COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Docket No. 2022-P-754
Bristol Superior Court Docket No. 2273CV133

CHILDREN'S HEALTH RIGHTS OF MASSACHUSETTS, INC.
Appellant,

v.

CAMBRIDGE PUBLIC SCHOOL DISTRICT, *et al.*,
Appellees.

REPLY BRIEF OF APPELLANT CHILDREN'S HEALTH RIGHTS OF MASSACHUSETTS, INC.

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Dated: November 4, 2022

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I. CHRM established standing for purposes of declaratory judgment.

CHRM alleged students of its parent members in the Districts are "subject to the Districts' vaccine mandates" and that the "mandates apply to CHRM's members' children." RA 14 at ¶ 8; RA 26 at ¶ 61. CHRM further alleges that the mandates are illegal for lack of authority of the school committees, preemption by DPH, and unconstitutional. Contrary to the Districts' assertions, the possibility of obtaining an exemption from an illegal rule does not transform an illegal rule into a legal rule. App. Br. At 19 (arguing, "If every member's child who attends public school in Belmont or Cambridge qualifies for an exemption to the vaccine requirements, there is no immediate risk of those children or their parents suffering a concrete, particularized injury."). Further, Cambridge's policy applies to all age-eligible students, not just those who wish to participate in extracurriculars.

Declaratory judgment may be sought "to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated ..." *Turley v. W. Massachusetts Reg'l Police Acad.*, Mass. Super., No. CV 18-0118-B

(Nov. 13, 2018), citing *Villages Dev. Co.* v. *Sec'y of Executive Office of Envtl. Affairs*, 410 Mass. 100, 106 (1991).

Any person, in this case minors represented by their parents in an organization, subject to illegal government action, may have their rights determined by declaratory judgment. The logical formula here is simple – an illegal rule plus being subject to that rule equals standing to have a court determine the legality of rule for declaratory judgment purposes. The Districts argue only that imposition of a rule does not by itself confer standing on just anybody to attack the rule via declaratory judgment. App. Br. at 15 (arguing "a claim of unlawful government conduct does not by itself establish standing"). CHRM acknowledges that it must have children in the Districts to have standing, which it alleged.

The Districts rely upon, *Ten Persons of Com. v. Fellsway Dev. LLC*, 951 N.E.2d 648, 660 (Mass. 2011), but in that case property owners near the Middlesex Fells Reservation who wanted to preserve the park for historical and other reasons attempted to stop development at the Fells and sought declaratory relief. In that case the Court rightfully held that nearby property owners cannot assert an interest in maintaining the character of nearby property thus could not seek declaratory relief. Here, however, the students are within the Districts and subject to the Districts' rules. Comparing this case with *Fellsway Dev*., supra, is inappropriate as the students here, through their parent members of CHRM, have standing to

challenge illegal rules to which they are subject. The Districts' reliance on *Fellsway Dev*. would be appropriate only if CHRM's parents did not have children in either District.

In Cambridge the mandate applies to all students age twelve and up, the only stated punishment being denial of participation in extracurricular activities. Cambridge argues that since the only stated punishment is denial of participation in extracurricular activities, CHRM-represented children in Cambridge suffer no harm unless they have been denied access to extracurricular activities. Being subject to an illegal rule, however, is injury in itself. Even if there were no punishment for refusing the Covid vaccine in Cambridge, their mandate can be challenged as illegal by anybody subject to the mandate. Thus, in Cambridge, all students subject to the mandate have standing to challenge it via declaratory judgment.

Concerning Belmont, though the District now claims mootness since they suspended the mandate, the same rings true. Though Belmont's illegal rule relates specifically to students wishing to participate in extracurricular activities, any unvaccinated student would otherwise have the right to participate in extracurricular activities presuming qualifications other than vaccination status are met. Belmont's rule has a chilling effect on unvaccinated students who wish to participate in extracurriculars at Belmont. The loss of the ability to participate in

extracurricular activities created by Belmont's rule is the injury to unvaccinated students represented by CHRM in Belmont. This injury permits the students, through their parents as members of CHRM, to challenge the rule through declaratory judgment.

CHRM, through its member parents with students in the Districts subject to the illegal rules of the Districts, established standing to bring this declaratory judgment action.

II. The action is not moot as to Belmont; if so, then the capable of repetition yet evading review exception to mootness applies.

Belmont's meeting minutes show the committee expressly rejected stating that it would "rescind" the mandate, and instead opted to "suspend" it so as "not to lose the policy in case it is needed in the future." R.A. at 403. The illegal rule expressly remains in Belmont's policies. Thus, the issue is not moot due only to Belmont's suspension of enforcement.

If this Court determines the matter is moot as to Belmont, then the "capable of repetition, yet evading review" exception should be applied where as here, again, the policy is merely suspended and not revoked. See *Blake v. Massachusetts Parole Bd.*, 341 N.E.2d 902, 906 (Mass. 1976), recognizing the exception. In *Sciaba Const. Corp. v. City of Boston*, 617 N.E.2d 1023, 1026 (Mass. App. 1993), the Court reviewed the merits of an otherwise moot issue since "[…] (1) the matter has been briefed and argued at some length, the issue is one of public importance

and is likely to arise again in similar factual circumstances and is likely to evade judicial review, and (2) a decision will probably prevent further litigation between the parties […]."

Here, the capable of repetition yet evading review exception to mootness should apply if the Court finds this matter is moot as to Belmont. The Districts rely on *City of Lynn v. Murrell*, 185 N.E.3d 912 (Mass. 2022), but in that case the executive order was expressly rescinded, and the argument against mootness was that a similar order could be enacted in the future. The difference between *Lynn* and this case is immediately apparent – Belmont opted to keep the same policy on the books so that the same policy can be reinstated. Thus, this situation is not so hypothetical as in the cases the districts offer where it was argued that similar policies could be enacted in the future. The immediate danger here is that the Belmont school committee expressly preserved the mandate within its rules because it "prefers not to lose the policy in case it is needed in the future." R.A. at 403. Thus, the illegal rule remains in Belmont's policies, even though Belmont has opted not to enforce it for the time being. Belmont is free to reinstate the rule at any time, and similarly to suspend it again and claim mootness when they face new litigation.

For these reasons this case is not moot as to Belmont, but if this Court finds the matter is moot it may still review Belmont's rule as it clearly is capable of repetition yet evading review.

III. CHRM established a likelihood of success on the merits.

a. The Districts lack authority to issue Covid-19 vaccine mandates because the Legislature did not expressly grant them any authority to enact vaccine mandates for students; G.L. c. 71, § 37H does not empower the Districts to mandate vaccination.

The Districts repeatedly attempt to read their claimed authority into a statute where it is clearly absent, and which requires the Districts to make policies related to the "conduct of students." G.L. c. 71, § 37H, par 2, (stating, "Each school district's policies pertaining to the conduct of students shall include the following: […] standards and procedures to assure school building security and safety of students and school personnel […]."). Add. 20. Thus, the Districts ask that this court determine that (1) vaccination is "conduct of students" and (2) conditioning participation in extracurricular activities on receiving the Covid vaccine, while still permitting children to attend school and congregate with one another during the regular school day, relates to the "safety of students."

G.L. c. 71, § 37H imposes no affirmative duty upon any student but only mandates that the Districts prohibit certain conduct. For example, the Districts must create disciplinary policies for fighting as explained in subparagraph (b), weapon or drug possession as explained in subparagraph (a), tobacco use as

explained in paragraph 1, and bullying as explained in paragraph 3. G.L. c. 71, § 37H mandates that the Districts create policy related to student conduct that may present a safety risk to students and school personnel. Add. 20-22.

Declining the Covid vaccine is not "conduct" contemplated by this statute. While the Districts claim "authority to institute measures designed to ensure the health and safety of students," the word "health" is nowhere to be found in G.L. c. 71, § 37H. App. Br. 21; See Add. 20-22. Mandatory vaccination is not a policy related to student conduct contemplated by G.L. c. 71, § 37H, nor can it be reasonably inferred from the statute.

Traditionally, school committees have authority over matters such as "hiring of teachers, the details of curriculum, or other matters concerning the policy and discipline of the schools." *Sch. Comm. of Gloucester v. City of Gloucester*, 85 N.E.2d 429, 434 (Mass. 1949). School committees have never been called upon nor authorized to make medical decisions for students. The Districts rely on opinions which discuss the authority of school districts generally, none of which states school committees can mandate medical interventions for children. The only case cited by the Districts discussing "contagious disease" is *Hammond v. Town of Hyde Park*, 80 N.E. 650 (Mass. 1907). *Hammond* involved a school committee's refusal to admit students to school who did not present a revaccination certificate for smallpox as ordered by the board of health. *Id*. Thus, the vaccination

requirement in *Hammond* was not created by the school committee; the "board of health" imposed the requirement that the school committee enforced. Here, the school committees have taken it upon themselves to impose a vaccination requirement absent an order from the Department of Public Health. The Department of Public Health, which has since covered the field in childhood vaccines, has not mandated the Covid vaccine for students to participate in extracurricular activities.

There is no Massachusetts statute, rule, or regulation that permits school districts to enact vaccine mandates, and the mandates themselves – as explained below – conflict with DPH's statutory grant of authority. For these reasons the Superior Court erred in finding CHRM did not establish a likelihood of success on the merits.

b. The Districts' mandates are preempted by the Department of Public Health's statutory and regulatory scheme.

G.L. c. 76, § 15 states, "No child shall, except as hereinafter provided, be admitted to school except upon presentation of a physician's certificate that the child has been successfully immunized against diphtheria, pertussis, tetanus, measles and poliomyelitis and such other communicable diseases as may be specified from time to time by the department of public health." This statute shows that the legislature itself mandated vaccination against "diphtheria, pertussis,

tetanus, measles and poliomyelitis," and left the remaining vaccinations required for school admission to be determined by the department of public health. Add. 23.

The legislative intent is clear – DPH is the only body identified by the legislature with authority to add vaccines to the required schedule for school attendance. The District's response to this is that admission to school is not conditioned upon vaccination, only participation in extracurricular activities, but extracurriculars are a part of school attendance as they are school sponsored activities. Regardless, this ignores the glaringly obvious point that school committees have no authority nor have they been placed in a position to mandate any vaccination.

The Districts lack any express grant of authority to mandate vaccination for any reason, which the Districts admit. App. Br. at 27. They attempt only to argue that the Districts' mandates can coexist with DPH's vaccination schedule, which presumes the Districts have the authority in the first place to mandate vaccination. Since the Covid vaccine is not on the childhood vaccine schedule, and since the legislature gave exclusive authority to DPH to determine what may be added to that schedule other than the five diseases identified by the legislature, vaccines cannot be added by school committees with no medical expertise or authority. Again, the Districts argue that their power is limitless if not expressly counteracted by some other measure.

Finally, the Districts claim school committee rules are akin to local "ordinances or bylaws" and thus are valid unless in clear conflict with state law. App. Br. at 26. School committee rules are not local ordinance or bylaws and thus are not entitled to the same test for validity as a local ordinance or bylaw. In the case of *Tiberio v. Town of Methuen*, 307 N.E.2d 302 (Mass. 1974), it was argued, but not decided, that a proposed local ordinance that a town council could increase the powers or duties of school committee conflicted with state law. That was argued because the state sets the powers of school committees as the Districts acknowledge in reference to G.L. c. 71. Generally, school committee rules do not have to undergo the same procedure for passage as local ordinances and bylaws, and the Districts point to no ordinance or bylaw, but only to meeting minutes of the school committee and an affidavit from a superintendent regarding a meeting of the school committee, wherein these vaccine mandates were enacted. Thus, the question is not what prevents the school committees from mandating vaccination, but what empowers them to enact these mandates, which is nothing.

School committees cannot mandate vaccination, regardless of the possibility for exemption and regardless of the punishment or conditions of the mandate. The Districts' claimed power to mandate vaccination is nonexistent; the Districts can point to no statutory grant of authority. For these reasons CHRM has a likelihood of success on the merits of this issue.

c. The Districts' Mandates violate CHRM parents' Constitutional rights.

The Districts' rules requiring vaccination, or conditioning participation in any extracurricular activity on vaccination is arbitrary government interference in CHRM parents' fundamental liberty interest in the care, custody, and management of their children. It has been widely acknowledged that arbitrary government action is unconstitutional. "[A]n acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *Jacobson v. Cmmw. of Massachusetts*, 197 U.S. 11, 28 (1905). The arbitrariness of the rules at issue here is blindingly apparent. Children are permitted to attend school all day, Covid vaccine or not, but then are disallowed from participation in extracurriculars if they have not taken a Covid vaccine. In all of the Districts' arguments they fail to address the logic of the rule. This is because there is no logic to the rule – it is purely punitive, not related to "health and safety," and demonstrative of why school committees should not, and do not, have the authority to force health related decisions on students.

In a recent decision reinstating public employees in New York City who were fired for being deemed "unvaccinated" from Covid, the Richmond County

Supreme Court of the State of New York found arbitrary action where, in part, "unvaccinated employees were kept at full duty while their exemptions were pending." *Garvey v. City of New York*, 85163/2022, 2022 WL 16559102, at 6 (N.Y. Sup. Ct. Oct. 24, 2022). Add. 29. That is, unvaccinated public workers were permitted to continue working for a period of time while their exemptions were being determined. As the *Garvey* court noted, "The vaccination mandate for City employees was not just about safety and public health; it was about compliance. If it was about safety and public health, unvaccinated workers would have been placed on leave the moment the order was issued. If it was about safety and public health, the Health Commissioner would have issued city-wide mandates for vaccination for all residents." *Id*., at 12. Add. 35. Similarly, if the Districts' mandates were about safety and health they would have attempted to condition school attendance on vaccination so that unvaccinated students would not congregate with vaccinated students all day. Similar to the mandates of the City of New York, the Districts' mandates are not about health and safety, but mere compliance. The mandates are thus unconstitutionally arbitrary.

Since the Districts' mandates are arbitrary, they are unconstitutional, and they unconstitutionally interfere with CHRM's parents' rights to direct the care and upbringing of their children. For these reasons CHRM demonstrated a likelihood of success on the merits, and the decision of the Superior Court should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's Order denying CHRM's request for injunctive relief, remand for further proceedings, or grant injunctive relief as CHRM requested at the Superior Court.

Respectfully submitted,

Children's Health Rights of Massachusetts,

By Its Attorney,

Dated: November 4, 2022

/s/ Brian Unger

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email this 4th day of November 2022 upon all counsel or parties of record.

Dated: November 4, 2022

/s/ Brian Unger
Brian Unger, BBO No. 706583

CERTIFICATE OF COMPLIANCE

Appellant certifies that its brief complies with the rules of the Court that pertain to the filing of briefs, including Mass. R. App. P. 16(a)(13) (addendum); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 18 (appendix to the brief, previously filed); Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. App. P. 21 (redaction). Compliance with the applicable length limit of Mass. R. App. P. 20 was ascertained by the word count function of Microsoft Word; this Brief is typed in size 14 Times New Roman font. The word count of the sections of this Brief required under Mass. R. App. P. 5 through 11, excluding those portions which are not required and were thus not included in this reply brief, is approximately 3,600.

Dated: November 4, 2022

/s/ Brian Unger
Brian Unger, BBO No. 706583

ADDENDUM

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XII. Education (Ch. 69-78a)
Chapter 71. Public Schools (Refs & Annos)

M.G.L.A. 71 § 37H

§ 37H. Policies relative to conduct of teachers or students; student handbooks

Effective: July 1, 2014
Currentness

The superintendent of every school district shall publish the district's policies pertaining to the conduct of teachers and students. Said policies shall prohibit the use of any tobacco products within the school buildings, the school facilities or on the school grounds or on school buses by any individual, including school personnel. Said policies shall further restrict operators of school buses and personal motor vehicles, including students, faculty, staff and visitors, from idling such vehicles on school grounds, consistent with section 16B of chapter 90 and regulations adopted pursuant thereto and by the department. The policies shall also prohibit bullying as defined in section 37*O* and shall include the student-related sections of the bullying prevention and intervention plan required by said section 37*O*. Copies of these policies shall be provided to any person upon request and without cost by the principal of every school within the district.

Each school district's policies pertaining to the conduct of students shall include the following: disciplinary proceedings, including procedures assuring due process; standards and procedures for suspension and expulsion of students; procedures pertaining to discipline of students with special needs; standards and procedures to assure school building security and safety of students and school personnel; and the disciplinary measures to be taken in cases involving the possession or use of illegal substances or weapons, the use of force, vandalism, or violation of a student's civil rights. Codes of discipline, as well as procedures used to develop such codes shall be filed with the department of education for informational purposes only.

In each school building containing the grades nine to twelve, inclusive, the principal, in consultation with the school council, shall prepare and distribute to each student a student handbook setting forth the rules pertaining to the conduct of students. The student handbook shall include an age-appropriate summary of the student-related sections of the bullying prevention and intervention plan required by section 37*O*. The school council shall review the student handbook each spring to consider changes in disciplinary policy to take effect in September of the following school year, but may consider policy changes at any time. The annual review shall cover all areas of student conduct, including but not limited to those outlined in this section.

Notwithstanding any general or special law to the contrary, all student handbooks shall contain the following provisions:

(a) Any student who is found on school premises or at school-sponsored or school-related events, including athletic games, in possession of a dangerous weapon, including, but not limited to, a gun or a knife; or a controlled substance as defined in chapter ninety-four C, including, but not limited to, marijuana, cocaine, and heroin, may be subject to expulsion from the school or school district by the principal.

(b) Any student who assaults a principal, assistant principal, teacher, teacher's aide or other educational staff on school premises or at school-sponsored or school-related events, including athletic games, may be subject to expulsion from the school or school district by the principal.

(c) Any student who is charged with a violation of either paragraph (a) or (b) shall be notified in writing of an opportunity for a hearing; provided, however, that the student may have representation, along with the opportunity to present evidence and witnesses at said hearing before the principal.

After said hearing, a principal may, in his discretion, decide to suspend rather than expel a student who has been determined by the principal to have violated either paragraph (a) or (b).

(d) Any student who has been expelled from a school district pursuant to these provisions shall have the right to appeal to the superintendent. The expelled student shall have ten days from the date of the expulsion in which to notify the superintendent of his appeal. The student has the right to counsel at a hearing before the superintendent. The subject matter of the appeal shall not be limited solely to a factual determination of whether the student has violated any provisions of this section.

(e) Any school district that suspends or expels a student under this section shall continue to provide educational services to the student during the period of suspension or expulsion, under section 21 of chapter 76. If the student moves to another district during the period of suspension or expulsion, the new district of residence shall either admit the student to its schools or provide educational services to the student in an education service plan, under section 21 of chapter 76.

(f) Districts shall report to the department of elementary and secondary education the specific reasons for all suspensions and expulsions, regardless of duration or type, in a manner and form established by the commissioner. The department of elementary and secondary education shall use its existing data collection tools to obtain this information from districts and shall modify those tools, as necessary, to obtain the information. On an annual basis, the department of elementary and secondary education shall make district level de-identified data and analysis, including the total number of days each student is excluded during the school year, available to the public online in a machine readable format. This report shall include district level data disaggregated by student status and categories established by the commissioner.

(g) Under the regulations promulgated by the department, for each school that suspends or expels a significant number of students for more than 10 cumulative days in a school year, the commissioner shall investigate and, as appropriate, shall recommend models that incorporate intermediary steps prior to the use of suspension or expulsion. The results of the analysis shall be publicly reported at the school district level.

Credits

Added by St.1972, c. 467. Renumbered and amended by St.1973, c. 430, § 5. Amended by St.1987, c. 285; St.1989, c. 603; St.1992, c. 133, § 430; St.1993, c. 71, § 36; St.1993, c. 380, § 1; St.1994, c. 51; St.2008, c. 386, § 1, eff. Mar. 16, 2009; St.2008, c. 451, § 50, eff. Jan. 5, 2009; St.2010, c. 92, §§ 3, 4, eff. May 3, 2010; St.2012, c. 222, § 1, eff. July 1, 2014.

Notes of Decisions (14)

M.G.L.A. 71 § 37H, MA ST 71 § 37H

Current through Chapter 125, 134, 136, 144-147, 149, 158, 174 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XII. Education (Ch. 69-78a)
Chapter 76. School Attendance (Refs & Annos)

M.G.L.A. 76 § 15

§ 15. Vaccination and immunization

Currentness

No child shall, except as hereinafter provided, be admitted to school except upon presentation of a physician's certificate that the child has been successfully immunized against diphtheria, pertussis, tetanus, measles and poliomyelitis and such other communicable diseases as may be specified from time to time by the department of public health.

A child shall be admitted to school upon certification by a physician that he has personally examined such child and that in his opinion the physical condition of the child is such that his health would be endangered by such vaccination or by any of such immunizations. Such certification shall be submitted at the beginning of each school year to the physician in charge of the school health program. If the physician in charge of the school health program does not agree with the opinion of the child's physician, the matter shall be referred to the department of public health, whose decision will be final.

In the absence of an emergency or epidemic of disease declared by the department of public health, no child whose parent or guardian states in writing that vaccination or immunization conflicts with his sincere religious beliefs shall be required to present said physician's certificate in order to be admitted to school.

Credits
Amended by St.1938, c. 265, § 5; St.1967, c. 590, § 15; St.1971, c. 285; St.1972, c. 161.

Notes of Decisions (10)

M.G.L.A. 76 § 15, MA ST 76 § 15
Current through Chapter 125, 134, 136, 144-147, 149, 158, 174 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

GEORGE GARVEY, ADAM BIANCO, ANTHONY FIGUEROA, CURTIS CUTLER, DALE NICHOLLS, DANNY HULKOWER, FRANK CALAMANCO, JAMES GERMANO, KOLA SMITH, MANDEL BAILEY, MITCHUM GREENE, PATRICIA BUCCELLATO, RALPH MARTINEZ, RUSSELL PIAZZA, SEAN ABELL, TOMMY LIBRETTI,

Petitioners,

Index #: 85163/2022

For A Judgment Pursuant To Article 78 of the CPLR

DECISION & ORDER

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, NEW YORK CITY DEPARTMENT OF SANITATION, DAVID CHOKSHI, in his official capacity as the Commissioner of the Department of Health and Mental Hygiene, and ERIC ADAMS, in his official capacity as Mayor

Respondents.

Upon all of the papers filed in support of the applications and the papers filed in opposition thereto, and after hearing oral arguments, it is

ORDERED that Motion #002 brought by Respondents for a judgment pursuant to CPLR 3211(a)(7) to dismiss the Petition on the grounds that the Petitioner failed to state a claim is hereby denied.

ORDERED that the Petition is hereby granted as set forth below.

BACKGROUND & PROCEDURAL HISTORY

On October 20, 2021, the Health Commissioner of the City of New York, David Chokshi, (hereinafter "Commissioner Chokshi" and/or "DOHMH") issued an Order of the Commissioner of the Department of Health and Mental Hygiene (hereinafter "public employee vaccination mandate"). The vaccination mandate required all City employees to show proof of at least one dose of vaccination against Covid-19 by 5:00PM on October 29, 2021. Petitioners are former-Department of Sanitation (hereinafter "DSNY") employees that were terminated in February 2022 for failure to comply with vaccination requirements. On December 13, 2021, the Commissioner extended the vaccination mandate to employees in the private sector (hereinafter "private employee vaccination mandate"). On March 24, 2022, Mayor Adams enacted Executive Order No. 62, which provided blanket exemptions from the private employers' vaccine mandate for athletes, performers, and other artists (hereinafter "private exemption order" or "Mayor's exemption").

Petitioners' central argument is that Mayor Adams' Executive Order No. 62, the private exemption order, rendered the public employee vaccination mandate arbitrary and capricious or unconstitutional. Furthermore, the Petitioners all claim, and provided laboratory documentation, that they have natural immunity to Covid-19 from prior infection(s). Respondents' central argument is that the private employers' exemption order and the public employee vaccination mandates were "created separately, and exist independently, of each other."

MOTION TO DISMISS

Upon a motion to dismiss a complaint pursuant to CPLR §3211, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." *Morris v. Gianelli,* 71 AD3d 965, 967 [2d Dept. 2010]. A motion to dismiss should be granted where the Complaint fails to "contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *Matlin Patterson ATA Holdings LLC v. Fed. Express Corp.,* 87 AD3d 836, 839 (1st Dept. 2011).

CPLR §3211(a)(7) provides that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that…the pleading fails to state a cause of action." The Court will consider "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Guggenheimer v. Ginzburg,* 43 NY2d 268, 275

(1977). Dismissal pursuant to CPLR 3211(a)(7) is warranted if the evidentiary proof disproves an essential allegation of the complaint, even if the allegations of the complaint, standing alone, could withstand a motion to dismiss for failure to state a cause of action. *Korinsky v. Rose,* 120 AD3d 1307, 1308 (2d Dept. 2014). Courts have repeatedly granted motions to dismiss where the factual allegations in the claim were merely conclusory and speculative in nature and not supported by any specific facts." *See Residents for a More Beautiful Port Washington, Inc. v. Town of North Hempstead,* 153 AD2d 727 [2d Dept. 1989]; *Stoianoff v. Gahona,* 248 AD2d 525 [2d Dept. 1998].

Respondents argue that the Petitioner's claims are time-barred by the applicable statute of limitations. Under CPLR Article 78, there is a four-month statute of limitations to bring a claim. Though the Respondents were terminated in February 2022, the statute of limitations would normally expire in June 2022. Typically, a termination decision becomes final and binding when a petitioner receives notice of their termination. *John v. New York City Dept. of Educ.,* 18 NY3d 457, 465-466 [2012]. However, the Court notes two very important dates that change the expiration of the statute of limitations. First, is the private exemption order issued by Mayor Adams in March 2022. Second, in June 2022, the Petitioners received letters from the Department of Sanitation, essentially being offered their jobs back if they were willing to comply with the vaccination mandate.

There are "two requirements for fixing the time when agency action becomes final and binding. First, the agency must have reached a definitive position on the issue…and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Block 3066, Inc. v City of NY,* 89 AD3d 655, 656 [2d Dept 2011]. Clearly, the action by the Department of Sanitation in sending letters to the terminated employees means that the agency did *not* reach a definitive position on the issue. Furthermore, the issuance of a blanket exemption for certain professions by the Mayor's Executive Order No. 62 on March 24, 2022, which is a partial basis for this Action, opened the door to this litigation. Therefore, the Court finds this Article 78 filed timely, in light of the actions taken by the DSNY and the Mayor's Executive Order.

ARTICLE 78

Judicial review of the acts of an administrative agency under article 78 is limited to questions expressly identified by statute (*see* CPLR §7803; *Matter of Featherstone v. Franco*, 95 NY2d 550, 554 [2000]). CPLR §7803 states:

> The only questions that may be raised in a proceeding under this article are:
>
> 1. whether the body or officer failed to perform a duty enjoined upon it by law; or
>
> 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.
>
> 5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

Under CPLR Article 78, the Petitioners must establish that the agency determination or decision is so "lacking in reason for its promulgation that it is essentially arbitrary." *NY State Ass'n. of Counties v. Axelrod,* 78 NY2d 158, 166 (1991). The standard of review is "whether the regulation has a rational basis, and is not unreasonable, arbitrary, or capricious." *Matter of Consolation Nursing Home, Inc., v. Commr. Of New York State Dept. of Health,* 85 NY2d 326, 331-332 [1995]. The reviewing court "must be certain that an agency has considered all the important aspects of the issue and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *O'Rourke v. City of NY,* 64 Misc. 3d 1203 [A] [Sup. Ct. Kings County 2019]. The Court "may not substitute its own judgment of the evidence…but should review the whole record to determine whether there exists a rational basis to support the findings upon which the …determination is predicated." *Purdy v. Kreisberg,* 47 NY2d 354, 358 (1979). "Public health agencies, in particular, are entitled to a high degree of

judicial deference when acting in their area of their particular expertise." *C.F. v. NYC Dept. Of Health & Mental Hygiene,* 191 AD3d 52, 69 [2d Dept. 2020].

In reviewing alleged arbitrary and capricious administrative determinations, a reviewing court's function is limited to "whether the record contains sufficient evidence to support the rationality of the…determination." *Atlas Henrietta LLC v. Town of Henrietta Zoning Bd. Of Appeals,* 46 Misc. 3d 325, 332 [Sup. Ct. 2013] *aff'd*, 120 AD3d 1606 [2014]. Furthermore, "capricious action in a legal sense is established when an administrative agency on identical facts decides differently." *Italian Sons & Daughters, Inc. v. Common Council of Buffalo,* 453 NYS2d 962 [4th Dept. 1982].

The Mayor, in issuing Executive Order No. 62, made a different decision for similarly situated people based on identical facts. There is nothing in the record to support the rationality of keeping a vaccination mandate for public employees, while vacating the mandate for private sector employees or creating a carveout for certain professions, like athletes, artists, and performers. This is clearly an arbitrary and capricious action because we are dealing with identical unvaccinated people being treated differently by the same administrative agency. See *Italian Sons & Daughters, Inc. v. Common Council of Buffalo,* 453 NYS2d 962 [4th Dept. 1982].

Though not raised in the initial filing, this Court considered the fact that all but one of the Petitioners applied for exemptions from the mandate. They received generalized and vague denials. During that time their exemptions were being processed, they remained unvaccinated. There was no reason that they could not continue to submit to testing and continue to fulfill their duties as public employees. There was no reason why the City of New York could not continue with a vaccinate or test policy, like the Mayor's Executive Order that was issued in August 2021.[1]

The Court finds that in light of the foregoing, the vaccination mandates for public employees and private employees is arbitrary and capricious. There was nothing demonstrated in the record as to why there was a vaccination mandate issued for only public employees in October 2021. This Court notes that Covid-19 rates were averaging under 1,500 per day in October 2021, significantly lower than today's average Covid-19 rates.[2] There was nothing demonstrated in the record as to why the private sector mandate was issued months later in December 2021. There was

[1] See Mayor's Executive Order No. 78 issued on August 31, 2021. eo-78.pdf (nyc.gov), last accessed October 24, 2022.
[2] Tracking Coronavirus in New York, New York Coronavirus Map and Case Count - The New York Times (nytimes.com), last accessed October 24, 2022.

nothing demonstrated in the record as to why exemptions were issued for certain professions in March 2022 under Executive Order No. 62. There was nothing demonstrated in the record as to why employees were kept at full duty during the months-long pendency of their exemption appeals. There was nothing demonstrated in the record as to why a titer was not an acceptable alternative to vaccination, other than a single CDC study entitled "New CDC Study: Vaccination Offers Higher Protection than Previous Covid-19 Infection" which was issued on August 6, 2021.[3]

Though vaccination should be encouraged, public employees should not have been terminated for their noncompliance. Over 79% of the population in New York City are vaccinated. These unvaccinated employees were kept at full duty while their exemptions were pending. Based upon the Petitioners' vague denials of their exemptions, the fact they were kept at full duty for several months while their exemptions were pending, the Mayor's Executive Order granting exemptions to certain classes of people, and the lifting of the private sector mandate, this Court finds the Commissioner's Orders of October 20, 2021, and December 13, 2021, as well as the Mayor's Executive Order No. 62 to be arbitrary and capricious.

THE SEPARATION OF POWERS DOCTRINE

The New York City Charter empowers the DOHMH and the Board of Health with "jurisdiction to regulate all matters affecting health in the City of New York," which includes supervising the "control of communicable and chronic diseases and conditions hazardous to life and health" and providing "programs for the prevention and control of disease." NY City Charter §§ 556, 556(c)(2), 556(d)(5), and 558(c). The Charter empowers the City Council to "adopt local laws…for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants." *NY City Charter* 28[a]. The Charter restricts the Board of Health's rulemaking to the publication of a health code. *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene,* 23 NY3d 681 [2014].

Furthermore, Section 17-109 of the Administrative Code empowers DOHMH to "add necessary additional provisions to the health code to most effectively prevent the spread of communicable disease…" Finally, Section 3.01(d) of the New York City Health Code provides, in part, that upon the declaration of a public health emergency, the DOHMH Commissioner "may

[3] New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection, U.S. Centers for Disease Control, August 6, 2021 https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html, last accessed 10/24/2022.

establish procedures to be followed, issue necessary orders and take such actions as may be necessary for the health or safety of the City and its residents. Such procedures, orders or actions may include, but are not limited to…exercising any other power of the Board of Health to prevent, mitigate, control or abate an emergency, provided that such exercise of authority or power shall be effective only until the next meeting of the Board…" and at that meeting the Board can continue or rescind the Commissioner's exercise of authority.

"The concept of the separation of powers is the bedrock of the system of government." *Matter of NYC CLASH, Inc. v. New York State Off. Of Parks, Recreation, and Historic Preserv.*, 27 NY3d 178, 183 [2016]. An administrative agency usurps the authority of the legislative branch when it promulgates a rule that the legislature did not delegate it the authority to make in the first instance. *Id.* at 178; *Greater New York Taxi Ass'n v. NYC Taxi and Limousine Comm'n.*, 25 NY3d 600, 609 [2015]. "Separation of powers challenges often involve the question of whether a regulatory body has exceeded the scope of its delegated powers and encroached upon the legislative domain of policy making." *Garcia v. NY City Dept. of Health & Mental Hygiene,* 31 NY3d 601, 608 [2018].

To determine whether an administrative agency "has usurped the power of the Legislature, courts must consider whether the agency: (1) operated outside of its proper sphere of authority by balancing competing social concerns in reliance solely on its own ideas of sound public policy; (2) engaged in typical, 'interstitial' rulemaking or 'wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance'; (3) 'acted in an area in which the Legislature has repeatedly tried- and failed- to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions'; and (4) applied its 'special expertise or technical competence' to develop the challenged regulations." *See Matter of Acevedo v. NYS Dept. of Motor Vehs.*, 132 AD3d 112, 119 [3d Dept. 2015] *citing Boreali v. Axelrod,* 71 NY2d 1 at 12-14 [1987].

Applying the *Boreali* factors here, it appears that the Respondents are promulgating a rule on City employees. The Respondents instituted a policy for vaccination for all workers within New York City, by separate orders for public and private workers, however, as of November 1, 2022, the mandate is being lifted for only private sector employees. Though the Board of Health has the power to regulate vaccinations and adopt measures to reduce the spread of infectious diseases per Administrative Code 17-109, the Board of Health does not have the authority to

unilaterally and indefinitely change the terms of employment for any agency. Therefore, this Court finds that the DOHMH has acted outside its proper sphere of authority.

As to the second *Boreali* prong, the Commissioner has, in effect, "wrote on a clean slate." Terms of employment for City employees, such as residency requirements, are codified. There has never been a vaccination requirement for employees. They are not vaccinated for seasonal flu, and to this Court's understanding, they've never been required to provide other proof of vaccination. As to the third prong, the legislature has made no attempts to legislate Covid-19 vaccination. Finally, as to the fourth prong, the Health Commissioner, and the Board of Health, certainly used their expertise to develop this Order.

This Court does not have a basis to disagree with *temporary* vaccination orders during a public health emergency, however, ordering and enforcing that vaccination policy on only a portion of the populace for an indefinite period of time, is akin to legislating. It appears that in issuing this indefinite order, usurping the power of the legislature, the Health Commissioner has acted beyond his authority. *See Boreali v. Axelrod,* 71 NY2d 1 [1987] and *See also Goldenstein, et al v. NYC Dept. of Health, et al,* Index No. 85057/2022, wherein this Court used a similar analysis in invalidating the "toddler mask mandate."

THE AUTHORITY OF THE HEALTH COMMISSIONER

The Health Commissioner's Order of October 13, 2021, states that "any City employee who has not provided the proof described in Paragraph 2 must be excluded from the premises at which they work beginning on November 1, 2021."[4] The Petitioners claim that the Respondents do not have the power or authority to exclude the Petitioners from entering their workplace and that the Commissioner exceeded the scope of his authority. This Court agrees that the Commissioner cannot enact a term of employment on City employees and has exceeded his scope of authority based upon the separation of powers discussion above.

The Respondents, in arguing that the Commissioner can set a condition of employment, heavily rely on a recent case in the Appellate Division, Second Department, *CF v. NYC Dept. of Health & Mental Hygiene,* 191 AD3d 52 [2d Dept. 2020]. In the *CF* matter, the DOHMH issued a mandatory vaccination requirement on residents arising out of a severe measles outbreak in

[4] Supplemental Order of the Commissioner of Health and Mental Hygiene to Require Covid-19 Vaccination for City Employees and Employees of Certain City Contractors. covid-19-vaccination-requirement-contractors-supplemental.pdf (nyc.gov) last accessed 10/21/2022

Brooklyn, New York. The Court in that matter found that the decisions of public health officials to declare mandatory vaccine requirements are not arbitrary, capricious, or an abuse of discretion, *CF v. NYC Dept. of Health & Mental Hygiene,* 191 AD3d 52, 64-65 [2d Dept. 2020]. However, this Court notes that in Brooklyn, failure to comply with the measles vaccination requirement resulted in fines for each day of noncompliance. Furthermore, the Second Department Appellate Division reserved on whether the fines imposed upon violation were excessive. The Court specifically stated that "in the event that fines are imposed upon any person for violation of the Board's resolution, such person is free to argue in an appropriate proceeding that the fine is so disproportionate that it is an abuse of discretion, as well as to argue that the fine is so grossly disproportionate to the gravity of the offense as to be constitutionally excessive." *Id.* Finally, upon this Court's own research, only three people were fined for noncompliance.[5] This Court notes that the DOHMH order requiring mandatory vaccination requirements in certain areas of Brooklyn were *temporary* and believes that termination in the instant proceeding is excessive.

The respondents further cite to a series of cases that permit vaccination mandates as a "condition of employment." However, none of these cases address the authority of the Health Commissioner to enact a term of employment under the Health Code to City employees. Nor, does the Order give authority to City agencies to terminate employees. *See Police Benevolent Association of the City of New York, Inc. on behalf f its Members, Patrick J. Lynch v. City of New York, at al,* Index 151531/2022. In another matter, healthcare workers were terminated for failure to comply with a "condition of employment" as they refused Covid-19 vaccination. See *We the Patriots USA v. Hochul*, 17 F.4th 266, 287 [2d Cir. 2021]. There is a key difference in the instant case. DSNY workers have *never* been required to be vaccinated as a condition of employment, while healthcare workers have *always* been required to be vaccinated against infectious diseases. *Id.* Members of the DSNY cannot be equated to healthcare workers.

Respondents argue that the "nature of petitioner's job as DSNY employees necessarily entails contact with NYC civilians- *hundreds of thousands of whom are unvaccinated."* This argument is patently incorrect. The Petitioners work primarily outdoors and have limited interaction with the public. Those "hundreds of thousands of whom are unvaccinated" are

[5] ABC News, New York City issues fines of $1000 to 3 people who refused to be vaccinated against measles, New York City issues fines of $1,000 to 3 people who refused to be vaccinated against measles - ABC News (go.com) last accessed 10/21/2022.

responsible for their own health. They choose for themselves whether to be vaccinated or whether to risk infection. City employees should also have the right to make their own choice regarding their own health.

The Petitioners are members of a union that collectively bargained for a contract with the City of New York. The contract, in effect from January 20, 2019, until December 27, 2022, makes absolutely no mention of any vaccination as a condition of or prerequisite to employment.[6] How can a "condition of employment" be created during the term of employment? This Court believes that a new "condition of employment" cannot be imposed upon these employees when the "condition" did not exist when they accepted contracted employment. The Court is aware that the Petitioners' union bargained for a process regarding exemptions *after* the enactment of this vaccination mandate. Based upon this bargaining, the Court is not finding a breach of contract and notes that the Petitioners have other avenues for relief regarding the collective bargaining process and their rights as labor employees.

Finally, states of emergency are meant to be *temporary*. The question presented is whether the Health Commissioner has the authority to enact a permanent condition of employment during a state of emergency. This Court finds that the Commissioner does not have that authority and has acted beyond the scope of his authority under the Public Health Law and in violation of separation of powers. The Petitioners herein should not have been terminated for their failure to comply with the Commissioner's Order during a *temporary* state of emergency.

THE NY CONSTITUTION

Under the NY Constitution Article 1, §11, "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." The purpose of this clause is to keep "governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Nicholas v. Tucker, 114 F3d 17, 20 [2d Cir. 1997].* Where government action draws a distinction between classes of people, "the classification must be reasonable and must be based upon some ground of difference that rationally explains the different treatment." *People v. Liberta,* 64 NY2d 152, 163 [1984]. Under the NY Constitution Article I, §7, no person may be deprived of life, liberty, or property without due process of the law.

[6] Executed Contract: Sanitation Workers. Plaintiff's Exhibit 5. https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=spsCWGtfYfFBQD_PLUS_KiHyuYA==, last accessed 10/21/2022.

This Court finds that based upon the analysis above, the Commissioner's Order of October 20, 2021, violated the Petitioners' equal protection rights as the mandate is arbitrary and capricious. The City employees were treated entirely differently from private sector employees, and both City employees and private sector employees were treated entirely differently from athletes, artists, and performers. All unvaccinated people, living or working in the City of New York are similarly situated. Granting exemptions for certain classes and selectively lifting of vaccination orders, while maintaining others, is simply the definition of disparate treatment. Furthermore, selective enforcement of these orders is also disparate treatment.[7]

There is no doubt that vaccination mandates were enacted in the furtherance of a legitimate governmental purpose. *See McMinn v. Town of Oyster Bay,* 66 NY2d 544, 549 [1985]. However, there must be a reasonable relation between the end sought to be achieved and the means used to achieve that end. *Id.* Though City employees are often held to a higher standard than employees in the private sector, there is no rational reason for vaccination mandates to distinguish City workers, athletes, performers, and other private sector employees. "All persons…shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Engquist v. Oregon Dept. of Agr.,* 553 US 591 [2008]. Either there is a mandate for all, or there is a mandate for none.

CONCLUSION

It is clear that the Health Commissioner has the authority to issue public health mandates. No one is refuting that authority. However, the Health Commissioner cannot create a new condition of employment for City employees. The Health Commissioner cannot prohibit an employee from reporting to work. The Health Commissioner cannot terminate employees. The Mayor cannot exempt certain employees from these orders. Executive Order No. 62 renders all of these vaccine mandates arbitrary and capricious.

Being vaccinated does not prevent an individual from contracting or transmitting Covid-19. As of the day of this Decision, CDC guidelines regarding quarantine and isolation are the same for vaccinated and unvaccinated individuals. The Petitioners should not have been terminated for

[7] It is worth noting by this Court, that neither party addressed the enforcement of the private sector vaccine mandate. It's unclear to this Court whether anyone was actually terminated under the private sector vaccine mandate or whether any businesses were fined. However, it is clear that enforcement of the private sector mandate is lacking: "Adams administration is not inspecting companies for vaccine mandate compliance," New York 1, City not inspecting businesses vaccine mandate compliance (ny1.com), last accessed 10/24/2022.

choosing not to protect themselves. We have learned through the course of the pandemic that the vaccine against Covid-19 is not absolute. Breakthrough cases occur, even for those who have been vaccinated and boosted. President Joseph Biden has said that the pandemic is over.[8] The State of New York ended the Covid-19 state of emergency over a month ago.[9]

As this Court stated in its decision in the *Rivicci* matter, this is not a commentary on the efficacy of vaccination, but about how we are treating our first responders, the ones who worked day-to-day through the height of the pandemic. *See Rivicci v. NYC Fire Dept.,* Index No. 85131/2022. They worked without protective gear. They were infected with Covid-19, creating natural immunity. They continued working full duty while their exemption requests were pending. They were terminated and are willing to come back to work for the City that cast them aside.

The vaccination mandate for City employees was not just about safety and public health; it was about compliance. If it was about safety and public health, unvaccinated workers would have been placed on leave the moment the order was issued. If it was about safety and public health, the Health Commissioner would have issued city-wide mandates for vaccination for all residents. In a City with a nearly 80% vaccination rate, we shouldn't be penalizing the people who showed up to work, at great risk to themselves and their families, while we were locked down.

If it was about safety and public health, no one would be exempt. It is time for the City of New York to do what is right and what is just.

Accordingly, it is hereby

ORDERED that the Petition is granted.

ORDERED that a declaratory judgment is granted in that the Commissioner of Health and Mental Hygiene's order dated October 20, 2021, violates the separation of powers doctrine under NY Constitution Article III, §1.

ORDERED that a declaratory judgment is granted in that the Commissioner of Health and Mental Hygiene's order dated October 20, 2021, violates the Petitioners' equal protection rights pursuant to NY Constitution Article I, §11.

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[8] Biden says Covid-19 pandemic is "over" in US. Biden says COVID-19 pandemic is "over" in U.S. - CBS News, last accessed 10/24/2022.

[9] New York state ends covid emergency; Hochul encourages new booster shot, New York state ends Covid emergency; Hochul encourages new booster shot - syracuse.com, last accessed 10/24/2022.

ORDERED that a declaratory judgment is granted in that the Commissioner of Health and Mental Hygiene's order dated October 20, 2021, violates the Petitioners' substantive and procedural due process rights pursuant to NY Constitution Article I, §6.

ORDERED that a declaratory judgment is granted in that this Court finds that the Commissioner lacks the power and authority to permanently exclude the Petitioners from their workplace.

ORDERED that this Court finds the Commissioner of Health and Mental Hygiene's order dated October 20, 2021, arbitrary and capricious pursuant to CPLR §7803.

ORDERED that this Court finds the Commissioner of Health and Mental Hygiene's order dated December 13, 2021, arbitrary and capricious pursuant to CPLR §7803.

ORDERED that this Court finds the Mayor's Executive Order No. 62 arbitrary and capricious pursuant to CPLR §7803.

ORDERED that the Petitioners' claim for breach of contract is denied.

ORDERED that the terminated Petitioners are hereby reinstated to their full employment status, effective October 25, 2022, at 6:00AM.

ORDERED that the Petitioners are entitled to back pay in salary from the date of termination.

ORDERED that the Petitioners are directed to submit a proposed judgment regarding back pay consistent with this decision on or before November 10, 2022.

This constitutes the Decision and Order of the Court.

Date: October 24, 2022

ENTER

Ralph J. Porzio

HON. RALPH J. PORZIO
J.S.C.