

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM R. MULLER; BERNADETTE M. ACERNO; LOUIS ARGENTO; DANIEL M. BEATTY; STEVELLE M. BROWN; RUSSELL R. BURGHARD; HENRY A. CABANILLA; JOSEPH CALCAGNO; EVELYN CARLO; THOMAS CASEY; THOMAS J. CRAWFORD; CHARLES DELGADO; VINCENT DESANTIS; ROBERT D. DRESSLER; ARTHUR C. EHRICH; DAVID A. ERDELYI; JOSE M. FERNANDEZ ;JOSEPH FERRARA; CHRISTOPHER V. FEZZA; COMPLAINT PAUL B.FRIEDMAN; NATALIE M. FRIEDMAN; JOHN GAVAN; JAMES GALLAGHER; MICHAEL J. GILMARTIN; BRENDAN HIGGINS; JUSTIN R. HOFFMAN; CHARLES HYLAND; ROBERT JOHNSON; MICHAEL C. KELLY; PATRICK MAGUIRE; PHILIP MARKS; MATHEW MARK MCCARTHY; JOSEPH A. MCNEILL; KATHLEEN MEEHAN; DAVID MELTZER; THOMAS MOLLOY; BEATRICE MOORE; ROBERT MURRAY; THOMAS P. O'ROURKE; CARLOS ORTIZ;MICHAEL V POTENZA; MARK PALUSHAJ; MADELINE QUILES; ACU A. RHODES; ANTONIO SARACINO JR.; CRAIG SCHOFIELD; KONRAD M. SEEGER; KEITH C. SINGER; KEITH W. SMITH; WILLIAM STIUSO; WING C. TSANG; MICHAEL J. WALKER, and MICHAEL E. VALENZANO,

Plaintiffs,

-against-

THE CITY OF NEW YORK; MICHAEL BLOOMBERG, Mayor of the City of New York; MARTHA K. HIRST, Commissioner of Citywide Administrative Services of the City of New York and RAYMOND KELLY as Police Commissioner of the City of New York,

Defendants.

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Plaintiffs as and for a Complaint respectfully allege:

**JURISDICTION AND VENUE**

**FIRST:** Jurisdiction is founded upon 18 U.S.C. 1983 and pursuant to the First Amendment right to Petition for Redress of Grievances in that it is alleged that the defendants, acting under color of state authority, have deprived the plaintiffs of Equal Protection of the Laws and have impaired provisions of contract law under the Fifth and Fourteenth Amendments to the United States Constitution and have had their employment contracts impaired by those acting under color of state authority in violation of the Contract Clause, Article I, § 10 of the United States Constitution. State pendant jurisdiction is invoked by reason of the assertion that the actions of the defendants have violated employment contract provisions protected by state law. Venue is in the Southern District of New York in that the defendants' principal location is in the Southern District of New York.

**THE PARTIES**

**SECOND:** At all times hereinafter mentioned the plaintiffs were and are citizens of the United States, and are employed by reason, of contractual and constitutional and statutory provisions, by the defendant THE CITY OF NEW YORK as Sergeants in the New York City Police Department, who hold that

position by reason of appointment thereto as the result of competitive examination pursuant to New York State law each of whom were qualified to compete in Examination No.2533 promotion to Lieutenant, New York City Police Department, and did in fact pass the said examination.

**THIRD:** At all times hereinafter mentioned the defendant THE CITY OF NEW YORK was and still is a municipal subdivision of the State of New York and does engage in state action; at all times hereinafter mentioned the defendant MICHAEL BLOOMBERG was or is the successor to the office of Mayor of the City of New York, and chief administrative and executive officer of the City of New York; the defendant MARTHA HIRST was or is the successor in office to the Commissioner of Citywide Administrative Services an agency of the City of New York responsible for the preparation, administering, grading and certifying eligible passing candidates of promotion examinations to appointing authorities of New York City agencies; the defendant RAYMOND KELLY was and still is the Commissioner of the New York City Police Department and its chief executive officer who, among other duties is the official authorized to appoint various members of the New York City Police Department to positions of rank from the certified list of successful passing candidates of various promotion examinations including the rank of lieutenant, New York City Police Department. All individual

defendants are members of the Executive Branch of New York City municipal government.

**FIRST CAUSE OF ACTION: EQUAL PROTECTION OF THE LAWS.**

**FOURTH:** Heretofore, on the 31st day of May, 2003, the defendant MARTHA HIRST pursuant to her authority as Commissioner of the Department of Citywide Administrative Services did conduct examination No.2533 for promotion to Lieutenant, New York City Police Department [Hereinafter "NYCPD"] a protected and competitive civil service position. Pursuant to the State of New York Constitution and its statutory provisions promotions to civil service positions are to be made insofar as practicable by competitive examination.

**FIFTH:** Each of the plaintiffs was eligible to take the said lieutenant examination and did pass the examination. As a result thereof each was required to be considered by the appointing authority Police Commissioner defendant RAYMOND KELLY for promotion reflective of their true competitive standing.

**SIXTH:** Heretofore various promotions were made to the position of Lieutenant, NYCPD by the defendant Kelly based upon the representation of defendant MARTHA HIRST of the competitive results of Examination No. 2533.

**SEVENTH:** On or about June, 2006, defendant RAYMOND KELLY appointed various candidates to the position of Lieutenant, NYCPD. Some of those

appointees had a lower grade on Examination No. 2533 than one or more of the plaintiffs, giving rise to a denial of Equal Protection of the Laws by the defendants.

**EIGHTH:** Said promotions of persons to the rank of Lieutenant NYCPD in June, 2006 who had a lower competitive passmark than some of the plaintiffs herein was caused by the unauthorized non-component adding of 2 ½ points to the passing grade of a candidate who resided within the five Boroughs of the City of New York, to the detriment of higher scoring candidates who live in other counties of the State of New York, all in violation of constitutional and statutory mandate.

**NINTH:** Pursuant to New York Law, police officers must be residents of the five counties of the City of New York, Nassau, Suffolk, Westchester, Putnam, Orange or Rockland Counties. Heretofore the NYCPD, in efforts to recruit members of the New York City Police Department uniformed service, the defendant CITY OF NEW YORK has and continues to advertise in recruitment drives in counties outside the City of New York, in authorized residency counties.

**TENTH:** Existing legislation requires only civilian employees of the NYCPD to reside within the five counties of New York City. The imposition of a penalty upon uniformed members of the NYCPD living in authorized counties outside the City of New York, is an *ultra vires* act of legislation by the defendants all of whom are members of the Executive branch of government. Residency

outside the five counties of New York City by uniformed members of the NYCPD does not change their status from uniformed to civilian employees of the NYPCD.

**ELEVENTH:** It was and is an expectation of employment in the New York City Police Department that residency within the counties of the City of New York and Nassau, Suffolk, Westchester, Putnam, Orange and Rockland Counties qualifies all such persons to equal protection of the laws relating to the equality of residency specified under state law and the exclusion of imposition of penalty by reason of residing outside the five counties of New York City.

**TWELFTH:** Residency within the five counties of the City of New York has no relevancy to competitive promotion imperatives.

**THIRTEENTH:** Many of the plaintiffs attended high school in the City of New York. In order to advance their family situation respecting air quality, less population density, and suburban living benefits moved to locations within the appropriate counties of Suffolk, Nassau, Westchester, Putnam, Orange and Rockland pursuant to their right to the Pursuit of Happiness brought about by employment imperatives, obligations and expectations. The prospect of granting unwarranted competitive advantage to uniformed members of the NYCPD who live in the City of New York creates the prospect of domiciliary breakup of families of uniformed members were they to reside outside the City of New York

in a more congenial environment while the uniformed member of the family, in order to avoid adverse consequences of such residency, must establish a residence within the City of New York to avoid such adverse consequence. Upon information and belief, in the past, the Police Commissioner or his predecessors in office have become aware of uniformed members who moved their family to New Jersey but had to maintain a residence for that member in New York City, which event on some occasions has led to disciplinary action or termination.

**FOURTEENTH:** Pursuant to the requirements of New York Constitutional and Statutory competitive examination requirements, neither the examination for promotion to Lieutenant New York City Police Department which preceded the subject lieutenant examination No.2533, nor the examination for the position of Lieutenant, New York City Police Department given subsequent the examination No. 2533 had the non-competitive residency points added to the score to those who were residents of the City of New York.

**FIFTEENTH:** In or about June 2006, candidates were being considered by the defendant Kelly for promotion to the rank of Lieutenant; at that time one or more of the plaintiffs herein had the residency component not been included in the placement position on the list would have been under consideration for the promotion.

**SIXTEENTH:** Were it not for the inclusion of the non-competitive component of New York City residency, the competitive standing of most of the Plaintiffs to be considered for promotion would be earlier than the standing they now have, some of whom would have been reached for appointment in June of 2006.

**SEVENTEENTH:** The exclusion of the plaintiffs from consideration for promotion to the rank of lieutenant in their true order of competitive performance on the subject lieutenant's test has led to a deprivation of Equal Protection of the Laws under the Fifth and Fourteenth Amendments to the United States Constitution justifying a judgment by this court that the defendants comply with the requirement that, insofar as practicable, appointments and promotion to civil service positions in the state of New York are to be based on competitive examination.

**EIGHTEENTH:** Heretofore the subsequent examination was administered by the defendant MARTHA HIRST for the position of Lieutenant, New York City Police Department. It is contemplated that the eligible list from said subsequent examination will be promulgated within a few months from the date hereof, which promulgation will, under New York law cause the subject list containing the plaintiffs will expire; in the event the subsequent examination list is not

promulgated the subject list is due to expire by operation of law in October 2007 under the four-year life of promotion lists to civil service positions in the City of New York.

**NINETEENTH:** This action constitutes a Petition for Redress of Grievances pursuant to the First Amendment to the United States Constitution in that the Plaintiffs have been denied Equal Protection of the Laws guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution which impacted the plaintiffs in or about June 2006, when candidates who had a lower competitive score on the examination were considered for promotion to the exclusion of some plaintiffs with higher competitive scores.

**SECOND CAUSE OF ACTION: IMPAIRMENT OF CONTRACTS**

**TWENTIETH:** Plaintiffs repeat and reiterate each and every allegation of Paragraphs FIRST thru NINETEENTH as if more fully set forth herein at length.

**TWENTY-FIRST:** The Contract Clause, Article I, § 10 of the United States Constitution prevents those acting under color of state authority from actions which will alleviate the commitment of one party to a contract or which interferes with the enforcement of the contract.

**TWENTY-SECOND:** The contract of employment of the plaintiffs with the defendant THE CITY OF NEW YORK, a political subdivision of the State of New

York, contained by operation of New York Constitutional and Statutory law, an obligation on the part of the City of New York to make promotions in the civil service branches insofar as practicable based upon the results of competitive examination. Said requirement is clearly and unequivocally expressed in law.

**TWENTY-THIRD:** The act of not considering the plaintiffs for promotion in their true competitive standing was caused by the inclusion of a non-competitive component of city residency. Said component has operated as a substantial impairment of the existing employment contractual relationship, serving no legitimate public purpose and was not based upon legitimate reason.

**TWENTY-FOURTH:** The plaintiffs who took Examination 2533 were and are entitled to be considered for promotion by the defendant RAYMOND KELLY in the order reflected by their true competitive score on said examination without regard to the non-competitive residency component that was and is not included in the contract of employment and the laws governing them.

**TWENTY-FIFTH:** By reason whereof the defendants have caused an unconstitutional impairment of the plaintiffs' contract of employment in violation of the Contract Clause of Article 1, Sec.10 to the United States Constitution thereby invoking the jurisdiction of this Court.

**AS AND FOR A STATE PENDANT ACTION**

**TWENTY-SIXTH:** Plaintiffs repeat and reiterate each and every allegation of Paragraphs FIRST thru TWENTY-FIFTH as if more fully set forth herein at length.

**TWENTY-SEVENTH:** Pursuant to New York State Law the employment contract between the defendant City of New York and the Plaintiffs provided that promotions to civil service positions be as a result of competitive examination.

**TWENTY-EIGHTH:** Heretofore persons with lower competitive scores on the subject examination than those of some of the Plaintiffs were promoted to the rank of Lieutenant by the defendants.

**TWENTY-NINTH:** The actions of the defendants deprived the plaintiffs of rights under their contracts of employment. Plaintiffs are entitled to specific performance of provisions of New York Constitutional and statutory law.

**BY REASON WHEREOF,** the plaintiffs respectfully request a judgment

(1) Directing that the Defendants repromulgate the list of successful candidates of Examination No. 2533, Promotion to Lieutenant NYCPD to comply with the New York Constitutional and statutory mandates that insofar as is practicable promotions to the civil service positions be based upon competitive examination, and that the residency component addition of 2 ½ points be eliminated as a component of the final standing of competing candidates.

(2) Directing that upon such repromulgation of the list to be certified to Raymond Kelly, Police Commissioner by the defendant MARTHA HIRST, promotions from the recertified list be made reflecting the plaintiffs' true competitive standing.

(3) Directing that upon such repromulgation the life of the list start anew pursuant to New York law.

(4) Issuing an injunction *pendente lite* to prevent the promulgation and certification of any list of eligible candidates for the Position of Lieutenant, NYCPD resulting from any subsequent examination for said position.

(5) Reasonable attorney fees.

(6) Judgment respecting the State Pendant Action granting specific performance of the employment contracts of the plaintiffs with the City of New York directing repromulgation of the list of eligibles to reflect the true competitive standing of the plaintiffs thereon.

Dated: March 6, 2007

Respectfully Submitted:

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