

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

POLICE BENEVOLENT ASSOCIATION OF THE
CITY OF NEW YORK, INC., on behalf of its members,
and PATRICK J. LYNCH, as President of the Police
Benevolent Association of the City of New York, Inc.,

Plaintiffs-Petitioners,

-against-

CITY OF NEW YORK, DAVID CHOKSHI, in his
official capacity as Health Commissioner of the City of
New York, KEECHANT SEWELL, in her official
capacity as Police Commissioner of the City of New
York, NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE, NEW YORK
CITY BOARD OF HEALTH, NEW YORK CITY
POLICE DEPARTMENT, NEW YORK CITY
DEPARTMENT OF CITYWIDE ADMINISTRATIVE
SERVICES, and DAWN PINNOCK, in her official
capacity as Commissioner of the Department of Citywide
Administrative Services,

Defendants-Respondents.

Index. No.

**ORAL ARGUMENT
REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

With the vaccine mandate for NYPD police officers and a series of rules issued by the City designed to coerce vaccination under threat of severe adverse employment consequences, Respondents overreached their authorization and utterly failed to meet their legal obligations. The most recent directive – announcing immediate termination of City employees effective February 11, 2022 – resulted and continues to result in the improper termination of hard-working police officers, and must be invalidated without delay.

Under the guise of what are supposed to be temporary emergency powers – which Respondents have now been wielding for nearly two years – Respondents have been piling on arbitrary and unlawful penalties on police officers, who have been on the front lines throughout the pandemic doing the difficult and dangerous work of protecting this City. Notwithstanding that police officers had been operating under a successful “Vax or Test” program, and at a time when the City had already achieved a high vaccination rate over 85%, the Health Commissioner promulgated the vaccine mandate on October 20, 2021, ordering that unvaccinated officers must be excluded from their workplaces beginning on November 1, 2021 (the “Vaccine Mandate”). The Vaccine Mandate was followed by a series of rules issued by the City (the “Guidance”), which, among other things, required that unvaccinated officers be placed on immediate leave without pay. Now, at a time when COVID-19 metrics are plummeting and the State and other jurisdictions are lifting mandates, Respondents are implementing permanent employment action against police officers. On January 31, 2022, the City issued another rule stating that unvaccinated officers would be terminated as of February 11, 2022, without any procedural protections such as charges or a hearing (the “Termination Requirement”), implementation of which is now underway.

Respondents act as though that COVID-19, which the City has been enduring for nearly two years, gives the Health Commissioner indefinite *carte blanche* to impose restrictions on individual rights, which the City in turn has relied on to impose sweeping, punitive employment rules – with permanent consequences – all without any public comment or hearing or compliance with other laws and fair process. Respondents are wrong. The Vaccine Mandate, Guidance and Termination Requirement violate the law in multiple respects, because they: conflict with laws vesting the Police Commissioner with exclusive authority over the governance, administration and discipline of the police force; exceed the limits on Respondents’ enforcement authority for Health Commissioner orders; and have been promulgated indefinitely without any public comment or hearing in violation of statutory rulemaking requirements.

First, as applied to police officers, the Vaccine Mandate, Guidance and Termination Requirement violate the New York City Charter and Administrative Code, because those laws vest the Police Commissioner with exclusive authority over the governance, administration and discipline of the police force. The Health Commissioner and Mayor have no such authority. By imposing a new requirement for a police officer to be able to enter the premises of his or her workplace, and mandating adverse employment consequences as penalties for failing to receive the vaccine, the Vaccine Mandate, Guidance and Termination Requirement relate to matters under the exclusive authority of the Police Commissioner, and upon which neither the Health Commissioner, nor the City through non-legislative pronouncements, can intrude.

Second, more broadly, there is no authority authorizing the Health Commissioner or the City to impose adverse employment consequences (such as leave without pay or termination) for violation of a Health Commissioner order. Rather, the laws establishing the Health Code, on which Respondents rely for promulgation of the Vaccine Mandate, provide for only monetary

enforcement mechanisms such as fines. Moreover, the powers under the Health Code on which Respondents rely are limited to temporary measures necessary to address a public health emergency. Employment consequences such as leave without pay or termination are not public health measures, and termination is a permanent penalty that endures well beyond any temporary emergency.

Third, the Vaccine Mandate, Guidance and Termination Requirement violate administrative rulemaking requirements. Even if the Vaccine Mandate were considered an emergency rule of the Health Commissioner to bypass public comment and hearing requirements of the City Administrative Procedure Act (“CAPA”) for its initial promulgation, CAPA requires public comment and a hearing when an emergency rule remains in effect for sixty days. The Vaccine Mandate has now been in effect for more than ninety days, still without any public comment and hearing. Moreover, Respondents cannot rely on any purported emergency power of the Health Commissioner for the sweeping rules imposed by the Guidance and Termination Requirement, because these were not imposed by the Health Commissioner. There was no arguable exception to public comment and hearing requirements for the Guidance and Termination Requirement. Accordingly, the Guidance and Termination Requirement are also procedurally defective.

The Vaccine Mandate, Guidance and Termination Requirement therefore exceed Respondents’ authority and are affected by errors of law, and must be overturned.

STATEMENT OF FACTS

COVID-19

Nearly two years ago, on March 12, 2020, the Mayor of New York City declared a state of emergency for the City, following the first confirmed case of COVID-19 in the City. ¶20.¹ In the months that followed, COVID-19 killed thousands of New Yorkers and forced the City's economy to grind to a halt. ¶21. As first responders, NYPD officers never ceased working on the front lines to keep the City safe. Not surprisingly, at least approximately 10,000 of the NYPD's 35,000 uniformed members contracted and recovered from COVID-19. ¶22.

In the winter of 2020/2021, COVID-19 vaccines became publicly available, and have been readily available in this City to those eligible to receive them since that time. ¶23. By the fall of 2021 (before the Vaccine Mandate), at least 85% of adults in the City had received at least one dose of the vaccine, and positive tests, hospital admissions, and deaths were all mere fractions of their peaks. ¶24. With the emergence in the City of the Delta and Omicron variants, there were temporary upticks in the COVID-19 metrics in the City, but the numbers have declined again as the waves have passed. ¶25. Some, including Dr. Anthony Fauci, predict that the COVID-19 virus will not be eradicated, but will be a continuing part of life going forward. ¶26. It is now accepted, including by the CDC, that the existing vaccines do not prevent infections or transmissions, and they are of waning effectiveness. ¶27.

Moreover, the superiority of natural immunity to vaccination has now been recognized even by the CDC. On January 28, 2022, the CDC concluded, based on a study of data from New York and California, that recovery from a prior COVID-19 infection provides superior protection than vaccination: namely, that natural immunity is 2.8 times as effective in preventing

¹ Citations to "¶" or "Ex." are to paragraphs in and exhibits to the Petition, unless otherwise stated.

hospitalization and 3.3 to 4.7 times as effective in preventing infection compared with vaccination. ¶28, Ex. 2; *see also* Ex. 3 (“By firing staff with natural immunity, employers got rid of those *least* likely to infect others.”).

The New York State declaration of emergency with respect to COVID-19 expired on June 24, 2021. ¶29. New York State lifted its mask-or-vaccine requirement for businesses and other indoor spaces (other than K-12 schools) as of February 10, 2022. The Governor stated: “This protocol, a temporary measure implemented on December 10 as statewide cases spiked, was an effective tool to address the winter surge and the rise of the Omicron variant. With case counts plummeting and hospitalizations sharply declining, this temporary measure is no longer needed statewide.” ¶30. Neighboring Connecticut allowed its vaccine mandate for state employees, among other executive orders, to expire as of February 15, 2022. ¶31.

In contrast, the Mayor and Health Commissioner in this City continue to unilaterally grant themselves emergency powers by continuing their declarations of a state of emergency beyond the twenty-second month. ¶32.

The Vax or Test Program

On August 31, 2021, the then-Mayor issued Executive Order No. 78, which established a mandatory vaccination or weekly test requirement for all City employees. ¶33, Ex. 4. Police officers complied with this policy for weeks without issue. ¶34. During this time, approximately 70% of NYPD police officers were vaccinated. ¶35. Vax or Test was effective and struck the appropriate balance between encouraging vaccination and respecting the medical autonomy of NYPD officers. ¶36. There is no evidence of widespread COVID-19 infection or transmission by or among NYPD police officers when Vax or Test was in place. ¶¶37-38.

The Vaccine Mandate and Guidance

On October 20, 2021 – almost two months after the promulgation of Vax or Test – the Health Commissioner issued the Vaccine Mandate, which required all officers to be vaccinated against COVID-19 by October 29, 2021. ¶39, Ex. 1. The sole provision in the Vaccine Mandate for non-compliance was that unvaccinated employees “must be excluded from the premises at which they work beginning on November 1, 2021.” Ex. 1 ¶3.

In the evening of October 21, 2021, DCAS released the Guidance, in the form of a “FAQs” document, which set forth additional rules relating to the Vaccine Mandate. ¶41, Ex. 5. In addition to establishing woefully inadequate procedures relating to accommodation requests (while predetermining that “accommodations will only be granted in limited circumstances,” Ex. 5 ¶21), the Guidance provided as “the penalty for non-compliance” that: “[b]eginning November 1, City staff who are not in compliance with the vaccine mandate and have not applied for a reasonable accommodation will be placed on Leave Without Pay (LWOP),” and “[e]mployees who refuse to comply will be terminated in accordance with procedures required by the Civil Service Law or applicable collective bargaining agreement.” Ex. 5 ¶51.

Prior to the Termination Requirement, Respondents did not terminate any NYPD police officers for non-compliance with the Vaccine Mandate. ¶43. Nor did they commence any processes to attempt to do so “in accordance with the procedures required by the Civil Service Law or applicable collective bargaining agreement.” *Id.* Commencing November 1, 2021, unvaccinated officers who did not submit an accommodation request were immediately placed on LWOP, but continued to receive their medical and pension benefits and was no impact on their seniority. ¶44. Officers with pending accommodation requests or pursuing appeals have been continuing to work and receive pay, and are subject to weekly COVID-19 testing and a

mask requirement. ¶45. To the extent accommodation requests are granted, the subject officers will be permitted to continue to work without vaccination. ¶46.

The Termination Requirement

On January 31, 2022, without any prior notice to Petitioners or their members, and at a time when COVID-19 metrics in the City have been declining following the temporary Omicron surge, DCAS issued a Memorandum, dated January 29, 2022, directed to all City agencies, including the NYPD, with the Termination Requirement. ¶47, Ex. 6. The Termination Requirement states that “effective immediately”: “Agencies must ensure that employees who have been on unpaid leave as a result of non-compliance with the Health Commissioner’s Order dated October 21, 2021 and have not chosen to continue health benefits coverage through June 30, 2022 pursuant to a union agreement, come into compliance with this mandate.”² ¶ 48 (underline in original). It further provides that, “Any employee in the above affected groups who fail to submit proof of being fully vaccinated by February 11th will be terminated.” *Id.* The Termination Requirement does not cite any authority for the imposition of this termination penalty. It references only the Vaccine Mandate, which does not say anything about termination.

The Termination Requirement was accompanied by a sample Notice of Termination Letter, further providing that for non-compliant employees, “your employment with the City of New York is terminated, effective February 11, 2022.” ¶50, Ex. 6. The Termination Requirement does not provide for any procedural protections, such as charges or a hearing, prior to termination. This is contrary to what was stated in the Guidance that any termination would be “in accordance with procedures required by the Civil Service Law or applicable collective bargaining agreement.” Ex. 5 ¶51.

² The reference to October 21, 2021 appears to be a mistake by Respondents, because the Vaccine Mandate was issued on October 20, 2021.

The Termination Requirement states that some unvaccinated employees will be permitted to remain employed through June 30, 2022. This reflects the fact that certain unions representing City employees reached settlement agreements with the City regarding the Vaccine Mandate in exchange for withdrawing their legal challenges. ¶52. The City's press release relating to these settlements stated that: "As part of this agreement, these unions have agreed to withdraw litigation filed last month which challenged the City's right to implement the mandate." ¶53. The press release further indicated that these settling unions all received the same terms from the City. In other words, these were not real negotiations at all; the City foisted terms upon these unions under the coercive pressure of the Vaccine Mandate. The PBA and its member police officers are not among those that reached "settlements" with the City. ¶54. While unvaccinated employees of unions that settled are permitted to remain employed at least through June 30, 2022, the Termination Requirement provides that other unvaccinated employees are subject to immediate termination. Yet, the City does not claim that the settling employees are somehow differently situated from the non-settling employees from a public health standpoint.

After the Termination Requirement was issued, the NYPD began sending a form termination email to unvaccinated police officers on LWOP. ¶56, Ex. 7. The termination email states: "If you do not come into compliance with the Order set forth on October 21, 2021 by receiving at least one dose of a two-dose COVID-19 vaccination series and uploading proof into the Central Personnel Resource (CPR) System by end of day Friday, February 11, 2022, the City of New York will terminate your employment."

Procedural Background

On October 26, 2021, before the Vaccine Mandate became effective, Petitioners commenced a proceeding in Supreme Court, Richmond County (*Police Benevolent Ass'n of City*

of *N.Y. v. de Blasio*, No. 85229/2021), and sought a temporary restraining order and preliminary injunction enjoining the implementation of the Vaccine Mandate. Petitioners asserted claims that the Vaccine Mandate (i) lacks a rational basis, and is therefore arbitrary and capricious, pursuant to Article 78; (ii) violates the New York State and City Human Rights Laws; and (iii) violates police officers' substantive due process rights under the New York State Constitution. On October 27, 2021, the Court granted the order to show cause but denied the TRO, and the Second Department denied Petitioners' application for a TRO pending leave to appeal. On December 6, 2021, the Court denied Petitioners' preliminary injunction, but also denied a cross-motion to dismiss, except with respect to the Human Rights Law claim.

On January 7, 2022, Petitioners asserted the arguments at issue here against the Vaccine Mandate and Guidance in the Richmond County case. Respondents objected to their inclusion in that case, and the Court expressly authorized Petitioners to file them in a separate case. On February 8, 2022, Petitioners withdrew these arguments from that proceeding without prejudice in order to assert them herein, together with their challenge to the subsequently-issued Termination Requirement. On February 16, 2022, the Richmond County Court denied the remainder of the Petition in that case, expressly stating that the claims at issue herein were not part of that decision.³

³ Petitioners are also among a group of plaintiffs in the case *New York City Municipal Labor Committee v. City of New York*, Index No. 151169/2022 (Sup. Ct. N.Y. Cty.), filed on February 8, 2022, which asserts claims for declaratory and injunctive relief that Petitioners' members and other City employees are entitled to procedural due process rights prior to termination. On February 10, 2022, the Court in that case denied the plaintiffs' application for a temporary restraining order of the Termination Requirement.

ARGUMENT

I. RESPONDENTS VIOLATED CITY LAW BY INFRINGING ON THE POLICE COMMISSIONER'S EXCLUSIVE AUTHORITY OVER THE GOVERNANCE, ADMINISTRATION AND DISCIPLINE OF POLICE OFFICERS

With the Vaccine Mandate, Guidance and Termination Requirement for police officers, Respondents ignore, and have clearly unlawfully intruded upon, well-established law vesting the Police Commissioner with exclusive authority over the governance, administration and discipline of the police force.

The New York Court of Appeals has repeatedly emphasized, including “[a]s long ago as 1888,” the “quasi-military nature of a police force,” and thus that “a question pertaining solely to the general government and discipline of the force . . . must, from the nature of things, rest wholly in the discretion of the commissioners.” *Patrolmen’s Benevolent Ass’n of City of N.Y., Inc. v. N.Y. State Pub. Employment Relations Bd.*, 6 N.Y.3d 563, 576 (2006) (internal quotes omitted).

The Police Commissioner’s authority in this regard has been codified in the New York City Charter and Administrative Code. Charter §434(a) states that “[t]he commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.” Administrative Code §14-115 further vests the Police Commissioner with exclusive authority over employment consequences for police officers, including any determination to withhold salary or to terminate. Section 14-115(a) states that, “The commissioner shall have power, in his or her discretion . . . to punish [a police officer] by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force.” Similarly, §14-115(b) provides that “[m]embers of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or

preferred against them, after such charges have been examined, heard and investigated by the commissioner or one of his or her deputies”

The Court of Appeals has recognized that both the State and City policy is reflected in Charter §434(a) and Administrative Code §14-115(a):

Though these two provisions are now New York City legislation, both were originally enacted as state statutes; the Charter provision was adopted by the State Legislature in 1897 (L. 1897, ch. 378, enacting N.Y. City Charter § 271), and the Code provision in 1873 (L. 1873, ch. 335, §§ 41, 55). Thus, they reflect the policy of the State that police discipline in New York City is subject to the Commissioner’s authority.

Patrolmen’s Benevolent Ass’n, 6 N.Y.3d at 574; *see also Montella v. Bratton*, 93 N.Y.2d 424, 429 (1999) (recognizing “comprehensive nature of the disciplinary provisions of the New York City Charter and Administrative Code”; “[t]hese provisions in the Charter and Code make clear that the Legislature determined to leave the disciplining of police officers . . . to the discretion of the Police Commissioner” (internal quotes omitted)); *Silverman v. McGuire*, 51 N.Y.2d 228, 231 (1980) (recognizing “the sensitive nature of the work of the police department and the importance of maintaining both discipline and morale,” such that only Police Commissioner has authority to enter into plea arrangements with officer subject to discipline).

The Charter and Administrative Code constitute the law of this City as enacted by the City Council, and thus the Mayor, Health Commissioner and other City officials are not above, and cannot pass rules or executive orders inconsistent with, these laws. Indeed, the laws setting forth the powers of the Health Department, Board of Health and Health Commissioner explicitly state that their powers are subject to other provisions of law. For example, Charter §556 providing for the powers of the Health Department states that it has “jurisdiction to regulate all matters affecting health in” the City “[e]xcept as otherwise provided by law.” Moreover, Charter §558 providing for the establishment of the Health Code provides that the Board of Health may

add to or amend the Health Code only to the extent not “inconsistent with the constitution, laws of this state or this charter” And the Introductory Notes to the Health Code state that “the avoidance of . . . inconsistency with the law and activities of other government agencies was a major consideration in the most recent revision of the New York City Health Code.”

The Vaccine Mandate, Guidance and Termination Requirement violate the laws vesting the Police Commissioner with exclusive authority over the governance, administration and discipline of the police force. The Vaccine Mandate establishes an unprecedented new requirement for NYPD police officers to be permitted on to the premises of their workplace – vaccination against COVID-19 – and sets forth a mandatory employment action or punishment for non-compliance of “exclu[sion] from the premises at which they work beginning on November 1, 2021.” Ex. 1 at 3. The Guidance imposed further mandatory employment action for non-compliance of LWOP. Ex. 5 ¶51. And the Termination Requirement further mandates that non-compliant employees must be terminated. Ex. 6. None of these policies was promulgated by the Police Commissioner. The Vaccine Mandate was issued by the Health Commissioner. The Guidance and Termination Requirement were issued by DCAS.

In *City of N.Y. v. Patrolmen’s Benevolent Ass’n of City of N.Y.*, 14 N.Y.3d 46, 59 (2009), the Court of Appeals held that “[t]he Police Commissioner’s disciplinary authority under sections 434(a) and 14-115(a) is not limited to the formal disciplinary process, i.e., situations where allegations of misconduct have been made or are being adjudicated against identified officers.” In that case, the Court held that the Police Commissioner has authority over police officer drug testing policies and the manner of drug testing. *Id.* The City’s new rules for vaccination of police officers and mandatory consequences for non-compliance are no different, and intrude on the Police Commissioner’s exclusive authority. *See also Montella*, 93 N.Y.2d at

432 (holding that it was improper for New York City Civil Service Commission – an agency equivalent to DCAS – to hear and decide police officer’s appeal of disciplinary determination, because “the Legislature determined to leave the disciplining of police officers, including the right to determine guilt or innocence of breach of disciplinary rules and the penalty to be imposed upon conviction, to the discretion of the Police Commissioner” (internal quotes omitted)).

The result is the same even if Respondents erroneously attempt to characterize the Vaccine Mandate, Guidance and Termination Requirement as something other than “discipline.” The Police Commissioner’s exclusive authority over police officers is not limited to discipline, because Charter §434(a) provides that she has “cognizance and control” not only over discipline, but of the “government, administration, [and] disposition . . . of the police force.” As such, the exclusive authority over the police force granted by statute to the Police Commissioner is far broader than disciplinary matters. *See Mestecky v. City of N.Y.*, 30 N.Y.3d 239, 243 (2017) (“meaning and effect should be given to every word of a statute” and “an interpretation that renders words or clauses superfluous should be rejected” (internal quotes omitted)). Moreover, the exclusive authority of the Police Commissioner to impose adverse employment consequences on police officers under Administrative Code §14-115(a) applies, by the express language of the statute, to any “violation of rules, or neglect or disobedience of orders . . . or any conduct injurious to the public peace or welfare.” There is no question that this statute applies by its plain language to the Guidance and Termination Requirement, which mandate the imposition of adverse employment consequences on police officers for non-compliance with the Vaccine Mandate and remove all discretion from the Police Commissioner regarding their subject matter.

As Charter §434 and Administrative Code §14-115 make clear, the Health Commissioner does not have authority to promulgate a new requirement for a police officer to be permitted onto the premises of his or her workplace, and the City cannot, through mere non-legislative Guidance and the Termination Requirement, mandate employment action and/or disciplinary consequences for police officers based on COVID-19 vaccination status. Even in an alleged emergency, Respondents cannot circumvent existing City laws such as the Charter and Administrative Code.

Accordingly, the Vaccine Mandate, Guidance and Termination Requirement should be stricken because they violate the Charter and Administrative Code by infringing on the exclusive authority of the Police Commissioner.⁴

II. RESPONDENTS DO NOT HAVE AUTHORITY TO ENFORCE HEALTH COMMISSIONER ORDERS THROUGH ADVERSE EMPLOYMENT CONSEQUENCES

More broadly, Respondents have not identified any authority or precedent, and there is none, for the imposition of adverse employment consequences – such as LWOP and termination – for non-compliance with a Health Commissioner order such as the Vaccine Mandate.

Health Code §3.11(a), which governs enforcement, provides that, with two exceptions not relevant here:

any person who is determined to have violated this Code or any other applicable law or regulation that the Department is authorized to enforce, shall, unless otherwise specified in such other law or regulation, be subject to a fine, penalty and forfeiture of not less than two-hundred and not more than two thousand dollars for each violation of a provision of this Code or any other such applicable law or regulation.

Other similar Health Commissioner Orders expressly reflect this limited enforcement authority. For example, in *C.F. v. N.Y. City Dep't of Health & Mental Hygiene*, 191 A.D.3d 52,

⁴ As set forth in Part II below, Petitioners are not arguing, and do not concede, that the Police Commissioner could validly impose these measures.

79 (2d Dep't 2020), which Respondents have relied upon in other litigation regarding the Vaccine Mandate, the Health Commissioner imposed a measles vaccine requirement for individuals living and working in certain communities in Brooklyn, and "enforcement of the Commissioner's orders would be limited to \$1,000 civil fines." Similarly, with respect to the Health Commissioner's December 13, 2021 order requiring COVID-19 vaccination for employees in the private sector, the only punishment for non-compliance is a fine on the employer of \$1,000. ¶84.

Here, the Health Commissioner's Vaccine Mandate states only with respect to non-compliance that "[a]ny City employee who has not provided [proof of vaccination] must be excluded from the premises at which they work beginning on November 1, 2021." Ex. 1 at 3. It contains no other consequence for remaining unvaccinated. Yet, with the Guidance and Termination Requirement, the City has imposed the unprecedented and draconian "penalty for non-compliance" with the Health Commissioner order of LWOP and immediate termination. Ex. 5 ¶51; Ex. 6. Neither the Health Code, nor the terms of the Vaccine Mandate itself, authorize enforcement through the imposition of employment consequences such as LWOP and termination. These employment consequences go well beyond a "fine, penalty and forfeiture of not less than two hundred and not more than two thousand dollars for each violation." Health Code §3.11(a).

Moreover, Health Code §3.01(d), on which Respondents rely for the Vaccine Mandate, authorizes the Health Commissioner only to take certain "public health action" in an emergency and only for the duration of the emergency. LWOP and termination from employment are not "public health action." Moreover, termination of employment is not a temporary response to a public health emergency; it is a permanent penalty. Forcing police officers to make the

Hobson's choice between unwanted vaccination or their jobs and associated benefits goes well beyond responding to a temporary public health emergency. As the U.S. Supreme Court recently recognized, "A vaccination, after all, cannot be undone at the end of the workday." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S.Ct. 661, 665 (2022) (internal quotes omitted). Thus, even if the Health Commissioner had authority to temporarily prohibit unvaccinated police officers from coming onto the premises of work (which he does not), he cannot mandate their termination, nor decide whether or not they should be paid, which are employment matters beyond the scope of their temporary public health authority.

In addition to the limitations on Respondents' authority under the Health Code, courts, including the U.S. Supreme Court, have rejected the notion that COVID-19 is a work-related danger, and thus Respondents have no authority for using COVID-19 vaccination status to impose employment consequences on police officers. As the Supreme Court held in striking down the federal government's vaccine mandate for private businesses, COVID-19 is not a "work-related danger" because:

Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.

Id. (emphasis in original).⁵ The federal government's vaccine mandate for federal employees, on which Respondents specifically relied for the Vaccine Mandate here, was also recently enjoined based in part on similar reasons: "a COVID-19 vaccine mandate is not an employment

⁵ While the Supreme Court separately upheld the vaccine requirement for institutions that receive Medicare and Medicaid funding, in that case there was no attempt to condition *employment* on receiving the vaccine; the issue was whether receipt of *federal funds* could be conditioned on a vaccine requirement, and thus that case is inapplicable here. *See Biden v. Missouri*, 142 S.Ct. 647 (2022).

regulation.” *Feds for Med. Freedom v. Biden*, -- F. Supp. 3d --, 2022 WL 188329, at *6 (S.D. Tex. Jan. 21, 2022).

Accordingly, Respondents have exceeded their authority by using adverse employment consequences to enforce the Health Commissioner’s Vaccine Mandate, and thus the Vaccine Mandate, Guidance and Termination Requirement are invalid.

III. THE VACCINE MANDATE, GUIDANCE AND TERMINATION REQUIREMENT VIOLATE RULEMAKING REQUIREMENTS

Respondents promulgated the Vaccine Mandate and subsequent Guidance and Termination Requirement without any public comment or hearing process. They rely on Health Code §3.01(d) to claim that they were entitled to bypass the public comment and hearing requirements on an emergency basis. But even if that were true for the initial promulgation of the Vaccine Mandate, CAPA specifically protects against such claims of indefinite “emergency” by requiring public comment and hearing after an emergency rule has been in effect for sixty days. Respondents have failed to comply with this requirement. Moreover, Health Code §3.01(d) has no applicability to the Guidance and Termination Requirement, which were not issued by the Health Commissioner. Respondents had no basis to circumvent rulemaking requirements for these sweeping rules applicable to all City agencies and employees.

CAPA §1043 sets forth the procedural requirements for the adoption of administrative rules. It provides that “[n]o agency shall adopt a rule except pursuant to this section.” CAPA §1043(a). CAPA’s procedural requirements for the adoption of a rule include review of the proposed rule by the Law Department to ensure that the rule “is not in conflict with other applicable rules” and “is narrowly drawn to achieve its stated purpose”; publication of the proposed rule in the City Record at least thirty days prior to a public hearing; and a public comment period. *Id.* §§1043(b)(1), (d)(1) & (e).

The Vaccine Mandate, Guidance and Termination Requirement are clearly “rules” subject to CAPA’s rule-making requirements. CAPA §1041 defines a “rule” as “the whole or part of any statement or communication of general applicability that (i) implements or applies law or policy, or (ii) prescribes the procedural requirements of an agency” A “change of policy” that “materially affected the rights” of individuals who are subject to it “equally and without exception” constitutes a “rule.” *Singh v. Taxi & Limousine Comm’n*, 282 A.D.2d 368, 368 (1st Dep’t 2001); *see also Lynch v. N.Y. City Civilian Complaint Review Bd.*, 183 A.D.3d 512, 518 (1st Dep’t 2020) (“resolution” adopted by civilian complaint review board to assert jurisdiction over sexual misconduct complaints was a “rule” under CAPA).

In determining whether a new policy is a “rule,” the Court must look to the “substantive effect” of the change, not its label. *Edenwald Contracting Co. v. City of N.Y.*, 86 Misc.2d 711, 721 (Sup. Ct. N.Y. Cty. 1974), *aff’d*, 47 A.D.2d 610 (1st Dep’t 1975). “CAPA’s definition of a ‘rule’ is to be construed broadly to accommodate the act’s basic objectives,” which are “to inform and gather input from the public on the development and promulgation of the myriad of City agency rules that affect New Yorkers; to provide accountability and openness.” *1700 York Assocs. v. Kaskel*, 182 Misc.2d 586, 594 (Civil Ct. N.Y. Cty. 1999) (internal quotes omitted).

The Vaccine Mandate replaced an existing Vax or Test program with a new COVID-19 vaccine requirement for all City agencies and employees; the Guidance – although labeled as a “FAQ” document – promulgated new City-wide requirements that, among other things, any City employee who does not comply with the Vaccine Mandate must be immediately placed on LWOP; and the Termination Requirement sets forth an across-the-board termination requirement as of a specific date. These sweeping new requirements applicable to all City agencies and employees are rules subject to rulemaking requirements.

To bypass CAPA's public comment and hearing requirements for rule promulgation, Respondents would need to satisfy CAPA §1043(i), which sets forth certain "emergency procedures." Pursuant thereto, "an agency may adopt a rule prior to the notice and comment otherwise required by this section if the immediate effectiveness of such rule is necessary to address an imminent threat to health, safety, property or a necessary service." *Id.* §1043(i)(1). The emergency procedures require that "[a] finding of such imminent threat and the specific reasons for the finding must be made in writing by the agency adopting such rule and shall be approved by the mayor before such rule may be made effective." *Id.*

CAPA sets forth a time limit for such an emergency rule, however. Section 1043(i)(2) provides:

A rule adopted on an emergency basis shall not remain in effect for longer than sixty days unless the agency has initiated notice and comment otherwise required by this section within such sixty day period and publishes with such notice a statement that an extension of such rule on an emergency basis is necessary for an additional sixty days to afford an opportunity for notice and comment and to adopt a final rule as required by this section; provided that no further such finding of an emergency may be made with respect to the same or a substantially similar rule.

The Vaccine Mandate was promulgated on October 20, 2021. Even assuming for purposes of argument that the Vaccine Mandate could be promulgated as an emergency rule under CAPA §1043(i), it has now been in effect for more than ninety days, but Respondents still have not initiated a notice and comment procedure as required by CAPA. Moreover, with respect to the Guidance and Termination Requirement, Respondents have not identified any emergency authority to promulgate these sweeping, unprecedented rules on all City agencies and employees without complying with rulemaking requirements.

Health Code §3.01(d) does not excuse Respondents from compliance with CAPA or other rulemaking requirements. Section 3.01(d) provides that "[w]here urgent public health

action is necessary to protect the public health against an imminent or existing threat, the Commissioner may declare a public health emergency,” and, during the continuance of such emergency, “the Commissioner may 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.” Nothing in that provision excuses the Health Commissioner from CAPA’s sixty-day requirement for rules such as the Vaccine Mandate that continue in effect for more than sixty days. Nor would such an interpretation make sense because if a rule is going to be in effect for sixty days or longer, the Health Commissioner clearly has time to initiate a public comment and hearing process after the rule’s initial emergency promulgation.

Indep. Rest. Owners Ass’n Rescue v. de Blasio, Index No. 85155/2021 (Sup. Ct. Richmond Cty. Sep. 10, 2021) (Ex. 8), is on point. In that case, the Mayor relied on New York Executive Law §24 – which authorizes a mayor to “promulgate local emergency orders to protect life and property or to bring the emergency situation under control” – to impose a vaccine mandate for restaurants and other indoor establishments. Although the issue was not directly raised by the petitioners, the Court questioned the failure to comply with CAPA’s normal or emergency rulemaking requirements. The Court stated: “An official record justifying the government’s fiat does not exist. Public testimony from public health care scholars and practitioners supporting these steps do not exist. The people’s representatives are not on record questioning the decisions, conclusions, and guidance of health care scholars and practitioners.”

Indep. Rest. Owners, Index No. 85155/2021, at 8. The Court concluded that:

There exists no authority remotely suggesting that the Mayor of New York City may promulgate permanent administrative rules unilaterally outside the normal and emergency rulemaking process. An executive order represents the prerogative of a single individual, and therefore should be limited in scope and duration – even in the context of an emergency.

Id. at 9.

The Court’s conclusion was not limited to the Mayor, because the Court recognized that “[a]dministrative agencies lack authority to issue permanent emergency regulations even while utilizing an abridged emergency rulemaking process.” *Id.* at 9 n.9. The following reasoning of the Court is equally applicable here: “It is procedure and its attendant processes that separates a functioning democratic republic from an autocracy that merely pays lip service to democratic principles and process. When a single individual attempts to impose a vision of morality by obviating the democratic process on a populace a sorry state of affairs exists.” *Id.* at 14; *see also Missouri v. Biden*, --- F. Supp. 3d ---, 2021 WL 5564501, at *7 (E.D. Mo. Nov. 29, 2021), *stayed on other grounds*, 142 S.Ct. 647 (2022) (“[N]otice and comment provide a ‘surrogate political process’ that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process. Requiring already hesitant individuals to get the vaccine – without giving them an opportunity to be heard – undermines the democratic process that the APA’s procedural safeguards are intended to protect and exacerbates the underlying hesitancy problem.”).

Moreover, Health Code §3.01(d) is not applicable to the Guidance and Termination Requirement, which were not promulgated by the Health Commissioner, but by DCAS. Respondents have not cited any procedural authority for the promulgation of the Guidance and Termination Requirement, which imposed additional, more severe employment consequences on police officers than the Vaccine Mandate itself. Respondents have not identified any basis to circumvent public comment and hearing requirements when they issued the Guidance and Termination Requirement.

To the extent Respondents attempt to rely on powers of the Commissioner of DCAS for the Guidance or Termination Requirement, they would still run into procedural violations. The

powers of the Commissioner of DCAS are set forth in Charter §814. Section 814(c) gives the Commissioner certain power to promulgate rules and regulations “relating to the personnel policies, programs and activities of city government in furtherance of and consistent with the state civil service law and this chapter.”

The relevant provision of the CSL is section 20, which, like CAPA, requires a public hearing: “Such rules, and any modifications thereof, shall be adopted only after a public hearing, notice of which has been published for not less than three days, setting forth either a summary of the subject matter of the proposed rules or modifications or a statement of the purpose thereof.” *See Trager v. Kampe*, 99 N.Y.2d 361, 365 (2003) (new residency requirement for police officers, which was contained only in the announcement for the examination, was invalid for failure to comply with CSL §20); *Hymes v. Schechter*, 6 N.Y.2d 352, 357 (1959) (change in methodology for grading civil service examination was not valid until formal rulemaking requirements were completed); *Martiniello v. City of N.Y.*, No. 102606/12, 2012 WL 2885453 (Sup. Ct. N.Y. Cty. June 29, 2012) (DCAS revisions to salary, time and leave policies “affecting both new and incumbent employees” without notice or hearing were invalid); *see also Smith v. Onondaga Cty. Civil Serv. Comm’n*, 24 Misc.2d 305, 306 (Sup. Ct. Onondaga Cty. 1959) (new residency requirement for position of fire lieutenant was adopted “pursuant to the provisions of Section 20 of the Civil Service Law”); *Walsh v. Watson*, 198 Misc. 643, 644 (Sup. Ct. N.Y. Cty. 1950) (new rule disqualifying persons convicted of petit larceny or dishonorably discharged from the military from being appointed as patrolman or fireman was adopted “in conformity with” predecessor to CSL §20). Respondents did not conduct any public hearing prior to the issuance of the Guidance or Termination Requirement as required.

In sum, putting aside whether the Health Commissioner should have undergone a public comment process before imposing the Vaccine Mandate, at a minimum CAPA required Respondents to commence a public comment process for the Vaccine Mandate at least as of the end of December 2021 – sixty days after the Vaccine Mandate was initially promulgated. Moreover, the Guidance and Termination Requirement, which are untethered from any alleged emergency authority of the Health Commissioner, were required to undergo a public hearing before promulgation.

Accordingly, Respondents violated CAPA and/or the Charter and CSL by failing to conduct any public comment or hearing process in connection with the Vaccine Mandate, Guidance and Termination Requirement, which renders these rules “a nullity.” *Lynch*, 183 A.D.3d at 518; *see also Indep. Rest. Owners*, Index No. 85155/2021, at 13 (“The accolades, stellar academic credentials, and a position of authority within the government does not obviate the requirement to follow procedures when either compelling the people to take action, or suspending the people’s ability to act a certain way.”).

CONCLUSION

The Court should grant the Petition, order that the Vaccine Mandate, Guidance and Termination Requirement are invalid, and award other relief necessary to make police officers whole such as reinstatement of employment and pay.

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