

MA: DRUG TESTING USING HAIR – STATE CIVIL SERVICE COMMISSION REVERSES TERMINATIONS OF BOSTON POLICE OFFICERS – MAYOR TO APPEAL TO COURT

On Feb. 28, 2013, in Boston Police Department Drug Testing Appeals, the Massachusetts Civil Service Commission held that there is a lack of scientific proof of hair testing for cocaine, and ordered six police officers reinstated. The Mayor of Boston has announced they will appeal to court. <http://www.mass.gov/anf/docs/csc/decisions/discipline/boston-police-drug-testing-appeals-022813.pdf>

10 police officers tested positive for cocaine; fired

“Ten Appellants brought these appeals to the Civil Service Commission (Commission), pursuant to G.L.c.31, §§41-43, to seek reinstatement following decisions of the Boston Police Department (BPD) discharging each of them from employment as tenured BPD police officers after they tested positive for the presence of cocaine in hair samples collected from them. The Appellants claim that the hair tests relied upon by the BPD are not based on scientifically sound and generally accepted methodology and that the process used to collect and test their samples was seriously flawed, making the test results insufficient to prove ‘just cause’ for their terminations.

The processing of the appeals was also stymied because the laboratory that performed the hair tests (Psychemedics Inc.) claimed a proprietary interest in aspects of its hair testing methodology and strenuously declined to produce certain documents needed to adjudicate these appeals.” [Footnote omitted.]

Hair testing for drugs is a “work in progress” – no nationally approved standards

“This Decision affirms the BPD’s undisputed right to ensure a drug-free workplace and, to that end, employ all lawful means, consistent with the terms of any collective bargaining agreement, to identify and terminate police officers who use illegal drugs. After receiving extensive testimony and evidence from experts presented by the BPD and the Appellants, the Commission finds that the BPD’s annual hair testing plan is an appropriate tool to enforce such a policy, although a positive hair test does not provide the 100% irrefutable evidence of drug ingestion that the BPD (and the police union) believed it did when the policy permitting such testing was negotiated and implemented.

Workplace hair testing for drugs, as distinct from urinalysis, has been and remains a ‘work in progress’. There has been a long-standing debate within both the scientific and law enforcement communities as to how accurately hair tests are able to differentiate between drugs found in hair due to ingestion as opposed to contamination by external or passive means. There are no uniform, nationally approved standards for hair testing. Protocols vary from laboratory to laboratory and have changed significantly over time.

Depending on what protocol is applied, what laboratory does the testing, or what instrumentation is used, many Appellants would test negative rather than positive. The BPD was the first and, until 2009, the only major municipal police department conducting annual hair testing of officers. The FBI Laboratory recently suspended hair testing of law enforcement personnel pending further study as to its efficacy.”

Hair testing not used in Federal workplace

“74. For reasons further discussed below, hair testing has never been approved for use in federal workplace drug testing and HHS regulations prescribe no cut-off requirements for such testing. Thus, except in Florida and Oklahoma, which enacted statutory cutoff criteria for hair drug testing, each individual testing laboratory, Psychemedics included, sets and, from time to time, revises, the cut-off criteria used for determining whether a hair sample tests positive for cocaine. The cutoff criteria for cocaine that is generally followed within the hair testing industry, and the one currently used by Psychemedics, is the presence of a level the parent drug at 5ng COC/10mg hair (also expressed as 0.5 ng COC/1.0mg hair and/or 500 pg COC/1.0mg hair), usually accompanied by confirmation of the presence of a defined concentration of at least one cocaine metabolite (e.g., BE, NOC and/or CE). One laboratory – Quest Diagnostics – uses a lower parent drug cutoff of 3ng COC/10mg hair. There is also support in the scientific literature for tiered cutoff levels, i.e., a COC level of 10ng/10mg as a “stand alone” cutoff and a lower level “when supported by other evidence of drug intake.”

75. Cutoffs used to test for cocaine in hair are thousands of times higher than the cutoffs used to test for marijuana. Marijuana is not an alkaloid, as is cocaine, and, therefore, is not absorbed with the same affinity in hair. For this reason, a hair test is considered relatively ineffective for detecting marijuana use, which explains why relatively fewer hair tests are reported positive for marijuana than cocaine, despite evidence that marijuana use is far more prevalent in the general population.”

6 Officers To be Reinstated

“The Commission concludes that, under basic merit principles and ‘just cause’ standards of the Civil Service Law (G.L.c.31, §§1, 41-43) applicable to all tenured public employees, a BPD police officer’s hair test that is reported as positive may be used for the purpose of determining whether or not an officer had used illicit drugs. A reported positive test result, however, is not necessarily conclusive of ingestion and, depending on the preponderance of evidence in a particular case, may or may not justify termination or other appropriate discipline of a tenured BPD officer. Under these principles, the BPD met its burden to establish just cause to terminate [4 named officers]. Their appeals are dismissed. The preponderance of the evidence fails to establish just cause to terminate [6 named officers].”

Legal Lessons Learned: Courts will ultimately decide lawfulness of hair testing. The Mayor of Boston has announced they will appeal to court.

http://bostonherald.com/news_opinion/local_coverage/2013/03/menino_vows_fight_on_cops_reinstatement