Drug & Alcohol Testing

# Hair-Follicle Drug Testing: Lessons for Employers

Snapshot

• Hair-follicle testing hasn't passed federal test for reliability

• Designer of federal program: testing is ‘cat and mouse game’ but would use urinalysis to deter drug-using applicants

By Hassan A. Kanu

Oct. 18 — If you're reading this at work, there's a solid chance you had to pee in a cup before your first day on the job. Or you may have handed over a sample of your hair for drug testing. It's also likely your job offer would have been revoked, or your employment terminated, if the drug test was positive.

The data on drug testing by employers are largely imprecise, but a 2016 survey of 3,459 HR professionals done by HireRight showed that 92 percent of employers that perform drug screens use urinalysis, while 8 percent use hair tests. While there are flaws in both the urinalysis test and the hair-follicle test, it's the hair-follicle test that is the most unreliable and could cause headaches for employers.

Case in point: A Massachusetts appeals court this month reinstated the jobs of six Boston police officers who tested positive for cocaine in a hair-follicle test. If there was a headline to come from that case, it might be “Cops Get Jobs Back Despite Failed Drug Test.”

It's not quite that simple and the result of that case might not be as unfair or inappropriate as it seems at first glance, according to professionals and academics interviewed by Bloomberg BNA. The case hinged on the court's conclusion that, although hair-follicle drug tests are reliable enough to “be used as some evidence” of drug use, “the risk of a false positive test was great enough to require additional evidence to terminate an officer for just cause.”

In other words, the fact that the officers failed the drug test didn't conclusively mean that they'd used a controlled substance in violation of their employer's policies.

Although there are important differences between urinalysis and hair-follicle tests, and between public and private employment, the officers’ reinstatement holds important lessons for employers and workers alike.

## Hair Testing: No Consensus Standards

The researchers and medical professionals Bloomberg BNA talked to echoed the reasoning of the Massachusetts court with regard to hair-follicle drug testing.

“Every independent scientific organization that has studied hair testing concluded that it isn't reliable,” Lewis Maltby, president and founder of the National Workrights Institute, told Bloomberg BNA. Maltby was previously director of the ACLU's National Task Force on Civil Liberties in the Workplace.

“The only scientists that support hair testing have ties to the industry,” Maltby said. The process “is so unreliable that the scientists at the Department of Health and Human Services won't permit employers to use it in programs covered by federal regulations.”

This includes commercial nuclear power plants, Paul Harris, who heads the Nuclear Regulatory Commission's fitness for duty program, told Bloomberg BNA.

"Hair testing has been around for a long time, however the science and technology behind it hasn't reached that of a consensus standard" just yet, Harris said. "HHS guidelines are viewed as the national consensus standards for drug testing," but Harris can't authorize hair testing in the nuclear industry "in part because HHS hasn't yet developed and issued guidelines."

Environmental Contamination From…Money?

The lack of federal employment guidelines on drug testing isn't arbitrary, according to J. Michael Walsh. He designed the federal employee drug-testing regime after it was mandated by President Ronald Reagan in the late 1980s and was also the executive director of President George H.W. Bush's Drug Advisory Council and director of research at the National Institute on Drug Abuse.

"There's been a lot of political pressure, lots of money and lobbying for literally the last 25 to 28 years" to get the federal government to approve hair testing, Walsh told Bloomberg BNA. "The science basically just didn't support integrating it into the federal program—there are still significant scientific issues, not about whether the technology can detect drugs in hair, but more so about the interpretation of how the drugs got there."

One reason for this is what's known as environmental contamination—accidental exposure to a drug that results in tiny, but detectable, traces of the drug in hair.

"Hair testing looks for microscopic traces of drug metabolites, only 1/100th as large as the concentrations involved in urine testing," Maltby said. "When you're testing for concentrations that low, it's impossible to get hair clean enough to avoid positive results for people who never use drugs."

Both Maltby and Walsh mentioned that a surprisingly large proportion of dollar bills contain detectable traces of cocaine, which can become trapped in hair easily because it is a fine powder.

"You can fail a hair test from handling a $20 bill someone else used for cocaine or from walking through a room where someone smoked pot the day before," Maltby said, noting that police officers are frequently required to be around drugs by nature of their job.

Possible Racial Bias, Disparate Impact

Scientific studies have also found another issue with hair-follicle testing: a likely racial bias. "It turns out that drugs tend to get into and stay in more coarse, darker hair, like black people have, at a much higher rate than it would for white folks' hair," Walsh said.

The 10 officers who sued the Boston Police Department are black. The group has another ongoing case on appeal in the U.S. Court of Appeals for the First Circuit alleging that use of a hair-follicle test has a biased disparate impact. Walsh gave expert testimony against the scientific validity of hair testing in the appeal.

The First Circuit in 2014 found that the test does have an adverse impact on black officers, but a lower court ruled in the city's favor after the case was sent back. It held that use of the test is nonetheless legal because the city showed that it's a necessary part of doing police business.

The First Circuit's "prior determination that the hair test has a disparate impact on Black police officers shifted the burden to the Department to show that the hair test was nevertheless justified as a business necessity," the officers argue in their brief. They go on to say that the lower-court judge essentially disregarded their expert testimony when the case was sent back, including their evidence of a recommendation by an independent toxicologist at the U.S. Naval Research laboratory to use a hybrid test with both hair and random urine samples.

Urinalysis Also 'Fraught With Error.'

Urinalysis as a way of testing for drug use also has its problems.

William Becker, a doctor and assistant professor at Yale School of Medicine, co-authored a study in which nearly 70,000 employees were asked to self-report whether they'd been drug tested—via urinalysis—as part of their employment.

He noted that most think a urinalysis is qualitative—either positive or negative—but that employers and labs often do follow-up tests to get a more conclusive or specific answer.

"For urinalysis, the interpretations based on the quantity present are pretty fraught with error," Becker told Bloomberg BNA Oct. 13. "Its really hard to make a whole lot of meaning of the difference between 300 or 1,500 nanograms of, say oxycodone, and yet I hear people making those kinds of inferences fairly regularly."

Another concern is that drug metabolites only stay in the urine for a few days. Pre-employment urine testing "is a charade," Maltby said. "An applicant who smokes pot knows he's going to be tested, he drinks beer until he passes the drug test and then goes back to pot."

Racial bias can also rear its head when employers use urinalysis to test for drugs with some employees but not others.

"We found that African-American individuals were more likely to report having been tested even when we adjusted for the kind of employment," he said. Additionally, "it seems as though even in occupations where testing is mandated, there's still discrepancies, which implies there's some racial bias" there.

Different Approaches to Problem

"Employers are allowed to fire employees based on the results of unreliable tests, but that doesn't make it a good idea," Maltby said. "Firing a productive employee because of a test result that's wrong hurts the bottom line."

It's "too speculative" to say other employers' hair tests could be invalidated in a court based on the Boston case, Harris said. "The FBI is doing hair testing, the Olympics is looking in to hair testing, and the EU is doing it, so you can't make gross generalizations," he said.

Drug testing by employers still has its place and can serve as a deterrent for some, Walsh said. "Part of it is your employment ad says there'll be a test, so there's a bunch of people who just won't show up."

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APPEALS COURT OF MASSACHUSETTS

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*Preston Thompson* & others[1] *vs. Civil Service Commission* & another[2] (and a companion case[3]).

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No. 15-P-330.

May 10, 2016, Argued October 7, 2016, Decided

Suffolk. Civil actions commenced in the Superior Court Department on April 3, 2013.

After consolidation, the case was heard by *Judith Fabricant*, J., [*463] on motions for judgment on the pleadings.

Judgment affirmed.

*Alan H. Shapiro* (*John M. Becker* with him) for Preston Thompson & others.

*Helen G. Litsas* for Boston Police Department.

*Amy Spector*, Assistant Attorney General, for Civil Service Commission.

Present: Cypher, Blake, & Henry, JJ.

BLAKE

*Blake*, J. Between 2001 and 2006, ten officers of the Boston police department (department) submitted hair samples to the department that tested positive for cocaine. In response, the department terminated their employment. The ten officers appealed the terminations to the Civil Service Commission (commission). After extensive hearings, the commission issued a decision upholding the terminations of Preston Thompson, Rudy Guity, Oscar Bridgeman, and William Bridgeforth (hereinafter, four officers), and overturning the terminations of Richard Beckers, Ronnie Jones, Jacqueline McGowan, Shawn Harris, Walter Washington, and George Downing (hereinafter, six reinstated officers or six officers), who were ordered to be reinstated with back pay and benefits to the date the commission hearings commenced.

The department and each of the ten officers filed a complaint for judicial review.4 A judge of the Superior Court affirmed the commission's decision, modifying only the back pay and benefits awards for the six reinstated officers to the date of each of their respective terminations. The four officers appeal, claiming that the department lacked just cause for their terminations. The department cross-appeals, claiming that there was substantial evidence to warrant the termination of the six reinstated officers.5 We affirm.

*Background*. 1. *Legal framework.* A tenured civil service employee who is aggrieved by a disciplinary decision of an appointing authority may appeal to the commission. See G. L. c. 31 , § 41 . After finding facts anew, the commission then must determine, by a preponderance of the evidence, whether the appointing authority met its burden of proof that there was just cause for the action taken. See *Massachusetts Assn. of Minority Law Enforcement Officers* v. *Abban*, 434 Mass. 256 , 260 , 748 N.E.2d 455 (2001); *Falmouth* v. *Civil Serv. Commn.*, 447 Mass. 814 , 823-824 , 857 N.E.2d 1052 (2006). We, in turn, need only inquire whether the commission's decision was "legally [*464] tenable," accepting the commission's factual determinations unless they are unsupported by "substantial evidence on the record as a whole." *Commissioner of Health & Hosps. of Boston* v. *Civil Serv. Commn.*, 23 Mass. App. Ct. 410 , 411 , 502 N.E.2d 956 (1987). See *Andrews* v. *Civil Serv. Commn.*, 446 Mass. 611 , 615-616 , 846 N.E.2d 1126 (2006).

2. *Commission decision*. The commission conducted hearings over eighteen days between October, 2010, and February, 2011, at which it received 202 exhibits and heard oral testimony from expert witnesses, each of the officers, and additional fact witnesses called by both sides. On February 28, 2013, the commission issued a comprehensive [**2] 132-page decision. We summarize the relevant portions of that decision as follows, reserving other facts for later discussion.

The ten officers are members of the Boston Police Patrolmen's Association (union). Rule 111, incorporated in the collective bargaining agreement (CBA) between the union and the department, provides for annual hair testing for drugs as part of the department's substance abuse policy.6, 7 Under rule 111, an employee "will be subject to termination" for a positive test result [*465] unless it is the officer's first violation. In that circumstance, the department shall offer the officer voluntary submission to a rehabilitation program. See note 7, *supra*. The notices of termination of each of the ten officers cited a violation of rule 111.8

Prior to its implementation, the hair testing program was the subject of extensive meetings and research within the union and the department. As part of that process, both the department and the union met with the legal counsel and a scientist from Psychemedics, Inc. (Psychemedics), the company eventually chosen to perform the testing, which provided assurances that its testing was "state of the art" and could, with respect to any particular drug, distinguish between voluntary ingestion and environmental exposure. The two sides also agreed on a number of essential elements of the program, including the appropriate "cutoff level," representing the minimum amount of a drug in a person's system required to trigger a positive test result for ingestion, and the availability of a second "safety net" retest.

A threshold issue before the commission was the scientific reliability of the hair testing, and its ability to distinguish between voluntary ingestion and environmental exposure. The ten officers and the department held competing views as to whether the testing alone was reliable enough to establish just cause supporting the officers' terminations. In support of their position, the ten officers called two expert witnesses, while the department opposed with its own panel of experts, including Dr. Thomas Cairns, a long-time employee and scientist at Psychemedics.9 Ultimately, the commission found that the hair testing methodology was not sufficiently reliable to be the sole basis for an officer's termination, concluding that "[a] reported positive test result … 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 [department] officer." Nonetheless, the commission found [*466] that hair testing is an appropriate tool to enforce the department's substance abuse policy and that hair test results could be used as some evidence of drug use.10, 11

Turning to whether just cause had been established in the present case as to the ten officers, as noted, the commission allowed them a full opportunity to present evidence refuting their positive test results. Taking that evidence, in addition to the positive test results, the commission considered [**3] each individual officer's credibility based on his or her testimony before the commission, any officer's refusal to acknowledge drug use by refusing the rehabilitation program, any absence of prior positive drug test results, and any officer's decision to obtain independent hair or other drug tests. Based on its review of this evidence, the commission found

that the additional evidence presented by the six officers outweighed the positive test results and ordered them reinstated with back pay from the date the hearing commenced, October 21, 2010. The commission took the converse view as to the remaining four officers and upheld their terminations.

3. *Superior Court decision*. On April 3, 2013, the ten officers and the department each filed separate complaints in the Superior Court seeking judicial review of the commission's decision.12 See G. L. c. 30A , § 14 . The department sought relief on the basis that (1) the commission had incorrectly found that positive hair tests alone were insufficient to support a termination, (2) the commission had ignored the language of the CBA in reaching its conclusion, and (3) the commission's decision as to the six officers was unsupported by substantial evidence. The four officers challenged the commission's authority to act on any ground other than the unreliable hair test results, and also claimed that the decision was not supported by substantial evidence. The six officers argued that they were entitled to back pay and benefits commencing from the date of their individual terminations.

In a detailed and thoughtful decision, the judge affirmed the commission's decision, with the exception of the back pay and [*467] benefits awards. On that point, the judge agreed with the six officers and ordered modification of the remedy accordingly. The department and the four officers now appeal to this court, restating the arguments they presented in the Superior Court. The department additionally challenges the judge's modification of the back pay and benefits awards.

*Discussion*. 1. *Implication of a positive test*. Both the department and the four officers maintain that the commission erred in the weight it afforded the positive hair test results. The department, on the one hand, argues that under the preponderance of the evidence standard, a positive test result alone is enough to terminate an officer's employment. The four officers, on the other, claim that because the notices of termination specified only a positive hair test, once the commission found that the hair testing by Psychemedics was not sufficiently reliable to be the sole basis for termination, the hearings should have concluded and the ten officers should have been reinstated. Both arguments demonstrate a misunderstanding of the scope of the commission's review under G. L. c. 31 , § 43 .

As we stated *supra*, when a case comes before the commission, it hears evidence and finds facts anew. In undertaking this process, the commission is not limited to the evidence that was before the appointing officer, but may consider any and all evidence before [**4] the commission that it considers relevant. See *Sullivan* v. *Municipal Ct. of the Roxbury Dist.*, 322 Mass. 566 , 572 , 78 N.E.2d 618 (1948) (interpreting earlier version of § 43 ). See also *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726 , 727-728 , 792 N.E.2d 711 (2003) (question is whether, on facts found by 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" [citation omitted]).

Here, after an exhaustive inquiry on the scientific reliability of the Psychemedics hair testing methodology, the commission reached the conclusion that a positive test was not conclusive on the question of voluntary ingestion, as the positive test may also represent sample contamination

by environmental exposure. In other words, the commission found that the risk of a false positive test was great enough to require additional evidence to terminate an officer for just cause.13 That conclusion is well supported by [*468] the record, which includes evidence of shifting cutoff levels through the years since the testing had been implemented, a lack of general acceptance in the scientific and law enforcement communities,14 and a lack of universally recognized industry standards. Having reached that conclusion, the commission logically proceeded to examine and to weigh the other evidence available either supporting or refuting ingestion on the part of each officer, applying the preponderance of the evidence standard, and to make a decision as to each officer accordingly. In doing so, the commission patently did not, as the department claims, assign to it an "elevated burden of proof."

As to the written notices of termination, the rationale provided is not as narrow as the four officers suggest. "[A] decision of the commission is not justified if it is not based on the reasons specified in the charges brought by the appointing authority." *Murray* v. *Second Dist. Ct. of E. Middlesex*, 389 Mass. 508 , 516 , 451 N.E.2d 408 (1983). Here, a reasonable officer would have understood that the reason he or she was facing termination was for violating department rules and regulations related to substance abuse, with the positive hair test result as evidence supporting the violation. See *McKenna* v. *White*, 287 Mass. 495 , 498 , 192 N.E. 84 (1934) (notice meant to "enable the removed officer or employee to know why he has been deemed unworthy to continue longer in the public service"). The commission accordingly properly examined all of the evidence related to whether there was a violation of rule 111, not simply the positive hair test result.

2. *Language of the CBA.* The department argues that the commission "usurped the [d]epartment's independent judgment and bargaining autonomy" by ignoring the controlling language of rule 111, incorporated in the CBA, which provides that an officer may be terminated based solely on a positive hair test. The commission decision, however, reveals a direct conflict between the [*469] CBA and the civil service law: namely, that while G. L. c. 31 , §§ 41 and 43 , permit termination only for just cause, see *Massachusetts Assn. of Minority Law Enforcement Officers* v. *Abban[**5]* , 434 Mass. at 260 , the CBA allows the appointing authority to terminate even when the test result may not reflect actual misconduct. In those circumstances, the commission ruled that, despite the provisions of the CBA, more evidence than a positive hair test was needed to demonstrate just cause. We agree that the statute controls.

"When possible, we attempt to read the civil service law and the collective bargaining law, as well as the agreements that flow from the collective bargaining law, as a 'harmonious whole.'" *Fall River* v. *AFSCME Council 93, Local 3177, AFL-CIO*, 61 Mass. App. Ct. 404 , 406 , 810 N.E.2d 1259 (2004), quoting from *Dedham* v. *Labor Relations Commn.*, 365 Mass. 392 , 402 , 312 N.E.2d 548 (1974). Where there is a conflict, however, as here, the civil service law controls as it "is not one of the statutes enumerated in G. L. c. 150E , § 7(d) , and, therefore, may not be superseded by a collective bargaining agreement." *Fall River* v. *Teamsters Union, Local 526*, 27 Mass. App. Ct. 649 , 651 , 541 N.E.2d 1015 (1989). See *Dedham* v. *Dedham Police Assn. (Lieutenants & Sergeants)*, 46 Mass. App. Ct. 418 , 420 , 706 N.E.2d 724 (1999).

3. *Substantial evidence*. Both the department and the four officers challenge the evidence supporting the commission decision. To withstand review, the decision must be supported by

substantial evidence. See G. L. c. 30A , § 14(7) . Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Boston Gas Co.* v. *Assessors of Boston*, 458 Mass. 715 , 721 , 941 N.E.2d 595 (2011), quoting from *Tennessee Gas Pipeline Co.* v. *Assessors of Agawam*, 428 Mass. 261 , 262 , 700 N.E.2d 818 (1998). See G. L. c. 30A , § 1(6) . In our review of the administrative record, we defer entirely to the commission on issues of credibility and the weight to be accorded to the evidence. See *Hickey* v. *Commissioner of Pub. Welfare*, 38 Mass. App. Ct. 259 , 262 , 647 N.E.2d 62 (1995). The standard was met here.

With great precision, the commission carefully analyzed each officer's individual case in reaching the determination that the department had met its burden as to the four officers, but not as to the six reinstated officers. In doing so, a divergent pattern of evidence emerged in the decision as to three factors: the level of cocaine present in the positive test, independent hair test results, and credibility. As to the four officers, each of their initial tests and each of their safety net retests were positive at levels well [*470] above the cutoff level.15 Two of the four officers had no independent hair testing following the initial positive test, while a third prevaricated in his testimony on the issue, finally admitting that his independent hair test was positive. Lastly, as to each of the four officers, the commission found the testimony in support of their denials to lack credibility.16 In contrast, each of the six officers had initial cocaine levels that were barely above the cutoff limit17 and each presented evidence of negative independent hair tests. As to credibility, the commission found that the six officers each presented a credible denial of drug use based on their testimony and any additional supporting evidence.18 In sum, the evidence amply supported the commission decision.

4. *Back pay and benefits awards*. General Laws c. 31 , § 43 , as appearing in St. 1981, c. 767, § 20, provides that, if the commission reverses the action of the appointing authority, "the person concerned shall be [**6] returned to his position without loss of compensation or other rights." Here, the commission ordered the reinstatement of the six officers retroactive to October 21, 2010, the date the parties appeared ready to commence the evidentiary hearings before the commission. In so doing, the commission found that there were unique circumstances warranting deviation from § 43 , including unusual delay, the lack of a claim by the officers of political or improper motive, and the failure of some officers to attempt to find new employment.

In modifying the order, the judge correctly explained that where the legislative directive is clear and unequivocal, as it is in § 43 , no exceptions, however worthy, may be applied. See *Garrison* v. *Merced*, 33 Mass. App. Ct. 116 , 118 , 596 N.E.2d 404 (1992) ("The distinction between words of command and words of discretion, such as 'shall' and 'may' have been carefully observed in our statutes"). Therefore, once the commission reversed the decision of the appointing authority as to the six officers, under the "shall" [*471] language of § 43 , the commission was required to return each of them to his or her position without loss of compensation or other rights. Accordingly, the six officers are entitled to reinstatement with back pay and benefits retroactive to each officer's termination date.

***Judgment affirmed.***

fn 1

Richard Beckers, Ronnie Jones, Jacqueline McGowan, Oscar Bridgeman, Shawn Harris, Walter Washington, William Bridgeforth, George Downing, and Rudy Guity.

fn 2

Boston Police Department.

fn 3

Boston Police Department vs. Ronnie C. Jones, Richard Beckers, Shawn Harris, Jacqueline McGowan, Walter Washington, George Downing, and the Civil Service Commission. The two cases were consolidated below for decision.

fn 4

The six reinstated officers sought judicial review only with regard to the back pay and benefits aspects of the commission decision.

fn 5

The commission and the six reinstated officers did not appeal the judgment of the Superior Court.

fn 6

A prior version of rule 111 provided for random urinalysis; this version was abandoned following the issuance of *Guiney* v. *Police Commr. of Boston*, 411 Mass. 328 , 329 , 582 N.E.2d 523 (1991).

fn 7

Rule 111 provides, in relevant part:

"V. TESTING

"Sworn personnel of the Boston Police Department will be tested for drugs and/or alcohol under the following circumstances: …

"G. Annual Drug Testing (Hair) . … [T]he parties agree that all sworn personnel shall be subject to an annual drug test to be conducted through a fair, reasonable, and objective hair analysis testing system. Each Officer shall submit to an annual test on or within thirty (30) calendar days of each Officer's birthday. …

"The Department agrees that it will establish and adhere to written collection and testing procedures for hair samples. These procedures shall be fair and reasonable so as to ensure the accuracy and integrity of the test and process. …

"VI. CONSEQUENCES OF A POSITIVE TEST

"ILLICIT DRUGS

"Sworn personnel who receive a verified positive test result for illicit drugs will be subject to termination. However, where the Officer's only violation is a positive test for illicit drug use and it is the Officer's first offense, the Commissioner shall offer voluntary submission to the following alternative [rehabilitation] program: … .

"VII. CONSEQUENCES OF VIOLATION OF THE POLICY

"Any violation of the Substance Abuse Policy shall lead to disciplinary action up to and including termination. The severity of the action chosen will depend on the circumstances of each case."

fn 8

The notices also cited violations of rules related to the conduct of department personnel and conformance to laws, based on the same positive hair test result.

fn 9

Cairns had worked for Psychemedics since 1995. At the time of the commission hearings, he was its vice-president for research and development.

fn 10

The commission also found that the testing was conducted with "reasonable scientific accuracy" and "an impressive variety of quality control procedures," and that hair testing allows for a greater window of detection beyond urine and blood testing, which is limited to the hours or days following ingestion.

fn 11

In a concurring decision, three commissioners opined that a positive hair test was sufficiently reliable to create a rebuttable presumption that the officers ingested cocaine.

fn 12

The cases were later consolidated for decision in the Superior Court. See note 3, *supra*.

fn 13

In its decision, the commission states: "given the uncertainty about the efficacy of current decontamination strategies and metabolite criteria to rule out all real-world contamination scenarios, hair test results cannot be used in rote fashion as a conclusive and irrefutable means to terminate a [department] officer on the premise that such testing is 'generally accepted' as reliable."

fn 14

For example, the commission noted that "[d]espite more than a decade of study and a clear federal policy against drugs in the workplace, the [Substance Abuse and Mental Health Services Administration, the Federal agency charged with improving quality and availability of prevention, treatment, and rehabilitative services with respect to substance abuse and mental illness] has declined to approve hair testing as a modality for detection of illicit drugs by employees of the federal government and those employed in the private sector that are subject to federal oversight."

fn 15

For instance, Thompson's initial test showed a level of cocaine three times the cutoff level; Bridgeforth's initial test was two times the cutoff level.

fn 16

For the officer whose positive independent hair test "slipped his mind," the commission described his testimony on that issue as "a mortal wound on his credibility."

fn 17

As to five of those officers, under prior cutoff levels, their initial test results would have been negative.

fn 18

Contrary to the department's suggestion, no additional expert testimony was needed to disprove that ingestion was the cause of the officers' positive initial tests. That argument ignores the fact that the expert evidence

presented showed that the test, itself, was unreliable, thus requiring further inquiry.