

CAUSE NO. D-1-GN-19-006875

TEXAS DEPARTMENT OF PUBLIC
SAFETY OFFICERS ASSOCIATION,
Plaintiff,

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IN THE DISTRICT COURT

v.

TRAVIS COUNTY, TEXAS

TEXAS DEPARTMENT OF PUBLIC
SAFETY; AND STEVEN MCCRAW,
Defendants.

53RD

____ JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION FOR DECLARATORY JUDGMENT,
TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, Texas Department of Public Safety Officers Association, file this *Plaintiff’s Original Petition for Declaratory Judgment, Temporary Injunction, and Permanent Injunction* against Defendants and alleges as follows:

DISCOVERY CONTROL PLAN

1. Plaintiff intends to conduct discovery in this case under Level 2 in accordance with TEX. R. Civ. P. 190.3.

RELIEF SOUGHT

2. Plaintiff affirmatively pleads it seeks non-monetary relief in the form of a declaratory judgment and injunctive relief.

PARTIES

3. Plaintiff, Texas Department of Public Safety Officers Association (DPSOA), is a labor organization comprised of 3,453 commissioned officers employed by the Texas Department of Public Safety, with Richard Jankovsky, a lieutenant with DPS, as their elected president.

DPSOA's principal office is located at 5821 Airport Boulevard, Austin, Travis County, Texas 78752.

4. Defendant Texas Department of Public Safety (DPS) is a state agency headquartered at 5805 N. Lamar Boulevard, Austin, Travis County, Texas 78752. DPS may be served with civil process by serving its Director, Steven McCraw.

5. Defendant Steven McCraw is the director of the Texas Department of Public Safety and is sued in his official capacity. He can be served at his office at 5805 N. Lamar Boulevard, Austin, Travis County, Texas 78752.

JURISDICTION & VENUE

6. This is a claim brought under the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*, for violations of TEX. GOV'T CODE § 614.172.

7. Defendants' governmental immunity is waived under these and other statutes, and under the *ultra vires* exception, and therefore this Court has jurisdiction.

8. This Court has jurisdiction pursuant to Article 5, § 8 of the Texas Constitution, TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*, and TEX. CIV. PRAC. & REM. CODE § 65.021.

9. This Court has subject matter jurisdiction over this dispute because the amount in controversy is within the jurisdictional limits of the Court. TEX. GOV'T CODE §§ 24.007-008.

10. Venue in this action is proper in Travis County, Texas, in that Travis County is where all or a substantial part of the acts or omissions giving rise to Plaintiff's cause of action arose.

FACTS

11. Plaintiff is a labor organization consisting of over 3,400 members residing in different locales across Texas who are employed by the Texas Department of Public Safety (DPS) as commissioned peace officers.

12. Pursuant to TEX. GOV'T CODE § 614.172, DPS is required to have physical fitness programs and standards and a reward policy. Ex. 1.
13. The statute requires that DPS have physical fitness programs which commissioned employees “must participate in” and standards which commissioned employees “must meet.” TEX. GOV'T CODE § 614.172(a).
14. The physical fitness standards “must directly relate to the officer’s job duties.” *Id.*
15. The physical fitness standards must be developed with the “services of a consultant.” *Id.*
16. DPS must have a “reward policy” which rewards commissioned officers, who meet the physical fitness standards, with administrative leave. § 614.172(a-1).
17. Commissioned officers who do not meet the required physical fitness standards are subject to discharge (termination), transfer and demotion. § 614.172(b).
18. In 2006, in anticipation of the impending legislative mandate to adopt physical fitness standards, DPS used the services of a consultant, Fitness Intervention Technologies (FIT), to conduct a study and develop and validate job-related physical fitness standards for commissioned officers. Ex. 2 at 21.
19. During its study, FIT evaluated 160 randomly-selected DPS commissioned officers in physical fitness tests and job-task simulations. *Id.* at 22.
20. FIT’s 238 page executive summary recommended 7 validated physical fitness tests: 1.5 mile run; 300 meter run; bench press; push-ups; sit-ups; agility run; and vertical jump. *Id.* at 151. FIT recommended that officers who could not successfully complete the validated physical fitness tests after 2 attempts be tested with 3 job task simulation tests. *Id.* at 146.
21. Beginning in 2007, DPS implemented the recommendations of FIT into physical fitness testing of its commissioned officers.

22. Since 2007, DPS has made multiple changes to the original, validated physical fitness standards. None of the changes were done with the aid of a consultant. Instead, new physical tests, requirements and standards were created via executive fiat.

23. In 2009, DPS eliminated 4 of the 7 validated physical tests, retaining only the 1.5 mile run, push-ups, and sit-ups. DPS also adopted new physical fitness standards for age and gender. These changes to the physical fitness standards were not done with the services of a consultant.

24. In 2010, DPS added a “rower” test and eliminated the FIT-recommended job task simulation tests. These changes to the physical fitness standards were not done with the services of a consultant.

25. In 2013, DPS added a “combat fitness” test, and raised the standards on its physical fitness tests from the FIT-recommended 25% to 50%. Additionally, DPS also modified its reward policy, raising the requirement for an incentive reward of administrative leave from 60% to 70%. DPS made these changes to the physical fitness standards without the services of a consultant.

26. In 2017, DPS again raised the standards on its physical fitness tests from 50% to 70%. These DPS changes were again made without the services of a consultant.

27. By 2017, DPS’s changes to the physical fitness standards had discarded 4 of the original 7 FIT recommended physical fitness tests and all of the 3 job task simulation tests. Of the 3 physical fitness tests which remained in use, the standards had drastically changed from the original FIT standards.

28. For example, the FIT run time 16:35 standard for all commissioned officers was abandoned and DPS required commissioned officers to run 1.5 miles in arbitrarily set times.¹ The sit-up test

¹ Male officers’ new standards were as follows: 11:04 age 20-24; 11:17 age 25-29; 11:42 age 30-34; 12:12 at 35-39; 13:00 age 40-44; 13:58 age 45-49; and 14:55 age 50 and above. Female officers’ new standards were as follows: 14:21 age 20-24; 14:30 age 25-29; 15:21 age 30-34; 15:42 at 35-39; 16:54 age 40-44; 17:34 age 45-49; 19:28 age 50 and above.

was modified from a FIT standard of 35 sit-ups in one minute to a two minute test requiring between 72 and 50, depending upon age and gender. The FIT push-up standard of 28 push-ups was altered to between 63 and 34, depending upon age and gender. Ex. 3.

29. Thus, by 2017, DPS required commissioned officers to choose from its “Standard” test (1.5 mile run, push-ups and sit-ups); “Rower” test; or “Combat Fitness” test. Ex. 4 at 266. None of these required physical fitness tests had standards which had been validated as job-related or had been developed with the services of a consultant.

30. DPS’s latest revision to the physical fitness standards is the “Command Presence” policy, which was implemented in Fall 2019. Ex. 5. DPS did not use the services of a consultant to aid in developing the Command Presence policy or its standards.

31. The Command Presence policy requires male commissioned officers to have a waist circumference of under 40 inches, and female commissioned officers must have a waist circumference of under 35 inches. *Id.* If a commissioned officer exceeds the waist circumference limit (DPS calls this “tier 1”), DPS uses a height/weight chart it borrowed from the Department of Defense to decide if the commissioned officer is in compliance (“tier 2”). *Id.* If DPS deems the commissioned officer is not in compliance with tier 2, it then conducts a “body composition” estimate using charts developed by the Department of Defense (“tier 3”). *Id.* A failure at the third and final tier means the commissioned officer is not in compliance and cannot pass the overall physical fitness test, regardless of his or her performance on the physical fitness test. *Id.*

32. DPS combined the Command Presence policy with its existing physical fitness tests (Standard, Rower, Combat Fitness) in what it calls a “Dual Compliance” requirement. *Id.* In other words, even if a commissioned officer meets or exceeds the standards on the physical fitness tests, he or she must also meet the new Command Presence standards.

33. Additionally, DPS again changed its reward policy to require passing at 80% on its chart in order to earn administrative leave time and 90% in order to be awarded a “Fitness Star” award. Ex. 4 at 270-71.

34. Commissioned officers earn administrative leave and an award, “a Fitness Star,” for good performance on the physical fitness tests. A reward policy is required by statute. TEX. GOV’T CODE § 614.172(a-1). However, under the new dual compliance requirement, no administrative leave or Fitness Star is awarded to employees who are not in compliance with the Command Presence policy, regardless of their performance on their selected physical fitness test.

35. Sanctions for non-compliance with the Command Presence policy include being placed on a “Fitness Improvement Plan,” a performance improvement plan,² demotion or transfer to “a non-enforcement role,” loss of overtime,³ denial of all secondary employment (off-duty jobs)⁴, loss of eligibility to promote, and termination. Ex. 1; Ex. 5 at 283.

36. In Spring 2019, DPS conducted fitness testing for 1,153 commissioned officers. Over half of the commissioned officers (594) were not in compliance with the Command Presence policy’s waist circumference requirement.⁵ Ex. 6.

37. 11 commissioned officers failed the Spring 2019 physical fitness test. Ex. 7. Of the 594 potential failures in the waist circumference measurement standard in Spring 2019, approximately 5 of those 11 failures were in compliance with the waist circumference standard.⁶ *Id.*

² Per DPS General Manual 07.62.09-10, a performance improvement plan could lead to negative consequences, such as a “special performance evaluation,” loss of a merit pay increase, and termination.

³ Loss of overtime is not a speculative sanction because DPS commissioned officers are routinely scheduled 10 hours of overtime per week.

⁴ Commissioned officers are entitled to engage in secondary employment pursuant to TEX. GOV’T CODE § 411.0077(a).

⁵ 532 males and 62 females had waist circumference measurements at or above the respective 40”/35” standards.

⁶ Waist circumference data was not provided for 2 of the failures.

38. The Public Safety Commission (PSC) controls DPS. TEX. GOV'T CODE § 411.003. The PSC shall “organize the department and supervise its operation” and “adopt rules considered necessary for carrying out the department's work.” TEX. GOV'T CODE § 411.004.

39. DPS presented the Command Presence policy to the PSC at its meetings on October 25, 2018, and February 21, 2019. On February 21, 2019, the PSC adopted the Command Presence policy for implementation in September 2019. Ex. 8 at 338.

40. During the 86th Legislature, Senate Bill 616 amended Chapter 411 of the Texas Government Code by adding Section 411.0045, which states, “the [public safety] commission shall adopt: (1) physical fitness programs in accordance with Section 614.172; and (2) a resolution certifying that the programs adopted under Subdivision (1) are consistent with generally accepted scientific standards and meet all applicable requirements of state and federal labor and employment law.” Ex. 9. These changes to the statute became effective on September 1, 2019.

41. The PSC was scheduled to consider a resolution required by § 411.0045 on August 8, 2019. Just prior to the meeting, Commissioner Pulliam resigned, leaving only two commissioners. Thus, no quorum existed and the meeting was cancelled. The next PSC meeting is scheduled for October 10, 2019.

42. As stated *supra*, TEX. GOV'T CODE § 614.172 mandates that DPS's physical fitness standards “must directly relate to the officer's job duties,” and it mandates that DPS “use the services of a consultant to aid the agency in developing the standards.”

43. The DPS physical fitness tests and standards are in violation of TEX. GOV'T CODE § 614.172 because the current DPS physical fitness tests and their standards were not developed with the aid of a consultant and are not related to the job duties of DPS commissioned officers. Unlike the original physical fitness tests developed by FIT in 2006, the current DPS physical fitness tests,

including the Command Presence policy, are not consistent with generally accepted scientific standards.⁷ Furthermore, DPS's reward policy does not award commissioned officers administrative leave for participating in and meeting the standards of the physical fitness tests. Instead, in violation of the statute, DPS requires commissioned officers to meet an arbitrarily set standard in order for a commissioned officer to earn administrative leave time.

44. Furthermore, DPS created the Command Presence policy from whole cloth and it has no relation to a commissioned officer's ability to perform his or her job functions, as demonstrated by the over 50% failure rate in the Spring 2019 testing. The Command Presence policy is an unreasonable policy which has no relation to a commissioned officer's ability to perform his or her job functions.

45. Under the Command Presence policy, these 594 commissioned officers are subject to adverse employment actions in the form of being placed on fitness improvement plans, being subjected to performance improvement plans, negative performance evaluations, transfers from law-enforcement positions, such as Trooper, Agent, or Ranger, to less prestigious "non-enforcement" positions, loss of merit pay increases, loss of income from regularly scheduled overtime, denial of secondary employment, denial of promotional opportunities, and termination.⁸

46. DPS has proceeded with its Fall 2019 physical fitness testing, placing hundreds of commissioned officers in jeopardy of associated sanctions. On information and belief, DPS has already begun sanctioning commissioned officers through fitness improvement programs, and DPS has stated its intention to increase sanctions in the near future.

⁷ DPS will attempt to justify the Command Presence policy with references to heart disease prevention and purported FBI interviews of convicted criminals.

⁸ In the Fall 2018 testing cycle, 4,053 commissioned employees were tested (the Fall testing cycle is mandatory for all commissioned officers while the Spring testing is optional). 897 (~22% of the commissioned officer workforce) were not in compliance with the 40"/35" Command Presence policy waist circumference standard. It should be noted that DPS has implemented a new waist measurement procedure which will likely result in higher circumference measurements and higher rate of failure in future testing.

SUIT FOR DECLARATORY RELIEF

47. Plaintiff reasserts and fully incorporates herein paragraphs 1 through 46 above as if fully asserted herein.

48. Defendants, through their actions, has caused uncertainty and insecurity with respect to Plaintiff's commissioned officer members' rights, status, and other legal relations.

49. Defendants have waived their immunity from suit by conduct.

50. Defendants has subjected Plaintiff's commissioned officer members to physical fitness tests which (1) were not developed with the services of a consultant, and (2) are not directly related to their job duties.

51. Defendants have alleged that Plaintiff's commissioned officer members cannot perform the physical tasks necessary to their jobs with waist circumferences in excess of the DPS standard of 40 inches and above for all males and 35 inches and above for all females.

52. Defendants have denied and continue to deny Plaintiff's commissioned officer members a statutorily required reward of administrative leave time for participating in a physical fitness programs and meeting its standards by requiring a higher standard under its reward policy, contrary to the statute.

53. Defendants have failed to adopt a reward policy which rewards commissioned officers who participated in a physical fitness program and meets the standards adopted under TEX. GOV'T CODE 614.172(a). DPS has denied and continues to deny Plaintiff's commissioned officer members a reward of administrative leave by arbitrarily requiring a higher standard for a reward under its reward policy, in violation of the statute.⁹

⁹ In Spring 2019, 720 commissioned officers scored above the 70% standard, but below the 80% standard set by the DPS reward policy. These commissioned officers were denied administrative leave incentives which are mandated by statute.

54. The statute in question is TEX. GOV'T CODE § 614.172:

Sec. 614.172. PHYSICAL FITNESS PROGRAMS AND STANDARDS. (a) Each law enforcement agency shall adopt physical fitness programs that a law enforcement officer must participate in and physical fitness standards that a law enforcement officer must meet. The standards as applied to an officer **must directly relate to the officer's job duties** and shall include individual fitness goals specific to the officer's age and gender. **A law enforcement agency shall use the services of a consultant to aid the agency in developing the standards.**

(a-1) Each law enforcement agency **shall adopt a reward policy** that provides for reward incentives to officers who participate in the program and meet the standards adopted under Subsection (a). **The reward incentives under the policy must be an amount of administrative leave** of not more than four days per year.

(a-2) An agency may adopt physical readiness standards independent of other law enforcement agencies.

(b) Except as provided by Subsection (c), a violation of a standard adopted under Subsection (a) is just cause to **discharge** an officer or: (1) **transfer** an officer to a position that is not compensated according to Schedule C of the position classification salary schedule prescribed by the General Appropriations Act[].

TEX. GOV'T CODE § 614.172 (emphasis added).

55. Plaintiff asks that this Court determine that DPS's physical fitness testing and standards, including the newly-implemented Command Presence policy and its standards, is not in compliance with the mandate that the physical fitness standards directly relate to Plaintiff's commissioned officer members' job duties.

56. Plaintiff asks that this Court determine that DPS's physical fitness testing and standards, including the newly-implemented Command Presence policy and its standards, is not in compliance with the mandate that the physical fitness standards be developed with the use of the services of a consultant.

57. Plaintiff asks that this Court determine that DPS's reward policy is not in compliance with the mandate that DPS's reward policy provide for reward incentives in the form of administrative

leave to commissioned officers who participate in the program and meet the standards adopted under TEX. GOV'T CODE § 614.172(a).

58. As a result of Defendants' conduct, Plaintiff's commissioned officer members have suffered damages exceeding the jurisdictional limits of this Court, which include, loss of future income, loss of future advancement opportunities, loss of future benefits, loss of future earning capacity, loss of administrative leave time, reasonable and necessary attorney fees and court costs.

59. Plaintiff is seeking all damages allowed by law.

60. Plaintiff requests this Court issue a declaratory judgment that the acts of the Defendants complained of herein violate TEX. GOV'T CODE § 614.172.

SUIT FOR TEMPORARY AND PERMANENT INJUNCTION

61. Plaintiff reasserts and fully incorporates herein paragraphs 1 through 60 above as if fully asserted herein.

62. Plaintiff requests the following injunctive relief in the form of a temporary injunction and a permanent injunction:

- a. That Defendants be enjoined from administering its physical fitness tests, which are not directly related to an officer's job duties and were not developed with the services of a consultant, to commissioned officers.
- b. That Defendants be enjoined from administering its Command Presence policy, which is not directly related to an officer's job duties and was not developed with the services of a consultant, to commissioned officers.
- c. That Defendants be enjoined from punishing, restricting, or sanctioning commissioned officers for non compliance with its current physical fitness tests and standards or its Command Presence policy and standards.

d. That Defendants be enjoined from administering its current reward policy, which does not reward all commissioned officers who participate in physical fitness tests and meet its standards.

63. Pursuant to TEX. CIV. PRAC. & REM. CODE § 65.011, Plaintiff makes application for a temporary injunction and a permanent injunction.

64. Plaintiff has a probable right to the relief sought because Defendants are violating the clear and unambiguous mandates of the statute in question, TEX. GOV'T CODE § 614.172., and it is therefore probable that Plaintiff will prevail in its declaratory judgment action.

65. If Plaintiff, a labor association of 3,453 DPS commissioned officers, is not granted injunctive relief by the Court, Plaintiff will suffer a probable, imminent, and irreparable harm in the form of the unreasonable physical fitness tests and standards, and unreasonable Command Presence policy and standards, and their related sanctions, namely: fitness improvement plans, performance improvement plans, demotions, transfers to non-enforcement positions, loss of overtime, denial of all secondary employment (off-duty jobs), loss of eligibility to promote, and discharge (termination). Plaintiff has no adequate remedy at law.

66. Plaintiff is willing to post bond.

67. Plaintiff asks the Court to set their application for temporary injunction for a hearing, and after a hearing, issue a temporary injunction.

68. Plaintiff asks that, after a trial on the merits, the Court issue a permanent injunction against Defendants.

ATTORNEY FEES

69. Plaintiff requests Defendants be ordered to pay reasonable and necessary attorney fees and costs of this action as provided by TEX. CIV. PRAC. & REM. CODE § 37.009.

JURY DEMAND

70. Plaintiff demands a jury trial.

CONDITIONS PRECEDENT

71. All conditions precedent to Plaintiff's claim for relief have been performed or have occurred.

REQUEST FOR DISCLOSURE

72. Under TEX. R. CIV. P. 194, Defendants are requested to disclose, within fifty (50) days of service of this request, information or materials described in Rule 194.2.

DOCUMENTS TO BE USED

73. Pursuant to TEX. R. CIV. P. 193.3(d) and 197.7, Plaintiff intends to use all documents exchanged or produced between the parties, including, but not limited to, correspondence, disclosures, and discovery responses, during the trial of this cause.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff asks that Defendants be cited to appear and answer, and that the Court declare that Defendants have violated TEX. GOV'T CODE § 614.172 by: (1) establishing physical fitness tests and standards which are not directly related to the job duties of commissioned officers; (2) by establishing physical fitness tests and standards without the services of a consultant; and (3) by failing to adopt a reward policy which provides reward incentives of administrative leave to all commissioned officers who participate in the physical fitness tests and meet the standards. Plaintiff also asks this Court to award the following: Injunctive relief in the form of declaratory relief, and a temporary injunction and a permanent injunction enjoining Defendants: (1) from administering its current physical fitness tests to commissioned officers, which are not directly related to the officer's job duties and were not

developed with the services of a consultant; (2) from administering its current Command Presence policy to commissioned officers, which is not directly related to officer's job duties and was not developed with the services of a consultant; (3) from punishing, restricting, or sanctioning commissioned officers for non compliance with its current physical fitness tests and standards or its Command Presence policy and standards; and (4) from administering its current reward policy, which does not reward all commissioned officers who participate in physical fitness tests and meet its standards. Furthermore, Plaintiff asks this Court to award all damages allowed by law, including damages not exceeding the jurisdictional limits of this Court, which include, loss of future income, loss of future advancement opportunities, loss of future benefits, loss of future earning capacity, loss of administrative leave time, prejudgment and post judgement interest, court costs, reasonable and necessary attorney fees, and all other relief to which Plaintiff is justly entitled.

Respectfully submitted,

/s/ John Snider

John Snider

State Bar No. 24063556

David Watsky

State Bar No. 20932600

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ATTORNEYS FOR PLAINTIFF

VERIFICATION

STATE OF TEXAS

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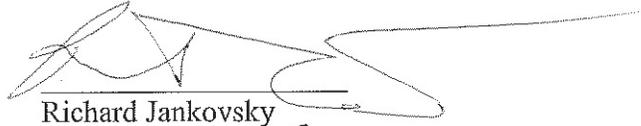
COUNTY OF

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BEFORE ME, the undersigned notary, personally appeared Richard Jankovsky, on behalf of Plaintiff, Texas Department of Public Safety Officers Association, and known to me and duly sworn, states the following:

- 1. My name is Richard Jankovsky, I am over the age of 18 and I am competent to make this verification. I have read the Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief. The facts stated in it are true and correct and are within my personal knowledge.
- 2. Affiant sayeth further not.



Richard Jankovsky

SWORN TO AND SUBSCRIBED BEFORE ME, this 19th day of September, 2019,

to which witness my hand and seal.



Notary Public in and for the State of Texas

