NOTIFY

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court
No. 2284-CV-00906
No. 2285-CV-00555

Hovsepian, et al. v. Massachusetts Peace Officer Standards and Training Commission

Consolidated with

New England Police Benevolent Association, et al. v. Massachusetts Peace Officer Standards and Training Commission

Memorandum and Order on Plaintiffs' Motions for Preliminary Injunction

The plaintiffs in these consolidated actions, four police officers and a police union, have moved to enjoin the newly created Massachusetts Peace Officer Standards and Training Commission ("POST" or the "Commission") from requiring them to answer certain written questions in connection with the officer recertification process required by the newly enacted G.L. c. 6E, asserting that the injunction is necessary to protect their constitutional rights.

Following a hearing, and careful consideration of all parties' written submissions and oral arguments, the Court ALLOWS the plaintiffs' motions IN PART, and orders that the Commission be enjoined from requiring officers to answer Question Nos. 6 and 7 at issue. The plaintiffs' motions are otherwise DENIED.

BACKGROUND

Two of the plaintiffs in the earlier-filed matter (Docket No. 2284-CV-00906) are officers with the Boston Police Department and the third is an officer with the Waltham Police Department; all are presidents of separate police unions (the "Suffolk plaintiffs"). The plaintiffs in the later-filed matter (Docket No. 2285-CV-00555), which was initially filed in Worcester Superior Court, are a union representing some 3,500 police officers in the Commonwealth, and

an officer with the Worcester Police Department who is president of another union (the "Worcester plaintiffs").

The defendant POST was one of several commissions established by Chapter 253 of the Acts of 2020, entitled "An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth" and enacted as an emergency law on December 31, 2020. Section 30 of the Act promulgated a new Chapter 6E of the General Laws, which created POST and vests the Commission with broad powers of oversight over all police officers in the Commonwealth.

Among the many responsibilities and powers vested in the Commission is certification of any individual seeking employment as a police officer in the Commonwealth, and "recertification" of all police officers already employed when the statute was enacted. Recertification is required every three years on a rolling basis, with July 1, 2022 the deadline for recertifying all officers whose last names begin with A-H (some 10,000 officers). One cannot be employed as a police officer in the Commonwealth, in any capacity, if not certified. G.L. c. 6E, §§4(d), 11.

Recertification requires officers to meet, at a minimum, nine criteria set out in the statute, two of which are at issue in the instant motions: "successful completion of an oral interview administered by the Commission;" and "being of good moral character and fit for employment in law enforcement, as determined by the Commission." G.L. c. 6E, §4(f)(1).

The Commission has delegated the tasks of conducting the oral interview, and determining whether an officer is of good moral character and fit for employment in law enforcement, to police department heads (and in the case of department heads, to their appointing

authorities). A department head may assign these tasks to a designee, although the department head is ultimately responsible for the character and fitness finding.

In connection with the interview requirement, the Commission has created a questionnaire containing eight questions which officers must answer in writing, under oath. The Commission has instructed department heads that they (or their designees) should discuss the officer's answers to the questionnaire with the officer during the interview, and that the answers should be considered when evaluating whether the officer has good moral character and fitness for employment. However, no answer provided by an officer may, by itself, be a basis for a failure to find good character and fitness, as that determination is to be made based on the "totality of the information obtained."

Both the Suffolk and Worcester plaintiffs challenge four questions included in the questionnaire:

> No. 1 Are you current in all tax payments? This includes federal and state taxes as well as property and excise taxes. (Note: if you are subject to and in compliance with a payment plan established by the federal or state government, you may answer "yes" to this question.) If no, please explain.
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> No. 6. In the last five years, have you ever sent or displayed a public communication on social media that you believe could be perceived as biased against anyone based on their actual or perceived race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status, or socioeconomic or professional level, provided you were at least 18 years old at the time? If yes, please provide each such public communication, and details. For these purposes, "communications" include, without limitation, posts, comments, and messages; and "public" communications are those that were made available to three or more people other than you.
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> No. 7. Do you currently belong, or have you ever belonged, to any organization that, at the time you belonged, unlawfully discriminated (including by limiting membership) on the basis of actual or perceived race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status, age or socioeconomic or professional level? If so, please provide details regarding each such organization.

> No. 8. Thinking broadly, do you have any knowledge or information, in addition to that specifically addressed in the preceding questions, which may be relevant, directly or indirectly, to your eligibility or fitness to be recertified as a law enforcement officer with this law enforcement agency? This would include, but is not limited to, knowledge or information concerning your character, temperament, habits, employment, education, criminal records, traffic violations, residence, or otherwise. If so, please provide details.

If the department head finds that the officer is of good moral character and fit for employment, the questionnaire is not to be forwarded to the Commission, but maintained in the officer's personnel file. If the department head does not find that the officer has character and fitness, s/he must forward to the Commission a copy of the questionnaire, along with a written report which:

> shall contain an explanation for the agency's determination, including, but not limited to, a description of specific conduct supporting the agency's determination … The written report must be sufficient to permit the commission to evaluate the basis for the employing agency's determination, and to permit the commission to determine whether the officer possesses good character and fitness for employment.
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> Commission's Regulations on Recertification, 555 CMR 7.05(2)(c)(i)-(ii).

An officer may submit a written response to the department head's report. 555 CMR 7.05(2)(d). The Commission then renders its own determination as to whether an officer possesses good character and fitness for employment, and in doing so must consider "all information available to it," including the department head's report and officer's response. 555 CMR 7.05(3).

If recertification is denied, the officer may seek review by the Commission's executive director. 555 CMR 7.10(1). An officer may then request a hearing before the Commission. 555 CMR 7.10(2). The Commission's final decision is appealable to the Superior Court under G.L. c. 30A. See G.L. c. 6E, §§10.

The deadline for all departments to have forwarded determinations of character and fitness to the Commission was initially June 15, 2022 and, by statute, the deadline for the Commission to make recertification decisions for the first round of officers was July 1, 2022. The Commission granted 30-day extensions to a number of departments to forward their character and fitness determinations. The Court was informed, at hearing, that each of the plaintiff officers in this action submitted his questionnaire and/or was granted an extension for doing so. According to a published report, a majority of officers who were due to be recertified by July 1, 2022 submitted the questionnaire, with sufficiently satisfactory responses.[1]

On April 27, 2022, the Suffolk plaintiffs filed the lawsuit underlying this action; on May 12, 2022 they filed an Amended Complaint, seeking, *inter alia*, a declaration that the four questions on the questionnaire noted above are unconstitutional.[2] The Worcester plaintiffs filed their Complaint soon after, alleging a variety of constitutional deficiencies in the recertification process, which are discussed in more detail below.

Each set of plaintiffs contemporaneously filed Motions for Preliminary Injunction. The Suffolk plaintiffs seek to enjoin the Commission from requiring them to answer the four questions noted above. The Worcester plaintiffs more broadly seek to enjoin the Commission from using the questionnaire, at all.

On June 8, 2022, the Commission enacted emergency regulations regarding recertification. The regulations provide that in determining whether an officer has good moral character and fitness for employment, a department head may consider:

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[1] See Lawyers Weekly on-line, June 21, 2022, "Tension in air as police recertification unfolds."

[2] The Amended Complaint also asserts that the Commission has engaged in serial Open Meeting Law violations, by forming subcommittees to advise and make recommendations to the Commission, which do not themselves follow Open Meeting Law proscriptions. Those claims are not at issue in the instant motions.

> whether an officer adheres to state and federal law, acts consistently with recognized standards of ethics and conduct adopted by the employing agency or as set forth in the Law Enforcement Code of Ethics and Standards of Conduct most recently adopted by the International Association of Chiefs of Police, and is worthy of the public trust and of the authority given to law enforcement officers. ... the agency also may rely on questionnaires, any guidance or forms approved by the Commission, performance reviews, relevant education, specialized training, professional awards, achievements, commendations by law enforcement agencies or officials or others, instances of imposed discipline, patterns of misconduct, and any other evidence of past performance.

555 CMR 7.05(2)(a)(i).

DISCUSSION

In order to obtain injunctive relief, the plaintiffs must show that: (1) they are likely to succeed on the merits of their underlying claims; (2) they will suffer irreparable harm if injunctive relief is denied; and (3) the harm to the plaintiffs if the injunction is denied outweighs the harm to the Commission if the injunction is granted. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). Because they seek to enjoin government action, the plaintiffs must also show that the requested relief promotes the public interest, or, at least, does not adversely affect the public. Garcia v. Department of Hous. & Cmty. Dev., 480 Mass. 736, 747 (2018).

The Court first considers whether the plaintiffs have satisfied their burden with respect to the four questions noted above; then considers the Worcester plaintiffs' contentions with respect to the questionnaire as a whole.

I. The Claim that Question Nos. 1, 6, 7 and 8 are Unconstitutional

A. Likelihood of Success on the Merits

All plaintiffs argue that requiring them to answer Question Nos. 1, 6, 7, and 8 violates their First Amendment and/or due process rights. The Worcester plaintiffs also argue that Question No. 8 violates their right to privacy. The Court addresses each question separately.

1. Question No. 6: Social Media

Plaintiffs challenge Question No. 6 on grounds that it violates the doctrines of overbreadth and vagueness. The two doctrines "are related concepts, but implicate distinct constitutional rights." Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 611 (2012). Overbreadth relates to protections provided by the First Amendment, while the vagueness doctrine is a function of due process. Id., at 611-12 (internal citations omitted). Where, as here, a litigant challenges a law[3] as both facially vague and overbroad, the Court considers the overbreadth claim first. Id., at 612 (internal quotation omitted).

a. Overbreadth

"[T]he overbreadth doctrine permits facial challenges to statutes or regulations that, although susceptible of some valid applications, are alleged to prohibit or chill constitutionally protected expression." Schoeller, 463 Mass. at 612; see also Massachusetts v. Oakes, 491 U.S. 576, 582 (1989) (O'Connor, concur) ("[o]verbreadth is a judicially created doctrine designed to prevent the chilling of protected expression"). A finding of overbreadth is "strong medicine," to be employed "sparingly and only as a last resort." Schoeller, 463 Mass. at 612. Application of the doctrine is therefore limited to instances where a law "prohibits a substantial amount of protected speech." Id. (internal quotations omitted).

The Commission does not dispute that the social media question is broad. Rather, it argues that the question is not subject to an overbreadth challenge because it does not actually prohibit speech; rather, the Commission argues, it is simply a question, meant to elicit

[3] The plaintiffs characterize the questionnaire as a "regulation," and the Commission does not really challenge that characterization. Therefore, the Court analyzes the questions as regulations, which have the force of law.

information and generate a conversation between the officer and the interviewer which may reveal further information that will shed light on whether the officer harbors bias. The Commission contends that broad inquiry into an officer's attitudes is the only way to ensure that evaluators have the universe of information necessary to make an informed decision about whether the officer has good character and fitness for employment. Thus, the Commission argues, such breadth is permitted, indeed required, to enable the Commission to effectuate its statutory purpose of eradicating bias in policing.[4]

It can hardly be disputed that eradicating bias in policing is a compelling governmental interest. It is also clear that the government has greater power to regulate the off-duty speech of a police officer than it has to regulate the non-professional speech of other employees whose professions do not so widely implicate the public interest and trust. See Gauthier v. Police Comm'r of Boston, 408 Mass. 335, 339 (1990) (police officers' expectation of privacy is diminished "due to the obvious physical and ethical demands of their employment"); Broderick v. Police Comm'r of Boston, 368 Mass. 33, 42 (1975) (in the sphere of law enforcement, "official conduct is not the only area which may be a subject of inquiry); Wilmarth v. Georgetown, 28 Mass.App.Ct. 697, 701-02 (1990) ("it is an implicit term of a police officer's employment in Massachusetts that the government may impose any conditions on his outside activities that are not unreasonable"); Fraternal Order of Police, Lodge No. 5 v. City of Phila., 812 F.2d 105, 127 (3rd Cir. 1980) ("police officers, like other public officials, have long been aware that the nature of their work subjects them to inquiry into personal data about their private

[4] G.L. c. 6E does not actually set forth its purpose; however, Chapter 253 of the Acts of 2020 provides that the purpose of the Act it to "forthwith provide justice, equity and accountability in law enforcement." Moreover, the Session Law also amended the Civil Rights Act, G.L. c. 12, §11H, to provide citizens with a right to "bias-free policing."

lives"). Further, it cannot be gainsaid that one's social media postings may be fertile ground for ferreting out discriminatory attitudes, and therefore bear a connection to an officer's fitness to serve. The Court thus agrees with the Commission that some inquiry into officers' social media communications would pass constitutional muster.

Nonetheless, the Commission's contentions are unavailing, because they disregard a fundamental tenet of First Amendment law: that is, that a regulation which targets content-based speech be drawn so as to not unnecessarily target (and therefore chill) protected speech. This tenet does not evaporate when a compelling government interest is at stake and an agency has been vested with broad powers to effect that interest. See Schoeller, 463 Mass. at 618 ("regulations that attempt to limit the speech of licensed professionals when acting outside of their professional capacity must be narrow, and applied with precision to the type of speech that the [agency] has a legitimate interest in regulating"); Broderick, 368 Mass. at 39, 41 (state should not "phrase general and vague questions [to police officers] in a broad dragnet approach;" there must be "standards to establish the limits of any inquiry into private affairs").[5]

Question No. 6 violates this tenet. Since (as discussed below) the question uses an indiscernable standard of what "could be perceived" as biased by unknown third parties, innumerable communications are caught up in the sweep of the question which do not, by any reasonable measure, reflect on an officer's ability to engage in biased-free police work.[6] The question therefore implicates "a substantial amount of protected speech" and is overbroad. Schoeller, 463 Mass. at 612.

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[5] In Broderick, officers challenged written questions posed to them on Fifth Amendment grounds.

[6] Some of several examples of such speech cited by the plaintiffs are discussing the positions of candidates for office on hot-button issues; and "liking" a comedy routine that does not reflect bias, but was performed by a comedian known to have biased attitudes.

The Commission's argument that any burden imposed on speech by the question is incidental because the question chills only the type of speech that might legitimately adversely affect certification, and, in any event, the answer cannot, by itself, be a basis for a finding of unfitness, is unpersuasive. The question requires a "Yes" answer to a broad range of speech, and the answer could ultimately be a factor in a decision that strips an officer of her ability to work in the profession. As such, the question is likely to restrain officers from engaging in protected social media communications, for fear that some such communication "could be perceived" by an unknown third party as biased. Compare Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 201 (2005) ("[t]he fact that [the Commission] professes to [interpret] the [question] much more narrowly than a more natural reading of its language would permit merely highlights the fact that, on its face, the [question] reaches far more broadly than necessary to achieve the government's stated purpose").[7]

Finally, the Court does not find the Commission's citation to cases involving applications for admission to the Massachusetts bar to be apt. See, e.g., Matter of Prager, 422 Mass. 86, 100-01 (1996) (approving of "full and exhaustive disclosure" by the applicant; a "mutual inquiry" that discloses the applicant's "innermost feelings and personal views;" and requirement that the applicant "present[] all material facts and supporting information"). In those cases, wide-ranging inquiry was deemed necessary to explore whether and how specific, prior misconduct by a particular applicant – such as criminal convictions and ethical violations – affected the applicant's present character and fitness to practice law. Here, by contrast, Question No. 6 is posed to every single officer in the Commonwealth, with no regard for whether the particular

[7] The Court does not, however, agree with the plaintiffs' additional contention that the question unlawfully "compels" speech. Job applicants are routinely requested to divulge information they would otherwise not during an interview.

officer has displayed any indicia of bias. The breadth of the question is thus not grounded in any need for such breadth, as was the inquiry in the line of cases under Prager.[8]

Because Question No. 6, as written, reaches protected speech and an affirmative answer could lead to significant negative consequences, the plaintiffs are likely to succeed on the merits of their claim that the question is overbroad.

b. Vagueness

As noted, the vagueness doctrine is a function of due process, which "requires that a law provide fair notice of what it prohibits or requires so that persons of common intelligence may conform their conduct to the law." Schoeller, 463 Mass. at 611. "A law is void for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application." Chief of Police of City of Worcester v. Holden, 470 Mass. 845, 854 (2015) (internal citations omitted). A law may also be vague if it "subjects people to an unascertainable standard." Brookline v. Commissioner of the Dep't of Envtl. Quality Eng'g, 387 Mass. 372, 378 (1982).

The Court agrees with the plaintiffs' contention that Question No. 6 is impossible to answer, as it asks officers to divine whether unknown third parties might "perceive as biased" any social media communication by the officer. While clearly, there are communications which any reasonable officer would know require an affirmative response, the question relies on such a subjective and unascertainable standard that persons of common intelligence simply cannot know the limits of what requires an affirmative response.[9]

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[8] While the Commission argued at hearing that this type of broad inquiry is "common," it could not cite any state or other authority that has posed such a far-reaching question as part of anti-bias policing measures, or in any other context. The Court itself could find none.

[9] By way of example, should an officer answer "Yes" because she has forwarded unkind jokes about lawyers; watched a racy comedy routine; or commented that she will miss the now-retired character of Apu from *The Simpsons*?

Moreover, the question asks about perceived bias in relation to two categories – "socioeconomic and professional level" – that do not implicate protected classes, further obscuring (and also broadening) the type of communication that will merit an affirmative response. And, the word "display" in the context of interactive computer media does not, as the Commission contends, have an obvious meaning.

Of course, "even a vague [regulation] may be made constitutionally definite by giving it a reasonable construction," and references to regulations or secondary sources may be "sufficient to establish a common understanding and practice" with respect to an otherwise vague requirement. Com. v. Hagopian, 100 Mass.App.Ct. 720, 725 (2022) (internal quotations omitted). Here, however, there are no sources to which an officer can turn to glean insight into the type of communication the Commission intends to merit an affirmative response. Contrast Hagopian, 100 MassApp. Ct. at 725 (relying on Massachusetts Driver's Manual to establish when it is permissible to use a car horn); Holden, 470 Mass. at 855-56 (relying on caselaw to explicate the undefined "suitable person" standard in the firearms licensing statute).

And, while the Commission argues that all that is required is a good-faith attempt to answer the question, the Court agrees with the plaintiffs that that rejoinder does not remediate their vagueness concerns. The Commission plainly considers the questionnaire an important part of the interview, which is itself an essential element of the recertification process. An officer's answers to the questions will play a meaningful role in the determination of whether s/he has good moral character and fitness for employment. Grounding these questions in wholly subjective, indiscernible standards does not comport with constitutional requirements. Accordingly, the plaintiffs are likely to succeed on the merits of their claim that Question No. 6 is vague.

As already noted, by finding that Question No. 6 is vague and overbroad as written, the Court does not mean to imply that the Commission cannot constitutionally inquire into officers' social media communications. As discussed, it cannot reasonably be disputed that the Commission has a compelling interest in rooting out bias in policing; that police officers are subject to greater regulation of their speech than other professionals; and that social media postings can be a useful tool in detecting biases. But in the Court's view, Question 6, in its present form, restricts too wide a range of speech, and is unduly vague. A better-defined, more tailored question, just as likely to achieve the end the Commission seeks, is required.

2. Question No. 7: Membership

The plaintiffs contend that the question whether they have ever belonged to an organization that unlawfully discriminated violates their First Amendment rights to free association (as well as due process) because it is not reasonably related to the goal of rooting out bias in policing.

Because compelled disclosure of memberships can infringe on rights to privacy of association and belief protected by the First Amendment, it can be justified only when there is "some substantial relation" between a compelling government interest and the information required to be disclosed. Attorney Gen. v. Bailey, 386 Mass. 367, 381 (1982) (citing Buckley v. Valeo, 424 U.S. 1, 64 (1976)). Here, there is not even a rational relation between the Commission's goal of ferreting out bias in policing and the information sought in Question No. 7, because the question requires disclosure of group membership that says nothing about whether an officer harbors bias.[10]

[10] Question No. 7 also raises vagueness concerns, as the question does not define "unlawfully discriminated." For present purposes, the Court accepts that, as stated by its counsel at hearing, the Commission means that the organization (not just one of its officials) was found liable for discrimination by a Court or other tribunal, and not that the organization was simply alleged to have engaged in discrimination. There is the further problem of how an

Specifically, there are innumerable groups which have been found liable for unlawful discrimination, but membership in which would not, by any reasonable measure, provide any indication of bias. Cited as an example at the hearing on plaintiffs' motions was the Boston Police Department, which reportedly was recently found liable in a suit alleging violations of the Americans With Disabilities Act.[11] Thus, every officer in the BPD (and numerous other departments, to be sure) would have to answer "Yes" to Question No. 7, but by doing so would convey no information about whether she actually harbors any animus toward the disabled. Where Question No. 7 makes no effort to limit disclosure to the type of membership that might actually indicate some bias (such as in groups whose purpose, policy, or principles is founded on discriminatory animus), but, rather, seeks information that by and large is irrelevant, the question is not substantially related to the Commission's goal of identifying officers who harbor bias and therefore does not justify the compelled disclosure.

The Court deems the likelihood that Question No. 7 will actually chill any officer's associational activities to be remote. However, in light of the absence of any rational connection between such broad disclosure and the Commission's interest in eradicating bias in policing, the Court concludes that "the question would not even withstand a more relaxed scrutiny than that usually applied to questions which seek disclosure of associational ties." Fraternal Order of Police, Lodge No. 5, 812 F.2d at 120.

Again, as with the social media question, the Court does not mean to imply that the Commission cannot constitutionally inquire into officers' group memberships, but the question

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officer would know such information, in the cases of larger organizations that operate in wide geographic areas. The Court accepts the Commission's response that an officer can only answer the question to the best of his or her knowledge.

[11] Other examples included the Boy Scouts of America and the Catholic Church.

must be framed so that it is reasonably likely to elicit information that is an indicia of bias. In its present form, Question No. 7 does not do that. Thus, the Court finds that the plaintiffs have a likelihood of success on the merits of their claim that Question No. 7 is unconstitutional.

3. Question No. 1: Taxes

The plaintiffs contend that Question No. 1, asking whether the officer is "current in all tax payments," violates due process because it is not reasonably related to the determination of whether an officer has good character and fitness. Massachusetts Federal of Teachers v. Board of Education, 436 Mass. 763, 779 (2002) (federal due process requires that a regulation bear a reasonable relation to a permissible legislative objective; state due process requires that legislation bear a real and substantial relation to the general welfare).

The Commission contends that delinquency on tax payments may indicate that an officer is under financial stressors which could make the officer vulnerable to corruption, including undue influence and blackmail.

"[S]ociety's interest in an honest police force is as strong as its interest in a self-reporting tax system," and this interest "outbalance[s] a patrolman's right to withhold financial information." O'Brien v. DiGrazia, 544 F.2d 543, 546 (1st Cir. 1976). O'Brien held that an order requiring officers to disclose a much broader array of financial information that that sought by Question No. 1 – including state and federal tax returns – was "specifically, directly, and narrowly" related to the interest in maintaining an honest police force, as such information would help establish an officer's "probity." Id., at 546. Further, the Court held, there need be no indication that the officer is actually in financial straits, or otherwise subject to corruption, to justify such an order. Id., at 546, n.4. The plaintiffs are therefore unlikely to prevail on their

claim that Question No. 1 is not sufficiently related to the Commission's objectives to satisfy due process.

Further, the plaintiffs' contention that the question does not clearly define what information is sought and is therefore vague (citing, as an example, that it is unclear whether a late-filing of estimated tax payments would require an affirmative response), is unpersuasive. The question is reasonably susceptible of interpretation and the questionnaire provides space to explain any "Yes" answers.

4. Question No. 8: The "Catch-all"

The plaintiffs contend that an officer cannot reasonably discern what information Question No. 8 seeks and the question is therefore unconstitutionally vague. The Court disagrees. Unlike the social media question, Question No. 8 asks about an officer's *own* thought processes, not those of unknown third parties. The question, including the specific terms challenged by the plaintiffs ("[t]hinking broadly;" "may be relevant;" "directly or indirectly") is not so vague that persons of common intelligence cannot ascertain what it is asking. This type of "catch-all" question, asking a job applicant if she can think of anything the employer might want to know about the applicant before deciding to put her on its workforce, is a routine inquiry that serves the employer's interest in hiring fit employees.

The Court also disagrees with the plaintiffs' contention that some of the subject matters which Question No. 8 lists for consideration have no correlation to character and fitness. First, the question is not limited to information that reflects only *adversely* on an officer's fitness; thus, an officer could provide information about employment or education (or any other subject) that reflects well on character and fitness. Further, information regarding the other challenged categories – habits, traffic violations, and residence – could relate to an officer's fitness (i.e. if an

officer has a significant gambling habit; displays routine disregard for traffic laws; or is not in compliance with a residency requirement).

Finally, the Court disagrees with the Worcester plaintiffs' contention that the question violates officers' privacy interests in their own thoughts. "[I]t is without question that police officers, as police officers, have an expectation of privacy that is less than that of private citizens." Guiney v. Police Comm'r of Boston, 411 Mass. 328, 336 (1991) (dissent, Nolan, J.); see also Commonwealth v. Hyde, 434 Mass. 594, 613 (2001) (dissent, Marshall, C.J.) ("[w]e hold police officers to a higher standard of conduct than other public employees, and their privacy interests are concomitantly reduced"); Gauthier, 408 Mass. at 339 (police officers' expectation of privacy is diminished "due to the obvious physical and ethical demands of their employment"). As noted, there is nothing about Question No. 8 that would make it offensive in any job application process, much less so in light of officers' reduced expectation of privacy. Moreover, job applicants must often discuss private thoughts that they would just as soon choose not to reveal in order to successfully interview.[12] The plaintiffs are therefore unlikely to succeed on their claim that Question No. 8 is defective.

B. Remaining Elements Required for Injunctive Relief

Because the Court has found that administration of Question Nos. 6 and 7 effect a deprivation of plaintiffs' constitutional rights, irreparable harm is presumed. Elrod v. Burns, 427 U.S. 347, 373-74 (1976).[13] As to a balancing of the respective harms, the Court finds unpersuasive the Commission's contention that striking the questions will require "an enormous

[12] For example, who would volunteer to describe her greatest weakness? But many job interviewees have had to do so.

[13] The Commission contends that the plaintiffs unduly delayed in seeking relief, which undermines their claim of irreparable harm based on the asserted constitutional deprivations. The Court has reviewed the chronology of events as set forth by both the Commission and the plaintiffs, and does not agree that the plaintiffs engaged in undue delay.

investment in investigatory resources" because the Commission will have to obtain the information it seeks from external sources. As discussed, the offending questions can be rewritten to address deficiencies, while still eliciting the information the Commission needs. Therefore, a balancing of the harms weighs in favor of injunctive relief. For the same reason, striking the questions – while concededly causing some delay in the recertification process for the first round of officers – will not adversely affect the public interest.

Accordingly, the Court finds that the plaintiffs have met their burden of establishing a right to injunctive relief with respect to Question Nos. 6 and 7, which will be ordered stricken from the questionnaire. The Court finds the plaintiffs have not met their burden with respect to Question Nos. 1 and 8.

II. The Questionnaire as a Whole

As noted, the Worcester plaintiffs have interposed a broader challenge to the recertification process, and seek an injunction against use of the questionnaire as a whole, asserting that: (1) the use of a questionnaire in connection with the oral interview requirement exceeds the Commission's statutory authority; (2) the use of a "good moral character" standard violates due process; and (3) all eight of the questions on the questionnaire violate officers' rights to privacy.

The Court finds that the plaintiffs are unlikely to prevail on the merits of these contentions, and therefore an injunction against using the questionnaire, in its entirety, is unwarranted, for the reasons that follow.

1. Use of a Questionnaire

The Worcester plaintiffs argue that requiring officers to answer written questions under oath as part of the interview process exceeds the powers granted the Commission by Chapter 6E,

§4, which provides that the Commission administer an "oral interview" as part of the recertification process.

The Court agrees with the Commission, that the statute vests the Commission with the power to establish the procedures it will use to effect the statute's objectives, and that the command that the Commission "administer" an oral interview is sufficiently flexible to allow it to require that officers answer written questions as part of the interview. See Massachusetts Fed'n of Teachers v. Bd. Of Educ., 436 Mass. 763, 774 (2002) (internal quotations omitted) ("[a]n agency's powers to promulgate regulations are shaped by its organic statute taken as a whole and need not necessarily be traced to specific words"); Grocery Mfrs. of Am., Inc. v. Department of Pub. Health, 379 Mass. 70, 75 (1979) (authority for regulation need not be pinpointed to specific statutory language). As such, the Court deems the Worcester plaintiffs unlikely to succeed on the merits of their claim that use of the questionnaire exceeds the Commission's authority.

2. Good Moral Character

The Worcester plaintiffs next argue that the certification process violates due process because it requires that officers be found to have "good moral character and fitness for employment" without defining those terms, thus exposing officers to arbitrary determinations by their respective department heads.

This contention was rendered moot when POST enacted regulations (after the plaintiffs' motion was filed) which, as noted, cite a number of criteria to guide department heads in making the character and fitness finding. See 555 CMR 7.05(2)(a)(i). Moreover, the "good moral character" standard is used in many professional licensing schemes (the Commission cited 10 such schemes), and courts have affirmed the standard's use even where the determination

whether it is met is left to the discretion of the decisionmaker. See Raymond v. Board of Registration in Medicine, 387 Mass. 708, 713 (1982) (affirming discipline against physician on grounds of lack of good moral character, even though agency's enabling statute and regulations did not provide such grounds as a basis for discipline). As such, even in the absence of any regulation providing guidance on good moral character, the Court would deem the plaintiffs unlikely to prevail on the merits of this claim.

3. Right to Privacy

Next, the Worcester plaintiffs argue that the questions violate officers' general right to privacy under G.L. c. 214, §1B, because it is unclear whether the questionnaires will be subject to disclosure under the Public Records Law. As already discussed, police officers are held "to a higher standard of conduct than other public employees, and their privacy interests are concomitantly reduced." Hyde, 434 Mass at 613 ("[t]here is a difference in kind, well recognized in our jurisprudence, between police officers, who have the authority to command citizens, take them into custody, and to use physical force against them, and other public officials who do not possess such awesome powers"); Guiney, 411 Mass. at 336; Gauthier, 408 Mass. at 339. This reduced expectation of privacy is codified to some extent in the Public Records Law, which excludes "records related to a law enforcement misconduct investigation" from the exemption from disclosure for information "relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." G.L. c. 4, §7, cl. 26(c).[14] In light of officers' reduced expectation of privacy, the Court does not find the fact that answers to the questionnaire may be subject to public disclosure to comprise an unwarranted intrusion on that privacy.

[14] By citing this provision, the Court does not mean to take any position on whether the questionnaire would be considered a public record.

ORDER

Accordingly, for the reasons set forth above, it is hereby ORDERED that:

1. The plaintiffs' Motions for Preliminary Injunction are ALLOWED IN PART, in that the Commission is enjoined from asking officers Question Nos. 6 and 7, in their present form, as part of the recertification process.
2. Officers who have not yet responded to the questionnaire because they were granted extensions to do so need not answer Question Nos. 6 and 7. For officers who have already turned in the questionnaire and answered Question Nos. 6 and 7 in their current form, the answers may not be used, directly or indirectly, as a basis for denial of recertification. Nothing in this decision is meant to prevent the Commission from requiring officers (both those who have not yet answered and those who have had their answers stricken) to answer revised questions that meet constitutional requirements.
3. The plaintiffs' Motions for Preliminary Injunction are otherwise DENIED.

Date: June 27, 2022

Jackie Cowin
Justice of the Superior Court