

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 2184-CV-02117

STATE POLICE ASSOCIATION OF MASSACHUSETTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

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 Union (collectively, the "Commonwealth" or the "defendants").¹

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

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 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 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 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 concluded.

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

DISCUSSION

1. 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 (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 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

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 (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 (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 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

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 (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”).

346, Intl. Bhd. of Police Officers v. Labor Relations Commn., 391 Mass. 429, 437 n.16 (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 negotiations after the policy takes effect. Sec'y of Admin. & Fin. v. Commonwealth Empl. Rels. Bd., 74 Mass.App.Ct. 91, 98 (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 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 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. Samson v. Murray, 415 U.S. 61, 92 n.68 (1974) (absent extraordinary circumstances, discharge of employment “will not support a finding of irreparable injury, however severely [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 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 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,

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

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).

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.

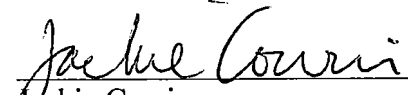
The Union also argues that the Commonwealth's professed need to act quickly on the mandate is belied by the fact that it did not impose a mandate for several months after the vaccine became available. This contention ignores certain realities that have developed only recently, and which increase the 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.

Date: September 23, 2021


Jackie Cowin
Associate Justice, Superior Court