

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

SUFFOLK, SS

Civil Action No. 22-1616D

BOSTON POLICE SUPERIOR OFFICERS)
FEDERATION, BOSTON POLICE DETECTIVES)
BENEVOLENT SOCIETY, JOHN BRODERICK,)
DONALD CAISEY, JEANNE CARROLL,)
SCOTT GILLIS, ROBERT GRIFFIN,)
TIMOTHY HORAN, JOEL MCCARTHY,)
JOSEPH MCDONOUGH, THOMAS PRATT)
AND JOSEPH SULLIVAN,)

Plaintiff/Petitioners,)

v.)

MICHELLE WU, in Her Official Capacity as)
Mayor of the City of Boston, ED FLYNN, in His)
Official Capacity as Boston City Council President,)
GREGORY LONG, in His Official Capacity as)
Acting Police Commissioner / Superintendent-in-)
Chief, and CITY OF BOSTON,)

Defendants.)

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CLERK / ASSISTANT

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF

1. The Boston Police Superior Officers Federation (the "Federation") is an employee organization within the meaning of G.L. c. 150E, § 1, with a principal place of business of 13 Clover Street, Suite 1, Dorchester, MA 02122. The Federation is the exclusive bargaining representative of sworn sergeants, lieutenants, and captains in the Boston Police Department, excluding those rated as detectives. There are approximately 250 sworn supervisors in the Federation bargaining unit.

2. The Boston Police Detectives Benevolent Society ("BPDBS" or the "Detectives")

is an employee organization within the meaning of G.L. c. 150E, § 1, with a principal place of business of 434 Hyde Park Ave, Boston, MA 02131. BPDBS the exclusive bargaining representative of three different units of Police Department employees: patrol detectives; detective superiors; and civilians assigned to the forensic unit (aka “criminalists”).

3. Jeanne L. Carroll, Donald Caisey, Thomas Pratt, John Broderick, Joseph Sullivan, Robert Griffin, Joseph McDonough, Scott Gillis, Joel McCarthy, and Timothy Horan all are sworn police officers of the Boston Police Department and registered voters in the City of Boston.

4. The Defendant City of Boston (“City”) is a public employer within the meaning of G.L. c. 150E, §1, with a principal place of business at Boston City Hall, Boston, MA 02201.

5. Michelle Wu is the Mayor of the City of Boston and the City of Boston is a public employer within the meaning of G.L. c. 150E, § 1, with a principal place of business at Boston City Hall, Boston, MA 02201. Wu is the chief executive officer of the City.

6. Ed Flynn is the President of the Boston City Council, which is the “legislative body” of the City of Boston, within the meaning of G.L.c. 150E, §1.

7. Gregory Long is the Superintendent-in-Chief of the Boston Police Department, and is the Acting Police Commissioner within the meaning of Chapter 322 of the Acts of 1962, Chapter 1 (hereinafter “Police Commissioner’s statute”).¹

8. 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.

9. The Boston City Charter restricts City council involvement in labor matters:

¹ On July 13, 2022, Mayor Wu named Michael Cox as permanent Police Commissioner, effective August 15, 2022.

Restrictions on the Making of Contracts. Except as otherwise provided in chapter four hundred and eighty-six of the acts of nineteen hundred and nine, neither the city council nor any member, committee, officer or employee thereof shall directly or indirectly on behalf of the city or of the county of Suffolk take part in the employment of labor, the making of contracts, or the purchase of materials, supplies or real estate; nor in the construction, alteration, or repair of any public works, buildings, or other property; nor in the care, custody, or management of the same; nor in the conduct of the executive or administrative business of the city or county; nor in the appointment or removal of any city or county employee; nor in the expenditure of public money except such as may be necessary for the contingent and incidental expenses of the city council. Any person violating any provision of this Chapter shall be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both. [Acts of 1951, c.376, s.1.17G]

10. Chapter 11 of the City of Boston Code (“Boston Code”) pertains to the Police Department (Attachment 1). For instance, Chapter 11-1.4 requires, “All Boston police vehicles, marked or unmarked, shall be manned twenty-four (24) hours a day by two (2) Boston Police Officers..”

11. Currently, not all Boston police vehicles are staffed 24 hours a day by two officers.

12. Chapter 11-1.2, “Shotguns in Police Vehicles; Training of Officers” states: “All Boston police vehicles shall be equipped with shotguns and shotgun racks. All Boston Police Officers shall participate in a training course for the handling and operation of shotguns. All Boston Police Officers shall be awarded a certificate of training from the appropriate police officials at the completion of such training.”

13. The Mayor and Police Commissioner declined to implement or enforce the Order. Around 1974, City Councilor O’Neil sued for enforcement.

14. Suffolk Superior Court Judge Francis J. Good declared the ordinance invalid, O’Neil v. White, Suffolk Sup. Court No. 683216 (Sup. Ct. 1974), ruling that the ordinance

violated the Police Commissioner's Statute.

15. Chapter 11-1.6 of the Boston Code provides:

On or before July 1, 1979, the size of the Boston Police Department shall be increased by the employment of a sufficient number of patrolmen so as to bring the force to strength of not less than two thousand three hundred (2,300) Police Officers. On or before July 1, 1980, the size of the Boston Police Department shall be increased by the employment of a sufficient number of patrolmen so as to bring the force to strength of not less than two thousand five hundred (2,500). Thereafter, additional officers shall be hired from time to time as needed so as to insure that the number of Police Officers on the force shall, at no time, be less than two thousand five hundred (2,500).

16. The Police Department currently employs less than 2,000 sworn police officers.

17. The Boston Police Commissioner's statute, St. 1906, c. 291, as appearing in St. 1962, c. 322, § 11, provides, "The police commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules and regulations for the efficiency of said police"

18. Massachusetts appellate courts have referred to the statute as conferring "nondelegable authority over the assignment and organization of the officers within the department" and providing "broad administrative control and discretion of the police commissioner of Boston."

19. The Supreme Judicial Court stated: "[C]onsiderations of public safety and a disciplined police force require managerial control over matters such as staffing levels, assignments, uniforms, weapons, definition of duties, and deployment of personnel.... [T]he deployment of officer personnel to meet the tasks and responsibilities of the department is a fundamental and customary prerogative of municipal management which falls squarely within

[Commissioner's] statute.” City of Bos. v. Bos. Police Superior Officers Fed'n, 466 Mass. 210, 215 (2013).

20. All sworn Boston Police Officers are provided Oleo-Resin Capsicum (O.C.) Spray (commonly known as pepper spray) and trained in its use.

21. The conduct of Boston police officers is governed by the Police Commissioner via Rules and Procedures, <https://bpdnews.com/rules-and-procedures>, General Orders, and/or Special Orders.

22. Boston Police Department Rules and Regulations concern conduct, rights and responsibilities (Rule 102), Police Officer duties and expectations (Rule 103), Supervisor duties and expectation (Rules 104, 104A, 105, 106, 107), Discipline Procedure (Rule 109), Critical Incidents (Rule 200), and Labor Disputes (Rule 202).

23. Under Rule 109, officers and complainants are notified contemporaneously about the results of an IAD investigation. The Rule does not provide a process for a complainant to appeal if they are aggrieved by the results of a Department Internal Affairs investigation.

24. Rule 200, regarding Critical Incident Management, is 74 pages long, including multiple Addenda. Addendum B (Code 100), for instance, addresses Crowd Control Situations and provides for use of Chemical Force, which is defined as “tools or weapons systems that disperse chemical irritants or incapacitating spray.”

25. The Rules and Regulations also concern use of force and equipment, such as: Deadly Force (Rule 303), Use of Less-Lethal Force, generally (Rule 303A), Use of Less-Lethal Force, TASER (Rule 303B), use of Patrol Rifles (Rule 303C), Use of Less-Lethal Force, 40MM Direct Impact Launcher (Rule 303D), Use of Non-Lethal Force (Rule 304),

and Uniforms & Equipment (Rule 306).

26. Rule 304, Use of Non-Lethal Force, for instance, provides:

The policy of the Boston Police Department is to use only that amount of force that is reasonably necessary to overcome resistance in making an arrest or subduing an attacker.

The right to use non-lethal force is extended to police officers as an alternative in those situations where the potential for serious injury to an officer or civilian exists, but where the application of lethal force would be extreme.

The availability of a variety of non-lethal weapons is necessary to provide the police officer with a sufficient number of alternatives when presented with a physical confrontation. However, since such force will not likely result in serious injury and the close public scrutiny that accompanies the use of deadly force, this availability may also increase the possibility for overzealous and inappropriate use of force. Therefore, application of non-lethal force will generally be limited to defensive situations where (1) an officer or other person is attacked, or (2) an officer is met with physical resistance during an encounter.

27. In May 2021, the Rule 304 was amended to reflect the Department's commitment to de-escalation techniques, and as required by Chapter 253 of the Actions of 2020.

28. Chapter 253 provides, at Section 30(14):

a. A law enforcement officer shall not use physical force upon another person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to:

Effect the lawful arrest or detention of a person;

Prevent the escape from custody of a person; or

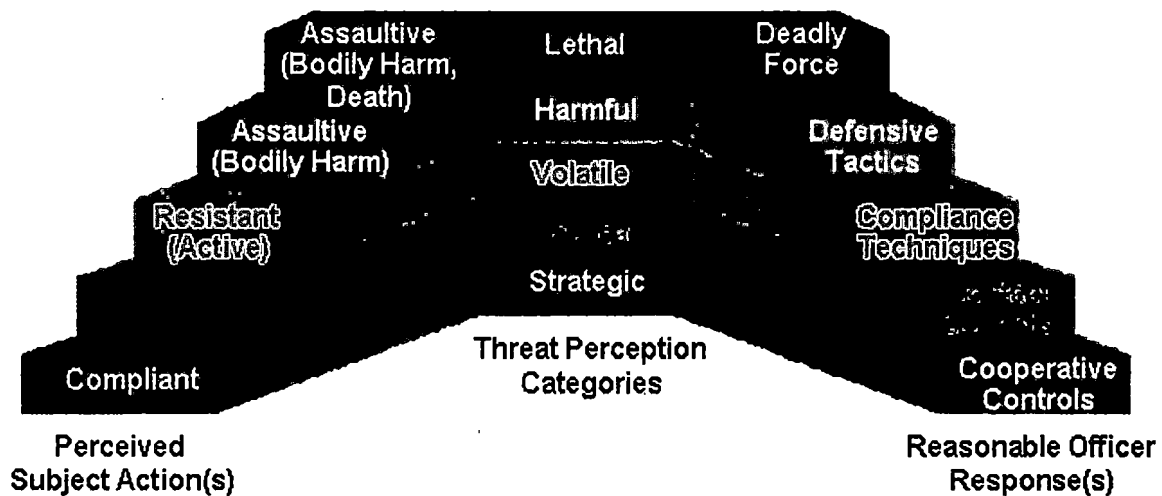
Prevent imminent harm and the amount of force used is proportionate to the threat of imminent harm:

Provided, however, that a law enforcement officer may use necessary, proportionate and non-deadly force in accordance with the regulation promulgated jointly by the POST Commission and the municipal police training committee (and taught at the Boston Police Academy).

b. A law enforcement officer shall not use deadly force upon a person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to prevent imminent harm to a person and the amount of force used is proportionate to the threat of imminent harm.

c. A law enforcement officer shall not use a chokehold. A law enforcement officer shall not be trained to use a lateral vascular neck restraint, carotid restraint or other action that involves the placement of any part of law enforcement officer's body on or around a person's neck in a manner that limits the person's breathing or blood flow."

29. The Department Use of Force Model, in which all officers are trained, is as follows:



30. Training include de-escalation techniques.

31. Pursuant to the above rules, chemical spray have been lawfully used by Boston

Police Officers, for instance in situations of violent riots that involved destruction to property and injury to people, including police officers, such as May 31, 2020.

32. Prior to issuing new rules and regulations or revising existing rules and regulations, the Department provides notice to the sworn police unions and an opportunity to address concerns, including applicable rights to bargain about the decisions or impacts of the decisions at issue.

33. The Federation and Detectives are parties to collective bargaining agreements (CBAs) negotiated with the City of Boston. The CBAs provide a standard for discipline (just cause) and a method to resolve disputes about discipline (arbitration).

34. The City's representatives for negotiations are the Office of Labor Relations, a division ultimately reporting to the Mayor, and representatives from the Police Commissioner, including the Police Department's Office of Legal Advisor and the Police Department's Office of Labor Relations.

35. Representatives from the City Council do not participate in collective bargaining negotiations.

36. The City and Police Department routinely assert that decisions regarding police assignment, deployment and equipment are reserved exclusively to the Police Commissioner, and that such decisions are not subject to bargaining with the sworn police unions. City of Boston, 32 MLC 4 (2005) (City/Commissioner has non-delegable authority to determine officers assigned to address threat of serious civil unrest).

37. For instance, the City cited the principle of law enforcement executive non-delegability, as discussed in City of Boston v. BPPA, 8 Mass.App.Ct. 220 (1979), to defend a refusal to provide unarmed Boston Public Schools police with chemical spray. The 1979 Appeals

Court decision cited the Commissioner's statute, among others, and held, "In this Commonwealth the decision as to who shall carry a firearm and under what conditions, be it a public official or a private citizen, is one which our Legislature has seen fit to leave with the **heads of law enforcement agencies.**" Id. (emphasis added).

38. The City and Police Department routinely assert that grievances or charges of prohibited practice pertaining to decisions of the Police Commissioner are not subject to the jurisdiction of grievance arbitration or the Department of Labor Relations. See, e.g., City of Bos. v. Bos. Police Patrolmen's Ass'n, 477 Mass. 434, 440 (2017) (statute did not prevent arbitrator from determining whether termination for police restraint not prohibited by Commissioner is supported by just cause); City of Bos. v. Bos. Police Superior Officers Fed'n, 466 Mass. 210 (2013) (arbitrator exceeded authority by enforcing contract provision that infringed Commissioner's non-delegable authority).

39. On December 16, 2020, the City Council amended Chapter XII of the Boston Code, Ordinances by creating the Office of Police Accountability & Transparency. (Attachment 2). The amendments provide a right of complainants to appeal Police Department internal affairs department investigations that determine complaints are not sustained, exonerated or unfounded to the Internal Affairs Oversight Panel (IAOP). The Amendments empower the IAOP to require that matters be further investigated or to invite the Police Commissioner to, notwithstanding previous decision, revisit previous decision.

40. Sworn police officers represented by the Plaintiff Unions could be subject to IAD determinations that are overruled, modified or reversed as a result of the ordinance.

41. On April 28, 2021, the City Council and Mayor Kim Janey approved an ordinance restricting the use of Chemical Crowd Control Agents and Kinetic Impact Projectiles,

subsequently codified as Chapter 11-1.10 of the City of Boston Municipal Code. (Attachment 1).

42. The Ordinance defines Chemical Crowd Control agents to include “pepper spray, mace, inert smoke.”

43. The Ordinance permits use of Chemical Crowd Control Agents and Kinetic Impact Projectiles only if:

- a. approved by on-scene supervisor of the rank of Deputy Superintendent or above specifically authorizes after determining that crowds cannot be controlled or quelled through any other methods and no other reasonable methods of de-escalation exist;
- b. the on-scene supervisor authorizing use provides at least two warnings in a particular manner.

44. The Ordinance purports to provide a cause of action for damages, attorneys fees, costs, and treble damages.

45. The Ordinance purports to waive qualified immunity for the officers and the City if the ordinance is violated.

46. Officers who violate the ordinance are subject to discipline from a minimum of five days up to discharge, as the Police Commissioner deems appropriate.

47. Officers represented by Plaintiff Unions could be subject to discipline and liability for actions that violate the ordinance.

48. The Ordinance places more restrictions on the use of non-lethal force, such as chemical spray, than lethal force, and, if enforced, encourages officers to use greater force than otherwise necessary.

49. The Department does not provide an officer at the rank of Deputy Superintendent or higher to be on duty or on call at all times.

50. On July 27, 2021, a day after the Ordinance took effect, the Boston Police Academy of the Department forwarded the Ordinance to all officers as Training Bulletin 2-21.

(Attachment 3). The Bulletin states: “This ordinance directly affects and constrains any sworn officer responding to a radio call or an assignment that has more than ten persons present and the application of their department issued hand held Oleo-Resin Capsicum (O.C.) Spray and shall only be utilized within the parameters set forth in the exceptions and exemptions as noted above.”

51. A day later, the Federation emailed the Department Office of Labor Relations, stating:

The City and Department have long contended that the Commissioner’s statute broadly endows the Police Commissioner with complete authority regarding police services within the City of Boston that cannot be delegated or subject to collective bargaining. We are surprised that the Commissioner appears to be delegating certain duties to City Council. The attached bulletin does not make it clear if the Department has adopted the ordinance as official policy or is merely passing it along as information of possible concern to officers. (And city ordinances are subordinate to collective bargaining under G.L.c. 150e, Chapter 7).

Usually, when the Department implements an operational change, notice is provided first to the unions. We did not receive any advance notice. Regardless, operational changes typically are announced through rules and/or commissioner’s memo. The issuance of this letter as a training bulletin without the imprimatur of the Commissioner leads us to question its force. Therefore, we insist that the Department or City clearly communicate whether officers are expected to comply with this ordinance and, if so, to suspend the policy until the City/Department has fulfilled its collective bargaining obligations, given that the policy has a direct and material impact on terms and conditions of employment.

(Attachment 4).

52. While the Federation and Department met, the Department declined to state whether the ordinance is applicable to, or enforceable against, police officers.

53. On August 25, 2021, the Federation and Detectives subsequently sent a letter to the City’s Office of Labor Relations and Corporation Counsel seeking clarification on the validity of the ordinance. (Attached). A courtesy copy was sent the Department. The Unions sought to assert their right to collectively bargain terms and conditions of employment, including

the decisions and impacts of decisions to implement changes via ordinances.

If advance notice of the City Council ordinance had been provided, the Unions could have engaged the Department on an assessment of the events of May 31, which precipitated this change. After all, neither the City nor City Council, to our knowledge, have studied what caused the melee on May 31 and what the public safety response should have been. We could have asked why the policy applies to "patrolmen" but does not mention several ranks represented by our unions (sergeants, lieutenants and captains). We could have asked for clarification of the phrase "gathering of any kind of more than ten persons," and whether it includes bystanders, first responders, and others. We could have discussed why the policy creates greater restrictions on using less-than-lethal measures for gatherings of more than ten persons than gatherings of less than ten persons. Indeed, we could have discussed why the policy makes it more challenging to use less-than-lethal force means than lethal force. We would have discussed why the policy does not provide for consideration of exigent circumstances, including immediate threat to public safety.

(Attachment 5).

54. The City never responded to the letter.

55. The police unions sent another letter to Council President Flynn, Superintendent-in-Chief Long, Corporation Counsel Cederbaum and Chief aide Mike Firestone, renewing their request for clarification on the validity of the ordinances. (Attachment 5). A copy of the August 2021 letter was enclosed.

56. Neither the City nor any recipient of the letter responded.

57. The Attorney General was provided with a copy of the preliminary petition for leave.

COUNT I – DECLARATORY RELIEF
G.L. c. 231A

58. An actual controversy exists between the parties about whether the Ordinance Restricting the Use of Crowd Control Agents and Kinetic Impact Projectiles, Chapter 11-1.10 of the Boston Code, is Valid and Enforceable, in light of the Police Commissioner's Statute, including but not limited to:

- a. Regulating the use of police equipment, including Crowd Control Agents and Kinetic Impact Projectiles, by banning, restricting or conditioning their use;
- b. Superseding the Rules, Regulations, and General and Special Orders of the Boston Police Department, and Police Commissioner;
- c. Creating a Cause of Action against law enforcement officers and/or the City for violations of the Ordinance, including remedies, such as attorneys' fees, costs, and treble damages;
- d. Waiving qualified immunity for police officers and the City.

59. A binding declaration about the validity of the Ordinance is necessary to determine whether and to what extent the sworn police unions and the police officers they represent are required to comply with the Ordinance under threat of discipline and civil liability, whether the City has purported to modify terms and conditions of employment, and whether and with whom the Unions have a right to demand to bargain about the changes and the impacts of those changes.

COUNT II – DECLARATORY RELIEF
G.L. c. 231A/ G.L.c.43B, §14

60. Plaintiffs hereby incorporate all previous allegations.

61. An actual controversy exists between the parties about whether the Ordinance Restricting the Use of Crowd Control Agents and Kinetic Impact Projectiles is Valid and Enforceable, under the City Charter and Home Rule Amendment, including but not limited to:

- a. Regulating the use of police equipment, including Crowd Control Agents and Kinetic Impact Projectiles, by banning, restricting or conditioning their use;
- b. Superseding the Rules, Regulations, and General and Special Orders of the Boston Police Department, and Police Commissioner;
- c. Creating a Cause of Action against law enforcement officers and/or the City for violations of the Ordinance, including remedies, such as attorneys' fees, costs, and treble damages;

d. Waiving qualified immunity for police officers and the City;

62. A binding declaration about whether the Ordinance is valid is necessary to determine whether and to what extent the sworn police unions and the police officers they represent are required to comply with the Ordinance under threat of discipline and civil liability, whether the City has purported to modify terms and conditions of employment, and whether and with whom the Unions have a right to demand to bargain about the changes and the impacts of those changes.

COUNT III – DECLARATORY RELIEF
G.L. Chapter 231A

63. Plaintiffs hereby incorporate all previous allegations.

64. An Actual Controversy exists about the validity of Chapter 12-17 of the Boston Municipal Code, which creates the Office of Police Accountability & Transparency, namely whether the City Council, in light of the Commissioner’s Statute, has authority to allow individuals to appeal decisions of the Boston Police Commissioner that do not sustain an internal affairs complaint.

65. A binding declaration about the validity of the Ordinance is necessary to determine whether officers, including Plaintiff officers and Plaintiff Unions, can be subject to investigation and discipline after the Commissioner has determined not to sustain a complaint.

COUNT IV – DECLARATORY RELIEF
G.L. c. 231A / G.L.c.43B, §14

66. Plaintiffs hereby incorporate all previous allegations.

67. An Actual Controversy exists about the validity of Chapter 12-17 of the Boston Municipal Code, which creates the Office of Police Accountability & Transparency, namely whether, in light of the the City Charter and Home Rule Amendment, the City Council has

authority to allow individuals to appeal decisions of the Boston Police Commissioner that do not sustain an internal affairs complaint.

68. A binding declaration about the validity of the Ordinance in light of the Commissioner's Statute s necessary to determine whether officers, including Plaintiff officers and Plaintiff Unions, can be subject to investigation and discipline after the Commissioner has determined not to sustain a complaint.

COUNT V- DECLARATORY RELIEF
G.L. c. 231A

69. An Actual Controversy exists about the validity of Chapters 11-1.4 and 11-1.6 of the Boston Code, in light of the Commissioner's Statute which require that all vehicles be manned by two officers and require no less 2,500 sworn police officers of the City.

70. A binding declaration about the validity of the Ordinance is necessary to determine whether the City and its Police Department are violating the Police Commissioner's Statute.

COUNT VI- DECLARATORY RELIEF
G.L.c. 231A/ c. 43B, §14

71. An Actual Controversy exists about the validity of Chapters 11-1.4 and 11-1.6 of the Boston Code, in light of the City Charter and Home Rule Amendment, which require that all vehicles be manned by two officers and staff the Department no less than 2,500 sworn police officers.

72. A binding declaration about the validity of the Ordinance is necessary to determine whether the City and its Police Department are violating City Code.

WHEREFORE, Plaintiffs pray that this Honorable Court:

73. That this Court grant them Declaratory Relief;

74. That this Court enter a Restraining Order prohibiting the Defendants and their agents, attorneys and those acting pursuant to their authority from implementing the aforementioned Chapters of the Boston Code, or in the alternative requiring that Defendants comply with Chapters 11-1.4 and 11-1.6 of the Boston Code.

75. Enter such other and further orders as the Court deems necessary and just.

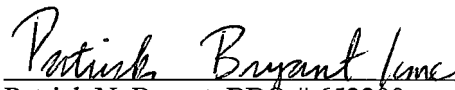
76. That this Court grant such further relief as it may deem just and proper.

77. That this Court in its discretion award costs, including reasonable counsel fees, as provided by General Laws, Chapter 43B, Section 14(2).

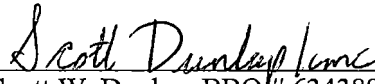
Respectfully submitted,

BOSTON POLICE SUPERIOR OFFICERS
FEDERATION, BOSTON POLICE DETECTIVES
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