

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

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 THE NEW YORK CITY MUNICIPAL LABOR :
 COMMITTEE, by its Chair HARRY NESPOLI; :
 UNIFORMED SANITATIONMEN’S ASSOCIATION, :
 LOCAL 831 IBT, by its President HARRY NESPOLI; :
 POLICE BENEVOLENT ASSOCIATION, by its :
 President PATRICK LYNCH; UNIFORMED :
 FIREFIGHTERS ASSOCIATION LOCAL 94 I.A.F.F. :
 AFL-CIO by its President ANDREW ANSBRO; :
 UNIFORMED FIRE OFFICERS ASSOCIATION, by its :
 President JAMES MCCARTHY; UNITED :
 FEDERATION OF TEACHERS, by its President :
 MICHAEL MULGREW; COUNCIL OF SCHOOL :
 SUPERVISORS AND ADMINISTRATORS, by its :
 President MARK CANNIZZARO; INTERNATIONAL :
 BROTHERHOOD OF TEAMSTERS, LOCAL 237, IBT, :
 by its President GREGORY FLOYD; CORRECTION :
 OFFICER’S BENEVOLENT ASSOCIATION, by its :
 President BENNY BOSCIO; COMMUNICATION :
 WORKERS OF AMERICA NYC LOCAL 1180, by its :
 President GLORIA MIDDLETON; SERVICE :
 EMPLOYEES INTERNATIONAL UNION, LOCAL :
 246, by its President JOSEPH COLANGELO; :
 LIEUTENANTS BENEVOLENT ASSOCIATION, by :
 its President LOUIS TURCO; SERGEANT’S :
 BENEVOLENT ASSOCIATION, by its President :
 VINCENT VALLELONG; DETECTIVES :
 ENDOWMENT ASSOCIATION, by its President PAUL :
 DiGIACOMO; CAPTAINS ENDOWMENT :
 ASSOCIATION, by its President CHRISTOPHER :
 MONOHAN; SANITATION OFFICERS’ :
 ASSOCIATION, LOCAL 444, by its President JOSEPH :
 MANNION; UNIFORMED SANITATION CHIEFS :
 ASSOCIATION, by its President IGNAZIO AZZARA; :
 INTERNATIONAL UNION OF OPERATING :
 ENGINEERS, LOCAL 30, by its Business Manager :
 WILLIAM LYNN; DISTRICT COUNCIL NO. 9 :
 PAINTERS & ALLIED TRADES by its Business :
 Manager and Secretary Treasurer JOSEPH :
 AZZOPARDI; INTERNATIONAL BROTHERHOOD :
 OF ELECTRICAL WORKERS, LOCAL 3 by its :
 President THOMAS J. CLEARY; INTERNATIONAL :
 UNION OF OPERATING ENGINEERS, LOCAL 891, :
 by its President ROBERT TROELLER; SERVICE :

Index No. _____

Hon. _____, J.S.C.

**AFFIRMATION
 OF BETH NORTON IN
 SUPPORT OF
 APPLICATION FOR
 TEMPORARY
 RESTRAINING ORDER
 AND PRELIMINARY
INJUNCTION**

EMPLOYEES INTERNATIONAL UNION, LOCAL
 300 by its President JAMES GOLDEN;
 BOILERMAKERS, BLACKSMITHS & METAL
 WORK MECHANICS, LOCAL 5, by its Business
 Manager STEVE LUDWIGSON; SERVICE
 EMPLOYEES INTERNATIONAL UNION
 SUPERVISORS, LOCAL 621, by its President CARL
 CHIARAMONTE; ORGANIZATION OF STAFF
 ANALYSTS, by its President ROBERT CROGHAN;
 N.Y.C. DISTRICT COUNCIL OF CARPENTERS,
 UBCJA, by its President PAUL CAPURSO;
 CORRECTION CAPTAINS' ASSOCIATION, INC., by
 its President PATRICK FERRAIUOLO; UNITED
 PROBATION OFFICERS ASSOCIATION, by its
 President DALVANIE POWELL; ALLIED BUILDING
 INSPECTORS LOCAL 211, by its President NELSON
 MAS,

Plaintiffs,

-against-

THE CITY OF NEW YORK; BOARD OF
 EDUCATION OF THE CITY SCHOOL DISTRICT OF
 THE CITY OF NEW YORK; and THE NEW YORK
 CITY HOUSING AUTHORITY,

Defendants.

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BETH NORTON, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am General Counsel of Plaintiff United Federation of Teachers' ("UFT") and am fully familiar with the content of the collective bargaining agreements between the UFT and Board of Education of the City School District of New York (the Board does business as the "Department of Education") (the "DOE") covering teachers and all UFT-represented employees employed by the DOE.

2. Part of my duties and responsibilities as General Counsel is to participate in negotiating and drafting collective bargaining agreements (“CBAs”) and other agreements entered into on behalf of the UFT’s over 100,000 represented employees. I also represent the UFT in a wide range of matters before both state and federal administrative agencies, arbitrators, state and federal courts.

3. I have personal knowledge of the matters set forth in this affirmation, except for such matters as are based on my review of court files or other relevant documents, and I believe such matters to be true.

4. I submit this affirmation in support of Plaintiffs’ Order to Show Cause for a temporary restraining order and preliminary injunction enjoining Defendants from summarily terminating unvaccinated employees represented by Plaintiffs without due process.

I. The History of Negotiations Between UFT and DOE

5. On August 24, 2021, DOHMH Commissioner Chokshi imposed the first version of a COVID-19 vaccination mandate (the “Mandate”) for all employees in the City school district, which requires all DOE staff, City employees, and contractors who “work in-person in a DOE school setting or DOE building” and others in City schools to – no later than September 27, 2021 – provide proof that they have at least received the first dose of a vaccine.¹

6. The Mandate was amended twice: on September 15, 2021 to provide for reasonable accommodations²; and on September 28, 2021 to change the compliance deadline to October 1, 2021.³

¹ Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination For Department of Education Employees, Contractors, and Others, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE (Aug. 24, 2021), <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-doe.pdf>

² Order of the Commissioner of Health and Mental Hygiene To Require COVID-19 Vaccination for Department of Education Employees, Contractors, Visitors, and Others, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL

7. Having already begun discussions with the UFT over a prior vax-or-test mandate, the DOE initially engaged in bargaining with the UFT on the impact and implementation of the new Mandate and did not challenge the UFT's declaration of impasse in this regard. The Public Employment Relations Board ("PERB") found the matter appropriate for impasse assistance, and appointed Martin F. Scheinman to mediate the matter.

8. On September 10, 2021, after expedited mediation and then binding arbitration between the UFT, the City and DOE, over the span of some 18 days, Arbitrator Scheinman issued an award concerning pay and personnel policies related to the implementation of the Mandate.⁴

9. The UFT Award generally provides, as relevant here, that:
- a. Employees had until November 30, 2021 to elect to either (1) separate from service with incentives or (2) remain on an extended unpaid leave through September 5, 2022 with health benefits and the ability to return if vaccinated or the mandate is lifted.
 - b. If an unvaccinated employee did not select either of these options by the November 30, 2021 deadline, as of December 1, 2021, the City employers "shall *seek to* unilaterally separate employees who have not opted" to either separate from service or remain on an unpaid leave. However, all

HYGIENE (Sept. 15, 2021) <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-doe-2.pdf>

³ Order of the Commissioner of Health and Mental Hygiene Revising the Effective Date for Required COVID-19 Vaccination for Department of Education Employees, Contractors, Visitors, and Others, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE (Sept. 28, 2021), <https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-doe-3.pdf>

⁴ See Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFT-CIO (Impact Bargaining), Arbitration Award (Sept. 10, 2021) (the "UFT Award"), Complaint Ex. 1.

parties reserved their existing rights in this regard, as the Awards explicitly state: “except for the express provisions contained, herein, all parties retain all legal rights at all times relevant, herein.”⁵

10. While the terms of the UFT Award were incorporated into the UFT’s CBAs by law, critically, the Award did not provide for any policy related to termination, because those procedures remain unchanged. Moreover, the Award *does not* determine that the DOE has a right to summarily terminate unvaccinated employees who have not selected from the personnel policies available to them by November 30, 2021. Rather, the Award states that City employers can “seek to” terminate those employees, which they have now done in an impermissible manner, given the Awards’ explicit reservation of rights.

II. Vaccination Status Is Not A Bar To DOE Employment

11. Approximately 240 UFT-represented DOE employees continue to work for the DOE remotely without being vaccinated for COVID-19, having received a medical exemption or a religious accommodation. The DOE has advised that some of these employees will be directed to work in-person at non-school facilities later this month, which is permissible under the Mandate.

12. From August 23, 2021 through at least November 22, 2021, the DOE sent numerous emails to staff regarding the vaccine mandate and consequences of an employee’s failure to comply with the DOE Mandate. None of the email communications indicate, or even mention, that unvaccinated UFT members will be subject to summary termination without regard to due process rights. See 8/23/21 communication attached hereto as Exhibit 1; 9/12/21 communication attached hereto as Exhibit 2; 9/23/21 communication attached hereto as Exhibit

⁵ See Complaint Ex. 1 at 17-18 (emphasis added).

3; 9/26/21 communication attached hereto as Exhibit 4; 9/1/21 communication attached hereto as Exhibit 5; 11/22/21 communication attached hereto as Exhibit 6.

III. The Instant Emergency

13. On or about January 31, 2022, the DOE's Division of Human Resources sent an email to unvaccinated UFT members, stating that they would be terminated effective February 11, 2022 due to failure to comply with the DOE Vaccination Mandate.⁶

14. The January 31, 2022 email further advised UFT members that "your health insurance coverage through the City will also cease upon termination."

15. Though the January 31, 2022 email⁷ mentions "COBRA"⁸ coverage, former employees must purchase such coverage at a cost of between \$877.13 and \$3,788.26 per month. Attached hereto as Exhibit 8 is a breakdown of the monthly COBRA rates for former DOE employees effective January 1, 2022.

16. Many UFT members, such as paraprofessionals – who make up 44% of the UFT represented employees subject to termination – earn a salary of between \$27,920 and \$44,416 while employed by the DOE. Attached hereto as Exhibit 9 is a salary schedule for paraprofessionals.

17. Pursuant to the UFT Award, a myriad of UFT members, including those with lower salaries, have been off payroll since approximately October 4, 2021, and as a result have had no income for months. Most of these members live in New York City, with its attendant high cost of living.

⁶ Attached hereto as Ex 7.

⁷ Ex. 7.

⁸ Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §1161 et seq.

18. Upon information and belief, purchasing COBRA coverage - which can cost up to \$3,788.26 per month – would be financially crippling for many of those UFT members who have been off payroll now for more than four months.

19. Even worse, some UFT members that received the January 31, 2022 termination notice have serious medical conditions and will be irreparably harmed by a loss of employer-provided health coverage on February 11, 2022.

20. The UFT contacted each of the more than 700 members who received the January 31, 2022 termination notification. Many of those contacted indicated that they have significant health conditions such as epileptic seizures, pregnancy, and severe heart conditions that would result in serious illness or injury should they lose their health insurance coverage on February 11, 2022 as scheduled. This includes UFT members who are receiving critical lifesaving medical treatment that could be interrupted by a loss of health insurance coverage on February 11, 2022.

21. Further, many of those being terminated were deprived of a legitimate review of their religious accommodation application, which, if provided, could well have precluded their termination. These are people that should have fallen within the protection of the Second Circuit's decision in Kane v. de Blasio, 19 F.4th 152 (2d Cir. 2021). There, the Second Circuit determined that the DOE's standards for evaluating religious accommodation requests were improperly constricted.

22. Pursuant to the order in Kane, the DOE was required to reconsider certain applications under more appropriate standards. But, the DOE has predominately limited this review solely to employees who actually applied and actually appealed denials of their religious accommodation applications.

23. Since the order in Kane was issued, many UFT members have advised the UFT that they were deterred from filing an application for accommodation under the original narrow parameters because they knew they would be denied. Others applied and were deterred from appealing on the same basis. Indeed, by communicating the narrow parameters the DOE hoped to cut down on applications that it did not intend to grant.

24. While the DOE has begun denying these post-Kane applications at the agency level, they are not permitting those employees to appeal, as others were able. Now, some of these employees – who are subject to the same unconstitutional procedures rejected by the Second Circuit – are among those who received notices earlier this week that they will be summarily terminated effective February 11, 2022. By placing these individuals on the termination list before some of their initial applications have been determined, the DOE demonstrates that they will be summarily denied, just as the DOE is seeking to summarily terminate them.

IV. Due Process Applicable to Employees Represented by the UFT

25. Before the most drastic action of termination, UFT members are entitled to access to the due process protections embodied in statutes and agreements the DOE is compelled to follow. To hold otherwise would dismantle the statutory and contractual due process procedures afforded to UFT members as public employees.

26. The UFT is a voluntary and unincorporated labor organization which operates pursuant to the General Associations Law of New York State. The UFT is, and has been, the exclusive bargaining representative of several units of employees, including classroom teachers, guidance counselors, paraprofessionals, occupational therapists, speech therapists, school psychologists, school secretaries, school social workers, nurses, administrative education analysts, and substitute teachers.

27. When the DOE seeks to take disciplinary action against UFT-represented employees, UFT members are entitled to due process procedures, including those set forth in Education Law § 3020-a as amended by the CBAs between the DOE and UFT, Civil Service Law § 75, and other negotiated CBAs.

28. Tenured pedagogues such as classroom teachers, guidance counselors, school secretaries, school social workers, and school psychologists, can only be disciplined after an Education Law § 3020-a due process hearing before a neutral hearing officer. See Education Law 3020-a; Article 21 of the Classroom Teacher CBA, attached hereto as Exhibit 10.

29. Other UFT-represented DOE employees such as paraprofessionals, occupational therapists, speech therapists, nurses, and substitute teachers are entitled to a just cause hearing pursuant to their respective collective bargaining agreements prior to the termination of their employment. See Articles 18 and 19 of the Nurses and Therapists collective bargaining agreement, attached hereto as Exhibit 11, and Articles 22 and 23 of the Paraprofessionals collective bargaining agreement, attached hereto as Exhibit 12.

30. Probationary DOE teachers are also entitled to contractual review procedures when facing termination of employment including an appeal of their termination to the DOE Chancellor. See Ex. 10, Article 21.D.

31. Therefore, the DOE's attempt to summarily terminate unvaccinated employees denies UFT-represented DOE employees the rights they are *guaranteed* by statute and contract prior to adverse employment action.

WHEREFORE, I respectfully request that the Order to Show Cause be granted, and for such other and further relief this Court deems just and proper.

Dated: New York, New York
February 8, 2022

By: 
BETH A. NORTON

WORD COUNT CERTIFICATE

I hereby certify that this affirmation complies with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court. This certificate certifies that the document complies with the word count limit. Compliance relied on the word count of the word-processing system used to prepare the document. The total number of the words in this affirmation, exclusive of the caption, and signature block, is 2, 018 words.

Date: February 8, 2022

/s/ Alan M. Klinger