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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
2284CV00001-H

BOSTON POLICE SUPERIOR OFFICERS FEDERATION & others¹

vs.

MICHELLE WU² & another³

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

On January 3, 2022, the plaintiffs, Boston Police Superior Officers Federation, Boston Police Detectives Benevolent Society, and Boston Firefighters Union, Local 718, International Association of Firefighters, AFL-CIO, filed this action for declaratory and injunctive relief against the defendants, Michelle Wu, in her official capacity as Mayor of the City of Boston, Massachusetts and the City of Boston. The plaintiffs are seeking to enjoin the defendants from “implementing a unilaterally-revised COVID-19 policy, mandating vaccination as a condition of employment, that not only violates Memoranda of Agreements (MOAs) executed by current and former administrations but will, if not enjoined, significantly reduce understaffed public safety agencies that are necessary to address the public health response to the ongoing pandemic, will overburden exhausted work forces, and will significantly reduce the testing of employees at a time when testing should be increased if not maintained.” Verified Complaint for Declaratory

¹ Boston Police Detectives Benevolent Society; Boston Firefighters Union, Local 718, International Association of Firefighters, AFL-CIO.

² In her official capacity as Mayor of the City of Boston.

³ City of Boston.

and Injunctive Relief, and Short Order of Notice (Complaint), at 1. The plaintiffs are seeking a declaration that: “the revised policy violates negotiated MOAs and/or legal obligations to negotiate changes to . . . the policy and the impacts of [the] revised policy prior to implementation.” Id.

The plaintiffs have filed a Motion for Injunctive Relief (Motion). See Paper Number 3. The plaintiffs ask this Court “to issue an injunction maintaining the status quo of vaccine verification-and-testing COVID-19 policy for employees, and preventing the Defendants . . . from implementing a Revised COVID-19 Policy that requires termination of employees who fail to verify initial vaccination by January 15, 2022 and full vaccination by February 15, 2022.” Motion at 1. The plaintiffs contend that the defendants “should be enjoined from disciplining or terminating employees who provide proof of test[ing] negative for COVID-19 at least every seven days, unless and until there is a final declaration of rights and resolution of claims under negotiated Memoranda of Agreement and [G.L. c. 150E]. Id. at 1-2. The Motion is supported by a twenty-five page memorandum. See Paper Number 4. The defendants have filed a twenty-five page written opposition and two affidavits in support of their opposition: one from Tammy L. Pust, Director of Labor Relations for the City of Boston, and the second from Dr. Bisola Ojikutu, M.D., M.P.H, Executive Director of the Boston Public Health Commission. See Paper Numbers 6-8. The Complaint and the parties’ memoranda contain various attachments. On January 12, 2022, this Court held a hearing on the plaintiffs’ Motion. For the following reasons, the plaintiffs’ Motion for Injunctive Relief is **DENIED**.

BACKGROUND

The facts as revealed by the pleadings and the materials submitted by the parties are as

follows. See Doe v. Superintendent of Schools of Weston, 461 Mass. 159, 160 (2011) (setting forth facts taken from plaintiff's complaint and attached exhibits in reviewing trial court's decision on preliminary injunction motion).

The plaintiffs are unions representing various police officers and firefighters who serve in the City of Boston (City). Plaintiff Boston Police Superior Officers Federation (Federation) is an employee organization within the meaning of G.L. c. 150E, § 1 and 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. The Boston Police Detective Benevolent Society (BPDBS) is an employee organization within the meaning of G.L. c. 150E, § 1 and is the exclusive bargaining representative of Boston Police Department patrol detectives, detective superiors, and civilians assigned to the forensic unit. The Boston Firefighters Union, Local 718, International Association of Firefighters, AFL-CIO (Local 718) is an employee organization within the meaning of G.L. c. 150E, § 1 and is the exclusive bargaining representative of, for the most part, all uniformed employees of the City's Fire Department, including all District and Deputy Chiefs of the Fire Department. The Fire Department employs approximately 1,500 uniformed employees. Defendant Michelle Wu is the Mayor of the City of Boston, and the defendant City is a public employer within the meaning of G.L. c. 150E, § 1.

"On March 10, 2020, the Governor [of Massachusetts] declared a state of emergency throughout the Commonwealth in response to the spread of COVID-19, a particularly virulent and dangerous coronavirus [SARS-CoV-2]." Christie v. Commonwealth, 484 Mass. 397, 398-399 (2020). See Executive Order No. 591. "The next day, the World Health Organization

declared COVID-19 to be a global pandemic.” Christie v. Commonwealth, 484 Mass. at 398-399. The pandemic has not yet ended. Nearly two years later, as of January 12, 2022, in Massachusetts alone, COVID-19 has killed 20,350 people (confirmed deaths) and infected 1,287,109 (confirmed cases). Mass.gov, COVID-19 Response Reporting, <https://www.mass.gov/info-details/covid-19-response-reporting>. In addition, as of January 12, 2022, the seven-day average of percent positivity is 21.61 percent, 3,087 patients are hospitalized with COVID-19, and 473 patients are in the Intensive Care Unit throughout Massachusetts. Id. The Massachusetts Water Resources Authority, which has been monitoring Massachusetts wastewater for evidence of COVID-19, has seen an unprecedented, exponential increase in the presence of COVID-19 since early December of 2021. Defendants’ Memo at 9 & Attachment 3. In the United States, as of January 12, 2022, there have been a total of 62,538,796 cases of COVID-19 and 840,286 COVID-19 deaths. Centers for Disease Control and Prevention (CDC), COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker/>. New confirmed cases of COVID-19 and deaths caused by the virus are recorded each day. Moreover, according to the CDC, SARS-CoV-2 continues to evolve and change its genetic code, which has led to variants of concern, including the Delta variant (B.1.617.2) and the Omicron variant (B.1.1.529). See CDC, SARS-CoV-2 Variant Classifications and Definitions, <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html>.

According to Dr. Bisola Ojikutu, Executive Director of the Boston Public Health Commission, in December of 2021, it became clear that the new Omicron variant was likely to spread significantly and rapidly. See Affidavit of Dr. Bisola Ojikutu, dated Jan. 10, 2022 (Ojikutu Affidavit), at para. 7. Due to Omicron, combined with holiday gatherings following

Christmas and the New Year, Dr. Ojikutu expected a surge of COVID-19 cases. Dr. Ojikutu believed that “continuing the practice of allowing employees to get tested rather than get vaccinated was insufficient to prevent transmission of COVID-19 in the context of the Delta, Omicron, and future variants, or suppress the spread of COVID-19 among City employees during the anticipated seasonal surge.” Id. at para. 13. People who are vaccinated against COVID-19 are significantly less likely to develop serious health complications from COVID-19, including hospitalization and death. Id. at para. 18. Moreover, by requiring the vaccination of City employees, the City reduces the likelihood of spread of COVID-19 to populations that these employees serve. Id. at para. 21. For example, police officers and firefighters may be required to enter the homes of citizens or have extremely close contact with citizens, including the elderly, children who cannot be vaccinated, and citizens who have compromised immune systems; by ensuring that City employees are vaccinated, the City significantly reduces health and safety risks to the public requiring such services. Ojikutu Affidavit at para. 22. According to Dr. Ojikutu, “the vaccination of all City employees is a necessary part of a medically sound and necessary public health strategy in the city to combat the spread and severity of COVID-19. Vaccination protects both employees and members of the public by reducing transmission of the disease and moderating the severity of symptoms in those who contract it. These factors are necessary both to protect the public and employees from COVID-19 but also to maintain a healthy workforce necessary to deliver the services that the public requires from municipal employees.” Id. at para. 24.

The plaintiffs explicitly acknowledge the severity of this global pandemic and the importance of COVID-19 vaccines:

At the outset, Plaintiffs affirm the following truths: The coronavirus pandemic is real. The ongoing pandemic that is heading into its third year represents, perhaps, the greatest public health threat to the United States in a century. The City of Boston, along with the rest of the country, currently is experiencing a surge, even if it is likely transitory and less lethal in nature than prior surges. The pandemic necessitates an aggressive response led by science and public health professionals. The federally approved vaccines represent an exceptional scientific achievement and are a necessary tool, though insufficient on their own, to control the pandemic. The rates of vaccination for employees represented by Plaintiff Unions significantly exceed that of Boston residents.

Plaintiffs' Memo at 2.

The City's first responders, some of whom are represented by the plaintiff unions, have worked tirelessly and served valiantly throughout the pandemic, and the City frequently forces them to work overtime, in part because the police and fire departments remain at historically low levels. Both the Boston Police Department and the Boston Fire Department lack sufficient sworn personnel to fulfill minimum staffing requirements without overtime. Most, if not all, of these first responders are unable to work remotely as other workers have been able to do during the pandemic. The City's police officers keep streets safe from crime, and the City's firefighters put out fires and assist with various emergencies. Their work is vital to the City.

On August 12, 2021, then-Acting Mayor Kim Janey announced a policy that City employees either verify their COVID-19 vaccination status or provide, at least once every seven calendar days, proof of a negative test for COVID-19. A Memorandum of Agreement (MOA) executed between Local 718 and former Acting Mayor Janey and between the Federation and Mayor Wu, allows asymptomatic public safety employees, regardless of their vaccination status, to work, if they submit either proof of being fully vaccinated against COVID-19 or if they submit proof of a negative test for COVID-19 every seven days. On October 7, 2021, Local 718

executed a MOA with the City, which provided, in part:

Vaccine Verification or Required Testing for COVID-19: The Union agrees to accept the August 30, 2021 Policy and referenced forms, COVID Vaccination Verification Form and Negative COVID Test Verification Form, in which all covered employees of the City shall be required to verify their vaccination status; and any employee who does not verify that they are fully vaccinated will be required to submit proof every seven (7) calendar days of a negative COVID-19 screening test. The Union further agrees that the City has satisfied all of its bargaining obligations under M.G.L. c. 150E associated with implementation of the Policy.

COVID-19 Sick Leave: The Parties agree that upon execution of this Agreement, the City shall re-establish a balance of four (4) tours (not to exceed 96 hours) of COVID-19 sick leave, as provided for in the City's Temporary COVID-19 Leave Benefits and the Boston Fire Department COVID-19 Supplemental Leave Policy, for each Union employee (this Agreement does not provide for a COVID-19 sick leave balance in excess of four (4) tours/96 hours of COVID-19 sick leave as currently provided for in the City's Temporary COVID-19 Leave Benefits and Boston Fire Department COVID-19 Supplemental Leave Policy). Further, the Parties agree that on the anniversary of the effective date of the Policy, and annually thereafter, the City shall re-establish a balance of four (4) tours (not to exceed 96 hours) of COVID-19 sick leave for each Union employee for each year that the Policy remains in effect (this Agreement does not provide for a COVID-19 sick leave balance in excess of four (4) tours/96 hours of COVID-19 sick leave as currently provided for in the City's Temporary COVID-19 Leave Benefits and Boston Fire Department COVID-19 Supplemental Leave Policy).

Expiring June 30, 2022, Union employees who: (1) are fully vaccinated, or who have a documented and approved medical or religious accommodation and are in compliance with submitting weekly negative COVID-19 tests; (2) exhausted the four (4) tours of COVID-19 Leave referenced in paragraph 2; and (3) test positive for COVID-19, may receive up to four (4) tours (not to exceed 96 hours) if they provide signed medical documentation from any qualified individual at a medical provider's office including but not limited to a physician's assistant, nurse, or physician that they are COVID-19 positive.

In-station Testing: Due to the unique operational needs of the bargaining unit, the City shall make in-station antigen testing available to Union employees subject to the City's good faith ability to procure the test[s] and at the continued discretion of the Fire Commissioner. The City will promptly notify the Union of any procurement problems.

Local 718 MOA, Attachment 3 to Complaint.

On December 7, 2021, the City executed a MOA with the Federation, which provides in part that:

Vaccine Verification or Required Testing for COVID-19: The Union agrees to accept the Policy in which all covered employees of the City shall be required to verify their vaccination status; and any employee who does not verify that they are fully vaccinated will be required to submit proof every seven (7) calendar days of a negative COVID-19 screening test. The Union further Agrees that the City has satisfied all of its bargaining obligations under M.G.L. c. 150E associated with implementation of the Policy.

Vaccines and testing are offered free of charge to employees at three identified City-operated sites open at various times and locations specifically for City of Boston employees.

...

In-station Testing: Subject to the City's good faith ability to procure the tests and at the continued discretion of the Commissioner, the City shall make in-station antigen testing available to Union employees on the "Last Half Shift" and Duty Supervisors who are required to submit test results under the Policy who demonstrate an inability to obtain necessary testing despite reasonable efforts to do so. At the discretion of the Commissioner, and subject to availability, tests may also be made available to other Union employees who are required to submit test results under the Policy and who demonstrate an inability to obtain necessary testing despite reasonable efforts to do so.

Federation MOA, Attachment 4 to Complaint.

The plaintiffs believe that the MOAs are consistent with standards issued by the U.S. Department of Labor's Occupational Safety & Health Administration, which apply to private-sector employers with at least one hundred employees and by guidance from the CDC that permits unvaccinated emergency responders to work even after certain exposures to COVID-19.

Plaintiffs' Version of Events Leading to Vaccination Policy Change

On Saturday, December 18, 2021, Mayor Wu left a message on the Federation voicemail

and contacted BPDBS President Donald Caisey about a vaccination policy change. Complaint, at paras. 41-42. On Sunday, December 19, 2021, Tammy Pust, Director of Labor Relations for the City, called Local 718 President John Soares about a policy change. Complaint, at para. 43.

On December 20, 2021, Mayor Wu unilaterally promulgated a new policy, nearly identical to the policy imposed by Massachusetts Governor Charlie Baker, which mandates COVID-19 vaccination as a condition of employment. In a letter to the Federation, Pust reported that forty-three sworn supervisors did not verify being fully vaccinated, which meant that at least eighty-three percent of sworn supervisors are vaccinated. In a letter to Local 718, Pust reported that 353 firefighters did not verify being fully vaccinated, which means that at least seventy-seven percent of firefighters are vaccinated. The City further reported that forty-six members of BPDBS did not verify being fully vaccinated, which means that at least eighty-nine percent of BPDBS members are vaccinated. According to the plaintiffs, Mayor Wu promulgated and announced this policy without having given the plaintiff unions notice or the opportunity to bargain as required by G.L. c. 150E, § 10. The plaintiffs contend that:

The City's actions violate and repudiate the express terms of the MOAs, including one executed by the Mayor Wu administration on December 7, 2021. Moreover, regardless of whether the City's unilateral actions repudiate these negotiated agreements, these actions violate the City's collective bargaining obligation under Chapter 150E because the decision to create a new mandatory condition of employment allowing for termination of asymptomatic, COVID-19-negative, unvaccinated emergency workers was issued without first bargaining to impasse or resolution about the Policy and/or about the impacts of the Policy. Such a vaccination mandate has a direct impact on fundamental terms or conditions of employment under G.L. c. 150E, § 10.

Injunctive relief to maintain [the] status quo pending a declaration of rights and resolution of claims is necessary to prevent irreparable harm not only to unvaccinated employees, who cannot undo becoming vaccinated, but also to vaccinated employees who will be forced to work even more hours to fill

vacancies created by the unnecessary termination of unvaccinated employees and to the Plaintiff Unions, whose strengths are diminished by being unable to block and/or remedy this unilateral change until many months or years from now and without the ability to seek interest arbitration as [it] is not only possible but required were the City to have satisfied its bargaining obligations in the first instance.

Plaintiffs' Memo at 3-4.

The City's Vaccination Verification Requirement becomes effective on Saturday, January 15, 2022.

On December 22, 2021, the Federation demanded that the City adhere to the existing MOA and meet to discuss the city's bargaining obligations. That same day, Local 718 President Soares contacted Mayor Wu and asked her to consider a continuation of the in-station testing program, to which she replied, "Sorry, John, but I cannot," without further explanation. Complaint, at para. 50. BPDDBS requested that the City cease and desist from further unilateral changes to the testing policy.

On December 23, 2021, the plaintiffs filed prohibited practice charges against the city with the Department of Labor Relations alleging violations of G.L. c. 150E, §§ 10(a)(1) & (5), which set forth certain prohibited practices, including refusing to bargain collectively in good faith. On December 24, 2021, the Federation filed a grievance regarding the City's new mandatory vaccination policy as violating the Federation MOA.

On December 30, 2021, the City finally responded to the Federation, offering to meet on January 7 or 10, more than three weeks after the new mandatory vaccination policy was announced and about one week before the vaccination deadline required by the Policy.

Defendants' Version of Events Leading to Vaccination Policy Change

On November 2, 2021, Mayor Wu was elected Mayor of Boston, and she was sworn in and started her mayoral term on November 18, 2022. See Affidavit of Tammy L. Pust, dated Jan. 9, 2022 (Pust Affidavit), at para. 10. Beginning on December 17 and concluding on December 19, 2021, Pust and Wu called the City's twenty unions to notify them about the contemplated vaccination policy change. Pust sent letters via email dated December 20, 2021 to all twenty City unions about the modification to the August testing and vaccination policy and indicated that the City would fulfill any bargaining obligations it might have. *Id.* at para. 12. On December 20, 2021, the City announced a modification of the August policy, and the new policy required that all employees verify at least one dose of the COVID-19 vaccination by January 15, 2022 and full vaccination by February 15, 2022.

On December 21, 2021, counsel for BPDBS's union responded that the BPDBS full bargaining team could not get together before January 5, 2022. BPDBS sent the City a cease and desist letter on December 22, 2021 and filed a charge of prohibited practice at the Department of Labor Relations on December 23, 2021.

On December 22, 2021, counsel for the Federation sent Pust an email expressing concerns about the new vaccination policy, alleging that it was implemented unilaterally and constituted a repudiation of the previously signed MOA. Pust Affidavit at para. 15. Union counsel also noted that the Federation was willing to meet to discuss the new vaccination policy, but reserved its right to withdraw from such negotiations. On December 17, 2021, the Federation filed a charge of Prohibited Practice at the Department of Labor Relations.

On December 23, 2021, Local 718 filed a charge of Prohibited Practice at the Department

of Labor Relations and scheduled a meeting for January 6, 2022.

Pust met separately with the three plaintiff bargaining teams on January 5, 6, and 7 of 2022. Id. at para. 18. Pust notes that the parties “are scheduled to appear before a DLR-assigned Mediator with respect to the Charges of Prohibited Practice on Tuesday, January 11, 2022.” Id. “The City intends to continue bargaining in good faith and meet any bargaining obligation it may have regarding the December Policy. The City is currently in the process of providing written information as requested, after which it will schedule future bargaining sessions as requested.” Id.

In addition, Pust reports that “there has been a huge increase in the number of employees absent in both the Police and Fire Departments” due to COVID-19 for the month of December. Id. at para. 26. More specifically, the “number of employees out in the Police Department in December 2021 due to Covid-19 was 101 up from 28 in November 2021. Similarly, 105 employees were absent from the Fire Department due to Covid-19 in December 2021 up from 34 in November 2021.” Id.

Plaintiffs File Complaint in Superior Court

On January 3, 2022, the plaintiffs filed this action against the defendants in the Superior Court. The Complaint contains three claims: breach of contract and/or motion to compel arbitration, G.L. c. 150C (Count I); declaratory relief (Count II); and injunctive relief (Count III).

At the hearing on January 12, 2022, the plaintiffs reported that at a mediation session on January 11, 2022, the City only agreed to one hour of mediation and sent someone with no authority with regard to decision-making. Moreover, the parties explained that employees who do not comply with the new vaccination policy by January 15, 2022 will be placed on unpaid

administrative leave, but they can use paid time off in order to continue receiving pay. See Complaint, Attachment 6 (City of Boston Policy: COVID-19 Vaccination Verification Requirement). There will be some sort of progressive discipline or suspension that will allow non-complying employees to reconsider their decision not to get vaccinated against COVID-19 before they are terminated.

DISCUSSION

A party seeking a preliminary injunction must show “(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party’s] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction.” See Garcia v. Department of Hous. & Community Dev., 480 Mass. 736, 747 (2018) (citations omitted). See also Massachusetts Port Auth. v. Turo Inc., 487 Mass. 235, 239 (2021) (same). “Where a party seeks to enjoin government action, the judge also must determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.” Garcia v. Department of Hous. & Community Dev., 480 Mass. at 747. See Foster v. Commissioner of Correction, 484 Mass. 698, 712 (2020) (same).

“By definition, a preliminary injunction must be granted or denied after an abbreviated presentation of the facts and the law.” Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980). “On the basis of this record, the moving party must show that, without the requested relief, it may suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits.” Id.

Upon review and after hearing, the plaintiffs’ Motion is denied because this Court is not

satisfied that the plaintiffs have demonstrated irreparable harm or that the plaintiffs' request for injunctive relief promotes the public interest. See Garcia v. Department of Hous. & Community Dev., 480 Mass. at 747. This Court will discuss each aspect of the analysis, in turn, below.

Likelihood of Success on the Merits

First, in order to obtain a preliminary injunction, the plaintiffs are required to show a likelihood of success on the merits. See id. Although this Court need not even address this issue because the plaintiffs have not demonstrated irreparable harm or that the requested injunctive relief would promote the public interest, this Court will do so, briefly, in an effort to assist the parties moving forward in this case.

The plaintiffs argue that they are likely to succeed on the merits of their Complaint because: (1) the City's December 20 policy breached the previously negotiated MOAs that included a testing option instead of vaccination; (2) the City's December 20 policy constitutes a unilateral change in conditions of employment in violation of G.L. c. 150E; and (3) the City cannot cite exigent circumstances to justify a unilateral change and/or regressive bargaining. Plaintiffs' Memo at 5-15. In response, the defendants argue, among other things, that: (1) the City's decision to adopt a revised COVID-19 policy is not a breach of any prior agreement and (2) the City has discharged and is continuing to discharge its obligation to bargain the impacts of its decision to adopt the December policy, to the extent such an obligation exists. Defendants' Memo at 10-19.

Citing Dracut v. Dracut Firefighters Union, IAFF Local 2586, 97 Mass. App. Ct. 374, 378-379 (2020), the City argues that it is "not required to bargain the decision to impose a vaccine requirement, and its prior impact bargaining resulting in two MOAs regarding testing

and vaccination does not preclude the City from adopting the December Policy.” Defendants’

Memo at 11. In Dracut, the Appeals Court recounted that:

Pursuant to G.L. c. 150E, § 6, public employers must negotiate in good faith with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment. However, from that expansively defined category of mandatory bargaining subjects, we have exempted certain types of managerial decisions that must, as a matter of policy, be reserved to the public employer’s discretion. **[I]n instances where a negotiation requirement would unduly impinge on a public employer’s freedom to perform its public functions, G.L. c. 150E, § 6, does not mandate bargaining over a decision directly affecting the employment relationship.** Local 346, Int’l Bhd. of Police Officers v. Labor Relations Comm’n, 391 Mass. 429, 437 (1984). See Boston v. Boston Police Patrolmen’s Ass’n, 403 Mass. 680, 684 (1989); Burlington v. Labor Relations Comm’n, 390 Mass. 157, 164 (1983); Lynn v. Labor Relations Comm’n, 43 Mass. App. Ct. 172, 178-179 (1997). [T]he inquiry has been directed towards defining the boundary between subjects that by statute, by tradition, or by common sense must be reserved to the sole discretion of the public employer so as to preserve the intended role of the governmental agency and its accountability in the political process. Id. at 178. [T]he crucial factor in determining whether a given issue is a mandatory subject of bargaining is whether resolution of the issue at the bargaining table is deemed to conflict with perceived requirements of public policy. Greenbaum, The Scope of Mandatory Bargaining Under Massachusetts Public Sector Labor Relations Law, 72 Mass. L. Rev. 102, 103 (1987).

Worcester v. Labor Relations Comm’n, 438 Mass. 177, 180-181 (2002). In sum, the nondelegability doctrine is a judicially created doctrine limiting the reach of G. L. c. 150E, §§ 6-7, in those circumstances where public policy requires that a public employer reserve certain personnel matters to its sole discretion in order to preserve accountability to the public in the performance of the essential functions of government.

Dracut v. Dracut Firefighters Union, IAFF Local 2586, 97 Mass. App. Ct. at 378-379 (emphasis added) (internal quotation marks omitted). The City, however, acknowledges that it negotiated the impacts of its August policy with the plaintiff unions and has “commenced the process of bargaining the impacts of the December Policy.” Defendants’ Memo at 13.

In the unique circumstances imposed by the COVID-19 pandemic, which includes the rapid emergence of the Omicron variant not too long ago, whether the City was permitted to abruptly and unilaterally impose a vaccine mandate on the employees represented by the plaintiff unions appears to be an open question. This Court need not decide the issue at this time, however, since the plaintiffs have not demonstrated irreparable harm or that their requested order would promote the public interest.

Yet, based on the limited record, this Court makes the following observations: The plaintiffs and the City previously and extensively negotiated a COVID-19 vaccination and testing policy in August of 2021. The City's vaccine mandate was formally announced with little warning to the plaintiff unions on December 20, 2021. The Christmas and New Year's holidays appear to have delayed further meetings between the parties. Pust reported that the parties finally appeared before a mediator with respect to the charges of prohibited practice on January 11, 2022. Pust Affidavit at para. 18. "The City intends to continue bargaining in good faith and meet any bargaining obligation it may have regarding the December Policy. The City is currently in the process of providing written information as requested, after which it will schedule future bargaining sessions as requested." *Id.* But at the hearing on January 12, 2022, the plaintiffs reported that at the January 11, 2022 mediation, the City only agreed to one hour of mediation and sent someone with no authority with regard to decision-making. Thus, the parties made no progress.

The defendants appear to want it both ways (unilaterally imposing a vaccine mandate and purportedly agreeing to bargain certain aspects of the policy change), but in the process, may have acted unfairly in abruptly imposing a vaccine requirement on the plaintiff unions that

contradicts or breaches the carefully negotiated MOAs and disregards the spirit of collective bargaining in good faith. Assuming, arguendo, that the City was permitted to unilaterally impose a vaccine mandate on the plaintiff union employees, it unequivocally has an obligation under G.L. c. 150E to engage in collective bargaining regarding the impact of that mandate. Because the City failed to do so prior to December 20, 2021, the plaintiffs have established a likelihood of success on the merits at least as to that cause of action.

Irreparable Harm

According to the December 2021 vaccine mandate, plaintiff members who have failed to provide proof of vaccination will be subject to an adverse employment consequence, including suspension without pay and eventual termination. While the consequences are undoubtedly injurious to the affected employee, they do not constitute “irreparable harm” for purposes of injunctive relief. See Garcia v. Department of Hous. & Community Dev., 480 Mass. at 747. The City argues that unvaccinated employees do not face irreparable harm because “[t]hey are not forced to be vaccinated,” and they are merely subject to “discipline including termination if they refuse to be vaccinated.” Defendants’ Memo at 20. Discharge from employment generally does not constitute irreparable harm. See Sampson v. Murray, 415 U.S. 61, 92 n.68 (1974) (noting that discharge of an employee “will not support a finding of irreparable injury [absent a genuinely extraordinary situation], however severely they may affect a particular individual”). See also Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640, 643 (1987) (“[E]conomic loss alone does not usually rise to the level of irreparable harm which a party must establish to obtain a preliminary injunction.”). If needed, any plaintiff employee who thinks that he or she was improperly subject to discipline or discharged for remaining

unvaccinated may file suit against the City and seek, among other things, back pay and other damages. Cf. Boston Police Dept. v. Jones, 98 Mass. App. Ct. 762, 763-774 (2020) (affirming certain back pay awards for Boston police officers who were wrongly discharged after their hair samples tested positive for cocaine); Ballotte v. Worcester, 51 Mass. App. Ct. 728, 734 (2001) (“In comparable situations, reinstatement to the position to which the plaintiff was entitled (without loss of rights such as seniority, tenure, or retirement) together with damages in an amount reflecting what the plaintiff would have earned if not deprived of that new position, less mitigation, have been awarded.”).

The plaintiffs further argue that union employees will suffer irreparable harm because further reductions in an already strained workforce will require vaccinated employees to work more hours, and “[m]andatory overtime is almost certain to increase.” Plaintiffs’ Memo at 16. They argue that vaccinated officers and firefighters will have to fill those vacancies in the interim, and while they will be compensated at applicable overtime rates, that money “will not adequately compensate for missing special one-time events with families, friends and loved ones.” Id. “Moreover, the undue strain on these employees continually forced to work more and longer tours of duty will have untold impacts on their physical, mental and emotional health that cannot be remedied.” Id. The plaintiffs, however, cite no case law to suggest that working mandatory overtime and missing certain events constitutes irreparable harm, and this Court is not persuaded that requiring vaccinated employees to work mandatory overtime would constitute irreparable harm. Nonetheless, as this Court stated at the January 12, 2022 hearing, the work done by the police officers and firefighters has been remarkable throughout this entire pandemic process. All of the employees represented by the plaintiff unions have been the lifeline of the

City and of the Commonwealth throughout this pandemic, and they have generally not had the opportunity, like many others, to participate in remote work. These public servants have done great work, and we owe them many thanks.

In addition, the plaintiffs argue that unions themselves will be harmed if an injunction does not issue because the “lack of opportunity to engage in meaningful negotiation and arbitration undermines the Unions’ collective bargaining power and risks diminishing the unions in the eyes of their members.” Plaintiffs’ Memo at 16. This Court disagrees—the plaintiff unions remain immensely powerful and may still ultimately prevail at the Department of Labor Relations or in this case. Pust asserts in her affidavit that the City has invited the unions to bargain and that bargaining is underway. The parties reported that a mediation session was held this week, and perhaps some progress will be made in the near future. Going forward, it appears that the plaintiff unions will retain their collective power.

Balancing the Harms & the Public Interest

The final consideration for this Court involves balancing the harms and weighing whether the plaintiffs’ requested order (maintaining the status quo of vaccine verification and testing) promotes the public interest. The plaintiffs contend that maintaining the status quo, allowing for a COVID-19 testing option every seven days, “will ensure strapped public safety agencies do not suffer further reductions in staffing” Plaintiffs’ Memo at 21. This is an important consideration. The police officers and firefighters represented by the plaintiff unions are vital to the City, and any reductions in their staffing would not be ideal.

But in light of the persistent and perilous public health emergency caused by COVID-19, the importance of vaccinations cannot be overstated, and the harm from preventing the vaccine

mandate from going into place, greatly outweighs any harm to the plaintiffs if the requested injunction does not issue. COVID-19 vaccines have prevented countless hospitalizations and deaths since they became available, and it is almost unthinkable as to what the world would look like without them. Again, in the United States alone, as of January 12, 2022, there have been a total of 62,538,796 cases of COVID-19 and 840,286 COVID-19 deaths. In Massachusetts, even though COVID-19 vaccines are readily available, as of January 12, 2022, the seven-day average of percent positivity is 21.61 percent, 3,087 patients are hospitalized for COVID-19, and 473 patients are in the Intensive Care Unit throughout Massachusetts. Thus, the COVID-19 pandemic unquestionably continues to threaten the Commonwealth, and the future of the pandemic remains uncertain.

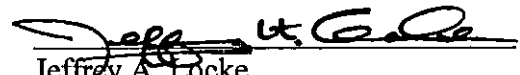
As discussed above, Dr. Ojikutu opined that “continuing the practice of allowing employees to get tested rather than get vaccinated was insufficient to prevent transmission of COVID-19 in the context of the Delta, Omicron, and future variants, or suppress the spread of COVID-19 among City employees during the anticipated seasonal surge.” Ojikutu Affidavit at para. 13. People who are vaccinated against COVID-19 are significantly less likely to develop serious health complications from COVID-19, including hospitalization and death. *Id.* at para. 18. Moreover, by requiring the vaccination of City employees, the City reduces the likelihood of spread of COVID-19 to populations that these employees serve. *Id.* at para. 21. For example, police officers and firefighters may be required to enter the homes of citizens or have extremely close contact with citizens, including the elderly, children who cannot be vaccinated, and citizens who have compromised immune systems; by ensuring that City employees are vaccinated, the City significantly reduces health and safety risks to the public requiring such services. *Id.* at para.

22. According to Dr. Ojikutu, “the vaccination of all City employees is a necessary part of a medically sound and necessary public health strategy in the city to combat the spread and severity of COVID-19. Vaccination protects both employees and members of the public by reducing transmission of the disease and moderating the severity of symptoms in those who contract it. These factors are necessary both to protect the public and employees from COVID-19 but also to maintain a healthy workforce necessary to deliver the services that the public requires from municipal employees.” Id. at para. 24.

Consequently, based on the record before this Court, the plaintiffs’ requested injunction does not promote the public interest, and balancing the harms supports allowing the City’s vaccine mandate to go into effect on January 15, 2022. Vaccinations help to protect police officers and firefighters from hospitalization and death and from spreading COVID-19 to others, including members of the public they frequently interact with and their fellow police officers and firefighters. Moreover, particularly in light of the highly contagious Omicron variant, testing once every seven days would be insufficient to prevent the spread of COVID-19. As the virus continues to adapt, policies must adapt as well. In these circumstances, requiring COVID-19 vaccinations as a condition of continued employment with the City is eminently reasonable and outweighs any reductions in staffing that may result.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiffs' Motion for Injunctive Relief (Paper Number 3) is **DENIED**.


Jeffrey A. Locke
Justice of the Superior Court

Dated: January 14, 2022