

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 0984CV00576D

SPENCER TATUM, GWENDOLYN BROWN,
LOUIS ROSARIO JR., and FRANCISCO BAEZ
individually and on behalf of a class of individuals
similarly situated,
Plaintiffs

vs.

COMMONWEALTH OF MASSACHUSETTS,
and PAUL DIETL, in his capacity as Personnel
Administrator for the Commonwealth
of Massachusetts, Human Resources Division,
Defendants

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFFS' EMERGENCY MOTION
TO ENFORCE THE SETTLEMENT AGREEMENT
AND/OR FOR A TEMPORARY INJUNCTION

Thirteen years of litigation culminated in what was believed to have been a remedy and resolution of this class action challenging the police sergeant's examination given by the Commonwealth's Human Resources' Division ("HRD"). In October, 2022, the court (Wilkins, J.) issued an order finding that Plaintiffs prevailed on their claims that several years of HRD's promotional exams had a discriminatory impact on minority police officers. More specifically, after a jury-waived trial on the issue of liability, Judge Wilkins found that the Commonwealth had discriminated, in violation of G.L. 151B, §4(4A), against minority candidates for the position of police sergeant in HRD's administration of promotional exams. Subsequently, in March, 2023, on the eve of the second phase of the trial concerning the remedy, the parties came to an agreement on a remedy. On March 31, 2023, the parties memorialized their agreement about the terms of the remedy in their Class Action Settlement Agreement ("Agreement"). On

May 11, 2023, Judge Wilkins entered an order approving the Class Settlement Agreement (“Order”). Pursuant to the Agreement, the Commonwealth, *inter alia*, agreed to (1) pay forty million dollars to resolve Plaintiffs’ claims that the 2005, 2006, 2007, 2008, 2010, and 2012 sergeant promotional exams had an unlawful disparate impact on the promotion of Black and Hispanic police officers; and (2) create and administer a new exam in 2023 that was nondiscriminatory.

It is that Agreement and Order that are at issue now in the Plaintiffs’ Emergency Motion to Enforce the Settlement Agreement and/or for a Temporary Injunction. Plaintiffs claim that the Commonwealth’s HRD has violated the Agreement in two ways: failing to provide the job analysis used in drafting the new test that HRD plans to offer on September 23, 2023, and failing to open the September 23, 2023 exam to all class members who wish to take that sergeant’s exam. First, Plaintiffs argue that the Commonwealth has not provided it with the job analysis even though Judge Wilkins ordered it to “forthwith ... when completed.” Next, Plaintiffs contend that the court, specifically Judge Wilkins, who had been specially assigned to this case before his retirement, and who invested countless hours hearing the evidence and drafting the decision and order on the liability phase of the case and then, as almost his last judicial act before retirement, heard and approved the Agreement and entered the Order,¹ presumed that all class members would be eligible for the next nondiscriminatory examination. However, as the Commonwealth points out, and Plaintiffs’ counsel acknowledged at the hearing, neither the Agreement nor the Order mention a remedy of allowing class members to sit for the September 2023 test.

¹ Order Approving Class Action Settlement, docket no. 137, May 11, 2023.

Because time is of the essence, with the September examination date only weeks away, and HRD's contention that any change in the composition of the enrolled test takers would derail that date, the court has expeditiously undertaken to hear and decide Plaintiffs' emergency motion. For the reasons explained below, the court finds that Plaintiffs have not met their burden to show a likelihood of a success on the merits that Defendants violated the Agreement nor the Order. Therefore, Plaintiffs' Motion is DENIED.

I. Job Analysis

In the Agreement, the parties stated that they could not agree about the degree of oversight that Plaintiffs should have related to the development of the new exam, and they asked Judge Wilkins to decide the issue. The court acknowledged that it "lack[s] power to tell the executive branch how to fulfill statutory or constitutional obligations, particularly where the decision involves the expenditure of funds and provisions of services outside of the court system proper." (Order pg. 5). The narrow exception is where, as here, the court has found a statutory and constitutional violation and it is left to the court to fashion a remedy. The court has both the power and authority to create a remedy for the violations it found.

The court attempted to thread that needle by denying Plaintiffs' request for oversight over the future HRD promotional exams, but instead sought to have the parties share information about the formation of the future exam. Thus, the Order required that Defendants "[i]n developing the next Police Sergeant's Promotional Exam, ... forthwith provide to the plaintiffs' attorneys and experts the following documents, when completed, for review and comment:" (1) job analysis; (2) proposed weights for components of the exam; (3) instructions to questions writers; and (4) instructions to subject matter experts. (emphasis added).² Plaintiffs focus on the

² The court wrote about this phrasing in its Order: "[t]his order avoids premature disclosure and interference with deliberative processes by waiting until certain milestones are complete before requiring disclosure." Order pg. 7.

“forthwith” language in the Order while the Commonwealth focuses on the “when completed” part of the Order.

Plaintiffs claim that the Commonwealth has not provided it with the job analysis.³ Plaintiffs request the court order the Commonwealth to comply with the Order by producing all documents related to the completed job analysis. The Commonwealth claims that the job analysis has not been completed and may not be available until after the September exam.⁴ Putting aside the Commonwealth’s specious claim that the September exam requires a completed job analysis and HRD will have it for that purpose but not for the purpose of “forthwith” providing it to Plaintiffs, the court acknowledges that “forthwith” is couched in a proviso, that is, “when completed” the job analysis must be turned over “forthwith.” Because HRD claims as of the date of the hearing that the job analysis was not complete, it has not yet violated the Order. The court would expect, however, that the job analysis be completed and provided in advance of the September exam. This then is perhaps a claim for an anticipatory violation, but there is still time for the Commonwealth to comply.

II. 2023 Exam

On September 17, 2022, before Judge Wilkins issued his order on liability, eligible individuals sat for the 2022 police promotional exam. Due to Judge Wilkins decision on October 27, 2022, however, the Commonwealth did not score the September 17, 2022 exam.

On June 8, 2023, the Commonwealth announced that it would be readministering the 2002 exam on September 23, 2023. The Commonwealth is allowing only those individuals who

³ The Commonwealth has either produced the other three categories of documents or will soon.

⁴ An affidavit from Regina Caggiano, director of the Civil Service Unit for the Human Resources Division, states: “The substantive work of the job analysis has concluded, from which, for example, the proposed weights for the components of the examination were established, and questions are being written. The drafting of the job analysis, which is a written capstone document, has begun but has not been finalized. The job analysis report will not be final until after the post exam analysis takes place.”

had sat for the 2022 exam on September 17, 2022 to take this “readministered” exam. On the same date, the Commonwealth also announced that it would administer the 2023 police promotional exam on September 23, 2023.⁵ The 2022 “readministered” exam and the 2023 police promotional exam are the same exam.

Plaintiffs object to HRD’s limitation on the eligible test takers, and more particularly for denying all class members the opportunity, if they wish, to take the September exam. Plaintiffs claim that “[t]he whole purpose of the settlement agreement is to give minority candidates an opportunity to take a nondiscriminatory exam in 2023 after being deprived of that opportunity for years.” Plaintiffs’ Motion, pg. 3. Plaintiffs submitted the affidavit of one class member, Officer Cano of Lawrence, who averred that he did not sign up for the 2022 exam because he believed it to be discriminatory only to learn that he is now ineligible to sit for the September 2023 exam. Plaintiffs thus seek to enjoin the Commonwealth from excluding class members from taking the exam on September 23, 2023.

A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that irreparable harm will result from the denial of the injunction; and (3) that, in light of the plaintiff’s likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction.” *Tri-Nel Mgmt. v. Board of Health*, 433 Mass. 217, 219 (2001), citing *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). In addition, “[w]hen a party seeks to enjoin governmental action, a judge is also required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.” *Boston Police*

⁵ To be eligible for this exam, a candidate’s police department must be participating. Most police departments participate in promotional exams on a two- to three-year cycle. For police departments on a two-year cycle that participated in 2022, the next exam for which individuals may register is 2024.

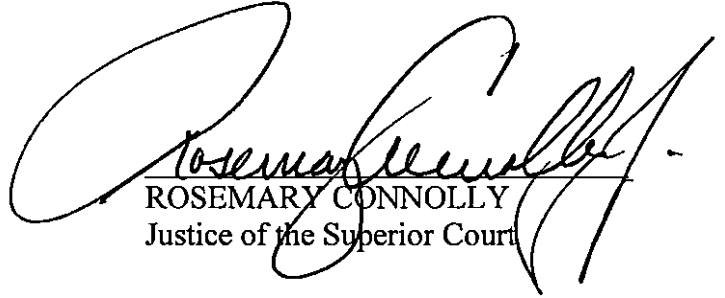
Patrolmen's Association, Inc. v. Police Department of Boston, 446 Mass. 46, 49-50 (2006)
(citations and quotations omitted).

As stated above, there is nothing in the Agreement nor Order about the ability of class members to take the next exam (whenever it might have been scheduled). The Agreement focused on a monetary remedy for past violations and the creation of a fair exam in the future. The Agreement and Order are comprehensive documents that contain considerable detail about the proceedings, the remedy, and how the monetary proceeds are to be allocated. No mention is made in either document of creating an additional remedy to declare all class members eligible for the September test. Aside from the affidavit of Officer Cano, there are no other class members identified as seeking to take the September test. The court therefore does not know if the number of potential additional test takers is 1 – or in the hundreds. More importantly, none of the class action settlement documents sent to the class members refer to this potential remedy or put them on notice of the possibility. It is hard to square Plaintiffs' position that this remedy was always contemplated by the parties, and the fact that it was never mentioned or referenced in the Agreement or Order is somehow further proof of how integral it was to the parties' settlement. The court understands Plaintiffs to argue that it was Judge Wilkins' intent that this remedy would naturally have been offered and extended to all class members. However, the current judge does not have the same history with this case and cannot presume to assume she has insight into what another judge may have intended. What is now before the court are the Agreement and the Order and it is those documents that control the court's decision here. Based on those documents, the court concludes that Plaintiffs have not shown that they are likely to succeed on their claim that Defendants breached the Agreement or the Order.

That Plaintiffs have not made this showing is sufficient to deny injunctive relief. See *Tri-Nel Mgmt., Inc.*, 433 Mass. at 227.

ORDER

For the foregoing reasons, Plaintiffs' Emergency Motion to Enforce the Settlement Agreement and/or for a Temporary Injunction is **DENIED**.



ROSEMARY CONNOLLY
Justice of the Superior Court

DATE: AUGUST 10, 2023