



**DESE Issues  
Substance Abuse  
Screening Guidance**

As reported in our October 2017 Client Advisor, the 2016 Opioid Law required districts to implement a verbal screening tool at two grade levels, and directed DESE and DPH to issue further guidance.

On January 26, 2018, the DESE issued a long awaited memo explaining the law and providing links to the screening tools and training programs. This memo can be found on their website at [www.doe.mass.edu/sfs/safety/verbalscreening.html](http://www.doe.mass.edu/sfs/safety/verbalscreening.html).

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**CSC Narrowly Upholds Police Untruthfulness  
Bypass Despite Questionable Questions**

In *Kerr v. Boston Police Department*, the Civil Service Commission (CSC) in a 3-2 decision upheld the bypass of a candidate for police officer based on untruthful answers during a background investigation. In its January 18, 2018 decision, the CSC rejected or set aside 5 of 7 reasons for bypass proffered by the BPD, ultimately relying on untruthful statements to the background investigator about misconduct allegations from middle school, coupled with the appellant’s selective memory of traffic warnings and citations, to uphold the bypass. The CSC indicated the traffic citations would not have been enough, *standing alone*, to uphold the bypass (others lower on the list were appointed with the same concern), however coupled with the other untruthfulness, the bypass was justified. Writing in a rare dissenting opinion, Commissioners Stein and Tivnan would have overturned the bypass.

The CSC criticized the BPD for finding untruthful appellant’s statement that he had no prior employment discipline. Appellant’s military record contained a remark regarding being counseled for returning late to base, yet, appellant had received a Good Conduct Medal signifying that he had no discipline. The CSC found it a fair difference of opinion on whether the remark constituted discipline and ruled the appellant’s answer was not untruthful. The CSC also chided BPD for an application question asking: “Is there anything not previously addressed that may cause a problem concerning your possible appointment as a police officer?” finding it too subjective to supply a meaningful basis for a bypass.

Both the majority and dissenting opinions highlighted the tension between the need for police agencies to conduct thorough background checks, possibly including inquiring about CORI information, and the Chapter 151B proscription against asking about arrests that do not result in convictions, and seemingly prohibiting the kind of action taken here by holding the applicant accountable for inaccurate answers to prohibited questions. Commissioner Bowman, writing for the majority, found it unnecessary to resolve this tension, but the minority would have done so by finding the questions were illegal. The majority may have been swayed by the cumulative effect of several police interactions appellant had “forgotten” or thought he did not have to disclose, but the net result was that the bypass finally rested on some police interactions connected to allegations of misconduct when the appellant was in middle school, a result roundly criticized by the dissent.

This is a developing area that will no doubt be exploited by unsuccessful applicants for public safety appointment. Check with your CLP attorney to review applications and when crafting reasons for bypass to ensure you do not end up on the wrong end of this issue.

**SJC: Sick Leave Buyback Is Not Wages**

In *Tze-Kit Mui v. Massachusetts Port Authority* (January 29, 2018), the Supreme Judicial Court rejected plaintiff’s Wage Act claim that his employer did not pay unused sick leave to him until a year after his separation from employment. The payment was delayed because Mui was initially fired, which disqualified him from the payment, but an arbitrator later overturned the discharge finding he had effectively retired first. The Court did not directly rely on the employer’s valid reason for the delay, finding instead that sick leave pay does not qualify as wages under the Act, but is more like a bonus contingent on meeting certain qualifications.

