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November 16, 2022

Governor Charlie Baker
Massachusetts State House
24 Beacon Street
Room 280
Boston, MA 02133

Re: Human Resources Division (HRD) - *Tatum v. Commonwealth of Massachusetts*, Suffolk Superior Court,
CA No. 0984CV00576A

To Honorable Governor Baker:

On October 27, 2022, Judge Douglas H. Wilkins of the Superior Court issued a set of Findings of Fact and Conclusions of Law on Phase I (Liability) in the referenced case (the "Tatum Case"). Along with that interim ruling, the Court issued a Scheduling Order asking the parties to propose "injunctive or declaratory relief" relating to a proposed "remedial plan" to address violations the Court found in HRD's promotional exams. A trial is scheduled on the issue of damages for March 20, 2023.

Despite the facts that: (i) the Superior Court's interlocutory ruling is not yet final or appealable; and (ii) between now and the bench trial the Scheduling Order calls for the parties to, among other things, exchange proposals setting forth specific injunctive and declaratory relief (plaintiffs by 11/23/22 and defendants by 12/16/22), the HRD recently notified police statewide that it will not score promotional exams already taken or proceed with any previously scheduled exams.

HRD's directive is not compelled or warranted as a matter of law or policy. Rather, the Commonwealth should protect, pending a final judgment, the rights of those police officers who, while unrepresented in the Tatum Case, invested valuable time and resources to prepare for the promotional exams by, among other things, allowing provisional scoring of the exams previously taken by police officers statewide.

This request is consistent with, if an extension of, Judge Wilkins' decision not to apply his ruling retroactively to existing appointments. And, while a new exam may well be warranted, those who invested effort and expense in the old exam should not be penalized. Stated another way, the various police agencies and the individual officers with promotional exams pending will be damaged if the exams are not scored and/or held. The public's significant interest in fully staffed and fully functional police agencies, and the officers' individual

rights of due process, need to be respected under any remedial plan fashioned by the Superior Court, whether interim or final.

M.G.L. Ch. 31, Section 2(a) offers the Governor, among other "aggrieved persons", the opportunity to direct the HRD to investigate the impact of the Tatum Decision on those Civil Service employees who have taken their promotional exams but been deprived, without notice or an opportunity to be heard, of their rights as Civil Service employees. This is to respectfully request for the Governor to take that step here.

As noted above, the Scheduling Order calls for the parties to exchange proposals for a remedial plan as part of any future/final judgment. The Governor may direct HRD to use that opportunity to protect Civil Service employees who are not parties to the lawsuit, and not treat the interlocutory ruling as a final judgment on the merits. By doing so, and refusing to score exams, HRD effectively "changed the Civil Service law and rules" without satisfying, for example, Chapter 31, §4, which requires notice and public hearing prior to any rule change.

If the decision in *Tatum* reaches final judgment, and withstands appeal and, potentially, collateral attack, the HRD will have no choice but to abide by the law prospectively. However, the HRD has acted prematurely in failing to defend the Civil Service employees whose rights are impaired retroactively despite being unrepresented in *Tatum*. Like the parties to that case, these Civil Service employees are entitled to basic due process protections including, without limitation, those set forth in Chapter 31.

In sum, given the lack of finality in the case, the defendants, the Commonwealth and HRD should use the "remedial plan" process to try to remind the Court that innocent, third parties impacted by the decision who reasonably relied on prior law should not be harmed as an incident of the plaintiffs' remedy. In the meantime, HRD should rescind its prior directive and continue to score and schedule promotional exams until final judgment is reached in the *Tatum* Case.

Thank you in advance for your attention to this important matter. If you or any members of your staff would like to discuss this issue further, we stand ready to do so.

Respectfully,

James Machado

James Machado
Executive Director
Massachusetts Police Association

cc: Mr. Paul Dietl
Personnel Administrator for the
Commonwealth of Massachusetts
Human Resources Division