

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Firearms Owners Against Crime -	:	
Institute for Legal, Legislative and	:	
Educational Action, Landmark	:	
Firearms LLC, and James Stoker,	:	
Petitioner	:	
	:	
v.	:	No. 218 M.D. 2022
	:	
Colonel Robert Evanchick,	:	Heard: May 12, 2022
Commissioner Pennsylvania	:	
State Police,	:	
Respondent	:	

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

Filed: September 2, 2022

Firearms Owners Against Crime – Institute for Legal, Legislative and Educational Action, Landmark Firearms LLC, and James Stoker (collectively, Petitioners) have filed a petition for review (Original Petition) in this Court’s original jurisdiction requesting that the Court issue an injunction directing Colonel Robert Evanchick, Commissioner of the Pennsylvania State Police (PSP), to hire and train as many new employees as are necessary to ensure that all firearm background checks are performed “instantaneously,” which Petitioners contend is required by pertinent sections of the Pennsylvania Uniform Firearms Act of 1995, Act of December 6, 1972, P.L. 1482, *as amended*, 18 Pa. C.S. § 6101 *et seq* (Firearms Act). Petitioners have filed an Application for Special Relief in the Form of a Preliminary

Injunction Under Pa.R.A.P. 1532 (Application for Preliminary Injunction), which is the matter currently before the Court for disposition.¹

I. FACTUAL ALLEGATIONS AND REQUESTS FOR RELIEF

In its Original Petition, Petitioners allege that PSP purposely understaffs its firearms section that is responsible for performing, through the Pennsylvania Instant Check System (PICS),² firearm purchase and transfer background checks as well as checks for individuals seeking or renewing a Pennsylvania license to carry a firearm (PICS Operations Section).³ Petitioners chiefly rely on sections 6111.1(b)⁴ and 6111.1(c)⁵ of the Firearms Act in arguing that the PSP has a duty under that statute to conduct instantaneous background

¹ PSP filed preliminary objections to the Original Petition. On May 10, 2022, Petitioners filed an Amended Petition for Review (Amended Petition). PSP's preliminary objections to the original petition thereafter were stricken as moot. On May 16, 2022, after the hearing on the Application for Preliminary Injunction, Petitioners filed an Application for Summary and Special Relief in the Nature of a Writ of Mandamus and Declaratory and Permanent Injunctive Relief (Application for Summary Relief). On June 9, 2022, PSP filed preliminary objections to the Amended Petition. On June 14, 2022, Petitioners filed preliminary objections to PSP's preliminary objections. The preliminary objections and Application for Summary Relief are scheduled for expedited argument in September 2022. The only matter currently before the Court for disposition is the Application for Preliminary Injunction.

² The PICS system is defined in PSP regulations as “[t]he Pennsylvania *instantaneous* records check system established under the [Firearms Act] and in accordance with the Brady Handgun Violence Prevention Act, 18 U.S.C.A. § § 921—925A.” 37 Pa. Code § 33.102 (emphasis added).

³ Although this section has been referenced by varying names throughout the pleadings, the Court refers to it as the “PICS Operations Section” based on the evidence presented at the preliminary injunction hearing on May 12, 2022.

⁴ 18 Pa. C.S. § 6111.1(b).

⁵ 18 Pa. C.S. § 6111.1(c).

checks and to provide immediate responses to the requesters of the checks. Sections 6111.1(b) and 6111.1(c) provide, in pertinent part, as follows:

(b) Duty of Pennsylvania State Police.—

Upon receipt of a request for a criminal history, juvenile delinquency history and mental health record check of the potential purchaser or transferee, the Pennsylvania State Police shall *immediately* during the licensee's call or by return call *forthwith*:

- (i) review the Pennsylvania State Police criminal history and fingerprint records to determine if the potential purchaser or transferee is prohibited from receipt or possession of a firearm under Federal or State law;
- (ii) review the juvenile delinquency and mental health records of the Pennsylvania State Police to determine whether the potential purchaser or transferee is prohibited from receipt or possession of a firearm under Federal or State law; and
- (iii) inform the licensee making the inquiry either:
 - (A) that the potential purchase or transfer is prohibited; or
 - (B) provide the licensee with a unique approval number.

...

(c) Establish a telephone number.-- The [PSP] shall establish a telephone number which shall be operational seven days a week between the hours of 8 a.m. and 10 p.m. local time for purposes of responding to inquiries as

described in this section from licensed manufacturers, licensed importers and licensed dealers. ***The Pennsylvania State Police shall employ and train such personnel as are necessary to administer expeditiously the provisions of this section.***

18 Pa. C.S. §§ 6111.1(b), 6111.1(c) (emphasis added).

Petitioners allege that the PICS Operations Section used to employ a dozen or more employees who are referred to as “operators,” but now only has two employees that are responsible for conducting 1.5 million background checks per year. The result of this understaffing, Petitioners allege, is that background checks now take much longer to complete than before, with some wait times exceeding 34 hours when a firearms transaction must be reviewed by an operator before the firearms transaction is allowed to proceed. Petitioners also allege that these excessive wait times cause some prospective purchasers of firearms to cancel their purchases, thus depriving firearms sellers of income from canceled sales. In addition, Petitioners state that PSP charges a \$2.00 fee for each background check and a \$3.00 fee for the sale of each firearm. Petitioners allege that they have incurred substantial un-reimbursable costs in paying PSP for background checks when the customer cancels the pending transaction due to the significant delay. The Application for Preliminary Injunction sets forth in detail facts specific to the individual Petitioners who sell firearms regarding how they have been impacted by the alleged understaffing of the Instant Check Unit.

Petitioners seek injunctive relief and request that this Court issue an order (1) enjoining PSP from engaging in practices that understaff the PICS Operations Section, and (2) requiring it to immediately comply with sections 6111⁶

⁶ Section 6111 is titled “Sale or Transfer of Firearms.” It references “instantaneous” background checks throughout.

and 6111.1 of the Firearms Act, article I, sections 1 and 21 of the Pennsylvania Constitution,⁷ and the Second Amendment to the U.S. Constitution,⁸ and (3) to immediately hire and train as many new employees for the PICS Operations Unit as are necessary to ensure that background checks are performed "instantaneously." Further, Petitioners request that this Court issue an order precluding PSP from requesting the \$2.00 fee for any background checks where the customer cancels the purchase/transfer of the firearm due to the delays of the PICS system and, consistent therewith, require PSP to assume that, if any seller of firearms utilizes PICS and does not remit the \$2.00 background check fee, that the failure to pay such fee is the result of the customer canceling the purchase/transfer of the firearm due to the delays of the PICS system. To effectuate that ruling, Petitioners seek a preliminary injunction to maintain the status quo until such time this Court may rule on the merits of Petitioners' claims.

II. FINDINGS OF FACT

The Court conducted a hearing on Petitioners' Application for Preliminary Injunction on May 12, 2022. The affidavits of the witnesses were admitted into evidence without objection, and the witnesses for Petitioners testified as if on cross-examination. PSP presented the testimony of Lieutenant Shandra Keeler, PSP's Firearms Division Director. Based on the evidence, the Court finds as follows.

PSP's Firearms Division contains several sections. Pertinent to this litigation is the PICS Operations Section, which conducts both automated and

⁷ Pa. Const. art. I, §§ 1 and 21.

⁸ U.S. Const. amend. II.

manual background checks for Federal Firearms Licensees (FFL)⁹ and sheriff's departments in association with the sale of firearms or the issuance of a license to carry permit. A requester can initiate a check by either logging into PSP's online PICS website or by calling PSP's Interactive Voice Response (IVR) system. Once the check is initiated, the PICS system runs the individual's personal information through several state and federal databases. From 2019 through the present, approximately 65 percent of the checks processed by the automated system returned a result within a few minutes or less and required no manual action by a PICS operator. In approximately 35 percent of the cases, the automated system detects information warranting additional, manual investigation. In those cases, the request is placed into a queue to wait for the next available PICS operator. Thereafter, wait times can vary greatly depending on the volume of requests and the reason the request was flagged by the automated system.

It is undisputed that wait times for many requests placed into queue can last up to 9 or 10 hours, or even spanning multiple days, until a final determination is returned by the operator. It also is undisputed that wait times for the average request requiring further operator action increased many times over from 2019 to 2021. The increase appears to have been caused by multiple factors, including an increased volume of requests, staff turnover and time off in the PICS Operations Section, and delayed investigation times due to new operator training.

In accordance with section 6111.1(c) of the Firearms Act, the PICS Operations Section is staffed seven days a week from 8:00 a.m. to 10:00 p.m. in two shifts per day. The PSP has in the past required mandatory overtime for operators

⁹ A "licensee" is defined in PSP regulations as "[a] person, partnership, association or corporation issued a license by the Commonwealth, or a political subdivision thereof, to sell or transfer a firearm." 37 Pa. Code. § 33.102.

during particularly busy seasons, but it does not currently have mandatory overtime in place. The PICS Operation section, as of April 2022, employs 56 operators. The number of operators has increased slightly since 2019. PSP currently is in the process of hiring additional operators for vacant positions in the PICS Operations Section. It also has requested additional appropriations from the General Assembly to fund 18 additional operator positions. Nevertheless, several operator positions remain vacant to date, and PSP has not put into place a clearly-defined plan to increase staff to abate the extended wait times.

III. LEGAL STANDARD

There are six essential prerequisites a party must establish before obtaining preliminary injunctive relief:

(1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

Because the grant of a preliminary injunction is an extraordinary remedy, the failure to establish a single prerequisite requires the denial of the request for injunction.

SPTR, Inc. v. City of Philadelphia, 150 A.3d 160, 166 (Pa. Cmwlth. 2016) (internal citations omitted). The burden of proving each prerequisite rests on the moving party. *Weeks v. Department of Human Services*, 222 A.3d 722, 726 (Pa. 2019).

IV. ARGUMENTS OF THE PARTIES

A. Petitioners' Argument

Irreparable harm

Initially, Petitioners argue that they are not required to show irreparable harm, as the violation of an express statutory provision constitutes *per se* irreparable harm. See *Firearm Owners Against Crime v. Lower Merion Township*, 151 A.3d 1172, 1180 (Pa. Cmwlth. 2016) (“This Court has stated that the violation of an express statutory provision constitutes *per se* irreparable harm and a preliminary injunction may issue where the other necessary elements are met. *Council 13, American Federation of State, County and Municipal Employees, AFL–CIO v. Casey* ... 595 A.2d 670, 674 ([Pa. Cmwlth.] 1991).” However, in the event this Court would require them to show irreparable harm, Petitioners state that, beyond the infringement of their constitutional rights that cannot be compensated by money damages, they have been financially harmed by canceled sales and the payment of fees to PSP that are not able to be charged to the customer anymore because of the canceled sales. Petitioners allege that this harm is a direct result of PSP’s practice of understaffing the PICS Operations Section.

Greater injury

Petitioners point out that this Court has previously stated that a greater injury will result from permitting a statutory violation to continue. See *Firearm Owners Against Crime*, 151 A.3d at 1181. Because PSP’s practice is directly contrary to the law and Petitioners and those similarly situated are being

disenfranchised from their statutory and constitutional rights, Petitioners maintain that a greater injury will result if a preliminary injunction is not issued by the Court.

Status quo

Petitioners contend that the last non-contested status existing immediately prior to PSP's practice of failing to staff adequately the PICS Operations Section was that background checks were taking only a matter of minutes to complete. Petitioners state this contention is evidenced by PSP's 2020 Firearms Annual Report, which shows that "of the 1,445,910 background checks performed by PSP in 2020, the average background check would take minutes, with more than 65% being approved instantaneously (or within a minute and a half), and with less than 35% requiring operator assistance, where those resulted in an average approval time of 44 minutes." (Application for Preliminary Injunction, ¶ 41).

Clear right to relief

Petitioners maintain that their right to relief is clear, such that they are likely to prevail on the merits of their appeal.

B. PSP's Answer

In its Answer, PSP denies the allegations made in Petitioners' Application for Preliminary Injunction and supports the claims made in its Answer by attaching the Unsworn Affidavit of Lt. Shandra P. Keeler (Lt. Keeler), who is PSP's Firearms Division Director in the Bureau of Records and Identification. PSP states that, since 2019, the number of PICS operators has actually increased, and currently employs 56 operators and 8 supervisors. As to Petitioners' claims regarding delays in processing PICS requests, PSP notes that most background checks in 2021, 65 percent, took minutes to complete.

Regarding its alleged understaffing, PSP notes that in its budget request for the 2022-2023 fiscal year, it asked the Legislature for 32 additional personnel for the Firearms Division, which would include 18 additional operators for the PICS Operations Section and 2 additional Legal Assistant Supervisors for that section. Regarding the 35% of PICS requests that are not approved within minutes, PSP states that the amount of time needed to make a final determination depends on the reason the automated system was not able to approve the request and that the amount of time needed for further research can vary greatly. PSP testified that in 2019 the requests for operator approval of a pending background check were completed in an average of 15 minutes, and that in 2021 the average time increased to 82 minutes. PSP attributes the increased wait times to factors including an increased volume of background check requests, staff turnover, military deployments, and health absences related to the COVID-19 pandemic. PSP noted that there has been a steady increase in the number of background checks since 2020, and they do receive at times unusually high volumes of requests, and they have to place a notice on the website regarding the delay. They estimate that for every 100 calls in the queue there is an estimated one hour wait time and that at its peak over the last three years there have been at times 900-1000 calls in the queue with a wait time of 9-10 hours. Regarding the 34-hour wait time listed in their materials, they posit it was a typographical error. Nonetheless, PSP says the wait time was probably meant to reflect wait times of 3-4 hours.

Lack of an emergency

PSP maintains that Petitioners' request fails to meet the threshold requirement that there be an emergency. Specifically, PSP argues that Petitioners cannot demonstrate that there has been or will be any sudden change to PSP policy that should be enjoined, as they claim that there have been steady increases in the

time for background checks for *more than a year*. As such, PSP argues that this case should be allowed to play out in the normal course and be decided on the merits.

Merits

PSP also argues that Petitioners have failed to show that they are likely to succeed on the merits, as they take the “instantaneous” language in Section 6111 of the Firearms Act out of context. PSP argues that “instantaneous” modifies the word “check.” Therefore, PSP maintains that every firearms transaction *is* subjected to an instantaneous check. However, a *final determination* on the eligibility to purchase a firearm is not necessarily instantaneous. PSP maintains that every purchaser who is not flagged by the automated and instantaneous PICS check is approved within minutes, and thus it is in compliance with the Firearms Act.

Due Process

PSP also contends that Petitioners fail to assert any authority for their claim of a constitutional right to an instant background check. Rather, the source of the supposed right to an instant check is statutory, not constitutional, and that the right at stake here is not the right to purchase a firearm, which Petitioners do not contend is being unlawfully denied, but rather the right to an “instantaneous” decision on a background check, a matter in which it has a substantial interest. PSP claims that there is no constitutional basis for the contention that a background check cannot take hours, or even days, when necessary.

Finally, PSP rejects Petitioners’ claims of an improper motive, and points out that it, like millions of employers in America, has been dealing with employee turnover and issues related to the COVID-19 pandemic and that, therefore, the increase in wait times for resolving background checks that have been flagged by the PICS system over the last two years is not a conscience-shocking constitutional deprivation.

V. SUBSEQUENT DEVELOPMENTS

A. Amended Petition for Review

As noted above, on May 10, 2022, Petitioners filed an Amended Petition for Review (Amended Petition), adding a mandamus claim. In the Amended Petition, Petitioners seek the following relief:

a. Declare that the [PSP's] Practice is unlawful and in contravention of 18 Pa.C.S. §§ 6111, 6111.1(b)(1), (c), as well as, Article 1, Sections 1, 21 of the Pennsylvania Constitution, and the Second Amendment to the U.S. Constitution;

b. Issue an injunction enjoining the enforcement of [PSP's] Practice and requiring the [PSP] and its officers, agents, servants, employees, and all persons in active concern or participation with them to immediately comply with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), (c), as well as, [a]rticle 1, [s]ections 1 [and] 21 of the Pennsylvania Constitution, and the Second Amendment to the U.S. Constitution, by immediately either repurposing existing employees or hiring and training as many new employees for the Instant Check Unit as are necessary to ensure that all background checks are performed “instantaneously” and responses to them are “immediate[;]”

c. Issue an injunction precluding the [PSP] from requesting the \$2.00 fee for any background checks, where the customer cancels the purchase/transfer of the firearm due to the delays of the PICS system and consistent therewith, order it to assume that any Federal Firearms Licensee that utilizes PICS and does not remit the \$2.00 background check fee is the result of the customer cancelling the purchase/transfer of the firearm due to the delays of the PICS system and preclude it from requiring the Federal Firearms Licensee to verify such in any manner; and,

d. Any other relief this Court may see fit.

(Amended Petition, pp. 22-23)

B. PSP's Preliminary Objections

As with the Original Petition, PSP filed preliminary objections to the Amended Petition. While the Preliminary Objections to the Amended Petition are not before the Court at this time, a review of the Preliminary Objections can be instructive in determining whether Petitioners have shown that they have a “clear right to relief,” which is one of the standards that must be met before a preliminary injunction may issue. Further, PSP’s first preliminary objection asserts sovereign immunity, which raises a jurisdictional question.

Specifically, PSP argues in its preliminary objections, *inter alia*, that it is entitled to sovereign immunity and therefore cannot be compelled to undertake affirmative action as requested by Petitioners. In support, PSP cites *Philadelphia Life Insurance Company v. Commonwealth*, 190 A.2d 111, 114 (1963), wherein the Supreme Court stated:

The distinction is clear between suits against the Commonwealth which are within the rule of its immunity and suits to restrain officers of the Commonwealth from enforcing the provisions of a statute claimed to be unconstitutional. Suits which seek to compel ***affirmative action on the part of state officials or to obtain money damages or to recover property from the Commonwealth*** are within the rule of immunity; suits which simply seek to ***restrain state officials*** from performing affirmative acts are not within the rule of immunity.

(emphasis in bold added). Regardless of how the request for relief is phrased, it is the substance of the relief requested that determines whether the injunction is mandatory or prohibitory. *Stackhouse v. Pennsylvania State Police*, 892 A.2d 54,

61 (Pa. Cmwlth. 2006). The nature of mandatory injunctions is to “command[] the performance of an affirmative act[.]” *Big Bass Lake Community Association v. Warren*, 950 A.2d 1137 (Pa. Cmwlth. 2008).¹⁰

Petitioners argue that sovereign immunity does not apply because, in their Amended Petition, they are seeking declaratory and injunctive relief in the nature of a request for mandamus seeking to compel performance of a duly-enacted law by an executive or administrative department, where there is no discretionary aspect to the law and financial damages are not sought.

PSP finally argues in response that the Amended Petition has mooted the original preliminary objections as well as the Application for Preliminary Injunction, as the Application for a Preliminary Injunction was based upon the factual averments and legal relief sought in the Original Petition. Because those averments and requests for relief are no longer operative, PSP argues, neither is the Application for a Preliminary Injunction.

VI. ANALYSIS

Although the number of positions in the PICS Operations Section has increased slightly since 2019, the evidence presented nevertheless shows that there are *significant* delays in the processing of a sizeable portion of the background checks transferred to PICS operators for manual investigation. Lt. Keeler confirmed that wait times *routinely* exceed 9-10 hours during peak times. In fact, the background check of Benjamin Brown, the owner of Petitioner Landmark Firearms, LLC, took over 20 hours, which is especially surprising because he is the holder of

¹⁰ An exception would exist for actions in mandamus which seek to compel the performance of a ministerial or mandatory duty. *Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Cmwlth. 2010).

a federal firearms license which authorizes him to sell firearms and, as such, he is clearly not a person prohibited by law from obtaining a firearm. The testimony

further revealed numerous instances where prospective purchasers of firearms canceled their purchases because of excessive wait times, thus causing Petitioners to lose the profits that they would have received from those sales. These delays, especially during gun shows (of which PSP has prior notice) have been going on now for years, and PSP does not appear to have a clear plan in place to abate these wait times.

The Court therefore concludes that Petitioners have made a preliminary showing that PSP has a statutory duty under sections 6111.1(b) and 6111.1(c) of the Firearms Act to conduct immediate background checks and provide the results immediately or, at least, without delay. It further has a duty to employ a sufficient number of operators in the PICS Operations Section to ensure that all of its duties under section 6111.1 are administered expeditiously. PSP is in violation of section 6111.1 in that the results from a significant portion of PICS background checks are delayed significantly, which delays are causing financial harm to sellers. The delays are caused at least in part by PSP's failure to adequately staff its PICS Operations Section to meet increased demand.

Petitioners have established all of the prerequisites for the Court to grant preliminary relief. The Court accordingly will grant Petitioners' Application in part and enjoin PSP from further noncompliance with section 6111.1 of the Firearms Act. The Court will defer awarding additional relief until after the final

disposition of the preliminary objections set for expedited argument on September 12, 2022.¹¹

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

¹¹ We note that, on June 23, 2022, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, ___ U.S. ___ (2022), slip. op. at 1, the Supreme Court of the United States recognized that the Second and Fourteenth Amendments to the United States Constitution “protect an individual’s right to carry a handgun for self-defense outside the home.” We are mindful of the challenges faced by PSP in dealing with the unprecedented increase in background checks due to firearms sales over the past several years, which has occurred at the same time as other external factors, such as the COVID-19 pandemic, and which have affected staffing. Nevertheless, the fact remains that there are significant delays in the processing times of background checks. The Supreme Court’s decision in *Bruen*, although not directly applicable to the case *sub judice*, does highlight the importance of the right to keep and bear arms, a right which is affected by the speed at which background checks are processed for citizens seeking to exercise this lawful right. Given these considerations, this Court encourages PSP to take necessary action to alleviate the excessive wait times identified above.

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Commissioner Pennsylvania	:	
State Police,	:	
Respondent	:	

ORDER

NOW, September 2, 2022, upon consideration of the Application for Special Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532 (Application for Preliminary Injunction) filed by Firearms Owners Against Crime – Institute for Legal, Legislative and Educational Action, Landmark Firearms LLC, and James Stoker (collectively, Petitioners), and Respondent Colonel Robert Evanchick, Commissioner Pennsylvania State Police’s (PSP) response thereto, after hearing, it is ordered that Petitioners’ Application is **GRANTED, in part**. PSP hereby is enjoined from further noncompliance with the Firearms Act as that noncompliance has been set forth in the accompanying Memorandum Opinion. The remainder of the Application is denied subject to any future relief this Court may award on the merits.

s/ Patricia A. McCullough

PATRICIA A. McCULLOUGH, Judge