefer Testimony at 210). When he compared her first testing data with her record and what he observed in his interviews, he could find nothing correlative. Her employment record was stable, with no record of discipline or conflict. Although the initial testing showed an anti-social, impulsive person with difficulty taking responsibility for her problems, he could find nothing in her history or documented record to suggest that there was anything for which she was not taking responsibility. (Id. At 163-165).
52. In trying to investigate why Ms. Boutin spiked so high on the first MMPI, he attributed it to a combination of naïveté, excess candor, and sloppiness. Many of

the questions, he explained, are phrased in the negative and can confuse a test-taker. (Schaefer Testimony at 177-178). He felt particularly confident in his analysis of Ms. Boutin because she was 30 years old, giving her enough time in the world to manifest her supposed negative traits without any evidence of her having done so. (Id. At 178).

53. Seeing suggestions in the Reade and Scott opinions that Ms. Boutin was failing to seek treatment for alleged psychological issues, he recommended that she seek treatment through her health insurance. He also felt this could give another independent analysis. After Ms. Boutin had met three times with Dr. James Gardner, Dr. Schaefer spoke with Dr. Gardner, who concurred that he could find not issues that either required treatment or would prevent her from functioning as a police officer. (Schaefer Testimony at 159-161).

Ms. Boutin's Testimony

54. The Appellant testified credibly and competently, neither losing her composure nor obfuscating. She presented her life history, particularly notable for her work ethic, at times working 70 hours per week in multiple jobs. She explained her relations with her family, which were frankly unremarkable. She had a clear and detailed memory of the most poignant aspects of the various interviews she had with Dr. Scott and Dr. Reade. Her answers were spontaneous and natural. Her demeanor and presentation easily corresponded to the answers given. Her answers, in the total context of this case rang true to me. (Boutin. demeanor Testimony, generally at 243-276).

55. Ms. Boutin addressed one issue that had surfaced concerning driving over bridges. She testified that she would prefer not driving over them, but did so frequently and was not afraid to do so. (Boutin Testimony at 256).
56. Ms. Boutin is an attractive young woman with blonde hair, an easy comfortable manner and a pleasant appropriate laugh when called for. She is well groomed and appropriately dressed. She appears to be self confident and relaxed. She did not respond inappropriately while sitting and watching Dr. Reade testify, sometimes with uncomplimentary assertions about her. She did not make any grimaces or other facial or body language expressions of disapproval. Her presentation and demeanor in the hearing room or on the witness stand, even under cross-examination was impressive if not remarkable. All of her responses to questioning were spontaneous, natural and appropriate. She made good eye contact and her answers rang true. In general, the Appellant presented herself as a solid, experienced person committed to becoming a police officer and justifiably bewildered at why she was being consistently rejected by the same two psychiatrists, despite not being diagnosed with any treatable malady. I find her to be a credible witness. (Testimony of Appellant 243-276 and demeanor of Appellant)
57. Dr Reade did not make an audio or video recording of her interview with the Appellant. Dr. Reade has testified in other cases that she does not, as a matter of course, record her second-level, psychological-prescreening interviews but does record her forensic interviews. Dr. Reade has also testified in other cases that her own presentation during the interview may affect the Interviewee's response. It

would be preferred that the second-level prescreening interviews were also recorded rather than relying on the subjective impressions, observations and memory of the Interviewer. (Administrative notice and testimony of Dr. Reade)

CONCLUSION

In the context of reviewing a bypass decision by an Appointing Authority, 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); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331 (1983); *McIsaac v. Civil Service Commission*, 38 Mass. App. Ct. 473, 477 (1995); *Police Department of Boston v. Collins*, 48 Mass. App. Ct. 411 (2000); *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003). An action is “justified” when it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” *City of Cambridge* at 304, quoting *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. 211, 214 (1971). The Appointing Authority’s burden of proof is one of a preponderance of the evidence, which is established, “... if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” *Tucker v. Pearlstein*, 343 Mass. 33, 35-6 (1956).

Basic merit principles, as defined in G. L. c. 31, §1, require that applicants be selected and advanced on the basis of their relative ability, knowledge and skills, assured

fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious action. *Tallman v. City of Holyoke, et al.*, G-2134; cf *Flynn v. Civil Service Commission*, 15 Mass. App. Ct. 206, 444 N.E.2d 407 (1983). Nevertheless, it is recognized that an appellant's "expectation of [selection] based on 'his position on a civil service list' does not rise to the level of a 'property interest' entitled to constitutional protection." *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991). Candidates simply have certain expectations that are substantially diminished by the ability of the appointing authority under state law to consider subjective factors in addition to the written examination score. *Burns v. Sullivan*, 619 F.2d 99 (1st Cir. 1980). Those factors must adhere to the intent of the civil service system. *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300 (1997). Civil Service law traditionally affords management a considerable degree of latitude in making selection decisions. "The appointing authority ... may select, in the exercise of sound discretion, among persons eligible...or may decline to make an appointment." *Goldblatt v. Corporate Counsel of Boston*, 360 Mass. 660 (1971), citing *Commissioner of the Metropolitan District Commission v. Director of Civil Service*, 348 Mass. 184 (1964).

In order to show that an Appointing Authority's decision was not justified, an Appellant must demonstrate that the stated reasons of the Appointing Authority were untrue, applied unequally to the successful candidates, were incapable of substantiation, or were a pretext for other impermissible reasons. *MacPhail v. Montague Police Department*, 11 MCSR 308 (1998), citing *Borelli v. MBTA*, 1 MCSR 6 (1987). In the task of selecting public employees of skill and integrity, moreover, appointing authorities are obligated to employ sound discretion. *City of Cambridge* at 304-5; *Goldblatt, supra*.

This tribunal cannot “substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” City of Cambridge at 304. In light of these standards and the evidence in this case, the appeal must be granted.

As the Commission recently stated in Roberts:

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, 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, 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, Sacco v. Roupelian, 409 Mass. 25, 28-29, 564 N.E.2d 386,388 (1990).

Roberts at 30.

Just as the Commission concluded in Roberts that the bypass did not comport with basic merit principles, it cannot help but reach the same conclusion in this case. As pointed out in Roberts, to bypass for psychological reasons, an appointing authority must establish that a candidate has a Category A or Category B psychiatric or behavior disorder. Id. At 33. Like Mr. Roberts, Ms. Boutin has no such disorder. It is also uncontested that she has never had any history of alcohol or substance abuse problems.

There is absolutely no evidence that Ms. Boutin has a Category A medical condition, defined as “a psychiatric diagnosis of certain specific psychiatric "disorders", as defined by the DSM-IV. [HRD Regulations, §10(6)(o)(1)]”. Roberts at 32. She has never been diagnosed with such a Category A condition nor did any of the evaluating doctors, including Scott and Reade, conclude she had one.

The other basis for psychological disqualification is a Category B psychiatric medical condition, which 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" [HRD Regulations, §10(6)(0)(2)(a)] and (b) "any other psychiatric condition that results in an individual not being able to perform as a police officer." [HRD Regulations, § 10(6)(0)(2) (b)].

Despite all of their negative assessments of Ms. Boutin, neither Dr. Scott nor Dr. Reade actually finds that she either had a history of a “psychiatric condition, behavior disorder, or substance abuse problem not covered by Category A,” or “any psychiatric condition that results in an individual not being able to perform as a police officer.” Rather, they appear to misconstrue the application of the mandated HRD criteria to BPD candidates.

In this regard, the lengthy quotation from Dr. Reade’s testimony at ¶ 39, above, is highly instructive. She phrases her mission not in terms of identifying disqualifying conditions, but, instead, as “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.” The HRD standards are not about finding those with skills that “would make them most likely to succeed,” it is about sorting out those with psychiatric conditions that result in their “not being able to perform as a police officer.”

While we might all agree that it would be wonderful if psychology could accurately predict who would be most likely to succeed as a police officer, there is no evidence the science has evolved that far. The best we can do, as the HRD regulations explain, is to identify those with psychiatric conditions that prevent them from being able to perform as a police officer.

In *Roberts*, the Commission adopted a standard for a disqualifying Category B psychiatric condition:

An applicant may be disqualified for having a Category B "psychiatric condition" so long as the applicant has a "psychiatric condition" which has manifested itself by a preponderance of scientifically reliable and credible proof of deficient mental health behavior, but not necessarily proof of a psychiatric "disorder" found within the DSM-IV.

Roberts at 34. The question thus becomes whether the BPD has satisfied its burden of showing that Ms. Boutin has a "psychiatric condition which has manifested itself by a preponderance of scientifically reliable and credible proof of deficient mental health behavior." Manifestly, it has failed to do so.

What triggered all of Ms. Boutin's difficulties here were the results of her first round of psychological testing. That first round of tests continued to plague her throughout the subsequent rounds of interviews, even though all experts conceded that by the third and fourth rounds, her test results were well within the norms. The second, third and fourth reports of both Scott and Reade are replete with references to earlier test results and interviews. Ms. Boutin had become *persona not grata*.

Just as Dr. Reade read into Mr. Roberts' relatively innocuous life supposed evidence justifying his bypass, so too did Dr. Scott and Dr. Reade mistakenly cast Ms. Boutin as having "anti-social" traits or tendencies. As Dr. Reade concluded in her first review: "Her testing indicates a pattern of disregarding rules, conflict with authority, irritability and mood lability. Ms. Boutin's history and clinical presentation were consistent with these findings." There is virtually nothing in Ms. Boutin's history to corroborate these supposed findings. As Dr. Schaefer points out [Ex. 8 at 10], her life does not match her initial test scores: the only documentation of her supposed antisocial predilection was a single fight in high school at age 16. She has worked steadily since high school, often at two jobs, without indication of any adverse action. Nothing in her adult life indicates any problems in dealing with authority.

By the latter rounds of testing, Ms. Boutin's scores no longer trigger any need for second stage review. Yet she cannot shake the first round of tests, despite a complete lack of correlation between them and her behavior in life.

The psychiatric opinions of Dr. Reade and Dr. Scott are infected with the bias the Commission saw in the Roberts case. *See also Cawley v. BPD, CSC decision G1-06-95, (11/22/06) at 10*, that reference in *Cawley* is "...it is clear that Dr. Reade has unwittingly established an unattainable bar for this Appellant that appears to be tinged with personal bias." Each of Dr. Reade's opinions in this present case builds on the last. Although the testing data varied dramatically from the first to the subsequent testing rounds, there is no recognition of this fact. There is continued reference to Ms. Boutin's failure to seek psychological treatment but no indication of what she is supposed to be treated for. Nothing in the Appellant's history warrants the conclusions reached by either Dr. Reade

or Dr. Scott. Their reports, particularly Dr. Reade's, are filled with computer-generated statements that fail to distinguish between hypothetical areas of concern and actual diagnosed psychological problems.

For all of the above-stated reasons, it is found that the Respondent has not established by a preponderance of the reliable and credible evidence in the record that it had just cause to bypass Appellant for the position of Boston Police Officer. Therefore, these appeals on Docket No. G1-06-139 and Docket No. G1-07-317 are *allowed*.

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs that name of the Appellant, Jessica Boutin, be placed at the top of the eligibility list for original appointment to the position of Police Officer so that her 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 she shall receive at least one opportunity for consideration from the next appointment to the position of BPD police officer. The Commission further directs that, if and when Jessica Boutin is selected for appointment and commences employment as a BPD police officer, her civil service records shall be retroactively adjusted to show, for civil service seniority purposes only, as her starting date, the earliest Employment Date of the other persons employed from Certification 251238. Finally, the Commission directs that the BPD may elect to require Jessica Boutin to submit to an appropriate psychiatric medical screening in accordance with current BPD policy either (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 (Bowman voted Yes, Henderson voted Yes, Stein voted Yes and Taylor voted Yes, Marquis, voted No Commissioners) on January 29, 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, 801CMR 1.01 (7) (1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Commission 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 M.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 section 14 of chapter 30A 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: John Marra, Atty. HRD
Tara Chisholm, Atty.
Alan H. Shapiro, Atty.