

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
JUDGE-IN-CHAMBERS**

FRATERNAL ORDER OF POLICE,	:	
METROPOLITAN POLICE	:	
DEPARTMENT LABOR COMMITTEE,	:	
D.C. POLICE UNION, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 2022 CA 000584 B
	:	
DISTRICT OF COLUMBIA, et al.	:	
	:	
Defendants.	:	

**ORDER DENYING PLAINTIFFS’ MOTION FOR A
TEMPORARY RESTRAINING ORDER**

The Court has before it an Emergency Motion by Plaintiffs Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union, Officer Larry Reed, Sergeant Todd Korson, Sergeant Jeremy Kniseley, and Officer David Wallace for a Temporary Restraining Order to enjoin the Mayor from “imposing or otherwise enforcing Mayor’s Order 2021-147, including any and all vaccine requirements issued through the Order” ("Motion").

The District of Columbia in its Opposition to the Motion asserted that Mayoral Order 2021-147 expired January 24, 2022, and that therefore the Motion is moot and the requested Order is unnecessary.¹ While the Plaintiffs’ Motion seeks to enjoin enforcement of vaccination requirements under Mayor’s Order 2021-147, the hearing on the Motion focused on the legal

¹ While the parties both agree that Mayoral Order 2021-147 expired, they differ on the date it expired (Jan. 4 v. Jan. 24). This dispute over the expiration date does not affect the outcome of this litigation over the temporary restraining order sought.

authority of the Mayor to require vaccinations for police officers. Consequently, the Court will address the Mayor's authority to require police officers to be vaccinated.

The Court will deny the Motion for a Temporary Restraining Order for the reasons given below. In reaching its decision, the Court considered Plaintiffs' Motion with exhibits, Defendants' Opposition with exhibits, documents submitted by both sides after the hearing, which have been entered into the record, and oral arguments made to the Court at a hearing held on February 15, 2022.

There is ongoing litigation before the Public Employee Relations Board (PERB) in which the officers are seeking no enforcement of vaccine requirements until Respondents produce information requested in discovery and the completion of bargaining requests. (Ex. C to Defendants' Opposition, p. 17). The District of Columbia raises the defense of failure to exhaust administrative remedies based on that ongoing litigation. However, counsel for the Plaintiffs argued that officers must decide now whether to take the vaccine because, if they have not been vaccinated by February 15, they face disciplinary consequences. For this reason, the Court considers this matter to be sufficiently extraordinary to justify the Court proceeding to decide the pending motion. There is no timeline for the end of the PERB litigation.²

Turning to the merits, a temporary restraining order, like a preliminary injunction, "is an extraordinary remedy, and the trial court's power to issue it should be exercised only after careful deliberation has persuaded it of the necessity for the relief." *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976); *see also District of Columbia v. Sierra Club*, 670 A.2d 354, 366

² The relevance of *Boston Firefighters Union Local 718 v. City of Boston*, submitted to the Court via praecipe by Plaintiffs' counsel after the hearing, was not briefed for this temporary restraining order. It may be addressed by the parties in the next phase of this litigation before Judge Maurice Ross.

(D.C. 1996) (applying *Wieck* standard to both a temporary restraining order and preliminary injunctions).

This Court employs a four-factor test in deciding whether to issue a temporary restraining order: (1) whether there is a substantial likelihood that movants will prevail on the merits; (2) whether movants are in danger of suffering irreparable harm during the pendency of the action if a temporary restraining order is not granted; (3) whether the balance of equities is in favor of the movant, and (4) whether the public interest would be served by the issuance of the restraining order. *See District of Columbia v. Reid*, 104 A.3d 859, 865 (D.C. 2014).

1. Substantial Likelihood of Success

In this Court's judgment, there is not a substantial likelihood that the Plaintiffs will prevail on the merits. The Plaintiffs rely on Mayor's Order 2021-147 and D.C. Code sec. 7-2306(a) & (b).³ Because the limited duration for a public health emergency allowed by section 7-2306, the Plaintiffs assert (in agreement with defendant) that Mayor's Order 2021-147 has expired. The Plaintiffs further rely on the failure of the Mayor to persuade the City Council to grant her authority to implement vaccine testing for District employees.⁴ The Plaintiffs argue that the fact that the Mayor asked the Council for legal authority to issue a vaccine mandate but failed to get it is proof that the Council has exclusive authority to issue a vaccine mandate. The FOP also relies on other statutes empowering the Council, and not the Mayor, to legislate.⁵

³ D.C. Code 7-2306(a) states: "An emergency executive order, or a public health emergency executive order, issued by the Mayor shall be effective for a period of no more than 15 calendar days from the day it is signed by the Mayor, but may be rescinded in whole or in part by the Mayor within that period should the Mayor determine that the public emergency no longer exists, or no longer warrants the part rescinded."

Subsection (b) of the same provision states: "An emergency executive order, or a public health emergency executive order, may be extended for up to an additional 15-day period, only upon request by the Mayor for, and the adoption of, an emergency act by the Council of the District of Columbia."

⁴ See Ex. 5 to Plaintiffs' Complaint.

⁵ See Complaint, paragraphs 18-21 and Plaintiffs' Memorandum, at pp 15-23.

The Defendants assert that the operative document that requires vaccination for police (and all other D.C. employees) is Issuance I-2022-3 (January 2022), covering Covid-19 Vaccination Requirements, effective January 24, 2022.⁶ This document was issued by the Director of the D.C. Department of Human Resources under the administrative authority of the Mayor. In issuing I-2022-3, the District of Columbia relies on D.C. Code sec. 5-101.03(4), which imposes on the Mayor the duty "within the boundaries of ... [the Metropolitan] Police District" of the District of Columbia "[t]o guard the public health".⁷ The Defendants also cite other statutory provisions in support of the Mayor's authority to issue I-2022-3.⁸

In reviewing the contentions of the parties on the likelihood of success on the merits, the Court finds that plaintiffs are unlikely to succeed on the merits of their contention that the Mayor lacks authority to issue the vaccination requirements at issue in this dispute.

2. Irreparable Harm

The factor of irreparable harm is of great importance.⁹ Plaintiffs argue that vaccine is an irreversible medical procedure with a risk of serious medical consequence, and it violates their right to bodily integrity and personal autonomy. These assertions, though deeply felt by officers who are resisting vaccination, are speculative. The vaccines being offered are approved by the

⁶ See Ex. A to Defendants' Opposition.

⁷ This section originated when local government powers were delegated to a Board of Commissioners; in 1973, when the District's Home Rule Act took effect, the Board of Commissioners was replaced by the Office of Mayor of the District of Columbia. The boundaries of the "Police District" referred to in Sec. 5-101.03 are coterminous with the boundaries of the District of Columbia.

⁸ See e.g., D.C. Code sec. 7-131(a) (stating that "[t]he Mayor may, upon the advice of the Director of the Department of Health . . . issue rules to prevent and control the spread of communicable diseases . . ."); D.C. Code sec. 1-617.08 (a)(6) (enabling personnel authorities "[t]o take whatever actions may be necessary to carry out the mission of the District government in emergency situations."); 6-B DCMR sec. 2004.1 (authorizes personnel authorities to establish physical requirements for performance of a specific job or class of jobs).

⁹ In considering the four factors, "the most important inquiry is that concerning irreparable injury . . . because the primary justification for the issuance of a [temporary restraining order] is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *District of Columbia v. Eastern Trans-Waste of Md., Inc.*, 758 A.2d 1, 14-15 (D.C. 2000) (internal quotations omitted).

U.S. Food and Drug Administration and have been given to millions of people in the United States and the world.

Plaintiffs further argue that the harm they face is disciplinary action, including possible termination. Though I-2022-3 provides that employees who “still” fail to comply with the Mayor's vaccination policy “are subject to administrative action as outlined in the . . . Enforcement section,” no action can be taken until March 15, 2022.¹⁰ Even assuming arguendo that facing administrative action is some kind of irreparable harm, it is not imminent; it will not start until after the middle of next month. Moreover, I-2022-3 contains an "Enforcement" section that involves a series of enforcement steps, beginning with "Verbal Counseling", and repeated violations, to precede "removal" of the employee.¹¹ Thus, there is no imminent threat of irreparable harm. Applying the standard of clear and convincing evidence to the factor of irreparable harm, this Court finds the potential and speculative harms alleged by Plaintiffs fall far short of imminent irreparable harm. While this judge is sympathetic to an officer who does not want a disciplinary action that may be brought in the future on his or her record, the choice of whether or not to be subject to a vaccine enforcement process is the officer's.

3 and 4. Balance of Equities and the Public Interest

Regarding the balance of the equities and public interest factors, the Court finds the District of Columbia's interest in protecting the health and safety of its employees and the public from the ravages of Covid-19 and its variants outweighs the potential harms Plaintiffs allege they face. Plaintiffs argue that vaccines are ineffective at preventing the spread on Covid-19, stating

¹⁰ I-2022-3, p. 1, Exhibit A to Defendants' Opposition. After the hearing, counsel for Plaintiff submitted an e-mail from Michael Coligan, Acting Assistant Chief, Metropolitan Police Department, stating that employees who fail to comply with vaccination requirements by February 15, 2022 will be “subject to discipline.” The Court accepts the assurance from counsel for the District of Columbia, Assistant Attorney General Richer, that no police officer will be subjected to an administrative action before March 15, 2022, which is what I-2022-3 states.

¹¹ I-2022-3 further provides: "if an employee becomes fully vaccinated before a final decision on removal is issued by the deciding official, the agency shall dismiss the action."

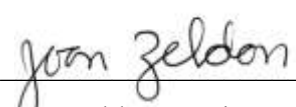
that some vaccinated officers have nonetheless contracted Covid-19. However, while the vaccine may not be not fully effective, the Court takes judicial notice that the rate of breakthrough cases within the District of Columbia of those who are fully vaccinated is only 5.7%. *Vaccination Data*, D.C. Health (Feb. 7, 2022), <https://coronavirus.dc.gov/data/vaccination>. Further, based on data through January 8, 2022, the CDC found that Covid-19-related hospitalization rates were 16 times higher for unvaccinated adults than they were for vaccinated adults. *Rates of Laboratory-Confirmed COVID-19 Hospitalizations by Vaccination Status*, CDC, <https://covid.cdc.gov/covid-data-tracker/#covidnet-hospitalizations-vaccination>.


Lastly, the vaccine mandate serves the public interest. The vaccination mandate not only reduces the risk of transmission of Covid-19 in the general community, it also reduces the number of public employees (including police officers) who fall seriously ill to Covid-19 and whose absence would hamper governmental functions and services.

Wherefore, it is, this 19th day of February 2022,

ORDERED that Plaintiffs' Motion for a Temporary Restraining Order is **DENIED**, and it is further

ORDERED that this case is hereby set for initial scheduling and a status hearing before Judge Ross on March 11, 2022 at 2 p.m.


Joan Zeldon, Senior Judge
Judge-in-Chambers



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