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IN THE SUPERIOR COURT FOR THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

PAUL T. ACEBEDO, JOSE K. ANGUI, ALLEN T. CALVO, CAIN C. CASTRO, ARGERNON A. FLORES, DEREK B. GERSONDE, SHAWN DLR. KAIPAT, PHILIP M. KALEN, and ADAM J. SAFER, **Plaintiffs,** **vs.** **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, and DENNIS C. MENDIOLA, Commissioner of DFEMS, in his official capacity and in his personal capacity,** **Defendants.**	**CIVIL ACTION NO. 21-0187** **ORDER FINDING THAT (1) THE PLAINTIFFS HAVE NOT EXHAUSTED ADMINISTRATIVE REMEDIES; (2) A PRELIMINARY INJUNCTION IS NOT A PROPER REMEDY FOR ECONOMIC HARM, AND (3)(a) PLAINTIFFS DO NOT HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS FOR ANY OF THEIR CLAIMS; (b) THE LEVEL OF THE THREAT OF IRREPARABLE HARM TO PLAINTIFFS IS PRIMARILY A QUESTION OF FINANCIAL HARM FOR WHICH AN ADEQUATE REMEDY WOULD BE AVAILABLE ON THE MERITS; (c) AND THE PUBLIC'S INTEREST IN PROTECTING THE HEALTH OF THE WHOLE CNMI AND PREVENTING THE SPREAD OF COVID-19 OUTWEIGHS THE PRIVACY AND OTHER INTERESTS OF NINE INDIVIDUAL FIREFIGHTERS**

I. INTRODUCTION

THIS MATTER came before the Court on July 6, 2021 at 2:30 p.m. for a hearing on the Plaintiffs' Motion for a Preliminary Injunction, and again on August 12, 2021 at 10:00 a.m. for a hearing on two new claims raised in the Plaintiffs' Amended Complaint, as relevant to the Motion for a Preliminary Injunction. The Plaintiffs, Paul T. Acebedo, Jose K. Angui, Allen T. Calvo, Cain C. Castro, Argernon A. Flores, Derek B. Gersonde, Shawn DLR. Kaipat, Philip M. Kalen, and Adam J. Safer, were represented by Attorney Joseph E. Horey. The Defendants, the

Commonwealth of the Northern Mariana Islands (hereinafter the "Commonwealth") and Dennis C. Mendiola, Commissioner of the Department of Fire and Emergency Medical Services ("DFEMS"), were represented by Assistant Attorneys General Abbi Novotny and Keith Chambers II. Dennis C. Mendiola (hereinafter "Commissioner Mendiola") is being sued (i) in his official capacity with respect to (a) the Plaintiffs' cause of action for declaratory and injunctive relief; and (ii) in his personal capacity with respect to the Plaintiffs' cause of action for deprivation of their civil rights under both (a) the Northern Mariana Islands Constitution and (b) the United States Constitution.

The Plaintiffs, former employees of DFEMS, request that the Court enter a preliminary injunction reinstating their employment by the Commonwealth until such time as a final decision is reached on the merits of their action.

The Court heard the testimony of the following witnesses: (a) Mr. Jose K. Angui, Plaintiff; (b) Mr. Shawn DLR. Kaipat, Plaintiff; (c) Mr. Philip M. Kalen, Plaintiff; (d) Mr. Cain C. Castro, Plaintiff; (e) Mr. Derek B. Gersonde, Plaintiff; (f) Mr. Paul T. Acebedo, Plaintiff; (g) Mr. Adam J. Safer, Plaintiff; (h) Mr. Argernon A. Flores, Plaintiff; and (i) Mr. Dennis C. Mendiola, Defendant.

The Court received the following exhibits into evidence: (1) Fact Sheet for Healthcare Providers Administering Vaccine (Vaccination Providers) – Emergency Use Authorization (EUA) of Pfizer-BioNTech COVID-19 Vaccine to Prevent Coronavirus Disease 2019 (COVID-19) (three page excerpt); and (2) Vaccine Information Fact Sheet For Recipients and Caregivers – Emergency Use Authorization (EUA) of Pfizer-BioNTech COVID-19 Vaccine to Prevent Coronavirus Disease 2019 (COVID-19) in Individuals 12 Years of Age and Older (seven pages).

The Court, having considered the filings, oral arguments, testimony, evidence, and applicable law, hereby **DENIES** Plaintiffs' Motion for Preliminary Injunction.[1]

II. BACKGROUND

A. COVID-19 Vaccine Emergency Use Authorization, Mandates and Approval

SARS-CoV-2 ("COVID-19" or "the virus") is a contagious disease that was first identified in Wuhan, China in the final months of 2019.

By March 11, 2020, COVID-19 had spread throughout Eurasia, Africa, the Americas, and Oceania, to become a worldwide pandemic.[2] Since that time, COVID-19 has killed millions of people across the world and hundreds of thousands of people in the United States alone.

On March 27, 2020, in response to the pandemic, the Secretary of the Department of Health and Human Services ("HHS") announced that there is "a public health emergency that has a significant potential to affect national security or the health and security of United States citizens living abroad and that involves the novel (new) coronavirus, SARS-CoV-2, [and, therefore,] circumstances exist justifying the authorization of emergency use of medical devices, including alternative products used as medical devices, pursuant to section 564 of the FD&C Act, subject to the terms of any authorization issued under that section" ("HHS Declaration").[3] The Secretary of HHS had the authority to make the HHS Declaration under 21 USC § 360bbb-3(b)(1)(C) ["Subsection (b)(1)"].

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[1] The Parties were given an opportunity to submit proposed orders. To be clear, if any language were used from the proposed orders or other sources, it is purely because the Court found those portions useful. This Order, including the analysis and deliberation, is the product of the Court. See *PRC, LLC v. Globuil Resort*, 2021 MP 5, ¶¶ 17-23.

[2] Dr. Tedros Adhanom Ghebreyesus, Director-General of the WHO, Opening Remarks at the Media Briefing on COVID-19 (March 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 ("We have therefore made the assessment that COVID-19 can be characterized as a pandemic.").

[3] *Emergency Use Authorization Declaration*, HEALTH AND HUMAN SERVICES DEPARTMENT (Mar. 27, 2020), https://www.federalregister.gov/documents/2020/03/27/2020-06541/emergency-use-authorization-declaration.

The first cases of COVID-19 were detected in the Commonwealth on March 28, 2020.[4] On December 11, 2020, in Response to the HHS Declaration, the U.S. Food and Drug Administration ("FDA") issued its first emergency use authorization ("EUA") for a vaccine designed to prevent the spread of COVID-19 – the Pfizer-BioNTech COVID-19 Vaccine.[5] Subsequently, the FDA issued its second EUA for the Moderna COVID-19 vaccine on December 18, 2020,[6] and its third EUA for the Janssen COVID-19 vaccine on February 27, 2021.[7]

One of the conditions of EUA in the Federal Food, Drug, and Cosmetic Act states the following:

> With respect to the emergency use of an unapproved product, the Secretary,[*to the extent practicable given the applicable circumstances* described in subsection (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following: […] appropriate conditions designed to ensure that individuals to whom the product is administered are informed […] of the option to accept or refuse administration of the product, *of the consequences, if any, of refusing administration of the product*, and of the alternatives to the product that are available and of their benefits and risks.

21 USC § 360bbb-3(e)(1)(A)(ii)(III) (emphasis added).

With respect to workplace vaccine mandates, the Centers for Disease Control and Prevention ("CDC") has stated that the FDA "does not mandate vaccination. However, whether a state, local government, or employer, for example, may require or mandate COVID-19 vaccination is a matter of state or other applicable law."[8]

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[4] Press Release, Commonwealth of the Northern Mariana Islands Governor's COVID-19 Task Force, Two cases confirmed positive for COVID-19: Hours for grocery stores adjusted (March 28, 2020) http://chcc.gov.mp/DocumentFiles/Two%20cases%20confirmed%20positive%20for%20COVID-19%20Hours%20for%20businesses%20and%20retail%20establishments%20adjusted.pdf.

[5] FDA, *Comirnaty and Pfizer-BioNTech COVID-19 Vaccine* (last updated Aug. 30, 2021), https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/pfizer-biontech-covid-19-vaccine.

[6] FDA, *Moderna COVID-19 Vaccine* (last updated Aug. 31, 2021), https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/moderna-covid-19-vaccine.

[7] FDA, *Janssen COVID-19 Vaccine*, (last updated Sept. 8, 2021), https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/janssen-covid-19-vaccine.

[8] CDC, *Workplace COVID-19 Vaccine Toolkit: Information for Employers and Employees*, (last updated Sept. 8, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html.

On May 28, 2021, the United States Equal Employment Opportunity Commission clarified that federal equal employment opportunity laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to reasonable accommodations for employees with disabilities or sincerely held religious beliefs that preclude vaccination.[9] While this statement "is not binding, [] it is advice about the position one is likely to meet at the Commission." *Bridges v. Hous. Methodist Hosp.,* No. H-21-1774, 2021 U.S. Dist. LEXIS 110382 (S.D. Tex. June 12, 2021) (Court rejected Plaintiff's claim that the vaccination requirement is invalid, because it violates federal law by requiring receipt of "unapproved" medicines in emergencies and no currently available vaccine has been fully approved by the FDA.)

On July 06, 2021, Dawn Johnsen, the Acting Assistant Attorney General in charge of the Office of Legal Counsel in the U.S. Department of Justice ("DOJ"),[10] issued a memorandum titled "Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine subject to an Emergency Use Authorization" ("DOJ Memo").[11] In the DOJ memo, U.S. Assistant Attorney General Johnsen addressed the question of "whether the 'option to accept or refuse' condition in section 564 prohibits entities from imposing such vaccination requirements while the only available vaccines for COVID-19 remain subject to EUAs."[12] The DOJ concluded "that it does not [and that] this language in section 564 specifies only that certain information be provided to potential vaccine recipients and does not prohibit entities from imposing vaccination requirements."[13]

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[9] United States Equal Employment Opportunity Commission, "EEOC Issues Updated COVID-19 Technical Assistance," May 28, 2021, https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance (last visited Sept. 13, 2021).

[10] "By delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides legal advice to the President and all executive branch agencies." OFFICE OF LEGAL COUNSEL, DOJ, https://www.justice.gov/olc (last visited Sept. 13, 2021).

[11] *Whether Section 564 Of The Food, Drug, And Cosmetic Act Prohibits Entities From Requiring The Use Of A Vaccine Subject To An Emergency Use Authorization*, UNITED STATES DEPARTMENT OF JUSTICE (JULY 6, 2021), https://www.justice.gov/olc/opinion/whether-section-564-food-drug-and-cosmetic-act-prohibits-entities-requiring-use-vaccine (last visited Sept. 13, 2021).

[12] *Id.*

[13] *Id.*

On July 29, 2021, United States President Joe Biden announced the imminent implementation of a vaccination mandate requiring all federal employees to show proof of vaccination, with anyone who does not do so being required to wear a mask on the job, physically distance from all other persons, and undertake weekly or twice weekly COVID-19 testing.[14] The military announced that it will follow suit.[15] There is a growing list of examples of vaccine mandates by hospitals, universities, and other employers and entities being upheld by courts around the United States. *See, e.g., Bridges v. Hous. Methodist Hosp.*, No. H-21-1774, 2021 U.S. Dist. LEXIS 110382 (S.D. Tex. June 12, 2021); *Klaassen v. Trs. Of Ind. Univ.*, No. 21-2326, 2021 U.S. App. LEXIS 22785 (7th Cir. Aug. 2, 2021) (Court of Appeal denied a motion for an injunction pending appeal, stating that because *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905) "holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2.")

On August 23, 2021, the FDA approved the Pfizer-BioNTech COVID-19 Vaccine for individuals sixteen (16) years of age and older.[16]

B. Directive No. 2021-002 and Termination of the Plaintiffs

On February 18, 2021, Commonwealth Governor Torres issued Directive No. 2021-002, mandating that all executive branch employees be vaccinated against COVID-19, with exceptions for those with medical conditions that could be adversely affected by the vaccine, and for those with religious objections. The Directive states, in pertinent part:

> Consistent with the duty to provide and maintain a workplace free of recognized hazards, this policy is adopted to safeguard the health and well-being of employees and their

[14] The White House, "Fact Sheet: President Biden to Announce New Actions to Get More Americans Vaccinated and Slow the Spread of the Delta Variant," July 29, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/ (last visited Sept. 13, 2021).

[15] *Id.*

[16] Press Release, FDA, FDA Approves First COVID-19 Vaccine: Approval Signifies Key Achievement for Public Health (Aug. 23, 2021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine (last visited Sept. 13, 2021).

> families, patrons, clients, visitors, others who spend time in our facilities, and the community, from the risks associated with COVID-19.
> […]
> All employees of the executive branch of the CNMI government are mandated to either (1) complete the COVID-19 vaccination program or (2) obtain an approved exemption accommodation. All department and activity heads will require prompt but reasonable timelines for employees under their charge to schedule and complete the COVID-19 vaccination regime. All department and activity heads shall confirm to my office that all of the employees under their charge have completed the vaccination program or have obtained an approved exemption.
> […]
> Employees may request for a medical exception accommodation or a religious exemption accommodation.

Directive No. 2021-002.

On March 16, 2021, Defendant Commissioner Mendiola issued a Memorandum to all DFEMS personnel, stating that all DFEMS employees were required to register for vaccination by March 18, 2021. The Memorandum explained that employees may request medical exception accommodation or religious exemption accommodation.

On March 18, 2021, the Plaintiffs and other firefighters wrote a letter to Commissioner Mendiola, objecting to the vaccine mandate due to the unknown effects of the vaccine, and petitioning for an exemption from the vaccine requirement on this ground.

On March 19, 2021, Commissioner Mendiola sent to the Plaintiffs a Notice of Proposed Adverse Action-Termination ("Notice"), which informed Plaintiffs of their proposed termination, including reasons for this termination, the date the termination was to take effect, and the legal justification for the termination. The Notice also informed Plaintiffs of their rights. Commissioner Mendiola placed the signatories of the petition on administrative duty. After this, some of the signatories of the petition agreed to be vaccinated, but the Plaintiffs did not.

On April 12, 2021, the Plaintiffs were notified that they would be terminated from DFEMS after thirty days, with termination being effective on May 12, 2021, on the ground of insubordination.

On or about April 28, 2021, Plaintiffs responded through their counsel, Attorney Horey, requesting that the termination notices be rescinded, and arguing that the proposed terminations would violate their constitutional rights to individual privacy and due process of law.

On May 12, 2021, an informal administrative conference and pre-determination hearing was held with DFEMS. Plaintiffs were provided with additional days to submit their proposed accommodations to DFEMS.

On May 14, 2021, Plaintiffs proposed ideas in a letter to Commissioner Mendiola for alternative duties they could perform that would enable them to continue in their jobs while substantially reducing or eliminating interaction with others, particularly with members of the general public. Pursuant to an agreement between the Parties, Commissioner Mendiola amended the Notice to allow for additional time to consider Plaintiffs' proposed accommodations.

On May 20, 2021, Commissioner Mendiola issued a post-determination outcome to the Plaintiffs, rejecting the proposed accommodations.

On May 21, 2021, Commissioner Mendiola issued the final Adverse Action, termination all Plaintiffs for insubordination.

C. Procedural History

1. Procedural History before the Administrative Appeal Process

On June 4, 2021, Plaintiffs filed their appeal with the Civil Service Commission.

On July 30, 2021, at 9 a.m., the Civil Service Commission held a Prehearing Conference. The Plaintiffs' cases were consolidated into one case before the Civil Service Commission.

Defendants filed an Answer to the Appeal on August 20, 2021.

Parties' discovery must be completed by September 20, 2021.

All Motions and Oppositions are due by October 8, 2021 and October 15, 2021, respectively.

All Prehearing documents, such as Exhibits and witness lists, must be filed before October 20, 2021.

A Prehearing Conference to prepare for an administrative hearing is scheduled for October 27, 2021.

2. Procedural History before this Court

On June 9, 2021, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief. In their Complaint, the Plaintiffs, who were employed by the Commonwealth as firefighters in DFEMS, allege that Directive No. 2021-002 mandating vaccination for all executive branch employees, the implementation of this Directive by DFEMS, and the termination of the Plaintiffs were unconstitutional acts in violation of the rights to privacy, due process, and equal protection under the N.M.I. Constitution.

On June 16, 2021, Plaintiffs filed a Motion for Preliminary Injunction, requesting that the Court reinstate the Plaintiffs as Commonwealth employees until such time as a final decision is reached on the merits of their action.

On June 28, 2021, the Defendants filed an Opposition to the Plaintiffs' Motion for Preliminary Injunction.

On July 2, the Plaintiffs filed a Reply in Support of Motion for Preliminary Injunction.

On July 6, 2021, eight of the nine Plaintiffs testified[17]. The Plaintiffs testified that they were firefighters. The Plaintiffs refuse to take the vaccine. The Plaintiffs refusal to take the vaccine was not based on religious or medical grounds. The Plaintiffs refusal range from personal choice, privacy concerns, and/or do not trust the vaccine to work as intended. The Plaintiffs testified that since their termination for insubordination for refusing to take the vaccine, they have suffered financial difficulties.

On July 13, 2021, the Plaintiffs filed a First Amended Complaint. Two additional claims were made, alleging that: (i) Defendant CNMI and Defendant Mendiola in his personal capacity deprived

[17] One of the Plaintiffs was not able to make it to the hearing as he had to attend a family funeral.

the Plaintiffs of their civil rights under the N.M.I. Constitution by infringing upon their right to individual privacy, their right to due process, and their right to equal protection of the law; and (ii) Defendant Mendiola in his personal capacity deprived the Plaintiffs of civil rights under the U.S. Constitution, violating the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

On July 28, 2021, the Defendants filed an Opposition to Plaintiff's Motion for a Preliminary Injunction Concerning Plaintiff's Two New Claims.

On August 4, 2021, the Plaintiffs filed a Reply to Government's Supplemental Opposition to Motion for Preliminary Injunction.

On August 11, 2021, the Defendants filed a Reply to the Plaintiffs' Response to Defendants' Opposition to the Plaintiffs' Motion for Preliminary Injunction on the Amended Claims.

On August 25, 2021, the Plaintiff filed a Notice of Approval of Vaccine, informing the Court that the FDA approved the Pfizer-BioNTech COVID-19 vaccine on August 23, 2021.

On August 31, 2021, the Plaintiff and the Defendants filed Supplemental Briefs concerning the effect of the FDA's approval of the Pfizer-BioNTech COVID-19 vaccine on this case.

III. DISCUSSION

A. Exhaustion of Administrative Remedies Requirement

"The doctrine of exhaustion of administrative remedies requires parties challenging agency actions and decisions to exhaust all administrative remedies before seeking judicial review." *Cody v. NMI Retirement Fund*, 2011 MP 16 ¶ 11 (citing *Marianas Ins. Co. v. CPA*, 2007 MP 24 ¶ 12). However, "[p]arties need not exhaust every potential remedy available to them. Instead, parties must only exhaust all intra-agency appeals *expressly mandated either by statute or by the agency's regulations*." *Id.* (quoting *Rivera v. Guerrero*, 4 N.M.I. 79, 84 n. 37 (1993)) (internal quotation marks omitted) (emphasis by *Cody* court).

1. Plaintiffs have not exhausted all intra-agency appeals expressly mandated by the Administrative Procedure Act and the Northern Mariana Islands Administrative Code

The Administrative Procedure Act ("APA") requires exhaustion as it requires finality of the agency action prior to review in the Superior Court. 1 CMC § 9112(b). While the APA does not mandate intra-agency appeals, it does require finality. *Id.* Even if such finality is not required under the APA, CNMI statutes and regulations do require appeals of the termination decision.

The Civil Service Commission is tasked with "hear[ing] and decid[ing] appeals of any person aggrieved by any action of the Office of Personnel Management or other management or any employee for disciplinary action, suspension, demotion or dismissal from civil service." 1 CMC § 8116(c). This duty is imposed and mandatory: "The Commission *shall* have the following powers and *duties*." 1 CMC § 8116 (emphasis added). A "duty" is defined as "[a] legal obligation owed or due to another and that needs to be satisfied." Black's Law Dictionary (11th Ed. 2019). If the Commission has a duty to hear and decide appeals, then it reasons that appeals must be filed or else the obligation owed to another (i.e. to the one aggrieved) is without force and effect.[18]

The Northern Mariana Islands Administrative Code ("NMIAC") provisions for the Civil Service Commission indicate that an intra-agency appeal is expressly mandated in the present case. These provisions set out the exact path prior to going to Court, indicating when the administrative remedies have been exhausted. *See* NMIAC § 10-20.2-257 (Table 200-1). Specifically, the table shows that the employee must appeal to the Civil Service Commission. *Id*. at Step 5 ("Employees Appeal to Civil Service Commission"). Steps 6 and 7 then have the Commission hearing (if requested by the employee in her appeal) and the decision of the Commission. Notably, the table indicates after step 7 that administrative remedies have been exhausted, and step 8 then lists the courts as the next step. This shows that the NMIAC expressly mandates intra-agency administrative appeal prior to the exhaustion

[18] *See also* NMIAC § 10-20.2-110(c), giving the Commission the duty to hold hearings and decide appeals of employees for "dismissals from the service."

of administrative remedies, and prior to any challenge to such administrative decisions in the courts. *See Cody v. NMIRF*, 2011 MP 16 ¶ 11 (holding that when an agency's regulations require an appeal, such must be done prior to bringing suit in the Superior Court) (citing *Marianas Ins. Co.*, 2007 MP 24 ¶ 12; *Myers v. Bethlehem Shipbldg,* 303 U.S. 41, 50-51 (1939)).

In addition, NMIAC §10-20.2-277 requires an appeal of termination for civil service employees: "[a]n employee must file an appeal within fifteen calendar days after delivery of the letter of decision." The mandatory nature of this step is expressly indicated by the use of the word "must." *See Commonwealth v. Camacho*, 2009 MP 1 ¶ 40. This requirement is not simply a time limit: it requires an appeal to the Civil Service Commission as the next step (again, in line with Table 200-1). Given that NMIAC Section 10-20.2-277 expressly mandates an intra-agency appeal, this appeal process must be completed prior to bringing suit in this Court. *See Cody*, 2011 MP at ¶ 11.

Here, the Plaintiffs are awaiting a scheduled Civil Services Commission hearing, which they requested, and their appeal process is therefore not yet at Step 6. They have not yet received a Civil Services Commission decision, which would mark the completion of step 7, and at which point they will be deemed to have exhausted administrative remedies, allowing them to bring an action for judicial review before this Court. Instead, Plaintiffs have skipped to step 8 while they have not yet completed step 6, failing to complete the intra-agency appeal process expressly mandated by the APA and the NMIAC. Thus, Plaintiffs' untimely and precipitate claim before this Court is in violation of the exhaustion of administrative remedies requirement.

Lastly, it is irrelevant that Plaintiffs argue that their due process rights are found outside of the Civil Service Regulations: Plaintiffs have already waived this argument and subjected themselves to the jurisdiction of the Civil Service Commission when they filed their appeal to the Civil Service Commission on June 4, 2021.[19]

[19] Pl. App. Civil Service Comm. June 4, 2021.

2. The Court declines to exercise its discretion to grant an exception to the exhaustion doctrine, as an administrative remedy would be neither inadequate nor irreparably harmful

Plaintiffs argue that exhaustion of administrative remedies is not required for parties asserting solely constitutional violations, and therefore the Plaintiffs' claim is an exception to this requirement. Defendants contend that even when parties assert constitutional violations, their claim is not an exception to the exhaustion of administrative remedies requirement if the administrative agency can provide the remedy sought by the party.

In *Dowden v. Warner*, the Ninth Circuit held that exhaustion of administrative remedies may not be required where a complaint is founded "solely" on a Constitutional issue, as resolution of a claim based "solely upon a constitutional right is singularly suited to a judicial forum." *Dowden v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973) (A marine was discharged pursuant to regulation that terminated the commission of any female officer who became the step-parent of a child under 18, and the District Court's dismissal of her case for failure to exhaust administrative remedies was overturned on appeal, as her complaint rested solely upon the resolution of her constitutional claim.) In *I.G.I. General Contractor & Dev., Inc. v. P.S.S.*, the Commonwealth Supreme Court recognized this rule but stated that "[a]s a general rule, the mere presence of a constitutional claim does not bar operation of the exhaustion of administrative remedies." *I.G.I. General Contractor & Dev., Inc. v. P.S.S*, 1999 MP 12 ¶ 22 (the Court affirmed dismissal because constitutional issues were not the sole issues in the case) (citing *Rivera v. Guerrero*, 4 N.M.I. 79, 83 (1993)). The Commonwealth Supreme Court clarified this rule in *Rivera v. Guerrero*, holding that the Court *may* grant an exception to the exhaustion doctrine under this rule "in instances where a plaintiff brings constitutional challenges *to the validity of a statute or ordinance* under which the agency acts, and *demonstrates positively* what the administrative decision would be, or that the administrative remedy would be inadequate or irreparably harmful, in his or her particular case." *Rivera,* 4 N.M.I. at 83 (emphasis in original).

Here, Plaintiffs have brought constitutional challenges to the validity of Directive No. 2021-002. However, Plaintiffs are unable to demonstrate positively what the administrative decision would be or that it would be inadequate or irreparably harmful. This is of course because the action is still pending and is in fact still in early stages of the proceedings.

Moreover, the issue before this Court is whether or not to grant a temporary injunction to reinstate the terminated employees during the pendency of this suit. This is clearly a remedy the administrative agency can grant via their appeal case. See *Metz v. Veterinary Examining Board*, 741 N.W.2d 244,254 (Wisc. 2007) (holding that even when couched in a constitutional challenge, if agency can provide remedy sought by party, then party must exhaust administrative remedies).

3. Conclusion: Exhaustion of Administrative Remedies Requirement has not been met

Given that the appeal at the Civil Service Commission is still pending, and the requested remedy restoring Plaintiff's employment is a remedy available through the administrative appeals process, the Plaintiffs have yet to exhaust administrative remedies. Until the Civil Service Commission issues its decision, the Superior Court cannot issue a judicial remedy. A plaintiff cannot short-circuit the administrative process and must be reasonably diligent in protecting her interests by engaging fully with the administrative process until she has exhausted all administrative remedies available to her. Plaintiffs filed an appeal with the Civil Services Commission and that appeal is still in the early stages of the proceedings. The very same remedy sought by the Plaintiffs from the Superior Court, namely restoration of their employment, is available in the administrative appeal proceedings. Plaintiffs cannot simply hedge their bets by simultaneously filing for an administrative appeal and bringing a cause of action in Superior Court, racing one legal proceeding against another and waiting to see which institution will give them the outcome they desire first. Plaintiffs' failure to exhaust administrative remedies deprives this Court of jurisdiction.

B. Preliminary Injunction is not a proper remedy where monetary damages are an available and adequate remedy

The Commonwealth Supreme Court has held that it is inappropriate to grant a preliminary injunction when money damages are an available and adequate remedy. *See Kevin International Corp. v. Superior Court*, 2006 MP 3 ¶ 17 (citing *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999)). Relying on the U.S. Supreme Court precedent, the Commonwealth Supreme Court concluded that "as a general rule, when a party is entitled to a remedy at law, no injunction should issue."[20] *Id.* Here, in their request for a preliminary injunction, Plaintiffs are seeking reinstatement as employees of the Commonwealth. However, if Plaintiffs prevail in their administrative appeal, they will be entitled to reinstatement. If the Plaintiffs, having exhausted domestic remedies, proceed on the merits before this Court and prevail, they will be entitled to reinstatement with back pay. Therefore, given that monetary relief is an available and adequate remedy, it would be inappropriate to issue a preliminary injunction.

C. Preliminary Injunction

Even if administrative remedies had been exhausted and a preliminary injunction were a proper remedy in the present case, the Plaintiffs' Motion for a Preliminary Injunction would not pass the four factors test determining whether a preliminary injunction should be granted. The Court will consider this analysis for the purpose of completeness.

"The purpose of a preliminary injunction is not to determine the merits of the case. Rather, it is to preserve the status quo between parties to an action pending a final determination on the merits." *Villanueva v. Tinian Shipping and Transp., Inc.*, 2005 MP 12 ¶ 19; *Pacific Am. Title Ins. & Escrow*

[20] At footnote 8, the N.M.I Supreme Court, in *Kevin International Corp.*, quotes *Breentag Int'l Chemicals, Inc. v. Bank of India*, which states "a more accurate description of the circumstances that constitute irreparable harm is that where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Breentag Int'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245 (2nd Cir. 1999). In the present case, such circumstances do not apply: there is nothing to indicate any substantial chance that upon final resolution of the action, the parties cannot be returned to the positions they previously occupied, namely employer and employees. There is nothing to indicate that the Plaintiffs cannot have their employment reinstated, with back pay, upon final resolution of this case.

(CNMI), Inc. v. Anderson, 199 MP 15 ¶ 8, 6 N.M.I 15, 17; *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). Commonwealth courts typically look to the following four factors in determining whether a preliminary injunction must be granted: (1) whether the plaintiff has a strong likelihood of success on the merits; (2) the level of the threat of irreparable harm to the plaintiff if the relief is not granted; (3) the balance between the harm the plaintiff will face if the injunction is denied and the harm the defendant will face if the injunction is granted; and (4) any effect the injunction may have on the public interest. *Id.* at ¶ 20 (citing *Johnson v. Cal. State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)). However, "[w]hen the government is a party, these last two factors merge." *See Washington v. DeVos*, 466 F.Supp.3d 1151, 1170 (E.D. Wash., 2020) (quoting *Drakes Bay v. Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). "[T]he Court will not grant a preliminary injunction unless the public interests in favor of granting an injunction 'outweigh other public interests that cut in favor of *not* issuing the injunction.'" *DeVos*, 466 F. Supp.3d at 1170 (quoting *All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (emphasis in original)).

1. Plaintiffs do not have a strong likelihood of success on the merits[21]

First, the Court notes that Plaintiffs do not contend that their substantive due process claim supports their current Motion for a Preliminary Injunction, and therefore this claim will not be considered as part of the discussion below.

Prior to considering under a constitutional analysis each of the remaining three claims of the Plaintiffs and whether they have a strong likelihood of success on the merits, the Court turns back to the words of the U.S. Supreme Court in 1905 with respect to a constitutional claim under the Fourteenth

[21] The Plaintiffs argue that in a case seeking an injunction alleging injury to constitutional rights, the four factors collapse into one, namely the likelihood of success on the merits. *Citing, for example, Dahl v. Board of Trustees of Western Michigan Univ.*, Case No. 1:21-cv-757, ECF No. 8 (W.D. Mich., Aug. 31, 2021), slip op. at 5-6; *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020). The Court notes, however, that even if this single-factor test is applied, the Plaintiffs are unable to show likelihood of success on one of their claims and thus unable to satisfy this test.

Amendment of the U.S. Constitution in the midst of a public health crisis. In reaching its conclusion that a state may issue a vaccine mandate to require all members of the public to be vaccinated against smallpox, the U.S. Supreme Court, in *Jacobson v. Massachusetts*, stated that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (Court sustained the criminal conviction of an individual who refused to be vaccinated against smallpox). In the midst of the COVID-19 pandemic, courts within the United States have returned again to the guidance of *Jacobson* and endorsed it. *E.g., Klaassen v. Trs. Of Ind. Univ.*, 2021 U.S. Dis. LEXIS 133300 *56, *60 (7th Cir. 2021). (citing *Republican Party v. Pritzker,* 973 F.3d 760, 763 (7th Cir. 2020). While the *Jacobson* ruling applied the U.S. Constitution, the same principle applies under the N.M.I. Constitution: rights guaranteed by the N.M.I. Constitution do not import an absolute right to every individual to be wholly free from restraint. Analysis of the Constitution at 29.

(a) N.M.I. Constitution Privacy Claim

Article I Section 10 of the Northern Mariana Islands Constitution provides that "[t]he right of individual privacy shall not be infringed except upon a showing of compelling interest." N.M.I. CONST., Art. I, § 10. "[Among other things, this right of individual privacy "protects a person from unconsented physical intrusions into his or her body." Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands, 25 (1976). When an individual believes that her right to privacy "has been intruded upon, that individual has the right to seek judicial action stopping the intrusion, preventing future intrusions of the same kind, and granting compensation for the harm caused by the intrusion." *Id.*, at 29-30. "[Among other things, this right of individual privacy "protects a person from unconsented physical intrusions into his or her body." *Id.*, at 25. "[A]n infringement of the guarantee [of privacy is required] to satisfy strict scrutiny review." *Elameto v. Commonwealth*, 2018

MP 15 ¶ 16 (quoting Analysis of the Constitution at 28-29). The N.M.I. Constitution "sets the balance in favor of the individual." Analysis of the Constitution at 25. "[L]itigants claiming the right's protections must, as a preliminary matter, provide sufficient evidence to establish that an intrusion rising to the level of a constitutional violation occurred." *Elameto,* 2018 MP at ¶ 18.

However, what is true of rights guaranteed under the U.S. Constitution is also true with respect to the N.M.I. Constitution: the right of individual privacy under the N.M.I. Constitution "is not absolute. The public has an interest in protecting the health, safety and welfare of the community composed of individuals. Each individual makes a compromise when that individual chooses to live with others and enjoy the benefits of society."[22] Analysis of the Constitution at 29.

In considering whether Directive No. 2021-002 constitutes an unconstitutional intrusion into the Plaintiff's right to privacy, the Court applies the three-part test established by the N.M.I. Supreme Court for evaluating an allegation of a constitutional privacy violation in *Elameto*: Plaintiffs must establish, through the use of sufficient evidence, "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Elameto*, 2018 MP at ¶ 20 (quoting *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39-40 (1994)).

Under this test, Plaintiffs do have a legally protected privacy interest. One class of legally recognized privacy interests includes autonomy privacy, namely "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference." *Hill*, 7 Cal.

[22] Plaintiffs contend that they faced a "Hobson's choice," being put in a position by Directive No. 2021-002 of either being vaccinated and therefore incurring constitutional injury, namely an invasion of their privacy, or facing disciplinary action. The Plaintiffs argue that this "Hobson's choice" is itself a constitutional injury, as supported by case law: "[a] plaintiff can suffer a constitutional injury by being forced to comply with an unconstitutional law or else face financial injury or enforcement action." *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 537 (N.D. Cal. 2017); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1156 (10th Cir. 2013), *aff'd sub nom.*; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Gorsuch J., concurring); *American Trucking Assns., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009); *Inouye v. Kemna*, 504 F.3d 705, 714 (9th Cir. 2007); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019).

4th at 35. Here, the Court assumes that the Plaintiffs have a right to bodily integrity. *See Klaassen v. Trs. Of Ind. Univ.*, No. 21-2326, 2021 U.S. App. LEXIS 22785 *5 (7th Cir. Aug. 2, 2021).

Turning to the second part of the test, Plaintiffs fail to show that they have a reasonable expectation of privacy in the circumstances. The existence of a legally protected privacy interest does not guarantee a reasonable expectation of privacy: a reasonable expectation of privacy is an objective entitlement, which is shaped by the circumstances and "customs, practices, and physical settings surrounding particular activities." *Elameto,* 2018 MP at ¶ 20 (quoting *Hill,* 7 Cal. 4th at 39-40.). One example is that "advance notice of an impending action may serve to 'limit [an] intrusion upon personal dignity and security' that would otherwise be regarded as serious." *Hill, id.*, at 36 (quoting *Ingersoll v. Palmer*, 43 Cal.3d 1321, 1346 (1987) (upholding the use of sobriety checkpoints)). The Plaintiffs are firefighters and emergency responders serving the greater interest of public health and safety in the time of a global pandemic. In the United States, vaccine mandates have been used to respond to public health emergencies and to protect the safety of the community since the nineteenth century. *E.g., Jacobson*, 197 U.S. 11 (1905); *Bissell v. Davidson*, 65 Conn. 183, 32 A. 348 (Conn. 1894); *Abeel v. Clark*, 84 Cal. 226 (1890). Laws requiring children to receive certain vaccinations before they attend school are ubiquitous across all fifty states and the District of Columbia, and "all laws provide exemptions for medical reasons and nearly all religious exemptions." *Klaassen,* 2021 U.S. Dis. LEXIS 133300 *56 (7th Cir. 2021); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656, 115 S. Ct. 2386, 132 L. Ed. 2d 56 (1995) (citing U.S. Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991-1992, p.1).

As emergency responders, the Plaintiffs have made a commitment to protect public health and safety. Therefore, they do not necessarily have a reasonable expectation of privacy with respect to the right to refuse what is now an FDA-approved vaccine, without qualifying for a medical or religious exemption, when they are frontline workers in a global health emergency. Having received FDA-approval, the Pfizer-BioNTech COVID-19 vaccine is no different than the other approved vaccines

that are been required across the country in order to prevent infectious diseases and protect public health and safety.

With respect to the third part of the test, Plaintiffs fail to show conduct by the Defendants constituting a serious invasion of privacy. In order to constitute a serious invasion of privacy, such invasions "must be sufficiently serious in their nature, scope and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Elameto,* 2018 MP at ¶ 20 (quoting *Hill*, 7 Cal. 4th at 37). As explained above, vaccine mandates are the norm across the United States, and therefore it cannot be said that a vaccine mandate—especially one involving an FDA-approved vaccine—constitutes an egregious breach of social norms.

Thus, while Plaintiffs have a legally protected privacy interest, Plaintiffs failed to provide sufficient evidence to show that they had a reasonable expectation of privacy and that the conduct by the Defendants constituted a serious invasion of privacy.

However, even if Directive No. 2021-002 was found to be an intrusion into the privacy of the Plaintiffs, even if the alleged "Hobson's choice" faced by the Plaintiffs is indeed a choice involving constitutional injury under the N.M.I. Constitution, such an intrusion *is* constitutionally permissible if the Defendants can satisfy strict scrutiny review. *Elameto,* 2018 MP at ¶ 16. To satisfy strict scrutiny review, the Commonwealth's intrusion must be "narrowly tailored to serve a compelling government interest." *Northern Mariana Islands v. Minto,* 2011 MP 14 ¶ 23 (citing *Zablocki v. Redhail,*434 U.S. 372, 388 (1978); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *In Re Seman*, 3 N.M.I 57, 67 (1992)). To be narrowly tailored, the infringement "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014); *see also* Analysis of the Constitution at 30 (Once the plaintiff offers sufficient evidence to establish an intrusion, "the defendant must show a public purpose for the intrusion [which] is a purpose that advances the health, safety or welfare of the community," and which is "necessary and could not have been accomplished in any

other less intrusive way."). "Public purpose" includes "the need […] to protect the health of the people." Analysis of the Constitution at 30.

Directive No. 2021-002 states that the vaccine mandate "was adopted to safeguard the health and well-being of employees and their families, […] and the community, from the risks associated with COVID-19." In enacting this mandate for employees of the executive branch of the Commonwealth government, the Commonwealth sought to advance the health, safety and welfare of the community and protect the health of the people against the spread of COVID-19. The U.S. Supreme Court has found that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (majority opinion). The Defendants had the same compelling interest here.

Moreover, the vaccine mandate is narrowly tailored. The FDA has stated that, for the purpose of preventing the spread of COVID-19, there is no "adequate, approved, and available alternative" to COVID-19 vaccinations.[23] A vaccine mandate is therefore the most efficient and effective method available to prevent the spread of COVID-19 in the CNMI. Given that there was no alternative to the vaccine to prevent the spread of COVID-19, and the vaccine mandate does provide exceptions for medical exemptions and religious exemptions, the vaccine mandate is narrowly tailored in that it is the least restrictive means of achieving the compelling state interest of preventing the spread of COVID-19. Again, to be clear, none of the Plaintiffs rely on the two recognized exceptions of medical and religious grounds for their refusal to take the vaccine.

In conclusion, therefore, Directive No. 2021-002 does not constitute an intrusion into the privacy rights of the Plaintiffs, and even if it did, the Defendants can satisfy strict scrutiny review and therefore that hypothetical intrusion would be constitutionally permissible.

[23] FDA, *Emergency Use Authorization (EUA) for an Unapproved Product Review Memorandum*, https://www.fda.gov/media/146338/download (last visited Sept. 13, 2021) ("There is no adequate, approved, and available alternative to the product for preventing COVID-19 caused by SARS-CoV-2").

(b) N.M.I. Constitution Procedural Due Process Claim

Pursuant to the N.M.I. Constitution, "[n]o person shall be deprived of life, liberty or property without due process of law." NMI CONST. art. I, § 5. "This section is taken directly from section 1 of the Fourteenth Amendment to the United States Constitution […and] no substantive change from section 1 of the Fourteenth Amendment or the interpretation of that section by the United States Supreme Court is intended." Analysis of the Constitution at 23-24; *see also Castro v. Castro*, 2009 MP 8 ¶ 16 ("Because the Commonwealth and U.S. Constitutions are essentially coextensive in regard to due process protections, we analyze the present facts as if the two bodies of law are one."). Therefore, the Court will conduct its analysis as if the two bodies of law are one.

In a procedural due process analysis, the Court must first determine if the Plaintiffs have due process rights and, if so, what process is due to Plaintiffs under these facts. *See J.G. Sablan Rock Quarry, Inc. v. Department of Public Lands*, 2012 MP 2 ¶ 18 ("To determine if Sablan's constitutional right to due process has been violated, we must first determine if a due process interest is implicated and, second, determine what procedures protect that interest sufficiently to satisfy due process.") (citing *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37, 43, 44-45 (1993) ("We must first determine if a due process interest is implicated and, second, determine what procedures protect that interest sufficiently to satisfy due process.")).

When determining if process is due, the Court must determine whether Commonwealth statutes and regulations gave Plaintiffs a protected property interest. *Triple J Saipan, Inc. v. Muna*, 2019 MP 8 ¶ 21 ("In order to be protected by due process, state statute or rule must create the liberty or property interest."); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) ("Property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972))). Property interests are "interests that a person has already acquired in specific benefits." *Triple J Saipan, Inc.*, 2019 MP at ¶ 20 (citing *Board of Regents*, 408 U.S. at 576).

Here, the Court can readily affirm that Plaintiffs had a protected property interest in their employment because they were classified employees.[24] *See Kizer v. Shelby County Government*, 649 F.3d 462, 466 (6th Cir. 2011) ("Where a state civil service system categorizes public employees as classified—that is, not subject to removal at will—employees have a state-law-created, constitutionally protectable property interest in maintaining their current employment." (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985)). Because Plaintiffs had a protected property interest in their employment and were terminated for cause by the Commonwealth, Plaintiffs were entitled to constitutional procedural due process.[25]

Next, the Court must determine to what process Plaintiffs are entitled. The question of "what process is due" does not concern itself with statutory law, but rather with what is constitutionally required. *Klingler v. Univ. of S. Mississippi, USM*, 612 F. App'x 222, 229 (5th Cir. 2015) ("Regardless of whether the interest arises from state law or the Due Process Clause, federal constitutional law determines what process is due."); *J.G. Sablan Rock Quarry, Inc.*, 2012 MP at ¶ 19 (analyzing the factors outlined in the United States Supreme Court case *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine what process the plaintiffs were entitled to under the Constitutions). The United States Supreme Court outlined "what process is due" for public employee termination cases in *Cleveland Board of Education v. Loudermill*, holding that notice and an opportunity to be heard are the essential requirements of due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). The U.S. Supreme Court further explained:

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[24] NMIAC § 10-20.2-257(c) ("An action against an employee may not be taken under this part except for 'such cause as will promote the efficiency of the service.'").

[25] The property interest here only comes from Plaintiffs' interest in their government employment. Plaintiffs do not have a property interest in the EUA procedures. *See Triple J Saipan, Inc. v. Muna*, 2019 MP 8 ¶ 22 ("PSS's claim amounts to no more than one to process itself, which procedural due process does not protect"); *see also Olim v. Wakinekona*, 461 U.S. 238, 250–51 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement [...] The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right."); *Dorr v. County of Butte*, 795 F.2d 875, 877 (9th Cir.1986) ("[A] substantive property right cannot exist exclusively by virtue of a procedural right").

> The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (internal citations omitted).

Here, the Plaintiffs received both notice and an opportunity to be heard. With respect to notice, Commissioner Mendiola sent a memorandum to DFEMS personnel, including the Plaintiffs, on March 16, 2021, stating that failure to register for the COVID-19 vaccine by March 18, 2021 may be grounds for termination. Commissioner Mendiola also provided to the Plaintiffs, on March 19, 2021, a Notice of Proposed Adverse Action-Termination ("Notice"), informing Plaintiffs of their proposed termination, the reasons for their proposed termination, the date the termination was to take effect, the legal justification for the termination, and notifying Plaintiffs of their right to respond. With respect to the opportunity to be heard, Plaintiffs responded to the Notice through their attorney, Mr. Horey, on April 27, 2021, and an informal administrative conference and pre-determination hearing was held with DFEMS on May 12, 2021. On May 14, 2021, Plaintiffs submitted written arguments through their attorney as to accommodations they believed should be provided to them, and Commissioner Mendiola amended the Notice to consider the Plaintiffs' written accommodation arguments. Further notice was provided when, on May 20, 2021, Commissioner Mendiola issued a post-determination outcome to the Plaintiffs, and when, on May 21, 2021, Commissioner Mendiola issued an Adverse Action for insubordination. Moreover, Plaintiffs appealed the termination to the Civil Service Commission on June 4, 2021, and will receive further opportunity to be heard in that forum. Thus, there is no violation of procedural due process: Plaintiffs received their constitutionally required notice and an opportunity to be heard.

Furthermore, given that the FDA approved the use of the Pfizer-BioNTech COVID-19 vaccine on August 23, 2021, the Plaintiffs' arguments regarding the requirement under the EUA laws and 21

U.S.C. Section 360bbb–3(e)(1)(A)(ii)(III) that patients be given notice that they have the option to accept or refuse the vaccination—and that the Commonwealth did not act "in the normal manner prescribed by law" in issuing Directive No. 2021-002— are moot.

(c) N.M.I. Constitution Right to Equal Protection Claim

The equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." *Minto,* 2011 MP at¶ 26 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439 (1985)). The equal protection clause of the N.M.I. Constitution, just like its due process clause, "is taken directly from section 1 of the Fourteenth Amendment to the United States Constitution" and as such, is interpreted in the same manner as section 1 of the Fourteenth Amendment. *Id.*; Analysis of the Constitution at 25 ("No substantive change from section 1 of the Fourteenth Amendment or the interpretation of that section by the United States Supreme Court is intended.")

"Traditional equal protection analysis under the U.S. Constitution scrutinizes laws which (a) affect a "suspect class," or (b) violate a fundamental right." *Matter of Blankenship*, 3 N.M.I. 209, 219 (1992). Here, Plaintiffs are not in a "suspect class" because "public employment is not a fundamental right under equal protection analysis." *Camacho v. N. Marianas Ret. Fund,* 1 N.M.I. 131, 135 (1990) (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976)). Therefore, Plaintiffs' equal protection clause claim fails.[26]

2. The level of the threat of irreparable harm to the Plaintiffs if the requested relief is not granted is primarily a question of financial harm for which an adequate remedy will be available at a later date, should Plaintiffs prevail

In an irreparable harm analysis, "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson v. Murray,* 415 U.S. 61, 90 (1974). This is because

[26] It is also worth noting that, contrary to line 44 of Plaintiffs' First Amended Complaint, the freedom of religion protected by the Constitutions does not give Plaintiffs a fundamental right to avoid the vaccine mandate. *See Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (stating that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause").

they are not considered "irreparable": "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.*, at 94; *see also Garcia v. United States*, 680 F.2d 29, 31 (5th Cir. 1982) (finding no irreparable harm because reinstatement with back pay was an available remedy).

Here, all of the Plaintiffs who testified spoke of the financial hardship they suffered due to their termination for insubordination. However, the law is clear: there is a possibility that adequate compensatory or other corrective relief, in the form of reinstatement to their employment and back pay, will be available at a later date if the Plaintiffs prevail, either through the administrative appeal process or through litigation before this Court. This possibility weighs heavily against a claim of irreparable harm, and this weight cannot be overcome by the Plaintiff. Therefore, the Court concludes that the level of threat of irreparable harm is not sufficient to satisfy this factor of the test.

3. The public interests in favor of granting an injunction do not outweigh other public interests that cut in favor of not issuing the injunction

In their arguments, the Parties addressed this factor as a balancing of harms rather than interests. Plaintiffs argue that the Commonwealth will suffer minimal hardship in taking the Plaintiffs back to work, citing some bureaucratic inconvenience involved in shuffling their work times, places, and duties in order to protect public health, and referring to the high vaccination rates within the executive branch and the Commonwealth as a whole. Defendants contend that the harm caused by the spread of COVID-19 outweighs the harm of a vaccine mandate.

In order for this combined third and fourth factor of the preliminary injunction test to be satisfied, the Court must find that "the public interests in favor of granting an injunction 'outweigh other public interests that cut in favor of *not* issuing the injunction.'" *DeVos*, 466 F. Supp.3d at 1170 (quoting *Cottrell*, 632 F.3d at 1138 (emphasis in original)). The public interests in favor of granting an

injunction include the protection of individuals' right to privacy. The public interests opposed to the issuance of an injunction is the public's health and safety, namely preventing community transmission of a deadly and continually evolving virus.

When the Court uses the term public interest, the Court highlights that this goes beyond the physical consequences of a community transmission, which are horrific to imagine and which we have witnessed in other communities around the world since the pandemic began (loss of life, the suffering of those who fall ill and their caregivers, lost schooling and ability to work, sick individuals dying because they are unable to receive adequate care due to the limited number of beds available in the intensive care unit and/or the limited availability of ventilators and oxygen, etc.).

The public interest in being able to trust DFEMS and the public's willingness to call emergency services in a crisis must also be added to this balancing of interests. The passing of an injunction reinstating firefighters who have chosen not to receive the COVID-19 vaccine because it had not yet been approved by the FDA – an objection which is now moot, of course, as the FDA has issued its approval for several COVID-19 vaccines – risks undermining the public's trust in DFEMS. It should not be forgotten that there are members of the community who have not been vaccinated and are therefore especially vulnerable to transmission, including children under the age of 12 and immunocompromised individuals. Even if the Plaintiffs are reinstated with accommodations that prevent them from any direct interaction with the public, members of the public may not feel safe calling DFEMS in an emergency situation if a member of their household has not been vaccinated. It is an issue of life and death when the public cannot call the DFEMS to provide rescue and emergency assistance because the firefighters and medical personnel are unvaccinated. In this regard, the public interest outweighs the concerns of the Plaintiffs.

Furthermore, in balancing the public interest in ensuring that nine individuals are able to exercise their right to privacy in refusing a COVID-19 vaccine against the public interest in ensuring the public health and safety of the entire Commonwealth community, the Court returns to the words

of the U.S. Supreme Court in *Jacobson v. Massachusetts*. In reaching its conclusion that a state may issue a vaccine mandate to require all members of the public to be vaccinated against smallpox, the U.S. Supreme Court further stated:

> If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some,[…] the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few.

Id. The public interest in protecting the privacy rights of a few individuals is outweighed by the public interest in protecting the health and safety of the entire community. For these reasons, the final factor of the test has not been satisfied and the Court declines to grant a preliminary injunction.

IV. CONCLUSION

For the reasons above, the Court finds that (1) the Plaintiffs have not exhausted administrative remedies; (2) a preliminary injunction is not a proper remedy for economic harm, and (3)(a) Plaintiffs do not have a strong likelihood of success on the merits for any of their claims; (b) the level of the threat of irreparable harm to the Plaintiffs is primarily a question of financial harm for which an adequate remedy would be available on the merits; and (c) the public's interest in protecting the health of the whole CNMI and preventing the spread of COVID-19 outweighs the privacy and other interests of the nine individuals firefighters. THEREFORE, the Plaintiffs' Motion for a Preliminary Injunction is DENIED.

SO ORDERED this 13th day of September, 2021.

/s/
JOSEPH N. CAMACHO, Associate Judge