

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ALICIA CROSBY,
Appellant

v.

Docket NO.: G1- 06-286

BOSTON POLICE DEPARTMENT,
Respondent

Appellant:

Leah Barrault, Atty.
Pyle, Rome, Lichten, Ehrenberg
& Liss-Riordan, PC
18 Tremont St., Suite 500
Boston, MA 02108

Appointing Authority:

Sheila Gallagher, Atty.
Office of the Legal Advisor
Boston Police Department
One Schroeder Plaza
Boston, MA 02120
(617) 343-4550

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant Alicia Crosby (hereinafter referred to as “Crosby” or “Appellant”), seeks review of the Personnel Administrator’s decision in accepting reasons proffered by the Responding-Appointing Authority Boston Police Department (hereinafter referred to as the “Department” or “BPD”), for the psychological “unfitness” bypass of the Appellant for original appointment to the position of police officer. The Personnel Administrator, (“HRD”) accepted the Department’s reasons for the psychological

“unfitness” bypass pursuant to G.L. c. 31§ 27 and the Appellant was bypassed on January 19, 2007 by other candidates who were lower on certification #260618. (Ex. 11.) The reasons proffered for the psychological bypass and accepted by the personnel administrator were based essentially on the opinion of Dr. Julia Reade: “Although she presents with significant strengths, including a lively intelligence and an engaging personality, Ms. Crosby also demonstrates a history of concerning impulsivity and poor judgment in a variety of job related and interpersonal situations. In her interview with me, she had difficulty containing herself and appeared mildly hypomanic. With respect to her ability to function as a police officer, Ms. Crosby, in my opinion, would have significant difficulties because of her vulnerability to impulsive decision-making and questionable judgment. For these reasons, Ms. Crosby is currently found not acceptable.” (Ex. 10, 11.)

The Appellant filed a timely appeal at the Commission. A full hearing was held on August 26, 2008 and November 4, 2008 at the offices of the Civil Service Commission before Commissioner Daniel M. Henderson. Leah Marie Barrault, Atty. represented the Appellant. Sheila Gallagher, Atty. represented BPD.¹ A total of six (6) audio tapes were made of the hearings

I. FINDINGS OF FACT:

The Commission’s case file did not contain HRD’s document packet. The parties stipulated to Exhibits 1-19. The BPD offered Exhibits 21 & 22, which was strongly objected to by the Appellant; they were admitted *de bene*, subject to later written argument in proposed

¹ Martha Lipchitz O’Connor, Atty. represented the Human Resources Division. On June 24, 2008 Attorney O’Connor submitted a letter to this Commission stating: “Please be advised that the Appellant in the above-captioned matter is no longer challenging the Boston Police Department’s Psychological Plan as approved by HRD. As such, the facts and issues do not appear to require further participation by HRD. HRD will not attend the full hearing in the above-referenced matter unless specifically asked to do so. If the Commission feels that HRD’s participation is necessary, please notify me as soon as possible of our expected role relative to the issues presented in order that I may adequately prepare.” (Ex. 12.)

decisions. Exhibit 31 was admitted for identification and impounded: segregated and kept confidential. Based on the documents entered into evidence (Ex. 1-31), a stipulation of facts(Ex. 20), the Testimony of the Appellant, Suffolk County Sheriff's Department Lieutenant Thomas Gorman, and the Testimonies of Dr. Mark Schaeffer, Dr. James Beck, and Dr. Julia Reade, **I make the following findings of fact:**

A. Background Facts Related to the Appellant:

1. The Appellant is a woman who was born and raised in South Boston, Massachusetts. (Ex. 1, Recruit Application.) She has always wanted to be a police officer. She enjoys helping people and wants to be a police officer in the city she grew up in. (Appellant.) In 2006, at the time of her bypass, the Appellant was twenty-nine (29) years old. The Appellant graduated from Boston Latin Academy High School in 1996. She then went on to receive a Bachelor of Arts Degree in Criminology from Suffolk University in February, 2001. (Ex. 1; Appellant.)
2. The Appellant does not and has **never** suffered from or been treated for a mental or psychological disorder. (Appellant.)
3. The Appellant's employment history shows that she has been employed as a corrections officer/deputy sheriff with the Suffolk County Sheriff's Department since approximately October of 2002. Correction officers are responsible for the care, custody and control of incarcerated individuals awaiting criminal trial. Appellant has worked in 32 housing units and other specialty assignments. She served as the Department's Liaison Officer with the Bureau of Immigration and Custody Enforcement. She is currently assigned to the women's housing unit or "Tower." Appellant each day accepts her post, conducts a security check and roll call, feeds the inmates, and then spends the remainder of her day resolving issues and conflicts that arise among female inmates. (Ex. 1; Appellant and Lieutenant Thomas Gorman.)
4. The Appellant's record with the Sheriff's Department is unblemished. She has **never** been disciplined. Appellant receives performance evaluations every six months. She received scores on her evaluation ranging from 3 to 5, 5 being the highest. Appellant has **never** received a poor rating related to judgment or decision-making. (Appellant and Lt. Gorman.)
5. The prison is a sporadic, unpredictable and often fast paced environment. The Appellant encounters stressful situations daily. Appellant presented testimony at hearing regarding a stressful incident she encountered in the women's housing unit and how she handled that encounter exercising good judgment and decision-making. (Appellant.)

6. Deputy Gerard Horgan of the Suffolk County Sheriff's Department is second in command to the Suffolk County Sheriff. In response to the question "how does the employee resolve conflict" he states: "**Officer Crosby has excellent verbal skills and is able to de-escalate situations.** She is honest and direct." In response to the question "how does employee manage stressful situations" he states: "Officer Crosby is able to run a housing unit by herself without any problems. She is firm, fair and consistent with inmates." Deputy Horgan further states: "Officer Crosby is a loyal and hard working self starter who takes pride in her work. She is well respected by her supervisors, peers and inmates. **She is well spoken and always adheres to Department policies.** During my nearly two decades in corrections, I have had the pleasure of working with many dedicated professionals who work in a very challenging environment. Alicia Crosby is one of the very best officers that I have supervised and has been asset to the Suffolk County Sheriff's Department." (Ex. 1.) (Emphasis added.)
7. In 2006, the Suffolk County Sheriff's Department Gang Unit commended the Appellant for her actions in obtaining intelligence from prisoners which became pivotal in the Unit's identification of gang members in the community. (Ex. 1; Appellant.) Appellant also received a commendation for her work in 2002. (Ex. 29.)
8. Lieutenant Melvin Reed of the Suffolk County Sheriff's Department Gang Unit states: "As a deputy sheriff-correction officer for the Suffolk County Sheriff's Department, Officer Crosby worked for the general population units within the facility; her hard work and professionalism elevated her to a highly touted position with the Immigrations Custom Enforcement Division located inside our facility. The Departmental qualifications listed for this position were responsible, professional, highly energetic and motivated. Officer Crosby was chosen for this position and in my opinion exceeded the standards that were being required." Lt Reed states: "**[t]here has been many situations that officer Crosby has relied on her quick thinking and good judgment to de-escalate potentially violent incidents inside the correctional facility.**" Lt Reed further states: "Officer Crosby in her duties as a Corrections Officer **routinely is encountered with high stress incidents in which her training and experience has assisted in the de-escalation of these potentially violent incidents.**" (Ex. 1.) (Emphasis added.)
9. Captain John F. Scaduto of the Suffolk County Sheriff's Department states: "Officer Crosby has **very good interpersonal skills in her interactions with a multitude of officers and federal agents from various agencies...**In her interaction with difficult/combatative detainees she has on several occasions **deescalated confrontations with detainees, both male and female, by using her verbal skills** and explaining that their behavior is unacceptable and on how to cooperate with the Suffolk and/or federal agents. This has occurred in my presence on many occasions." (Ex. 1.) (Emphasis added.)
10. Lieutenant Thomas Gorman of the Suffolk County Sheriff's Department has been with the Department for 16 years. He supervised Appellant at the Bureau of Immigration and Custody Enforcement for approximately 2 years. He saw her on a daily basis. In his current capacity as building and staff supervisor he oversees Appellant at her assignment to the women's housing unit. He sees her on a daily basis. Lt Gorman has **never**

disciplined Appellant and is not aware of any other officer in the Department disciplining Appellant. He has **not** observed and is otherwise not aware of Appellant demonstrating any issues with judgment or decision-making: just the opposite,” Appellant is a “squared away officer.” (Lt. Gorman.)

11. In response to the question “how does the employee resolve conflict” Lt Gorman states: **“She has great communication skills** an example of this would be detainees housed in the same cell and not getting along. She finds out the problem, informs the detainees that she’ll look into it, reports it to her immediate supervisor, and recommends to move one to a different cell.” In response to the question “how does the employee manage stressful situations” he states: “I have supervised her when there have been fights in her unit. She stays calm, reports incident (via radio), waits for assistance and then when appropriate help is on the scene, separates, restrains and handcuffs the combatants.” (Ex. 1.) (Emphasis added.)

B. Facts Related to the Boston Police Department’s Psychological Screening Plan:

12. On or around July 22, 2004, the Department submitted to HRD a request for the authority to utilize a psychological screening plan. In July of 2004, Sally McNeely, the Director of the Organizational Development Group of HRD, gave verbal approval to Edward Callahan for the Boston Police Department (“BPD”) to proceed with the psychological screening of current police officer candidates pursuant to its psychological screening plan. (Ex. 20, Stipulated Facts; Ex. 13.)
13. Roberta Mullan, the Department’s Director of Occupational Health Services, is responsible for administration of BPD’s psychological screening plan. (Ex. 20.)
14. BPD permits clinicians conducting the first and second level clinical interviews pursuant to the Department’s psychological screening to rely upon the following in making their psychological suitability determinations: a) Results from MMPI-2, PAI, personnel data questionnaire, background investigation, recruit application, and medical records may be used when the first and second level interviews are conducted by psychiatrists. No specific instructions are given to psychiatrists conducting the first and second level clinical interviews pursuant to the BPD’s psychological screening plan with respect to what information and/or documents s/he may rely upon in making their psychological determination. The doctors are expected to abide by the psychological screening plan in conjunction with their training and experience. The doctors are expected to utilize the standards set forth by the Commonwealth of Massachusetts statutes and regulations to determine the psychological ability to perform the duties or manage the stresses of an armed police officer. (M.G.L. c. 31, §61A). (Ex. 20.)

C. Facts Related to Appellant’s 2005 Conditional Offer of Employment (not the subject of this bypass appeal)

15. Sometime in 2005, Appellant’s name appeared on Certification No. 251238 for the position of permanent full-time BPD police officer. Appellant did not pass her pre-

employment background investigation. (Ex. 20.) If Appellant were hired she would have attended a spring 2006 police academy. (Appellant.) It was the finding of the BPD that “Ms. Crosby’s use of sick time while an employee of the Suffolk County Sheriff’s Department [during the years 2003, 2004 and 2005] was excessive.” (Ex. 2.) The Appellant was bypassed. BPD informed the Appellant orally of the bypass in January of 2006. (Appellant.) The Appellant received a letter from BPD regarding such bypass on or about May 25, 2006. However, as a practical matter, the Appellant already realized that she had been by bypassed by the BPD (“I didn’t get the job”) since she had been informed by friends that they were starting in the BPD Police Academy on the very same day that she started in the State Police Academy. (Appellant, Exs. 2 and 20.)

**D. Facts Related to Appellant’s 2006 Conditional Offer of Employment
(subject of this bypass appeal)**

16. Sometime during the summer of 2006, Appellant’s name appeared on Certification 260618 for the position of permanent full-time police officer in the Boston Police Department. (Ex. 20; Appellant)
17. Appellant met with BPD Recruit Investigations Unit and provided them with her Student Officer Application, letters of personal reference, supervisor/human resources data forms, and confidential neighborhood assessment forms. The Student Officer Application was signed by the Appellant and her signature notarized on December 27, 2005. She also swore and verified the contents by signing the application before the BPD Investigator on December 28, 2005. (Exs. 1 and 20.)
18. Appellant passed her pre-employment background investigation. (Exs. 2 and 20.)
19. BPD Sergeant Detective Edward Cox writes in Appellant’s background investigation report: “On May 25, 2006, Ms. Crosby was bypassed for employment due to her excessive misuse of sick time. I have had the opportunity to speak with Ms. Crosby on this matter and she assures me that her attendance will never be a problem in the future. I am in possession of a letter (and have attached it to this form) dated July 10, 2006 from one Allison McPherson. Ms. Macpherson is the Senior Administrative Assistant of the Personnel Division of the Suffolk County Sheriff’s Department. Ms. Macpherson states that Ms. Crosby has not used any sick time as of this date.” (Jx. Ex. 2.)
20. On July 27 2006, BPD offered Appellant a conditional offer of employment subject only to her passing a medical examination and the psychological screening component of the medical examination. (Exs. 3 and 20.)
21. On August 12, 2006, the Appellant completed the Minnesota Multitphasic Personality Inventory-2 (MMPI-2) and the Personality Assessment Inventory (“PAI”). (Exs. 5, 6 and 20.)
22. On August 28, 2006, Appellant attended a first level psychological interview with Dr. Marcia Scott, the BPD’s consulting psychiatrist. (Ex. 20.)

23. Dr. Julia Reade is a licensed psychiatrist in private practice with over twenty years' experience and 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 also consulted for other police departments in Massachusetts. During most of the time she has served as the BPD's second level screener, Dr. Scott has been the BPD's first level screener. Dr. Reade only sees candidates who have failed to pass Dr. Scott's first level screening. Dr. Reade testified that although she and Dr. Scott may agree on there being a psychological issue that disqualifies a particular candidate, they also sometimes disagree on what that particular psychological issue may be. (Dr. Reade, Ex. 7)

24. Dr. Scott has referred the following number of recruits, by recruit class, to Dr. Reade for a second level screening. Of those recruits, Dr. Reade found by recruit class that: 100%, 88%, 72% and 88% were unfit to be a Boston police officers. For the past three years, the statistics show:

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

(Stipulation, Ex. 20)

25. Neither Dr. Scott nor Dr. Reade audio or video record their psychiatric candidate review interviews. (Exhibits, testimony, administrative notice)

26. On September 5, 2006, BPD sent Appellant to see Dr. Julia Reade for a Second Level Opinion psychiatric review interview. (Ex. 20.)

27. Dr. Reade identified her report (Ex. 8) as a fair and accurate representation of the interview. She testified and reported that her observations of the Appellant at the September 5, 2006 interview, which took place at her Chestnut Hill office, were: "she was early for her appointment, neatly dressed, a very attractive young woman, personable, she came across as a very likeable, bright, engaging young woman." The report also concisely outlines the Appellant's background: "She has no criminal charges and a driving record with no infractions. She has a Bachelors degree from Suffolk University, and a good credit record." And Sherriff's Dept. employment references describing her as "assertive, cooperative and reliable". "Although she presents with significant strengths, including a lively intelligence and an engaging personality..."(Dr. Reade, Ex. 8)

28. However, Dr. Reade begins her report by noting that the Appellant had been previously found not acceptable on psychological testing and interview by Dr. Scott. Dr. Reade also refers to the Appellant's previous bypass in May 2006 for "excessive misuse of sick time" and also again uses the negative phrase "misuse of sick time" at the Sheriff's Department. Dr. Reade refers to the Appellant leaving the State Police Academy for

“possible medical reasons.”, “...gave an oddly vague account of her college career” and somehow providing an inadequate explanation for her “car trouble” which caused her to be late for Dr. Scott’s appointment. Dr. Reade chose to overlook the objective and substantive background history of the Appellant’s significant accomplishments and focus instead on details of those few minor and tangential incidents; which Dr. Reade determined to be reliable indicators of enduring negative traits. I find Dr. Reade’s inordinate focus and repeated reference to negatives in Dr. Scott’s report, to be suspect. Dr. Reade opined that “She appears to have little psychological insight and is reluctant to engage in self-disclosure or self-evaluation.”; yet, Dr. Reade had just informed the Appellant that there was no confidentiality in this evaluation process. Dr. Reade even reports that the Appellant told her she could not remember the specific requested detail regarding the foreign course availability of her five year earlier college career. The Appellant provided a sufficient explanation, supported by medical records regarding her leaving the State Police academy. The “car trouble” and being late for Dr. Scott’s appointment explanation, seems to have taken on monumental, albeit unclear significance. This may have been partly due to Dr. Reade’s style of inquiry, of asking a series of specific questions and pushing the Appellant on the matter. Dr. Reade expresses her observations or conclusions regarding the Appellant with the use of indefinite or inconclusive terms or phrases, including: “appears”, “may be”, “indicated”, “endorsed 1 critical item”, “Dr. Scott raised concerns”, “reflect”, “...inconsistent with her age and achievements.”, “intimated”, “confusing account”, “...gave an oddly vague account of her college career”, “...appeared mildly hypomanic.”, “...her vulnerability to impulsive decision-making and questionable judgment.” Dr. Reade’s determinations here are by and large subjective appraisals or characterizations, based primarily on the one hour interview. Dr. Reade indicates in her report and testimony, a predisposition to follow the lead of Dr. Scott on the specific areas of inquiry and determinations of fitness. I also find the emphasis on minor incidents, were embellished into subjectively determined negatives by the use of excessive language or description; taken in conjunction with the other enumerated alleged negative observations by the interviewers, to be an indication of bias or some other improper consideration by the BPD. (Exhibits and testimony, demeanor, reasonable inferences, Ex.8, Dr. Reade, Appellant).

29. Dr. Reade testified on direct examination that she then began the interview, by explaining the role of the interview, the lack of confidentiality and other parameters. Then, she testified: “I usually ask people who are anxious to tell me something about either why they want to be a police officer or why they think they were sent for a second opinion? And that seemed to be foremost in her mind.” Dr. Reade was then asked Q.- And did Ms. Crosby seem anxious to you? To which she answered, A. “Ms. Crosby seemed so flustered and so sort of amped-up and revved-up. She was talking a mile-a-minute, her speech was very pressured. It was hard to interrupt. It was hard to contain her. This lasted through the whole interview. She was extremely animated and up-beat and you know sort of pleasant but there was this, as I described in my report ... this head-long rush of words. She frequently interrupted me before I could even form a question or she would start to answer a question before I could finish stating it. It was really quite notable, how pressured she was, how animated she was and how sort of high energy and hard to contain, she was.” Dr. Reade testified in an emphatic manner in tone, cadence, and facial

expression, in accentuation of her descriptive language. (Dr. Reade, testimony and demeanor)

30. Dr. Reade was then asked Q. - And why was that a concern for you? She answered A. – “It was a concern for several reasons, one is that one of the major mental illnesses is bipolar disorder, which is characterized by periods of mania or hypomania, which is characterized clinically by pressured speech, high levels of animation, difficulty containing a person. An individual can also be quite engaging and quite likeable and quite personable. So, one of the things I was concerned about, was her presentation was so rushed and so ramped-up that I could not tell whether this was secondary to anxiety, whether this was related to a hypo manic episode or whether this was something that was part of her style, which was kind of a head-long, impulsive, rushing into things kind of style.” Q. – And what did you do in order to come up with an assessment whether or not you thought Ms. Crosby had either bipolar or was anxious. How did you approach this? A. – Actually, I was never able to address the questions of whether she was bipolar in my interview, because so much of my interview time was spent consumed by trying to get a clear picture of some factual issues related to: her departure from the State Police Academy, the status of her knee, her use of her sick time in the Sheriff’s office, some questions about her schooling, her difficulties in arriving at the interview with Dr. Scott on time, with her explanations for why she had not been there, her experience going through the police process. I was not able actually to get to these questions about whether she was bipolar, because it took so many extra questions and so much additional time to try to tease-out just an ordinary factual narrative about these other issues. Q. –... IS it your purpose in these interviews to come-up ... to diagnose someone with a medical disorder? A. – At times it’s significant to address the question of diagnosis, for example when candidates come through the process who have already been in treatment *and* are on medication. It’s important to assess ... or they have had a history of treatment to assess whether they currently meet criteria for that diagnosis. Whether their treatment is adequate. What their current functioning is. In those situations, it is absolutely critical to establish a psychiatric diagnosis and to have an opinion about the efficacy of functioning of the individual.” Q. – So, in regards to the functioning of Ms. Crosby, did you have any information prior to this interview regarding any pre-existing psychological diagnosis? A. – “No” Dr. Reade admits here, that she had insufficient time left to make a determination of an existing psychological condition, due to the time she had spent on tangential issues. (Dr. Reade)
31. Dr. Reade was asked while testifying in a prior hearing, on another appeal, whether she had previously made what she considered to be a reasonable accommodation for a candidate. *See O’Loughlin v Boston Police Department*, G1-06-286, appeal allowed, dated May 28, 2009. Dr. Reade testified at the *O’ Loughlin* hearing on February 25, 2008. She testified then, that there were two prior candidates who were in a similar situation to Mr. O’Loughlin in which she recommended that they not be bypassed. Those two candidates in the 2004-2006 time-frame, did have psychiatric conditions for which they were treated by a psychiatrist with psychotropic medications. She recommended to the BPD then that those two candidates not be bypassed and should continue in treatment with the suggestion that they notify the BPD upon any change in diagnosis or type or

amount of medications taken. Dr. Reade viewed her recommendation in those two cases to be an “accommodation”. (Administrative notice: Testimony of Dr. Reade in O’Loughlin v Boston Police Department, G1-06-286)

32. Dr. Reade previously testified in the Boutin appeal to the following regarding her purpose in psychological screening. She phrased her mission not in terms of identifying disqualifying conditions but instead: “to make sure candidates who are being sent to the Academy have the requisite psychological skills and resilience and the traits that would make them most likely to be successful and constructive police officers.” She also described her mission and purpose in similar language in the Coutts appeal. (See. Jessica Boutin v Boston Police Department, No. G1-06-139 & G1-07-317, page 25, allowed January 29, 2009, and Kelley Coutts v Boston Police Department, No. G1-07-277, allowed May 7, 2009. (administrative notice)
33. Dr. Reade, testified in this present appeal, and described her role, purpose and procedures in conducting her pre-employment psychological screenings for the BPD. Her aim is to do an evaluation that is tied to the characteristics and duties of the job being applied for. It is a “very job specific” evaluation. She was asked if she employed any guidelines for her screenings. She testified that she uses the “POST” guidelines promulgated by the State of California POST Commission or the “Peace Officer Standards & Training Commission”. This Commission traces its lineage back to the 1950’s for the establishment of hiring qualification standards, including psychological fitness, among other hiring requirements. The BPD offered Exhibit 21 into evidence, “California Commission on Peace Officer Standards and Training-Patrol Officer Psychological Screening Dimensions”. Dr. Reade identified Exhibit 21 as a fair and accurate representation of what she uses, and testified that she “uses these dimensions as part of her guidelines in the screening process.” The Appellant objected to the admission, on a variety of grounds and Exhibit 21 was admitted *de bene*, subject to latter written argument in the parties’ post-hearing proposed decisions. After consideration, Exhibit 21 is admitted only for the limited purpose of being a document that Dr. Reade claimed to have employed as part of her guidelines for her screenings. However, it is not sufficiently authenticated for completeness, accuracy and application etc. In any event, it is a document related to the State of California POST Commission intended for statutory application only in the state of California, with possible inconsistency or conflict, in application, with parts of the relevant Massachusetts laws, regulations, rules and standards (Dr. Reade, Ex. 21)
34. The “POST” guidelines were promulgated by the State of California POST Commission or the “Peace Officer Standards & Training Commission”. The Commission on Peace Officer Standards and Training (POST) was established by the California Legislature in 1959 to set minimum selection and training standards for California law enforcement. The minimum peace officer selection standards are set forth in California statutes: [Government Code Sections 1029 and 1031](#). Every California peace officer must be: Calif. Penal Code Section 13510 (a) gives POST the authority to establish minimum selection standards for peace officers employed by agencies that participate in the POST program. These peace officers must, at a minimum, meet the selection standards outlined in the

Government Code, and pass the POST selection requirements contained in [Commission Regulations 9050-9055](#) (pdf) prior to hire. These regulations include: Reading and Writing Ability Assessment (Regulation 9051), Oral Interview (Regulation 9052), Background Investigation (Regulation 9053), Medical Evaluation (Regulation 9054), and Psychological Evaluation (Regulation 9055). (Administrative notice, available at: http://www.post.ca.gov/Hiring/Peace_Officers/Selection_Standards.asp)

35. It is noted that the relevant Calif. Statutes (POST) [Commission Regulations 9050-9055](#) do comply with the Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA). It is also noted that the California regulations may allow for a psychological evaluation that can go beyond the detection of psychological disorders. (§ 9055(a)); Also with required sources of information for the psychological evaluation. (§ 9055(d)); Psychological Evaluation Reports in which the screeners rate candidates on a scale of A-F. (§ 9055(e)) and allowing the rejected candidate to submit a second opinion or independent evaluation before a final determination is made. (§ 9055 (f)) (Administrative notice, available at: http://www.post.ca.gov/Hiring/Peace_Officers/Selection_Standards.asp)
36. The BPD offered Exhibit 21 into evidence, “[California Commission on Peace Officer Standards and Training-Patrol Officer Psychological Screening Dimensions](#)”. Dr. Reade identified Exhibit 21 as a fair and accurate representation of what she uses, and testified that she “uses these dimensions as part of her guidelines in the screening process.” However, it is difficult for a layperson to envision that any Psychiatrist is capable of effectively addressing, measuring and evaluating all of the intricate and interrelated behaviors or traits outlined here in ten pages, in a single 1-hour clinical interview. (Dr. Reade, Ex. 21, reasonable inference)
37. Dr. Reade’s understanding of the nature and responsibilities of a police officer is through reading literature. She has spent **no** time with working police officers either on the beat or at the police station. (Dr. Reade; Ex. 7.)
38. In Dr. Reade’s report dated October 28, 2006, as grounds for the Appellant’s psychological disqualification, she states: “Although she presents with significant strengths, including a lively intelligence and an engaging personality, Ms. Crosby also demonstrates a history of concerning impulsivity and poor judgment in a variety of job related and interpersonal situations. In her interview with me, she had difficulty containing herself and **appeared mildly hypomanic**. With respect to her ability to function as a police officer, Ms. Crosby, in my opinion, would have significant difficulties because of her **vulnerability to impulsive decision-making and questionable judgment**. For these reasons, Ms. Crosby is currently found not acceptable.” (Ex. 8.)
39. In a [letter dated November 22, 2006](#) from BPD Human Resources Director, Robin W. Hunt, [the Appellant was informed](#), among other things, “that the results of her psychological screening indicate that she cannot adequately perform the essential

functions of the public safety position for which [she] applied and **a reasonable accommodation is not possible.**” The letter further provided “therefore you will not be appointed as a Boston Police Officer.” Where Appellant was being bypassed she was also notified of her appeal rights to the Civil Service Commission. (Emphasis added)(Exs. 9 and 20.)

40. In a letter dated November 22, 2006, the Department notified HRD that the Appellant failed to meet the psychological criteria for appointment as a police officer and that it was bypassing her for the position of police officer. Specifically, the Department stated that it was relying upon Dr. Reade’s second opinion report, concurred to by Dr. Marcia Scott, which psychologically disqualified the Appellant. (Ex. 10.)
41. On January 19, 2007, HRD accepted the Department’s reasons for bypassing the Appellant. (Exs. 11 and 20.) The Appellant filed this timely bypass appeal. (Ex. 20.)
42. The Boston Police Department did not produce any evidence regarding its exploration of or offer of or attempt to provide any “reasonable accommodations” to the Appellant, 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 9, 10, 11, exhibits and testimony).
43. Under the ADA, a disability is: (A) a physical or mental impairment that substantially limits one or more of the major life activities . . . (B) a record of such an impairment; or (C) **being regarded as having such an impairment.**.,(Emphasis added) 42 U.S.C. §§ 12102(2)(A) and Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000) (Administrative notice)
44. A conditional offer of employment is a legal term of art developed under the Massachusetts anti-discrimination laws, M.G.L. c. 151B, as well as the federal Americans with Disabilities Act (ADA). Specifically, under these statutes, an employer may not require that an applicant undergo a medical examination prior to making that individual a conditional offer of employment. Most relevantly, G.L. c. 151B provides: “An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that **an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job...**” G.L. c. 151B §4(16) (emphasis added, administrative notice)
45. HRD has developed in conformance with its policies and published a “Model Plan For Psychological Screening of Entry-Level Public Safety Positions” HRD’s stated goal of this Plan is: “The goal of this psychological screening program is to detect any serious

psychological disorders or characteristics that would render a candidate unable to perform with reasonable accommodation the essential functions of the public safety position for which the candidate is being considered.” It is also noteworthy that HRD’s Model Plan, at Section II Stage One, (A.) calls for the group administration of the MMPI test and several other named tests, of which the PAI test is not one. The HRD Model Plan requires that the Psychological Screener, at Section II Stage Two -Clinical Interview, (BPD’s 1st level screener) “...will examine the results of the psychological tests, review background information provided by the hiring department (concerning criminal convictions, relevant medical information, if any, and information from interviews with employers, teachers and associates) and conduct a clinical interview of the candidate.” The HRD Model Plan also lists one to three additional tests at Stage Two that the Psychological Screener may administer to further evaluate the candidate. The PAI test is not one of the three named discretionary tests. HRD’s Model Plan, at Section II Stage Three, (BPD’s 2nd level screener), requires that a board-eligible or board-certified psychiatrist perform certain duties and evaluate the candidate. The screening psychiatrist, at Stage Three is required to file a written, signed report. “*The report must describe why the candidate is unqualified for appointment as a public safety employee. Evidence substantiating this opinion must be supplied, and the report must explain specifically why the disorder prevents the candidate from successfully performing with reasonable accommodation the essential functions of the public safety position for which s/he was considered.*” Section III Responsibilities of the Appointing Authority at (6.) also requires the appointing authority to notify HRD with a written statement that the candidate has “... *been found unqualified... and that no reasonable accommodation is possible.*”(administrative notice: HRD “Model Plan For Psychological Screening of Entry-Level Public Safety Positions”)

46. The Personnel Administrator Rule (PAR) that applies to the appointing authority’s statement of reasons for bypass : “Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule, PAR.02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category. Such statement shall indicate all reasons for selection or bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. The certification process will not proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approves reasons for selection or bypass. PAR.08(3)
(Administrative notice)
47. The Commonwealth’s personnel administrator (HRD) has established Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel

HRD regulations, for police officers, establish two disqualifying categories of psychiatric medical conditions:

- “Category A Medical Condition” is a “condition that would preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others.” Category A “psychiatric” medical conditions include “disorders of behavior, anxiety disorders, disorders of thought, disorders of mood, disorders of personality”.
- “Category B Medical Condition” is a “condition that, based on its severity or degree, may or may not preclude an individual from performing the essential functions of a municipal police officer or present a significant risk to the safety and health of that individual or others.” Category B “psychiatric” medical conditions include “a history of any psychiatric condition, behavior disorder, or substance abuse problem not covered in Category A. Such history shall be evaluated based on that individual’s history, current status, prognosis, and ability to respond to the stressors of the job” and “any other psychiatric condition that results in an individual not being able to perform as a police officer.” (administrative notice:(HRD) Regulations for Initial Medical and Physical Fitness Standards for Municipal Public Safety Personnel).(Ex. 14,15)

48. 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, Ex. 14,15)
49. Dr. Reade did not testify that she found that the Appellant suffered from either a “Category A Medical Condition” or a “Category B Medical Condition”. Dr. Reade also did not state such findings or conclusions in her unfavorable psychiatric second opinion report of October 28, 2006. (Ex 8 and testimony of Dr. Reade)
50. The specific reasons proffered by the BPD for the bypass of the Appellant must be approved or accepted by the Human Resources Division (HRD) pursuant to G.L. c. 31 § 27, being more completely outlined and described in the relevant HRD policies, guidelines and PAR. The proffered reason for bypass was that the Appellant was deemed psychologically unfit for appointment as a Boston police officer. (Administrative notice, exhibits, stipulations and testimony)
51. On January 3, 2008, Dr. James Beck interviewed and performed an independent psychological consultation of the Appellant. (Ex. 16.)
52. Dr. Beck is an expert in the field of police psychological fitness for duty cases. Dr. Beck is a graduate of Harvard and Yale. He has taught at the Harvard Medical School for over thirty (30) years. In his nearly thirty (30) years of experience as a forensic psychiatrist, Dr. Beck has conducted numerous police fitness for duty interviews, which are virtually

identical to psychological pre-screenings. Dr. Beck has also had extensive experience working directly with police officers, particularly those in emotional distress, and therefore has vast knowledge regarding the emotional rigors and job duties required of police work. Notably, in addition to all of his expertise, Dr. Beck served as a consultant to the Human Resources Division (then the Personnel Administration) of the Commonwealth and participated in at least earlier versions of HRD's regulations with respect to psychological disqualifications. (Ex. 17; Beck)

53. Dr. Beck reviewed the Appellant's Recruit Application materials, the results of his MMPI-2 and the PAI, as well as the reports of Dr. Scott and Dr. Reade disqualifying the Appellant. In his report, Dr. Beck opines: "I find no evidence that the candidate has any mental disorder or behavioral characteristics that would significantly interfere with her performing the essential functions of a Boston Police Officer. There is no evidence of any symptomatic mental disorder, and no evidence of any pattern of conduct that would suggest a possible character or personality problem. To the contrary, not only is there an abundance of absence of evidence of mental disorder or character problem, there is abundant evidence of psychological health. In my opinion she is more than adequately qualified to be a Boston Police Officer and I believe that if given the opportunity she would prove to be a strong and valued member of the Boston Police Department." ²(Ex. 16, p. 2.)
54. Appellant was **not** "difficult to contain" during her interview with Dr. Beck. Appellant did **not** appear "hypomanic."³ (Dr. Beck.) Dr. Beck's report further states: "**She presented in a cheerful, pleasant, energetic woman who answered questions readily. She was very down to earth in her discussion of her work and personal life. Her affect is full range and appropriate. Her thought is quite clear.**" (Ex. 16, p. 8.) (Emphasis added.)
55. On December 31, 2007, Dr. Mark Schaeffer interviewed and performed an independent psychological consultation of the Appellant.⁴ (Ex. 18.)
56. Dr. Schaeffer is a licensed clinical and forensic psychologist. He has been performing psychological pre-screenings for police departments, including those in Watertown, Framingham, Lynn and Randolph, since 1980. **He has performed at least 500 to 700**

² Over the past 16 months Dr. Beck has evaluated 10 candidates for BPD who have appealed a rejection on psychological grounds. (Ex. 16, p. 8.) Dr. Beck agreed with Dr. Reade regarding 3 of these candidates. (Dr. Beck.)

³ Individuals suffering from hypomania exhibit grandiose or exaggerated ideas of their own abilities and status in the world. Individuals sometimes speak loud and fast. In an interview setting it is difficult to distinguish from mania and interview anxiety. Dr. Beck would look for evidence from that individual's background to substantiate whether his or her interview behavior was mania or anxiety. (Dr. Beck.) Dr. Reade admitted at hearing that there was **nothing** in Appellant's background to substantiate that Appellant was hypomanic. (Dr. Reade.)

⁴ The fact that Dr. Beck and Dr. Schaeffer's clinical interviews of the Appellant occurred nearly one (1) year after Dr. Reade's interview of the Appellant in no way weakens their conclusion or their findings with respect to the validity of Dr. Reade's conclusion. The clinical interview is intended as a mechanism to gather further data regarding a police candidate. Dr. Beck and Dr. Schaeffer reviewed the **same** MMPI-2 results, PAI results, and application materials including employment references which were before Dr. Reade during her psychological evaluation of the Appellant. The Appellant's life history and data had remained unchanged making the time lapses between the clinical interviews irrelevant.

screenings mostly as a 1st level screener. There is an advantage to having a Psychologist perform the screening due to their specialized training in interpreting testing results. (Ex. 19; Schaeffer.) Dr. Reade has conducted **only 250** psychological pre-screenings. (Dr. Reade.)

57. Based on Dr. Schaeffer's experience and statistical data, less than 5% (3-5%) of candidates are found unsuitable at the 1st level screening and about one-half of that number, (1.5-2.5%) are deemed to be unsuitable at the 2nd level screening. (Dr. Schaeffer)
58. Dr. Schaeffer reviewed the Appellant's Recruit Application materials, her results on the MMPI-2 and the PAI, as well as the reports of Dr. Scott and Dr. Reade disqualifying the Appellant. In his report dated April 1, 2008, Dr. Schaeffer opines: "In sum, Alicia Crosby is a 30-year old candidate for the Boston Police Department who, on both interview and test data, showed no signs of significant psychological or substance abuse problems which would interfere with her ability to carry out the duties of a police officer for the City of Boston. She has now been a corrections officer for over five years, working in a variety of stressful and difficult situations, and her performance to this point has been regarded as exemplary, with no issues raised about either her behavior or judgment on the job. She should be found Acceptable on the psychological pre-screening as a candidate for the Boston Police Department." (Ex. 18, p.7.)
59. Appellant was **not** "difficult to contain" during her interview with Dr. Schaeffer. Dr. Schaeffer's report states: "**In our interview, Ms. Crosby presented as bright and enthusiastic. She was coherent and contained, answering all questions put to her.**" Dr. Schaeffer further states: "There was nothing in her [employment] references or in her description of her past to suggest hypo-manic behavior or any pattern of behavior which might suggest that she has been going 'so fast' that she has a problem communicating or functioning. Indeed there was nothing to suggest significant psychological issues." (Ex. 18.)
60. Subsequent to Appellant's first bypass in 2006, the Appellant had been given an additional conditional offer of employment or a reconsideration of her application (second application) from the Boston Police Department and was bypassed again based upon the psychological disqualification of Dr. Julia Reade. (Appellant.)

E. Facts Related to Appellant's MMPI-2 and PAI Results

61. For purposes of psychological screenings, a candidate's MMPI-2 and PAI test results flag possible employment issues and can serve as a basis upon which the clinician conducting the clinical interview can explore with the candidate and gather data regarding whether those issues have had on that individual's ability to function in life. This exploration is done through a clinical interview as well as a thorough review of a particular candidate's background history. While having value, neither the results of MMPI-2 nor the PAI can serve as the sole basis for disqualifying a police candidate. (Dr. Schaeffer and Dr. Reade.)

62. Appellant's MMPI-2 and PAI results were not a contributing factor to Dr. Reade's decision to bypass the Appellant. (Dr. Reade.)
63. Appellant's MMPI-2 and PAI results were "unremarkable." (Dr. Reade, Dr. Schaeffer, and Dr. Beck.)
64. Dr. Reade's report states: "Ms. Crosby responded defensively on the MMPI, and "attempted to minimize her problems and to deny her faults, even minor ones that are exhibited by most people. She appears to have little psychological insight and is reluctant to engage in self-disclosure or self-evaluation." Content themes indicated that she "may be unusually sensitive to criticism. (Ex. 8.)
65. The MMPI-2 is comprised of 500 true-false questions or "items." MMPI-2 results "can serve as a useful guide for employment decisions in which personality adjustment is considered important for success on the job...the MMPI-2 should NOT be used as the sole means of determining the applicant's suitability for employment." (Ex. 5, MMPI-2 Report, p. 12.)
66. Taking the test in a defensive manner is typical of candidates taking the MMPI-2 for employment. Candidates want to "make a good impression" and put their "best foot forward." (Ex. 5, MMPI-2 Report, pg. 5; Dr. Mark Schaeffer.) The MMPI report noted: "This normal range personality pattern does not suggest any likely employment problems based on psychological maladjustment. This individual would probably have little trouble adapting to a wide range of work environments." (Ex. 5, MMPI-2 Report, p. 6.)
67. MMPI-2 computer generated interpretive reports contain so-called content themes. Content themes "may serve as a source of hypothesis for further investigations." (Ex. 5, MMPI-2 Report, p. 7.) Appellant's content themes show that "she may be unusually sensitive to criticism." *Id.* There is **no** evidence in Appellant's background history to support that she may be unusually sensitive to criticism.
68. Dr. Reade's report states: "The PAI results indicated moderate risk of job-related, integrity, anger management and substance abuse problems. Ms. Crosby endorsed 1 critical item related to verbal aggression." (Ex. 8.)
69. The PAI is comprised of 340 true-false questions or "items." PAI results "should be viewed as only one component of a comprehensive screening procedure that should also include at least one other psychological test based on normal personality functioning. A comprehensive personal history questionnaire and a structured interview focused on job-relevant behavior are recommended. The hiring authority's final screening decision should be based upon corroborating information gathered from multiple data sources." (Ex. 6, PAI Report, p. 1.)
70. There is **no** data to support that Appellant has had issues with integrity, anger management, substance abuse or verbal aggression. "In terms of her psychological risk rating factor (the probability that current applicant would be rated as "poorly suited" by

psychologists familiar with criminal justice), Ms. Crosby was in the “Low Risk” range at 10% risk.” (Ex. 18, p. 4; Schaeffer.)

71. The same three experts who testified in this appeal also previously testified in another appeal, on the same subject matter, Roberts v Boston Police Department, No. G1-07-282, decision dated September 25, 2008. In the Roberts appeal the following fact was found: “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, all the expert witnesses who testified in this case agree 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.” The foregoing is finding of fact 30, page 11 of the decision allowing the Appeal: (administrative notice: Roberts v Boston Police Department, No. G1-07-282, dated September 25, 2008. (*Testimony of Reade, Schaffer, Beck; Exhibits 6, 7 & 8*). It was also found in the Roberts appeal that: “The only expert psychologist qualified to interpret The Appellant’ MMPI-2 and PAI test results who testified was Dr. Mark S. Schaefer, a licensed clinical and forensic psychologist with approximately 30 years experience. (Id.)

F. Facts Related to Psychological Evidence:

72. Dr. Beck, Dr. Schaeffer and Dr. Reade agreed that the Appellant does **not** suffer from a psychiatric condition as defined by the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (“DSM-IV”).⁵ (Beck, Schaeffer, Reade.)
73. Appellant does **not** suffer from any of the psychiatric conditions as described by the HRD Regulations.⁶ (Ex. 15, pp. 37-38; (Dr. Beck and Dr. Schaeffer.)
74. A psychological pre-screener’s job is not to decide whether to hire a candidate for the position of police officer. Rather, a pre-screener’s job is to discern from the material presented whether that candidate **suffers currently** from a psychological condition which would interfere with her ability to carry out the duties of a police officer. (Dr. Schaeffer.)
75. In psychological screenings, employment history is a critical factor used in assessing whether a candidate poses a psychological condition which has interfered with the

⁵ The DSM-IV is a diagnostic manual that lists symptoms for all psychiatric disorders. It is used as shorthand for clinicians nation-wide to ensure that they are all on the same page with respect to diagnosing disorders. (Dr. Schaeffer.)

⁶ Those disorders listed as Category A medical conditions are based upon the DSM-IV and a candidate can only be disqualified for employment under Category A if they have a diagnosed mental disorder as found within the DSM-IV. Category B medical conditions, including sub categories (a) and (b), do not require as grounds for disqualification diagnosis under the DSM-IV, however, it must be shown that the candidate has a “psychiatric condition” either historically, subcategory (a), or presently, subcategory (b). A “psychiatric condition” is an aspect of behavior which has endured over time and has shown up for an individual in a range of forums. (Dr. Beck.)

applicant's ability to function well in a work setting and therefore may impair that candidate's ability to function in the position for which she has applied. If the past work is similar to the position in question the screener can use the candidate's past performance as an indicator of future performance. (Dr. Beck and Dr. Schaeffer.)

76. The Appellant's employment history in this case suggests that she does **not** possess any psychological conditions which have or would in the future interfere with her ability to function well as a police officer particularly where her previous employment has been similar to police work in nature. There is **no** evidence that she exhibited "questionable judgment" or "impulsive decision-making" in any of her past jobs. (Dr. Beck and Dr. Schaeffer.)
77. Dr. Schaeffer's report states: "She has worked for the past five-plus years as a correctional officer in the Suffolk County Sheriff's Department, handling a variety of situations ranging from calming agitated or explosive inmates, to liaising with other agencies. References supplied with her application, from a captain, a lieutenant, and the superintendent, were all glowingly positive, focusing on her intelligence, ability to handle diverse range of activities, and her very good interpersonal skills. There was no reference to her having problems in communicating, nor any suggestion that she has problems with impulsivity or poor judgment." (Ex. 18, p. 6.)
78. Dr. Reade's findings that the Appellant **does** suffer from a "vulnerability to impulsive decision making and questionable judgment" which would interfere with her ability to perform the essential functions of a police officer is **not supported by any data in Appellant's history**. (Dr. Beck and Dr. Schaeffer.)
79. Dr. Reade's bypass of the Appellant was grounded in Appellant's purported "failure to present a cognitive narrative" regarding several topics during the clinical interview. (Dr. Reade.) Such topics included: Appellant's use of sick leave at the Sheriff's Department; Appellant's decision to leave the State Police Academy in April of 2006; Appellant's undergraduate degree from Suffolk University; and Appellant's explanation for her arriving late to her interview with Dr. Marcia Scott. (Ex. 8; Dr. Reade.)
80. The psychological testing methods employed by Dr. Reade were flawed because she overly relied upon the Appellant's interview performance, and gave little to no weight to the Appellant's adult life functioning including relevant work history. (Dr. Beck and Dr. Schaeffer; Ex. 16, p. 8.)
81. It is natural for a candidate to be anxious or nervous during the interview portion of their psychological screening. This is particularly true for recruits who have had little to no contact with a mental health professional. (Dr. Reade and Dr. Schaeffer.)
82. Dr. Reade claimed that she tries to make her interviews as unstressful as possible by making it closer to a job interview than a detailed psychological interview. Dr. Reade is

also aware of her personal impact on the interviewee and tries to objectively weed out that subjective component or interpersonal aspect of the interview. (Dr. Reade)

83. Dr. Reade believed that the Appellant was not cooperative enough in the testing, to provide for an open evaluation. She also believed that there were suggestions in the test results related to sensitivity to criticism. She felt the Appellant was very defensive in her approach to the tests, which likely suppressed some results. (Dr. Reade)
84. Dr. Reade's interview impression of the Appellant was that she was: "early for the appointment, attractive, neatly dressed, personable, and likeable and an engaging young woman." (Dr. Reade)
85. However, Dr. Reade also found her to be: "so flustered and amped up", "so ramped up", "extremely animated", "pleasant but in a headlong rush", "a mile a minute", "high energy and hard to control" and that it lasted through the interview. She was unable to determine whether it was an indication of "bipolar" or being "anxious" due to so much time spent trying to tease out a factual narrative regarding the knee, sick time, schooling and the State Police Academy." (Dr. Reade)
86. Dr. Beck states in his report: "...[t]he fact that a candidate makes a poor impression on an interviewer is secondary information that must be evaluated in the context of overall life functioning. The interview is a two person situation, and it is always possible that the interviewee is responding to something in the situation, e.g., knowing that rejection is likely, or to something about that the interviewer that we can not evaluate..." (Ex. 16, p.8.)
87. In conducting his own psychological pre-screenings, Dr. Schaeffer gives **some** weight to a candidate's performance in an interview; however, he is cautious not to draw too much from something small or insignificant. Dr. Schaeffer has contacted employers or investigators when he was unsure about something he saw in an interview to "see what was going on there" and to confirm what he saw. (Dr. Schaeffer.)
88. The proof of whether a candidate has a psychological condition which would interfere with their ability to perform the functions of a police officer lie in how that candidate has functioned in the world. Appellant at the time of her bypass was nearly 30 years old and if she had a psychological condition it would have manifested itself somewhere in her personal or work life. Dr. Reade puts too much emphasis on the clinical interview of the BPD screening process and such emphasis is fatal to her conclusion because there is no data to support her concerns regarding judgment and impulsivity purportedly observed during the clinical interview process. If Dr. Reade was unable to get a clear picture of Appellant's employment and background history during their clinical interview it was incumbent upon Dr. Reade to seek out additional data through contacting BPD, other sources and Appellant's references. (Dr. Schaeffer.)
89. Dr. Reade interviewed the Appellant on September 5, 2006. At that interview, Dr. Reade was aware of the fact that the Appellant had been admitted to the State Police Academy

but had left the Academy shortly thereafter, due to a knee problem, in April, 2006. (Ex. 8, Dr. Reade). The Appellant had previously completed the required State Police processing, after receiving a conditional offer of employment from the State Police on or about August 29, 2005 (Ex. 24, Appellant). The Appellant passed the “PAT” physical abilities test, a 1.5 mile run conducted on September 10, 2005, the medical evaluation on September 28, 2005, the oral interview and obstacle course conducted on October 4, 2005 and the psychological screening conducted on October 7, 2005. (Ex. 24, Appellant). The State Police psychological screening is similar to that of the BPD, which includes a review of records, a series of written tests and an interview. (Ex. 24, Appellant) The Appellant passed all of the State Police requirements, which also included a background investigation. (Ex. 24, Appellant). She entered the State Police Academy in the class which began on Monday, April 3, 2006. (Ex. 25, Appellant)

90. Dr. Reade did not attempt to contact anyone at the State Police, either directly or indirectly, to review their records and other information regarding the Appellant, including her psychological screening, medical and academy departure records, despite the BPD having the appropriate waiver of rights and releases of information signed by the Appellant. Dr. Reade did not otherwise review such records. (Exhibits and testimony, Dr. Reade)

Appellant’s Use of Sick Leave at the Sheriff’s Department

91. Dr. Reade’s report states: “Ms. Crosby gave a confusing account of her misuse of sick time, stating that she could use her sick time for weddings and funerals, and adding defensively, ‘plus being around the jail, you get sick easily.’ She then acknowledged that she frequently was not sick when she took time off, noting that she had wanted to be close to her grandmother during her terminal illness, and later, that she had wanted to drive with her grandfather to Florida. She could not remember how many days she had taken.” (Ex. 8.)
92. Dr. Reade saw in Appellant’s file a letter authored by the Appellant stating, in part: “Please be aware that I have not been in violation of Suffolk County Sheriff’s Department’s Managing Attendance Policy (MAP). The contributing factors to my use of ‘undocumented sick time’ can be attributed to my Department’s seniority based system for both shifts and days off. This system did allow for discretionary use of ‘undocumented sick time’ that would allow junior officers such as myself to meet family obligations that the seniority based system did not allow for.” (Ex. 23, Appellant.)
93. Dr. Reade has **no** personal knowledge regarding the Suffolk County Sheriff Department and their sick leave policies. Dr. Reade has **never** worked at a prison. Dr. Reade did **not** contact the Suffolk County Sheriff Department’s to discuss their sick leave policies or the Appellant’s purported “confusing account of her misuse of sick time.” (Dr. Reade.)
94. Appellant used 44 sick days between the years 2003 to 2005 and often “banged” in on weekends because she worked weekends. Appellant used sick time for illness and injury.

Appellant, however, also used sick time to care for her dying grandparents and once in 2004 to attend a wedding.⁷ Appellant used sick time for family obligations when she was not unable to use vacation or personal time due to seniority and bidding process for shifts and time off. In 2003, 2004 and 2005 Appellant worked a fixed work schedule which included all weekends. Appellant reported this sick leave use on her BPD application. (Testimony of Appellant.)

95. The Suffolk County Sheriff's Department gives corrections officer 12 sick days each year. They can be carried over into the next year and there is no cap on sick leave accumulation. Employees must present sick notes to justify absences. However, each employee is entitled to take 2 unexcused absences each quarter (3 months) for a total of 8 unexcused absences per year. 90% of corrections officers take their 2 unexcused absences per quarter. 12, 13 and 14 sick days per year is the norm and not excessive under Suffolk County Sheriff's Department's standards and use on weekends is not an issue. There is an informal practice condoned by command staff of corrections officers using their 2 unexcused absences to take care of family obligations that they would otherwise not be able to attend to because of their work schedule which always involves weekends and a shift/day off bidding process which disfavors junior corrections officers. (Lt. Gorman and Appellant.)
96. The Department has **never** disciplined a corrections officer for using sick time to attend to a family obligation. The Department has **never** disciplined the Appellant because she used sick time for family obligations. (Appellant & Lt. Gorman.)
97. After BPD initially bypassed Appellant because of her sick leave usage at the Sheriff's Department the Appellant immediately stopped using sick time for family obligations and at the time of her second application to BPD (the subject of this appeal) and 2006 interview with Dr. Reade the Appellant had used **no** sick time. (Appellant; Ex. 2.)
98. Dr. Reade admitted that she did not receive any information from the Sheriff's Department regarding any problem with the Appellant's use of sick leave. The only information she received regarding a problem with sick leave use at the Sheriff's Department was from Dr. Scott's report. (Dr. Reade)
99. Neither Dr. Beck nor Dr. Schaeffer had problems during their clinical interviews with Appellant understanding her explanation of her sick leave usage while with the Sheriff's Department or her explanation of the Department's practices with respect to sick leave usage. (Dr. Beck and Dr. Schaeffer; Ex. 18, pp. 2, and 6; Ex. 16, p. 6.)
100. Dr. Schaeffer's report states: "In this interview, Ms. Crosby stated that the use of sick time was due to both her being ill, as well as some use of sick time to attend other functions. Ms. Crosby clearly understood that while she was not formally disciplined for "excessive" use of sick time, her use of multiple sick days in a three year period had

⁷ Appellant agrees with Lt. Gorman that using sick time to attend a wedding was crossing the line. Thus, Appellant's use of sick time to attend a wedding ended with her one instance back in 2004. (Appellant & Lt. Gorman.) Using sick time to attend a wedding is not poor judgment but rather "youth." (Lt. Gorman.)

consequences for her application to the police department, and this process as well. She was empathetic in both this interview and in a letter which she submitted in 2006, that this would not be a problem in the future. As far as can be determined, this had not been an on-going issue, nor was it cited by her current employer.”⁸ (Ex. 18, p. 6.)

101. There is nothing wrong with Appellant’s character where she was using sick leave in accordance with the Sheriff’s Department’s practice. (Dr. Beck.)

Appellant’s Decision to the Leave the State Police Academy in April of 2006

102. **Dr. Reade’s report states:** “When asked about her decision to leave the State Police Academy in April 2006, Ms. Crosby reported that she “got nervous” about a “possible knee injury” related to pain she felt while running, but could not provide a clear account of her actions. In response to painstaking and very specific inquiry, it appeared that Ms. Crosby impulsively left the first academy without consulting a physician about her knee. She then **intimated** that she left the first academy because she hoped that she would be accepted by Boston, and the screening process for Boston overlapped with the timeframe that required her to be in the State Police Academy.” (Emphasis added) (Ex. 8.)

103. Dr. Reade eventually admitted on cross-examination that Appellant **never** told her that she left the State Police Academy without first consulting with a physician. (Dr. Reade.)

104. The Appellant did **not** leave the State Police Academy impulsively and without first consulting a physician. On August 29, 2005, the Massachusetts State Police Academy gave Appellant a conditional offer of employment. (Ex. 24.) She received this conditional offer around the same time that she submitted her first application to BPD. (Appellant.) On March 10, 2006, Appellant was appointed to the State Police Academy. (Ex. 25.) The Appellant entered the Police Academy on April 3, 2006. (Appellant.) She entered the Police Academy with a pre-existing right knee injury, bursitis, which she had treated with physical therapy and cortisone shots. *Id.* Appellant’s right knee injury is well documented by her surgeon Dr. Lars Richardson’s notes. (Ex. 28.) The Appellant left the State Police Academy within two weeks because her right knee was swollen and she could not run. (Appellant.) She was seen by State Police medical staff and they

⁸ Dr. Beck’s report states: “She acknowledged that she had used sick time while working at the Sheriff’s Department when in fact she had not been sick. She took time to be a bridesmaid when she was not able to get vacation. When her maternal grandmother was sick she went to the hospital and stayed with her until she died. Her paternal grandfather was diagnosed with cancer and he moved in with her and she cared for him for a period of time. There were periods when he did not sleep and she was up all night and got exhausted. She used some sick time for that. The remainder of her sick time she said related to being sick especially when she hurt her knee. She noted that she had never been reprimanded or disciplined for her use of sick time. Comment. Informal discussion with the Sheriff’s Department confirms that it is widely understood within the Department that a reasonable use of sick time when vacation time is not available is an appropriate way to deal with the need for time off. The department was very happy with Ms. Crosby’s work, and personnel administration was not in the least concerned about her use of sick time. Of note, the sick time related primarily either to her time caring for ill elderly relatives or for when she herself was either sick or injured.” (Ex. 16.)

advised her to leave the Academy and take a medical deferment. *Id.* Appellant consulted with Dr. Richardson on the telephone and he advised her to leave the Academy and take a medical deferment. *Id.* Appellant had to see a State Police physician prior to receiving a medical deferment which she ultimately was granted. (Appellant.) The Appellant secured for this proceeding a letter dated April 9, 2008 from the State Police confirming her medical deferment and that in the event of another academy class she would be given full consideration for employment. (Ex. 26.)

105. On June 9, 2006, the Appellant saw Dr. Richardson. He recommended she undergo surgery on her knee. (Jx. Ex. 28.) Dr. Richardson also recommended a more conservative alternative, physical therapy. (Testimony of Appellant.) Appellant decided to undergo physical therapy and hold off on surgery.⁹ *Id.* Appellant had recently made her second application (or reconsideration) to BPD (the subject of this appeal) and she was hopeful that her knee would get better and that if she were hired by BPD she could withstand the rigors of the Boston Police Academy in the fall. *Id.*
106. In connection with her reapplication or second application to BPD (the subject of this appeal) Appellant disclosed her knee injury, her departure from the State Police Academy and provided BPD with **all** of Dr. Richardson's medical notes. (Appellant; Exs. 27 and 28.)
107. In connection with her second application to BPD (the subject of this appeal); the Student Officer Application was signed by the Appellant and her signature notarized on December 27, 2005. She also swore and verified the contents by signing the application before the BPD Investigator on December 28, 2005. (Exs. 1 and 20.)
108. The Appellant submitted her signed and acknowledged her BPD Personal Data Questionnaire on August 12, 2006. (Ex. 4)
109. Dr. Reade **never** requested to see Appellant's medical records prior to formulating and publishing her reported opinion of the Appellant's psychological unfitness for the position of police officer, on October 28, 2006. However, sometime in August-September, 2008, between the two dates on which Dr. Reade did testify at this hearing; she did contact BPD's Occupational Health, regarding the Appellants records. Dr. Reade testified in chief on August 26, 2008 and in rebuttal on November 4, 2008. (Dr. Reade.)
110. In her BPD Personal Data Questionnaire, dated August 12, 2006, Appellant refers to her departure from the State Police Academy as due to a "possible knee injury" (Ex. 4.) Appellant's use of the word "possible" relates to her state of mind of the time she left the State Police Academy in April of 2006. The Appellant knew that her knee was swollen and that she could not run, however, the Appellant was not certain at that time whether her injury was new or was a continuation of her pre-existing knee injury, bursitis. (Appellant.)

⁹ In February of 2007, when all else failed, Appellant eventually received surgery on her right knee. (Appellant.)

111. The Appellant **never “intimated [to Dr. Reade] that she left the State Police Academy because she hoped that she would be accepted by Boston, and the screening process for Boston overlapped with the timeframe that required her to be in the State Police Academy.”** Appellant was aware when she entered the SP Academy that she had been bypassed by the BPD, since her friends had told her that they were starting the BPD Academy on the same date she started at the SP Academy. When Appellant entered the State Police Academy in April of 2006, the BPD had simultaneously begun their spring police academy that same day. Appellant had applied for this class (her first application) but had been bypassed based upon her background check. (Appellant) Additionally, in April of 2006 BPD had not yet started processing a new recruit class. Appellant did not reapply but actually was being reconsidered as her second application to BPD (the subject of this appeal) until late summer of 2006. She actually learned that the BPD was reconsidering her application at the beginning of August, 2006. (Ex. 3, Appellant.) However, it appears that due to the short interval between the two successive BPD classes, that the Appellant’s second application or reconsideration was expedited. She had applied for the first class, been bypassed and was being reconsidered for the second class, by the BPD. The Appellant’s BPD Student Officer Application is voluminous, detailed and an onerous burden to complete accurately and timely together with all the required supporting documentation. The BPD appears to have relied on Appellant’s single application for her processing for both classes. (reasonable inferences, Ex.1, 20)

112. Dr. Reade is a very bright and accomplished professional as evidenced by her very impressive resume and testimony. (Ex. 7, admin. notice) Her testimonial proficiency and adeptness at handling cross-examination displays and affirms her intellectual and linguistic skill. She is equally facile with common or colloquial expressions as she is with medical and psychological terms. It was sometimes burdensome for the cross-examiner to get a simple, direct answer to a specific question which could have been answered- yes or no. Dr. Reade would usually reply in calm circumlocution and/or repetitious verbosity to the cross-examiners increasing frustration. However, Dr. Reade usually remained unflappable during the protracted cross-examination, as if the cross-examiner would eventually tire and move on. The cross-examiner repeatedly tried to flesh out the specific basis and source for ***Dr. Reade’s opinion*** that the Appellant: “...demonstrates a history of concerning impulsivity and poor judgment in a variety of job-related and interpersonal situations. In her interview with me [Dr. Reade], she had difficulty containing herself and appeared mildly hypomanic.”(Ex. 8), the basis for the bypass. Dr. Reade resisted, evaded, or avoided the cross-examiner’s clear and purposeful intent by a variety of methods, including: Using subtle or indefinite terms to create uncertain inferences, descriptions or issues, Giving an overly broad, lengthy, repetitive, shaded or uncertain answer to a question requiring simplicity and specificity e.g. –yes or no, Generalizing when particularity was called for and vice versa, Blaming the Candidate for any mistake or uncertainty by her providing unclear, confusing and/or contradictory information, Willful ignorance or failing to seek additional records and information to fill the informational void, or resolve the claimed confusion, so that her opinion or testimony could then remain as undocumented as factually or chronologically unsound or contradictory, and Exaggeration or hyperbole- usually with a negative connotation or inference regarding the Appellant, etc. The cross-

examiner diligently attempted to discern what Dr. Reade's issues or concerns were based on the specific language and content of Dr. Reade's report and direct testimony. (Ex. 8) For instance, Dr. Reade was repeatedly asked how the Appellant's response to the slow leak/flat tire situation and being late for Dr. Scott's appointment was an example of poor decision making. Dr. Reade repeatedly avoided any definitive answer by a variety of methods including some of those listed above. She testified that it was not just her decision making but also her reporting. "The facts appear to shift", were "discrepant", "sort of an evolving story." Dr. Reade refused to opine on the Appellant's actual decision or any alternative situational choice as being good, bad or indifferent; she testified "...**I'm not an expert on how people solve their slow leaks and their interview obligations and it's a stressful circumstance...**" Dr. Reade also relied on the claimed difficulty of the interview to shift blame for any non or miscommunication to the Appellant; by testifying that "**among other things, was that it took many, many, many, many specific, painstaking questions to tease out the narratives that I ultimately put in my report. And it was impossible for me to get a clear, spontaneously generated narrative from [her] about what the difficulty had been and how she had thought through the problem. So, on one hand it was like pulling teeth and the second one that it kept shifting.**" Dr. Reade's evasive posture was further exhibited on the issue of Dr. Reade's claiming in her report (Ex.8) that the Appellant "*intimated*" that she left the State Police Academy, due to a knee problem, without first consulting with a physician with the expectation of enrolling in the preferred BPD academy. Dr. Reade claimed that this was another example of her impulsivity or poor judgment. Q.- Did she tell you that specifically? A.- "**Ms. Crosby was exquisitely vague and confusing**"... *interruption* Q.- focus on my question? A.- "As best as I could tell from my multiple questions, Ms Crosby did not consult with a physician specifically about her knee before she left the academy on April 11, 2006." A.- "Specifically at the time, yes" Q. *Repeated.* Did she tell you that, specifically? A.- "No, she told me,... she didn't consult with a physician. (interr) ... a very confusing story about having consulted with a physician, having undergone some kind of diagnostic tests. She gave me confusing information about the nature of the injury and then she gave very confusing information and contradictory information about whether she has consulted a physician within the academy, whether she had her own physician, whether she had gone to a hospital. **It was impossible for me to get a clear understanding of her decision making** regarding her departure eight days into the academy for problems related to her knee, other than-her knee hurt." Dr. Reade repeatedly relied defensively, on the Appellant's inability to relay a clear and coherent explanation of a given issue or event during the interview. However, in a series of questions, she was asked why she had not followed up the interview, with a telephone call to BPD's Occupational Health, to the State Police, or to the Appellant to clear up the confusion, she answered, I don't remember if I called occupational health, I didn't call the State Police and finally regarding the Appellant: A.- "**I'm not a Detective, I'm a Psychiatrist...**" This part of her answer was blurted out spontaneously in a defiant and sarcastic manner, (tone, inflection and facial expression). Dr. Reade then immediately reverted to her normal, calm and controlled demeanor to complete her answer, which was a long repetition of the Appellant's inability to provide a clear coherent narrative. Dr. Reade responded to another question regarding decision making: A.- "**I think you are parsing out one part of what is a much larger ... area of**

concern...” Dr. Reade was asked a hypothetical question, on a change of her opinion if she had seen medical records documenting the injury and medical consultation prior to leaving the academy. She answered: A. **“...I would have to see those records before I could answer...”** At another point in her cross-examination she answered: A.- **“It’s more complicated than that and I apologize for being so long-winded, but I really can’t answer it as a yes-no question.”** Dr. Reade was asked on cross-examination, regarding leaving the SP Academy, if she had considered the interpersonal dynamic or the way questions are asked, affecting the interviewee. The question was asked with the word reticent mistakenly used instead of cognizant. Dr. Reade and this hearing officer were instantly aware of this slip, as it is a commonly occurring event in hearings. Dr. Reade then had the choice of either ignoring the slip-up, or highlighting it in her answer. She chose to highlight it as follows: A.-**“I’m not reticent of that, I’m cognizant of it.”** Dr. Reade considers cross-examination as a contest of control, at which she is very adept. I find Dr. Reade to be a resistant, if not an evasive witness. The rendition of testimony here is only part of Dr. Reade’s testimony on cross-examination and intended as examples. (Dr. Reade, testimony and demeanor, Exhibits, reasonable inferences)

113. Dr. Reade’s minimalization or complete omission of the Appellant’s established considerable educational, employment and personal history as a foundation for her own opinion is inexplicable. Dr. Reade is obligated to substantiate a Category B Medical (psychiatric) condition by the showing of a “history of any psychiatric condition, behavior disorder or substance abuse problem.” HRD regulations and its Model Plan, require that “such history shall be evaluated on that individual’s history, current status, prognosis, and ability to respond to the stressors of the job...” Dr. Reade failed to even attempt to corroborate her assessment by contacting any of the numerous personal and other references she provided on her BPD application. She failed to contact BPD’s Occupational Health or the Recruit Investigation Unit. She failed to contact the State Police Academy where the Appellant had passed all of the entrance requirements including the psychological screening. Dr. Reade could have also obtained records regarding the knee injury from the SP Academy. Dr. Reade’s failure to make a reasonable inquiry or search for information to support her opinion of psychological unfitness is a dereliction, given the serious nature of the matter, a career being at stake. Dr. Reade’s characterization and portrayal of the Appellant’s behavior and statements during the interview, in her testimony and her reports appear to be incongruous, sometimes indefinite, subjective and/or misleading; certainly contrary to what the Appellant’s background information, personal references and her presentation and demeanor at this hearing would support. (Exhibits, demeanor and testimony)

114. Dr. Reade’s demeanor is that of a well practiced and experienced psychiatric professional. However, it is difficult to reconcile her alleged critical observations and her extremely negative characterizations of the Appellant’s behavior and presentation during her interview; with the Appellant’s calm and appropriate demeanor at this hearing. Dr. Reade chose to assess and interpret the Appellant’s MMPI-2 and the PAI test results on her own, without the recommended assistance of a specially trained psychologist. Dr. Reade was aware that the Appellant is well educated, engaging and likable with a blemish-free background and employment history. Dr. Reade was also well aware that

her interviews cause anxiety in most candidates, as a career was on the line. Yet, Dr. Reade gave an opinion of unfitness at the conclusion of her psychological screening evaluation. Dr. Reade gave this opinion of unfitness primarily based on her interview/evaluations of the Appellant. It is inexplicable and unjustified for Dr. Reade to have formed this dire and incongruous opinion of the Appellant, without ever attempting to corroborate them, by contacting background references familiar with the Appellant and the other sources of data previously cited. Alternatively, Dr. Reade could easily have audio-video taped her interview with the Appellant, to corroborate her observations and opinions. The lack of an accurate interview record also denied the Appellant evidence to support her version of the interviews. The lack of an accurate record of the interviews also hampers the Commission's ability to independently determine facts related to it. Dr. Reade had an affirmative duty to specifically substantiate her opinion by reference to the Appellant's background history. This failure to corroborate was Dr. Reade's choice, since the Appellant had provided a volume of background documentation with accompanying releases and waivers, as required by the BPD. I do not find Dr. Reade to be a credible or reliable witness, especially regarding her subjective rendition of the interview. I found this finding partly on Dr. Reade's resistant testimonial style and repetitive omissions regarding any actual historical corroboration and substantiation of her grave and consequential opinion of unfitness. Dr. Reade's opinion and conclusions were substantially subjective determinations of the degree or intensity of the Appellant's alleged traits or behavior patterns, as exhibited during the interview. I find Dr. Reade's testimony and the opinions and documents she authored to be insufficiently factually supported by reliable and credible evidence in the record. (Exhibits and testimony, reasonable inferences, testimony and demeanor of Dr. Reade)

115. Subsequent to leaving the State Police Academy in April, 2006 on a medical deferment due to her knee, the Appellant did seek additional, medical diagnosis and treatment for it, including physical therapy received in the summer of 2006. She was then notified by the BPD that her application was being reconsidered for the 2006 class (second application). She completed and submitted her signed BPD Personal Data Questionnaire as directed, on August 12, 2006(Appellant, Ex. 4). She completed and signed her BPD Health History Questionnaire on August 2, 2006. (Ex. 31 impounded). She also completed and signed a detailed BPD Medical History check list form on the day of her BPD medical examination, August, 30, 2006. The attached BPD Medical Examination form was also completed and signed by the BPD medical staff person, on the day of the examination. (Ex. 31 impounded). The Appellant also signed on August 30, 2006 a BPD Medical Release of all information regarding her knee, addressed to her treating physician, Lars C. Richardson, M.D. (Ex. 27). Dr. Richardson responded by providing all of his and other providers' relevant medical records. (Ex. 28). Appellant did eventually receive surgery on her knee in February, 2007. (Appellant)
116. Dr. Beck and Dr. Schaeffer focused in their interviews with the Appellant on her explanation regarding why she **left** the Academy because that is what Dr. Reade criticized in her report. (Dr. Schaeffer.)

117. Neither Dr. Beck nor Dr. Schaeffer had problems during their clinical interviews with Appellant understanding Appellant's explanation for leaving the State Police Academy in April of 2006. Appellant provided them with a "coherent" and "cut and dry" explanation which was supported by medical documentation which, at least, Dr. Schaeffer reviewed. (Dr. Beck and Schaeffer; Ex. 16, p. 7; Ex. 18, pp. 2-3, and 6.)
118. Dr. Schaeffer states in his report: "Dr. Reade, in her interview with Ms. Crosby, was concerned at Ms. Crosby's inability to clearly articulate both the circumstances under which she left the Academy, and whether Ms. Crosby had followed proper procedures in her request to leave (e.g. seeing a physician, establishing the nature of her injury.) In our interview, Ms. Crosby was quite clear as to why she left the Academy, and that the Academy did not feel that she violated procedure or behaved in an impulsive manner in her departure. If Ms. Crosby is not giving an accurate picture of her departure from the Academy, then this would be a source of concern raising questions about her ability to honestly accept responsibility as well as her maturity and judgment. If on the other hand, there is documentation that Ms. Crosby had an injury, sought appropriate medical care, and it was determined she could not complete the Academy at that time for medical reasons, then speculations as to what this incident suggested about her character would appear to be unwarranted. It is my understanding that there is clear documentation corroborating her injury and the reason for her departure." (Ex. 18, p. 6.)

Appellant's Undergraduate Degree

119. Dr. Reade states in her report: "Ms. Crosby also gave an oddly vague account of her college career, stating that it took her five years to complete her Bachelors Degree in 2001. When asked about this, Ms. Crosby stated, 'I think I got mono in my Sophomore year...Plus I went abroad and they didn't have all the classes I needed...I think I finished my classes in December.' She did not remember why she did not know what courses were offered in the foreign academic program ahead of time." (Ex. 8.)
120. Dr. Reade **never** reviewed or requested to review Appellant's college transcript. (Dr. Reade & Appellant.)
121. The Appellant took one additional semester of courses before completing her Bachelor's Degree in December of 2000 and receiving her diploma in spring of 2001. She got mono in the spring of her freshman year or fall of her sophomore year of college. Appellant reduced her course load from 5 classes to 4 classes per semester. She took 1 semester abroad in Spain. Appellant knew before registering for her semester abroad that several of the courses she needed to graduate were not being offered in Spain. Appellant, however, went to Spain for the experience. The Appellant was **not** asked nor did she report to Dr. Reade that she haphazardly went to Spain without knowing what courses were being offered in that program. Appellant and Dr. Reade apparently had a miscommunication during their interview regarding Appellant's semester abroad. Appellant understood Dr. Reade to be asking her why the university did not offer in Spain the courses she needed to graduate. Appellant, of course, answered that she did not why the university chose to offer the courses in Spain that it did. (Appellant.)

122. Neither Dr. Beck nor Dr. Schaeffer had problems during their clinical interviews with Appellant understanding her academic background nor are either concerned from a clinical perspective that it took the Appellant 5 semesters instead of 4 semesters to receive her Bachelor's Degree. (Dr. Beck and Schaeffer.)

Appellant's Explanation for Her Arriving Late to Her Dr. Marcia Scott Interview

123. Dr. Reade states in her report: "She stated that she expected to be bypassed by Dr. Scott because she had 'car trouble' and was twenty minutes late for their appointment. When asked specific questions about her car problems, Ms. Crosby first reported that she had had a flat tire. With further questioning, she stated that her tire had not been flat, but appeared to have a low leak, so she drove back to the police headquarters in a different car. She presented this as an imperative and out of her control. **When I pushed her**, she responded that her home 'wasn't that far away,' and then acknowledged that she had chosen to be late for her interview because she 'was afraid after the interview I'd have a complete flat when I came out. So instead I went home and switched cars.'"(Emphasis added) (Ex. 8.)

124. The Appellant was late for her interview with Dr. Scott. She left her house and shortly thereafter noticed that her steering wheel had become "tight." She checked her car and noticed her tire was low and near flat. Appellant turned around to switch cars because her house was closer than BPD headquarters. She did not want to risk breaking down on the side of the road or coming out from her interview to a flat tire at BPD headquarters. The Appellant after getting a new car hit unexpected traffic on Melnea Cass Blvd. and was 15 minutes late for her interview with Dr. Scott. She called Dr. Scott from the road to alert her that she was going to arrive to her interview late because of car troubles. (Appellant.)

125. Neither Dr. Beck nor Dr. Schaeffer had problems during their clinical interviews with Appellant and understanding her late arrival to Dr. Scott's interview nor are either concerned from a clinical perspective regarding Appellant's decision-making skills on that day. (Dr. Beck and Schaeffer.)

126. On cross-examination, Dr. Reade refused to opine whether Appellant's actions in turning around to get a different car and running late for Dr. Scott's interview exhibited good or poor judgment skills. She stated her clinical concern lye in Appellant's giving different stories regarding this event to Dr. Scott and Dr. Reade during her clinical interviews. (Dr. Reade.)

G. Facts Related to Dr. Scott, Her Interview Notes, and Her Failure to Testify

127. BPD introduced as an exhibit Dr. Marcia Scott's purported notes from her interview with Appellant. These notes recount purported conversations which occurred between Appellant and Dr. Scott during their clinical interview. (Ex. 22.) The Commission accepted these notes de bene and subject to further argument regarding their admissibility.

128. **Dr. Reade's report states:** "Dr. Scott raised concerns that Ms. Crosby 'has difficulty facing criticism,' and that 'her responses and decisions, at times, reflect rule avoidance and poor judgment inconsistent with her age and achievements. When confronted with inconsistencies she cited memory problems and gave confusing, incomplete, sometimes inaccurate reports.'" (Ex. 8.)
129. Dr. Scott's notes state: "[Appellant] said she was at the State Police Academy (for two weeks) last year but left because of knee surgery. She added that she hadn't been injured, it 'just came up, a little problem.' She said she did not return to the Academy because she was applying here... Asked why she hadn't returned to the State Police she said she prefers to work here and added, smiling tightly, 'they cut off all of your hair, shave it, so we're uniform, they're tough, they sit you down and yell and yell at you, I mean scream.'"(Ex. 22, de bene.)
130. Appellant denies making these statements to Dr. Scott during their clinical interview. Appellant told Dr. Scott that she left the State Police Academy two weeks in to it because of a knee injury. She never told Dr. Scott that she did not return to the Academy because she was applying at BPD. Dr. Scott asked Appellant why she was applying to BPD if she was on medical deferment from the State Police Academy. Appellant answered that she had wanted to be BPD police officer for as long as she could remember and would be happy with either job. She never told Dr. Scott that she did not want to return to the State Police Academy because they cut her hair and yelled at her. Dr. Scott asked Appellant why the State Police cut her hair. Appellant responded that the State Police wanted uniformity and there was no time to fuss with hair anyway. Appellant testified that getting a short haircut at the academy was actually a running family joke and light hearted, especially with her brother and father who had been through it. Dr. Scott made an off handed comment to Appellant about red heads going gray early, which Appellant assumed was an "ice-breaker" at the interview. Dr. Scott asked the Appellant what the State Police Academy was like and whether they yelled at recruits. Appellant responded that they yelled at recruits all day because they want to test recruits to see how they respond under stressful situations. (Appellant.)
131. Dr. Scott's notes state: "Concerning her delay for a flat tire, I asked her where her car was now. She said it was at home. I asked how she got there with a flat. She said calmly, with a smile, 'Well it was just a little flat.' Asked how she knew she had a tire problem she thought a few minutes and said it 'was wobbly.' Asked what she did when she noticed it she said she drove home and called AAA. I asked who was home to receive AAA. She said 'me.' Asked if they might have come and gone before she got home. She said she hadn't called them yet." (Ex. 22, de bene.)
132. Appellant denies making these statements to Dr. Scott during their clinical interview. Appellant told Dr. Scott that she had left her house and shortly thereafter noticed that her steering wheel had become "tight" and her tire was low and near flat. She never told Dr. Scott that her tire was "wobbly." The Appellant did not tell Dr. Scott that

she called AAA once she got to her house. Dr. Scott asked Appellant if she was going to call AAA when she completed their interview and returned home and, if so, who would be home to receive AAA. Appellant responded that she intended to call AAA once she got home from their interview and that she would be available to receive them. (Appellant.)

133. Dr. Scott's notes state: "Ms. Crosby said she had been bypassed by BPD for sick days she had taken while at the State Academy. She did not report the pattern of around 15 days a year for the past three years until I found it in the record. Asked about that she said 'she took time because a friend was shot. You don't get family time for the wake and funeral.' Her letter in file, however, explains that she took it as sick time because she did not have the seniority to get the time off. I asked if she understood that taking sick time when not sick was a problem for others at work. She looked puzzled. Asked why those obligations had interfered with work since she works evenings she said, 'Well I wouldn't want to go to work crying.' I asked if she had been emotionally sick. She did not reply. I asked if she was aware how an unplanned day in the prison affects her co-workers. She smiled." (Ex. 22, de bene.)

134. Appellant denies making these statements to Dr. Scott during their clinical interview. When asked about her use of sick at the Sheriff's Department and her first bypass from BPD Appellant told Dr. Scott that she used sick time when she was sick and to fulfill family obligations including a wedding, funerals and to take care of sick family members. Dr. Scott asked her what she meant and Appellant replied that the Sheriff's Department permits corrections officers to use undocumented sick time to attend funerals and to care for sick family members. Dr. Scott asked Appellant who died. Appellant responded her grandmother, a friend and family friends. Dr. Scott asked Appellant how her friend died. Appellant replied that he had been stabbed outside a bar. Appellant never said her friend had been shot. When asked by Dr. Scott how an unplanned day in the prison affects her co-workers Appellant replied that coverage was always available. It is noted that the Appellant disclosed her sick leave use as required, in the BPD Student Officer Application. (Appellant.)

135. The Department did **not** produce Dr. Marcia Scott at hearing to testify. The Department did not offer any evidence of any subpoena or other request for of Dr. Scott's presence or for her unavailability to testify or any other excuse for her absence as a witness. I draw no adverse inference from these facts or Dr. Scott's failure to be called as a witness.

136. The Appellant objected to the admission of Dr. Scott's report into evidence, (Exhibit 22). The report was taken *de bene* subject to later written argument contained the parties proposed decisions. I admit the report as an exhibit for limited purposes. The report was a document that Dr. Reade reviewed and considered in forming her own opinion of the Appellant. However, since it is hearsay and Dr. Scott did not testify and subject herself to cross-examination, I am not considering the contents of the report for

its truth. Accordingly, I do not give her observations and conclusions any weight, except for facts supported by other credible evidence.

137. **The testimony and demeanor of Dr. Schaeffer:** I found Dr. Schaeffer to be a confident and very competent professional in his field who impressed me as an honest, credible and articulate expert witness. His ease of testimony reflects his many years of professional practice, impressive professional and academic credentials and numerous opportunities as an expert witness. (Ex. 19) He confidently and completely explained and justified his reported opinion of psychological fitness of the Appellant for the position of police officer. (Dr. Schaeffer, Ex. 18) He substantially corroborated the observations, findings and opinion of Dr. Beck. He was forthright, consistent and resolute under cross-examination. I find him to be a reliable and credible witness. (Testimony and demeanor of Dr. Schaeffer)

138. **The testimony and demeanor of Dr. Beck:** I also found Dr. Beck to be confident and very competent professional in his field, who impressed me as an honest, credible and articulate expert witness. Yet, Dr. Beck has even more years of professional experience and more opportunities as an expert witness. He has impressive professional and academic credentials, being extensively published. (Ex. 17) He confidently and completely explained and justified his reported opinion of psychological fitness of the Appellant for the position of police officer. (Ex. 16) He substantially corroborated the observations, findings and opinion of Dr. Schaeffer. He was forthright, consistent and resolute under cross-examination. I find him to be a reliable and credible witness. (Testimony and demeanor of Dr. Beck)

H. Facts Related to Appellant's Demeanor and Testimony at Hearing

139. Appellant's testimony and demeanor clearly contrasted with the interview experience of Dr. Reade as relayed in her report: the appellant remained calm and poised throughout both days of hearing. Appellant's testimony was clear. Her responses on both direct and cross-examination were thoughtful and concise. Appellant exhibited little anxiety even under the pressures of cross-examination. The Appellant was not difficult to contain and she did not "speak in a headlong rush of words ... that made her difficult to follow." Her narratives were not confusing. The Appellant engaged in no "exuberant" or "spontaneous" outbursts and she never interrupted the attorneys asking her questions on direct or cross-examination or gave "long, confusing, excited answer[s]." (Testimony and demeanor of Appellant, Ex. 8.)

140. The Appellant, Alicia Crosby testified in a straight-forward, forthright manner. She was appropriate in dress and appearance including body language and facial expression. I did not notice any unusual behavior or nervousness during the two days of this hearing. She did not equivocate or try to explain her answers unless called on to do so. Her answers were clear, sufficiently detailed and easily understood. She described the stressful unpredictable nature of her work as a Correction Officer and gave several examples of her quick, good judgment to resolve spontaneous, dangerous situations that

occurred. She responded very well under cross-examination. She even responded well when she was surprised by the attempt at impeaching her credibility by the use of a document (Exhibit 31, impounded), with which she was not readily familiar, which purported to include a prior inconsistent statement by her. The use of this document was objected to by Appellant's Attorney; the objection was overruled and allowed to be used for that purpose. The Appellant described all of the detailed responses and information she provided to both Dr. Scott and to Dr. Reade in the interviews and admitted that she was "very nervous" during Dr. Reade's interview. I found the Appellant's testimony to ring true in her language, detail, tone and delivery. I found her to be honest and sincere. The Appellant looked directly into the eyes of Dr. Reade, sitting only 4 feet away, during Dr. Reade's entire testimony, which at points described the Appellant's interview negatively and was at odds with the Appellant's testimony. The Appellant only displayed signs of conviction and resolute confidence in her testimony while on the witness stand and off of it. I find her testimony to be accurate and reliable. I find her to be a very credible witness. (Exhibits, testimony, testimony and demeanor of Appellant)

141. There has been at least one prior appeal heard at the Commission in which it was concluded that Dr. Reade's evaluation of the candidate was tainted by some bias held by Dr. Reade against the candidate. The Commission concluded in that appeal that "... intervention is warranted in cases such as this where personal bias has tainted a hiring process." (administrative notice: See Kerri Cawley v Boston Police Dept., No. G1-06-95 decision page 18, *Allowed*, dated November 22, 2006.)
142. 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 nine 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. On appeal affirmed by superior court, Suffolk Civil Action No. 06-5331-C. Shawn Roberts v Boston Police Department, No. G1-06-321, allowed September 25, 2008. On appeal affirmed by superior court, Suffolk Superior Court, Civil Action No. 2008-4775-G, memorandum and order dated December 30, 2009. Jessica Boutin v Boston Police Department, No. G1-06-139 & G1-07-317, allowed January 29, 2009, Daniel Moriarty v Boston Police Department, No. G1-05-442, allowed April 9, 2009, Kelley Coutts v Boston Police Department, No. G1-07-277, allowed May 7, 2009, Kevin O'Loughlin v Boston Police Department, No. G1-07-282, allowed on May 29, 2009, Jill Kavaleski v. Boston Police Department, No. G1-07-299, allowed October 22, 2009, Richard Savickas v Boston Police Department, No. G1-07-51 allowed January 7, 2010, and Daniel Fitzgibbon v Boston Police Department, No. G1-07-224 allowed February 4, 2010 (administrative notice)

CONCLUSION OF THE MAJORITY (Bowman, Marquis and McDowell)

The majority of Commissioners adopt the findings of fact of Commissioner Henderson, who was the hearing officer regarding this appeal, but respectfully disagree with Commissioners Henderson and Stein regarding their conclusion, noted below as the conclusion of the minority.

The instant appeal involves an original appointment to the position of police officer in the Boston Police Department. The Appellant was bypassed for appointment because she was deemed psychologically unfit for appointment as a Boston police officer.

In the Summer of 2006, the Appellant was eligible for appointment to the Boston Police Department, subject to medical and psychological screening. The Appellant was administered two written psychological tests, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and the Personality Assessment Inventory (PAI).

The Appellant responded defensively to the MMPI-2, in an attempt “to minimize her problems and deny her faults, even minor ones.” The results of the MMPI-2 also indicated that the Appellant “appears to have little psychological insight and is reluctant to engage in self disclosure or self-evaluation.” (Exhibit 5)

The PAI results indicated that the Appellant had a “moderate risk of job-related, integrity, anger management and substance abuse problems.” The Appellant endorsed critical items relating to persecution, identity problems and loneliness. (Exhibit 6)

The Appellant moved onto Phase II of the psychological screening and met with Dr. Marcia Scott, a Department psychiatrist, who conducted a first-level psychiatric examination, pursuant to the Department’s psychological screening plan. Dr. Scott reviewed the MMPI and PAI test results and conducted a clinical interview. Dr. Scott observed that the Appellant had “difficulty discussing any details and deficiencies and was sometimes vague in her responses.” She also

noted that that the Appellant's responses and decisions "reflect rule avoidance and poor judgment." Based on her review of the written examinations and her clinical interview, Dr. Scott concluded that the Appellant had certain personality traits that would interfere with "her ability to communicate clearly and make effective judgments," which are critical traits necessary for an individual to perform the duties of an armed police officer. (Exhibit 22)

As a result of Dr. Scott's finding, the Appellant was entitled to a second examination by another psychiatrist, Dr. Julia Reade. Dr. Reade is a Board Certified psychiatrist who has worked for the Department for 8-9 years conducting Second Level Psychiatric interviews for police officer recruits. She is Board Certified in General Psychiatry and Forensic Psychiatry and has extensive experience in Law and Psychiatry as well as Occupational Psychiatry. (Exhibit 7) Dr. Reade has overruled Dr. Scott approximately 5 – 20% of the time and has deemed these recruits psychologically fit to be Boston police officers. Although she reviews the results of the MMPI and PAI, Dr. Reade relies more heavily on the clinical interview.

Dr. Reade noted that the Appellant was "engaging and likeable but difficult to contain during the interview." Dr. Reade explained that it was difficult to follow because she spoke with a "headlong rush of words," and often she would not let Dr. Reade complete her question before, "interrupting and giving long, confusing, exciting answers." (Exhibit 8 and Testimony of Dr. Reade)

Dr. Reade testified that the Appellant gave conflicting answers about: 1) her use of sick time with a prior employer (a reason for a previous bypass); 2) her reasons for leaving the State Police Academy; and 3) her reasons for being late for her interview with Dr. Scott. Dr. Reade found that despite the Appellant's positive attributes, she had a history of impulsivity and poor

judgment; was “mildly hypomanic” and concluded that this personality trait along with others would prevent the Appellant from functioning well as an armed police officer.

At the Commission hearing, the Appellant offered opinion testimony from Dr. Mark Schaefer and Dr. James Beck to rebut the findings of Dr. Scott and Dr. Reade. Dr. Schaefer has done several hundred first-level screenings for various police and fire departments, but he has never done screenings for Boston. Dr. Schaefer rarely finds a candidate psychologically unfit for police work unless they have a mental diagnosis. He clears 97% of the screened candidates.

Dr. Schaefer did not administer any separate tests of his own, but he did interview the Appellant for approximately 90 minutes in his office. He testified that the Appellant appeared flustered when she initially arrived for the interview because she was pulled over for speeding prior to the interview. Dr. Schaefer opined that the Appellant’s work history and references were the best data to assess the Appellant’s psychological fitness to be a police officer. He found that the Appellant did not have any Category A or Category B conditions as outlined in the state’s medical standards guide. He concluded that the Appellant was working in “a variety of stressful and difficult situations as a corrections officer and her work performance appeared exemplary” and that she was acceptable to work for the Boston Police Department.

Dr. Beck did not rely on the MMPI-2 or the PAI test results when he evaluated the Appellant. Rather, he relied primarily on the Appellant’s life history and employment history. Dr. Beck concurred with Dr. Schaeffer that there was no evidence of a psychological condition which would interfere with the Appellant’s performance of the essential functions and duties of a Boston police officer.

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.” Cambridge v. Civil Service Comm’n, 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). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a 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 Comm’n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision.” Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The instant appeal is strikingly similar to a recent appeal where a majority of the Commission (Commissioners Henderson, Stein and Taylor) overturned the BPD’s decision to bypass the Appellant based on a psychological evaluation. The majority decision was later

reversed by the Superior Court. See Boston Police Dep't v. Daniel Moriarty and Massachusetts Civil Service Comm'n, No. 2009-1987-D, Suffolk Superior Court (2010).

In Moriarty, the Appellant also relied on Dr. Beck's opinion testimony that he was psychologically fit for the position of Boston police officer. While the Appellant in the instant appeal also relied on testimony from Dr. Schaefer (who has testified in several other appeals before the Commission), neither Dr. Beck nor Dr. Schaefer conducted their own independent written examinations and both of them relied heavily on the Appellant's work record as proof of her fitness to be a Boston police officer.

In Moriarty, the Court concluded that, "The issue is not whether [the Appellant] can come forward with evidence to show that he would succeed as a Boston police officer. Rather, the inquiry is whether the Department has justified its decision. The reasoning underlying the Department's decision is not undermined by Dr. Beck's opinion testimony. The Department's psychiatrists followed the HRD protocol, using approved psychological tests that Dr. Beck declined to administer ... the Commission reaches too far in relying on Dr. Beck's non-conforming evaluation to invalidate the Department's retraction of its offer to Mr. Moriarty. In addition, Dr. Beck relied principally on Mr. Moriarty's work record as proof as his fitness to be a Boston police officer. If the work record were dispositive of the issue of Mr. Moriarty's fitness, no testing or clinical interview would be necessary. The work history, however stellar, cannot displace the results of the psychological testing and clinical interviews of Dr. Scott and Dr. Reade. The Commission erred in concluding otherwise."

Here, based on a strikingly similar fact pattern as Moriarty, the BPD has shown that it was justified in bypassing the Appellant based on Dr. Reade and Dr. Scott's conclusions that she was not psychologically fit to perform all of the duties and functions of a Boston police officer. Their

conclusions were reached after conducting an approved evaluation that included the administration and review of the MMPI and PAI written tests and an independent clinical evaluation of the Appellant during separate interviews. The hearing officer errs by relying too heavily on the contrary opinions of Dr. Beck and Dr. Schaeffer and the Appellant's prior work history to second-guess BPD's decision to bypass the Appellant.

Even if the Appellant's prior work history were to be considered, work in the Suffolk County Sheriff's Department can not be equated to that of a Boston police officer. Boston police officers are required to carry a firearm at all times while on duty. They make split-second decisions regarding the use of that firearm on overnight patrols in some of the most dangerous parts of the City. Similarly, the hearing officer's reference to a one-year probationary period as evidence that the Boston Police Commissioner is "not without recourse in redressing errors" is misplaced. The very purpose of a psychological evaluation is to *prevent* fatal errors from occurring by ensuring that new recruits are psychologically fit for the rigors of this stressful and dangerous job on day one. That is precisely what the BPD has sought to do here and they were reasonably justified in bypassing the Appellant when they concluded otherwise.

For the majority:

Christopher C. Bowman
Chairman

CONCLUSION OF THE MINORITY (Henderson, Stein):

In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was “reasonable justification” for the bypass. E.g., City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997) (Commission may not substitute its judgment for a “valid” exercise of appointing authority discretion, but the Civil Service Law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”). See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) (“The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles . . . the commission acted well within its discretion.”); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action”). See also, Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996)

(rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission “sufficient to satisfy due process”)

It is well settled that reasonable justification requires that Appointing Authority actions be based on “sound and sufficient” reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. See Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346, 348 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 451 N.E.2d 443, 430 (1928). All candidates must be adequately and fairly considered. The Commission has been clear that a bypass is not justified where “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.” Borelli v. MBTA, 1 MCSR 6 (1988).

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 Comm’n, 31 Mass. App. Ct. 315, 321, 577 N.E.2d 325, 329 (1991).

The greater amount of credible evidence must . . . be to the effect that such action ‘was justified’ . . . [I]f [the factfinder’s] mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different . . . from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, ‘unless it shall appear that it was made without proper cause or in bad faith.’

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*)

Appointing Authorities are charged with the responsibility of exercising sound discretion with honesty and good faith when choosing individuals from a certified list of eligible candidates on a civil service list. “On a further issue we may now usefully state our views. The appointing

authority, in circumstances such as those before us, may not be required to appoint any person to a vacant post. He may select, in the exercise of a sound discretion, among persons eligible for promotion or may decline to make any appointment. See the line of cases cited in Goldblatt vs. Corporation Counsel of Boston, 360 Mass 660, 666, and (1971): 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."

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

When an Appointing Authority relies on scientific evidence provided through expert witnesses to support the justification for a by-pass decision, the Commission is mindful of the responsibility to ensure: (a) the scientific principles and methodology on which an expert's opinion is based are grounded on an adequate foundation, either by establishing "general acceptance in the scientific community" or by showing that the evidence is "reliable or valid"

through an alternative means, e.g., Canavan's Case, 432 Mass. 304, 311, 733 N.E.2d 1042, 1048 (2000) *citing* Commonwealth v. Lanigan, 419 Mass. 15, 641 N.E.2d 1342 (1994); (b) the witness is qualified by “education, training, experience and familiarity” with special knowledge bearing on the subject matter of the testimony, e.g., Letch v. Daniels, 401 Mass. 65, 69-69, 514 N.E.2d 675, 677 (1987); and (c) the witness has sufficient knowledge of the particular facts from personal observation or other evidence, e.g., Sacco v. Roupenian, 409 Mass. 25, 28-29, 564 N.E.2d 386, 388 (1990).¹⁰

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 (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

¹⁰ 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).

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). See also: (impartial medical examiner's opinion (IME) found in part to be unsupported by admissible evidence in the record of hearing at DIA), Thomas Brommage's Case 75 Mass. App. Ct. 825 (2009). This issue was also addressed by Justice Christine M. Roach in a recent Superior Court Memorandum and Order at page 6.- Boston Police Department v. Roberts, Superior Court Docket No. 2008-4775-G (December 30, 2009) "Stripped of these inappropriate foundations, BPD's expert opinions failed to establish reasonable justification for the bypass. Under these circumstances, the Commission reasonably decided BPD bypassed Roberts, based on the biased decision-making of its experts, rather than a fair application of the psychological standards set forth in G.L. c. 31, § 61A and its accompanying regulations. The Commission as fact finder was well within its discretion to credit Robert's experts' opinions in this regard. Commonwealth v. Hinds, 450 Mass. 1, 12, note 7 (definitive jury charge on assessment of expert opinion testimony). The court is aware of no authority to the contrary.

In so doing, the Commission did not substitute its judgment for that of BPD, because it made no determination of its own as to Roberts psychological fitness as a police officer. Boston Police Dept. v. Cawley, Suffolk Civil No. 06-5331-C;...” Justice Roach further concluded “The problem on this record is that the clinicians’ interview conclusions are not supported by substantial, reliable, psychiatric evidence.” Memorandum and Order on Cross-Motions for Judgment on the Pleadings, dated December 30, 2009, at page 6, Suffolk Civil Action No. 2008-4775-G Boston Police Department vs. Shawn Roberts and Massachusetts Civil Service Commission

Applying these applicable standards in the circumstances of the present case, the Commission concludes that the BPD’s bypass of the Appellant 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 Department’s Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Appellant Does Not have a Mental Disorder as Defined by the HRD Regulations, or the DSM-IV**

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” (the HRD Regulations) and incorporated into the BPD’s Psychological Screening Plan (PSP). 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 DSM-IV. [HRD Regulations, §10(6(o)(1)]. A “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” [HRD Regulations, §10(6)(o)(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)(o)(2)(b)].

The evidence here establishes that the Appellant does not carry, and has never been diagnosed with any “Category A” or “Category B” psychiatric or behavior disorder contained within the DSM-IV, 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. Somerville 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).

Thus, the justification for bypassing the Appellant turns on whether the evidence supports a conclusion that she fits one of the “Category B” definitions of a “psychiatric condition” of sufficient severity and degree to disqualify her to serve as a police officer.

A “psychiatric condition” would seem to be virtually synonymous with a mental or emotional “disorder”. *See, e.g.*, MERRIAM-WEBSTER’S MEDICAL DICTIONARY (2002) (“psychiatric” means “dealing with cases of mental disorders”); AMERICAN HERITAGE DICTIONARY (2006) (“psychiatry” means “the branch of medicine that deals with the diagnosis, treatment and prevention of mental and emotional disorders”). The experts who testified,

however, all seem to use the term more broadly to encompass behavior that does not necessarily qualify as a “disorder”. Dr. Beck defined a Category B disqualifying “psychiatric condition” to mean evidence of some aspect of a person’s behavior or trait that appears over a range of circumstances or in a variety of situations, either in the historical past [§10(6)(o)(2)(a)] and/or the historical present [§10(6)(o)(2)(b)].

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 DSM-IV.

The Appellant has a very impressive background history in all respects. However, both BPD screeners pay lip service to this important overt fact and concentrate on insignificant interview generated events instead. The first-level screening by Dr. Scott was improperly infected with a perfunctory, pre-disposition to disqualify the Appellant as indicated by the inordinate time and emphasis spent on the Appellant’s 15 minute late arrival for the interview, due to “car trouble” and other relatively minor events. There is a strong indication that Dr. Reade takes the lead from Dr. Scott and focuses on those same minor events raised by Dr. Scott. The taint of Dr. Scott’s ultimate negative determination and her other negative observations clearly contaminates Dr. Reade’s evaluation, to the point of nearly predetermining the results. This is indicated by the one-sided statistical figures for these two Interviewers over a three year period and Dr. Reade’s ready acceptance and affirmation of the ancillary events cited in Dr. Scott’s negative first level report. However, the accuracy of the BPD’s version of the interview events and observations are

not susceptible to independent verification, since neither Dr. Scott nor Dr. Reade audio or video record their evaluation interviews.

On the evidence presented here, the Commission is satisfied that the BPD clearly failed to carry its burden to justify bypassing the Appellant because of a disqualifying Category B “psychiatric condition”. Therefore, The Department’s Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Appointing Authority’s Characterizations of the Appellant as Possessing Psychological Characteristics Which Impair Her Ability to Perform the Essential Functions of a Police Officer Lack Factual Support in the Appellant’s Background.

Dr. Reade described her role, purpose and procedures in conducting her pre-employment psychological screenings for the BPD. Her aim is to do an evaluation that is tied to the characteristics and duties of the job being applied for. It is a “very job specific” evaluation. She was asked if she employed any guidelines for her screenings. She testified that she uses the “POST” guidelines promulgated by the State of California POST Commission or the “Peace Officer Standards & Training Commission”. This Commission traces its lineage back to the 1950’s for the establishment of hiring qualification standards, including psychological fitness, among other hiring requirements. The BPD offered Exhibit 21 into evidence, “California Commission on Peace Officer Standards and Training-Patrol Officer Psychological Screening Dimensions”. Dr. Reade identified Exhibit 21 as a fair and accurate representation of what she uses, and testified that she “uses these dimensions as part of her guidelines in the screening process.” The Appellant objected to the admission, on a variety of grounds and Exhibit 21 was admitted *de bene*, subject to latter written argument in the parties’ post-hearing proposed decisions. After consideration, Exhibit 21 is admitted only for the limited purpose of being a

document that Dr. Reade claimed to have employed as part of her guidelines for her screenings. However, it is not sufficiently authenticated for completeness, accuracy and application etc. In any event, it is a document related to the State of California POST Commission intended for statutory application only in the state of California, with possible inconsistency or conflict with the application of parts of the relevant Massachusetts laws, regulations, rules and standards. (Dr. Reade, Ex. 21, administrative notice). The BPD offered Exhibit 21 into evidence, "California Commission on Peace Officer Standards and Training-Patrol Officer Psychological Screening Dimensions". Dr. Reade identified Exhibit 21 as a fair and accurate representation of what she uses, and testified that she "uses these dimensions as part of her guidelines in the screening process." However, it is difficult for a lay person to envision that any Psychiatrist is capable of effectively addressing, measuring and evaluating all of these intricate and interrelated behaviors or traits outlined here in ten pages, in a single 1-hour clinical interview. In any event the injection of these California POST dimensions into the established Massachusetts process is unnecessary and potentially problematic. (Dr. Reade, Ex. 21, exhibits and testimony. reasonable inference)

Where a candidate has no mental impairment, and otherwise has a very strong work record, the Civil Service Commission has refused to uphold a psychological bypass based upon mere speculation raised by a candidate's performance on his or her psychological testing including the clinical interview. Like a medical bypass, mere speculation with respect to a psychological or mental condition is not enough. There has to be significant evidence in the record that the candidate suffers from a psychological or mental condition, and that this condition will interfere with his or her ability to perform the essential functions of a job. Here, the Appointing Authority, relying upon Dr. Reade's second-level opinion, bypassed Appellant,

Alicia Crosby, stating that she demonstrates a history of concerning impulsivity and poor judgment and she would have significant difficulties which would interfere with her “ability to adequately perform the essential functions of the public safety position.” As detailed herein, however, in addition to the fact that the Appellant does not suffer from any specific conditions as described in the DSM-IV or the HRD regulations, Dr. Reade’s conclusions with respect to the Appellant, as concurred to by Dr. Scott, lack factual support in the Appellant’s background and in the record as a whole. Thus, the Appellant’s bypass must be allowed.

Where an appointing authority has bypassed a candidate on the grounds that s/he did not pass its psychological examination, the Commission applies basic merit principles in determining whether the bypass was appropriate. *Gerakines v. Town of North Reading Police Department*, 12 MSCR 30 (1999); *citing* G.L. c. 31, s. 1; *Flynn v. Civil Service Commission*, 15 Mass. App. Ct. 206 (1983). The issue before the Commission in these cases then becomes whether on the evidence presented before it; the Appointing Authority has sustained its burden of proving there was sound and sufficient reason for disqualifying the Appellant for appointment on the grounds that s/he was psychologically unfit. *Id.*; *citing* *City of Cambridge v. Civil Service Commission*, 43 Mass. Ct. 300 (1997), *McIsaac v. Civil Service Commission*, 38 Mass.App.Ct. 473, 476 (1995), *Gloucester v. Civil Service Commission*, 408 Mass.App.Ct. 292, 297 (1990); *Mayor of Revere v. Civil Service Commission*, 31 Mass.App.315 (1991).

The Commission has consistently held that a candidate should not be psychologically bypassed unless there is psychological evidence showing that the applicant is actually unqualified for the position of police officer, rather than simply being potentially unqualified. *Michael Kilmartin v. Lowell Police Department*, 10 MCSR 89 (1997) (evidence and supportive testimony concerning appellant’s proven record of disciplined behavior in what is considered a

stressed environment as a corrections officer cannot be disregarded.); *Frank J. Masiello Jr. v. Town of Framingham*, 15 MCSR 6 (2002); *Daniel Funaro v. Chelmsford Fire Department*, 8 MSCR 29 (1995) (Commission overturned bypass holding that a psychological bypass based on psychological testing and clinical observations obtained after a single interview will not stand up where there exists evidence in the appellant's background to the contrary); and *Thomas Whalen v. City of Quincy*, 7 MCSR 271 (1994).

Indeed, in the case of *Daniel Funaro v. Chelmsford Fire Department*, the Commission overturned a psychological bypass even though two (2) doctors for the Appointing Authority found the appellant unfit to perform the essential functions of a firefighter. In support of his case, the Appellant submitted to the Commission an independent psychological assessment as well as a letter from Steven Vellucci, his plant supervisor for six years in a job unrelated to firefighting, addressing areas of concern highlighted by the Appointing Authority doctors. The Commission found as follows:

The Vellucci letter paints the Appellant as an exceptionally hard-working and reliable employee. The Appointing Authority has no basis for disrupting this portrait other than paper and pencil test results and the clinical observations of Drs. Barry and Gressitt, arrived after a single meeting with each. Dr. Barry's and Dr. Gressitt's characterizations lack factual support in the Appellant's background and fail to diagnose any specific disorder identified in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. While the test results may highlight areas of concern regarding a candidate's background, they should not deny career opportunities to individuals who otherwise have blemish-free records.

Moreover, in the case of *Lucero v. City of Revere*, 8 MSCR 200 (1995), the Commission overturned a psychological bypass, even though the applicant had an elevated personality level based on an MMPI scale and "appears hyperactive with a tendency to drive himself excessively with periodic episodes of irritability, hostility, and aggressive outbursts." The Commission

found that because there was no evidence that the elevated scale had ever interfered with the appellant's ability to work, it could not justify his psychological disqualification. *Id.*

First, as detailed below, it was unrefuted at hearing that the Appellant does **not** suffer from a psychiatric condition as defined by the HRD regulations, or the DSM-4. Secondly, and most importantly, there is absolutely **no** evidence that Appellant has "history of concerning impulsivity and poor judgment in a variety of job-related and interpersonal situations" or that her purported vulnerability to "impulsive decision-making" and "questionable judgment" as cited to by Dr. Reade in her report has ever interfered with the Appellant's ability to function in an employment setting-even where such employment has been stressful in nature. *Id.* Dr. Beck and Dr. Schaeffer testified that a candidate's employment history is a critical factor used in assessing whether a candidate possesses a psychological condition which has interfered with or would interfere with the applicant's ability to function well in an employment setting. Indeed, as detailed above, the Commission itself has overturned psychological bypass appeals where there exists no evidence that the psychological condition cited to by the Appointing Authority has ever been problematic for the applicant in the employment context. *See Funaro and Lucero, supra.*

Here, it is compelling that the Appellant has been employed at the Suffolk County Sheriff's Department since 2002 holding an **unblemished record** and several **commendations**. Appellant provided BPD with several employment references and **none** of these references provide data to substantiate Dr. Reade's finding that Appellant has "history of concerning impulsivity and poor judgment in a variety of job-related and interpersonal situations" and is vulnerable to "impulsive decision-making and "questionable judgment" and thus could not handle the rigors of a BPD police officer position. (Ex. 8.)

To the contrary, Deputy Gerard Horgan of the Suffolk County Sheriff's Department, second in command to the Suffolk County Sheriff, states "**Officer Crosby has excellent verbal skills and is able to de-escalate situations...She is well spoken and always adheres to Department policies.**" (Ex. 1.) (Emphasis added.) Lieutenant Melvin Reed of the Suffolk County Sheriff's Department Gang Unit states, "[t]here has been many situations that officer Crosby has relied on her quick thinking and good judgment to de-escalate potentially violent incidents inside the correctional facility...Officer Crosby in her duties as a Corrections Officer routinely is encountered with high stress incidents in which her training and experience has assisted in the de-escalation of these potentially violent incidents." (Ex. 1.) (Emphasis added.) Captain John F. Scaduto of the Suffolk County Sheriff's Department states, "Officer Crosby has very good interpersonal skills in her interactions with a multitude of officers and federal agents from various agencies...In her interaction with difficult/combative detainees she has on several occasions deescalated confrontations with detainees, both male and female, by using her verbal skills and explaining that their behavior is unacceptable and on how cooperate with the Suffolk and/or federal agents. This has occurred in my presence on many occasions." (Ex. 1.) (Emphasis added.) Lieutenant Thomas Gorman of the Suffolk County Sheriff's Department testified on behalf of the Appellant. He has supervised Appellant for several years. Lt. Gorman has **not** observed and is otherwise not aware of Appellant demonstrating any issues with judgment or decision-making: just the opposite," Appellant is a "**squared away officer.**"

There is simply **no** evidence that the psychological issues cited by Dr. Reade, Appellant's "history of concerning impulsivity and poor judgment in a variety of job-related and interpersonal situations" and vulnerability to "impulsive decision-making and "questionable

judgment,” have **ever** been problematic for her in the employment context or would even potentially be problematic in her future employment as a police officer. *See Funaro and Lucero, supra*. In fact, all of the evidence is to the contrary.¹¹

Dr. Reade admits that there is absolutely **no** data in Appellant’s history to support her findings that Appellant has a history of or a vulnerability to “impulsive decision-making” or “questionable judgment.” Dr. Reade’s findings related to Appellant’s psychological issues, “history of concerning impulsivity and poor judgment in a variety of job-related and interpersonal situations” and a vulnerability to “impulsive decision-making” and “questionable judgment,” are based upon what **she describes** as the Appellant’s purported “failure to present a cognitive narrative” regarding several topics during the clinical interview. Such topics include: Appellant’s use of sick leave at the Sheriff’s Department; Appellant’s decision to leave the State Police Academy in April of 2006; Appellant’s undergraduate degree from Suffolk University; and Appellant’s explanation for her arriving late to her interview with Dr. Marcia Scott. (Ex. 8.)

At the outset, it is striking that Dr. Reade appears to be the **only** person who has had difficulty with Appellant’s communication skills making her concerns regarding their exchange at the clinical interview spurious, at best. Dr. Reade points to **unsigned** clinical interview notes which BPD purports to belong to Dr. Scott as evidence supporting Appellant’s problems with presenting cognitive narratives. However, this Commission must give **no** consideration to Dr. Scott’s purported **unsigned** clinical interview notes where Dr. Scott did not testify at this hearing

¹¹ The fact that the Appellant’s employment at the Sheriff’s Department is not identical to the functions of a BPD police officer does not change the impact of her experience. In a psychological bypass appeal, the Commission’s test does **not** require that the Appellant’s previous work history be identical in nature rather than the Appellant’s previous work history is useful in determining whether the psychological concerns raised by the Appointing Authority have ever posed problems for the Appellant in the work setting. *See Funaro and Lucero, supra*. Here, the Appellant has dealt with high stress situations and has always exercised good judgment and decision-making skills. Notwithstanding the Department’s assertions to the contrary, this previous work history is related to police work and in any event **is** useful where it directly addresses Dr. Reade’s major concern with the Appellant’s vulnerability to “impulsive decision-making” and “questionable judgment.” (Ex. 8.)

to authenticate such notes and where Appellant successfully and credibly rebutted **every single** statement and observation made by Dr. Scott's notes. The Appellant's employment references praise her communication skills. Dr. Beck and Dr. Schaeffer had **no** problems with Appellant's communication skills during their clinical interviews. The Appellant testified before this hearing officer and she was forthright, clear and concise even under the rigors of a contentious and stressful cross-examination. She is found to be a reliable and credible witness. However, Dr. Reade's observations and opinion are tainted if not predetermined by Dr. Scott's earlier interview, and report of concerns or unfitness. Dr. Reade's difficulties in communicating with Appellant appear, at best, appear to be a function of Dr. Reade and her interview style which this Commission has found in the past questionable and often infused with subjectivity and personal bias. *See Cawley v. Boston Police Department*, G1-06-95 (2006 Bowman); *affirmed Cawley v. Boston Police Department*, Superior Court Case No. 06-5331-C (2007 Muse); *Roberts v. BPD*, G-06-321 (2008, Stein).¹²

First, Appellant's use of sick leave while at the Suffolk County Sheriff's Department does **not** "demonstrate[] a history of concerning impulsivity and poor judgment in a ... job-related... situations" and does **not** support that Appellant is vulnerable to "impulsive decision-making and questionable judgment." (Ex. 8.) BPD initially bypassed Appellant for her sick leave usage in 2003, 2004 and 2005 at the Sheriff's Department. (Ex. 2, and 20.) Appellant's sick leave usage was high during those years because the Sheriff's Department permits corrections officers to use and the Appellant used sick days to tend to family obligations. Lt.

¹² BPD appealed this decision to Superior Court. On Cross-Motions for Judgment on the Pleadings, Roberts' Motion was Allowed and BPD's Motion was Denied and the case was Dismissed With Prejudice. The court found that, "... BPD's experts failed to establish reasonable justification for the bypass. Under these circumstances, the Commission reasonably decided BPD bypassed Roberts, based on the biased decision-making of its experts, rather than a fair application of the psychological standards set forth in G.L. c. 31, § 61A and its accompanying regulations." *See Memorandum and Order BPD v. Civil Service Commission & Shawn Roberts*, Superior Court Action No. 08-4775-G, page 6 (Roach, December 30, 2009).

Gorman from the Sheriff's Department testified about the Department's practice of permitting corrections officers to use sick days to tend to family obligations where because of their fixed weekend work schedules and bidding system disfavoring junior officers these employees would not otherwise be able to tend to such important matters. Appellant was never counseled or disciplined for her sick leave usage.

Appellant's sick leave usage is a **not** a problem for the Sheriff's Department.

Importantly, **Appellant's sick leave usage is no longer an issue for BPD.** Appellant understood from her first bypass from BPD that her sick leave usage at the Sheriff's Department was not kosher for BPD and she accordingly changed her habits and ceased to use sick leave for family obligations. **BPD passed Appellant during her background check conducted in connection with her second application to BPD (subject of this appeal) stating that her sick leave usage at the Sheriff's Department was no longer an issue for BPD.** (Ex. 2.)

Notwithstanding that Dr. Reade saw in Appellant's file a letter authored by the Appellant clearly describing the circumstances surrounding Appellant's use of sick leave at the Sheriff's Department, (Ex. 23), **and notwithstanding that BPD passed Appellant on her background check and expressly stated that her sick leave usage at the Sheriff's Department is no longer an issue for BPD,** (Ex. 2) Dr. Reade attempts to resurrect Appellant's sick leave usage as a purported psychological issue under the ruse that Appellant can't relate an intelligible narrative relative to such usage. BPD had **no** problems understanding Appellant's explanation of the circumstances surrounding her sick leave usage at the Sheriff's Department during this second hiring round. Dr. Beck and Dr. Schaeffer had **no** problems understanding the Appellant's explanation of the circumstances surrounding her sick leave usage at the Sheriff's Department. Appellant gave forthright, clear and concise testimony regarding her sick leave usage at the

Sheriff's Department. Dr. Reade's testimony that Appellant was "confusing" or "extremely confusing" as to this topic during their interview is not credible.

Dr. Reade's confusion relative to Appellant's use of sick leave at the Sheriff's Department may be a function of Dr. Reade's ignorance as to operations of the corrections department and her utter failure to do anything outside of her interview with Appellant to discover the sick leave policies and practices of the Sheriff's Department. Additionally, Dr. Reade's confusion relative to Appellant's use of sick leave is a function of her bias and her opinion as demonstrated at hearing that the Appellant should not use sick leave when she is not sick under any circumstances and the fact that she did evinces "questionable judgment." However, as Dr. Beck explained, there is **nothing** wrong with Appellant's character where she was using sick leave in accordance with the Sheriff's Department's practice. This Commission believes that by following an employer allowed practice, without suffering any discipline or counseling for it; the Appellant should not be subject to later sanction, in a pre-employment screening. This is not an issue to be used to sustain Appellant's bypass or disqualification based on what Dr. Reade purports to be a confusing account of past history despite that fact that there is accurate and unrefuted evidence that Appellant's past history is not problematic from any perspective including a psychological perspective.

Secondly, Appellant's departure from the State Police Academy in April of 2006 does **not** "demonstrate[] a history of concerning impulsivity and poor judgment in a ... job-related ... situation[]" and does not demonstrate that she is vulnerable to "impulsive decision-making and questionable judgment." (Ex. 8.) Dr. Reade accuses Appellant of "impulsively [leaving] the Academy without consulting a physician about her knee." (Ex. 8.) The evidence shows that Appellant did **not** leave the State Police Academy impulsively and without first consulting a

physician. Appellant exhibited sound throughout the process, proceeding with caution, assisted by professional advice in her decision-making. She also thoroughly documented the entire process for her own protection and subsequent verification. Appellant entered the Police Academy with a pre-existing right knee injury which was well documented prior to and subsequent to the State Police Academy. (Ex. 28.) The Appellant left the State Police Academy two weeks in because her right knee was swollen and she could not run. Appellant consulted with State Police physicians and her surgeon prior to leaving the Academy. Indeed, Appellant had to see a State Police physician prior to receiving a medical deferment which she ultimately was granted. (Ex. 26.) The Academy did not feel that she violated procedure or behaved in an impulsive manner in her departure and has assured her that she will be given “full consideration” for their next academy. (Exs. 26, and 28.)

In connection with her reconsideration or second application to BPD (the subject of this appeal) Appellant disclosed her knee injury, her departure from the State Police Academy, and provided BPD with **all** of her surgeon’s medical notes related to her right knee. (Exs. 27 and 28.) BPD’s Medical Unit did **not** question Appellant’s right knee injury or the circumstances surrounding her departure from the State Police Academy. Neither Dr. Beck nor Dr. Schaeffer had any problems during their clinical interviews understanding Appellant’s knee injury or her reason for leaving the State Police Academy. The Appellant presented clear, concise and detailed testimony at this hearing regarding **why** she left the State Police Academy in April of 2006 and what medical opinions she sought and received prior to her departure.

If Dr. Reade was left with uncertainty after her interview with Appellant regarding **why** Appellant left the State Police Academy in April of 2006 and whether Appellant truly suffered from a right knee injury Dr. Reade could have picked up the phone and contacted BPD Recruit

Investigations or BPD Medical Unit or the State Police Academy or the Appellant, to get some answers. Dr. Reade admits that Appellant **never** told her that she left the State Police Academy without first consulting a physician. BPD Medical Unit at that time had **all** of Appellant's medical records related to her right knee and struggles up to and at the State Police Academy. BPD Recruit Investigations was well aware of Appellant's departure from the State Police Academy in April of 2006, (Ex. 2), and if the circumstances surrounding **why** she left were suspicious in any way then Recruit Investigations presumably would have investigated such prior to passing her on the background investigation. It is noted that Dr. Reade did not contact the BPD's Occupational Health Unit for information prior to rendering an opinion in this case. However, she did contact the Unit sometime between the two Commission hearing dates in this matter; both on which Dr. Reade testified. It seems that Dr. Reade should also have been interested in the **State Police psychological screening results and documentation, since she was found to be psychologically fit**, as she had entered the State Police Academy. Dr. Reade had all of the signed releases and waivers necessary to obtain that information.

At hearing, Dr. Reade changed gears in the face of credible evidence refuting her meritless concerns and allegations in her report. Dr. Reade apparently, now wants the Commission to believe that her real psychological concerns rest in Appellant's lying about her knee injury and why she left the State Police Academy. Although, it is admittedly unclear exactly what inference Dr. Reade intended by her testimony and report. Dr. Reade contends that Appellant "intimated" to her during their clinical interview that the real reason she left the State Police Academy was "because she hoped she would be accepted by Boston, and the screening process for Boston overlapped with the timeframe that required her to be in the State Police Academy." (Ex. 8.) Appellant testified credibly that she made **no** such intimation. Indeed,

BPD's 2006 spring police academy concluding their screening process began simultaneously with the State Police Academy, on the same day April 3, 2006. BPD bypassed the Appellant for that class. BPD did not begin a new hiring round and screening process until summer of 2006. Thus, there were **no** overlapping BPD and State Police screening processes in April of 2006. Dr. Reade's new theory falls down like a house of cards.¹³ BPD and Dr. Reade again want this Commission to sustain Dr. Reade's unfitness opinion-bypass decision based on what she purports to be a confusing account of past history despite that fact that there is accurate and unrefuted evidence that Appellant's past history is not problematic from any perspective including a psychological perspective. Dr. Reade's testimony was confused regarding the substance, detail and chronology of the problematic events she cited in her report. She attempted to blame the Appellant for this confusion. However, the Appellant testified to the events in clear, concise detail in contradiction of Dr. Reade's version of the interview. The Appellant also supported her testimony with a documented chronology that refuted Dr. Reade's testimony

Lastly, Appellant's taking of an extra semester to complete her undergraduate degree and her decision in the face of a nearly flat tire to return home and switch cars thus making her 15 minutes late for her interview with Dr. Scott do **not** "demonstrate [] a history of concerning impulsivity and poor judgment in a ... job-related... situations" and do **not** support that Appellant is vulnerable to "impulsive decision-making and questionable judgment." (Ex. 8.) It appears that

¹³ At hearing, Dr. Reade also pointed to Appellant's Personal Data Questionnaire dated August 12, 2006 where she refers to her departure from the State Police Academy in April of 2006 as due to a "possible medical reason []" as further evidence that Appellant was being dishonest about her knee injury and **why** she really left the Academy. (Ex. 4.) Dr. Reade appears to argue that since Appellant had seen her surgeon on June 9, 2006, and he had confirmed that her knee problems were a continuation of her pre-existing knee injury, bursitis, (Ex. 28), Appellant knew in August of 2006 when she filed out her Questionnaire what was wrong with her knee when she left the State Police Academy in April of 2006 and should have written that down instead of writing "possible medical reasons." Appellant credibly explained at hearing that her use of the word "possible" relates to her state of mind of the time she left the State Police Academy in April of 2006. The Appellant knew that her knee was swollen and that she could not run, however, the Appellant was not certain at that time whether her injury was new or was a continuation of her pre-existing knee injury. All of this, however, is moot in light of the fact that notwithstanding what Appellant wrote on her Questionnaire BPD had all of Appellant's medical records and was well aware of her right knee injury and her struggles with such injury both before and after the April of 2006 State Police Academy. (Ex. 28.)

Dr. Scott held a grudge over the Appellant's tardiness for the interview. This grudge tainted or slanted Dr. Scott's report or notes, against the Appellant. Dr. Reade followed the lead of Dr. Scott's negative report and affirmed her focus and conclusions. Dr. Reade's ultimate conclusion of unfitness was strongly influenced, if not predetermined by Dr. Scott's negative report. Dr. Reade agrees that it is not these events themselves that cause her psychological concerns. Rather, Dr. Reade's psychological concerns stem from the Appellant's purported inability to clearly discuss these events during their clinical interview. Again, Dr. Beck and Dr. Schaeffer had no problems understanding Appellant's discussion of these events during their clinical interviews and the Appellant gave forthright, clear and concise testimony regarding these events at hearing. An audio-video recording of the interview would have been the simplest solution to this asserted confusion or conflict regarding the interview circumstances.

Simply, Appellant took an extra semester to complete her undergraduate degree because she had mono one semester and because she went abroad to Spain for one semester and classes she needed to graduate were not offered in Spain. Appellant reported this very information to Dr. Reade and she incorporated such into her report. (Ex. 8.) It is difficult to understand Dr. Reade's confusion regarding Appellant's clear explanation. An audio-video recording of the interview would have been the simplest solution to this asserted confusion or conflict regarding the interview circumstances.

At hearing, Dr. Reade suggested that Appellant "impulsively" went to Spain and did not find out until she got there that the courses Appellant needed to graduate were not being offered. The Appellant, however, testified credibly, that she was **not** asked nor did she report to Dr. Reade that she "impulsively" went to Spain without knowing what courses were being offered in that program. The evidence shows that Dr. Reade was either not articulating clear questions or

not accurately recalling the responses relative to Appellant's undergraduate degree during their interview. According to Dr. Reade in response to the question 'why she did not know ahead of time what courses were being offered by Spain' the Appellant stated 'I don't know.' Appellant, however, testified credibly that she understood Dr. Reade to be asking her why the university did not offer in Spain the courses she needed to graduate. Appellant, of course, answered that she did not why the university chose to offer the courses in Spain that it did. Dr. Reade appears to be unable to look at herself as the source of the problem between her and the Appellant during their clinical interview. This Commission cannot sustain Dr. Reade's bald assertions that Appellant has a history of "impulsivity" and "poor judgment" when such assertions are based upon Appellant's answers to Dr. Reade's poorly articulated questions or inaccurately recorded during the clinical interview.

Dr. Reade's concern with Appellant's decision-making on the day of her interview with Dr. Scott is completely unclear from her report and her testimony at hearing shed no further light. Dr. Reade in a very matter of fact manner recounts her discussion with Appellant relative to Appellant's car troubles on the day of her interview with Dr. Scott and her decision to turn around and get a new car which resulted in her tardiness to their interview. (Ex. 8.) Dr. Reade **refused** at hearing to opine as to whether Appellant's actions that day were "impulsive" or showed "questionable judgment." She evaded a definitive answer by testifying: "...**I'm not an expert on how people solve their slow leaks and their interview obligations and it's a stressful circumstance...**" Dr. Reade's took a different tact and stated her concern was the Appellant's purported actions in telling different stories regarding her car troubles during her clinical interviews with Dr. Scott and Dr. Reade as evidenced by **Dr. Scott's unsigned and unauthenticated** clinical interview notes. (Ex. 22, de bene.) BPD, however, did not produce

Dr. Scott to testify at hearing and the Appellant rebutted every single aspect of Dr. Scott's notes as they relate to this incident. This Commission must thus disregard Dr. Reade's concerns and testimony on this topic where such was grounded in unsubstantiated hearsay statements in **Dr. Scott's unsigned and unauthenticated** clinical interview notes. (Ex. 22, de bene.)

For these reasons, where the Appointing Authority's psychological bypass of the Appellant lacks factual support in the Appellant's background, particularly her employment history, and in the record of this proceeding as a whole, the bypass appeal must be allowed.

First, as detailed below, it was unrefuted at hearing that the Appellant does not suffer from a psychiatric condition as defined by the HRD regulations, or the DSM-IV. Second, there is absolutely no evidence that the impulsivity and poor judgment cited to by Dr. Reade in her report has ever interfered with the Appellant's ability to function in an employment setting—even where such employment has been stressful and dangerous in nature. Dr. Reade also exhibited her bias by failing to give the Appellant due credit for this successful employment history. *Id.* Both Dr. Beck and Dr. Schaeffer testified that an Appellant's employment history is a critical factor used in assessing whether a candidate possesses a psychological condition which has interfered with the applicant's ability to function well in an employment setting, and whether the candidate can in fact handle the rigors of the position for which s/he has applied. Indeed, as detailed above, the Commission itself has overturned psychological bypass appeals where there exists no evidence that the psychological condition cited to by the Appointing Authority has ever been problematic for the applicant in the employment context. *See Funaro, supra.*

Here, it is compelling that the Appellant has had highly relevant and challenging employment experience and training with the Suffolk County Sheriff's Department as a corrections officer.

Appellant has worked for the Suffolk County Sheriff's Department since approximately October, 2002. She has an extremely good work history, having received all positive recommendations from her superiors at the jail. She is well respected by her superiors, peers and inmates. She is described by Sheriff's Dept. Lt. Melvin Reed by many approbative terms, such as: hard-working, responsible, professional, and **"highly energetic and motivated"**. She has never been disciplined. As a correctional officer, the Appellant is responsible, in a variety of assignments, for overseeing the safety and well-being of the inmates incarcerated at the facility as well as the safety and well of her fellow correctional officers. She has received firearms training as a correctional officer. The Appellant was appointed to be a member of the Sheriff's Emergency Response Team, where her supervisor, Lieutenant Melvin Reed personally witnessed her in many situations exercise "quick thinking and good judgment to de-escalate potentially violent incidents inside the correctional facility." He has also observed her using "verbal skills" to deescalate confrontations between both male and female detainees and in other "high stress incidents". The Appellant has also routinely assisted the Sheriff's Gang Unit.

There is simply no evidence that the psychological issues cited by Dr. Reade, including impulsivity and poor judgment have ever been problematic for her in the employment context or would even potentially be problematic in her future employment as a police officer. *See Funaro, supra.* In fact, all of the evidence is to the contrary.

Dr. Reade supported her finding that Appellant suffers from a "vulnerability to impulsive decision-making and questionable judgment" by ignoring her successful past history and pointing to and focusing instead on details of those few minor and tangential incidents, and the Appellant's alleged interview explanation of them. Neither Dr. Scott nor Dr. Reade could point to any real world substantive event, which could be objectively corroborated. The Appellant

denied and effectively refuted both Dr. Scott and Reade's interview versions. The Appellant also corroborated and substantiated her testimony of the interview transpirations and her psychological fitness, by: documentation, other witnesses' testimony, references, expert testimony and opinion, and a substantial high quality background history. Dr. Scott emphasized some details of those few minor and tangential incidents; which Dr. Reade then took that lead and determined that these incidents to be reliable indicators of enduring negative traits. I find Dr. Reade's inordinate focus and repeated reference to negatives in Dr. Scott's report, to be highly suspect, and did have a prejudicial effect on the interview. It is an indication of a predisposition, predetermination or bias, as these two Psychiatrists are familiar, having worked together for many years, and the predisposition has been statistically borne out. Moreover, at the hearing, the Appellant gave her version of the interviews, which refuted the reported versions. She also gave a perfectly logical and coherent explanation for each minor incident and described how each incident was raised and addressed during the interviews.

Dr. Reade admitted at hearing that she had no real first hand work related experience or knowledge regarding either the Suffolk County Sheriff's Department or the Boston Police Department officers. Her information and views are derived from secondary sources such as publications and hearsay sources. She did nothing, prior to stating her opinion of unfitness, to ascertain whether her understanding was accurate. Moreover, Dr. Reade admitted to never looking at Appellant's supervisor references. Finally, since Dr. Reade has never actually worked in a police department or spent time "on the beat" she would have no basis to compare the work Appellant performed as a corrections officer with the work performed by a full-time police officer with the Boston Police Department. As it turns out, the Appellant's work history shows that as a Corrections Officer with the Sheriff's Department she performs some similar

duties in a dangerous, stressful environment which would help prepare her and prove her qualifications for employment as a Boston Police Officer.

For these reasons, where the Appointing Authority's psychological bypass of the Appellant lacks factual support in the Appellant's background, particularly her employment history, and in the record of this proceeding as a whole, the bypass appeal must be allowed.

The Department's Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Department Doctor's Own Psychological Testing Methods Were Inaccurate.

In psychological bypass appeal cases, the Commission does far more than simply look to make sure that impermissible reasons are not being asserted, rather, it will require that the Appointing Authority show its doctors' psychological screening methodology is accurate and defensible. *See Michael Doran of Norwood*, 11 MCSR 121 (1998).

Here, Dr. Schaeffer and Dr. Beck, both experts in their fields, testified that the BPD doctors' psychological testing methods were flawed in that they gave too much weight to the Appellant's paper and pencil psychological testing results and his performance during clinical interviews and gave virtually no weight to the Appellant's background history and adult life functioning. (Testimonies of Dr. Schaeffer and Dr. Beck.). In coming to her conclusion with respect to the Appellant, Dr. Reade, by her own admission, relied in large part upon the information that she had obtained through the Appellant's paper and pencil tests, the Appellant's performance during her clinical interview, and Dr. Scott's first-level interview notes based upon the same.

Dr. Reade testified that in fact she did nothing to ascertain whether her concerns with respect to the Appellant having psychological issues had been issues for the Appellant before. She never interviewed any of his supervisors at the jail. Indeed, Dr. Reade appeared to give little

or no weight to the Appellant's five years of employment at Suffolk County Corrections based on her presumption that the Appellant's work there was "structured" and had no parallels in actual police work.

According to Dr. Beck and Dr. Schaeffer, a sound psychological testing methodology consists of the clinician taking any questionable test results, as well as any red flags raised during the clinical interview, and determining whether these issues have ever impacted that Applicant's ability to live or work in such a way that it would suggest them incapable of performing the job for which they have applied, *i.e.*, a police officer. *Id.* This determination is made through a thorough investigation and understanding of the Appellant's background and history of adult life functioning. *Id.* If the issues raised by the testing and the interview are not supported by background data, then a disqualification and bypass is not justified. *Id.*

In his report, Dr. Beck states that:

I saw no evidence that the PAI was invalid. The test results appeared to show a low risk for job-related difficulties consistent with that of other successful applicants. . . . This is a man with a solid life story. There is no evidence for mental disorder and no history of a behavioral condition that would interfere with his ability to perform the duties of a police officer. He grew up in a stable home. He has strong family relations. He appears to be a loving uncle who spends considerable time caring for his niece. . . .

He has worked successfully as a corrections officer for five years. He had one episode in which his supervisor strenuously disagreed with his judgment, upon administrative review the organization did not find his behavior worthy of sanction.

Against this life-long evidence, Dr. Reade opposes her concerns based on psychological testing and on the psychiatric interviews conducted by herself and Dr. Scott. As I have written in previous reports, rejection on these grounds represents in my view a fundamental misunderstanding of the weight to be given to interview and test data in comparison with life history.

(Jt. Ex. 11.) Dr. Beck and Dr. Schaeffer's psychological testing model is indeed consistent with Commission caselaw in that it necessitates psychological evidence. *See Funaro, supra.*

Furthermore, Dr. Reade over-relied on the Appellant's performance during her clinical interview -- which is an unnatural setting. Since candidates are seeking employment, they come into the interview wary that their job is on the line and wanting to impress the clinician. Many of the candidates have never in their lives been before a mental health professional and therefore are justifiably nervous.

The fact that somebody appears nervous and defensive during this clinical interview is therefore natural and should be taken within the context of the situation. Dr. Schaeffer gives some weight to a candidate's performance in his own psychological pre-screening interviews, however, he is cautious not to draw too much from something small or insignificant. (Testimony of Dr. Schaeffer.)

C. The Department's Psychological Bypass of the Appellant Lacked a Sound and Sufficient Reason Pursuant to M.G.L. c. 31, §1 Where the Appellant Does Not have a Mental Disorder as Defined by the HRD Regulations, or the DSM-4.

In the case at hand, the Department gave the Appellant a conditional offer of employment contingent upon her passing a medical examination and the psychological screening component of the medical examination. (Ex. 3.) A conditional offer of employment is a legal term of art developed under the Massachusetts anti-discrimination laws, Massachusetts General Laws. c. 151B, as well as the Americans with Disabilities Act. Specifically, under these statutes, an employer may not require that an applicant undergo a medical examination prior to making that individual a conditional offer of employment. Most relevant, G.L. c. 151B provides as follows:

An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that **an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job...**

M.G.L. c. 151B, s. 4 (16) (emphasis added). Thus, an offer of employment is conditional under those statutes when the only condition for appointment is the passing of a medical examination that is directly related to the performance of the position to be filled. *Id.* It follows therefore that a candidate's conditional offer of employment can only be rescinded based upon the type of information that can be obtained from a "medical examination." *Id.* These requirements have created a system where individuals receive appointments off Civil Service lists but are still required to undergo physical, medical and psychological screenings for certain jobs (mainly public safety positions).

In the Boston Police Department, a candidate receiving a conditional offer of employment from the Department must undergo a medical examination which includes a psychological screening component. (Ex 3, and 13.) This is consistent with G.L. c. 151B and its requirement that a conditional offer of employment can only be made conditional subject to a further medical examination. The Department administers the psychological screening component of the medical examination pursuant to its psychological screening plan, which has been approved by HRD. (Ex. 13.) According to the first sentence of the Department's psychological screening plan, the goal of the psychological screening process is to "identify candidates who may exhibit any evidence of a mental disorder as described in the Regulations for Initial Medical and Physical Fitness Standards Tests for Municipal Public Safety Personnel." ("HRD Regulations") The HRD Regulations referenced in the Department's psychological screening plan were promulgated by HRD pursuant to its authority under the Massachusetts Civil Service Laws, G.L. c. 31, section 61A, which provides that a candidate appointed to a municipal police department **must** undergo an initial medical evaluation and shall have met the initial standards prior to performing the duties of that position. (Ex. 14, & 15.)

The HRD Regulations spell out the pre-placement medical evaluation standards for police officers as well as the medical conditions for which a candidate can be disqualified from employment. These medical conditions are broken down into two (2) categories, Category A and Category B medical conditions, and are described previously in detail. (Ex. 15) Most relevant to this case, the Regulations

include the **psychiatric conditions for which a police candidate can be disqualified** from employment. Specifically, Section 10(5)(o) provides as follows:

(o)Psychiatric

1. Category A medical conditions shall include:

- disorders of behavior
- anxiety disorders
- disorders of thought; disorders of mood
- disorders of personality

2. Category B medical conditions shall include:

- a. 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,
- b. any other psychiatric condition that results in an individual not being able to perform as a police officer.

(Ex. 15, pp. 37-38.)

In this case, the Appellant was granted a conditional offer of employment and underwent the psychological screening component of the medical examination. The Appellant "failed" the psychological screening component and was bypassed on those grounds. Notwithstanding this bypass, however, it was unrefuted at hearing that the Appellant does **not** suffer from any medical condition or psychiatric condition as defined by the HRD regulations and was not bypassed on those grounds. Moreover, it was unrefuted at hearing that the Appellant does not suffer from any mental health condition as described by the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association ("DSM-IV"), which is a manual listing symptoms for disorders used by psychiatrists and other mental health professionals in diagnosing patients with mental health conditions nationwide. It follows therefore that where the Appellant simply has **no** identifiable medical or psychiatric condition under the HRD Regulations or the

DSM-4, the Department had no medical grounds under the Civil Service Laws, or even its own psychological screening plan, to disqualify her and revoke her conditional offer of employment. In effect, the Department reneged on the Appellant's conditional offer of employment on the basis of what can only be described as "non-medical" information which flies in the face of the very premise and legal protections afforded by G.L. c. 151B to a candidate given a conditional offer of employment.

Dr. Reade goes beyond the parameters and purpose of the established proper psychological screening process. The BPD offered Exhibit 21 into evidence, "California Commission on Peace Officer Standards and Training-Patrol Officer Psychological Screening Dimensions". Dr. Reade identified Exhibit 21 as a fair and accurate representation of what she uses, and testified that she "uses these dimensions as part of her guidelines in the screening process." However, it is difficult for a layperson to envision that any Psychiatrist is capable of effectively addressing, measuring and evaluating all of the intricate and interrelated behaviors or traits outlined here in ten pages, in a single 1-hour clinical interview. (Dr. Reade, Ex. 21, reasonable inference) However, these dimensions are an unnecessary addition to the process since they are not sufficiently authenticated for completeness, accuracy and application etc. In any event, it is a document related to the State of California POST Commission intended for statutory application only in the state of California, with possible inconsistency or conflict, in application, with parts of the relevant Massachusetts laws, regulations, rules and standards (Dr. Reade, Ex. 21)

Dr. Reade is not intent on just determining whether a candidate suffers from a disqualifying psychological condition. She also attempts to subjectively determine the candidate's potential for successfully completing the Police Academy and eventual successful

performance as a police officer. Dr. Reade previously testified in the Boutin appeal to the following regarding her purpose in psychological screening. She phrased her mission not in terms of identifying disqualifying conditions but instead: “to make sure candidates who are being sent to the Academy have the requisite psychological skills and resilience and the traits that would make them most likely to be successful and constructive police officers.” She also described her mission and purpose in similar language in the Coutts appeal. (See. Jessica Boutin v Boston Police Department, No. G1-06-139 & G1-07-317, page 25, allowed January 29, 2009, and Kelley Coutts v Boston Police Department, No. G1-07-277, allowed May 7, 2009.

(administrative notice)

BPD’s Noncompliance with “Americans with Disabilities Act of 1990”. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq., G.L. c. 151B §4(16), G.L. c. 31 § 61A and other Relevant Laws and Rules:

The Boston Police Department did not produce any evidence regarding its exploration of or offer of or attempt to provide any “reasonable accommodations” to the Appellant, 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 7, exhibits and testimony).

Under the ADA, a disability is: (A) a physical or mental impairment that substantially limits one or more of the major life activities . . . (B) a record of such an impairment; or (C)

being regarded as having such an impairment., 42 U.S.C. §§ 12102(2)(A) and Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000) (Administrative notice)

The effect of ADA, “Americans with Disabilities Act of 1990” has been explicitly expanded by at least one recent Circuit Court decision to include all employees or job applicants not just those with disabilities. See John Harrison vs. Benchmark Electronics, Huntsville, Inc. No. 08-16656, The United States Court of Appeals for the Eleventh Circuit, Decision dated January 11, 2010. This decision reversed and remanded an appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 07-00815-CV-5-IPJ. The Circuit Courts decision states at page 13: “In enacting § 12112(d), Congress sought to prevent employers from using pre-employment medical inquiries “to exclude applicants with disabilities- particularly those with so-called hidden disabilities such as epilepsy, diabetes, *emotional illness*, heart disease, and cancer-before their ability to perform the job was even evaluated.”(Emphasis added) H.R. Rep. No 101-485, pt. 2, at 1. The legislative history of § 12112(d)(2) indicates that “Congress wished to curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment by drafting [§ 12112(d)].” Griffin v. Steeltek, 160 F.3d at 594, (10th Cir. 1998). Allowing non-disabled applicants to sue will enhance and enforce Congress’s prohibition.” (Administrative notice)

A conditional offer of employment is a legal term of art developed under the Massachusetts anti-discrimination laws, M.G.L. c. 151B, as well as the federal Americans with Disabilities Act (ADA). Specifically, under these statutes, an employer may not require that an applicant undergo a medical examination prior to making that individual a conditional offer of employment. Most relevantly, G.L. c. 151B provides: “An employer may not make pre-employment inquiry of an applicant as to whether the applicant is a handicapped individual or as

to the nature or severity of the handicap, except that **an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job...**" G.L. c. 151B §4(16) (emphasis added, administrative notice)

In a letter dated November 22, 2006, from the Boston Police Department Human Resources Director, Robin W. Hunt, the Appellant was informed, "that the results of your psychological screening indicate that you cannot adequately perform the essential functions of the public safety position for which you applied and **a reasonable accommodation is not possible.**" The letter further provided "therefore you will not be appointed as a Boston Police Officer." Where Appellant was being bypassed she was also notified of her appeal rights to the Civil Service Commission. (Emphasis added) (Statement of Stipulated Facts, # 8, Exhibit 9)

The BPD raised and addressed the issue of reasonable accommodation in its bypass letter regarding the Appellant. The conclusory language in the letter: "that the results of your psychological screening indicate that you cannot adequately perform the essential functions of the public safety position for which you applied and **a reasonable accommodation is not possible.**"; implies that the BPD did attempt to specifically determine what essential functions of the position she could not perform, why, and what specific reasonable accommodation might be implemented by the BPD. I believe that the BPD is legally obligated by Massachusetts General Laws, HRD rules and Federal law to perform these specific acts and determinations, in good faith. The BPD failed to meet or even attempt in good faith to meet its obligations under these enumerated and other relevant laws and rules. The BPD's failure to comply with the requirements of the ADA by meaningfully addressing the issue of reasonable accommodation

might be considered by some to be a separate and secondary issue. However, I feel that it is a substantive issue which Dr. Reade and the BPD should have addressed. That failure is serious. However, I would reach the same result and conclusion in this decision exclusive of any evidence or weight attributed to it or reasonable inferences drawn from or any other consideration of this entire ADA issue.

Dr. Reade's testimony here and in the *O'Loughlin appeal* that she gives extra time and consideration for a *reasonable accommodation*, to candidates who have been previously diagnosed and treated for a psychiatric condition is remarkable. This is a bald admission of preference and therefore of bias against any candidate not previously diagnosed and treated. This testimony taken together with the other cited indications of bias in this appeal-decision supports a conclusion that the psychological screening process here was tainted, so that the Appellant did not receive fair and impartial consideration for the position of Boston Police Officer.

In summation; If the Appellant's background history had suggested that impulsivity, poor judgment and other cited traits or conditions had been a recurring issue for her and that it had interfered in the employment context, then Dr. Reade's observations that the Appellant was impulsive and prone to questionable judgment during her clinical interview, and her reliance on this observation in coming to her conclusion, might have some credibility. But, as described above, the Appellant's five year work record with the Sheriff's Department and commendations with respect to her ability to handle the danger, stress and the rigors of corrections work suggests otherwise.

At worst, this is an Appellant who did not live up to the subjective expectations of the clinical interviewer and this, substantially served as the basis for the Appellants' disqualification. According to Dr. Beck and Dr. Schaeffer, this psychological testing method of over reliance on

interview performance without a corroborating history is simply inadequate and unacceptable. (Testimonies of Dr. Schaeffer and Dr. Beck.)

Dr. Beck and Dr. Schaeffer credibly and reliably testified in substantive support of their opinions as contained in their respective reports. They found that the Appellant did not suffer from any disqualifying psychological condition and on the contrary that she had exhibited and demonstrated over her life history to be able and qualified in all respects, including psychologically, to be a police officer.

The Appointing Authority is not without recourse in redressing errors with respect to the appointment of candidates, since the legislators of this Commonwealth in their wisdom provide a one year trial period for such public safety personnel, during which time such employees can be removed from employment without recourse to this Commission. (G.L. c. 31§ 61) *See Kilmartin, supra*. This lengthy probation period should provide the Appointing Authority with ample opportunity to evaluate the performance of the Appellant under stress, and if a problem arises, to sever her employment. *See Lucero, supra*.

For these reasons, we conclude that the Appellant's bypass appeal should be allowed and that the Appellant's name should 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. We further conclude that if Alicia Crosby should be selected for appointment and commences employment as a BPD police officer, her civil service records should be retroactively adjusted to show, for seniority purposes, as her starting date, the earliest

Employment Date of the other persons employed from Certification #260618. Finally, the conclude that the BPD should be allowed to elect to require Alicia Crosby 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 his application for appointment. In either case, such screening should be performed, de novo, by qualified professional(s) other than Dr. Scott or Dr. Reade. We also suggest that any subsequent psychological screening interview be audio-video recorded.

For the minority,

Daniel M. Henderson,
Commissioner

For all the reasons stated in the Opinion of the Majority, the Appellant's appeal is hereby ***dismissed.***

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; McDowell, Commissioner – Yes; Marquis, Commissioner – Yes; Henderson, Commissioner – No; Stein, Commissioner – No) on June 3, 2010.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:

Leah Barrault, Esq. (for Appellant)

Sheila Gallagher, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)