COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2284CV00001

BOSTON POLICE SUPERIOR OFFICERS FEDERATION; BOSTON POLICE DETECTIVES BENEVOLENT SOCIETY; and BOSTON FIREFIGHTERS UNION , LOCAL 781, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, ALF-CIO,

Plaintiffs,

v.

MICHELLE WU, in Her Official Capacity as Mayor of the City of Boston and CITY OF BOSTON,

Defendants.

E-FILED 1/10/2022

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

In denying plaintiffs' Motion for Injunctive Relief, this Court would be acting consistently with other decisions of this Court denying injunctions on substantially identical challenges to the Commonwealth's vaccine mandate. The unions in those prior matters failed to meet their burden on any of the elements of the test for injunctive relief, especially the elements of demonstrating irreparable harm and the balancing of harms in light of the public interest. Courts in the Commonwealth and nationally have consistently found that the public interest in addressing the Covid-19 pandemic through vaccine mandates overwhelms unions' assertions of competing interests and dictates denial of applications for injunctive relief. Defendants have provided the Court a record of the public health interests that provide a compelling basis for denying the application currently before the Court.

FACTS

The City Has Been Guided By Public Health and Science in Its Response to the Covid-19 Pandemic.

Throughout the course of the Covid-19 pandemic, the City and its Mayors have looked to the Boston Public Health Commission ("BPHC") for guidance in responding to this unprecedented public health crisis and navigating how best to protect its employees and the citizens it serves. Pust Aff. ¶¶ 20-23. BPHC has provided guidance on various employment-related policies including the requirement of face coverings when reporting physically to a City worksite, screening before reporting to work, quarantining and isolating after an exposure or positive test, reductions to the City's in-person work force, and requiring those who have not been vaccinated to provide evidence of a negative test on a weekly basis. Pust. Aff. ¶ 22.

August Policy

On or about August 12, 2021, the City, acting upon advice and guidance from the BPHC, created the Vaccine Verification or Required Testing Policy (the "August Policy") requiring all City employees to either provide verification of vaccination or submit proof of a weekly negative Covid-19 test. Pust Aff. ¶ 4. The City's Office of Labor Relations ("OLR") provided written notice that same day informing all twenty bargaining units who represent its various employees of the City's intent to implement this Policy with an effective date of September 24, October 4 or October 18, depending on the employee's position. Pust. Aff. ¶ 4. The City offered to meet with the unions to comply with any bargaining obligations that might exist. Pust. Aff. ¶ 4.

Thereafter, the City began meeting with each of the twenty bargaining units that requested to bargain, meeting with Plaintiff unions over the course of August, September, and in some cases October. Pust Aff. ¶¶ 5, 7-9. Based on the negotiations, the City made modifications

to the types of documentation permitted to demonstrate negative testing, clarified details and updated the August Policy on August 30, 2021. Pust Aff. ¶ 6.

During negotiations, Boston Firefighters Union, Local 781 requested that the City include a provision to "revisit the agreement" which the City added, stating: "[t]he City intends to periodically review the Policy and shall fulfill any impact bargaining obligations associated with any proposed substantive changes." Pust Aff. ¶7. No other bargaining unit requested similar language, and this language is not included in any other Memorandum Of Agreement ("MOA"). *Id.* The City understood this language not to create any new obligations, but instead merely reflected legal requirements that already existed. *Id.* Moreover, the City believed the language was unnecessary. *Id.* The MOA also indicates it "shall not be used to demonstrate a practice or create a precedent for any other matter." *Id.* On October 7, 2021, Local 781and the City executed an MOA with this language. *Id.*

On October 29, 2021, after several negotiation sessions and following this implementation of the August Policy, the City provided the Federation a separately bargained MOA, which also contained non-precedent setting language. Pust Aff. ¶ 8. On November 26, 2021, after the August Policy took effect, the Boston Police Superior Officers Federation returned the signed MOA. *Id.* On Tuesday, December 7, 2021, the then interim Director of Labor Relations for the City countersigned. *Id.*

After a meeting in August with the Boston Police Detectives Benevolent Society ("BPDBS"), on September 16, 2021, the then interim Director of Labor Relations provided BPDBS a letter with the updated policy and offered to continue to meet. Pust Aff. ¶ 9. After various communications, on December 16, 2021, the parties agree to meet again on January 5, 2022 to further discuss the August Policy *Id.*

Confluence of Events – Seasonal Influenza, Omicron, Holiday Surge, Leveling Off of Vaccinations

In November 2021 as the City began to prepare for its second winter of this pandemic it also began to prepare for cold and influenza season. Affidavit of Bisola Ojikutu, M.D., M.P.H. "Ojikutu Aff.") ¶ 4. Unlike the prior year, the available data indicated a more active influenza season than usual, placing further strain on both the City workforce as well as Boston's healthcare system. *Id.*

At the same time as the City was observing an increase in influenza cases, a new variant of Covid-19, Omicron, began to emerge. Ojikutu Aff. ¶ 5. The first report of this new variant to the World Health Organization ("WHO") came from South Africa on November 24, 2021.[1] In December, it became clear this new variant appeared to be more contagious than previous variants and was spreading rapidly based on data from South Africa and then the United Kingdom. The BPHC reviewed all relevant data including epidemiological modeling that demonstrated the spread of the Omicron variant was likely to be significant and rapid. Ojikutu Aff. ¶ 7.

Based on the pace of the spread of Omicron in the first half of December throughout the globe, including in the United States and in Massachusetts, it became clear that this surge could coincide with a surge of expected Covid-19 cases following the Christmas and New Year Holidays. Based on her knowledge in her field about the seasonality of infectious disease similar to Covid-19, as well as the now twenty-two months of this pandemic, Dr. Ojikutu and her

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[1] World Health Organization, Statements, Classification of Omicron (B.1.1.529): SARS-CoV-2 Variant of Concern, dated Nov. 26, 2021, Parkkali, Maarit, available at: https://www.who.int/news-room/statements/26-11-2021-classification-of-omicron-(b.1.1.529)-sars-cov-2-variant-of-concern (last visited 1/6/2021). Thereafter on December 1 and 2, 2021, the first cases of this new variant were found in the United States. Centers for Disease Control and Prevention, Covid-19 Science Brief: Omicron (B.1.1.529 Varian), available at https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-omicron-variant.html#print (last visited 1/6/2021).

advisors at BPHC anticipated a significant increase in Covid-19 cases during and following the holiday season marked by family gatherings, social gatherings, and increased amounts of time spent indoors in general. Ojikutu Aff. ¶ 8.[2]

The expectation of an impending surge of a highly-contagious Covid-19 variant timed with an anticipated active influenza season and the likelihood of a post-holiday and seasonal increase in cases resulted in the City's administration consulting with the BPHC. The City sought guidance regarding what measures should be taken to maintain a safe workplace for City employees, ensure essential services continued to be available to the public, and to protect the public the City serves, particularly the most vulnerable. Ojikutu Aff. ¶ 9.

Although Covid-19 testing is an important tool to ensure that those who are infected can isolate and prevent further spread of the disease, testing alone is not sufficient to prevent the spread of the virus. Ojikutu Aff. ¶ 12. Vaccination is the most important tool to prevent serious infections, hospitalizations, and death. *Id.* Vaccination rates are among other key metrics BPHC, and other members of the City Administration regularly follow on the Covid-19 Data Dashboard in order to ensure that timely data is used to inform Covid-19 policy and programmatic interventions. *Id.*

December Policy Announcement

Based on guidance from the BPHC and relying on data and information from the Center for Disease Control ("CDC"), the City determined a vaccine mandate was the most effective action it could take to protect its employees, provide a safe work place, ensure the continued provision of public services, and protect the public. Ojikutu Aff. ¶11.

[2] In addition, the number of new individuals being vaccinated both Citywide and among City employees, had begun to drop off in late Fall. This was despite efforts by the BPHC and City to conduct ongoing public education campaigns, vaccination clinics and other interventions, including the August Policy, to encourage voluntary uptake of vaccinations including the August Policy Ojikutu Aff. ¶ 10; Pust Aff. at ¶ 23.

On the same date the vaccine requirement for City employees was announced the BPHC announced temporary measures requiring proof of vaccination for entry into certain public indoor settings Ojikutu Aff. ¶ 31. The new public policy prohibited covered entities from permitting patrons, employees, interns, volunteers, or on-site contractors to enter without displaying proof of vaccination. The implementation date for the public facing policy is the same as for City employees. *Id.*

Rationale Behind the Vaccine Policy

It is widely accepted in the infectious disease medicine and public health fields that individuals who are vaccinated are less likely to contract Covid-19 than those who are not. Ojikutu Aff. ¶ 15. As of January 4, 2022, 80.7% of Boston residents have had at least one dose of a Covid-19 vaccination, and 69.3% are fully vaccinated. *Id.* The current data, research, and analysis indicate that for vaccinated persons who do contract Covid-19 have a viral load is significantly lower than that of infected unvaccinated individuals. Ojikutu Aff. ¶ 16. This lower viral load results in vaccinated individuals shedding less virus and for a shorter duration of time, reducing the likelihood they will infect others. *Id.* Vaccination reduces the risk of serious illness and, on average, the period of time for which employees that do contract Covid-19 are symptomatic, allowing quicker recovery and return to service. Ojikutu Aff. ¶17. Those who are vaccinated are significantly less likely to develop serious health complications from Covid-19, including hospitalization and death. Ojikutu Aff. ¶ 18. Because vaccination reduces the risk of serious illness, it reduces the strain on the City workforce which provides critical services to city residents. Ojikutu Aff. ¶ 17.

Public health officials concluded that by requiring vaccinations of all City employees, the City reduces the likelihood that there will be "clusters" and/or workplace spread of Covid-19.

Ojikutu Aff. ¶ 20. Vaccination also reduces the likelihood of Covid-19 spread from City employees to the populations it serves. Ojikutu Aff. ¶ 21. Those requiring public services, in particular those services provided by the employees plaintiffs represent, do not have an option in most instances regarding whether to seek such services and/or to interact with these City employees. Ojikutu Aff. ¶ 22. Providing police and fire services often require these employees to enter the homes of citizens or have extremely close contact with citizens, including vulnerable populations such as the elderly, children who cannot be vaccinated, and or citizens who have compromised immune systems. Ojikutu Aff. ¶ 22. By ensuring its employees are vaccinated, the City significantly reduces health and safety risks to the public requiring such services. *Id.*

Further, vaccinations significantly reduce the likelihood of hospitalization, and requiring vaccination prevents further burden of the health care system. Ojikutu Aff. ¶ 23. Even if the Omicron variant tends to cause less severe illness, which is being evaluated by the public health community, the sharp increase in cases results in increases in hospitalizations, as shown in the hospitalization and hospital capacity metrics BPHC follows. *Id.* Throughout the pandemic, preserving hospital capacity has been an overarching imperative that has informed emergency interventions and employment protections. *Id.*

It is the position of the BPHC that 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. Ojikutu Aff. ¶ 24.

Notice and Bargaining of the December Policy

Between December 17 and 19, 2021, the City, through Mayor Wu and its Director of Labor Relations began notifying all twenty City bargaining units that in order to combat the

ongoing pandemic and more contagious variants it was establishing a new policy requiring vaccination. Pust Aff. ¶ 11.

On December 20, 2021, that Policy was publicly announced (hereinafter, the "December Policy"). Pust Aff. ¶¶ 12-13. On the same date, the City's Director of Labor Relations also sent formal written notice of the December Policy to the City's twenty unions, providing the December Policy and offering to meet. Pust. Aff. ¶ 12. The December Policy is scheduled to take effect on January 15, 2021, giving employees approximately four weeks to obtain their first vaccination in order to be considered in compliance and/or request and receive a medical or religious accommodation. Pust Aff. ¶ 13.

The following day, December 21, 2021, counsel for the BPDBS's unions responded indicating the BPDBS full bargaining team could not meet before January 5, 2022. Pust Aff. ¶ 14. Accordingly, the City's bargaining representatives met with the BPDBS's bargaining team on January 5, 2022, to bargain the impacts of the December Policy. Pust Aff. ¶ 18. Local 781 left a voicemail for the Director of Labor Relations on Monday, January 3, 2022, requesting to meet over the December Policy. Pust Aff. ¶ 17. A meeting was scheduled for and conducted on January 6, 2022. Pust Aff. ¶ 18. The Federation responded reserving its rights but indicating it would meet with the City, and the parties scheduled a meeting for January 7, 2022, which went forward. Pust Aff. ¶¶ 15-16, 18. The City is reviewing the unions' proposals and will to respond to potential impacts the unions raised regarding the December Policy after it has had a chance to hear from each union that requested to meet. Pust Aff. ¶ 18.

Data Has Borne Out the BPHC's Concerns and Need for Vaccination

Since the December 20, 2021, notice of the December Policy, the City has seen an exponential increase in the community's Covid-19 positivity rate. Although the rate was only

6.7% at the time of the announcement, by December 27th, it had increased almost three-fold to 18.2%. As of January 4, 2022, the positivity rate was up to 31.9%, an almost five time increase in less than one month.[3] BPHC Covid-19, available at https://analytics.boston.gov/app/boston-covid, (last visited 1/8/2022) and Verified Complaint. The Commission uses a 5% positivity rate for its threshold of concern. Ojikutu Aff. ¶ 29. Similarly, the Massachusetts Water Resources Authority, which has been monitoring the state's wastewater for evidence of Covid-19 since March of 2020, has seen an unprecedented, exponential increase in the presence of Covid-19 since early December 2021. See **Attachment 3**.

The City has also seen an exponential increase in employee absences due to Covid-19 in recent weeks. Pust Aff. ¶ 26. This has corresponded with an increase in the number of employees absent due to illness caused by Covid-19 in both the Police and Fire Departments specifically. *Id.* The number of employees absent from the Police Department in December 2021 due to Covid-19 illness was 101 up from 28 in November 2021, *Id,* while 105 employees were absent from the Fire Department due to Covid-19 illness in December 2021 up from 34 in November 2021. *Id.* This an all-time high for both departments. *Id.*

ARGUMENT

The Superior Court cases adjudicating motions to enjoin vaccine requirements reflect consensus on the test. A union must establish that: (1) it is likely to succeed on the merits of its action; (2) it and/or its members would suffer irreparable harm without the injunction; (3) the risk of such harms outweighs the risk of similarly irreparable harm to the governmental entity; and, (4) where the union seeks to enjoin government action, it must also demonstrate that "the

[3] The BPHC has monitored the same six metrics since early on in the pandemic to track the spread and risk of Covid-19 to our communities. Ojikutu Aff. ¶¶ 26-27. These metrics were publicly announced on November 20, 2020, during a press conference that included at least twenty media outlets they have been available on the BPHC's webpage since January 21, 2020. Ojikutu Aff. ¶ 26.

requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *See Local 589, Amalg. Transit Union v. Massachusetts Bay Transp. Auth.*, Suffolk Superior Court, C.A. No. 2184CV02779 (December 22, 2021) at 5 (citations omitted) (**Attachment 1**); *see also State Police Ass'n v. Commonwealth*, 2021 Mass. Super LEXIS 478, * 4 (September 23, 2021) (**Attachment 2**). These cases adopt the familiar tests in *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980) and *Garcia v. Department of Hous. & Cmty Dev.*, 480 Mass. 736, 747 (2018). Neither Court found that the plaintiff met its burden on any element. Both Courts, significantly, found that the unions had failed to demonstrate irreparable harm or that their position promoted the public interest.

A. The Unions Fail to Demonstrate a Likelihood of Success on the Merits

The Unions assert three claims: (1) for "breach of contract and/or motion to compel arbitration, G.L. c. 150C;" (2) for declaratory relief; and (3) for an injunction in aid of arbitration or administrative process. Verified Complaint at ¶¶ 60 – 64. The Unions seek to enjoin the City from implementing the December Policy requiring its employees, including the Unions' members, to be vaccinated against Covid-19 and to require that the Policy be bargained as part of their respective successor contracts, a process that, the Unions admit, will take years. Because the Unions are mistaken as to the requirement that the City is required to bargain its decision to require vaccination and that the ongoing bargaining of the impacts of that Policy must be delayed, the Unions fail to demonstrate a likelihood of success on the merits of its claims.[4]

[4] The relevant standard for meeting their burden of demonstrating a likelihood of success is to demonstrate that the Unions are likely to prevail in the Department of Labor Relations ("DLR"). The City concedes that, although the DLR has primary jurisdiction over the Unions' claims, this Court may adjudicate the Unions' motion for injunctive relief as a matter in aid of the administrative proceedings or in a subsequent arbitration. This position is consistent with the holding in *State Police Ass'n of Mass. at * 3 – 4* (rejecting the Commonwealth's argument that the Court should abstain from issuing injunctive relief on theories of primary jurisdiction and exhaustion of remedies.)

1. The City's Decision to Adopt a Revised COVID Policy is not a Breach of any Prior Agreement

The Unions allege that certain underlying agreements (hereinafter referred to as memoranda of agreement or "MOAs") regarding testing and vaccination were breached by the City's December Policy. The two Unions that entered into MOAs will not succeed on their breach of contract claims. In public sector labor law, M.G.L. c. 150E contains a basic concept that public employers possess general management authority to not bargain over a decision affecting the employment relationship in instances where a negotiation requirement would unduly impinge on a public employer's freedom to perform its public functions. *Dracut v. Dracut Firefighters Union, IAFF Local 2586, 97* Mass. APP. Ct. 374 (2020). In short, the City 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.

Although, G.L. c. 150E supports the concept that the "underlying" MOAs do not preclude a revised or new policy, the text of the two MOAs themselves contain express language allowing for the modification of the MOAs.[5] BPDBS never arrived at a testing and vaccination MOA; therefore, a breach is impossible as to that union. Local 718 arrived at a testing and vaccination MOA (after the implementation date), which specifically notes "Review: The City intends to periodically review the Policy and shall fulfill any impact bargaining obligations associated with any proposed substantive changes." Verified Complaint Attachment 3 ¶7. The Federation arrived at a testing and vaccination MOA that carries a "no practice or precedent" clause noting, "the parties agree that this Agreement shall not be used to demonstrate a practice

[5] No Union is arguing a breach of their collective bargaining agreement.

or create a precedent for any other matter."[6] Verified Complaint Attachment 4 ¶4. Even without the express language in the Local 718 and Federation MOAs, the City could not reasonably be bound to a testing and vaccine MOA for an infinite duration. Rather, the City is entitled to review and change its policy subject to the obligation of notice and impact bargaining. There is no language in any agreement granting public safety employees the express right to work while unvaccinated.

Only two provisions of the Federation's MOA were materially changed by the December Policy. *See* Union's Brief at 5-6. One concerns "In-station Testing", which the Unions do not press as a breach. The second relates to vaccine verification or required testing. The December Policy modifies the language to omit the option of weekly testing. There is no language in the MOA prohibiting the City from revising its policy or committing to a period in which employees may work while unvaccinated. In the context of the MOAs, the Unions' "acceptance" of the initial policy in no way precludes revision. Had the public health circumstances of the pandemic dramatically improved such that the initial testing requirement was no longer needed for unvaccinated employees, the MOA with the Unions would not preclude the City from revising its policy accordingly, just as it does not preclude the revision the City made in response to and in anticipation of adverse changes to the public health emergency.

There is also no question that there was a fundamental change in circumstances – or exigent circumstances – that the City needed to address without further delay. In August 2021, the City addressed the then-current Covid-19 crisis by adopting a vaccinate-or-test policy. As set forth at length below, by early December 2021, that policy was outdated, based on forecasts of

[6] The MOA with Local 718 contains the "no precedent" language as well.

the effect of the Omicron variant that proved chillingly accurate. Just as it had in August, the City issued a policy with a future implementation date and invited the Unions to bargain.[7]

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.

Whether it was required to do so, the City negotiated the impacts of its August Policy Pust. Aff. ¶7-9. All three Unions engaged in bargaining concerning the impacts of the August Policy well after the August Policy was implemented. Only two of the three Unions entered into MOAs with the City, both after it was implemented. None of the Unions insisted that the August Policy was subject to decisional bargaining, or asserted that the impacts were required to be bargained to resolution or impasse prior to implementation generally or as part of successor bargaining, or filed a Charge of Prohibited Practice with the DLR or sought injunctive relief.[8] Moreover, both MOAs state that they are without effect as binding "practice or precedent."

Similar to the August Policy, the City commenced the process of bargaining the impacts of the December Policy. Pust. Aff. ¶14-16. The City proposed dates to and began impact bargaining with the Unions (as well as the remainder of City bargaining units). Pust. Aff. ¶18.

The Unions devote a short section of their brief to arguing that vaccinations should be subject to *decisional* bargaining (in addition to *impact* bargaining); however, vaccines are not

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[7] An alternate analysis of this issue reaches the same conclusion. The December Policy, although documented as a "revision" to the August Policy, stands alone as a separate management decision responding to a new set of circumstances – in effect, a new decision. The August Policy required "vaccinate or test", and the parties' MOA bargained the impacts of that policy. The December Policy is "vaccinate", period. Since the first decision (testing or vaccination) involved general management authority, so did the second (vaccination) based on the perception (subsequently confirmed) that an unprecedented surge was about to occur and that the option of testing no longer would provide sufficient protection to the City in meeting its responsibility to provide emergency services and protect the public. The City is now bargaining the impacts of a different and independent decision, with no distinction from the impact bargaining in which the Unions acquiesced previously. Accordingly, the Unions are not likely to prevail on their breach of contract claim.

[8] The MOA executed by the Local 718 expressly concedes the City's authority to "periodically review" the policy and agrees that any "proposed substantive changes" are subject only to impact bargaining. Verified Complaint Attachment 3 ¶7.

subject to *decisional* bargaining. The Commonwealth Employment Relations Board has exempted certain types of managerial decisions that must, as a matter of policy, be reserved to the public employer's discretion. *City of Worcester v. Labor Relations Commission*, 438 Mass. 177, 180 (2002). The Unions cite a recent DLR Hearing Officer decision concluding that the vaccination requirement (two doses of Moderna or Pfizer vaccines or a single dose of the Johnson & Johnson vaccine by October 17, 2021) was a function of general management authority and there was no probable cause to believe that there was a violation of the M.G.L. c. 150E when the employer failed to bargain over the decision to require a vaccine, as a negotiation requirement would unduly impinge on a public employer's freedom to perform its public functions. Therefore, M.G.L . c. 150E, Section 6 does not mandate bargaining over a decision affecting the employment relationship. See *Commonwealth of Mass./Admin and Fin. and MCOFU*, SUP-21-8824 (November 3, 2021) (Attachment 1 to Unions' Brief at 6) *citing Local 346, Int'l Brotherhood of Police Officers v. Labor Rels Comm'n*, 391 Mass. 429, 437 (1984).

Regarding *impact* bargaining, the Unions take the position that they may delay bargaining the impacts of the December Policy by electing to defer that bargaining to the bargaining of successor contracts. They argue that the City must, and cannot, demonstrate that the policy is based on "exigent circumstances" that would deprive them of a supposed right to defer. However, even without exigent circumstances, the doctrine the Unions seek to invoke does not apply. Even if it did, there is overwhelming evidence of exigent circumstances which would authorize impact bargaining without the artificial delay the Unions seek.

a. The Unions Cannot Indefinitely Delay the Bargaining of the Impacts of the December Policy by "Electing" to Defer that Bargaining to Successor Contract Negotiations

The Unions' argument that the City is required to engage in the impact bargaining that the City has already initiated embeds a Trojan horse. The Unions take the position that, if impact bargaining is required, they may "elect" to delay that bargaining indefinitely. Unions' Brief at 12. They argue that because their respective collective bargaining agreements are presently expired, each "has the right to insist that the vaccine mandate not [ ] be implemented until the parties have reached impasse or resolution on the impacts within the contacts of ongoing or anticipated successor contract negotiations." Unions' Brief at 12. They therefore assert, without citation, that negotiation of the impacts of the December Policy be wrapped into successor negotiations (also called "main table" negotiations) along with every other issue that may become part of the negotiation of their next collective bargaining agreements with the City. *Id.* Elsewhere in their brief, the Unions blatantly admit that, if the City must bargain this question in the multiple successor negotiations, the process would take "many months or years." Unions' Brief at 4. This tactic clearly is at the core of the Unions' strategy, because their motion for injunctive relief requests an injunction prohibiting enforcement of the December Policy "unless and until there is a final declaration of rights and resolution of claims under negotiated Memoranda of Agreement and Chapter 150E of Massachusetts General Law." Unions' Motion at 1 – 2 [sic]. In short, the Unions want a delay of enforcement that will extend well beyond the current public health crisis, whatever its outcome and regardless of the intervening consequences.

The law will not countenance this cynical attempt to impose delay onto the City's vaccine mandate. The Unions' argument that the City's impact bargaining obligation, if any, must be swallowed by main table negotiations for successor agreements contravenes Massachusetts law,

at least where, as here, the subject matter is *not* addressed in the relevant collective bargaining agreements.

Massachusetts law specifies that where an employer acts pursuant to non-delegable managerial authority, it may still have an obligation to bargain the impacts of its decision if that decision affects "terms and conditions of employment." The scope of its impact bargaining obligation, however, is limited and narrow. *See City of Lynn v. Labor Relations Commission*, 43 Mass. App. Ct. 172, 179-80 & n.12 (1997) – an employer may be required to bargain the "ancillary matter[]" of the decision's impact, covering the "ways" in which the decision is implemented (citations omitted); *City of Worcester v. Labor Relations Commission.* 438 Mass. 177, 185 (2002) – only the *means and method* by which the decision will be implemented must be bargained. The scope of "main table" successor bargaining is far broader - the parties "are free to explore one another's positions *over the entire range of mandatorily bargainable* subjects which particularly concern them.'" *Town of Brookline,* 20 MLC 1570, 1595 (1994) (emphasis added).

In their brief, the Unions appear to argue that they can delay the impact bargaining by unilaterally "electing" to have it deferred to main table bargaining. Unions' Brief at 10. The City is aware of only one case which has required that impact bargaining occur at the main table. In *City of Boston*, 31 MLC 25 (2004) the parties' agreement contained a comprehensive provision covering the assignment of paid police details and the applicable procedure. *Id.* at 26-27. Subsequently, the City decided to alter this system, and, after the union rejected the offer of separate impact bargaining, the City put the new system in place. While the then-Labor Relations Commission agreed with the City that this *decision* fell within its non-delegable managerial authority and that its obligation was limited to bargaining the impacts, *Id.* at 31, it held that

where the parties' contract expressly covered the subject during the life of the agreement it had to be negotiated in connection with successor bargaining. *Id.* at 32. Even then, however, the Commission properly limited the City's obligation, ordering it to bargain only "the means and method of implementing" its decision. *Id.* at 33.

The present case is different from *City of Boston* because the subject matter is *not* addressed in the contracts. While *City of Boston* opined in *dicta* that absent a provision in the contract the impact bargaining still should occur at the "main table", *Id.* At 32-33, that dicta should not determine the result here. Otherwise, the carefully-crafted distinction between the scope of decisional bargaining and that of impact bargaining which has been developed over many years would be eliminated. Simply put, if the subject matter has been determined as part of the "big bargain" at the main table, revising it there might make sense. If it has not, holding it hostage to the myriad of topics that require decision bargaining makes no sense. The City has found no decisions actually applying *Town of Brookline* to circumstances like those here and things should be left that way. *City of Boston* cannot be used as a contrivance to obliterate the limited scope of any required impact bargaining and it should not be used as an artifice to delay *ad infinitum* the enforcement of a core decision by the City that is essential to the public safety.

b. The Record Demonstrates Overwhelming Evidence That "Exigent Circumstances" Exist for the December Policy

Even if the impact bargaining were subject to the Unions' election to delay, the Unions concede that right would be ineffective if there were exigent circumstances which "may justify a unilateral change with minimal or no bargaining." Unions' Brief at 12. The Unions devote considerable attention to arguing that no exigent circumstances exist, citing facts that have been outstripped by the shockingly rapid spread of Covid-19, particularly through the Omicron variant. Unions' Brief at 12 – 15.

An employer may justify its insistence on bargaining *any* issue separately from ongoing successor negotiations in the presence of "exigent circumstances", i.e., where it is shown that: (1) there were circumstances beyond its control which required the imposition of a deadline for negotiations; (2) the deadline imposed was reasonable and necessary; and (3) the union was on notice that the change would be implemented on a certain date. *City of New Bedford* 38 MLC 239, 251 (2012); [9]

The current grim public health outlook meets all three elements of this test. The Unions concede the indisputable fact that there were circumstances beyond the City's control that justify the imposition of a deadline on the impact bargaining and that the deadline was reasonable and necessary. Unions' Brief at 12 – 13, nor could they contest those three elements. The facts have gotten well out in front of the Unions on this issue.

The Unions' argument as of the December 30, 2021, date of their brief, was that there was not sufficient movement in the published metrics tracked by the BPHC in early December 2021 to justify the December Policy. Unions' Brief at 13 – 15. The Unions' claim that the December 20, 2021, letter from Tammy Pust "cherry picked" data and failed to show that there were changes in that data that satisfy their conception of what would have been necessary to demonstrate exigent circumstances justifying – if necessary – expediting the bargaining of the impacts of the December Policy.

In fact, the City's decision to adopt the December Policy was based on substantially more evidence than reflected in the December 20 letter. As set forth above, the City was guided by the

[9] S*ee also Boston School Committee and Administrative Guild*, 4 MLC 1912, 1916 (1978) ("[w]here circumstances beyond the control of the employer *require immediate action, bargaining after the fact* may satisfy the bargaining obligation." [emphasis added]); *Town of Barnstable*, 26 MLC 67, 71 (1999); *Town of Plymouth*, 26 MLC 220, 223-24 (2000). The City submits that the "exigent circumstances" test should be applied even more flexibly for narrow impact bargaining than it is for decisional bargaining.

BPHC, which had projected that the trifecta of the flu season, the holidays and the realization of the transmissibility of the Omicron variant presaged the spike in cases, and its attendant effects on City employee, the public, the community's workforce and the health care infrastructure. See Facts and Supra and Ojikutu Aff.

If any circumstances are ever "beyond the control" of the City, certainly the continued, spiraling effects of the ongoing pandemic meet that test. Moreover, the City has clearly satisfied the other requirements of an "exigent circumstances" defense because it gave the Unions express notice of the January 15 deadline nearly four weeks in advance, on December 20, 2021, when it invited impact bargaining Pust Aff. ¶12.

Accordingly, even if the City were required to demonstrate "exigent circumstances" to mandate impact bargaining in this case, the Unions cannot demonstrate a likelihood of success on this (or on any other) issue upon which they rely. Therefore their request for injunctive relief should be denied.

B. The Unions Fail to Demonstrate Irreparable Harm

The Unions argue three categories of irreparable harm: (1) that unvaccinated members will be irreparably harmed by the permanency of becoming vaccinated; (2) that vaccinated union members will be irreparably harmed because "further reductions in an already strained workforce" will be exacerbated by the (unspecified) number of members who will presumably quit their jobs or be separated; and (3) that the Unions will themselves suffer "diminished bargaining power" if the December Policy is not enjoined. Unions' Brief at 16 – 19. Two of these theories have been soundly rejected by this Court and the third, concerning harm to vaccinated employees by the effects of attrition, lacks any record support.

Unvaccinated employees do not face irreparable harm. They are not forced to be vaccinated. Under the December Policy, they are subject to discipline including termination if they refuse to be vaccinated. That is not irreparable harm: "it is difficult to see how a policy that compels them to do what is manifestly in the interest of their health and society's harms them at all, much less irreparably. As the law is clear that, generally, discharge from employment does not constitute irreparable harm that must be weighed in considering an injunction, however the court need not resolve this broader question." *Local 589* at 14. Similarly, the Court in *State Police Ass'n* found that this asserted harm is, ultimately, economic. If an employee is subject to discipline for refusing to become vaccinated, and, if the City "is eventually found to have violated its bargaining obligations, discipline imposed under the policy can be rescinded and the employee made whole through an award of back pay, removal of discipline from a personnel file, and similar measures." *State Police Ass'n* at * 5 *citing, inter alia Southeast & Southwest Areas Health & Welfare & Pension Funds*, No. 21-CV-03840 (N.D.Ill., Aug. 3, 2021) (no irreparable harm where availability of relief through grievance arbitrations means that, if mandatory vaccine policy is found to have violated union's rights, there will be an adequate remedy for any harm caused by policy's implementation). *See also Local 589* at 13 -14 (members can bring actions for reinstatement and back pay can fully compensate an employee demonstrating wrongful dismissal) (citations omitted).[10]

The Unions' assertion that they, as labor organizations, will sustain irreparable harm is similarly unfounded. Had the Unions attempted to support this claim with evidence, it is hard to see how they could do so. For example, there is no difference between the manner in which the

[10] One of the Unions has acknowledged to this Court "that an economic loss alone does not satisfy the irreparable harm requirement." *Boston Firefighters Union IAFF Local 718 the City of Boston*, C.A. N. 20-00303 at 11. *See also Does 1-6 v. Mills,* 16 f.4th 20, 36 (1st Cir. 2021); *Together Emples v. Mass. Gen. Brigham, Inc.* 2021 U.S. Dist. LEXIS 217386 (November 10, 2021).

August Policy was bargained and that concerning the December Policy. In August, the Unions acquiesced in the implementation of the policy and engaged in impact bargaining over the ensuing months, with two of them entering into MOAs well after the policy was in place and another continuing into the new year. Here, the City has invited the Unions to bargain, and bargaining has commenced. *See* Pust Aff. ¶ 18. It is impossible to imagine that following the same path now "undermines the Unions' collective bargaining power and risks diminishing the Unions in the eyes of their members [and] leads to a dissipation of support for the Unions themselves." Unions' Brief at 16.

Further, the Unions predict that, if they were to prevail at the DLR, that would result in a remedy that is unduly delayed. Unions' Brief at 18 – 19. Strikingly, the Unions assert that the appropriate remedy instead is to defer the bargaining of the impacts of the December Policy, a policy driven by rapidly developing public health needs, to bargaining over successor agreements, a result that they predict would be "two or three years from now." *Id.*

This theory of irreparable harm to the Unions as institutions was rejected in both recent trial court decisions. In *State Police Ass'n,* the Court acknowledged the union's interest existed but found it was outweighed by considerations of public health. *Id.* at * 6. The Court in *Local 589* "was not persuaded" by this argument, noting that the absence of an injunction did not prevent the union from representing its members by pursuing a declaratory judgment and also finding that "any putative harm to the union's collective bargaining rights" is outweighed by risks to the public. *Id.* at 14 – 15.

The Unions' assertion that *vaccinated* employees are irreparably harmed by the December Policy is novel, speculative, and wholly unsupported by record evidence. The Unions give no evidence, or even an estimate of the number of unvaccinated members who would resign

or be terminated and what impact that would have on the workload of other members. The City offers, by contrast, data showing that vaccinated co-workers will: (1) reduce the chance of employees coming down with severe cases of Covid-19; (2) be less likely to infect vaccinated or unvaccinated colleagues; and (3) contribute to the overall resiliency of the workforce. Ojikutu Aff. ¶¶ 15-23; Pust Aff. ¶¶ 23 and 26. In each of these ways, the December Policy will have the opposite effect on the workforce compared to what the Unions argue.

Because the Unions fail to demonstrate that they or their members suffer irreparable harm from the December Policy, their motion to enjoin that policy should be denied.

C. The Unions Fail to Meet Their Burden of Demonstrating a Favorable Balance of Harms

The Unions' conception of the balance of harms omits any reference to considerations of public health. The Unions assert that they "seek only to maintain the status quo" in the face of unquestionably changed and significant public health concerns. The Unions admit that the status quo they seek to maintain is one that would require bargaining over a period of years before a vaccine mandate could be implemented. Unions' Brief at 18-19 In support of their contention, they rely on a trial court decision from Minnesota that adopts a theory rejected by two decisions of this Court.

Balancing the supposed harm to unions if they are unsuccessful in achieving a desired result against the very real considerations of public health and health in the workplace advanced by the City requires no balancing at all. The interests overwhelmingly favor the public health initiative. In *State Police Ass'n,* the Court characterized the balancing as: the interest of the Unions in bargaining on behalf of their members, even if likely to succeed, is

> outweighed by the Commonwealth's more significant interest in protecting the health and safety of its workforce (including the State Police), those who come into contact with its workforce, and

> the public in general. And, the Commonwealth has established that the best way to promote this interest is by vaccinating as many people as possible, as quickly as possible. As such, suspending the deadline for Union members to obtain full vaccination would be against the public interest which the defendants are charged with protecting, and cause more harm to the Commonwealth than is caused to the Union by the denial of such relief.

State Police Ass'n at * 6. Similarly, the *Local 589* decision finds that "any putative irreparable harm to the union's collective bargaining rights is far outweighed by the risk of irreparable harm to MBTA passengers and society" and adopts Judge Cowin's observation that "the [u]nion's contentions frame the public interest too narrowly by focusing on its [collective bargaining rights] … to the exclusion of everyone else." *Local 589* at 14 -15.

The public interest in safe interactions with its public safety and other necessary employees, and the public interest in maintaining the health of all of those employees – vaccinated and unvaccinated – both for their benefit and to maintain an effective workforce far outweigh a speculative diminishment of the Unions' good will among its members. Accordingly, the balance of harms clearly favors the City.

D. The Unions Fail to Meet Their Burden of Demonstrating that Enjoining the City's Revised Vaccination Favors the Public Interest

In an action to enjoin government action, "the court must also determine that the requested relief promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Garcia.*, 480 Mass. at 747. The City presents uncontroverted evidence – from witnesses charged with the promotion of public health - of a public interest grounded in combatting a global pandemic with severe and escalating local consequences. Moreover, the Unions concede that "[t]he coronavirus pandemic is real" and "represents, perhaps, the greatest public health threat to the United States in a century" and that the City "is currently experiencing a surge" which "necessitates an aggressive response lead by science and

public health professionals." Unions' Brief at 2. In light of that, all the Unions offer as an offsetting public interest is a public policy "favoring collective bargaining between public employers and employees." *Id.* at 22.

The City demonstrates a strong – overwhelming – interest in vaccination as necessary for public health, including, and perhaps especially, vaccination of City employees who interact with the public. The change from "vaccinate or test" to "vaccinate" is a response to the increase in Covid-19 transmission, particularly transmission due to the highly-infectious Omicron variant.

The City incorporates by reference the recitation of facts at pgs. 2-9 and the Affidavit of Bisola Ojikutu, M.D., M.P.H., the Executive Director of the BPHC which provide detailed record support for the public interest supporting the December Policy. Ojikutu Aff. ¶1 These provide, in summary, that individuals who are vaccinated are less likely to contract Covid-19 than those who are not and if they do, their viral load is significantly lower than that of infected but unvaccinated individuals. Vaccinated individuals who contract Covid-19 shed less virus and for a shorter duration of time, thus reducing the likelihood they will infect others and allowing them to return to work sooner. Vaccination reduces the risk of serious illness and therefore reduces the strain on the City workforce which provides critical services to City residents.

Public health officials concluded that by requiring vaccinations of all City employees, the City reduces the likelihood that there will be "clusters" and/or workplace spread of Covid-19 as well as the likelihood of spread of Covid-19 from City employees to the populations it serves. Those requiring public services, in particular those provided by the employees plaintiffs represent, do not have an option in most instances regarding whether to seek such services and/or to interact with these City employees. These services often require these City employees to enter the homes of citizens or have extremely close contact with citizens, including vulnerable

populations such as the elderly, children who cannot be vaccinated, and or citizens who have compromised immune systems. Ojikutu Aff ¶22

Vaccination prevents further burden of the health care system. The City has an obligation to ensure these resources are available to the public, which requires that the City protect them. It is the unrebutted and compelling position of the City, relying on the BPHC that 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. Ojikutu Aff. ¶11.

This record supports a finding that that the public interest favors the City. This Court has found that "the public interest is, unquestionably, best served by stopping the spread of the virus, in order to protect people from becoming ill, ensure adequate supply of medical services, and curtail the emergence of new, deadlier variants of the virus. Scientific data gathered by the CDC establishes that Covid-19 spreads more easily through unvaccinated persons than vaccinated; that the unvaccinated are 10 times more likely to be hospitalized or die if they become infected; and that vaccination is the most effective means of stopping the virus from spreading." *State Police Ass'n at* ** 10 – 11. The Unions' interest is outweighed by the "more significant interest in protecting the health and safety of its workforce . . . those who come into contact with its workforce, and the public in general." *Id.* Here, the City has established that the best way to promote this interest is by vaccinating as many people as possible, as quickly as possible. As such, suspending the deadline for Union members to obtain full vaccination would be against the public interest which the defendants are charged with protecting. *Id. see also Local 589* at 5 – 6.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Injunctive Relief should be denied.

MICHELLE WU AND CITY OF BOSTON
By their attorneys,

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Dated: January 10, 2022

CERTIFICATE OF SERVICE

I, Robert D. Hillman, certify that I understand that counsel of record will receive electronic notice of the electronic filing of this pleading.

Robert D. Hillman

ATTACHMENT 1

No *Shepard's* Signal™
As of: January 7, 2022 3:46 PM Z

State Police Ass'n v. Commonwealth

Superior Court of Massachusetts, At Suffolk

September 23, 2021, Decided

Opinion No.:147345, Docket Number: 2184-CV-02117

Reporter

2021 Mass. Super. LEXIS 478 *; 2021 WL 5630383

State Police Association of Massachusetts v. Commonwealth of Massachusetts et al.

Case Summary

Overview

HOLDINGS: [1]-The police union's motion for a preliminary injunction to enjoin implementation of Executive Order 595, requiring that all Massachusetts Executive branch employees be fully vaccinated by October 17, 202 was denied because in did not identify any irreparable harm its members might suffer if the vaccine policy was not suspended. The harms were economic harms which could be remedied through the administrative process; [2]-The union did not establish that the balance of harms or the public interest favored issuance of the injunctive relief because, while the union had a significant interest in effecting its right to bargain the terms and conditions of its members' employment, that interest was outweighed by the Commonwealth's more significant interest in protecting the health and safety of its workforce, those who come into contact with its workforce, and the public in general.

Outcome

Motion for preliminary injunction denied.

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Grounds for Injunctions

Evidence > Burdens of Proof > Allocation

HN1[] **Injunctions, Grounds for Injunctions**

In order to obtain an injunction, a plaintiff has the burden of showing that: (1) it is likely to succeed on the merits of its claim in the Complaint; (2) it will suffer irreparable harm if injunctive relief is denied; and (3) the harm to the plaintiff if the injunction is denied outweighs the harm to the Commonwealth if the injunction is granted. When the plaintiff is seeking to enjoin government action, it must also show that the requested relief promotes the public interest, or, at least, does not adversely affect the public.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Governments > Local Governments > Employees & Officials

HN2[⬇] **Injunctions, Preliminary & Temporary Injunctions**

Regarding a preliminary injunction, absent extraordinary circumstances, discharge of employment will not support a finding of irreparable injury, however severely it may affect a particular individual.

Judges: [*1] Jackie Cowin, Associate Justice, Superior Court.

Opinion by: Jackie Cowin

Opinion

Memorandum and Order on Plaintiff's Motion for Preliminary Injunction

The plaintiff State Police Association of Massachusetts (hereafter, the "Union") seeks to enjoin implementation of Executive Order 595 (the "Order"), requiring that all Massachusetts Executive branch employees be fully vaccinated by October 17, 2021, until the defendants engage in collective bargaining with the Union over the impacts of the Order—or, more precisely, the impacts of the policy issued pursuant to the Order.

After hearing, and careful consideration of the parties' written submissions and oral arguments, the Court orders that the Motion be DENIED.

FACTS

Plaintiff is the exclusive bargaining unit for the approximately 1,800 members of the Department of State Police ("Department") holding the rank of Trooper, Trooper First Class, and Sergeant. Defendant Commonwealth of Massachusetts, acting through the Secretary of the Executive Office of Administration and Finance, is the Union members' employer, and defendant Human Resources Division ("HRD") is the state agency charged with, among other things, representing the Commonwealth in collective bargaining matters with the [*2] Union (collectively, the "Commonwealth" or the "defendants").[1]

On August 19, 2021, Governor Baker issued the Order, which mandates that HRD establish a policy requiring that all employees of the Commonwealth's Executive branch prove that they have received full COVID-19 vaccination by October 17, 2021, and that they are maintaining full vaccination going forward. The Order also requires that the policy provide for progressive discipline, up to and including termination, for failure to comply with the vaccine mandate, or for lying about one's vaccination status. The policy is to allow for "limited" exemptions from the vaccine requirement for medical or religious reasons.

The day the Order was issued, the Union issued a demand to bargain the impacts of the Order to the Commonwealth's chief negotiator, John Langan ("Langan"). On August 23, 2021, Langan sent Union counsel a copy of the policy HRD had drafted, but not yet finalized, to implement the Order. On August 30, 2021, Langan and members of the Union met and discussed the Union's requested changes to the policy, after which the Union sent Langan its own proposed policy.

The Union's policy tracked much of HRD's draft policy but included [*3] the following significant changes: Union members would be allowed to engage in weekly testing, to be conducted while on-duty at a department facility, and mask-wearing as an alternative to vaccination; October 17, 2021 would be the date for starting, rather than completing, the vaccination

[1] The Department and State Police Colonel Christopher Mason are also named defendants.

process; and any COVID-related illness suffered by a Union member would be deemed a line-of-duty injury, entitling the member to benefits under G.L.c. 41, §111F.

On Sept. 10, 2021, three days before the Union was scheduled to meet again with Langan, HRD sent an email to all Executive branch employees, explaining how to verify that they had received the vaccine, and how to seek a medical or religious exemption. The email also informed employees of the dates by which they would have to get the first shot of the Moderna (Sept. 19) or Pfizer (Sept. 26) vaccine in order to comply with the new policy, and also noted employees could get the one-shot Johnson & Johnson vaccine any date up to and including Oct. 17.

In response to the Sept. 10 email, Union counsel wrote to Langan, expressing concern that the vaccination policy would go into effect without bargaining. Langan responded that the Commonwealth intended to comply [*4] with its bargaining obligation, but that many of the terms included in the Union's proposed policy were "directly at odds" with the purpose of the Order.

At the Sept. 13 meeting, Langan proposed some concessions, including paid time off to receive the vaccine, and paid leave for vaccinated employees who are forced to quarantine due to COVID-19 exposure. Langan also stated that the October 17 deadline for obtaining full vaccination would not be changed.

On September 16, 2021, the Union filed a Charge of Prohibited Practice with the Division of Labor Relations ("DLR"), the agency charged with enforcing the public employee collective bargaining law, G.L.c. 150E. DLR docketed the charge on September 20 and is in the process of scheduling a mediation between the parties, as well as an investigative conference.

On September 17, 2021, the Union filed the instant Complaint, which seeks: (1) a declaration that defendants have violated their obligations under G.L.c. 150E, §10, by failing to bargain over the impacts of the vaccination policy; and (2) an injunction, enjoining enforcement of the October 17, 2021 deadline for full vaccination until either the parties negotiate to resolution or impasse, or DLR proceedings are [*5] concluded.

Meanwhile, Langan and Union counsel continue to communicate and another meeting between the parties is planned for Sept. 28.

DISCUSSION

Commonwealth's Jurisdictional Argument

The Commonwealth argues, first, that the Court should refrain from issuing injunctive relief pursuant to the related doctrines of primary jurisdiction and exhaustion. Citing *Mass. Corr. Officers Federated Union v. County of Bristol*, 64 Mass.App.Ct. 461, 462, 833 N.E.2d 1182 (2005), the Commonwealth argues that judicial action at this stage of the proceedings would interfere with DLR's exclusive authority to decide the Union's complaint of an unfair labor practice.

While agreeing that the merits of the Union's claim that the Commonwealth has violated its bargaining obligations must be decided by DLR in the first instance, the Court is not convinced that, if the Union were to meet the criteria for injunctive relief, the Court must abstain from issuing such relief. Enjoining an employer from enforcing a policy while the DLR investigates whether the employer violated its bargaining obligations might impact the employer's management practices; it would not interfere with the agency's statutory prerogative to decide the matter in the first instance. Nor, by issuing injunctive relief, would the Court be substituting [*6] its judgment for that of DLR, since the injunction would merely serve to prevent irreparable harm to the Union should it eventually prevail at DLR. Indeed, the Commonwealth acknowledges there are

cases in which injunctive relief may be appropriate even while DLR proceedings are ongoing (although it argues this is not one of those cases).

Accordingly, the Court proceeds to address whether the Union has met the criteria for obtaining a preliminary injunction.

2. Criteria for Obtaining a Preliminary Injunction

HN1[↑] In order to obtain an injunction, the Union has the burden of showing that: (1) it is likely to succeed on the merits of its claim in the Complaint; (2) it will suffer irreparable harm if injunctive relief is denied; and (3) the harm to the Union if the injunction is denied outweighs the harm to the Commonwealth if the injunction is granted. *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617, 405 N.E.2d 106 (1980). Because the Union is seeking to enjoin government action, it must also show that the requested relief promotes the public interest, or, at least, does not adversely affect the public. *Garcia v. Department of Hous. & Cmty. Dev.*, 480 Mass. 736, 747, 108 N.E.3d 945 (2018).

3. Likelihood of Success on the Merits

The Union contends that there "can be no question" that DLR—which, as noted, has primary jurisdiction to decide the issue [*7] presented in the Union's claim for declaratory relief—will decide that the vaccine policy is subject to mandatory impact bargaining, and that the Commonwealth's imposition of the October 17, 2021 deadline for full vaccination, without having completed negotiations, violates the statutory duty to bargain in good faith.[2] See G.L.c. 150E, §10(a)(5). The Union notes that DLR has docketed its Charge as a "significant impact" case.

Without conceding that the policy is subject to impact bargaining, the Commonwealth argues that the Union is unlikely to succeed on the merits of its claim because the Commonwealth did bargain in good faith, and it was the Union that prematurely stopped negotiations by filing the charge at DLR. The Commonwealth argues that imposition of a deadline for vaccination cannot be parsed from the non-negotiable decision to issue the vaccination policy itself, and therefore the deadline is not a term that must be negotiated. *Local 346, Int'l. Bhd. of Police Officers v. Labor Relations Commn.*, 391 Mass. 429, 437 n.16, 462 N.E.2d 96 (1984) (when there is only one means of implementing a decision within the employer's managerial prerogative, bargaining over means is not required). The Commonwealth argues, further, that it can still fulfill its obligation to bargain over other terms of the policy by continuing [*8] negotiations after the policy takes effect. *Sec'y of Admin. & Fin. v. Commonwealth Empl. Rels. Bd.*, 74 Mass.App.Ct. 91, 98, 904 N.E.2d 468 (2009) (Commonwealth could have "implemented the [policy], and continued post-implementation bargaining without running afoul of its obligations under G.L.c. 150E").

The Court need not determine how likely the Union is to prevail on its underlying claim, because the Court finds the Union has not satisfied the remaining criteria for injunctive relief.

4. Irreparable Harm

The Union identifies two measures of irreparable harm its members will suffer if the October 17 deadline for full

[2] The Union does not contest that the Order itself, which calls for issuance of a mandatory vaccination policy, is subject to mandatory bargaining. *Worcester v. Labor Relations Comm'n.*, 438 Mass. 177, 180, 185, 779 N.E.2d 630 (2002) (certain types of "core managerial decisions" are exempt from mandatory bargaining, but implementation of exempt decisions may be the subject of mandatory impact bargaining if the decision affects "wages, hours, standards . . . [or] any other terms and conditions of employment").

vaccination is not suspended until either negotiations or DLR proceedings are completed. First, members who opt to comply with the mandate will lose the ability to choose which vaccine they receive, as it is too late to be fully vaccinated with the Moderna vaccine by October 17 (because of the time required between shots), and there are only days remaining in which one could timely get the first Pfizer shot. Second, the Union argues that it will be deprived of its statutory right to meaningfully bargain at least some of the terms of the policy (such as, e.g., the deadline for compliance).

The Court agrees with the Commonwealth's contention that these harms are, at bottom, economic [*9] harms which can be remedied through the administrative process, and therefore do not comprise irreparable harm warranting injunctive relief. *Cheney*, 380 Mass. at 621 (no irreparable harm when money damages will adequately redress any harm a plaintiff might suffer prior to a final judgment, should it prevail on the merits of its claim).

Specifically, an employee who wishes to receive the Pfizer or Moderna vaccine but has missed the deadline for the first shot can, in fact, still do so. Similarly, an employee who objects to any term of the policy which the Union contends it has the statutory right to negotiate, has the option of refusing vaccination altogether until negotiations are completed.

Of course, either of these actions may subject the employee to discipline, up to and including termination, under the policy. However, if the Commonwealth is eventually found to have violated its bargaining obligations, discipline imposed under the policy can be rescinded and the employee made whole through an award of back pay, removal of discipline from a personnel file, and similar measures. *Sampson v. Murray*, 415 U.S. 61, 92 n.68, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974) (*HN2*[↑] absent extraordinary circumstances, discharge of employment "will not support a finding of irreparable injury, however severely [*10] [it] may affect a particular individual"); *International Brotherhood of Teamsters, Local 743 v. Central States, Southeast & Southwest Areas Health & Welfare & Pension Funds*, No. 21-CV-03840 (N.D.Ill., Aug. 3, 2021) (no irreparable harm where availability of relief through grievance arbitrations means that, if mandatory vaccine policy is found to have violated union's rights, there will be an adequate remedy for any harm caused by policy's implementation).

Accordingly, the Union has not identified any irreparable harm its members may suffer if the vaccine policy is not suspended, and injunctive relief is unwarranted for this reason alone.

5. Balancing of Harms/Public Interest

The Union argues that an injunction would not adversely affect the public interest, because there is no evidence unvaccinated troopers in this state have suffered a higher incidence of COVID-19 than vaccinated troopers, or that lack of vaccination has impacted the Department's ability to perform its duties.[3] The Union goes on to argue that injunctive relief will actually serve the public interest by effecting its statutory right to impact bargaining. Accepting the Union's assertion about the incidence of COVID-19 among its unvaccinated members (no evidence of this assertion was proffered), the Union's contentions frame the public interest too narrowly, by focusing on its members to [*11] the exclusion of everyone else.

Specifically, the public interest is, unquestionably, best-served by stopping the spread of the virus, in order to protect people from becoming ill, ensure adequate supply of medical services, and curtail the emergence of

[3] The Union reported that 80% of its members are vaccinated.

new, deadlier variants of the virus. Scientific data gathered by the Centers for Disease Control (CDC) establishes that COVID-19 spreads more easily through unvaccinated persons than vaccinated; that the unvaccinated are 10 times more likely to be hospitalized or die if they become infected; and that vaccination is the most effective means of stopping the virus from spreading.[4]

Therefore, while the Union has a significant interest in effecting its right to bargain the terms and conditions of its members' employment (and assuming, without deciding, that the Commonwealth has impinged upon that right), the Court concludes that this interest is outweighed by the Commonwealth's more significant interest in protecting the health and safety of its workforce (including the State Police), those who come into contact with its workforce, and the public in general. And, the Commonwealth has established that the best way to promote this interest [*12] is by vaccinating as many people as possible, as quickly as possible. As such, suspending the deadline for Union members to obtain full vaccination would be against the public interest which the defendants are charged with protecting, and cause more harm to the Commonwealth than is caused to the Union by the denial of such relief.

The Union also argues that the Commonwealth's professed need to act quickly on the mandate is belied by the fact that it did not impose a mandate for several months after the vaccine became available. This contention ignores certain realities that have developed only recently, and which increase the urgency of achieving widespread vaccination: the advancement of the Delta variant; the approach of winter (when the virus is believed to spread more rapidly); and, perhaps, unexpected resistance to vaccination.

Accordingly, the Union has not established that the balance of harms or the public interest favor issuance of the relief it seeks.

ORDER

WHEREFORE, it is hereby ORDERED that the plaintiff's Motion for Preliminary Injunction be DENIED.

Jackie Cowin

Associate Justice, Superior Court

Date: September 23, 2021,

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[4] See https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html (visited Sept. 23, 2021); see *also* https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html#:—:text=%E2%80%A2%20Fully%20vaccinated%20people%20with,the%20virus%20to%20others (visited Sept. 23, 2021).

ATTACHMENT 2

4

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.: 2184CV02779

LOCAL 589, AMALGAMATED TRANSIT UNION,

PLAINTIFF,

vs.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

DEFENDANT

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

On October 20, 2021, the defendant, the Massachusetts Bay Transportation Authority ("MBTA") issued a "COVID-19 Vaccination Policy" ("the policy"), requiring its employees to be vaccinated against the COVID-19 coronavirus. Under the policy, employees who are not vaccinated and have not secured a medical or religious exemption can be discharged. On November 24, 2021, the plaintiff, Local 589 of the Amalgamated Transit Union ("the union"), which represents MBTA workers, filed this Verified Complaint, which seeks declaratory and injunctive relief. The union seeks an injunction prohibiting the MBTA from enforcing the vaccination policy and ordering the parties to arbitration to resolve their disagreement over its provisions. Because the union has not demonstrated that it is likely to prevail on the merits of the case or that the balance of irremediable harms favors the issuance of an injunction, the Motion for Preliminary Injunction is **DENIED**.

12/23/2021
Parties notified
by email
BSS

FACTS & PROCEDURAL HISTORY

On August 19, 2021, Governor Charlie Baker issued "Executive Order 595: Implementing a Requirement for COVID-19 Vaccination for the Commonwealth's Executive Department Employees" ("Executive Order 595"). In Executive Order 595, Governor Baker called on "[i]ndependent agencies and authorities, public institutions of higher learning, elected officials, other constitutional offices, the Legislature, and the Judiciary . . . to adopt policies consistent with this Executive Order." Executive Order 595 at p. 3, § 3. Between August 19 and October 19, 2021, the parties engaged in discussions, of varying degrees of formality, about the MBTA's intention to implement a vaccination policy for its employees. See Barnes Aff.[1] at pp. 2-4, § 3. The union made several proposals; the MBTA agreed to some and rejected others. See *id.* at pp. 2-3, § c. The parties did not reach an agreement, and on October 20, 2021, the MBTA announced the policy at issue in this case. See MBTA Policy/Procedure No. 7.23, "COVID-19 Vaccination Policy," appended to the Verified Complaint as "Attachment B."

The policy requires employees to be fully vaccinated immediately,[2,3] if they have not

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[1] References to the Affidavit of Ahmad Barnes Filed in Support of the Massachusetts Bay Transportation Authority's Opposition to Plaintiff's Motion for a Preliminary Injunction are denoted by the abbreviation, "Barnes Aff.," followed by page and paragraph citations. References to the policy are denoted by the word, "Policy," followed by page and section citations. References to the Collective Bargaining Agreement ("CBA") are denoted by the abbreviation, "CBA," followed by page and section citations. References to Impartial Umpire Sheila Mayberry's "Denial of Union's Motion for Preliminary Relief Re: Vaccination Policy" ("Denial"), which is Attachment 8 to the Barnes Affidavit, are denoted by the word, "Denial," followed by a page citation.

[2] The policy, which was issued on October 20, 2021, requires all employees to be fully vaccinated "[a]s of October 18, 2021." Because the policy permitted employees time to come into compliance, see text *infra*, its issuance two days *after* the deadline for compliance, although curious, does not appear to work any significant hardship.

received "approved medical or religious exemption[s]." Policy at p. 2, § III, B. The policy defines full vaccination. See *id.* It also requires that employees maintain their vaccination by receiving booster shots as recommended by the federal Centers for Disease Control's Advisory Council on Immunization Practices. See id. at p. 3, § IV. The policy also provides that employees are in "[p]artial compliance" if they have: (1) received the first shot of the Pfizer or Moderna vaccines; (2) scheduled an appointment to receive the Johnson & Johnson vaccines; or (3) have an application pending for a medical or religious exemption. *Id.* at p. 2, § III, C. The policy requires that employees submit proof of compliance – or partial compliance. The policy sets out a schedule of phased disciplinary actions that the MBTA can take if an employee is non-compliant.[4] The disciplinary steps culminate in administrative separation from the MBTA. See *id.* at p. 5, § VII. The disciplinary process is paused automatically if the non-compliant employee comes into partial compliance, and it ends – with associated documents removed from the employee's record – if the employee becomes fully compliant before administrative separation. See *id.*

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[3] In its pleadings and at the hearing, the union submitted that ninety-four percent of the MBTA's operating staff is vaccinated. It is not entirely clear to the court whether this also represents the percentage of union members that are vaccinated. Nothing, however, turns on this distinction, if, in fact, it is one.

[4] According to the policy, a non-compliant employee initially is issued a "First Notice of Non-Compliance." Policy at p. 4, § VII. This notice instructs the employee to come into compliance and instructs the employee to attend a "follow-up compliance interview . . . approximately four weeks from the date of the [first] notice." *Id.* After that interview, employees who continue not to comply will be issued a "Final Notice of Non-Compliance." *Id.* Employees issued that notice will be suspended for five days, referred to the Employee Assistance Program, and ordered to appear at a second "follow-up compliance interview . . . approximately three weeks from the date of the [final] notice." *Id.* An employee who remains non-compliant is then "[d]isqualified" from work and will not be paid, or accrue benefits. Sixty days after an employee's disqualification, the employee can be "[a]dministratively [s]eparated" from the

On October 29, 2021, the union sent a letter opposing the policy to MBTA General Manager Steve Poftak. Verified Complaint, Attachment C, p. 3. The letter was termed "a grievance." *Id.* The grievance expressed the union's dual objections that the policy could not be implemented unilaterally by the MBTA and that, in any event, even if the MBTA could implement a vaccination policy without bargaining, the policy promulgated was unreasonable. See *id.* The letter requested that the dispute be heard by the impartial umpire designated in the collective bargaining agreement, Sheila Mayberry. See *id.* The MBTA objected by letter dated November 1, 2021. See Barnes Aff., Attachment 5.

On November 3, 2021, the union filed a "Motion for Preliminary Relief" and supporting memorandum of law with Umpire Mayberry. *Id.*, Attachment 6. The Motion for Preliminary Relief sought an Order that, in relevant part, prohibited the MBTA from enforcing its vaccination policy and ordering it to participate in arbitration. See *id.* That day, the MBTA responded with a letter to the union. *Id.*, Attachment 7. The subject line of the letter was "Step 2 Grievance Answer re: COVID-19 Vaccine Policy." *Id.* The letter was a detailed response to the union's grievance of October 29, 2021. The heart of the letter was the MBTA's position that, because the "issuance of the Policy is within the scope of . . . [the MBTA's] inherent management rights, pursuant to M.G.L. c. 161A, § 25, and by statute is specifically excluded from collective bargaining," the dispute was not arbitrable. *Id.*

In response to the union's filing, the Umpire held a hearing with the parties over the telephone on November 5, 2021. Barnes Aff. at p. 7, ¶ 19. Six days later, she issued a "Denial of Union's Motion for Preliminary Relief Re: Vaccination Policy" ("Denial"). Barnes Aff. at

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MBTA. *Id.* at p. 5, § VII.

Attachment 8. Umpire Mayberry concluded that her authority under the Collective Bargaining Agreement ("CBA") between the parties did "not include preemptive action or extraordinary powers to enjoin a policy or the authority to order the Parties to negotiate terms of a policy prior to a hearing on the merits of alleged harm created by the policy." Denial, p. 6.

The union brought this civil action on December 6, 2021. As of the date of the hearing, according to the union, ninety-four percent of the MBTA's operating staff was vaccinated. See note 3, *supra*. The court held a hearing on December 20, 2021, and took the matter under advisement.

ANALYSIS

To establish an entitlement to injunctive relief, the union must establish that: (1) it is likely to succeed on the merits of its action; (2) it and/or its members would suffer irreparable harm without the injunction; and (3) the risk of such harm outweighs the risk of similarly irreparable harm to the MBTA. See *Doe* v. *Worcester Pub. Sch.*, 484 Mass. 598, 601 (2020), citing, *inter alia*, *Packaging Indus. Grp., Inc.* v. *Cheney* ("*Cheney*"), 380 Mass. 609, 616-617 (1980). Further, because the union seeks to enjoin government action, it must also demonstrate 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. and Cmty. Dev.*, 480 Mass. 736, 747 (2018), quoting *Loyal Order of Moose, Inc., Yarmouth Lodge # 2270* v. *Board of Health of Yarmouth*, 439 Mass. 597, 601 (2003). See also *Sampson* v. *Murray*, 415 U.S. 61, 83, (1974), quoting *Cafeteria & Restaurant Workers Union, Local 473, A.F.L.-C.I.O.* v. *McElroy*, 367 U.S. 886, 896 (1961) (noting "the well-established rule that the Government has traditionally

been granted the widest latitude in the 'dispatch of its own internal affairs'"). The union's submission does not make this showing.

"By definition, a preliminary injunction must be granted or denied after an abbreviated presentation of the facts and the law." *Cheney*, 380 Mass. at 616. "The preliminary determinations summarized below are 'based on the affidavits, attached exhibits, and motions furnished by the parties, as well as reasonable inferences from that evidence.'" *Ethicon Endo-Surgery, Inc.* v. *Pemberton*, 2010 WL 5071848, at *1 (Mass.Super. 2010) (Lauriat, J.), quoting *Fazio* v. *Bank of Am.*, 2010 WL 2432024, at *1 (Mass.Super. 2010) (Fremont-Smith, J.). The court also considers the parties' arguments at the hearing.

I. THE UNION'S LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIM

A. G.L. c. 161A

Unless the union can demonstrate that it is likely to succeed on the merits of its claim, it is not entitled to injunctive relief. Whether the union will succeed on its claims depends entirely on whether the MBTA's vaccination policy affects employees' "working conditions," which are subject to collective bargaining under G. L. c. 161A, § 25, or, instead, is an aspect of the MBTA directors' "inherent management right," which are not subject to collective bargaining under the statute. G. L. c. 161A, § 25. Although, unsurprisingly, there is no case directly on point, the statutory language and the holdings in analogous cases lead to the conclusion that the MBTA's vaccination policy falls under its directors' "inherent management right" and is therefore not subject to collective bargaining. *Id.*

The MBTA was created – and is governed – by G. L. c. 161A. Section 25 of the statute authorizes its directors "to bargain collectively with labor organizations representing employees

of the [MBTA] . . . and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, the assignment of work schedules and work locations on the basis of seniority . . . ." *Id.* The statute then sets out issues subject to collective bargaining. Section 25 further provides, however, "that the directors shall have no authority to bargain collectively *and shall have no authority to* enter into collective bargaining agreements with respect to matters of inherent management right . . . ." *Id.* (emphasis supplied). The statute then lays out the types of actions that constitute "management right[s]." *Id.* Among these are the rights: (1) "to direct, appoint, and employ officers, agents and employees *and to determine the standards therefor*," and (2) "to discharge or terminate employees . . ." subject to restrictions not relevant in this case. *Id.* at §§ i, ii (emphasis supplied).

In interpreting a statute, the court follows its language if it is "plain and unambiguous." *Emma* v. *Massachusetts Parole Bd.*, 488 Mass. 449, 453 (2021), quoting, *inter alia*, *Sharris* v. *Commonwealth*, 480 Mass. 586, 594 (2018). Section 25 of G. L. c. 161A authorizes the MBTA's directors to hire employees and, as part of that authority, permits them "to determine the standards" for employment. G.L. c. 161A, § 25. It also empowers the directors "to discharge or terminate employees . . . ." *Id.* at § 2. The MBTA's vaccination policy is a "standard" for employment, and its implementation can, in cases of ongoing non-compliance, result in "discharge." *Id.* at i, ii. It therefore involves "inherent management right[s]," which, by statute, cannot be the subject of collective bargaining. *Id.*

The union urges the court to conclude that the vaccine policy involves its members' "working conditions" and is therefore subject to collective bargaining. This argument fails for three reasons. First, by including standards for employment and the authority to discharge in the

definition of "matters of inherent management right," the statute expressly excludes them from the universe of matters subject to collective bargaining. *Id.* Second, the right to set conditions for employment and to discharge are different in kind from the matters that the statute lists as proper subjects of collective bargaining: "wages, salaries, hours, working conditions, the assignment of work schedules and work locations on the basis of seniority, including (a) hours of work each day and days worked each week . . . and (b) the filling of vacancies by promotion or transfer of qualified applicants on the basis of seniority, health benefits, pensions and retirement allowances . . . ." *Id.* Each of these issues affects the conditions under which employees work, rather than their qualification for employment and/or eligibility for continued employment. This further indicates that the policy at issue here is a matter of "inherent management right" rather than one pertaining to "working conditions."

Finally, the union directs the court's attention to no case in which a court has held that a policy like this one is subject to the collective bargaining requirements of G. L. c. 161A, § 25. The union's citations to *Newton* v. *Labor Relations Commission*, 388 Mass. 577, 572 (1983), and *Commonwealth of Massachusetts*, 27 MLC 1, 5 SUP-4304 (June 30, 2000), are unavailing. In both of those cases, the courts concluded that the issues in question were appropriate subjects for collective bargaining. This distinguishes them from this case, in which the policy is not. See *supra*. Moreover, both cases apply G. L. c. 150E, § 10(a)(5), which does not apply to the MBTA. See G. L. c. 150E, §1 (excluding from definition of "'employer' or 'public employer' . . . authorities created pursuant to chapter one hundred and sixty-one A"); G. L. c. 161A, § 25 ("The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees, shall not apply to the [MBTA] . . . nor to the employees

thereof, but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of its employees by the laws relating to street railway companies.").[5]

The most closely analogous case to this one cited by either of the parties is *Local 589, Amalgamated Transit Union* v. *Massachusetts Bay Transportation Authority* ("*Local 589*"), 1991 WL 11692423 (Mass. Super. 1991) (King, J.). In that case, a former justice of this court concluded that the MBTA's drug screening policy, which also could result in termination, "was within its inherent management rights and not subject to collective bargaining." *Local 589*, 1991 WL 11692423. The court notes, additionally, that another superior court justice recently reached a similar conclusion in a similar case. See *State Police Ass'n of Mass.* v. *Commonwealth*, ("State Police Assn.") 2184CV02117 (Mass. Super. 2021) (Cowin, J.) (rejecting plaintiff union's application for injunctive relief from vaccination requirement pending collective bargaining). Cf. also *Jamieson* v. *Charles D. Baker, Governor of the Commonwealth*, 2185CV0981 (Mass. Super. 2021) (Reardon, J.) (Governor's Executive Order 595 does not violate state employee's due process or equal protection rights). In this context, the court notes that, at the hearing, counsel for the union could draw the court's attention to no case in any jurisdiction in which a court has

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[5] The union's reliance on cases involving preliminary injunctions in aid of arbitration is equally unpersuasive. Both of the cases cited by the union – *Teachers Association of the Japanese Educational Institute of New York, Inc.* v. *Japanese Educational Institute of New York*, 724 F. Supp. 188 (S.D.N.Y. 1989) ("*Teachers Ass'n of the Japanese Educational Institute*") and *Local 1266, International Association of Machinists* v. *Panoramic Corp.*, 668 F. 2d 276 (7th Cir. 1981) – interpreted the federal Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, which is not applicable here. The Norris-LaGuardia act generally "prohibit[s] injunctions in peaceful labor disputes over arbitral issues." *Teachers Ass'n of the Japanese Educational Institute*, 724 F. Supp. at 191. The United States Supreme Court, however, "has allowed courts to consider the propriety of an injunction where necessary to preserve the arbitral process." *Id.*, citing *Boys Mkts., Inc.* v. *Retail Clerk's Union Local 770*, 398 U.S. 235 (1970). In both cases the union relies on, the court

enjoined enforcement of a COVID-19 vaccine mandate on the grounds that it required collective bargaining prior to adoption. Application of G. L. c. 161A, § 25, thus leads to the conclusion that the union is unlikely to succeed on the merits of its claim.

B. THE COLLECTIVE BARGAINING AGREEMENT ("CBA")

The union further argues that the MBTA's action in implementing the vaccine policy violates the parties' CBA. Section 100 of the CBA requires the parties to submit to arbitration "any difference [that] arise[s] between them which cannot be mutually adjusted." CBA at p. 9, § 100. Although this language is quite broad, it is limited by Section 102 of the CBA, which provides that the MBTA "will exercise the exclusive right to set its policy; to manage its business in the light of experience, good business judgment *and changing conditions*; to determine the amount of service to be run at any and all times; to direct the working forces; to determine the number of its employees at any time; to determine the qualifications for and to select its managerial forces and all new employees; *to make reasonable rules and regulations governing* the operations of its business *and the conduct of its employees*; *to enforce discipline for violations of rules and other misconduct*; *and to suspend or discharge its employees for cause*." *Id.* at p. 10, § 102 (emphasis supplied). Unsurprisingly, this language tracks closely the provisions of the MBTA's governing statute, G. L. c. 161A. See Section I, *supra*.

Apparently recognizing the limitation that Section 102 places on the broad arbitration provisions of Section 100, the union contends that Section 102 is inapplicable in this case because the MBTA's vaccine policy is unreasonable. The union argues that the policy is unreasonable because the MBTA has never required vaccination – or, indeed, even checked on

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concluded that the disputes in question were arbitrable, which is not true in this case.

vaccination status – except as part of the routine medical examinations that are part of the hiring process. The union further contends, somewhat oddly, that the MBTA did not implement a vaccine requirement during the first two years of the pandemic and has never implemented one in the face of other illnesses for which vaccines are available. None of these arguments is persuasive.

First, it is difficult to imagine how the MBTA could have implemented a vaccine mandate before vaccines were widely available. As this happened in the early part of 2021, it is illogical to suggest that the MBTA delayed for two years in implementing its vaccine policy. The parties do not dispute that the MBTA began discussing a vaccination policy with the union in August 2021. As this was only months after vaccines became widely available – and only a shorter time after their efficacy in combatting the virus was demonstrated – the union's argument on this point is perplexing, to say the least. So, too, is its comparison of the public health risks presented by other diseases for which vaccines are available. As the United States Court of Appeals for the Sixth Circuit recently observed, "[t]he COVID-19 pandemic has wreaked havoc across America, leading to the loss of over 800,000 lives, shutting down workplaces and jobs across the country, and threatening our economy." *In re: MCP No. 165, Occupational Safety and Health Admin. Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard 86 Fed. Reg. 61402, Nos. 21-7000, et al*, at 1 (6th Cir. December 17, 2021). With the possible exception of polio, none of the diseases cited by the union has had the impact on this country that COVID-19 has. Moreover, that the MBTA did not implement a vaccination requirement in the past in cases of public health emergencies in no way suggests that its policy in this case is unreasonable. Cf. *id.* at 19 ("Even if we assume that OSHA should have issued an

ETS earlier, moreover, 'to hold that because OSHA did not act previously it cannot do so now only compounds the consequences of the Agency's failure to act.'"), quoting *Asbestos Info. Ass'n*, 727 F. 2d 415, 422 (5th Cir. 1984).

The union further argues that the policy is unreasonable because it does not require MBTA passengers to be vaccinated. Putting aside the practical questions that such a measure would raise – both as to the MBTA's legal authority to implement it and its impact on operations – the argument does not suggest that the policy is unreasonable. That the MBTA *might* be able to go even further in protecting public health in no way suggests that taking steps that it clearly has the legal authority to take is unreasonable.

Finally, the union contends that the policy is unreasonable because the MBTA does not provide workers with the vaccine or permit them to be vaccinated during work hours. This argument requires little discussion. That there may be potential improvements to the existing policy does not indicate that it is unreasonable. Additionally, nothing in the record suggests that the MBTA is unwilling to discuss changes to its policy. Indeed, the record suggests the contrary.

II. THE BALANCE OF HARMS

That the union is unlikely to succeed on the merits of its claim arguably ends the inquiry. As the balance of harms also dictates the denial of injunctive relief, however, the court addresses it, as well. The union contends that the denial of an injunction will irreparably damage both its members and its collective bargaining rights. The MBTA responds that this is incorrect and, in any event, the scope and impact of the COVID-19 pandemic far outweighs either of those interests. Because the court concludes that neither the union nor its members will suffer irreparable harm, as that term is defined in the law, and that the health risk to both union

members and the public far outweighs any such irreparable harm, the court concludes that the balance of harms weighs heavily against issuance of the injunction the union seeks.

The union's primary argument is that, in forcing reluctant employees to be vaccinated, the court is irretrievably impinging on their right to bodily autonomy. If, in fact, the policy actually *forced* employees to submit to vaccination, the court would have to address this issue. As nothing in the policy compels employees to submit to vaccination, however, it does not. Rather, the policy coerces employees to be vaccinated but does not force them. As the MBTA notes, employees who do not qualify for a medical or religious exemption but who nonetheless are resistant to vaccination have the option of resignation – with reservation of limited rehiring rights. Massachusetts courts – and, indeed, courts around the country – have repeatedly held that, absent extraordinary circumstances, discharge from employment "will not support a finding of irreparable injury, however severely [it] . . . may affect a particular individual." *Sampson* v. *Murray*, 415 U.S. 61, 92 n.68 (1974). See also *Cheney*, 380 Mass. at 621 (injunction cannot be based on injury fully compensable by money damages); *Micro Networks Corp.* v. *HG Hightec, Inc.*, 188 F. Supp. 2d, 18, 22 (D. Mass. 2002) (generally, "the possibility of monetary injury does not constitute irreparable harm").

Union members who are coerced to resign by, or are discharged pursuant to, the policy can seek redress in the courts. They can bring actions for reinstatement and back pay. Massachusetts case law establishes that reinstatement and back pay can fully compensate someone who is impermissibly dismissed from a position in an unwarranted disciplinary proceeding. Cf. *Hosford* v. *School Comm. of Sandwich*, 421 Mass. 708, 717-718 (1996) (reinstatement and damages proper remedy for untenured teacher suspended in violation of her

First Amendment rights). Cf. also *Ballotte* v. *Worcester*, 51 Mass. App. Ct. 728, 734-735 (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.") and cases cited.

Thus, as the law defines irreparable harm, the union has not demonstrated that its members will suffer any. The court also pauses briefly to note that, at the hearing, counsel for the union conceded that the union did "not contest the science." The court understands this to mean that the union does not contest the devastating scope of the pandemic, the efficacy of the vaccines in combatting its spread, or that vaccines are one of the most – if not the most – effective means of controlling the virus. Given this reasonable concession, the court observes that, as to union members who have neither medical conditions that prevent them from being vaccinated and/or religious objections to vaccination, it is difficult to see how a policy that compels them to do what is manifestly in the interest of their health and society's harms them at all, much less irreparably. As the law is clear that, generally, discharge from employment does not constitute irreparable harm that must be weighed in considering an injunction, however, the court need not resolve this broader question.

Finally, to the extent that the union contends that the policy's impingement on its collective bargaining rights constitutes an irreparable harm that precludes the issuance of an injunction, the court is not persuaded. First, the absence of an injunction does not prevent the union from pursuing its action for declaratory judgment, even if it is unlikely to succeed on the merits. See Section I, *supra*. Second, any putative irreparable harm to the union's collective

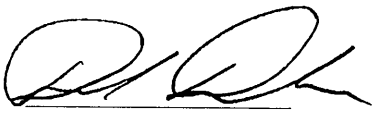
bargaining rights is far outweighed by the risk of irreparable harm to MBTA passengers and to society. As the court (Cowin, J.) observed in *State Police Assn.*, 2184CV02117, "the [u]nion's contentions frame the public interest too narrowly, by focusing on its [collective bargaining rights] . . . to the exclusion of everyone else."

The public health and safety risk posed by the COVID-19 pandemic is unparalleled in the past century.[6] "COVID-19 is a contagious, dangerous, and sometimes deadly disease" (quotation omitted). *Committee for Pub. Counsel Servs.* v. *Barnstable Cnty. Sheriff's Office*, 488 Mass. 460, 463 (2021). "Despite access to vaccines and better testing, . . . the virus rages on, mutating into different variants, and posing new risks." *In re: MCP No. 165, Occupational Safety and Health Admin. Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard 86 Fed. Reg. 61402, Nos. 21-7000, et al* at 1 (6th Cir. December 17, 2021). The MBTA's vaccine policy is a reasonable response to an exceptionally challenging public health emergency. The risk of irreparable harm to MBTA employees and passengers alike – as well as to the broader society – outweighs any harm asserted by the union resulting from that policy.

[6] It is apparently not a straightforward proposition to compare mortality rate of the so-called Spanish Flu global pandemic of 1918-1919 to that of the COVID-19 pandemic. See E. Thomas Ewing, *Measuring Mortality In the Pandemics of 1918-1919 and 2020—21*, Health Affairs Blog, April 1, 2021. https://www.healthaffairs.org/do/10.1377/hblog20210329.51293/full/. That we have to look back more than one hundred years for a comparison says much, in itself, about the unusual threat posed by the COVID-19 coronavirus.

CONCLUSION AND ORDER

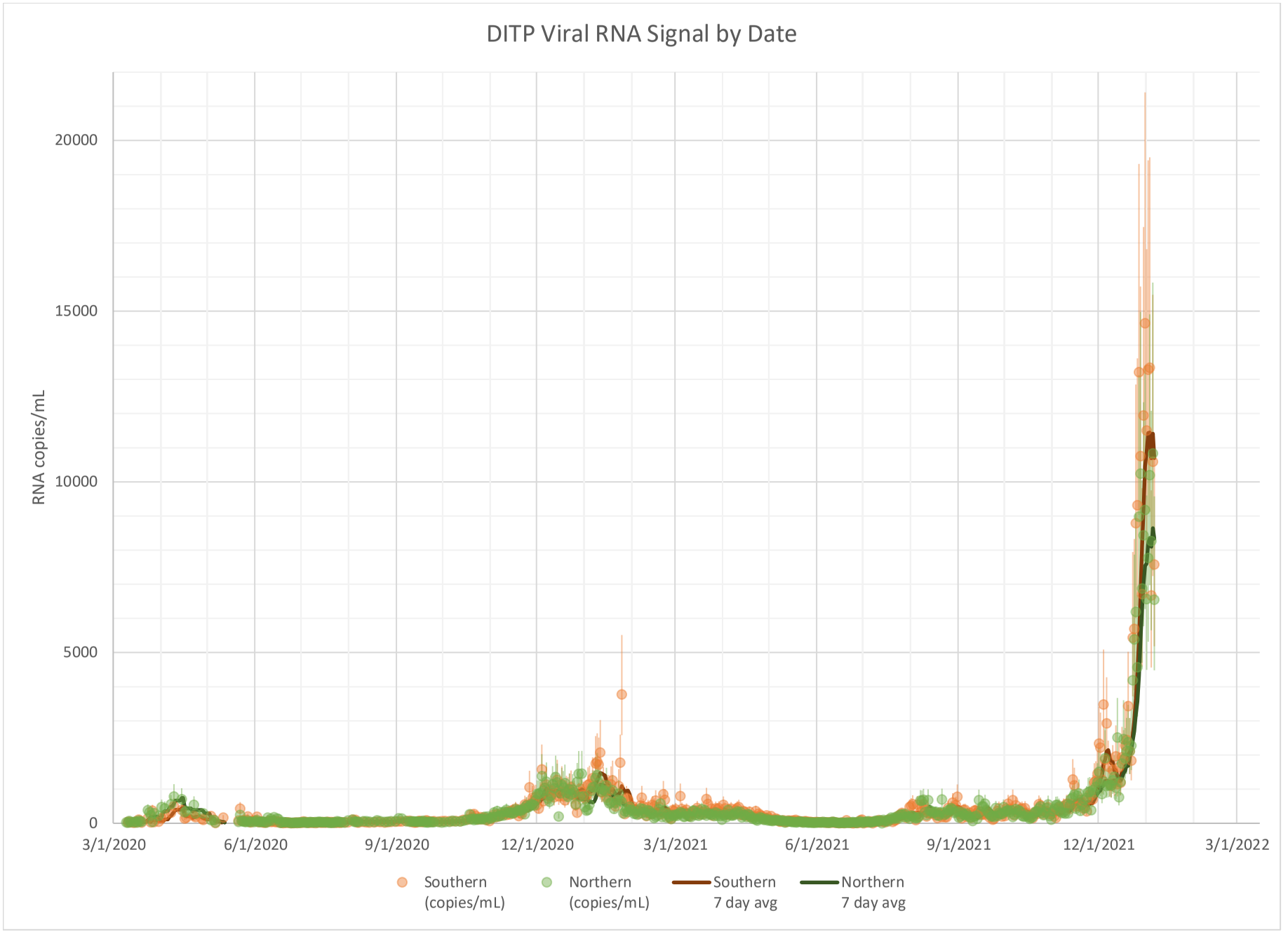
For the foregoing reasons, the union's Motion for Preliminary Injunction is **DENIED**.



David A. Deakin
Associate Justice

Dated: December 22, 2021

ATTACHMENT 3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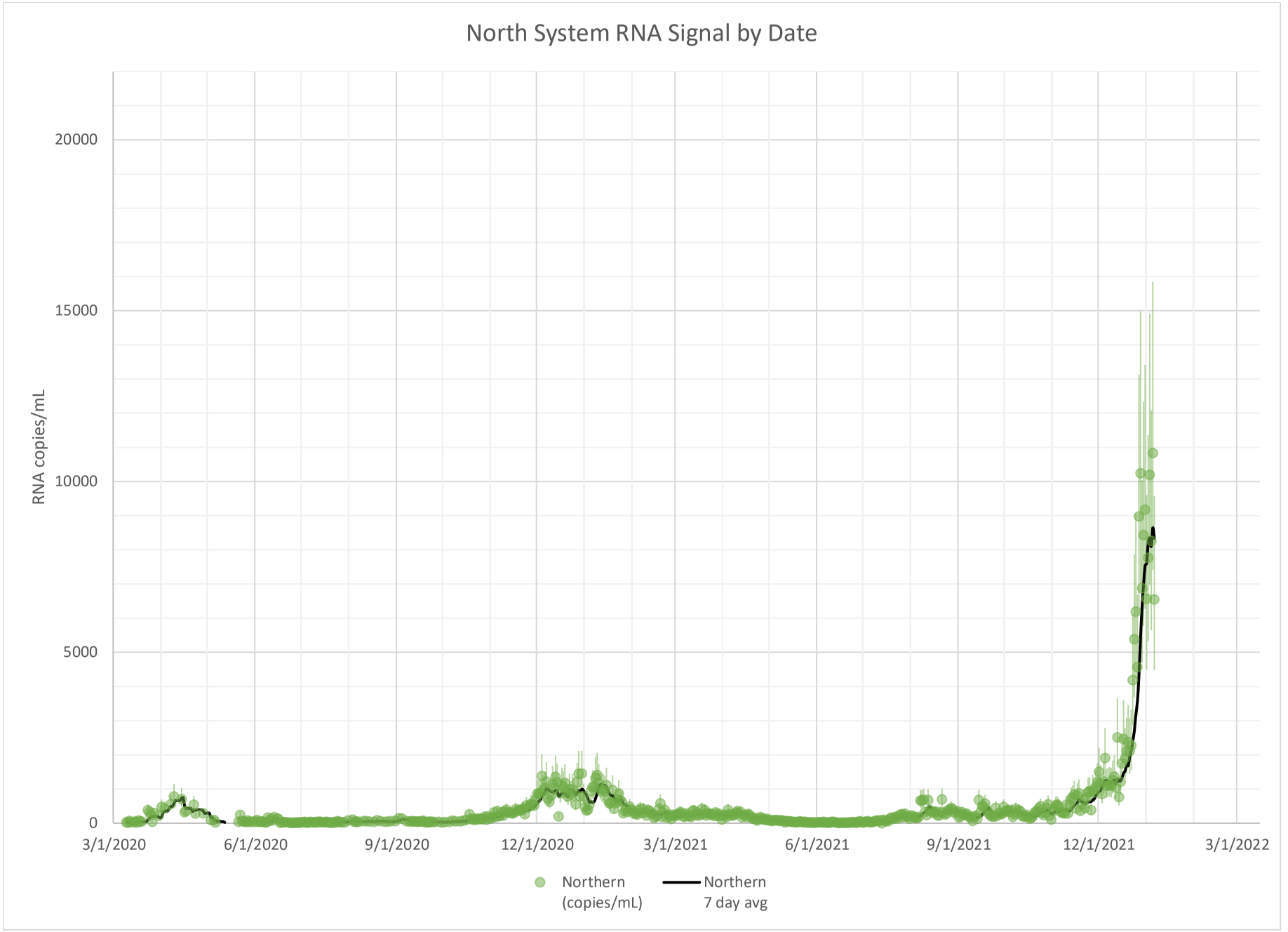
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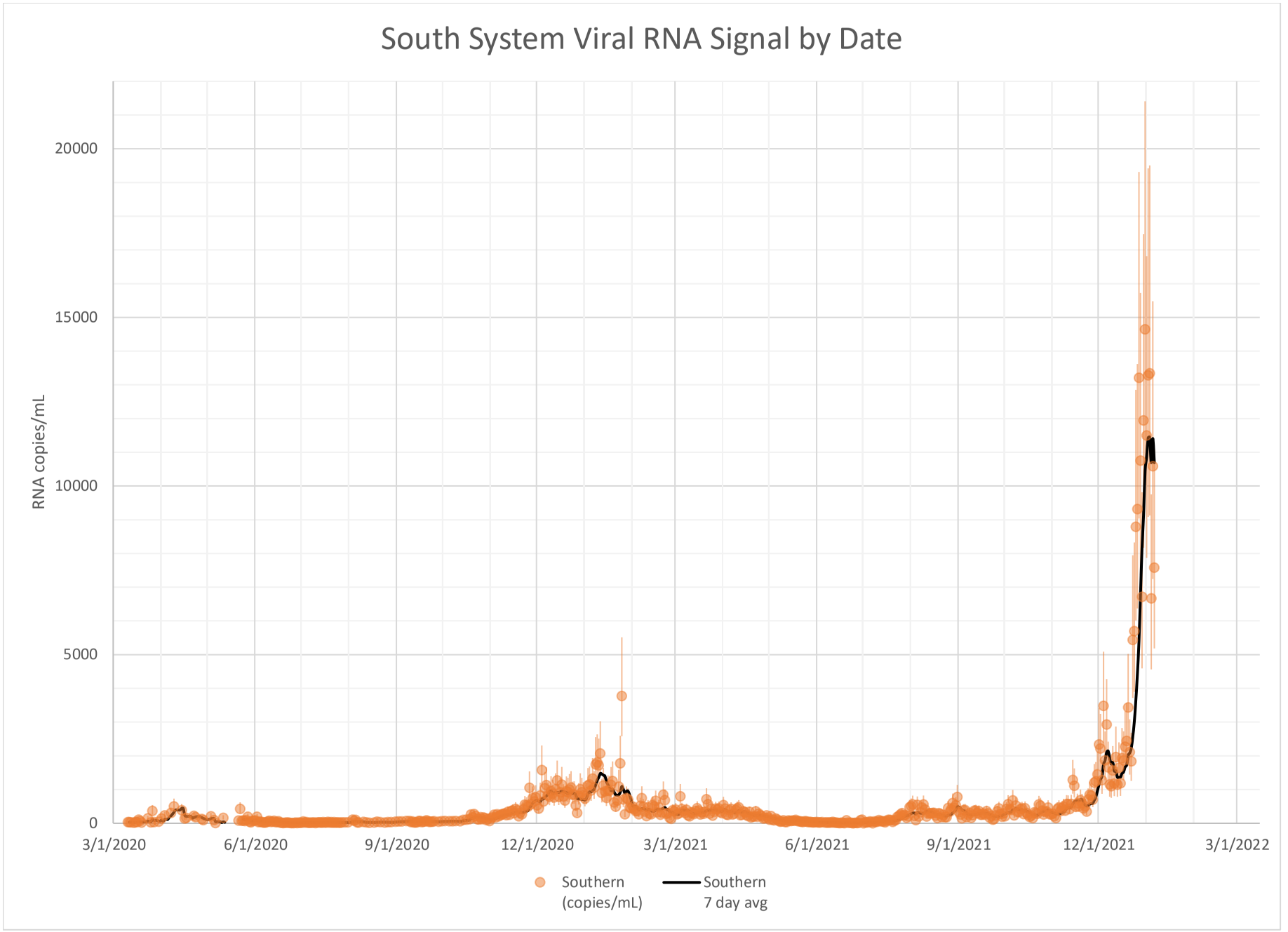
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