

**Statement of Civil Rights and Social Justice
Organizations Urging Boston Police Department to
Discontinue Hair Drug Test
(November 25, 2019)**

It's time for the City of Boston to take a stand against Psychomedics' hair drug test.

The under-signed organizations have long been extremely concerned about the critical lack of racial diversity in the Boston Police Department (BPD) and the structural employment practices that stagnate progress. One of the key barriers to BPD diversity is the hair drug test, which disproportionately results in false positives for Black officers. In the wake of the recent Supreme Judicial Court (SJC) ruling that once again highlights the scientific unreliability of this test, we urge BPD to discontinue its use immediately.

As the *Boston Globe* recently stated in its editorial calling upon BPD to stop using this discredited test:

Making sure that Boston police officers aren't using drugs—that makes sense. But testing officers and applicants in a way that costs the city millions in lawsuits and may produce inaccurate results—well, that's a lot less defensible. With yet another judgment going against the city, it's clear that the police need a better way to conduct tests.

See Problematic Drug Hair Tests for Boston Police Officers Should Be Retired, BOSTON GLOBE (Nov. 10, 2019), available at:

<https://www.bostonglobe.com/2019/11/10/opinion/problematic-drug-hair-test-boston-police-officers-should-be-retired/>

Black representation in BPD falls far below the representative community demographics. Nearly 30% of Boston identifies as Black, yet only 22% of BPD employees so identify. When focused on managerial or supervisory sworn officers, that figure drops to 19%. In the next few years, with the anticipated retirement of a significant number of Black officers, BPD will become even less diverse. We urge the City to take a meaningful stand to improve racial diversity by ending the use of the discriminatory hair test.

The test's many flaws have now been thoroughly established in numerous courts and recognized by the City itself:

- As the SJC held in last month's decision, the test "is prone to produce false positives." *Boston Police Department v. Civil Service Commission et al.*, SJC-12653, slip op. at 10 (Oct. 30, 2019). Although the test can identify the presence of a drug in a hair sample, it "cannot determine the way the drug became

incorporated into the hair follicle,” meaning that it cannot reliably distinguish between internal ingestion and external contamination. *Id.* at 12.

- As the SJC also noted, this “uncertainty surrounding environmental contamination is further confounded” by evidence that incorporation rates vary by hair color and ethnicity. *Id.* at 12 n.14 (citing studies of differential contamination rates on “hair of different color (e.g., light, dark) and ethnic origin (e.g., Caucasian, African-American)”).
- Indeed, as the First Circuit Court of Appeals held in 2014, the test falls most heavily on Black officers: “the differential between positive test results for black and white employees was statistically significant.” *Jones v. City of Boston*, 752 F.3d 38, 47 (1st Cir. 2014).
- And in an unsuccessful indemnification action against Psychemedics last year, the City itself described the hair testing performed by Psychemedics as “negligent and wrongful conduct...” *Psychemedics Corp. v. City of Boston*, Suffolk Sup. Ct 17-2494-BLS1, Counterclaim of the City of Boston ¶49 (excerpts attached). The City faulted Psychemedics for its testing regime, correctly pointing out that “[t]here are no universal industry standards controlling the performance of hair testing” and that “[t]here are no uniform benchmarks for interpreting hair test results.” *Id.* ¶17.

The financial costs to the City of continuing to use this highly flawed test are enormous – and growing. In response to a recent public records request, BPD admitted that the City had spent **over \$2.1 million** on outside counsel bills for hair test litigation through March 2019 (see attached). And due to losses in court, the City was liable to wrongfully terminated officers “in amounts that have yet to be fully determined.” *Psychemedics v. City of Boston, supra*, Counterclaim of the City of Boston ¶48. Just considering *partial payments* for back pay and benefits that the City had already made to those officers by February 2018, the amounts exceeded **\$1.7 million**. *Id.*

At a time when the community is calling on the City to recommit to improving diversity, expending millions of scarce taxpayer dollars to continue defending this discriminatory test is unconscionable. That is not even to mention other costs that are harder to quantify but equally disturbing: the harm to dedicated public servants when their careers are derailed and they are falsely branded as drug users, and the cost to public safety when highly qualified officers of color are unfairly removed from the force.

The recent SJC decision makes it imperative for the City to address this problem **now**. For all of the above reasons, we strongly urge the City to discontinue use of this scientifically unreliable and discriminatory test at BPD immediately.

Lawyers for Civil Rights
Boston Society of Vulcans
ACLU of Massachusetts

MAMLEO
Massachusetts Employment Lawyers Association
Massachusetts Law Reform Institute

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 17-2494-BLS1

PSYCHEMEDICS CORPORATION,

Plaintiff/Defendant-In Counterclaim,

v.

CITY OF BOSTON,

Defendant/Plaintiff-In-Counterclaim.

THE CITY OF BOSTON'S ANSWER
TO FIRST AMENDED
COMPLAINT AND
COUNTERCLAIM OF THE CITY
OF BOSTON

ANSWER

1. Paragraph 1 of the Complaint is an introduction to which no response is required.

To the extent a response is required, the City of Boston ("City"), admits the allegations of the first and third sentences and deny the allegations of the second, fourth and fifth sentences of paragraph 1 of the First Amended Complaint (the "Complaint").

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. The City lacks sufficient information to form a belief as to truth or falsity of the allegation that the Psychemedics Corporation ("Psychemedics") hair test is used by law enforcement agencies worldwide, but admit the remaining allegations of the first sentence of

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2018 FEB 20 P 2:17
CLERK OF SUPERIOR COURT
CIVIL DIVISION

17. There are no universal industry standards controlling the performance of hair testing, except for general agreement that a level of 5ng/10mg of cocaine, plus some level of metabolite, is the minimum concentration indicative of a low-level user. There are no uniform benchmarks for interpreting test results. Of the several laboratories that now offer hair testing to employers, the testing methods vary from laboratory to laboratory. While some parameters are described generally in published literature, substantial parts of the laboratory methodologies, including Psychomedics, are hidden behind claims of competitive proprietary interest.

18. Psychomedics testing of five of the six officers whose terminations were overturned by the Commission (Officers Beckers, McGowan, Washington, Downing and Jones) showed dramatic, and scientifically significant, variations in the officers' initial test results as compared with their safety net test results. Psychomedics SOPs in place when those officers were tested ignored the variability of the initial test results as compared to the test results in the subsequent "safety net" test.

19. The Commission found that, "while some degree of variation can be explained by the time delay between initial sampling and subsequent follow-up safety net and/or independent tests of the [officers], the difference in most of the test results for many of the [officers] greatly exceeds the 20% variability allowed in forensic chemistry, as well as the 30% variability" limit provided by the BPD rules after 2007. The Commission noted the "large discrepancies" in the officers' Psychomedics hair drug test results and concluded that "[c]learly, this degree of variability and potential difference in outcome is not indicative of a mature, stable and reliable methodology."

test was great enough to require additional evidence to terminate an officer for just cause. 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." That conclusion is well supported by 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, and a lack of universally recognized industry standards.

48. The City is now liable for back pay and benefits to Officers Beckers, McGowan, Harris, Washington, Downing, and Jones in the Civil Service Commission Appeals in amounts that have yet to be fully determined. On February 16, 2018, the City made partial payments to four of the officers in partial satisfaction of that liability. The payments to, or for the benefit, of the officers, which included required payroll withholding amounts, were as follows:

<u>Date</u>	<u>Officer</u>	<u>Gross Payment Amount</u>
February 16, 2018	Harris	\$498,792.05
February 16, 2018	Washington	\$311,705.14
February 16, 2018	Downing	\$391,867.83
February 16, 2018	Jones	\$577,123.44
	TOTAL	\$1,779,488.46

49. Psychemedics was negligent in its administration of its hair drug testing for the City during the period with 1998 to 2003 and specifically with regard to the administration of that testing as it applied to Officers Beckers, McGowan, Harris, Washington, Downing and Jones. But for Psychemedics' negligent and wrongful conduct, the City would not have been found liable to those six officers in the Civil Service Commission Appeals.

HAIR DRUG TESTING OUTSIDE COUNSEL BILLS
CITY OF BOSTON LAW DEPARTMENT/BOSTON POLICE DEPARTMENT

September 6, 2006 – March 31, 2019

\$2,120,362.46

Morgan Brown & Joy:

\$770,694.53 (9/5/06 – 11/24/10)

(Mary Jo Harris, Michael Clarkson, Sean P. O'Connor)

Ogletree Deakins

\$207,125.27 (4/11-6/13)

(Michael Clarkson)

Helen Litsas

\$981,755.12(11/22/10- 3/31/19)

Davis, Malm,D'Agostine

Tom Fitzpatrick

\$160,787.54 (11/17-3/31/19)