UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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OREN BARZILAY, as President of UNIFORMED EMTS, PARAMEDICS, AND FIRE INSPECTORS, LOCAL 2507, DC 37, AFSCME; UNIFORMED EMTS, PARAMEDICS, AND FIRE INSPECTORS, LOCAL 2507, DC 37, AFSCME; ELIZABETH BONILLA; ALEXANDER NUNEZ; MEGAN PFEIFFER; and JOHN RUGEN,

Plaintiffs,

- against - **20-cv-4452 (LJL)**

THE CITY OF NEW YORK, and DANIEL NIGRO, as Commissioner of the Fire Department Of the City of New York, and CARLOS VELEZ,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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Preliminary Statement

Plaintiffs are EMTs and Paramedics who work for the Fire Department of the City of New York ("FDNY"), and the union that represents them. They have brought this action complaining that Defendants (1) retaliated against them because they communicated with the media on matters of public concern; and (2) deprived them of a liberty interest without due process by falsely accusing them of violating HIPAA and patient confidentiality requirements and barring them from employment as EMTs and Paramedics in New York City's 911 system without providing notice or an opportunity to be heard on these allegations. Discovery has been completed. Plaintiffs now bring this motion for Partial Summary Judgment on Defendants' liability for depriving Plaintiffs of their liberty interests without due process.

Statement of Material Undisputed Facts

Plaintiff Uniformed EMTs, Paramedics, and Fire Inspectors Local 2507, DC 37, AFSCME ("Local 2507" or "the Union") is a union that represents EMTs and Paramedics employed by the FDNY. Barzilay decl. ¶ 3. Beginning in 2019, Local 2507 launched a campaign to publicize the difficulties faced by the Union's members working in New York City's 911 system, and to publicize its contention that the pay afforded FDNY EMTs and Paramedics is inequitably lower than that paid to New York City Police Officers and Firefighters. Declaration of Oren Barzilay ("Barzilay decl.") ¶ 4.

The Union succeeded in gaining press coverage on the subject of compensation for FDNY EMTs and Paramedics. Barzilay decl. ¶ 6; Dwyer dep. 54-55[1] (Meginniss Ex. A). For example, on September 21, 2019, the New York Times published an editorial entitled "Emergency Medical Workers Deserve Pay Equity." Barzilay decl. ¶ 6, and Ex. A. And on

[1] All references to "dep." are to page numbers in the deposition of the individual referred to. All deposition excerpts are attached as exhibits to the accompanying declaration of Walter Meginniss.

December 30, 2019, NBC News published the report entitled "Medical first responders say they're underpaid and overworked. Will anything change?" Barzilay decl. ¶ 6 and Ex. B.

In 2020, Local 2507 expanded its campaign to publicize the difficulties that EMTs and Paramedics faced in performing their duties during the pandemic. Barzilay decl. ¶ 7. There has been substantial media interest in the effect of the pandemic on New York City EMTs and Paramedics. Dwyer dep. 60, 66-67 (Meginniss Ex. A); Barzilay decl. ¶ 8 and Exs. C and D. Members of the press frequently filmed EMTs and Paramedics performing their duties, and contacted Local 2507 seeking the Union's help in setting up interviews with Local 2507 members. Barzilay decl. ¶ 11. Local 2507 officers and members were quoted in press reports describing the difficulties of working in the pandemic and the shortage of personal protective equipment available to FDNY EMTs and Paramedics. *See, e.g.*, Barzilay decl. Ex. D. Local 2507 officers also criticized the FDNY's lack of preparedness for the pandemic. Greco decl. ¶ 7 (Union V.P. testified at N.Y. City Council March 5, 2020, on City's emergency medical services system's lack of preparedness the pandemic).

The Individual Plaintiffs' Appearances in Press Reports

In early April, 2020, the Union received a request from the Australian Broadcasting Corporation ("Aus. BC") for help filming FDNY EMTs and Paramedics at work. Barzilay decl. ¶ 12. Local 2507 agreed to provide that assistance, and Local 2507 President Barzilay asked Plaintiff John Rugen – a FDNY EMT and one of Local 2507's Executive Board members – to get time off to assist the Aus. BC team observe the work of some FDNY personnel. *Id.*, at ¶ 13.

President Barzilay and Mr. Rugen met the Aus. BC team on April 10. *Id.*, at ¶ 15. Barzilay informed them they could set up in public areas and film EMTs and Paramedics at work. *Id*. That day, with two Aus. BC reporters in his personal vehicle, Mr. Rugen followed a

FDNY ambulance to a location where the ambulance crew was responding to a call. Rugen decl. ¶ 8. At the site of the call, the Aus. BC team exited the car and followed the EMS crew. *Id.*, at ¶ 9. Mr. Rugen understood that the Aus. BC team would be observing and photographing from the sidewalk or another location available to the public. *Id.* However, Mr. Rugen learned that the Aus. BC team, rather than remaining outside in public areas, had also entered that building. *Id.*, at ¶ 10. Mr. Rugen entered the building, intercepted the Aus. BC team and told them they could not enter but must remain outside in public areas. *Id.* The Aus. BC team informed Mr. Rugen that they had received authorization from the patient's family to enter the residence and film, and declined to exit. *Id.* Neither Mr. Rugen nor the EMS crew (Plaintiff Pfeiffer and her partner, Paramedic Nauth) authorized, encouraged or consented to the Aus. BC team' entry into the residence. *Id.*, at ¶ 11; Pfeiffer decl. ¶ 5.

On April 11, 2020, Mr. Rugen again helped the Aus. BC team follow EMTs and Paramedics while they worked. Rugen decl. ¶ 12. With the Aus. BC team in his car, Mr. Rugen followed an ambulance dispatched to a call. *Id*. Outside a residential building that the EMS crew (Plaintiff Nunez and his partner, Paramedic O'Neal) had entered, the Aus. BC team told Mr. Rugen they wanted to enter the building as well. *Id.* Mr. Rugen told the Aus. BC crew not to do so, and then alerted a FDNY supervisor at the scene that the Aus. BC team wanted to enter the building but that he, Mr. Rugen, had told them not to do so. *Id*. Subsequent to that conversation, the Aus. BC team entered the building. *Id.* Neither Mr. Rugen nor the EMS crew had authorized, consented to or encouraged that entry. Rugen decl. ¶ 13; Nunez decl. ¶ 15. Paramedic Nunez was not even aware that the Aus. BC team had entered the residence until he had completed treating the patient and had left the building. Nunez decl. ¶ 5.

Neither Mr. Rugen, nor Mr. Nunez, nor Ms. Pfeiffer disclosed to the Aus. BC team the

name, address, condition or treatment of any patients, nor any information related to the medical condition of patients. Rugen decl. ¶ 14; Nunez decl. ¶ 6; Pfeiffer decl. ¶ 6.

On April 20, 2020, the Aus. BC published the video/article entitled "Behind Enemy Lines New York." Rugen decl. ¶ 15.[2] The article included quotes from Mr. Rugen, Mr. Nunez and Ms. Pfeiffer that each provided during a time when he/she was not working. *Id.*

On April 15, 2020, an Associated Press film crew followed Plaintiff Elizabeth Bonilla while she performed her duties as a FDNY Paramedic. Bonilla decl. ¶ 4. Ms. Bonilla spoke to the AP reporters prior to the start of her shift. *Id.*, at ¶ 5. In addition, at one point during her shift, an AP cameraman filmed Ms. Bonilla on a sidewalk outside of the home of a patient she had tried to save; as she walked to her ambulance, Ms. Bonilla expressed her distress over the fate of the patient. *Id.*, at ¶ 5. Shortly thereafter, AP published a video that included the clip of Ms. Bonilla's expression of her distress. Bonilla decl. ¶ 6.[3] The entire interaction with the reporter in which Ms. Bonilla expresses her distress lasts 23 seconds. *Id.* Ms. Bonilla did not disclose to the AP news team the name, address, condition or treatment of any patients. *Id.*

FDNY communications with the New York City Department of Investigation

Carlos Velez is a high-ranking official of the FDNY, holding the title of Assistant Commissioner at the FDNY. Velez dep. 8 (Meginniss Ex. C). He is responsible for the management of the FDNY's Bureau of Investigations and Trials ("BITS"). *Id.* On April 20, 2020, acting at the direction of Assistant Commissioner Velez, FDNY Associate Disciplinary

[2] The original version can be found on the internet at https://mobile.abc.net.au/news/2020-04-21/coronavirus-paramedics-doctor-on-the-frontline-new-york-covid-19/12139676?amp;pfmredir=sm&nw=0&pfmredir=smt Plaintiffs are delivering a copy of the original version to the Court in a flash drive.

[3] The article can be accessed on the internet at http://www.aparchive.com/metadata/youtube/a3f445b770c840b0a7a7d8d2a6e1d5d2 Plaintiffs are delivering a copy to the Court in a flash drive.

Counsel Bianca Kodzoman wrote to the New York City Department of Investigation ("DOI") concerning Plaintiff Bonilla. Palazzolo dep. 23-24 (Meginniss Ex. B); Meginniss Ex. J. The DOI is an agency separate from and works independently of the FDNY. *Id.*, at 18-19. The communication to DOI was a "referral" and states that the referral was based on "multiple alleged HIPAA violations in that Paramedic Elizabeth Bonilla allowed a news crew to follow her during a tour and she discussed and allowed filming during patient care." Meginniss Ex. J. The communication referenced links to three media stories that incorporate the AP report on Ms. Bonilla's work on April 15. *Id.* Ms. Bonilla was working with a partner on April 15, 2020. Bonilla decl. ¶ 4. Her partner was not named in the referral to DOI because her partner was not quoted in the media stories. Palazzolo dep. 29 (Meginniss Ex. B).

On April 22, 2020, Ms. Kodzoman wrote to DOI concerning Plaintiffs Nunez, Pfeiffer and Rugen. Kodzoman dep. 20-21 (Meginniss Ex. E); Meginniss Ex. I. The communication was a "referral" to the DOI and states that the referral is based on "multiple alleged HIPAA" violations that occurred on April 10, 2020. Meginniss Ex. I. The communication referenced a link to an article published by Aus. BC that includes reporting on the work of Ms. Pfeiffer on April 10, and on the work of Mr. Nunez on April 11. *Id.* Ms. Pfeiffer and Mr. Nunez each worked with a partner. Nunez decl. ¶ 4; Pfeiffer decl. ¶ 4. Their partners were not named in the FDNY's DOI referral because those partners were not quoted in the Aus. BC article. Palazzolo dep. 31-32 (Meginniss Ex. B). Asst. Commissioner Velez and BITS Dep. Director Joseph Palazzolo made the decision to make the DOI referrals. Palazzolo dep. 28 (Meginniss Ex. B).

The restrictions imposed on Bonilla, Nunez, Pfeiffer, and Rugen

On April 26, 2020, FDNY issued an order restricting the employment of Plaintiffs Bonilla, Nunez and Pfeiffer. Answer to Sec. Amended Complt. ¶ ¶ 8, 9, 10 (Meginniss decl. Ex.

K). The FDNY issued the restriction order without first speaking to any of these persons. Bonilla decl. ¶¶ 8, 12, 14; Nunez decl. ¶¶ 8, 11; Pfeiffer decl. ¶¶ 8, 11. While their employment was restricted, Plaintiffs Bonilla, Nunez and Pfeiffer continued to report to work with the FDNY but were not permitted to perform any patient care or field-related duties and were not allowed to drive FDNY vehicles. Bonilla decl. ¶ 9 and Ex. B; Nunez decl. ¶ 9 and Ex. A; Pfeiffer decl. ¶ 9 and Ex. A. They were forbidden to work overtime and lost allowances that they would have been paid if they were not restricted. Bonilla decl. ¶ 9; Nunez decl. ¶ 10; Pfeiffer decl. ¶ 10; Palazzolo dep. 68 (Meginniss Ex. B); Velez dep. 101 (Meginniss Ex. C). Notably, during the period Plaintiffs' employment was restricted, unrestricted EMTs and Paramedics performing patient care and field duties were required to work 12-hour shifts. Barzilay decl. ¶ 27; Palazzolo dep. 69 (Meginniss Ex. B). Those 12-hour shifts resulted in overtime earnings for the EMTs and Paramedics who worked them. *Id.* Plaintiffs would have earned thousands of dollars more than they actually earned during this period if they had been permitted to work overtime during this period. Bonilla decl. ¶ 20; Nunez decl. ¶ 22; Pfeiffer decl. ¶ 22.[4]

On April 26, 2020, the FDNY suspended Mr. Rugen from employment; in the same directive, the FDNY also restricted Mr. Rugen's employment. Rugen decl. ¶¶ 20, 21 and 23 and Ex. E. Mr. Rugen's suspension lasted for 28 days, and during that time, he was deprived of all FDNY compensation. *Id.,* at ¶ 24. On May 26, 2020, FDNY notified Mr. Rugen that his suspension was lifted but that the restriction from performing all patient care/field related duties and from driving Department vehicles remained in effect. *Id.*, at ¶ 25 and Ex. F. During the

[4] Plaintiffs are moving for partial summary judgment on liability. Plaintiffs contend that they are entitled to compensatory relief resulting from Defendants' due process violations, and that compensatory relief will include restoration of earnings that they can prove they lost. A judgment on the amount of damages owed Plaintiffs requires the resolution of triable disputes of fact.

period he was no longer suspended but was "restricted," Mr. Rugen was forbidden to work overtime and lost allowances he would have been paid if he had not been restricted. Palazzolo dep. 69 (Meginniss Ex. C); Barzilay decl. ¶ 27. Unrestricted EMTs and Paramedics were required to work 12-hour tours during the period of Mr. Rugen's suspension and restriction, which generated overtime earnings. *Id.* Had Mr. Rugen been permitted to perform patient care and field duties during this period he would have earned thousands of dollars more than he actually earned. Rugen decl. ¶ 36.

The decision to restrict the employment of Plaintiffs Bonilla, Nunez and Pfeiffer, and the decision to restrict and suspend Plaintiff Rugen were made by Asst. Commissioner Velez. Velez dep. 15, 16 (Meginniss Ex. C). Another high-ranking official, Terryl Brown, the FDNY Chief Legal Counsel and Deputy Commissioner for Legal and Administrative Affairs, participated in the decision-making on the restrictions and suspension. Brown dep. 8 (Meginniss Ex. F). Asst. Commissioner Velez decided to impose the restrictions upon Plaintiffs Bonilla, Nunez, Pfeiffer and Rugen because of what he described as their "apparent violations of Privacy and HIPAA regulations for their alleged conduct in articles that took place in the first half of April." Velez dep. 32, 38-39 (Meginniss Ex. C). Plaintiffs have denied and continue to deny that they committed such violations. Bonilla decl. ¶ 12; Nunez decl. ¶ 14; Pfeiffer decl. ¶ 14; and Rugen decl. ¶¶ 11, 13, 14.

The bar to employment in the 911 system

FDNY EMTs and Paramedics respond to calls to New York City's 911 system for emergency medical assistance. Barzilay decl. ¶ 32. The FDNY manages the system for responding to those calls. *Id.* Voluntary hospitals also deploy their own ambulances staffed with their own employees to respond to calls to New York City's 911 system for emergency medical

assistance. *Id.*, at ¶ 33; Maguire decl. ¶ 3. Every EMT and Paramedic who responds to calls for emergency medical services in a voluntary hospital's 911 ambulances must have a Computer Assisted Dispatch Voluntary Access System ("CAD VACS") identification number. Wagner dep. 17 (Meginniss Ex. H). Voluntary hospitals that wish to have their ambulances included in the 911 system must apply to the FDNY for CAD VACS numbers for each of their EMT or Paramedic employees who staff those ambulances. *Id.* Those applications are reviewed and approved or rejected by the FDNY. *Id.* Upon approval, the FDNY issues a CAD VACS number that the approved EMT or Paramedic must use to log into the 911 system for assignments. *Id.* In this way, the FDNY "credentials" each EMT and Paramedic who receives a 911 assignment. *Id.*, at 21. The FDNY maintains a file of each EMT and Paramedic working for a voluntary hospital who is permitted to work in NYC's 911 system. *Id.*, at 23-24.

Some FDNY EMTs and Paramedics hold second jobs with voluntary hospitals that deploy ambulances in NYC's 911 system and work on those hospitals' 911 ambulances. Maguire decl. ¶ 4; Wagner dep. 30 (Meginniss Ex. H). In fact, it is common for FDNY EMTs and Paramedics to hold such employment with more than one participating hospital. Wagner dep. 31-32 (Meginniss Ex. H). When a FDNY EMT or Paramedic is restricted by the FDNY from performing patient care, the FDNY reviews its files to determine whether the EMT or Paramedic also performs work in NYC's 911 system for a voluntary hospital. *Id.*, at 29. Upon finding that a restricted EMT or Paramedic also holds employment in a participating voluntary hospital, the FDNY sends a notification to the hospital's ambulance department administrator that the individual's CAD VACS has been restricted. *Id.*, at 32. An employee whose CAD VACS number is restricted cannot log in to receive assignments in NYC's 911 system. *Id.*, at 51, 64-65. Restricted personnel are not permitted to receive an assignment that requires a CAD VACS

identification number. *Id.*, at 34, 64-65.

Thus, when the FDNY imposed patient care restrictions on Plaintiffs Bonilla, Nunez, Pfeiffer and Rugen on April 26, 2020, they were not only barred from working on ambulances for the FDNY, they were barred from performing 911 EMT and Paramedic emergency medical services for all other employers in NYC's 911 system. Barzilay decl. ¶ 34; Maguire decl. ¶ 5.

Earlier in her career, Plaintiff Pfeiffer held employment as an EMT with North Shore Hospital working in the NYC 911 system at the same time that she held employment as an EMT with FDNY working in the 911 system. Pfeiffer decl. ¶ 24. Earlier in his career, Plaintiff Nunez held employment as a Paramedic with Wyckoff Hospital working in the NYC 911 system at the same that he held employment as a Paramedic with FDNY working in the 911 system. Nunez decl. ¶ 24. During the period that the FDNY restricted his employment, Plaintiff Nunez sought employment with Wyckoff as a Paramedic in the 911 system. *Id.* He was unable to secure that employment because of the FDNY's restriction. *Id.* Ms. Pfeiffer did not seek employment with a voluntary hospital participating in the 911 system in New York during the period of her restriction because she knew that the restriction would bar her from obtaining such 911 system work with a voluntary hospital. Pfeiffer decl. ¶¶ 24, 25.

The FDNY's failure to give notice to Plaintiffs of the DOI referral or the reasons for the restrictions

Plaintiff Bonilla was not notified of the April 20, 2020, Kodzoman referral to DOI concerning her and learned of the referral after a copy was produced in discovery. Bonilla decl. ¶ 12. Plaintiffs Nunez, Pfeiffer and Rugen were not notified of the April 22, 2020, Kodzoman referral to DOI concerning them and first learned of it after a copy was produced in discovery in this action. Nunez decl. ¶¶ 13, 14; Pfeiffer decl. ¶¶ 13, 14; Rugen decl. ¶¶ 17, 19.

The April 26, 2020, notices of restriction sent to Plaintiffs Bonilla, Nunez and Pfeiffer

included no statement of reasons for the restrictions nor any reference to a date or time of alleged misconduct or of the acts that purportedly constituted misconduct. Bonilla decl. ¶ 8 and Ex. B; Nunez decl. ¶ 8 and Ex. A; Pfeiffer decl. ¶ 8 and Ex. A. As a matter of common practice, the FDNY issues such notices of restriction without any statement of reasons for the restriction. Velez dep. 34, 38 (Meginniss Ex. C); Palazzolo dep. 57 (Meginniss Ex. B); Greco decl. ¶ 4.

The April 26, 2020, notice sent to Plaintiff Rugen advising him of his suspension and restriction states only that he allegedly violated "the FDNY's Social Media and HIPAA Privacy Policies, New York State Public Health Law and Federal Patient Privacy Law/Regulations on or about April 10, 2020." Rugen decl. Ex. E. The memo does not identify the conduct which FDNY contends constituted those violations. *Id.*

Plaintiffs Bonilla, Nunez, Pfeiffer, and Rugen contend that the allegations of HIPAA violations referred to in the Kodzoman communication to DOI are false. Bonilla decl. ¶ 12; Nunez decl. ¶ 14; Pfeiffer decl. ¶ 14; Rugen decl. ¶¶ 11, 13, 14.

On April 27, 2020, Local 2507's lawyer wrote to FDNY Chief Legal Counsel and Deputy Commissioner for Legal and Administrative Affairs Terryl Brown concerning the suspension of Mr. Rugen and the restrictions of Plaintiffs Bonilla, Nunez, Pfeiffer, and Rugen. Barzilay decl. ¶ 22 and Ex. G. The letter requested that discipline not be imposed until a discussion of any allegations of misconduct could take place. *Id.* The letter noted that the FDNY had yet to disclose the grounds on which it had taken action against Plaintiffs Bonilla, Nunez, Pfeiffer and Rugen, but included Local 2507's conjecture that FDNY was reacting to the Aus. BC reporting of its interactions with Plaintiffs. *Id.* The letter asserted that the FDNY's actions were based on incorrect assumptions about the facts, and, thus, a full discussion prior to the implementation of discipline would be appropriate. *Id.* On April 28, 2020, Deputy Commissioner Brown

responded. Barzilay decl. ¶ 24, Ex. H. She did not disclose the grounds upon which the FDNY had acted and did not address the Union's conjecture about those grounds. *Id.* Instead, she declared that the measures taken by the FDNY against Plaintiffs were commonly utilized by city agencies and consistent with FDNY practices. *Id*. She did not offer an opportunity for the Plaintiffs to respond to allegations that they had engaged in misconduct. *Id.*

Officials at Local 2507 suspected that the FDNY had taken action against the Plaintiffs because the FDNY incorrectly assumed that Plaintiffs had arranged for the Aus. BC team to enter patients' residences and film patients while they were being treated. Barzilay decl. ¶ 26. Local 2507 officers were aware that the Aus. BC reporters who had entered into those residences had done so without the authorization or consent of any of the Plaintiffs. *Id.* Because the Aus. BC team had told Mr. Rugen that they had secured authorizations from the patients' families to enter the residences, he reached out to one of the Aus. BC reporters who had filmed that work. Rugen ¶ 27. The reporter sent Mr. Rugen copies of the recorded authorizations of the residents. *Id.* Although the FDNY had not requested them, Local 2507 forwarded the authorizations to the FDNY on May 15, 2020. Greco decl. ¶ 8. The FDNY did not respond to the transmission. *Id.*

The complaint in this action was filed on June 10, and served on June 11, 2020. *See* Answer to Sec. Amended Complt. ¶ 34 (Meginniss Ex. K). On June 11, 2020, James Saunders, the FDNY Chief Health Care Compliance officer and HIPAA Privacy Officer, summoned Plaintiff Rugen to an interview. Rugen decl. ¶ 28, Ex. G. The notice of interview stated that the "matter" to be discussed was "an alleged HIPAA violation" and that Mr. Rugen was "being interviewed as a **SUBJECT** relative to the above-stated incident" but did not include any information concerning the date or time of the incident or the acts or conduct that constituted the "incident." *Id.* Mr. Rugen was questioned about his conduct and the conduct of Mr. Nunez, Ms.

Pfeiffer, and Union President Barzilay in connection with the Aus. BC reporting of events on April 11 and 12. Rugen decl. ¶ 29. Mr. Saunders asked Mr. Rugen about communications between the press and Plaintiffs Nunez and Pfeiffer, and asked how the press had gained entry into homes in which patients were being treated. *Id.* Mr. Saunders did not ask Mr. Rugen any questions about Ms. Bonilla. *Id.* After his interview with Mr. Rugen, Mr.Saunders concluded that none of the Plaintiffs had committed HIPAA violations, and communicated that conclusion to BITS. Kodzoman dep. 73 (Meginniss Ex. E); Saunders dep. 77 (Meginniss Ex. D).

On the afternoon of June 17, after the interview of Mr. Rugen had been completed, the FDNY lifted the restrictions on Plaintiffs Bonilla, Nunez and Pfeiffer, and two days later, the FDNY lifted the restriction on Mr. Rugen. Bonilla decl. ¶ 13 and Ex. D; Nunez decl. ¶ 15 and Ex. C; Pfeiffer decl. ¶ 17 and Ex. C; Rugen decl. Ex. 32 and Ex. H. Mr. Saunders's conclusion that they had not committed HIPAA violations was one of the reasons that the FDNY lifted the restrictions. Palazzolo dep. 65 (Meginniss Ex. B). The other reason was that DOI had informed FDNY that it would not conduct an investigation. *Id.*

The notices that the restrictions were lifted did not contain any reasons why they were lifted. Bonilla decl. ¶ 13 and Ex. D; Nunez decl. ¶ 15 and Ex. C; Pfeiffer decl. ¶ 15 and Ex. C; Rugen decl. Ex. D. During the entire period in which the restrictions were in effect, FDNY never spoke with Bonilla, Nunez, and Pfeiffer concerning the reasons for the restrictions and never gave them an opportunity to voice their contention that allegations that they had committed misconduct were false. Bonilla decl. ¶ 14; Nunez decl. ¶ 16; Pfeiffer decl. ¶ 16.

As a matter of practice, when the FDNY concludes that a restricted EMT or Paramedic should be restored to unrestricted status and no further action need be taken against him/her on the matter that led to the restriction, the FDNY does not compensate him/her for any wages or

allowances lost during the period of restriction. Barzilay decl. ¶ 30; Greco decl. ¶ 6.

The continuing impact of the FDNY's "investigation"

Although the FDNY lifted the restrictions in mid-June, 2020, it asserts it is continuing to investigate the conduct of Plaintiffs Bonilla, Nunez, Pfeiffer and Rugen that led to the imposition of those restrictions. Palazzolo dep. 66 (Meginniss Ex. B).

On July 17, 2020, a month after lifting the restrictions, the FDNY summoned Plaintiff Bonilla and Plaintiff Pfeiffer to interviews to be held with BITS attorney Kodzoman. Bonilla decl. ¶ 15, and Ex. E; Pfeiffer decl. 17 and D. The Notices of Interview both informed each of them: "it is alleged that on or about 4/15/20 [for Pfeiffer, 4/10/20] you participated in a news story while on duty, in uniform, and while on the scene of assignments, without authorization." *Id.* The Notice also informed each that she is the "subject relative to" that incident. *Id*. The interviews took place July 23, 2020. Bonilla decl. ¶ 16; Pfeiffer decl. ¶ 18.

On July 17, 2020, FDNY also summoned Plaintiff Nunez to an interview with BITS attorney Kodzoman. Nunez decl. ¶ 18 and Ex. D. The Notice of Interview informed him that "it is alleged that on or about 4/11/20 you participated in a news story while on duty, in uniform, and while on the scene of assignments, without authorization" and that he is the "subject relative to" that incident. *Id.* The interview took place July 24, 2020. Nunez decl. ¶ 19.

On August 10, 2020, FDNY summoned Plaintiff Rugen to an interview with BITS attorney Kodzoman. Rugen decl. ¶ 33 and Ex. I. The Notice of Interview informed him that "it is alleged that on or about 4/10/20, 4/11/20, and 4/15/20 you participated in a news story without the Department's authorization. You submitted a Citytime request for 'excused leave union activity' for 4/10/20 without authorization." *Id*. The interview took place on August 12, 2020. Rugen decl. ¶ 34.

After their respective interviews with Ms. Kodzoman in July and August, 2020, Plaintiffs Bonilla, Nunez, Pfeiffer and Rugen have received no further communication from BITS or anyone else at the FDNY concerning the investigation. Bonilla decl. ¶ 17; Nunez decl. ¶ 20; Pfeiffer decl. ¶ 19; Rugen decl. ¶ 35.

The practice of FDNY is for BITS to investigate allegations of misconduct by employees and, if BITS concludes that the allegations have merit, to issue formal disciplinary charges against the offending employee unless the employee agrees to a settlement of the matter. Greco ¶ 9; Palazzolo dep. 9 (Meginniss Ex. B); Velez dep. 128-130 (Meginniss Ex. C). Although Plaintiffs are covered by a collective bargaining agreement ("CBA") that provides for grievance and arbitration clause of disputes about discipline, Barzilay decl. ¶ 36 and Exs. I, J, and K, an employee gains the opportunity for a disciplinary hearing only after being served with charges. Greco ¶ 10. The FDNY asserts that the time limit for issuing charges is 18 months "from the time of misconduct," except where the conduct is of a criminal nature, in which case the 18-month limitation does not apply. Velez dep. 25-26 (Meginniss Ex. C); Barzilay decl. Ex. H.

The practice of the FDNY includes, depending on the allegations, suspending and/or restricting employees without first issuing charges. Greco decl. ¶ 11; Velez dep. 26-27 (Meginniss Ex. C). The FDNY asserts that, even without issuing charges, it may suspend an employee for up to thirty days "pending the determination of disciplinary charges." *Id.* When the FDNY reinstates a suspended employee after a time period that is less than 30 days, the FDNY asserts that it has up to 18 months "from the time of misconduct" to issue formal charges against the employee. Velez dep. 26-27 (Meginniss Ex. C). Although Mr. Rugen was suspended for 28 days beginning April 26, 2020, he has not been served with charges. Rugen decl. ¶ 15.

Furthermore, the FDNY maintains that even when it concludes that employment

restrictions should be lifted without further action against the affected employees, it has no obligation to restore compensation lost by the employee or to provide any other form of compensatory relief. Greco decl. ¶ 6; Barzilay decl. ¶ 30. The Union challenged this practice in an arbitration, arguing, *inter alia*, that employees should be entitled to compensatory relief when restrictions have been lifted without any consequent discipline. In *Dist. Council 37, AFSCME, Locals 2507 and 3621 v. City of New York and FDNY,* OCB Nos. A-15389-17, *et al.*, (Arb. J. Brown, Jan. 19, 2021), the arbitrator held that (1) the FDNY has a managerial right to restrict the employment of EMTs and Paramedics pending investigation of possible misconduct, and is free to keep them in restricted status as long as it is investigating; and (2) the CBA gives restricted EMTs and Paramedics no right to contest the restrictions unless there is "evidence of punitive intent sufficient to establish that the [affected employees'] restricted duty assignments were, at any point, disciplinary in nature." Meginniss decl. Ex. L, at 28 (hereinafter, "*Ramos award*").

The FDNY has issued no formal charges against Plaintiffs Bonilla, Nunez, Pfeiffer or Rugen since April 2020. Bonilla decl. ¶ 17; Nunez decl. ¶ 10; Pfeiffer decl. ¶ 19; Rugen decl. ¶ 15. Accordingly, none of these Plaintiffs has had the opportunity to have a hearing to rebut allegations of misconduct arising out of the events in April 2020. Nevertheless, while EMTs and Paramedics are the subject of a BITS investigation, they will not be considered for promotion. Barzilay decl. ¶ 27; Velez dep. 102 (Meginniss Ex. C).

Plaintiff Pfeiffer applied for a promotion to the position of rescue Paramedic following the date the FDNY lifted the restriction of her employment. Pfeiffer decl. ¶ 20. Had she received the promotion, Ms. Pfeiffer would have made more money. *Id.* She was told, however, that she was not eligible for the position because of "an open BITS case." Pfeiffer decl. ¶20 and Ex. E.

Following the date that the FDNY restricted Plaintiff Bonilla's employment, Ms. Bonilla sought promotion to the position rescue Paramedic. Bonilla decl. ¶ 18. She was advised by the Chief of HAZTAC that she was not eligible for promotion because of the restriction of her employment. *Id.*

Summary Judgment standard

Summary judgment is warranted if the pleadings, depositions, admissions, and answers to interrogatories, together with the affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)*; Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). The party opposing the motion "may not rest upon . . . mere allegations or denials . . . but must set forth specific facts showing … a genuine issue for trial." Fed. R. Civ. P. 56(e). Evidence that is merely colorable, conclusory or speculative is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. at 249. The party opposing the motion "may not rest upon the mere allegations or denials . . . but must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Accordingly, it is insufficient for a party opposing the motion "merely to assert a conclusion without supplying supporting arguments or facts." *Bellsouth Telecomm., Inc. v. W.R. Grace & Co.*, 77 F.3d 603, 615 (2d Cir. 1996) (citation and quotations omitted); *Stewart v. Fashion Inst. of Tech.*, 18-cv-12297 (LJL), 2020 WL 6712267, at *7 (S.D.N.Y. Sep. 20, 2020) ("The nonmoving party 'cannot defeat the motion by relying on the allegations in [its] pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible,'" *quoting Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996)).

ARGUMENT

PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIMS THAT THE RESTRICTION OF THEIR EMPLOYMENT WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD VIOLATES DUE PROCESS

On April 26, 2020, Defendants restricted the employment of Plaintiffs Bonilla, Nunez, and Pfeiffer without any notice of the reasons for that action and without affording them any opportunity to dispute the grounds upon which the restrictions were imposed. The restrictions remained in effect for 53 days (until June 17, 2020). During that period, Defendants never informed Plaintiffs of the grounds for the restriction and Defendants never even spoke to Plaintiffs about the restrictions. On April 26, 2020, Defendants restricted the employment of John Rugen and suspended him. The only reasons given Mr. Rugen for the suspension and restriction were that he had allegedly violated FDNY policies on April 10 – the notice of suspension and restriction provided no indication of what acts Mr. Rugen had engaged in that were, in Defendants' view, violative of the cited policies. As with the other Plaintiffs, Defendants afforded Mr. Rugen no opportunity to dispute the grounds upon which the action was taken. Mr. Rugen's suspension was lifted on May 26, 2020, but the restriction remained in effect until June 17, 2020 – 55 days after it was imposed.

The restrictions materially affected the employees' status and earnings at the FDNY. Plaintiffs lost thousands of dollars as a result of the restrictions. Furthermore, the restrictions effected a bar to Plaintiffs' employment as EMTs and Paramedics *everywhere* in the New York City 911 system. Ordinarily, state-certified EMTS and Paramedics can work in the City's 911 system providing emergency medical care as employees of voluntary hospitals that participate in the system. FDNY EMTs and Paramedics are able to gain employment with New York City voluntary hospitals in the 911 system even while holding their full-time FDNY positions; but

they are barred from all such 911 employment when they are "restricted" by the FDNY.

Thus, the "restrictions" and suspension imposed by FDNY infringed Plaintiffs' liberty interest in pursuing the profession that they had dedicated their lives to pursuing – the rendering of prehospital emergency medical services to the public. That liberty interest is protected by the Due Process Clause of the Fourteenth Amendment and by Article I, § 6, of the N.Y. Constitution. In imposing those restrictions, the FDNY violated Due Process because it provided (1) no meaningful notice of the grounds for the imposing them; and (2) no meaningful opportunity for Plaintiffs to offer evidence and arguments why those grounds were meritless.

A. The restrictions deprived Plaintiffs of a protected liberty interest – the right to pursue the occupation of one's choice

While they were "restricted," Plaintiffs were barred from working as EMTs and Paramedics in New York City's 911 system. The Fourteenth Amendment provides that no "state * * * shall deprive any person of life, liberty or property without due process of law."[5] As the Second Circuit explained in *Donato v. Plainview-Old Bethpage Cent. School Dist*., 96 F.3d 623, 630-31 (2d Cir. 1996),

> Liberty, as enshrined in the Fourteenth Amendment, is a "broad" notion, [*Board of Regents v.*] *Roth*, 408 U.S. at 572 [1972], and one of the many freedoms it encompasses is the freedom "to engage in any of the common occupations of life," *Meyer v. Nebraska*, 262 U.S. 390, 399 . . . (1923).

Merely treating an employee adversely with respect to his/her job does not ordinarily give rise to a claim that the government has impaired the employee's liberty interest. But when the government takes action that "places a significant roadblock in that employee's *continued ability to practice his or her profession*," the government infringes the employee's liberty interest.

[5] N.Y. Const. Article I, § 6, also bars the deprivation of "life, liberty or property without due process," but omits the reference to the "state." For this reason, among others, the N. Y. Const. provides greater protection under its Due Process Clause than is provided by the Fourteenth Amendment. *Sharrock v. Dell Buick-Cadillac, Inc.* 45 N.Y.2d 152 (1978).

Donato, 96 F.3d at 631 (emphasis added). That infringement is only permissible if the employee was afforded due process.

Liberty interest claims are most commonly presented when a governmental employer (1) has denigrated an employee's good name and reputation in connection with an adverse employment action taken against the employee, and (2) then publishes that stigmatizing characterization in a way that a reasonable factfinder would conclude makes it likely the employee will find it very difficult to obtain another job in the same field. In *Donato*, for example, the defendants declined to rehire plaintiff as an assistant principal on the basis of strongly negative evaluations of her performance, evaluations that were maintained in her personnel file and likely to be revealed to a prospective employer. 96 F.3d at 631-32. The Second Circuit rejected defendants' argument that plaintiff's liberty interest was unaffected because she remained free to pursue some *other* kind of supervisory job or a teaching job, rather than a job as an educational supervisor:

> As we made clear in *Huntley* [*v. Community School Bd.*], 543 F.2d at 985, a significant difference exists between a teaching and a supervisory position. It is of little consequence to our analysis that appellant is not foreclosed from finding employment in some other line of work outside the education field. Due process protects the freedom "to engage in *any* of the common occupations of life." *Meyer* [*v. Nebraska*], 262 U.S. at 399, 43 S. Ct. at 626 (emphasis supplied).

96 F.3d at 632. The frame of analysis applied by the court in *Donato* is commonly referred to as "stigma plus." The government's adverse action against the employee, coupled with publication of stigmatizing information about the employee that will create a roadblock for the employee's pursuit of other employment in the field will violate the Due Process Clause if these actions were taken without affording the employee notice and an opportunity to rebut the claims. *See also Velez v. Levy*, 401 F.3d 75, 87-88 (2d Cir. 2005) (a "stigma plus" claim requires plaintiff to allege (1) the utterance of a statement about her that is injurious to her reputation, that is capable

of being proved false, and that she claims is false, and (2) a tangible and material state-imposed burden in addition to the stigmatizing statement); and *Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004).[6]

In the instant case, Defendants took adverse action against Plaintiffs when they suspended and/or restricted Plaintiffs' employment and then published stigmatizing information about Plaintiffs that created a roadblock to further employment in their chosen occupation: (1) Defendants notified DOI of allegations that Plaintiffs were alleged to have committed HIPAA violations, and (2) they ensured that voluntary hospitals participating in the 911 system would be made aware that Plaintiffs were restricted from performing patient care. *See, especially, Behrend v. Klein*, 04-cv-5413 (SMG), 2006 WL 2729257 (E.D.N.Y. Sep. 25, 2006) (placing teacher on the "ineligible list" infringed liberty interest, necessitating notice and opportunity to be heard to contest the grounds for such action). Indeed, the FDNY's restriction system works in a way that is nearly identical to the "ineligible list" system at issue in *Behrend.* If a restricted EMT or Paramedic has employment with a voluntary hospital working in the 911 system, the FDNY notifies the hospital that the individual has been restricted from, and will no longer be able to work in, the 911 system. Should the restricted FDNY EMT or Paramedic seek to gain work on a voluntary hospital's ambulance in the 911 system, the FDNY will not "credential" the individual and she will not be able to perform that work.[7] The restricted employee loses the right to do this

[6] To prevail on a "stigma plus" claim, it is not necessary for the plaintiff to prove that the stigmatizing statements were false. It is sufficient that the plaintiff assert that the claims were false, and that a hearing should have been afforded plaintiff on that issue. *Patterson v. City of Utica*, 370 F.3d at 330.

[7] The "publication" requirement is met when the stigmatizing material is contained in the government agency's files and will only be produced if a prospective employer seeks it. *See Donato v. Plainview-Old Bethpage C.S.D.*, 96 F.3d at 631-32; and *Brandt v. Board of Coop. Educ. Servs.*, 820 F.2d 41, 45 (2d Cir. 1987) (the publication requirement of the "stigma plus" is met when the damaging information is retained in a personnel file and will be given to prospective employers upon request). Thus, whether Plaintiffs actually made the application for employment at voluntary hospitals that would have triggered the FDNY's rejection of their CAD VACS authorization is not material to a "stigma plus" analysis of their liberty interest claim.

work not only at the FDNY, but throughout the City. And the communication that the individual has lost that right because she is restricted is a stigma that goes to her competence – it is at least as stigmatizing as being placed on the "ineligible list" is for a New York City teacher. *Behrend v. Klein*, 2006 WL 27829257, at *8.

However, there is an even more compelling reason to conclude that Plaintiffs' liberty interests were infringed by the FDNY. The "stigma plus" paradigm is not the only analytical framework for analyzing liberty interest infringements. An infringement of the liberty interest in pursuing an occupation is more easily shown where the government simply *orders* that individuals be deprived of the right to pursue their profession by barring them from practicing it. Here, when they imposed the restrictions on Plaintiffs, Defendants barred Plaintiffs from working as EMTs and Paramedics in New York City's 911 system – not just as employees of the FDNY, but as employees for any of the hospitals that supply ambulances in that system.

The liberty interest cases most analogous to the instant case are those in which the government revokes or suspends an individual's license to perform an occupation or arbitrarily denies the individual's application for that license. For example, in *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983), the Sixth Circuit held that the plaintiffs had been deprived of their liberty interest in the pursuit of their occupation as barbers when the state board of examiners ordered that they close their barber shop and declined to permit them to take the state's "master barber" exam. Citing *Meyer v Nebraska*, 262 U.S. at 399, the Sixth Circuit noted that "freedom to choose and pursue a career . . . qualifies as a liberty interest which may not be arbitrarily denied by the State." 699 F.2d at 328. In circumstances in which "governmental institutions regulate careers or occupations in the public interest through the licensing process," the government will be intruding on interests protected by the Due Process Clause if it administers

that process in a way that arbitrarily bars citizens from practicing their profession of choice. *Id.*[8] *See also, Johnson v. Morales*, 946 F.3d 911, 921 (6th Cir. 2020) (plaintiff's "interest in her . . . license [to operate a restaurant] is enough to invoke due process protection); *Sanderson v. Village of Greenhills*, 726 F.2d 284 (6th Cir. 1984) (village's denial of opportunity to operate a pool hall gives rise to a valid liberty interest claim even though there is no property right entitling plaintiff to do so). Similarly, in *Cowan v. Corley*, 814 F.2d 223 (5th Cir. 1987), the Fifth Circuit held that a county sheriff's order depriving a private wrecker towing/company of the right to retrieve vehicles from public streets in that county infringed the liberty interest of the plaintiff: "The essence of Cowan's complaint is that he has been denied the opportunity to pursue his livelihood. That is a constitutionally protected interest." 814 F.2d at 227. The court held that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure," and "[t]his Circuit has also repeatedly acknowledged the principle that a person has a liberty interest in pursuing an occupation." 814 F.2d at 227-28. *See also Phillips v. Vandygriff*, 711 F.2d 1217 (5th Cir. 1983), *aff'd on rehearing*, 724 F.2d 490 (5th Cir. 1984) (liberty interest implicated in denial of opportunity to be manager of savings and loan institutions within state). Decisions from courts in numerous other jurisdictions have recognized the same principle – when the government blocks a plaintiff's pursuit of an occupation through its licensing or permitting processes, its actions affect the person's liberty and may violate the Due Process Clause. *Becker v. Ill. Real*

[8] The court observed that plaintiffs' interest in operating the barber shop might also be characterized as a "property interest." However, the court did not decide that question because "[t]he infringement is sufficiently serious, and the reasons given in justification for the delay [in granting a license] so lacking in substance as to constitute a due process violation of plaintiffs' 'liberty' interests." 699 F.2d at 328. The deprivation of liberty was sufficient to trigger Due Process protection.

Est. Admin. & Discip. Bd., 884 F.2d 995 (7th Cir. 1989); (revocation of real estate license implicated liberty interest); *Shume v. Pearson Educ., Inc.*, 306 F. Supp.3d 117 (D.D.C. 2018) (nonrenewal of nurse's aide license implicated liberty interest); *Horn v. City of Mackinac Is.*, 938 F. Supp.2d 712, 720 (W.D. Mich. 2013) (denying peddler right to sell wares in city during period when state had licensed those sales and city had no ordinance restricting that activity, violation of substantive due process); *Horney v. Walla Walla Co.*¸ No. CS-93-055 JBS, 1993 WL 350191 (W.D. Wash. Aug. 31, 1993) (EMT's liberty interest violated in denial of recertification that effected bar to work as EMT).

Courts in this Circuit adhere to this same principle – governmental action revoking one's right to practice one's profession infringes a liberty interest. For example, in *Tomanio v. Bd. of Regents, State Univ. of N.Y.*, 603 F.2d 255 (2d Cir. 1979), *rev'd on other grounds*, 446 U.S. 478 (1980), the Second Circuit held that when the state denied plaintiff's request for a waiver of her failure to pass an exam for a license to practice as a chiropractic, it infringed an interest protected by the Due Process Clause: "the interest of a practitioner of the healing arts in the continued practice of her profession" is a property interest and "may also be a 'liberty interest'" protected by the Fourteenth Amendment. 603 F.2d at 259. And in *Tsirelman v. Daines*, 794 F.3d 310, 315 (2d Cir. 2015), the Second Circuit recognized that doctors have a "liberty interest in pursuing their profession" that is implicated when the state revokes their medical license. In *Tsirelman*, although a state statute afforded plaintiff a forum to contest the revocation of his license, he argued that the "preponderance of evidence" standard of proof set out in the statute was constitutionally insufficient, and that only a "clear and convincing evidence" standard could satisfy Due Process. 794 F.3d at 314-15. The court rejected the argument that the preponderance of the evidence standard was inadequate but recognized that the plaintiff's

interest was entitled to protection under the Due Process Clause. *Id.* In the instant case, Plaintiffs have an intertest in pursuing their occupation that is equally entitled to protection, yet *no* process has been afforded Plaintiffs to contest the revocation of their right to work in the 911 system. *See also, Spinelli v. City of New York*, 2 Civ. 8967 (RWS), 2010 WL 4273285 (S.D.N.Y. Oct. 28, 2010), *on remand from* 579 F.3d 160 (2d Cir. 2009) (liberty interest in selling firearms infringed when City suspended license); *Conrad v. County of Onondaga*, 758 F. Supp. 824 (N.D.N.Y. 1991) (plaintiff had stated a valid liberty interest claim against the County that had denied him a Master Plumber's license, because the denial of the license deprived him of the right to practice his occupation in the County); *Barchi v. Sarafan*, 436 F. Supp. 775 (S.D.N.Y. 1977) (three-judge court), *aff'd in part, rev'd in part, sub nom. Barry v. Barchi*, 443 U.S. 55 (1979), (a horse trainer's license to train in New York was an "interest" protected by the Due Process Clause: "The private interest at stake is, simply, the right to a livelihood.").

Finally, New York state courts have used the same analytical framework to hold that licenses and permits may only be revoked in a manner that comports with Due Process. *See, Patgin Carriages Co., Inc. v. N.Y.C. Dept. of Health*, 28 Misc.3d 1229, 958 N.Y.S.2d 62, 2010 WL 3420457 at *8 (Sup. Ct. N.Y. Co. 2010) (*de facto* revocation of license to operate horse carriage without notice and hearing violated due process because the licenses were essential to plaintiff's pursuit of a livelihood); *Augat v. Dowling*, 161 Misc.2d 225, 613 N.Y.S.2d 527, 530 (Sup. Ct. Albany Co. 1994) (state agency's refusal to approve plaintiff to work as an administrator of an adult care facility held tantamount to denial of a license; Due Process required notice and a hearing).

Governmental action barring employment in a given field may be challenged under the Due Process Clause even if the government's system of regulating the field is something less

formal than licensing. It is the governmental bar to employment that is important, not the form that the bar takes. Thus, for example, in *Phillips v. Vandygriff, supra*, the Fifth Circuit considered a plaintiff's challenge to a *de facto* "licensing" process in which individuals were not able to gain employment as managers of savings and loan institutions unless they were approved by a board of state regulators. The system was not prescribed by state law, but operated in fact as an obstacle to those who sought that occupation: if the board did not approve, the individual could not gain employment as a savings and loan manager. The difference between "formal licensing and de facto licensing" was immaterial.

> If a Texas statute required that savings and loan managerial officers be screened by the Commissioner, and the Commissioner denied entry into the profession without notice or an opportunity to be heard, such a procedure clearly would be actionable. In this case we have the same basic procedure and result, but authorized solely by the assumption of power through industry custom. The absence of statutory authority for licensing cannot somehow lessen the demands of due process.

711 F.2d at 1223. The FDNY's system of barring EMTs and Paramedics from receiving NYC 911 calls implicates the same Due Process concerns.

A significant feature of the liberty interest claims based on the government's revocation of a license or permit is that these claims do not require proof of stigma and publication. When the government simply bars an individual from pursuit of her chosen occupation, it is irrelevant, for purposes of Due Process, whether the government has published a stigmatizing characterization of the individual. The bar erected by the revocation of the license/permit is itself the "significant roadblock" to plaintiff's pursuit of her profession. Accordingly, even if the Court were to hold that defendants did not publish communications stigmatizing Plaintiffs, the Defendants' "restriction" of their employment without providing them notice and a hearing would still violate the Due Process Clause. As the Fifth Circuit explained in *Phillips*,

> *De facto* licensing, by contrast, turns not on the ultimate truth or falsity of the representations, but on their absolute exclusionary effect. The injury done to the plaintiff is not in the harm to his reputation per se, but in the denial to him of the hearing to which he would have been entitled under due process were the licensing process actual rather than constructive.
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> * * *
>
> Our concern is only that the commissioner's informal endorsement may in practice become a prerequisite for employment within the industry. If so, the applicant, who plainly has a protectable interest in not being arbitrarily or discriminatorily denied the opportunity to practice his profession, . . . must be granted the due process protections necessary to uphold that interest.

Phillips v. Vandygriff, 724 F.2d 490, 492-93 (5th Cir. 1984), *on rhg., aff'g*, 711 F.2d 1217 (1983). Whether or not the FDNY's public characterizations of Plaintiffs were stigmatizing, the order to all entities that deploy ambulances in the 911 system that Plaintiffs not be permitted to work on those ambulances infringed Plaintiffs' liberty interests.

Of course, there are exceptions to the broad proposition that a liberty interest is infringed when government interferes with an individual's pursuit of an occupation. Thus, failing to meet a valid licensing requirement, as for example, having to pass a job-related examination, does not constitute an infringement of the right to pursue the occupation of one's choice if the applicant continues to have the right to re-take the exam. *See Conrad v. County of Onondaga Examiners*, 758 F. Supp. at 829. Similarly, when a governmental agency authorizes a particular field of commerce in one geography but limits it in another, the agency has not barred companies subject to that regulation from pursuit of their occupation. *Cityspec, Inc. v. Smith*, 617 F. Supp.2d 161, 169 (S.D.N.Y 2009) (Cityspec was authorized to do boiler inspections within designated cities but not elsewhere; "The exclusion of Plaintiffs from conducting *additional* state mandated boiler inspections interferes not with the right to engage in a profession, but only in the ability to expand market share within a particular area." (Emphasis added)); and *Allocco Recycling, Ltd. v.*

Doherty, 378 F. Supp.2d 348 (S.D.N.Y. 2005) (plaintiff active in the fill material business not deprived of liberty interest when state denied request to expand that business). But these exceptions do not apply here.

First, Plaintiffs have not failed an exam or failed to meet a licensing requirement. Defendants *de facto* took a license to practice away from them.

Secondly, Defendants barred Plaintiffs from working in the 911 system throughout New York City, the entire jurisdiction over which the FDNY exercises control. Plaintiffs do not seek to expand the field in which they may practice their profession, but to restore their right to practice it in the field over which Defendants have complete jurisdiction.

Finally, while they may have been free to pursue work in the field of health care during the period of their restrictions, Plaintiffs were not permitted to do work in the occupation they are devoted to – 911 emergency prehospital care. That work is simply unique in the demands that it makes on practitioners, the variety of care that 911 EMTs and Paramedics must provide, and the life-and-death urgency attendant to that care. *See* Maguire decl. ¶ 7. Just as the Second Circuit concluded in *Donato* that the continued opportunity to perform some other kind of supervisor job did not undermine the plaintiff's claim that her liberty interest in working as a supervisor in the field of education had been abrogated, so the opportunity to do some other kind of health care work does not undermine Plaintiffs' claim that their liberty interest in pursuing their careers as EMTs and Paramedics in the 911 system was abrogated by the FDNY's "restrictions." The FDNY's restriction system afforded Plaintiffs no opportunity to contest that bar and gain restoration. Restoration was left to the whim of the FDNY.

B. Defendants did not afford Plaintiffs due process

Because the individual Plaintiffs had a protected liberty interest in their chosen

occupation as 911 EMTs and Paramedics, the FDNY was not free to abridge that interest except in a manner that comports with due process. Due process requires, at a minimum, meaningful notice of the reasons the FDNY acted to restrict their employment, and a meaningful opportunity for Plaintiffs to explain why those "reasons" were incorrect. More specifically, Plaintiffs were entitled to (1) notice, (2) some kind of hearing before the restrictions were imposed, and (3) a prompt, comprehensive post-restriction hearing that would have allowed Plaintiffs to marshal evidence and make arguments to challenge the decision to restrict them. Defendants provided them none of these.

The Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), formulated the fact-based inquiry to be applied in determining whether steps taken by the government in curtailing an interest protected by the Fourteenth Amendment satisfy the requirements of the Due Process Clause. The Court held that determining what process is due requires weighing three distinct factors: (1) the private interest held by the individual who will be affected by the official action; (2) the risk, given the procedures the government follows, that the individual will be deprived of that interest for reasons that are erroneous, and the probable value of additional or substitute procedural safeguards in protecting against an erroneous deprivation; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.*

1. Plaintiffs were improperly denied pre-deprivation notice and hearing

In *Cleveland Bd. of Educ v. Loudermill*, 470 U.S. 532, 544 (1985), the Court held that some pre-deprivation notice and opportunity to be heard had to be afforded public employees before they were terminated. "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Id.* at 546,

citing Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975). Applying the *Mathews* analysis, the Court reasoned:

> Some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. . . . Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. . . . The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success. . . . The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one.

Id. at 543-44 (citations omitted). The Court held that, even though a full-blown evidentiary hearing was not required, some form of notice and an opportunity to respond should have been given to the employees before termination. *Id*. at 546-47.[9]

While the protected interest at issue in *Loudermill* was the employees' property interest, the Second Circuit has recognized that the principle that some kind of pre-deprivation process is required before infringing an interest protected by the Due Process Clause applies equally to liberty interests. Thus, in *Velez v. Levy*, 401 F.3d 75 (2d Cir. 2005), the court held that, absent emergency circumstances, a pre-deprivation hearing of some kind should have been conducted before the New York City Schools Chancellor removed the plaintiff from her position on a

[9] The Court declined to hold that a full-blown evidentiary hearing was required before termination in large measure because, under Ohio law, they were entitled to a "full post-termination hearing." 470 U.S. at 546.

school board. The district court had found that the plaintiff had adequately pled the elements of a liberty interest deprivation but held that she had been afforded all the process that was required – she had appealed the removal to the full Board of Education and that body had overturned the decision and restored her to her position only 61 days after the removal. 401 F.3d at 82-83. The Second Circuit reversed. Although plaintiff had been vindicated in the post-deprivation appeal process, she had a valid claim that the Chancellor had violated the Due Process Clause by removing her from the Board without notice or a chance to tell her side of the story *before* the removal took place. 401 F.3d at 92-93. *See also Di Blasio v. Novello*, 344 F.3d 292, 303 (2d Cir. 2003) (due process generally requires "'some kind of hearing' prior to depriving [persons] of a liberty or property interest" – plaintiff stated a valid claim that he had been deprived of his liberty interest without due process when the Commissioner of Health suspended his license to practice radiology without any pre-suspension notice or opportunity to be heard.).

Critical to the Second Circuit's decisions in *Velez* and *Di Blasio* was the fact that the decision-maker in each case was a high-ranking official with the authority to impose suspension summarily. *Velez*, 401 F.3d at 92; *DiBlasio*, 344 F.3d at 303. Pre-deprivation process may not be required where the infringement of the protected interest is effected by a low-level employee who did not adhere to the standards of practice of the agency. In such a case, the deprivation may be characterized as "random and unauthorized" and a post-deprivation hearing may be all that Due Process requires. *Velez*, 401 F.3d at 302 ("due process does not require the impossible . . . [and] [w]here a deprivation at the hands of a government actor is 'random and unauthorized,' hence rendering it impossible for the government to provide a pre-deprivation hearing, due process requires only a post-deprivation proceeding," *quoting Zinermon v. Burch*, 494 U.S. 113, 128–29 (1990)). However, the notion that pre-deprivation process is not necessary where the

action taken is "random and unauthorized" has no application when the action is taken by a high-ranking official cloaked with the authority to act summarily. In *DiBlasio*, the Commissioner who suspended the plaintiff's license had the authority to do so summarily, 344 F.3d at 303, and in *Velez*, the Chancellor had authority to remove plaintiff from the school board. 401 F.3d at 302. The acts of those cloaked with such authority cannot reasonably be said to be random and unauthorized; thus, the general rule that a person must be afforded notice and some opportunity to be heard before depriving a person of a liberty interest applies when the actor is a high-ranking official. *Velez,* 401 F.3d at 92. *See also, New Windsor Volunteer Ambulance Corps, Inc. v. Meyers*, 442 F.3d 101 (2d Cir. 2006). High-ranking officials were responsible for the restrictions at issue here.

The rationale for the Court's holding in *Loudermill* is especially pertinent here. The *Loudermill* Court recognized that a pre-deprivation hearing of some kind would provide "an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.*, at 545-46. Here, no pre-deprivation hearing of any kind was afforded to Plaintiffs, and when Defendants finally interviewed one of them – 53 days after having imposed the restrictions – they promptly lifted the restrictions. As in *Loudermill,* the very fact that the restrictions were lifted when Defendants decided to give at least one of the Plaintiffs a chance to explain what happened indicates rather strongly that "an error might have been avoided had [Plaintiffs] been provided an opportunity to make [their] case" to the FDNY. 470 U.S. at 543-44.

The facts of the instant case are also strikingly similar to the facts considered by the Second Circuit in *Velez.* There, the plaintiff had been suspended from a community school board, but reinstated 61 days later when her appeal to the full Board was sustained. Despite the

availability of that post-deprivation process, the court held that plaintiff was entitled to pursue her procedural Due Process claim because she had not been afforded any pre-deprivation process. Here, Plaintiffs were restricted from working as 911 EMTs and Paramedics for 53 days. They were afforded no pre-restriction notice or opportunity to be heard, despite the prompt effort by their Union to obtain such process.

Loudermill involved the termination of employment, and the private interest in avoiding an FDNY restriction might be perceived as less weighty than a private interest in avoiding termination. However, even if the interest may be judged to be less weighty, that lesser weight does not justify dispensing altogether with notice and an opportunity to be heard. The Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975) makes clear that even short suspensions of a protected interest must be preceded by some pre-deprivation process. In *Goss*, the Court held that students facing a temporary suspension of 10 days or less must be given oral or written notice of the charges against them, and if they deny the charges, an explanation of the evidence the authorities have and an opportunity to present their side of the story before the suspension is imposed. *Id.*, at 581. The Court explained that "things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context." *Id.*, at 584. Similarly, the interest at issue in *Velez* was a suspension from the community school board, not a termination. Yet, pre-deprivation process was due plaintiff. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972).

There are some circumstances in which pre-deprivation process is not required, even when the action is taken by high-ranking government officials. But those circumstances are limited: the government may dispense with pre-deprivation process before infringing an interest

protected by the Fourteenth Amendment only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). In *Gilbert v. Homar*, 520 U.S. 924 (1997), the Court held that, in the context of the government depriving an employee of a protected property or liberty interest, those extraordinary circumstances may be present when (1) "[a]n important government interest is at stake," and (2) there is "a substantial assurance that the deprivation is not baseless or unwarranted," and (3) there is a need for "prompt action." 520 U.S.at 930–31. In *Gilbert*, the Court concluded that a state university was entitled to suspend one of its police officers immediately upon learning that he had been arrested on felony drug charges. The university had a compelling interest in taking swift action to protect the public confidence in its law enforcement, and there was a need for prompt action. The critical factor for the Court, however, was that the *arrest* assured that the risk of error in the decision to suspend was low: "The last factor in the *Mathews* balancing, and *the factor most important to resolution of this case*, is the risk of erroneous deprivation and the likely value of any additional procedures." *Id.*, at 933 (emphasis added). The Court reasoned that

> the purpose of a pre-*termination* hearing is to determine "whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." . . . By parity of reasoning, the purpose of any pre-*suspension* hearing would be to assure that there are reasonable grounds to support the suspension without pay. . . . But here that has already been assured by the arrest and the filing of charges. In *[FDIC v.]Mallen.* [486 U.S. 230, 241 (1988),] we concluded that an "ex parte finding of probable cause" such as a grand jury indictment provides adequate assurance that the suspension is not unjustified. . . . The same is true when an employee is arrested and then formally charged. First, as with an indictment, the arrest and formal charges imposed upon respondent "by an independent body demonstrat[e] that the suspension is not arbitrary." . . . Second, like an indictment, the imposition of felony charges "itself is an objective fact that will in most cases raise serious public concern." . . . It is true . . . that there is more reason to believe an employee has committed a felony when he is indicted rather than merely arrested and formally charged; but for present purposes arrest and charge give reason enough. They serve to assure that the state employer's decision to suspend the employee is not "baseless or unwarranted," . . . in that an independent third

> party has determined that there is probable cause to believe the employee committed a serious crime.

520 U.S. at 933-34 (citations omitted, emphasis in original).

The facts of the present case are far different than those in *Gilbert* and do not in any way support dispensing with pre-deprivation process. Plaintiffs were not arrested, there was no indictment, and there was no assessment by any independent third party that there was probable cause to believe Plaintiffs had committed wrongdoing. Defendants acted on their own "assessment" of the facts. Defendants brought to the attention of a third party – the Department of Investigation – what they characterized as "allegations of multiple HIPAA violations," but that third party never concluded there was probable cause to believe that misconduct had occurred. Indeed, Defendants imposed the restrictions on Plaintiffs long before they heard from the DOI; and when DOI did provide an assessment, it was that DOI would not be pursuing the matter at all. Finally, the facts simply contradict any claim that Defendants had a need to act promptly. Defendants made their first referral to DOI on April 20 and their second on April 22. They did not impose restrictions until April 26, nearly a week after the first referral.

Following *Gilbert,* courts have consistently rejected the notion that pre-deprivation process can be dispensed with in circumstances in which the factor that was critical to the Court's decision is not present – *viz.*, where there has been no assessment by an independent third party that there was probable cause to believe the accused employee committed the offense. *See Johnson v. Morales,* 946 F.3d 911, 924-25 (6th Cir. 2020); *Padberg v. McGrath-McKechnie,* 203 F. Supp. 2d 261, 280 (E.D.N.Y. 2002); *El Boutary v. City of New York,* 1:18-cv-3996 (ARR)(JO), 2018 WL 6814370 (S.D.N.Y. Dec. 26, 2018); and *Akinde v. N.Y. City Health and Hosp. Corp.,* 1:16-cv-8882 (GHW), 2019 WL 4392959, at *7 (S.D.N.Y. Sep. 13, 2019). In *El Boutary,* the court held that a for-hire-vehicle driver was entitled to pursue his claim that the

suspension of his FHV license without *pre*-suspension notice or hearing violated Due Process, even though he was granted a hearing within nine days of the suspension and his license was restored after only 34 days. *Id.*, at *6. The court distinguished *Gilbert*: "No impartial government official or independent third party had any personal knowledge of the incident, nor did the plaintiff have even an informal opportunity to tell the TLC his version of events. *Id.*, at *7.[10] The defendants had reached the conclusion that Mr. El Boutary had committed misconduct "[a]fter hearing from the media about an altercation of which they had no first-hand knowledge" and having taken "a statement from the passengers without inquiring into the plaintiff's account of the incident." *Id.*, at *6. Without having given Mr. El Boutary an opportunity to explain, the defendants' judgment about the incident was necessarily at risk of being erroneous. *Id.* Likewise, in *Akinde*, the court held that plaintiff stated a valid claim that the lack of any pre-deprivation process when he was suspended because of alleged mental instability violated Due Process: "The main divergence between this case and *Gilbert*, therefore, is the fact that [the Regulation that authorized the defendants to suspend plaintiff] imbues a sole NYC HCC official—rather than a neutral third-party—with the responsibility for making the probable cause determination regarding the danger or potential for disruption presented by an employee, arguably heightening the risk of an erroneous deprivation").[11]

In this case, Defendants took no steps to assure that their judgment that Plaintiffs had

[10] While it declined to grant summary judgment to plaintiff, the court did observe that "the bar that the defendants must meet is a high one. The law allows that 'process may be postponed until after deprivation where an important governmental interest is accompanied by assurances that the deprivation is warranted.' It is therefore not enough for the defendants to establish simply that the passengers' allegations were severe; they must also demonstrate that the TLC's investigation involved assurances that the allegations were genuine." *Id.*

[11] A pre-deprivation hearing may be dispensed with where the allegations giving rise to the deprivation are not disputed. *See Spinelli v. City of New York*, 579 F.3d 160, 171 (2d Cir. 2009) (the risk that suspension of a license to sell firearms might be based on an erroneous assessment was non-existent because "Spinelli, while downplaying these infractions, has never disputed them."). The allegations of misconduct in this case are clearly disputed.

committed misconduct was not an erroneous one. Indeed, high-ranking officials of the FDNY rebuffed Plaintiffs' counsel's effort to arrange "some kind of hearing" before or immediately after the imposition of the restriction. Defendants' refusal to provide for any pre-deprivation process violated the Due Process Clause of the Fourteenth Amendment, and Article I, Sec. 6, of the N.Y. Constitution.

2. Plaintiffs were not given meaningful notice of allegations of misconduct.

An essential element of due process is that the individual whose liberty or property interest is at risk of being infringed by government action must have meaningful notice of the grounds upon which the government is acting. Such notice has to be sufficiently specific that a reasonable person can understand what she is being accused of. *See Goss v. Lopez*, 419 U.S. at 582 ("We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is."). In *Spinelli v. City of New York*, 579 F.3d 160, 172 (2d Cir. 2009), the Second Circuit held that the notice provided to a gun dealer of the basis for suspending his license was constitutionally inadequate. The court observed that "due process notice contemplates specifications of acts or patterns of conduct, not general, conclusory charges unsupported by specific factual allegations," and held that because the notice at issue contained only "conclusory statements" that the dealer had violated security requirements contained in City regulations, "Spinelli was left to guess at the security breaches to which the letters referred." *Id. See also, In re Gault*, 387 U.S. 1, 33 (1967) ("Notice, to comply with due process requirements, . . . must set forth the alleged misconduct with particularity.").

Here, Defendants provided Plaintiffs no meaningful notice of the allegations of misconduct here. Plaintiffs Bonilla, Nunez and Pfeiffer were notified on April 26 that their

employment was restricted and on June 17 that the restriction was lifted. Those notices contained not one syllable of an accusation of what they had done wrong and what the accusation was based on. Plaintiff Rugen was notified on April 26 that his employment was suspended and restricted. The notice stated only that he allegedly violated "the FDNY's Social Media and HIPAA Privacy Policies, New York State Public Health Law and Federal Patient Privacy Law/Regulations on or about April 10, 2020." Rugen decl. Ex. E. On June 11, 2020, Plaintiff Rugen was summoned to an interview with the FDNY Health Care Compliance Officer and the notice of interview stated that the "matter" to be discussed was "an alleged HIPAA violation," and that Mr. Rugen was "being interviewed as a **SUBJECT** relative to the above-stated incident" but did not include any information concerning the date or time of the incident or the acts or conduct that constituted the "incident." *Id.*, Ex. G. Thus, neither the April 26 notice nor the June 11 notice gave Mr. Rugen information about what he was accused of and what the accusation was based on.

In short, all of the individual Plaintiffs were "left to guess" about what they had done wrong that triggered the restrictions of their employment. *Cf.*, *Spinelli*, 579 F.3d at 172. The notices provided Plaintiffs concerning the imposition of the restrictions of their employment were simply constitutionally inadequate.

3. Plaintiffs have not been afforded meaningful post-deprivation process.

Defendants have afforded Plaintiffs no post-deprivation process to contest the restrictions of their employment. Although Plaintiffs are covered by a collective bargaining agreement ("CBA") that provides for grievance and arbitration clause of disputes about discipline, Barzilay decl. ¶ 36 and Exs. I, J, and K, nothing in the CBA guarantees that Plaintiffs will have an opportunity to challenge the restrictions of their employment and recover what they have lost

because of those restrictions.

The FDNY has long asserted that restrictions of employment like those suffered by Plaintiffs here are not disciplinary actions and, thus, the FDNY's managerial right to impose restrictions cannot be challenged in the CBA's grievance and arbitration procedure. The FDNY also maintains that, even when it concludes that employment restrictions should be lifted without further action against the affected employees, it has no obligation to restore compensation lost by the employee. These contentions were the subject of a recent arbitration between the Union and the City. In the *Ramos award*, the arbitrator confirmed that the CBA gives restricted EMTs and Paramedics no right to contest the restrictions unless there is "evidence of punitive intent sufficient to establish that the [affected employees'] restricted duty assignments were, at any point, disciplinary in nature." Meginniss decl. Ex. L, at 28. Using this standard, the arbitrator considered the restrictions imposed on six different employees. He found that that four did not establish that the restrictions were disciplinary, while two had a valid claim, but only with respect to five weeks of the six months they were restricted. *Id.*, at 28 – 33.

Although grievance and arbitration processes prescribed by a collective bargaining agreement may satisfy the requisites of due process in some circumstances, they do not satisfy due process when an employee cannot obtain relief except upon a showing that the government has acted with "punitive intent" and, even then, cannot be assured of obtaining all of the relief the employee should be entitled to under the Due Process Clause. *See Parrett v. City of Connersville*, 737 F.2d 690 (7th Cir. 1984) (grievance and arbitration did not provide all the process that was due where the arbitrator could not fully compensate the employee for losses and the arbitrator lacked the power to stop the deprivation before it was imposed).

As is evident from the *Ramos award*, the CBA here does not permit a remedy that

redresses the deprivation of Plaintiffs' liberty interest. Rather, pursuant to the *Ramos award*, the CBA only permits an employee to challenge a restriction if the period of restriction lasts so long that the restriction may be characterized as "punitive." Even in that event, the amount of compensation to which the employee will be entitled will be limited to losses sustained during that part of the restriction period that was "too long." Thus, the CBA provides *no* remedy for the deprivation itself or for the failure to grant the affected individual a pre-deprivation or prompt post-deprivation hearing; and the limitation on compensatory relief means that the individual cannot recover compensation for *all* of the losses she can show she sustained. *Cf.*, *Carey v. Piphus*, 435 U.S. 247 (1978); and *Patterson v. City of Utica*, 370 F.3d 322, 337 (2d Cir. 2004) (plaintiffs deprived of liberty interest without due process are entitled to compensatory relief to recover losses that would not have occurred if the proper procedure had been in place). *See also Ciambriello v. County of Nassau*, 292 F.3d 207 (2d Cir. 2002) (grievance procedure with no pre-deprivation notice and opportunity to be heard not a bar to action under the Due Process Clause); and *Goetz v. New Windsor Cent. School Dist.*, 698 F.2d 606, 610 (2d Cir. 1983) (grievance procedure no bar to Due Process Clause claim because plaintiff "may well be entitled to more due process than the procedure under the collective bargaining agreement afforded him.").

Finally, after lifting the restrictions of Plaintiffs' employment, the FDNY has continued to "investigate" Plaintiffs and to that end interviewed Plaintiffs Bonilla, Pfeiffer and Nunez on July 23 and 24, 2020, and Plaintiff Rugen on August 12, 2020. The stated purpose of these interviews was to determine whether to initiate a formal disciplinary proceeding on the incidents that underlie the restrictions of Plaintiffs' employment. Even if these interviews might be characterized as post-deprivation opportunities to be heard, they were certainly not timely. To satisfy due process, post-deprivation hearings must be prompt, particularly when there is an

absence of pre-deprivation process. *See Barry v. Barchi.* 443 U.S. at 67; and *Spinelli v. City of New York,* 579 F.3d at 171-74 (2d Cir. 2009) (the 58-day delay, coupled with City's blanket policy of only providing a hearing after the completion of its investigation, violates requirement that process be afforded at a meaningful time and in a meaningful manner). To date, nearly thirteen months after the incidents, the FDNY has not initiated a disciplinary proceeding that would permit Plaintiffs to invoke an evidentiary hearing. Plaintiffs have not had a timely post-deprivation hearing; indeed, they may never have an opportunity to present their case at a hearing. And the absence of "charges" cannot be equated with a clearing of Plaintiffs' name. The pendency of "investigations" continues to deprive them of the right to seek promotion.

Defendants' failure, indeed refusal, to provide a prompt, meaningful post-deprivation opportunity to be heard violates the Due Process Clause.

CONCLUSION

For all the foregoing reasons, Plaintiffs should be granted partial summary judgment on their claims that Defendants are liable for having violated the Due Process Clause of the Fourteenth Amendment, and Article I, Section 6, of the N.Y. Constitution when they restricted their employment, and suspended the employment of Plaintiff Rugen, in April, 2020, without providing constitutionally requirement pre-deprivation and post-deprivation process.

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Respectfully submitted,

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