

COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION

Suffolk, ss.

KELLEY COUTTS,  
Petitioner

v.

G1-07-277

BOSTON POLICE DEPARTMENT,  
Appointing Authority,

Appellant's Attorney:

Joseph G. Donnellan, Atty.  
Rogal & Donnellan, P.C.  
43 Charles Street  
Needham, Massachusetts 02494  
(781) 455-7100  
(781) 455-7101 (Facsimile)  
[jdonnellan@rogalanddonnellan.com](mailto:jdonnellan@rogalanddonnellan.com)

Appointing Authority's Attorney:

Sheila Gallagher, Atty.  
Office of the Legal Advisor  
Boston Police Department  
One Schroeder Plaza  
Boston, Massachusetts 02120  
(617) 343-4550  
[GallagherS.bpd@ci.boston.ma.us](mailto:GallagherS.bpd@ci.boston.ma.us)

Commissioner:

Daniel M. Henderson

**DECISION**

Pursuant to the provisions of G.L.c. 31, §2(b), the Appellant, Kelley Coutts (hereinafter "Ms. Coutts" or "Appellant"), seeks review of the Personnel Administrator's of the Human Resources Division (HRD) decision to accept the reasons of the Boston Police Department (hereinafter "Appointing Authority" or "BPD") bypassing her for

original appointment to the position of police officer. A timely appeal was filed at the Commission.

A full hearing was held on January 28, 2008 before Commissioner Daniel M. Henderson. Two audio tapes were made at the hearing.

Thirteen 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:*

Kelley Coutts,

I make the following findings of fact:

### **FINDINGS OF FACT**

1. Kelley Coutts' name appeared on Certification #70048 by virtue of her being a municipal police officer employed by Boston Municipal Police Department when the City of Boston abolished that position on December 31, 2006 (Stipulations).
2. On June 25, 2007 the BPD, acting through its Director of Human Resources, Robin Hunt, notified the Human Resources Division of its intent to by-pass Kelley Coutts for the position of police officer with the BPD. Thereby persons whose names appeared lower on the Certification were appointed. (Exhibit 1).
3. On July 31, 2007 the Human Resources Division, acting through its Civil Service Unit, notified Ms. Coutts that it had accepted the reasons as given by the Appointing Authority pursuant to G.L. c. 31 § 27, thereby allowing Boston to

appoint an individual who appeared below Ms. Coutts on Certification #70048 (Stipulations).

4. June 25, 2007 was the date of appointment for those employees selected for appointment to the BPD who appeared below Ms. Coutts on the list. (Stipulations).
5. The reasons given by the BPD are as contained in its letter to HRD dated June 25, 2007 and include the assertion that Ms. Coutts was and is “unqualified” to serve as a Boston Police Officer. This determination was based on findings of Dr. Julia Reade that due to her “...being a well-intentioned but impulsive woman, who has difficulty attending to details or organizing her thoughts. In her interview with [Dr. Reade], she communicated in a chaotic fashion and could not present a clear, factual chronology of any part of her history. She appears to have difficulty reflecting on or taking responsibility for her actions. Ms. Coutts may suffer from an untreated attention or anxiety disorder, but appears to be overwhelmed currently. These limitations would interfere with Ms. Coutts’ ability to manage the duties of an armed police officer.” (Exhibit 1).
6. Ms. Coutts began her employment with the City of Boston on June 29, 1998 when she was hired as a Site Officer with the Boston Municipal Police Department (Exhibit 3, Student Officer Application, testimony of Appellant).
7. Ms. Coutts attended and graduated from the Boston Police Academy as part of recruit class 37-99. Her dates of attendance were May 12, 1999 – November 24, 1999 (Testimony of Appellant and Exhibit 3, Student Officer Application).

8. Ms. Coutts successfully served as an armed police officer with the Boston Municipal Police Department upon her graduation from the Boston Police Academy up until the BMPD was abolished on December 31, 2006. (Testimony of Appellant and Exhibit 3).
9. From 2000 through 2003 Ms. Coutts was assigned to the Boston Housing Authority Police Department, as an armed police officer, where she patrolled the City's housing developments. (Testimony of Appellant).
10. On November 11, 2007 Ms. Coutts was appointed to the Needham Police Department where she serves as a police officer assigned to the midnight shift. Ms. Coutts is a full-time officer who patrols Needham in a marked police car and is armed. (Testimony of Appellant).
11. Prior to joining the Needham Police Department Ms. Coutts interviewed with other police departments in the area including Foxborough and Norwood. Ms. Coutts was given and passed at least two (Foxborough and Needham) psychological screening for the position of police officer in 2007 (Testimony of Appellant).
12. In August 2006 Ms. Coutts applied to transfer to the BPD in anticipation of the abolishment of her position as a Boston Municipal Police Officer. Ms. Coutts attended the orientation class for recruit candidates, filled out her application and underwent a background check (Testimony of Appellant).
13. Ms. Coutts was moved forward through the recruit process including being put through the BPD's psychological screening process for the first time, on October 30, 2006. This process was done in conformance with the "Boston Police

Department-Proposed Psychological Screening Plan” (Testimony of Dr. Reade, Exhibits 4, 5, 10 & 13).

14. The 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)

15. 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 1<sup>st</sup> Level Psychiatrist-screener, (Dr. Marcia Scott). If the 1<sup>st</sup> 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 2<sup>nd</sup> Level Screening interview and opinion. In this case, Dr. Scott, the 1<sup>st</sup> Level screener, had given the Appellant an unfavorable assessment after her interview in March, 2007. (Exhibits 8, 9 & 10, Testimony of Dr. Reade)

16. Dr. Reade testified that her 2<sup>nd</sup> 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 8, 9 & 10, Testimony of Dr. Reade)

17. 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- 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. (Exhibit 10, testimony of Dr. Reade)

18. 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)

19. 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)
20. 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 10, exhibits and testimony)
21. 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)
  22. Ms. Coutts 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 October 30, 2006 and the second time on March 3, 2007. (Exhibits 4, 5, 9& 10, testimony of Dr. Reade)
  23. As part of that psychological screening, Ms. Coutts 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 computer. (Exhibit 4, testimony of Dr. Reade).
  24. In the summary report, Ms. Coutts' "approached the (2007) MMPI-2 test in an open and cooperative fashion and her resulting profile was unremarkable." Her (2007) PAI test indicated Ms. Coutts to be at a "moderate risk of receiving 'poorly suited' rating" The computer generated summary also gauged Ms. Coutts'

risk factor as “high” in the three following areas: Integrity problems; Anger management problems and substance abuse problems. (Exhibits 4, 5 & 9).

25. Dr. Reade testified 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.” (testimony of Dr. Reade)

26. Dr. Reade testified further 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.” (testimony of Dr. Reade)

27. Dr. Reade also testified 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. (testimony of Dr. Reade)

28. However, Dr. Reade testified 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”. Dr. Reade found Ms. Coutts to be “more cautious on the first set of tests” and “more forthcoming on the second set of tests”. The test results indicated “possible work problems” and “possibly problems functioning in a law-enforcement capacity”. An “indication of personal traits with a content that was likely enduring”. An indication of “possibly problematic anger”. Yet, Dr. Reade concluded that both sets of tests presented “fairly un concerning profiles” and that she was satisfied with Coutts’ explanation at the interview and determined that Coutts behavior was “contained” or “controlled” and “not explosive outbursts”.(Testimony of Dr. Reade)

29. Dr. Reade testified that her 1-hour 2<sup>nd</sup> 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”(Testimony of Dr. Reade)
30. On October 30, 2006 after interviewing Ms. Coutts, Marcia Scott, M.D., BPD’s consulting psychiatrist, concluded of Ms. Coutts that “(t)here is no evidence of an Axis I mental disorder, current mental impairment or difficulty with behavioral control or judgment that would prevent the candidate from successfully training or performing the duties of an armed police officer” (Exhibit 8).
31. As of October 30, 2006 Ms. Coutts had been trained through the Boston Police Academy and had been successfully performing the duties of an armed police officer in the City of Boston (BMPD) for some 8 years (Testimony of Appellant and Dr. Reade and Exhibit 3).
32. After being deemed psychologically competent for consideration as a Boston Police Officer in October 2006, Ms. Coutts continued through the BPD’s hiring process until sometime in November 2006 when she was notified that she could proceed no further due to her inability to pass the Physical Abilities Test or PAT. That inability was due to her being in an advanced stage of pregnancy (Testimony of Appellant and Exhibit 13).
33. On December 28, 2006 Ms. Coutts and the BPD entered into a settlement agreement regarding her inability to complete the PAT due to her pregnancy and

- how she would be treated in the next round of applicants (Testimony of Appellant, Exhibit 13).
34. Through the agreement the BPD and the City of Boston acknowledged that as of December 28, 2006 the BPD was not in possession of any information that would disqualify Ms. Coutts as a candidate for the position of police officer with the BPD, excepting her inability to complete the PAT due to her late term pregnancy (Testimony of Appellant and Exhibit 13).
  35. Through the agreement signed by all parties, the City of Boston, the BPD agreed not to challenge Ms. Coutts application for unemployment benefits due her by virtue of the City of Boston abolishing her job and laying her off (Testimony of Appellant and Exhibit 13).
  36. The City of Boston did challenge Ms. Coutts application for unemployment benefits; notwithstanding its agreement not do so. After an administrative appeal and hearing, Ms. Coutts was finally awarded her unemployment benefits (Testimony of Appellant and Exhibit 13).
  37. On November 28, 2006 Ms. Coutts gave birth to her third child, Nicholas. (Testimony of Appellant).
  38. On December 31, 2006 Ms. Coutts was laid off by the City of Boston due to her position as a municipal police officer with the Boston Municipal Police Department being abolished and Ms. Coutts was placed on the HRD reemployment list (Testimony of Appellant and Exhibit 12).
  39. In January 2007 Ms. Coutts received notice from the BPD of an opening due to her being placed on the reemployment list (Testimony of Appellant).

40. Ms. Coutts again went through the hiring process up to and including being evaluated by Dr. Marcia Scott in March 2007, some 4 months after her initial evaluation by Dr. Scott, in November, 2006 when she had been determined to be psychologically fit to be a police officer. (Exhibit 8, Testimony of Appellant).
41. In March, 2007, Ms. Coutts was then sent to Dr. Julia Reade, who performed a second level opinion interview on April 17, 2007. (Testimony of Dr. Reade and Appellant and Exhibit 9).
42. Dr. Reade is a board certified psychiatrist who consults with a number of police departments. She performs second level opinion evaluations and fitness for duty examinations. She is under contract to perform second level opinion evaluations for the BPD, which she has performed second level interviews for approximately ten years. (Exhibit 6 and Testimony of Dr. Reade).
43. 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 that there is only one psychological standard for the position of police officer (Testimony of Dr. Reade).
44. Dr. Reade testified to her memory of the interview meeting she had with Ms. Coutts. Dr. Reade recalled that Ms. Coutts' hair was not in place or "messy". Dr. Reade claimed that Coutts appeared "like a human tornado" and "quite anxious" and that she made mention of an art poster in the doctor's waiting room or as Reade described "spilling out commentary and questions" Dr. Reade described

Coutts' appearance as "disheveled" but could not remember what she was wearing. (Testimony of Dr. Reade). Dr. Reade's general description of Coutts' presentation, responses and appearance was quite negative. However, Reade did also concede that Coutts was "friendly and likeable." (Testimony of Dr. Reade).

45. Dr. Reade's appraisal of Coutts is stated in clearly subjective terms from a clearly subjective view point, such as: "her physical appearance looked like she had trouble getting herself together," "and it made me wonder how well she was functioning or coping with the stress". "I started questioning her ability to pull herself together in a most contained and professional way". It was "extremely difficult and problematic getting good, concrete information in a clear coherent fashion." "It was very difficult getting even rudimentary information on why or what her thinking had been regarding three children [first] then marriage." Dr. Reade further testified: "I tried to get information about her work history and education and her family relationships and her current life situation. Because I wanted to understand what her job situation had been and education background had been and her current life situation [three children] and what she envisioned the life of a Boston police officer would be like." "It was very hard to get a clear understanding of her thinking and motivation and planning through any of this." However, Coutts' detailed employment, educational, criminal, driving, credit, relationship and family history is organized and laid out in the BPD's Student Officer Application and investigation summary. (Testimony of Dr. Reade, Exhibit 3)

46. Dr. Reade is an experienced and well prepared professional witness. However, Dr. Reade testified in such a manner as with phraseology, inflection, tone and demeanor (raised eye brows or wide-eyed look) that indicated she was dissatisfied with the explanations or the actual facts Ms. Coutts provided to her in the interview regarding the breakup with a long time boyfriend she had while living in California, her decision to have children with her husband prior to their being married and the inadequate emotion she displayed over the loss of her mother. Dr. Reade testified that Coutts' description of her reaction to her mother's death in 1990 and her break-up with her boyfriend was "trivial" and "dismissive" and therefore inadequate or inappropriate. However, deeply probing and then characterizing a person's description of a personal and emotional long past experience seems inappropriate for the purposes of this interview, except in extreme circumstances. Coutts recounted to Reade regarding her mother's death that "It was sad, but at least I got a chance to say goodbye". This seems like an appropriate response in this setting. Dr. Reade criticized Coutts' interview responses regarding her mother's death and her break-up with her boyfriend as inadequate, testifying that "She didn't help me understand" and "She didn't explain to me why this important relationship broke-up." Satisfying Dr. Reade's unstated subjective standard of disclosure seems to be the bench mark for interview success. Dr. Reade further testified that she was concerned that Ms. Coutts could not readily recount her academic credentials and that she was unable to adequately explain her reason(s) to move to California or to return from California. Dr. Reade testified in a demeaning or dismissive manner regarding

Coutts' 8 years of experience as an armed and trained Boston Municipal Police Officer, (BMPD). She described Coutts' BMPD experience as "pretty routine" and making "some arrests". The inference that Dr. Reade intended to convey is that BMPD experience cannot be compared favorably with BPD experience. (Testimony of Dr. Reade and Exhibit 9, reasonable inference).

47. Dr. Reade focused on Coutts' mother's death and her break-up with a long time boyfriend, both events occurred in the 1990-1995 time-frame. Dr. Reade believed that Coutts dismissed or trivialized these events. The alleged trivializing was a "concern" to Dr. Reade but she testified in an indefinite manner about it: "...*I wasn't sure what that represented*". Dr. Reade was cross-examined on what specific questions she asked in pursuit of her concern, but she was unable to answer. Dr. Reade responded; "*I can't tell you in detail how I asked her about it. I know that I asked her several different questions about her circumstances ...*" And Dr. Reade admitted "*probing those areas*" and looking at "...*of how someone deals with those stresses and major losses and to look for signs of depression, anxiety or other psychiatric concerns.*" Dr. Reade complained that Coutts "*didn't help me understand*". Dr. Reade's indefiniteness in describing how or why she pursued these concerns during the interview is compounded by the fact that the alleged concerning events occurred at least 10-17 years before the interview. Coutts had a more recent and relevant history of police officer job performance that could have been explored by Dr. Reade. Coutts testified that Dr. Reade did not even become aware that she had been BMPD police officer for 8 years until the very end of the interview. Coutts told Dr. Reade at the interview

that for the BMPD job she had completed the BPD Police Academy. Yet, Reade did not even ask her if she had been psychologically screened in the BMPD hiring process. Coutts testified that she had made over 100 arrests during her 8 years on the BMPD and described some of those arrests. Coutts testified that Dr. Reade did not ask her about the specifics of her BMPD arrests or whether she testified in court on them.(Testimony of Appellant and Dr. Reade)

48. Ms. Coutts testified that the breakup with a long ago boyfriend, during the early to mid 1990's was hard to explain other than he wanted to return to Maryland to be close to his family and she wanted the same and returned to Massachusetts from California. Ms. Coutts' mother had become terminally ill with cancer in that time period and she wanted to be near her family. She has moved forward in her life (Exhibit 3, Testimony of Appellant).

49. Ms. Coutts testified to her marriage and family life and that she recounted the same to Dr. Reade in the interview. She testified to the involvement of both she and her husband in the raising of their children and to the involvement of the paternal grandparents in their family life. By all accounts, Ms. Coutts' established that she is balancing the demands of raising 3 young children with the demands of being a full-time police officer (Testimony of Appellant).

50. Ms. Coutts also testified to the emotional pain that she endured during her mother's illness and after her passing. Ms. Coutts conveyed that during the interview, she did emotionally react by tears forming in her eyes when recalling her mother, but that she did not and would not break down and cry in front of a total stranger when recalling her mother's passing (Testimony of Appellant).

51. Ms. Coutts testified that she answered all of Dr. Reade's questions directly and appropriately. Dr. Reade did not ask her to elaborate on any of her answers. Dr. Reade did not ask her about her hair or clothing. Dr. Reade asked her only one question regarding anger and that question-How would you react, if you were cut-off in traffic? Coutts answered that question. (Testimony of Appellant)
52. Ms. Coutts is looked up to by her longtime friend of 30 years for the poise she displayed during this very stressful time in Ms. Coutts' life. "(H)er (Ms. Coutts's mother) long illness placed a tremendous amount of stress on Kelley[Coutts]...(t)hese pressures continued after her mother's death. Kelley was not only able to handle her own feelings of loss and pain with grace and courage, but she also was able to mediate difficulties that arose between family members..." (Exhibit 3, Personal Letter of Reference of Sandra J. McGunigle).
53. Dr. Reade also sought to portray Ms. Coutts as someone who refuses to take responsibility for her actions. Dr. Reade testified as an example that Ms. Coutts' sought to deflect responsibility for being late to work by putting the blame on the school busses on Columbia Road. (Testimony of Dr. Reade, Exhibit 9).
54. Ms. Coutts testified that the question she was asked was different than the one that was recounted by Dr. Reade in her testimony. She testified that she informed Dr. Reade that she had never been late to work and that Dr. Reade pressed her to assume if she were late, she wanted her to tell her how she would deal with it. Ms. Coutts opined that any theoretical lateness might be due to the school busses on the main artery leading to her work. Her start time coincided with school

release. She also testified that she would phone in and let her superiors know about the delay. (Testimony of Appellant).

55. Dr. Reade also spent a great deal of time on trying to assert that Ms. Coutts' driver's license had once been suspended and used Ms. Coutts' denial to further support her claim that she refuses to take responsibility for her actions. However, it is noted that Mass. RMV Driver's Histories are sometimes difficult to read and interpret. Sometimes licenses are intended by the RMV to be suspended pending the timely payment of fees or costs to the court or the registry. Written notice of such intended suspension may or may not be sent in a timely fashion by the RMV to the driver and the driver learns of such suspension when they are subsequently stopped by a police officer and then notified. (Administrative notice, testimony of Dr. Reade, Exhibit 3 and Testimony of Appellant).

56. Ms. Coutts denied that her license had ever been suspended and she offered her explanation of why she believed that. She never denied getting the traffic ticket and she explained why there was a delay in getting the ticket resolved. She thought that the ticket had been originally "squashed" or taken care of. Approximately 3 months later, when she was notified that her license would be suspended if not paid, she went to West Roxbury Court that same day, paid the fee and had the pending suspension revoked and her license reinstated. (Testimony of Appellant).

57. Dr. Reade admitted 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 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. (Testimony of Dr. Reade).
58. Dr. Reade acknowledged that her testimony regarding Ms. Coutts amounted to small examples of why she should not be a police officer (Testimony of Dr. Reade).
59. Dr. Reade testified that she did give “a lot of weight” to Coutts’ eight years experience as a trained and armed police officer in the City of Boston (BMPD). However, Dr. Reade failed to reconcile this long term performance of the essential functions of a police officer with her own opinion that Coutts would be psychologically unfit to continue performing those functions in the future. Dr. Reade’s opinion on future performance is clearly contradictory to Coutts’ established history and actual job performance. Dr. Reade’s contradictory opinion is clearly incompatible with the proper application of and the plain language of the appropriate section of HRD’s Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel. (Testimony of Dr. Reade, administrative notice).
60. Dr. Reade referred to Ms. Coutts’ first interview with Dr. Scott, which was performed in October 2006 and wherein Dr. Scott “raised concerns...that Ms. Coutts ‘tends to respond impulsively when questioned or criticized and needs to be held to accuracy of details’”. However, Dr. Reade failed to report that Dr. Scott concluded of Ms. Coutts that “(t)here is no evidence of an Axis I mental disorder, current mental impairment or difficulty with behavioral control or

- judgment that would prevent the candidate from successfully training or performing the duties of an armed police officer” (Exhibit 9 and Exhibit 3).
61. The BPD did not offer any evidence regarding any psychiatrically related changes that had occurred in Ms. Coutts from the time of the first exam in October 2006 until the time of the second exam in March 2007 that changed the results of the finding of Dr. Scott.(Exhibits and testimony)
62. Ms. Coutts testified that at the end of her 30 minute interview with Dr. Scott on March 23, 2007, as she was walked out of Dr. Scott’s office, someone directed her to (BPD) Bobbie Mullan’s office to pick up a letter. That letter directed her to the second level interview with Dr. Reade. Coutts was shocked and surprised by this letter since Dr. Scott had not given her any indication that it was coming. (Testimony of Appellant, Exhibit 8)
63. Ms. Coutts did apply for the position of police officer, off of the re-employment list, in seven other municipalities. She had proceeded in each application process not being psychologically rejected by any of those municipalities and passed the psychological screening in several. She completed and passed the psychological screening for the Foxboro and Needham Police Departments in September, 2007. She was hired by the Needham Police Department as a full time permanent police officer in November, 2007. (Testimony of Appellant)
64. Ms. Coutts also applied for the position of police officer in the City of Quincy and her application was in process for about a year. However, Coutts later learned that Quincy did not finalize the hiring process because “It got wind” of the fact that she did not pass the BPD psychological screening. (Testimony of Appellant)

65. Dr. Reade did not testify to what essential functions of the position of police officer Ms. Coutts could not or would not be able to perform due to her psychological makeup (Testimony of Dr. Reade).
66. The Boston Police Department did not produce any evidence as to what the essential functions of a Boston Police Officer are and which functions Ms. Coutts could not perform. (Exhibit 2, testimony and exhibits).
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 Ms. Coutts, due to her alleged “disability” or mental limitation, so that she 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”. (Administrative notice Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq., Exhibit 2).
68. Ms. Coutts appeared before the Commission and testified. Her dress and demeanor were appropriate. She exhibited a very good memory. She testified that she sat in Dr. Reade’s waiting room for 20 minutes and had time to examine a poster on the wall and simply inquired of it with Dr. Reade at the beginning of her interview. She wore the same outfit to Dr. Reade’s interview that she wore to the Commission hearing, (a blue blouse with a white collar and black slacks). She testified that it was raining the day of her interview and that her hair, which is naturally curly and was, then down to her shoulders, was certainly affected by the

rain. Her hair was tied up in a bun at the Commission hearing and she offered to let her hair down to show the way it had been at the interview. The hearing officer declined the offer. She made good eye contact and answered clearly and responsively, without hesitation. Her presentation and demeanor was poised, calm and appropriate during her own testimony and during Dr. Reade's testimony of sometime uncomplimentary characterizations. She withstood vigorous and detailed cross-examination with calm and ease. Her straight-forward testimony and detail of specific facts rang true. I observed her appearance and her manner of testifying and I credit her testimony as truthful and accurate. She is a very credible witness. (Testimony and demeanor of Appellant)

69. 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 Ms. Coutts was faulty. Dr. Reade focused on several old personal events on which to characterize and form conclusions regarding their possible psychological impact on Coutts. However, Dr. Reade conversely minimized or ignored Coutts' actual 8 year performance as a BMPD police officer up until 2006. Dr. Reade's virtual omission of this relevant and recent verifiable history is inexplicable. Dr. Reade's characterization and portrayal of Coutts' behavior and statements during the interview is nearly the opposite of what Coutts, a credible witness, testified actually occurred. Coutts' presentation and demeanor which Dr. Reade claimed to have observed during the interview is very nearly the opposite of what this hearing officer observed of Coutts' Commission hearing testimony. Dr. Reade's second level opinion is the fundamental issue and it is substantially

founded on her 1 hour interview of Coutts. 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, Exhibit 9)

70. 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)

71. 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 four 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 & G1-06 317, allowed January 29, 2009 and Daniel Moriarty v Boston Police Department, No. G1-05-442, allowed April 9, 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 credible evidence in the record. 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 Civil Serv. 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.

Ms. Coutts has been a resident of the City of Boston for more than 12 years and was an employee of the City of Boston for more than 8 years prior to her job as a municipal police officer being abolished. She graduated from the Boston Police Academy and worked as police officer in the City of Boston for the Boston Municipal Police Department for more than 8 years. For over three years of her tenure with the BMPD she was assigned or detailed to the Boston Housing Authority. She currently

performs the duties of an armed police officer within the Town of Needham, a suburban community that borders Boston. Coutts' actual successful performance of the functions of a police officer for the Town of Needham since November, 2007, contradicts Dr. Reade's opinion or guess on her future performance.

Ms. Coutts presented herself before the Commission as a likeable, capable, mature, experienced and well-mannered woman with a sincere desire to continue serving her community as a police officer.

She is someone who understands her role in a rigidly structured environment, such as a police department is, and as someone who for more than 8 years successfully undertook the duties of a police officer within the City of Boston and is now currently undertaking such duties in Needham. Even with the heightened scrutiny that is rightly imposed upon police officers, Police Comms. of Boston v. Civil Serv. Commn., 22 Mass. App. Ct. 364, 370-371 (1986), Ms. Coutts has proven over many years that she is capable of performing the duties of a Boston Police Officer. What is required is the type of qualities that Ms. Coutts has exhibited over the course of her career.

The Appointing Authority has put forth evidence that even its expert witness characterizes as small reasons to justify a psychological by-pass (Testimony of Dr. Reade). The actual reasons stated by the Appointing Authority in its bypass letter are highly suspect base on the findings of fact made here. The excessive focus on Ms. Coutts' personal life, including the expectation of a detailed explanation why she broke up with a boyfriend in the early 1990's, is inexplicable. The entire interview-evaluation process smacks of sexism or some impermissible standard and undermines even further the small reasons that the Appointing Authority has put forward. The relevance of

probing into long ago relationships can be established when there is a connection with a particular candidate's fitness to serve as a police officer. Cases involving a candidate accused of domestic abuse or some other crime toward a close relation or some continuing bad behavior would make inquiries into such relationships not only relevant, but essential. Unfortunately for the Appointing Authority, those circumstances do not exist here. When coupled with Dr. Reade's focus on the Appellant's decision to have children with her husband prior to their marriage and her comments regarding the lack of emotion toward the loss of her mother, Dr. Reade's detailed focus on the Appellant's personal and emotional relationships, without some relevant factual basis suggest that these inquiries are not about establishing the Appellant's fitness to serve as a police officer. Rather, they are inquiries that are wholly unrelated to Ms. Coutts' fitness to continue serving the City of Boston as a police officer.

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 (1<sup>st</sup> 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).<sup>1</sup>

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

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<sup>1</sup> 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 Ms. Coutts for appointment to the position of Boston police officer did not comport with basic merit principles resulting in harm to her employment status through no fault of her 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 Ms. Coutts 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. *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 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)

The Commission accepts this premise. 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 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 Ms. Coutts because of a disqualifying Category B "psychiatric condition".

The first-level screening by Dr. Scott was an inexplicable reversal of Dr. Scott's 3-4 month earlier review. This unexplained reversal of opinion and Dr. Scott's failure to alert Coutts to the reversal improperly infected the screening process with a pre-disposition to disqualify Ms. Coutts. Both Dr. Scott and Dr. Reade appeared to have misstated, misremembered or mischaracterized the interview questions and responses to the detriment of Ms. Coutts. Ms. Coutts 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. While the ultimate decision to by-pass Ms. Coutts does not rest on Dr. Scott's conclusions, the fact remains that, had Ms. Coutts received a fair and objective first-level screening, more likely than not, she 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 conclusion that "Ms. Coutts may suffer from an untreated attention or anxiety disorder, but appears to be overwhelmed currently" and that she was "impulsive,...have difficulty attending to detail or organizing her thoughts, ...communicated in a chaotic fashion, had difficulty reflecting on or taking responsibility for her actions." Dr. Reade pointed to no convincing situational example that any of Ms. Coutts' behavior – outside the interview itself – supported her conclusions, save for the single alleged incident of a suspended driver's license, which Ms. Coutts effectively rebutted. 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 Ms. Coutts' current "level of anxiety" is based heavily upon her subjective observations of her during the interview and little in the way of objective real-world context. Dr. Reade's conclusions and opinion of Ms. Coutts' interview presentation and resulting psychological fitness is very near the opposite of what this hearing officer observed and concluded at this hearing. Ms. Coutts' lengthy, documented history is contrary to Dr. Reade's assessment.

The BPD wrote in its letter to Ms. Coutts that she was incapable of performing the essential duties of a police officer and that no accommodation could be made which would allow her to do so (Exhibit 2). Nowhere in the record did the Appointing Authority produce reliable evidence on or explain what those essential duties the Appellant could not undertake.

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 her to facilitate her 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 Ms. Coutts, due to her alleged "disability" or mental limitation, so that she 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 "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 Ms. Coutts could not successfully perform the duties of an armed police officer and also found no disqualifying mental impairment in October 2006 (Exhibit 3) and that the Appointing Authority has put forth no evidence to establish any change in the Appellant’s psychological makeup during the 4 months between examinations, it is clear that the Appointing Authority has failed to establish sound and sufficient reasons for this by-pass.

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

Dr. Reade herself testified that Ms. Coutts very may well have been deemed fit to serve had she 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 her prior successful service as a 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 Ms. Coutts’ psychiatric screening by Dr. Reade bear the earmarks of capriciousness if not bias.

The reasons as given for the bypass by the BPD were small and inconsequential to the ability of the Appellant to perform as a Boston Police Officer.

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, Kelley Coutts, 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, Kelley Coutts 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 certification for appointment as a BPD police officer. The Commission further directs that, if and when Kelley Coutts is selected for appointment and commences employment as a BPD police officer, her civil service records shall be retroactively adjusted to show, for seniority purposes, as her 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 Kelley Coutts 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,

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Daniel M. Henderson,  
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman voted No; Henderson voted Yes, Marquis voted No, Stein voted Yes and Taylor voted Yes, Commissioners) on May 7, 2009.

A True Record. Attest:

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**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)(1), 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)