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Assistant Deputy Commissioner Vanessa Facio-lince
Police Department City of New York
One Police Plaza, 14th Floor
New York, N.Y. 10038

In the Matter of the Disciplinary Proceedings against Police Officer Frankie F. Palaguachi, Tax Registry No.: 957932, Shield No.: 27476, Case Nos.: 2024-30166

Re: Reply in Further Support of Motion to Strike Testimony and Exhibits 1–4, Preclude Testimony, and Dismiss Charges Relating to Psychemedics' Unvalidated EIA Hair Testing

Dear Commissioner Facio-lince:

The Department's opposition to Officer Palaguachi's motion to strike the testimony of Dr. Paulsen, Sergeant Tse, preclude the anticipated testimony of Dr. Joseph J. Ciuffo (Medical Review Officer), and to strike Exhibits 1–4, and to dismiss the charges, fundamentally fails to address the core legal issues. Instead, it offers a series of misstatements about the Uniform Guidelines on Employee Selection Procedures (UGESP), the Frye standard, and the relevance of certifications, licenses, and FDA clearances. Most notably, the Department's reliance on these materials does not remedy the underlying legal deficiency: Psychemedics' enzyme immunoassay (EIA) methodology has not been validated in accordance with the Frye standard or UGESP, making the evidence and the anticipated testimony inadmissible under Rule 7.01 of the Rules of Evidence.

The Department's invocation of certificates, licenses, and court rulings fails to substantively address the question of whether Psychemedics' EIA hair testing methodology is scientifically accepted within the relevant scientific community. These certifications do not provide a basis for admitting the test results under Frye or UGESP. As explained in Officer Palaguachi's motion, under Rule 7.01, this tribunal has a **non-delegable** duty to ensure that only scientifically validated and UGESP-compliant evidence is allowed. The Department has failed to meet that burden.

Moreover, the Department's references to case law, including pre-Boston litigation cases, are legally insufficient to resolve the issues at hand. Notably, the Department cites decisions that did not address the Frye standard or UGESP compliance for Psychemedics' EIA methodology, and therefore, those cases offer no judicial guidance to this tribunal. The Boston litigation, most prominently the findings in Jones v. City of Boston, 752 F.3d 38 (1st Cir. 2014), directly implicates the issues of racial disparities and the scientific validity of Psychemedics' testing

methodology. This litigation, which concluded with a $2.6 million settlement in December 2023, highlights the systemic flaws and scientific shortcomings of Psychemedics' approach, underscoring that it remains unsuitable for use in determining disciplinary actions.

The Massachusetts Civil Service Commission's rejection of Psychemedics' radioimmunoassay of hair (RIAH) testing for cocaine in 2013, based on its susceptibility to environmental contamination, inconsistent lab cutoffs, and lack of uniform standards, is particularly instructive. The Commission concluded that "a positive hair test, standing alone, cannot establish ingestion" and deemed the method a "work in progress." This finding applied to cocaine, a metabolite that is chemically more stable in hair than THC. Suppose Psychemedics' methodology could not reliably distinguish ingestion from contamination for cocaine. In that case, it is even more unreliable for marijuana (THC), where the metabolite THC-COOH is unstable and more prone to contamination.

The First Circuit's rulings in Jones v. City of Boston (2014, 2016) provide further support for the motion, as the court applied UGESP principles directly to Psychemedics' testing. While it did not resolve the issue of scientific validity (a matter already rejected by the Massachusetts Commission), it remanded the case for trial to consider whether alternative methods—such as urinalysis—could be used. This is a direct application of UGESP §1607.3(B), which requires employers to adopt less discriminatory alternatives when available.

These rulings demonstrate that Psychemedics' methodology has been scientifically rejected and legally challenged across multiple drug classes and contexts. Psychemedics' EIA methodology has never been validated under UGESP, has been repeatedly rejected by scientific authorities, and has been shown to disproportionately impact Black officers, as evidenced by the Boston case. Despite this, the Department continues to rely on Psychemedics' internally generated thresholds, without conducting any UGESP-compliant validation or disparate impact studies.

The unreliability of the Psychemedics testing methodology undermines the entire record before the tribunal. Specifically:

- **Exhibit 1 (Collection Questionnaire)** and **Exhibit 4 (Medical Review Officer Documents)** are derivatives of Psychemedics' unvalidated EIA process and add no independent reliability; they presuppose the validity of the underlying test.
- **Exhibit 2 (Dr. Paulsen's CV)** provides credentials but cannot substitute for the necessary scientific validation.
- **Exhibit 3 (The "Positive" EIA Test Result)** is the contested product of Psychemedics' proprietary, unvalidated methodology.

Since Psychemedics' testing methodology fails to meet the legal and scientific standards under Frye, UGESP, and Griggs, these Exhibits cannot stand as competent evidence and must be excluded.

I. UGESP, Griggs, and the Department's Non-Delegable Duty

The Department's opposition attempts to downplay the binding nature of the Uniform Guidelines on Employee Selection Procedures (UGESP), suggesting that UGESP is "guidance only." This characterization is a fundamental misreading of both the legal standards governing employment practices and the precedents that have established the binding nature of UGESP under Title VII of the Civil Rights Act. The Department's approach not only ignores well-established case law but also inadvertently concedes several key points made in Officer Palaguachi's motion, which highlight the Department's failure to comply with UGESP, Frye, and due process.

A. UGESP's Binding Nature Under Title VII

UGESP is not merely a set of guidelines; it is a legally binding framework developed by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice to enforce Title VII's prohibition against discrimination in employment practices. The Department's attempt to downplay UGESP's binding nature by referring to it as "guidance" contradicts decades of case law, most notably Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405, (1975), both of which reaffirm that UGESP is central to the legal analysis of employment practices under Title VII.

In Griggs, the U.S. Supreme Court held that "practices, procedures, or tests [that] operate to exclude African-Americans and other minorities [must] be shown to be related to job performance," reinforcing that disparate impact—rather than intent—was sufficient to establish discrimination under Title VII. The Court further emphasized that employers must demonstrate that employment practices, including testing procedures, are job-related and consistent with business necessity. The Court in Griggs specifically referenced the guidelines established under UGESP, affirming that they are integral to ensuring compliance with Title VII.

The Department's assertion that UGESP is "guidance" is also at odds with the language of the regulations themselves. 29 C.F.R. Part 1607 (which includes UGESP) is not a set of recommendations but a formal rule adopted by the EEOC. Courts have consistently upheld its binding nature in employment discrimination cases, including the requirement that employers conduct validity studies (such as those required by UGESP §1607) to demonstrate the job-relatedness of their selection procedures, including drug testing protocols.

B. UGESP's Direct Application to Psychemedics' EIA Methodology

The Department's failure to address UGESP's requirement that drug testing methods be validated—particularly under §1607—amounts to a concession of this key point. Officer Palaguachi's motion has consistently argued that Psychemedics' enzyme immunoassay (EIA) methodology has never undergone UGESP-compliant validation. This is a fundamental failure that the Department has failed to address meaningfully in its opposition.

UGESP clearly mandates that when an employer uses a selection procedure, such as drug testing, it must ensure that the procedure is validated for the specific job-related purpose for

which it is used. This validation must be conducted using scientifically accepted methods, as described in §1607.4, and must include an assessment of potential adverse impacts on various demographic groups. As we demonstrated in our motion, Psychemedics' EIA testing methodology has never been validated for employment decisions, as required by UGESP.

The Department's failure to provide any evidence of such validation is not only a violation of UGESP but also an implicit admission that it has not met its burden to demonstrate that the testing methodology is job-related and consistent with business necessity under Griggs. Instead, the Department erroneously suggests that mere use by other employers or past judicial rulings is sufficient to validate the testing methodology, which contradicts UGESP's explicit requirements.

C. The Department's Concession on the Burden of Proof and Lack of Rebuttal

The Department's response further concedes that it has failed to meet the burden of proof required under UGESP and Griggs. Under these cases, the burden rests squarely on the Department to prove that any selection procedure it employs is job-related, does not disproportionately impact minority groups, and is consistent with business necessity. By failing to address the key point raised in Officer Palaguachi's motion—the lack of UGESP-compliant validation studies for Psychemedics' EIA hair test—the Department effectively concedes this point.

The Department's reliance on *cases involving certifications, licenses, or commercial use*—such as the FDA's clearance or Psychemedics' accreditation—does not address the core issue of whether Psychemedics' testing methodology has been validated for its intended purpose as required under UGESP. This lack of scientific validation is the very issue raised by Officer Palaguachi in his motion, and the Department's failure to dispute this fact leaves the issue conceded.

Furthermore, the Department's suggestion that prior rulings—such as those in cases that involved the testing methodology in other contexts—are dispositive of the issues raised here reflects a misunderstanding of UGESP's requirements. The fact that courts have upheld Psychemedics' testing in some contexts does not equate to a scientific validation of the methodology under UGESP, Frye, or Griggs. This is a key point that Officer Palaguachi's motion emphasizes: prior court rulings and commercial acceptance are insufficient substitutes for the rigorous validation process mandated by UGESP.

D. The Department's Failure to Address Officer Palaguachi's Motion in Full

Officer Palaguachi's motion presented several legal arguments that the Department failed to address adequately, notably the following:

1. The requirement for scientific validation under Frye and UGESP: The Department failed to provide any evidence of Frye-compliant general acceptance of Psychemedics' EIA methodology, which is critical to the admissibility of the evidence.

2. The impact of the *Boston* litigation and the Commission's rejection of Psychemedics' testing: The Department neglected to respond to Officer Palaguachi's citation of the Massachusetts Civil Service Commission's rejection of Psychemedics' radioimmunoassay of hair (RIAH), especially in the context of its inability to distinguish ingestion from contamination reliably. This ruling is pivotal in assessing the reliability of the methodology.
3. The legal implications of disparate impact under UGESP: The Department did not rebut the specific claim that Psychemedics' testing methodology disproportionately impacts Black officers, as evidenced by the Jones v. City of Boston case and its direct application of UGESP principles. This omission highlights a critical failure to address Officer Palaguachi's legal arguments.

In light of these points, the Department's opposition fails to present any admissible evidence to support the validity of Psychemedics' testing methodology or its compliance with UGESP. The Department has effectively conceded several key points by failing to provide a rebuttal or evidentiary support; therefore, the motion to strike the testimony and exhibits, preclude testimony, and dismiss the charges should be granted in its entirety.

II. Frye and the Lack of General Acceptance

The Department's opposition relies heavily on the assertion that the use of Psychemedics' enzyme immunoassay (EIA) methodology by other employers and courts somehow equates to general acceptance within the scientific community. This is a misapplication of both the Frye standard and the legal principles that govern the admissibility of scientific evidence. As the Department fails to provide any reliable scientific validation for the methodology under the Frye test or the Uniform Guidelines on Employee Selection Procedures (UGESP), its arguments only further highlight the shortcomings of its case and inadvertently concede several critical points raised in Officer Palaguachi's motion.

A. Commercial Adoption Does Not Equal Scientific Consensus

The Department's reliance on the fact that Psychemedics' methodology has been used by other employers or upheld by courts in prior cases does not satisfy the Frye standard for general acceptance in the relevant scientific community. As established in Wesley v. People, 83 N.Y.2d 417 (1994), "commercial adoption" of a scientific method does not equate to "scientific consensus" as required under Frye v. United States, 293 F. 1013 (D.C. Cir. (1923).

In Wesley, the New York Court of Appeals clarified that the Frye standard requires scientific methods or theories to be generally accepted by the relevant scientific community, not just commercial or legal markets. The Court emphasized that "the scientific community, not just the courts, must recognize the reliability of a given technique." This directly applies to Psychemedics' enzyme immunoassay (EIA) methodology for hair testing, which the Department claims is valid due to its use by other employers or past court decisions. This argument fails to meet the Frye standard, which specifically requires validation through scientific scrutiny, peer-reviewed studies, and consensus within the scientific field.

The Department's arguments regarding the "commercial use" of Psychemedics' testing method—while notable—are insufficient for establishing general acceptance within the scientific community. The Frye standard is not satisfied merely because a test or methodology is used by various employers or referenced by courts in past rulings. Instead, as emphasized in Wesley and reaffirmed in other Frye-based case law, the test must undergo rigorous validation within the relevant scientific community before being accepted as reliable for legal purposes.

B. The Department Concedes Lack of Scientific Validation

The Department's argument inadvertently concedes several key points raised in Officer Palaguachi's motion, particularly the lack of scientific validation for Psychemedics' methodology. The Department's failure to rebut Officer Palaguachi's assertion that Psychemedics' enzyme immunoassay (EIA) methodology has never been subject to peer-reviewed studies or Frye-compliant validation is an implicit admission that it cannot meet the scientific standards required for admissibility.

In its opposition, the Department refers to the testing's use by other employers and its clearance in specific legal contexts. However, it fails to provide any substantive evidence of general scientific consensus on the reliability and accuracy of Psychemedics' EIA methodology. The Department offers no peer-reviewed studies, scientific publications, or recognized scientific authorities who have validated the testing method as generally accepted in the scientific community. This failure is crucial and leaves the Department's position unsupported by the scientific standards that Frye demands.

Further, the Department's argument does not address Officer Palaguachi's central point that Psychemedics' EIA methodology has never been validated in accordance with the Frye test or UGESP guidelines. It also fails to provide any evidence of studies showing that the test method has been adopted or scrutinized by the relevant scientific bodies for hair testing as it relates to drug use and its application in employment decisions. Without this validation, any reliance on the test as a credible and scientifically accepted method for employment-related drug testing is premature, unsupported, and legally flawed.

C. The Department's Failure to Address the Lack of Validation Under Frye and UGESP

The Department's opposition is devoid of any meaningful engagement with the legal issues raised in Officer Palaguachi's motion regarding Frye and UGESP. These are fundamental to the analysis of whether Psychemedics' EIA methodology is admissible as evidence. Specifically, Officer Palaguachi's motion outlined the legal requirement that any testing methodology used in employment decisions must meet both scientific and legal standards of reliability, such as those outlined in Frye and UGESP.

The Department's failure to address the issue of whether Psychemedics' test methodology meets the Frye standard—i.e., whether the scientific community has generally accepted it—represents a significant omission in their opposition. As a result, the Department has effectively conceded that it cannot meet the Frye standard for scientific validity. The failure

to address this issue further bolsters Officer Palaguachi's position that the evidence based on Psychemedics' unvalidated testing methodology must be excluded from the record.

D. Additional Legal Failures: Frye and UGESP Are Not Substitutes for Commercial Use

The Department's reliance on *cases involving certifications, licenses, or commercial use*—such as the FDA's clearance or Psychemedics' accreditation—fails to address the core issue of whether the methodology has been validated under the scientific standards outlined in Frye and UGESP. Specifically, the Department's arguments about FDA clearance are irrelevant to the Frye test, as FDA approval does not address whether a scientific methodology has been tested and accepted by the relevant scientific community.

As established in Medtronic v. Lohr, 518 U.S. 470 (1996), FDA clearance pertains to safety and efficacy, not scientific validation. Therefore, FDA clearance does not automatically validate a method under Frye or make it admissible under the rules of evidence. This distinction has been repeatedly clarified by the courts, as seen in Zimmer NexGen (2010), where the U.S. Supreme Court explained that regulatory approval does not equate to judicial acceptance of the underlying methodology in court.

Similarly, the Department's reliance on past court rulings involving Psychemedics' methodology fails to address the specific legal issue raised in Officer Palaguachi's motion—the lack of scientific validation under Frye and UGESP. Past rulings do not establish the general acceptance of the methodology by the scientific community, which is a prerequisite for its use in court under the Frye standard.

In conclusion, the Department's reliance on commercial adoption and legal precedent does not meet the rigorous Frye standard, which requires scientific consensus on the validity of the methodology. The Department has failed to provide any evidence of general acceptance of Psychemedics' enzyme immunoassay (EIA) methodology within the scientific community, nor have they addressed the key point raised in Officer Palaguachi's motion regarding the lack of Frye compliance. The Department has effectively conceded several key points by failing to provide a rebuttal or evidentiary support; therefore, the motion to strike the testimony and exhibits, preclude testimony, and dismiss the charges should be granted in its entirety.

III. Misrepresentation of FDA 510(k) Clearance

The Department's opposition attempts to use the FDA 510(k) clearance as a justification for the admissibility of Psychemedics' enzyme immunoassay (EIA) methodology. However, this reliance on FDA clearance misrepresents the purpose and scope of the 510(k) process and does not satisfy the scientific validation requirements of the Frye standard or UGESP. The Department's argument that FDA clearance somehow validates the reliability of Psychemedics' EIA testing method is legally and scientifically flawed.

A. FDA 510(k) Clearance Does Not Equal Scientific Validation

FDA clearance under the 510(k) process is primarily concerned with determining whether a product is "substantially equivalent" to another already on the market. This clearance process assesses whether a device is safe and effective for its intended use within the FDA's regulatory framework. However, it does not provide a scientific validation of the underlying methodology used by the product, nor does it satisfy the scientific acceptance required under the Frye standard.

As established in Medtronic v. Lohr, 518 U.S. 470 (1996), the FDA 510(k) process is distinct from scientific validation. The U.S. Supreme Court made clear that "FDA approval does not preclude a court from applying state law and does not exempt the device from being scrutinized for scientific validity in a legal context." In other words, FDA clearance does not equate to scientific consensus or judicial validation of the methodology's reliability for purposes of admissibility in court.

Similarly, in Zimmer NexGen (2010), the Supreme Court reaffirmed that FDA clearance is a regulatory determination focused on safety and effectiveness, but does not automatically validate the scientific basis of a device or testing method. The Court emphasized that courts must independently assess whether the methodology has been validated in the scientific community, particularly when it comes to expert testimony and the admissibility of scientific evidence.

In this case, Psychemedics' enzyme immunoassay (EIA) methodology has never been independently validated by peer-reviewed studies or generally accepted in the scientific community as required by the Frye standard. FDA clearance alone cannot substitute for scientific consensus on the reliability and validity of the methodology used for hair testing in employment-related drug testing.

B. FDA's Own Warnings and Limitations on 510(k) Clearance

The FDA itself has issued warnings and clarifications that further demonstrate why its 510(k) clearance does not equate to scientific validation of Psychemedics' methodology. In Medtronic v. Lohr, the Court pointed out that 510(k) clearance "does not establish the safety and efficacy of a device or method in a scientific sense—it merely assures that the device or method is substantially equivalent to an existing one."

Moreover, the FDA has made it clear that clearance does not address the scientific reliability of methods used for drug testing, particularly when it comes to novel methodologies or methods that have not undergone comprehensive scientific validation. The FDA's own guidelines indicate that 510(k) clearance does not mean that a device or method is scientifically validated, and it does not certify that the method will withstand legal scrutiny, especially in contexts such as employment law where Frye and UGESP standards apply.

The FDA does not engage in the same type of peer-reviewed scientific validation required under Frye, nor does it conduct the types of studies needed to meet the general acceptance standard in the relevant scientific community. As such, the Department's reliance on 510(k) clearance for validating the Psychemedics' enzyme immunoassay (EIA) methodology is a

misapplication of the clearance process. It does not provide any basis for admissibility under the legal standards for scientific evidence.

C. Department's Concession of Scientific Validation Failure

In failing to provide any substantive rebuttal to Officer Palaguachi's argument that Psychemedics' methodology has not been scientifically validated, the Department effectively concedes that its testing method is not subject to the rigorous scrutiny required under Frye and UGESP. While the Department argues that the 510(k) clearance of Psychemedics' product is sufficient, it fails to address the key issue raised in Officer Palaguachi's motion: that commercial approval or regulatory clearance does not validate a methodology scientifically.

The Department's opposition does not present any peer-reviewed studies, independent research, or scientific consensus validating Psychemedics' enzyme immunoassay (EIA) methodology. Instead, it relies on a regulatory process (510(k) clearance) that does not meet the standards required for scientific validity in legal contexts. This failure to address the lack of scientific validation highlights the Department's inability to meet the Frye standard. Further, it undermines its reliance on the 510(k) clearance as evidence of the methodology's general acceptance.

D. Legal Concession of Key Points Raised in Palaguachi's Motion

By failing to provide any meaningful rebuttal to the central argument—that Psychemedics' testing methodology has not been scientifically validated under Frye—the Department has effectively conceded this critical point. The Department also failed to address Officer Palaguachi's claim that Psychemedics' EIA methodology has not been subjected to peer-reviewed studies, scientific validation, or general acceptance in the scientific community. These omissions demonstrate that the Department cannot meet the legal and scientific standards for the admissibility of Psychemedics' test results and related testimony.

The Department's reliance on FDA 510(k) clearance as proof of validation is both legally insufficient and scientifically flawed. It is clear that the FDA's regulatory process does not replace the rigorous scientific validation required under Frye and UGESP, and the Department's failure to address these points further strengthens Officer Palaguachi's argument that the evidence based on Psychemedics' unvalidated methodology must be excluded from the record.

In conclusion, the Department's reliance on FDA 510(k) clearance as validation for Psychemedics' enzyme immunoassay (EIA) methodology is legally and scientifically flawed. FDA clearance does not equate to scientific validation under Frye and UGESP, and the Department's failure to address this crucial issue only further undermines its position. The Department's arguments regarding FDA clearance are inadequate to overcome the inability of Psychemedics' methodology to meet the scientific and legal standards required for admissibility in court.

In light of these points, the Department's opposition fails to present any admissible evidence to support the validity of Psychemedics' testing methodology or its compliance with

UGESP. The Department has effectively conceded several key points by failing to provide a rebuttal or evidentiary support; therefore, the motion to strike the testimony and exhibits, preclude testimony, and dismiss the charges should be granted in its entirety.

IV. Collection Defects, Sergeant Tse's Testimony, and Dr. Paulsen's Contradictory and Biased Testimony

A. Collection Defects and Sergeant Tse's Testimony

The Department's defense relies on the claim that chain-of-custody documentation and Sergeant Tse's testimony can establish the reliability of Psychemedics' enzyme immunoassay (EIA) hair testing methodology. However, the Department's arguments misinterpret the role of chain-of-custody in relation to scientific validation.

While the chain of custody is crucial for ensuring that evidence is not tampered with, it cannot, on its own, establish the reliability of the scientific method used to collect and analyze the evidence. Sergeant Tse's testimony merely attests to the procedural aspects of the collection process, including the proper handling of samples and the completion of the necessary documentation. His testimony, however, does not address the core issue: the unreliability of Psychemedics' EIA methodology, which remains unvalidated under both Frye and UGESP.

The chain-of-custody procedures described by Sergeant Tse do not mitigate the fundamental flaws of the EIA test. In fact, Sergeant Tse's limited expertise on the technical aspects of the test process only underscores the fact that the chain-of-custody alone cannot remedy the inherent scientific shortcomings in Psychemedics' testing methodology. Furthermore, his testimony fails to address the more pressing issue of inconsistent results that plague the EIA testing, as outlined in Officer Palaguachi's motion.

B. Dr. Paulsen's Contradictory and Biased Testimony

The Department's reliance on Dr. Paulsen's testimony to justify the validity of Psychemedics' enzyme immunoassay (EIA) methodology fails to address the critical issues of bias, scientific inconsistency, and unexplained contradictions that undermine his credibility and the reliability of the test. Dr. Paulsen, as an employee of Psychemedics, is inherently biased in his defense of the company's product, and his testimony does not meet the scientific standards required for expert testimony.

1. Dr. Paulsen's Conflict of Interest and Bias as a Psychemedics Employee

Dr. Paulsen's role as an employee of Psychemedics fundamentally compromises the objectivity of his testimony. As someone whose professional reputation and compensation are directly tied to the success of Psychemedics and its products, Dr. Paulsen's testimony cannot be considered impartial. His financial stake in defending the EIA methodology makes him an interested party, not a neutral expert. Under established principles of expert testimony, a conflict of interest undermines the reliability of his opinions. His defense of the methodology is

motivated by self-interest, which raises questions about the credibility and objectivity of his testimony.

2. Growth Rate Explanation: Scientifically Implausible and Unsupported

Dr. Paulsen relies heavily on the claim that hair growth rates can be used to determine drug ingestion timelines, a claim that is scientifically flawed and lacks substantial support in peer-reviewed research. He suggests that hair grows at a predictable rate and that this can be correlated to the presence of drugs. However, this assumption fails to account for the substantial variability in hair growth across individuals, influenced by factors like age, ethnicity, and health. Scientific literature consistently discredits the idea that hair growth can be reliably used to predict drug use. Dr. Paulsen's failure to address this variability or provide any scientifically accepted research to back up his claim significantly undermines the credibility of his testimony. The scientific consensus shows that hair growth rates are not consistent enough to draw the conclusions Dr. Paulsen suggests.

3. Disregard of Negative Results: Unsupported Dismissal of Omega Negatives and Psychemedics' Negative Results

Dr. Paulsen fails to address critical issues with the negative results produced by Psychemedics' testing methodology, particularly the Omega negative results—instances where hair samples test negative for drugs despite the individual's history of drug ingestion. This raises serious concerns about the reliability and accuracy of the test. Dr. Paulsen dismisses these inconsistencies as outliers, yet provides no scientific explanation for why these results occur or how they can be reconciled with the claim of accuracy that the EIA test purports. The failure to detect drugs in samples where they should logically appear weakens the scientific foundation of the methodology and casts serious doubt on its overall effectiveness.

4. The Impact of Negative Results on the EIA Test's Overall Reliability

The consistent occurrence of negative results—whether Omega negatives or Psychemedics' own negative results—severely undermines the reliability of the EIA test. A test that cannot consistently detect drugs, especially in cases where they should logically be present, fails to meet the scientific rigor required for reliable drug testing in legal and employment contexts. Dr. Paulsen's failure to engage with these contradictions leaves his testimony incomplete and unscientific, especially given the absence of an explanation for why the test fails under certain conditions.

5. Conclusion: Dr. Paulsen's Failure to Address Critical Inconsistencies

Ultimately, Dr. Paulsen's testimony is insufficient to defend the validity of Psychemedics' EIA testing methodology. His bias as an employee of Psychemedics, combined with his scientifically unsubstantiated explanations for critical flaws in the test—such as inconsistencies in hair growth and negative results—renders his testimony unreliable. Failure to address fundamental issues, such as the unexplained Omega negative results and inconsistent test outcomes, further diminishes his credibility as an expert. His inability to provide meaningful,

scientifically credible responses to these critical concerns highlights the fragility of his position and reinforces the need to preclude his testimony from the record.

C. Department's Legal Concessions and Unaddressed Points

The Department's failure to directly rebut these critical points further demonstrates the weaknesses in their defense of Psychemedics' testing methodology. The Department does not address the core issue of Dr. Paulsen's bias as a Psychemedics employee, nor do they challenge the scientific deficiencies in his testimony. By omitting a meaningful rebuttal to these arguments, the Department tacitly concedes that Dr. Paulsen's testimony is neither impartial nor scientifically valid.

Moreover, the Department does not provide any independent validation of Psychemedics' methodology, nor do they cite any peer-reviewed research that would support Dr. Paulsen's claims. Instead, they rely on internal data from Psychemedics, which is inherently flawed due to its lack of independent verification. This failure to provide objective evidence highlights the fundamental weaknesses in the Department's defense.

In sum, the Department has effectively conceded several key points by failing to provide a rebuttal or evidentiary support; therefore, the motion to strike the testimony and exhibits, preclude testimony, and dismiss the charges should be granted in its entirety.

V. Medical Review Officer's Failures

Dr. Ciuffo's anticipated testimony, along with Exhibit 4, merely recycles the assumption that Psychemedics' EIA test is valid—an assumption contradicted by both scientific consensus and binding precedent. His testimony will not provide any new or independent scientific validation for the EIA methodology. Instead, it will simply reiterate Psychemedics' own claims about the test's reliability, which have been consistently challenged.

1. Failure to Provide Independent Validation

Dr. Ciuffo's anticipated testimony and Exhibit 4 fail to offer independent verification of Psychemedics' EIA methodology. Rather than addressing the scientific flaws and lack of validation identified in prior litigation and scientific studies, Dr. Ciuffo merely assumes the test's validity. His reliance on Psychemedics' own internal data does not meet the rigorous standards required for MRO testimony, particularly as it has not been subject to independent peer review, the Frye standard, or UGESP validation.

2. Exhibit 4: Recycling Assumptions, Not Validating the Test

Exhibit 4, which includes Dr. Ciuffo's documentation, merely presupposes the validity of Psychemedics' EIA test. It offers no independent validation or objective scientific analysis of the test's reliability. Without a scientifically rigorous basis or independent review, these documents should be excluded as unreliable evidence.

Given the lack of independent validation, failure to address binding precedent, and reliance on unverified assumptions, Dr. Ciuffo's testimony should be precluded and Exhibit 4 stricken from the record.

VI. Evidence of Racial Bias and Boston Litigation

The Department's attempt to distinguish the Boston litigation from the present case fails to address the core issue that both Psychemedics' RIAH and EIA methodologies share: a lack of independent validation. Both testing methods are unreliable in their results, particularly in the context of race and drug testing accuracy, as evidenced by the *Boston Police Drug Testing Appeals* (Massachusetts Civil Service Commission, 2013). The Commission rejected Psychemedics' RIAH for cocaine as evidence of ingestion, citing environmental contamination, inconsistent laboratory cutoffs, and a lack of uniform standards. Notably, the Commission concluded that "a positive hair test, standing alone, cannot establish **ingestion**," declaring the method to be a "work in progress" unfit to support discipline without additional corroboration. If the RIAH method could not reliably distinguish between ingestion and contamination for cocaine—metabolically a more stable substance—it is even less reliable for marijuana, where THC-COOH is notorious for being unstable and highly prone to external contamination.

The Department fails to address this critical point—both the RIAH and EIA methods have never been validated in a manner that meets scientific consensus or legal standards for accuracy and reliability. The EIA methodology suffers from the same issues of contamination, inconsistent results, and a lack of scientific validation, as demonstrated in the Boston litigation. The Department's argument that EIA can be distinguished from RIAH is without merit, as the underlying flaws in the technology are identical.

Additionally, the First Circuit in Jones v. City of Boston, while not directly addressing the scientific validity of the test, emphasized the disparate racial impact the test had on Black officers, further underscoring the failure of Psychemedics' testing to meet the requirements of UGESP. The 2023 settlement of the Boston litigation, in which the City paid $2.6 million, further solidifies the point that the EIA test and its predecessor, RIAH, are not suitable for employment-related testing due to their unvalidated methodology and inherent discriminatory impact.

The Department's failure to rebut these findings from the Boston litigation or explain the test's shortcomings highlights the weakness in their defense. By not directly addressing the lack of scientific validation and the disparate impact on minority groups, the Department tacitly concedes these critical points, which severely undermine their reliance on Psychemedics' testing as credible and valid evidence in this case.

This record of bias and rejection underscores why Exhibits 1 through 4 add nothing of probative value. Administrative questionnaires, MRO paperwork, résumés, and unvalidated "positive" results cannot transform an unreliable and racially biased methodology into admissible evidence.

In light of these points, the Department's opposition fails to present any admissible evidence to support the validity of Psychemedics' testing methodology or its compliance with UGESP. The Department has effectively conceded several key points by failing to provide a rebuttal or evidentiary support; therefore, the motion to strike the testimony and exhibits, preclude testimony, and dismiss the charges should be granted in its entirety.

VII. Due Process and Burden of Proof

The Department's attempt to shift the burden of proof onto Officer Palaguachi is both legally and procedurally flawed. Under Loudermill v. Cleveland Board of Education, 470 U.S. 532 (1985), and Griggs v. Duke Power Co., 401 U.S. 424 (1971), the burden of proving the validity and job-relatedness of any employment test, including drug testing, lies with the employer—not the employee. The Department is required to demonstrate that the Psychemedics testing methodology meets the standards of scientific validity and non-discriminatory impact under UGESP, and it cannot simply shift this responsibility onto Officer Palaguachi.

Furthermore, the Griggs decision established that an employer must prove that its employment practices, such as drug testing, are job-related and consistent with business necessity. The Department has failed to provide any admissible evidence or scientific validation to meet this burden, particularly regarding the validity of the EIA test and its disparate racial impact. As established in Loudermill, the Department cannot bypass its burden of proof by relying on the assumption that the EIA test is valid without independently demonstrating its compliance with the relevant legal and scientific standards.

The Department's legal arguments, by failing to address these fundamental principles directly, concede that they have not met their burden of proof. They have failed to produce the required UGESP-compliant validation studies or any peer-reviewed research supporting the scientific reliability of Psychemedics' testing. This omission further undermines their position and highlights their inability to demonstrate that the testing methodology is both reliable and legally defensible.

Therefore, the Department's opposition fails to present any admissible evidence to support the validity of Psychemedics' testing methodology or its compliance with UGESP. Additionally, the Department's failure to meet the Griggs and Loudermill standards has effectively conceded several key points by failing to provide a rebuttal or evidentiary support; therefore, the motion to strike the testimony and exhibits, preclude testimony, and dismiss the charges should be granted in its entirety.

Conclusion[1]

[1] Courts have long been cautioned against admitting unvalidated "science." Once "established" forensic methods—such as blood spatter pattern analysis, bite mark comparison, and arson/fire investigation—were widely accepted in courts across the country, only to be later discredited as scientifically unreliable. *National Research Council, Strengthening Forensic Science in the United States: A Path Forward* 155 - 161 (2009). In 2016, the President's Council of Advisors on Science and Technology (PCAST) reaffirmed this concern, warning that many long-standing forensic methods lacked foundational

This tribunal is now presented with the Department's first meaningful Frye/UGESP challenge to Psychemedics' methodology—a challenge the Department has failed to meet. Their opposition does not engage the core legal arguments; instead, it relies on certifications, licenses, and past case citations that do not address Frye's general acceptance or UGESP validation. That silence is a concession.

The Department has not produced a single UGESP-compliant validation study, a single peer-reviewed article showing general scientific acceptance, or any credible response to the controlling authority in Griggs, Albemarle Paper, Loudermill, or the Boston litigation. By failing to rebut these issues, the Department has effectively admitted them.

Under Rule 7.01 of the Rules of Evidence, this tribunal cannot admit or consider evidence that fails to meet the Frye and UGESP standards. Accordingly, the testimony of Dr. Paulsen and Sergeant Tse, the anticipated testimony of Dr. Ciuffo, and Exhibits 1–4 must be precluded. With no admissible evidence remaining, dismissal is not discretionary—it is mandatory.

Officer Palaguachi, therefore, respectfully requests that the charges be dismissed in their entirety. Anything less would risk replicating the systemic collapse already seen in Boston, where nearly two decades of cases were unraveled once courts finally confronted the scientific and legal deficiencies of Psychemedics' methods.

Respectfully submitted,

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validity and urging courts to exclude unvalidated techniques from legal proceedings. See PCAST, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016). The danger is not theoretical: in 2015, the Department of Justice and FBI admitted that microscopic hair analysis testimony contained material errors in more than 90 percent of reviewed cases. DOJ/FBI Microscopic Hair Comparison Analysis Review, Press Release (Apr. 20, 2015). The lesson is clear: market adoption or courtroom familiarity does not equate to scientific validity. *Frye* demands general acceptance in the relevant scientific community—not assumptions grounded in history, commerce, or convenience.