

COMMONWEALTH OF MASSACHUSETTS SUPERIOR COURT

SUFFOLK, SS

Civil Action No. \_\_\_\_\_

PAUL LYONS, SEAN GIBBONS, CRAIG  
HARDY, SCOTT FIGGINS, and all others  
similarly situated.

Plaintiffs,

v.

MASSACHUSETTS HUMAN RESOURCES  
DIVISION

Defendant

SUFFOLK SUPERIOR COURT  
CIVIL CLERK'S OFFICE  
2022 NOV 14 A 11:41  
MICHAEL JOSEPH DONOVAN  
CLERK/MAGISTRATE

**VERIFIED COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF, AND SHORT ORDER OF NOTICE**

This is an action seeking an injunction against the Massachusetts Human Resources Division (“HRD”) requiring the Defendant to conduct the Boston District Chief and the statewide Lieutenant and Captain promotional exams that have long been scheduled for Saturday, November 19, 2022, and that almost one thousand firefighters have signed up and been studying for. On November 9, 2022, HRD canceled such examinations without “sound and sufficient” reasons to do so. That same day, the Plaintiffs filed a timely appeal with the Massachusetts Civil Service Commission (“Commission”) against HRD contesting HRD’s decision to cancel the above-referenced promotional examinations and such appeal is currently being processed before the Commission.

**PARTIES**

1. Plaintiff, Paul Lyons, holds the rank of a Captain with the Boston Fire Department. He resides at 68 Cedarcrest Road, Canton, MA 02021.
2. Plaintiff, Sean Gibbons, holds the rank of a Captain with the Boston Fire Department. He resides at 37 Rangeley Street, Dorchester Massachusetts, 02124.
3. Plaintiff, Craig Hardy, holds the rank of a Firefighter with the Everett Fire Department. He resides at 14 Ingold Street, Everett Massachusetts, 02149.

4. Plaintiff, Scott Figgins, holds the rank of a Firefighter with the Whitman Fire Department. He resides at 237 Monponsett Street, Hanson Massachusetts, 02314.
5. The Defendant is the Human Resources Division (“HRD”), an agency of the Commonwealth which operates under the Secretary of Administration. HRD is vested with considerable authority to administer day-to-day functions of the civil service system, including, but not limited to, “administering and enforcing” the civil service law and “conducting examinations for purposes of establishing eligible lists.” *See* G.L. c. 31, § 5(e).

### **JURISDICTION & VENUE**

6. The Court has original and statutory jurisdiction over the subject matter of this action by virtue of G.L. c 212, §4, G.L. c. 214, §1. The relief is authorized by G.L. c. 231A, §§1 et. seq. and G.L. c. 214.
7. The venue is appropriate in this Court, pursuant to G.L c. 223, §1, in that the Plaintiffs are residing in different counties, but the Defendant is in Suffolk County, and this is their usual place of business.

### **FACTS**

8. The Whitman, Everett, and Boston Fire Departments are subject to civil service and Chapter 31 of the Massachusetts general laws for promotions.
9. Chapter 31 requires the Whitman, Everett, and Boston Fire Departments to promote candidates pursuant to a ranking of them determined by an approved civil service process. The process results in a ranking of candidates by score.
10. HRD is charged with the duty to “conduct examinations for the purposes of establishing eligible lists.”
11. HRD offers annual promotional examinations for Civil Service Fire Departments across the Commonwealth.
12. The promotional examinations are the same for all Civil Service Fire departments, although specific to rank - an examination for Firefighters, Lieutenants, Captains, District Chiefs, Deputy Chiefs, and Chiefs.
13. HRD conducts Boston Fire Department promotional exams separately, however, such are also specific to rank - an examination for Firefighters, Lieutenants, Captains, District Chiefs, Deputy Chiefs, and Chiefs.
14. HRD ranks candidates who pass the examination by municipality in order of their examination score, after considering credit for certain education and experience. This ranking of eligible candidates is known as the “eligible” or “eligibility” list.
15. Sometime in May 2022, HRD announced that it would conduct statewide promotional examinations for the ranks of Fire Lieutenant and Captain on November 19, 2022.
16. HRD also scheduled a make-up Boston Fire Department promotional examination for the rank of District Chief for November 19, 2022.

17. HRD conducted an initial Boston Fire Department promotional examination for the ranks of Deputy Chief and District Chief back on May 21, 2022. The Boston Fire Deputy Chief examination contained 80 questions and the Deputy Chief promotional exam contained 100 questions. Subsequent to its administration of the Boston Deputy and District Chief promotional exams, HRD received numerous complaints from candidates regarding the contents of such exams. HRD established an eligible list for the rank of Boston Deputy Chief, however, on or about August 18, 2022, the candidates that took the Boston District Chief promotional examination were notified that the results of their May 21, 2022, promotional exam had been voided and that it would conduct a re-examination on November 19, 2022.
18. Plaintiffs have spent a significant amount of time and money preparing for the promotional examinations at issue while also managing their busy work schedules serving the public and taking care of their families.
19. Plaintiffs Paul Lyons and Sean Gibbons, 18-year and 25-year veterans of the Boston Fire Department, have each spent over one thousand dollars on administration fees and books for the May 21, 2022, and November 19, 2022 exams. They have also each spent anywhere from 3 to 5 hours every day studying for these examinations.
20. Plaintiff, Craig Hardy, a 25-year veteran of the Everett Fire Department, has spent almost one thousand dollars on administration fees and books and for the past seven months, he has studied approximately 40 hours every week in preparation for the Everett Lieutenant Promotional Examination.
21. Plaintiff, Scott Figgins, a 14-year veteran of the Whitman Fire Department, has spent almost two thousand dollars on administration fees and books and for the past seven consecutive months, he has also studied approximately 40 hours every week in preparation for the Whitman Captain Promotional Examination.
22. The Boston Fire eligible list for the rank of District chief expired on September 25, 2022.
23. The Whitman Fire eligible list for the rank of Lieutenant expired one year ago and there is currently no list from which that Department can promote.
24. The Everett Fire eligible list for the rank of Captain is set to expire on March 1, 2023.
25. On November 9, 2022, HRD informed the Plaintiffs that the promotional examination for the ranks of Boston Fire District Chief and the statewide promotional examinations for the ranks of Lieutenant and Captain scheduled for November 19, 2022, was canceled.
26. As grounds, HRD claims that it must cancel the above-referenced promotional examinations in response to a recent Phase I Superior Court liability ruling in the case of *Tatum v. HRD*, C.A. NO. 0984CV000576, attached hereto as **Exhibit 1**.
27. *Tatum v. HRD* was filed by a class of Black and Hispanic police officers alleging racial and national origin discrimination in employment in the police sergeant promotional examinations administered by HRD for the years 2005, 2006, 2007, 2008, 2010, and 2012.
28. On November 9, 2022, the Plaintiffs filed a timely appeal with the Commission against HRD, attached hereto as **Exhibit B**, contesting HRD's decision to cancel the above-referenced promotional examinations and such appeal is currently being processed before the Commission.

**CLAIMS FOR RELIEF**

**COUNT I – DECLARATORY RELIEF**

29. An actual controversy exists between the parties in that Defendant has violated Chapter 31§ 5(e) by canceling the promotional re-examination for the rank of Boston District Chief and the statewide promotional examination for the ranks of Lieutenant and Captains without “sound and sufficient” reasons, which standard is required of them under Civil Service Law. A binding declaration about the Plaintiffs’ rights under G.L. c. 31 is necessary to settle the existing controversy between the parties and to allow for the resolution of this dispute before the Commission and/or the Courts as the Law requires.

**COUNT II –  
INJUNCTIVE RELIEF IN AID OF  
ADMINISTRATIVE PROCESS**

30. Unless the Defendant is enjoined on the terms set forth in the Plaintiffs’ request for relief, the Plaintiffs lack any adequate administrative remedy. The Commission cannot retroactively undo foreseeable, immediate harm to Plaintiffs that would result from the impacts of the cancellation of the November 19, 2022 examinations.
31. Any remedy provided through the Commission would be a hollow formality. Only injunctive relief can prevent irreparable harm and ensure that limited remedies of the Commission and/or the Court are adequate.

WHEREFORE, Plaintiffs pray that this Honorable Court:

32. Issue a short order of notice requiring that Defendant appear and show cause why the following relief sought herein should not be granted:
- Enter a Temporary Restraining Order requiring Defendant to conduct the Boston District Chief and the statewide Lieutenant and Captain promotional exams that have long been scheduled for Saturday, November 19, 2022.
  - Enter such other and further orders as the Court deems necessary and just.

Respectfully submitted,

PAUL LYONS et al.,

/s/ Leah Marie Barrault

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Date: November 10, 2022.

#### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document has been served on November 10, 2022, upon Defendant by electronic mail.

/s/ Leah Marie Barrault

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Leah Marie Barrault, Esq.

## VERIFICATIONS

I, Craig Hardy, Firefighter with the Everett Fire Department, hereby certify and verify that I have read the above Complaint, that the information contained therein is true and accurate as to the allegations pertaining to the cancellation of the November 19, 2022, statewide Captain and Lieutenant promotional examination.

Signed under the pains and penalties of perjury, this 10<sup>th</sup> day of November 2022.

/s/ Craig Hardy

I, Scott Figgins, Firefighter with the Whitman Fire Department, hereby certify and verify that I have read the above Complaint, that the information contained therein is true and accurate as to the allegations pertaining to the cancellation of the November 19, 2022, statewide Captain and Lieutenant promotional examination.

Signed under the pains and penalties of perjury, this 10<sup>th</sup> day of November 2022.

/s/ Scott Figgins

I, Paul Lyons, Captain with the Boston Fire Department, hereby certify and verify that I have read the above Complaint, and that the information contained therein is true and accurate as to the allegations pertaining to the cancellation of the November 19, 2022, Boston District Chief promotional examination.

Signed under the pains and penalties of perjury, this 10<sup>th</sup> day of November of 2022.

/s/ Paul Lyons

I, Sean Gibbons, Captain with the Boston Fire Department, hereby certify and verify that I have read the above Complaint, that the information contained therein is true and accurate as to the allegations pertaining to the cancellation of the November 19, 2022, Boston District Chief promotional examination.

Signed under the pains and penalties of perjury, this 10<sup>th</sup> day of November 2022.

/s/ Sean Gibbons

# EXHIBIT A



**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**SUPERIOR COURT  
C.A. NO. 0984CV00576**

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

**v.**

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

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PHASE I (LIABILITY)**

The best test-takers are not necessarily the best police sergeants. Yet, the Commonwealth of Massachusetts through the Personnel Administrator, Human Resources Division (“HRD”) regularly administered written exams, knowing that its testing format had an unnecessary, plain and obvious adverse impact upon Blacks and Hispanics, compared to White candidates. To challenge HRD’s format, a class of Black and Hispanic police officers (some now retired) filed this case in 2009, alleging racial and national origin discrimination in employment (G.L. c. 151B, § 4) in the police sergeant promotional examinations administered by HRD for the years 2005, 2006, 2007, 2008, 2010, and 2012.

The court conducted a bench trial in phase I of this case, limited to liability. It heard testimony from live witnesses and received over 300 exhibits on June 26, 27, 28 and 29 and on July 25, 26, 27 and 28, 2022. It heard arguments on July 29, 2022, and September 30, 2022. It received written post-trial briefs on September 15, 2022.

The evidence is very clear. It defeats any justification for HRD's heavy reliance upon biased exams to identify the best candidates for promotion to sergeant. Moreover, HRD knew of clearly superior assessment methods, but continued to use the same, unnecessarily discriminatory format anyway. The massive amount of evidence proving the known and unjustified disparate impact of HRD's format leaves no doubt in this court's mind that the Commonwealth has interfered with the plaintiffs' rights to consideration for promotion to police sergeant without bias due to race or national origin. G.L. c. 151B, § 4(4A). The court will therefore conduct phase II of this trial, in which it will determine a remedy. The remedy will provide relief to the plaintiff class, which must be commensurate with the deep-seated illegality in the testing format that HRD used, at least for the 2005, 2006, 2007, 2008, 2010, and 2012 exams.

In fashioning a remedy, the court realizes that candidates and appointing authorities relied upon and participated in HRD's process in good faith, although some agencies did seek a better way. The court in no way faults those candidates and appointing authorities. Least of all does the court cast doubt on the qualifications of the successful candidates. HRD's violation involved selection among qualified candidates, all of whom abided by HRD's rules. No party has suggested a remedy that would affect any existing appointments.

#### **PRIOR PROCEEDINGS**

This case travelled a long road to get to trial. In 2007, some of the plaintiffs sued the Commonwealth, HRD and their employing municipalities in the United States District Court for the District of Massachusetts. Lopez v. City of Lawrence, U.S. Dist. Ct. No. 07-11693, 2014 WL 12978866 (D. Mass. September 5, 2014), *aff'd* 823 F.3d 102 (1st Cir. 2016), cert. denied, 137 S.Ct. 1088 (2017) ("Lopez I"). In an interlocutory appeal, the First Circuit held that the state defendants were not "employers" within the meaning of Title VII and were therefore entitled to

immunity under the Eleventh Amendment to the United States Constitution.” Lopez v. Massachusetts, 588 F.3d 69, 72 (1st Cir. 2009). The plaintiffs dismissed their state law claims against the state defendants under G.L. c. 151B without prejudice and refiled them in this court.

This court dismissed the entire case, relying in part on the 2009 First Circuit decision. The plaintiffs appealed. The Supreme Judicial Court affirmed dismissal of several claims, but rejected the defendants’ sovereign immunity claims and held that the complaint stated a claim upon which relief could be granted on a theory of interference with protected rights under G.L. c. 151B, § 4(4A). Lopez v. Commonwealth, 463 Mass. 696, 701-702, 706-712 (2012) (“Lopez II”). On remand, on September 16, 2013, this court (Fabricant, J.) certified the class, finding that the case “presents questions of both law and fact that are indisputably common to all members of the proposed class, including the legal questions of what exactly plaintiffs must prove to show discriminatory impact and harm, and the factual questions of whether the test had a discriminatory impact in each of the years alleged.”

Meanwhile, the federal case against the employers went to trial. The Federal District Court judge, sitting without a jury, found that, while the Boston promotional examinations caused a disparate impact based on race in 2005 and 2008, the tests were nevertheless job-related and consistent with business necessity, and the plaintiffs failed to prove that Boston had refused to adopt an alternative with less disparate impact. The First Circuit affirmed in Lopez I.

On June 27, 2018, Defendants filed their Motion for Judgment on the Pleadings, arguing issue preclusion based upon the First Circuit’s decision in Lopez I. On January 7, 2019, the Superior Court (Tochka, J.) allowed the Motion and dismissed the Third Amended Complaint. The plaintiffs were again successful on appeal, this time from a judgment entered on January 14, 2019. In Tatum v. Commonwealth, 98 Mass. App. Ct. 1105, 2020 WL 4200865 at \*2-\*3 (2020)

(Rule 23.0 order), the Appeals Court held that the plaintiffs failed to establish identity of the parties, privity (because the federal district court denied class certification) and adjudication of identical issues. Upon remand, the case was specially assigned to the undersigned for trial.

### **FINDINGS OF FACT**

The Plaintiffs are a class of current or former police officers who took a police sergeant promotional exam created and administered by the Commonwealth of Massachusetts Human Resources Division ("HRD") in 2005, 2006, 2007, 2008, 2010, or 2012. The Plaintiffs include current and former officers for the cities of Brockton, Lawrence, Methuen, Lowell, Springfield, Worcester, Boston, and other cities and towns throughout the Commonwealth of Massachusetts, as well as the Massachusetts Bay Transportation Authority ("MBTA"). Each named and class Plaintiff is either Black or Hispanic. The Plaintiffs were either not promoted to sergeant or experienced a significant delay in such promotion based on their scores on HRD's examinations.

The court finds the following facts by a preponderance of the evidence it finds credible:

#### **I. The Tests and Promotional Lists**

1. HRD developed and administered all of the examinations at issue in this action (the 2005, 2006, 2007, 2008, 2010, and 2012 exams). The exams were substantially the same in format and approach, though the specific questions were different.

2. The sergeant's promotional examination in 2005 through 2012 consisted of 80 multiple-choice questions. For the same years, HRD simply added 20 questions for the lieutenant's exam, and 20 more questions for the captains. The higher rank exams thus included all of the questions on the sergeant's exam.

3. The written examination's multiple-choice questions were all taken (sometimes verbatim) from police-related textbooks. This component has been in effect for at least 50 years.

4. The educational and experience ("E&E") component nominally accounts for 20% of a candidate's overall score. It is essentially the same today as it was 50 years ago.

5. The exams generated results that were largely reproducible ("reliable"). HRD's expert, Dr. Silva, calculated the reliability of the exams using "Cronbach's alpha", which took the average of all split halves of each respective exam. He found that the lowest reliability of any exam was .71 and the highest was .84. The court concludes that all of the exams had good reliability.

6. Based on the exams, HRD created lists of candidates, ranked by order of their scores, for use by appointing authority. Each appointing authority used the list to promote candidates from within the ranks of that municipality's police force. Police officers from each participating municipality for any of the exams at issue competed only against the other officers from their department for spots on the eligibility list for their municipality. For instance, under no circumstances can a police officer from Chelsea be promoted to sergeant in the Quincy police department.

7. Each of the examinations at issue in this case contained different questions, had different municipalities participating, and with the exception of repeat test takers, had different candidates taking the examinations. HRD issued different eligibility lists for each participating municipality for each of exams at issue (i.e., the 2005, 2006, 2007, 2008, 2010, and 2012 statewide exams, and the 2005 and 2008 Boston exams).

## Test Development

8. The outlines used for the 2005, 2006, 2007, and 2008 statewide sergeant's exams were based on the knowledge, skills and abilities ("KSAs") and job tasks identified as important to the job of sergeant in the Validation Report for the 1991 Police Promotional Selections Procedures dated October 1, 1991 ("1991 Validation Report") and the 2000 Morris & McDaniel Job Analysis Report. There were some major shortcomings in HRD's use of these Reports, as discussed below.

9. The outlines used for the 2005, 2006, 2007, and 2008 statewide exams included KSAs in the following categories for sergeant: Law/MGL, Supervision, Community Policing, and Police Functions.

10. Guy Paris, who began working in test development for HRD around 1990, was primarily responsible for writing test items, or multiple-choice questions, for the 2005, 2006, 2007, and 2008 statewide exams.

11. To write questions for those statewide exams, Mr. Paris consulted an outline that identified the competency areas by category that were important for the job of sergeant. The outline listed the number of questions to be written for each competency, and incorporated and linked these questions to the source material on the reading list for each respective exam.

12. Mr. Paris made sure that the reading lists for the 2005, 2006, 2007, and 2008 statewide exams listed the most current versions of the sources as of the reading list publication date.

13. In February, 2005, prior to administering of the 2006 exam, HRD surveyed 170 community police chiefs about the proposed reading list. The police chiefs rated the use of particular sources and recommended other sources.

14. There were 80 multiple-choice questions on the 2005, 2006, 2007, and 2008 statewide exams, but Paris wrote many more than 80 questions so that subject matter experts (“SMEs”) could review the potential questions and select the most appropriate questions. The use of SMEs is a best practice in developing the written portion of a police promotional exam.

15. For those statewide exams, HRD retained two to four SMEs, who were typically police chiefs, to review the potential questions. For instance, Robert Champagne, the former Police Chief for the City of Peabody, served as one of the SMEs from 2005 to 2012. HRD rarely used more than three SMEs and, in most cases, appears to have used only two SMEs, both of whom were police chiefs, to review reading lists and examination questions. With so few SMEs and given the deficiencies identified below, the court gives only modest weight to the SME process in assessing the validity of the exams for statewide application or use in Boston.

16. After Mr. Paris drafted questions for the 2005, 2006, 2007, and 2008 statewide exams, he conducted meetings in which the SMEs reviewed the potential questions and rated them for suitability to each rank, difficulty, readability, and recommended use. The SMEs also reviewed them for content, consistency, applicability, and practicality.

17. An HRD consultant, E.B. Jacobs also reviewed the potential questions for the 2007 and 2008 statewide exams for cultural bias. It revised some questions and recommended replacing some questions.

18. In the summer of 2009, as part of a mini job analysis for the police promotional exam, which included the sergeant’s exam, HRD’s manager responsible for the 2010 and 2012 exams, Lauren Fitzgibbons, met with SMEs to review the reading list and the exam outline.

19. Those SMEs recommended that the criminal law and constitutional law guides from Attorney Rogers of Commonwealth Police Services, Inc. be used in place of the criminal

law and constitutional law guides that had been listed on the reading lists in previous years. Ms. Fitzgibbons also provided the SMEs' comments about the reading list and the outline to E.B. Jacobs for use in writing the questions for the 2009 statewide exam.

20. In 2009, Ms. Fitzgibbons also held meetings with the SMEs to review proposed questions for use on the 2009 statewide exam.

21. Based on SME input, Ms. Fitzgibbons revised the reading lists for the 2010 and 2012 statewide exams to include Massachusetts Criminal Law and Massachusetts Criminal Procedure by Attorney Rogers.

22. E.B. Jacobs, created the outlines for the 2010 and 2012 statewide exams, which included KSAs in the following categories for sergeant: Law/MGL, Police Functions, Community Policing, and Supervision.

23. Through these and other steps, HRD kept the reading lists and resulting exams current. Within the constraints of a written multiple choice test and limited E&E component, HRD's exam development process was comprehensive and conscientious.

24. The court rejects the inference that these test development processes, by themselves, "ensured that those exams were job related" (Def. Prop. Findings VII). Even apart from the inability of a written multiple-choice exam to predict good job performance as a sergeant, a good process may be a necessary component of job-related testing, but it is not sufficient, as even a brief summary will show. For instance,

- a) The questions on the exam largely test for rote memorization of facts and passages taken directly from textbooks that candidates are asked to study. The 1991 Validation Report and 2000 study did not identify test-taking skills and lack of test-related anxiety as job-related.



- b) HRD also had candidates complete a computerized form E&E worksheet, which assigned candidates certain points based on certain educational criteria (discussed fully below).
- c) HRD gave 80% weight to a candidate's scores on the multiple-choice exam and 20% weight to the E&E component. No credible study validated these weights.
- d) For each exam, HRD set a passing score for the multiple-choice test. In all but one of the challenged exams, HRD set the passing score at 70. It did not rely on any accepted scientific criteria for establishing the passing score for its exams.
- e) Once HRD tabulated exam scores, it created a promotional eligibility list for each department that participated in the exam. It did so in rank order, according to scores rounded to the nearest whole number. No credible study showed that single-point differences in scores reflected any significant difference in job qualifications.

25. At the time it administered the exams in question – and for a long time before that – HRD knew that police departments throughout the Commonwealth generally promote candidates on the eligibility list in rank order fashion.

26. A one-point difference in exam score can make the difference between promotion and being passed over. It can also cause denial or delay of promotion. It can also make the difference between being considered for promotion and excluded from consideration. HRD knew this when it administered the tests at issue in this case.

27. The court now turns to a more detailed discussion of HRD's testing and ranking format, roughly following the same order that HRD used in administering that format.

### **Knowledge, Skills, and Abilities (“KSAs”)**

28. A valid exam targets and measures the important KSAs needed effectively to perform the position at issue, and then assesses at least a representative sample of the most important skills.

29. Police sergeants are first-level supervisors, with direct responsibility for supervising patrol officers on a day-to-day basis. They are responsible for responding as needed to routine calls and must respond to all serious incidents (e.g., aggravated assaults, homicides, shootings, sexual assaults, community disorders involving racially-motivated incidents, armed robberies, and injured officers).

30. Chief among the essential skills and abilities for this position are:

- Leadership skills;
- Supervision skills;
- Decision-making and problem-solving;
- Interpersonal skills;
- Communication skills; and
- Integrity.

31. A number of studies and reports confirm the primacy of these KSAs. For instance HRD’s 1991 Validation Report determined that critical abilities of a police sergeant include, among other things, (a) “ability to make and carry out decisions quickly,” (b) “ability to give clear, concise verbal orders,” (c) “ability to communicate orally and in writing,” (d) “ability to bring calm to control surroundings when in stress producing situations,” and (e) “ability to establish rapport with persons from different ethnic, cultural and/or economic backgrounds.”

32. The court also accepts and adopts as fact the statements of a subject matter expert, former Peabody Police Chief Robert Champagne. He stated accurately that good sergeants “could communicate well, people that had – that were approachable, people that had a nice demeanor, people that commanded respect from the people that were there that were

knowledgeable that the 1991 Validation Report knew what it was that they were talking about.” The court also adopts as fact Chief Champagne’s testimony that knowledge of the profession and “just general knowledge of the – of the city” were desirable traits for aspiring sergeants.

33. The 1991 Validation report generated a comprehensive list of KSAs required to perform the job of police sergeant. It included a job analysis study that included the following major steps: (1) “[g]athering of available job information from Massachusetts police departments, as well as job analysis reports, survey instruments, and other information from jurisdictions outside the Commonwealth”; (2) “[d]evelopment and administration of a task inventory questionnaire designed to identify the frequent and critical tasks and duties of each of the five ranks,” including sergeant; (3) “[d]evelopment and administration of a knowledges, skills, abilities and personal characteristics (KSAPs) inventory questionnaire designed to identify the important KSAPs required at the time of appointment to each of the five ranks,” including sergeant; (4) “[l]inkage of the important KSAPs to the frequent and critical tasks of these jobs by subject matter experts (SMEs)”; (5) “[d]esign and use of critical incident technique (CIT) structured group discussions to gather from SMEs descriptions of actual incidents which have occurred on the job”; (6) “[d]esign and use of structured group discussions to gather information from SMEs about the Education and Experience (E&E) component of DPA’s selection procedures”; and (7) “[d]esign and use of structured group discussions to gather information from SMEs about the recommended reading list, from which the multiple-choice written examination questions for the police promotional exams are derived.”

34. From the inventory of 187 total KSAs, the SMEs identified 159 KSAs in the 1991 Validation Report that were needed to perform the job of sergeant. The 1991 Validation Report

was substantially accurate and reliable in identifying the necessary KSAs for the police sergeant position.

35. The 1991 Validation Report, however, has serious flaws in identifying (1) which KSAs are testable on a multiple-choice exam and (2) which KSAs are measured in HRD's education and experience component.

36. A 2000 job analysis conducted by the testing firm Morris & McDaniel for the Boston Police Department determined that critical KSAs of a police sergeant include, among other things, (a) "skill in supervision and leadership," (b) "skill in implementing community policing procedures and techniques," (c) "interpersonal skills," (d) "presentation skills," (e) "oral communication skills," (f) "ability to remain calm in stressful situations," (g) "ability to instill confidence," and (h) "ability to think under pressure." The court adopts these determinations as to Boston.

37. The 2000 job analysis assessed only the KSAs required of a police sergeant in the Boston Police Department, and did not analyze the KSAs of police sergeants in other municipalities or departments.

38. On rating sheets, the SMEs ranked the importance of various KSAs as part of that job analysis. Their rankings are implausible. The 11 SMEs gave identical rankings to all of the approximately 1,100 ratings, which is all but impossible in the absence of coordination between the SMEs. The court does not credit those rankings, which almost certainly reflect some unknown factor that interfered with the SMEs' independence.

39. HRD made no attempt to defend the inexplicable unanimity of these rankings, aside from speculation. There is simply no evidence demonstrating that any complete consensus

occurred, and given that each of the questions instructed the rater to answer based on the work that they do, it is not possible for everyone to have agreed unanimously on every ranking.

40. The 2000 job analysis also claimed that police sergeants perform certain tasks every day, but that could not possibly be true.<sup>1</sup> Those tasks included:

- Qualifies and/or engages in required practice of operation of firearms and other weapons;
- Investigates and resolves citizen complaints against police officers;
- Set up command post at scenes of robberies, homicides, fires, etc.;
- Directs activities at the scene of major incidents (e.g., serious/fatal accident, crime, natural disaster, etc.)
- Conducts internal investigations;
- Investigates and prepares reports regarding misconduct by subordinates;
- Investigates use of force and injury to prisoner incidents and prepares reports for superiors as required;
- Recommends subordinates for commendations and disciplines them for dereliction of duty;
- Inspects licensed premises and prepares reports on violations, if any are found; and
- Talks with leaders of demonstrations.

41. The 2000 job analysis did reach some highly significant conclusions. Most importantly, it determined that at least half of the skills necessary for the job of police sergeant should be tested by assessment mechanisms other than a written multiple-choice examination. The court adopts that determination.

42. Finally, HRD never performed a criterion validity study, which is designed to evaluate the extent to which a sergeant's actual job performance correlates with performance on an examination. A criterion validity study would have been feasible where HRD has used the same examination format for decades and there is thus a large pool of current and former

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<sup>1</sup> Since the job analysis asked 11 sergeants with diverse job assignments to state what tasks they themselves did every day, these claims would not be true even if, for instance, some sergeants in a specialized unit (e.g. internal affairs) did conduct internal investigations daily.

sergeants within the Commonwealth whose job performance and test scores could have been analyzed to evaluate the validity of HRD's promotional exams.

#### **Written Exams**

43. Most of the questions on the exams at issue in this case tested topics that were important to the job of sergeant. That does not mean that HRD's format was reasonably job related. It was not.

44. Because HRD failed to test many important KSAs, measured test-taking skills and memorization, enabled test-related anxiety to affect results and failed to ask questions that focused upon measuring job-related knowledge, its format did not rank candidates for promotional purposes on a basis that was substantially job related.

##### **a. Testability of KSAs**

45. For one thing, the exams did not test many important job qualifications. More importantly, written questions on a particular topic often test details, rather than job-related knowledge of information and principles actually used on the job. Testing for knowledge of soon-forgotten details does not measure ability to apply knowledge practically and to exercise judgment on that topic in specific situations, as a sergeant actually does on the job. Finally, the tests measure a candidate's test-taking skills, abstract knowledge and ability to memorize source material. A sergeant does not need these skills in practice. Nor does a candidate need abstract knowledge that does not reflect the ability to use judgment in a practical way on the job.

46. As part of the 1991 Validation Report, the SMEs identified 58 KSAs that, in their view, were tested by the multiple-choice component. HRD did not develop alternative methods of evaluating the remaining KSAs. It simply opted not to test them at all. Yet, many of the critical skills and abilities could not possibly be tested in a written multiple-choice examination.

These included “[s]kills in identifying problems, securing relevant information from both oral and written sources, identifying possible causes of problems, and analyzing and interpreting data and complex situation [sic] involving conflicting demands, needs, or priorities,” “[a]bility to confront problems, take charge, and assume responsibility,” “ability to appropriately delegate assignments,” “ability to plan,” and “ability to develop alternative solutions to problems and evaluate courses of action and to reach logical decisions based on the information at hand,” among others. Those skills, among others (such as ability to communicate orally with subordinates and civilians), call for situational judgment and interpersonal skills, rather than theoretical and academic knowledge about such judgment and skills.

47. Implausibly, HRD stated the KSAs just quoted could be tested adequately and appropriately on the written examination, with questions in the format HRD actually used. That was not true.

48. Moreover, as written, HRD’s actual examinations did not in fact test even for some skills that could have been tested, because some questions addressed abstract knowledge and failed to focus on matters relevant to performance as a police sergeant.

49. Where HRD did address questions of empathy or the dangers of authoritarian supervision, it did so by asking an informational question, rather than testing whether the individual candidate had empathy or authoritarian traits. Thus, reaching the correct answer turned upon test-taking skills, temporary memorization, or academic understanding of facts unrelated to actual job performance. For instance, question 35 on the 2010 exam asked:

According to CP, the most critical determinant of future success as a community policing Officer is:

- A. superior communication skills.
- B. Empathy.
- C. autonomy.
- D. Analytical ability.

There is no reason to think that a candidate who knows that the correct answer is "B" will actually have more empathy than someone who thinks that a plausible alternative answer is what "CP" lists as the "most critical determinant."

50. Likewise, question 37 on the same exam asked:

Barker and Carter found that authoritarianism is a dominant trait among Officers. According to CP, police managers should:

- 1 Recognize that authoritarian traits are most prominent in young Officers and that they tend to subside with experience.
- 2 Attempt to reduce authoritarianism and its behavioral consequences because Officers tend to become more authoritarian over time.
- 3 Encourage Officers to take an authoritarian approach because it often helps to control a situation.
- 4 Not involve an Officer possessing this trait in community policing efforts because it will likely escalate the Officer's degree of authoritarianism.

When asked about this question, the Commonwealth's SME responded that authoritarianism was a problem, but not between 2006-2012 when, in his opinion it was getting better. He pointed out that, most important, a sergeant should identify whether authoritarianism was a problem and, if so, to train the officer(s) in question. The question did not address that most important skill and, according to the subject matter expert, may be addressing a largely outdated concern.

51. HRD long knew that many important KSAs could not be tested in either the written or E&E component. When it oversaw the Morris and McDaniel's job analysis in support of the 1987 Boston Police Department promotional examination and set the allocation of points across various components of the examination, it knew that the experts at that firm believed that the written test did not assess many of the attributes needed for the job and should account for no more than 40% of the overall score.

52. While the true percentage of KSAs that are testable through a written multiple choice test is open to some debate, the court accepts the range from (a) Morris and McDaniel's



1989 estimate that 40% of the KSAs could be tested in a written test to (b) Dr. Wiesen's estimate that HRD only tested 22% of KSAs in the multiple choice test.

53. In 2000, the Boston Police Department commissioned another job analysis by Morris & McDaniel, which led to the 2002 Boston examination. Morris & McDaniel advised HRD and the Boston Police Department to administer an examination that included non-written components (an assessment center and performance review system) that, collectively, received as much weight as the written multiple-choice examination:

The method of evaluation of a candidate for promotion on a KSA may include, but is not limited to, a written examination, an assessment center, a training program, a probationary period, and/or a medical/physical examination. **The method of evaluation is dependent on the appropriateness of measurement for the particular KSA.** For example, knowledge of search and seizure laws can be evaluated most effectively in a written examination, whereas **ability to communicate orally is more appropriately evaluated through a performance based assessment technique such as an oral board or an assessment center.** [Emphasis supplied].

Ex. 42 at p. 1 (Bates number 1550). This advice is sound.

54. That advice is also consistent with the testimony, in *Lopez I*, of Ed Davis, the former Commissioner of the Boston Police Department. He testified that a written exam should be a component of every sergeant's exam because "the basic fundamental knowledge that's needed to be in a supervisory rank in a police department. . . is so important to the day-in-day-out work of [a sergeant]."

55. Many of the KSAs identified in the 1991 job analysis and 2000 Morris & McDaniel study call for evaluation through "a performance based assessment technique." Failure to do so injects extraneous influences (such as test-taking ability and temporary memorization skills) into the selection process, while diminishing the exam's ability to measure important KSAs accurately or appropriately.

56. HRD's knowledge of the Morris & McDaniel 2000 study also confirms its knowledge that a written multiple-choice test alone does not sufficiently test for the skills and abilities necessary for the job.

57. The limitations of HRD's format in testing KSAs are also apparent when compared to alternatives. In 2002, HRD approved the City of Boston's plan to introduce a performance review system to the examination process. Under that system, candidates' prior job performance would be reviewed and assessed as part of the promotion process.

58. As Dr. Silva acknowledged at trial, performance review systems "can be useful and they do tend to reduce adverse impact." His own company, E.B. Jacobs has recommended use of such systems. However, Boston's plan to implement a performance review system was ultimately abandoned following opposition from the police unions. In scrapping the plan, then-Police Commissioner Paul Evans stated:

Just as we have changed the way we do police work, we must change the way we promote. We need to understand that our promotional system remains mired in a tradition that has become obsolete and disconnected from the way we do business today. We must be willing to reward police work, not memorization skills.

b. Formulating Questions for Testable KSAs

59. The exams at issue also included questions that lack "fidelity," i.e. a relationship to a sergeant's job, even though the questions nominally relate to, for instance criminal procedure and criminal law. A patrol supervisor sergeant would use the criminal procedure and the criminal law portion of what HRD assigned candidates to read and study. The other assigned reading materials may cover important topics, but knowing those sources has considerably less relationship to the sergeant position. Apart from the criminal procedure and criminal law, the technical knowledge part of HRD's exams had only an attenuated connection, if any, to the actual job.

60. For instance, sergeants must apply their knowledge by exercising judgment in specific situations. It is possible to write situational judgment questions, and some examinations do so, but very few of HRD's questions do so.

61. HRD's multiple choice questions regarding topics covered in assigned source materials follow a common format: They start with "according to" the source, followed by approximately 4 sentences, followed by four choices, based upon the sentence. These questions test knowledge of the source material. Such an emphasis on memorization of source material lacks support in any analysis of KSAs needed to perform well as a police sergeant.

62. Similarly, many questions are definitional in that the answers turn upon the meaning of a particular word. Those questions have low fidelity, because a sergeant's job does not generally involve using academic jargon or other definitions of concepts in the assigned reading. Dr. Wiesen's estimate that 20% of the questions are primarily definitional is reasonable.

63. Some examples discussed during trial<sup>2</sup> illustrate and prove that testing for knowledge of material assigned and memorized during test preparation is not the same as testing for practical knowledge used on the job.

64. On cross-examination of plaintiffs' expert, the Commonwealth asked about questions 4, 5, 10 and 15 on the 2005 exam, which ostensibly measure knowledge of a relevant topic of criminal procedure. They do measure that knowledge, but not in a way adapted to

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<sup>2</sup> The court recognizes, of course, that taking isolated examples from the voluminous record does not prove a trend or overall conclusion. The court therefore concentrates on examples chosen by the Commonwealth to justify its position during the trial, because those examples illustrate problems in the Commonwealth's justifications for the exams.