

COMMONWEALTH OF MASSACHUSETTS

17

SUFFOLK, s.s.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION No.

21. 2117 F

_____)
STATE POLICE ASSOCIATION OF)
MASSACHUSETTS,)
))
Plaintiff,)
))
v.)
))
COMMONWEALTH OF MASSACHUSETTS/)
SECRETARIAT OF ADMINISTRATION &)
FINANCE, acting through THE HUMAN)
RESOURCES DIVISION, THE DEPARTMENT)
OF STATE POLICE, and)
COLONEL CHRISTOPHER MASON,)
Individually and in his official capacity,)
))
Defendants.)
_____)

2021 SEP 17 A 9:59
SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
MICHIGAN / MASSACHUSETTS

**VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND REQUEST FOR TEMPORARY RESTRAINING ORDER AND SHORT ORDER OF NOTICE**

I. INTRODUCTION

This is an action for declaratory and injunctive relief brought pursuant to G.L. c. 231A, § 1 to enjoin and prohibit the Defendants from unilaterally implementing a mandatory vaccination policy without first bargaining over the impact of its decision on the State Police Association of Massachusetts (“SPAM”) and its members as is required by G.L. c. 150E, § 10.

The Defendants, the Commonwealth/Secretariat of Administration & Finance, the Department of State Police, and Colonel Christopher Mason have not complied with the Law as set forth by the Legislature (G.L. c. 150E, §10) and the Division of

Labor Relations, the agency authorized by the Legislature to interpret and enforce G.L. c. 150E, et seq., Leahy v. Local 1526, Am. Fedn. of State, County, & Mun. Employees, 399 Mass. 341, 347 (1987). Simply put, that Law requires the Commonwealth to negotiate with SPAM either to resolution or impasse, over the impacts of implementing the new or mandatory vaccination policy authorized by Executive Order 595 issued on August 19, 2021.¹

The Defendants undertook the conduct that this Verified Complaint seeks to enjoin without bargaining to resolution or impasse the impacts of these policies which are mandatory subjects of bargaining as defined by G.L. c. 150E, § 10.

As the Commonwealth's conduct is undertaken in violation of the law, a preliminary injunction is necessary to maintain the status quo and to prevent the Commonwealth of Massachusetts and its agent, Colonel Christopher Mason, from arbitrarily implementing changes in a mandatory subject of bargaining until it bargains to resolution or impasse or that this matter can be expeditiously resolved through an administrative hearing before the Department of Labor Relations, the state agency with primary jurisdiction over this dispute. Local 1526, Am. Fedn. of State, County, & Mun. Employees, 399 Mass. at 347.

The conduct of the Defendants is in direct violation of the Legislatively declared public policy of the Commonwealth which is to “encourage[e] the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association...for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” See, G.L. c. 150A, § 1. The

¹ SPAM contends that the policy promulgated by HRD is in excess of the requirements under the Executive Order.

Plaintiffs will suffer irreparable harm if a status quo injunction is not granted since the DLR cannot retroactively undo foreseeable, immediate harm to SPAM and its members that would result from the implementation of this policy. Since it is clear that the Commonwealth of Massachusetts and its agent, Colonel Christopher Mason, have acted unlawfully, and because the public interest would be served by granting injunctive relief, this Court should grant injunctive relief requiring the Commonwealth of Massachusetts to not implement the vaccination policy in question until such time the administrative agency with primary jurisdiction over this dispute decides on the validity of the conduct of the Commonwealth Defendants.

Finally, the Plaintiff is seeking a declaration of its rights and benefits as due it through public employee collective bargaining law as those rights and obligations pertain to the protection of State Police officers from the arbitrary acts of the Commonwealth and the circumstances under which the Commonwealth is allowed to ignore the clear mandate of the collective bargaining law, if at all.

II. PARTIES AND RELEVANT AGENCIES

1) The State Police Association of Massachusetts (“SPAM”), an employee organization as that term is defined in G.L. c. 150E, § 1, is the Plaintiff. SPAM is organized under the laws of the Commonwealth and has a usual place of business in Boston, Suffolk County, Massachusetts. SPAM is the exclusive bargaining representative for employees of the Commonwealth employed within the Department of State Police (“DSP”) and holding the rank of State Police Trooper, State Police

Trooper First Class, and State Police Sergeant, and excluding all other employees.

The bargaining unit represented by SPAM is referred to as Unit 5A.

2) The Commonwealth of Massachusetts/Secretariat of Administration & Finance (“Commonwealth”) is the Defendant. The Commonwealth is an employer as that term is defined in G.L. c. 150E, § 1. The Commonwealth is a party to an Agreement with SPAM that covers the terms and conditions of employment of the members of the bargaining unit represented by SPAM.

3) The Human Resources Division (“HRD”) is an agency of the Commonwealth which operates under the Secretary of Administration. HRD has been designated by the Commonwealth as its sole representative authorized to act on behalf of the Commonwealth for collective bargaining matters between SPAM and the Commonwealth.

4) The Department of State Police is an agency of the Commonwealth which operates under the Executive Office of Public Safety and Security.

5) The Defendant Christopher Mason is the Superintendent of the Department of State Police and holds the rank of Colonel. Colonel Mason, as the head of the State Police, has responsibility for the executive and administrative functions of the DSP. Colonel Mason was appointed to his current position on or about November 15, 2019. Colonel Mason is named in his individual and official capacity:

6) The Department of Labor Relations (“DLR”) is an agency of the Commonwealth and is the agency charged with administering and enforcing the public employee collective bargaining law, G.L. c. 150E, et seq. The DLR has primary

jurisdiction over matters to pertaining to G.L. c. 150E, et seq., Leahy v. Local 1526, Am. Fedn. of State, County, & Mun. Employees, 399 Mass. 341, 347 (1987).

III. STATEMENT OF FACTS

7) The DSP has approximately two thousand, ninety-seven (2,097) sworn members out of which approximately one thousand, eight hundred and nine (1,809) occupy the ranks of State Police Trooper, State Police Trooper First Class, and State Police Sergeant and are represented by SPAM.

8) The Commonwealth and SPAM are parties to a collective bargaining agreement (“Agreement”) which covers the terms and conditions of employment of the bargaining unit represented by SPAM.

9) On August 19, 2021, Governor Baker issued Executive Order 595 (“Order”), ordering executive branch employees to obtain COVID-19 vaccination within 60 days. (Exhibit 2, appended hereto)

10) The Order directed the Human Resources Division (“HRD”) to draft a policy within 60 days to effectuate the Order.

11) The Order states that all executive department employees must demonstrate no later than October 17, 2021, that they have received COVID 19 vaccination.

12) The Order instructed HRD to create "appropriate enforcement measures to ensure compliance, which shall include progressive discipline up to and including termination for non-compliance and termination for any misrepresentation by an employee regarding vaccination status."

13) The press release announcing the Order stated: "Executive Department employees who are not vaccinated or approved for an exemption as of October 17, 2021 will be subject to disciplinary action, up to and including termination. The Administration will continue to work with its union partners regarding this policy, and specific ramifications of non-compliance for staff represented by unions will be discussed well in advance of October 17 with each employee union."

14) On August 19, 2021, moments after learning of the Order, Association Labor Counsel Paul Hynes ("Attorney Hynes") sent notice to the Commonwealth's Chief Negotiator John Langan ("Langan") that the Association wished to bargain the impacts of the Order. (Exhibit 3, Appended hereto)

15) On August 23, 2021, Langan sent the Association a Draft copy of the Vaccination Verification Policy ("Policy"). (Exhibit 4, Appended hereto)

16) On August 30, 2021, the Association met with Langan and members of the Department of State Police ("Department") bargaining team. At this meeting the Association was provided a briefing on the Draft Policy. The Association presented to Langan its requests regarding the policy. The Association requested the following: reasonable alternatives, presumptive protection, and a deadline for beginning the regimen.

(a) Reasonable alternatives were discussed at length by the Association. The Association is asking for the Commonwealth to provide the ability of those members who have either had COVID previously, or those that choose not to get the vaccine, for either their personal beliefs, religion or medical conditions to be allowed to take a weekly test and wear a mask in the performance of their duties. The Association asked the Commonwealth to perform these tests while on-duty, at a department facility, and to be administered by the Department.

(b) The Association requested that all members be given presumptive protection. This was explained as if a member contracts COVID,

becomes ill from the vaccination, is forced to retire from COVID or was to die that these would automatically be considered as a line-of-duty injury. The Association highlighted that there are currently numerous members who contracted COVID in the performance of their duties and the Department did not treat these injuries as a line-of-duty injury. These members are continuing to fight for their rights and ask to be treated as if they were injured in the line-of-duty.

17) Both the Association and Langan scheduled the next meeting for September 13, 2021 at 2:00 p.m.

18) On September 3, 2021, the Association sent a comprehensive tracked version of counter proposals to the Policy, which were to be discussed at the September 13, 2021 meeting. (Exhibit 5, Appended hereto)

19) On September 10, 2021, HRD sent an email to all state employees, including Association members, with deadlines and forms, both of which were topics being discussed at the impact bargaining. (Exhibit 6, Appended hereto)

20) On September 10, 2021, Attorney Hynes sent an email to Langan outlining concerns about the HRD email. This email made it clear that HRD's conduct rendered this now to be a *fait accompli*. (Exhibit 7, Appended hereto)

21) On September 13, 2021, Langan emailed Attorney Hynes and assured him that the Commonwealth will fulfill its bargaining obligations. (Exhibit 8, Appended hereto)

22) On September 13, 2021, the Association had their second meeting with Langan and members of the Department's bargaining team. Langan rejected all of the Associations counter proposals. Langan claimed that they had no ability to deviate from the Governor's Executive Order. Additionally, they made it clear that they would not change the dates and that Association members had to receive the first (1st) shot by September 19, 2021 or September 26, 2021, depending on which vaccination the member was choosing to get to be in compliance with the Governor's Executive Order.

23) At the September 13, 2021, the Association was informed that training and guidance for the ADA Coordinator and Diversity Officer were not complete, and this training would be provided to them on September 14, 2021. The Association asked to attend this training and was told that they could not attend as there would be many questions about the program from “managers.” The Association asked for further guidance on topics such as: what is a reasonable accommodation, as stated in the Executive Order. What type of punishment would a member receive if not fully vaccinated? Will a member be placed on Modified Duty? Will masks and testing be a reasonable alternative? Langan again stated that he had no answers to any of our questions and that further guidance and training will be forthcoming.

24) At the September 13, 2021, meeting, the Association was informed by Langan that although the Executive Order states that there would be sixty (60) days to develop a policy, he was not authorized to extend the deadline to give the Association and the Commonwealth the appropriate time to negotiate the impacts of the Executive Order. Langan stated that he would continue to work on the policy with the Association, however, he must make sure that everyone is vaccinated by October 18, 2021.

25) At the September 13, 2021, meeting, the Association was informed by Langan that within several days an email will be sent to all state employees, including Association members, where they will be asked to complete an “Attestation” form regarding their vaccination status. The Association asked for a copy of the attestation form for review and to provide us with an opportunity to negotiate the questions within the form itself. Langan informed the Association that he was unable to share the complete form with the Association as he only had a screen capture of the form, and it did not include the dropdowns contained within the form. Langan was asked if the Association sent back the form with modification and strike throughs to the language, would they be considered. Langan indicated that he

would share the request with his principals, however, it was imparted to the Association that the form was coming out, as is, to all members “real soon.” This information was taken by the Association to mean that there would be no negotiations relative to the attestation form. As with both the medical exemption form and the religious exemption form, the Association was not provided any opportunity for negotiations with the forms prior to dissemination.

26) Both parties agreed to meet again on September 28, 2021, which is the same date that the Association and the Commonwealth are meeting for Main Table Negotiations for a successor Collective Bargaining Agreement.

27) The parties have not come to either resolution or impasse as to the impacts of the Order and negotiations continue.

28) The COVID vaccine regimen requires two successive vaccines separated by several weeks for Pfizer and Moderna; Johnson & Johnson provides a one dose vaccine. A person seeking a vaccine may not choose the brand of vaccine that s/he receives; rather, the patient receives whichever is available.

29) A member who is seeking the Moderna Vaccination must begin their regimen by September 19, 2021. (Exhibit 6, Appended hereto)

30) A member who is seeking the only currently Food and Drug Administration (“FDA”) vaccine, which is produced by Pfizer (Comirnaty), they will need to begin the regimen by September 26, 2021, to be in compliance with the Executive Order. Members have been reporting to the Association that they have been unable to receive the Pfizer Vaccination. Members are reporting that the Pfizer vaccine is not in stock and is not readily available to the Association membership.

31) Where the parties have not concluded impact bargaining and we are up against immovable deadlines from the October 17, 2021, deadline, the Association’s members are left with the choice of complying with the Order or face termination, even though the impact

bargaining process is not complete. In other words, if the Order is not suspended, the Association's members will be forced to comply with the Order even though HRD has not bargained in good faith to resolution or impasse.

32) The decision of an employer to issue policies relating to its operations may be a non-delegable managerial prerogative, and outside the scope of Collective Bargaining.

33) The impact of that decision on terms and conditions of employment is, however, a mandatory subject of bargaining.

34) On September 16, 2021 SPAM filed a charge of prohibited practice with the DLR alleging that the Department failed to comply with its bargaining obligation pursuant to M.G. L. c. 150E. An employer violates Section 10(a)(5), and derivatively, 10(a)(1), when it takes action that impacts a mandatory subject of bargaining without giving to the exclusive representative, an opportunity to bargain to resolution or impasse.

35) The statutory obligation to bargain in good faith includes the duty to bargain prior to changing any practice that impacts a mandatory subject of bargaining, Newton v. Labor Relations Commission, 388 Mass. 557, 572 (1983); Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000).

36) Based on the filings by SPAM at the DLR challenging the wrongful conduct of the Commonwealth Defendants, SPAM has met all of the administrative prerequisites to the filing of this action.

IV. CLAIMS FOR RELIEF

COUNT I

DECLARATORY RELIEF IS APPROPRIATE

An actual controversy exists between the parties in that the Plaintiffs assert that the Commonwealth/Secretariat of Administration & Finance acting through Colonel Christopher Mason has violated SPAM's rights and the rights of its members by unilaterally implementing the changes in mandatory subjects of bargaining without first giving an opportunity to bargain to resolution or impasse the exclusive representative of the employees whose rights are infringed by the conduct of the Colonel and the Commonwealth Defendants. The Commonwealth/Secretariat of Administration & Finance and Colonel Mason asserts that it has such a right to act as they have. A binding declaration is necessary to settle the rights and obligations of the parties under the Law. All parties necessary to an adjudication of this dispute have been joined herein, and such a declaration will settle the existing controversy and allow for resolution of this dispute before the Department of Labor Relations as the law requires.

COUNT II THE NECESSITY OF INJUNCTIVE RELIEF IN AID OF THE ADMINISTRATIVE PROCESS

Unless the Defendants are enjoined on the terms set forth in Plaintiffs' request for relief, Plaintiffs lack any adequate administrative remedy. The DLR cannot retroactively undo foreseeable, immediate harm to SPAM and its members that would result from the impacts of vaccinations, potential side effects and a policy which would subject SPAM members to discipline up to and including decertification and termination for failure to comply with a policy, the impacts of which had never been negotiated with SPAM.

Therefore, any remedy provided through that forum will be a hollow formality. Only injunctive relief in aid of the remedial powers of the Department of Labor Relations will insure an adequate remedy in that administrative agency. Therefore, SPAM is requesting that an order be issued compelling the Commonwealth to participate in the administrative proceedings started by SPAM and required under the Law to address and resolve the dispute between the parties as to the rights of the party's public employee collective bargaining law and that the status quo be maintained until such time as the matter of Commonwealth and SPAM, SUP-21-____ is addressed and resolved by the Department of Labor Relations.

V. **REQUESTS FOR RELIEF**

WHEREFORE, Plaintiffs pray that this Honorable Court:

1. Issue as short order of notice requiring the Defendants, Commonwealth of Massachusetts/Secretariat of Administration & Finance and Colonel Christopher Mason, to appear and show cause why the following relief sought herein should not be granted:

a. Order the Commonwealth of Massachusetts/Secretariat of Administration & Finance and the State Police Association of Massachusetts to proceed to hearing before the Department of Labor Relations in the matter of Commonwealth and SPAM, SUP-21-____ to determine and resolve the dispute over the unlawful conduct of the Commonwealth as alleged by the Plaintiff.

b. Order that, pending the resolution of the dispute over the implementation of the vaccination policy and that the Defendant,

Commonwealth of Massachusetts/Secretariat of Administration & Finance and Colonel Christopher Mason, and their agents, attorneys, and those acting pursuant to their authority, be restrained from implementing the vaccination policy until such time as the parties have had a hearing and decision by this Court or the Department of Labor Relations.

2. Enter a Temporary Restraining Order prohibiting the Defendant, Commonwealth of Massachusetts/Secretariat of Administration & Finance and Colonel Christopher Mason, and their agents, attorneys, and those acting pursuant to their authority, be restrained from implementing the vaccination policy pending a hearing on Plaintiff's request for Preliminary Injunctive Relief.
3. That the Defendants, their agents, servants or employees be ordered and directed to pay the Plaintiffs' legal fees and costs in bringing this action.
4. Enter such other and further orders as the Court deems meet and just.

Respectfully submitted,
Plaintiff,

STATE POLICE ASSOCIATION OF
MASSACHUSETTS,

by its attorneys,

ANGOFF, GOLDMAN, MANNING & HYNES, P.C.


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SUFFOLK, ss SUPERIOR COURT DEPT
(date) 9/17/2021
Notice ordered issued hereon returnable
at the F SESSION, RM. 1006
on 9/22/2021 @ 10 a.m.
to show cause why A PRELIMINARY
INJUNCTION
should not ISSUE
By the Court, (COWIN, J)
ATTEST: STEVEN J. MASSE
Assistant Clerk

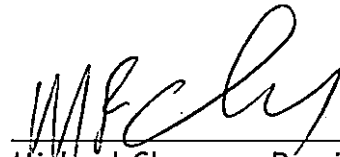
Dated: September 17, 2021

JURAT

I, Michael Cherven, do hereby state under oath that I am an adult, over the age of eighteen, and have personal knowledge of the facts asserted in this Complaint and I affirm them as true except as to matters of belief which I believe to be true.

SIGNED AND SWORN UNDER THE
PAINS AND PENALTIES OF PERJURY

Dated: September 17, 2021

A handwritten signature in black ink, appearing to read "M Cherven", written over a horizontal line.

Michael Cherven, President
State Police Association of Massachusetts