

NEW YORK STATE SUPREME COURT
QUEENS COUNTY

CORRECTION OFFICERS' BENEVOLENT
ASSOCIATION, INC., CORRECTION
CAPTAINS' ASSOCIATION, and ASSISTANT
DEPUTY WARDENS/DEPUTY WARDENS
ASSOCIATION,

Plaintiffs,

Index No.

- against -

CITY OF NEW YORK,

Defendant.

**BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY
RESTRAINING ORDER**

ARGUMENT¹

POINT ONE

The Court Should Grant Plaintiffs' Request for a Temporary Restraining Order

New York Civil Practice Law and Rules ("CPLR") Sections 6301 and 6313 permit the court to issue a temporary restraining order where the applicant can demonstrate "immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing [on a request for preliminary injunction] can be had."

An "injury is irreparable when it cannot be adequately compensated in damages or there is no set pecuniary standard for the measurement of damages." Board of Higher Ed. City of New York v. Marcus, 63 Misc.2d 268, 274 (S.Ct. Queens Co. 1970). Stated otherwise, irreparable harm is present if ultimate injunctive relief will be rendered ineffectual without interim relief.

¹ In the interest of brevity, Plaintiffs incorporate as if stated herein the introduction in the Verified Complaint as the introduction for this brief. For a statement of relevant facts, the Court is referred to the Verified Complaint in its entirety.

New York State Housing Finance Agency Employees' Association, et al. v. New York State Housing Finance Agency, et al., 183 A.D.2d 435 (1st Dept., 1992); Cove v. Rosenblatt, 148 A.D.2d 411 (2d Dept., 1989).

In the context of the current pandemic, it is clear that the more time Correction Officers (“COs”), Correction Captains (“Captains”), Assistant Deputy Wardens (“ADWs”), and Deputy Wardens (“DWs”) (collectively, “Uniformed Staff”) spend on the job, the more likely they are to contract a devastating illness. Literally every moment Uniformed Staff spend at work entails an ongoing terror that the illness will be contracted or carried to loved ones. This terror, and the attendant illness, is simply not reparable by damages.

The illegal nature of the City’s attacks on the bodily integrity of Uniformed Staff is fully grounded in applicable precedent under the State Constitution’s due process clause and at common law. The right to bodily integrity is defined as “The right of an individual that his person be held inviolable [and] to immunity from ... invasion of the body...” Breithaupt v. Abram, 352 US 432, 437 (1957). This right prevents the government from “imposing substantial physical intrusions and significant risks of physical harm” upon a person. Planned Parenthood v. Casey, 505 U.S. 833, 927 (1992) (Blackman, concurring). This right is protected because: “The integrity of an individual’s person is a cherished value of our society.” Schmerber v. California, 384 U.S. 757, 772 (1966). “The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death.” Washington v. Harper, 494 U.S. 210, 237 (Stevens concurring). To be sure, these doctrines have never been applied to civil service employment. But, similarly, never has there been a crisis by which a public employer has required so many employees to jeopardize their health to this extent. Even absent a crisis scenario, moreover, it is well established that public employees do not forfeit their due process rights by accepting civil

service appointment and the employer cannot be free to wholly disregard the employee's health and safety as the City does when it assigns Uniformed Staff to work without such a fundamental human need as rest and sleep and when it permits known recently infected staff to return to duty without confirmation testing. *See e.g. Forti v. New York State Ethics Com'n*, 75 N.Y.2d 596, 614 (1990) (public employee possesses both property and liberty interests protected by State Due Process Clause. Public employee entitled to protection against government action which is not "reasonably related" to a legitimate state goal); *Morissette v. Dilworth*, 59 N.Y.2d 449, 452 (1983) (police officer possessed First Amendment right to freedom of association. Officer had right to protection against rules not serving a "legitimate and substantial" government purpose and such "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved government purpose.")

Here, there is no legitimate purpose for having COs work life-threatening hours. It may be that the City, during the epidemic, may have difficulty staffing positions. The inconvenience in staffing posts, however, is simply not a justification for subordinating employee health and safety and, in light of dangerous viral pandemic, the health and safety of family and other loved ones and the general public, to the operational needs of the DOC. Stated simply, the City must find another way. It is not for Plaintiffs, or any other union to dictate how the City can meet its legal obligations to its employees while meeting its operating objectives. Rather, it is City's obligation to figure it out as it has the burden of more narrowly achieving its governmental purpose. Nonetheless, the pool of modified duty COs whose modifications do not stem from inmate care errors or omissions could work to alleviate the burden on those COs forced to work triple shifts.

Rushing the recently infected back to work without proof of recovery, of course, is a wholly inadequate response to any staffing issues as the goal of meeting staffing needs by returning ill Uniformed Staff to work can be achieved without rushing the recently infected back to work without proof of recovery. This is so in light of the availability of testing at one of the many recently contracted facilities before return to duty is authorized. It is further clear that the absence of return to duty testing serves no legitimate purpose as the result is just an increased numbers of infected employees and reinfection which further challenges the DOC to meet staffing requirements.

Again, the City must find a legal and effective way of meeting the DOC's obligations, whether by mobilizing modified duty COs or some other means, to both its employees, its "customers" and the public. Indeed, the current pandemic with the City's response of unconstitutional intrusions is outside the scope of job conditions Uniformed Staff could have anticipated when they accepted their respective positions. Any burden in this regard is simply a cost of doing business and is not a consideration in evaluating the scale of equity. Under these circumstances, any assertion that the equities do not favor Plaintiffs fails both as a matter of law and of conscience.

Under these circumstances, Defendant must be restrained pending a hearing on a preliminary injunction. Consequently, the motion for temporary restraining order must be granted.

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Respectfully submitted,

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