PRESENT: HON. JUDITH A. HARD
Acting Justice
STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
SUSAN M. KENT, PRESIDENT NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO; GALE BAPTISTE-FRAHAM; ROBERTA STAFFORD; JODIE DESOCIO & JOHN HORAN,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

DECISION AND JUDGMENT
Index No.: 6454-13
RJI No.: 01-13-ST5212

-against-

NIRAV R. SHAH, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT of HEALTH; NEW YORK STATE DEPARTMENT of HEALTH; NEW YORK STATE PUBLIC HEALTH & HEALTH PLANNING COUNCIL; ANDREW CUOMO, GOVERNOR of the STATE OF NEW YORK & THE STATE OF NEW YORK,

Respondents.

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES: New York State Public Employees Federation; AFL-CIO
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Petitioners are the President of the Public Employees Federation, AFL-CIO (PEF) and four registered nurses who are PEF members.[1] They commenced this Article 78 proceeding to annul 10 New York Code of Rules and Regulations (hereinafter, "NYCRR") § 2.59 and its conforming regulations, as enacted by respondents. They seek relief pursuant to CPLR § 7803 (2) and (3), and contend that the regulations, which require unvaccinated healthcare providers to wear masks in areas where patients may be present, to be arbitrary, capricious, irrational, contrary to law and promulgated in excess of jurisdiction. Under the regulations, the Commissioner of Health (Commissioner) may require the wearing of a mask whenever he/she determines that the influenza virus is prevalent. For the reasons stated below, the Court declines to grant petitioners' request to declare 10 NYCRR § 2.59 and its conforming amendments null and void on the grounds that they are arbitrary, capricious, irrational, contrary to law and promulgated in excess of jurisdiction.

FACTS

I. The Regulation

Claiming Public Health Law (PHL) §§ 225, 2800, 2803, 3612 and 4010 as authority for its adoption, the regulation at issue amends §§ 2.59, 405.3, 415.19, 751.6, 7613, 766.11, and 7.93 of Title 10 NYCRR. The pertinent part is contained in § 2.59 (d) which reads:

> (d) During the influenza season, all healthcare and residential facilities and agencies shall ensure that all personnel not vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients or residents may be present. Healthcare and residential facilities and

[1] Since the filing of the petition, two of the four nurses have been vaccinated (Petitioner's Reply Brief, p. 3). The Court grants the request of the New York State Nurses Association to file an *amicus curiae* brief regarding this matter and has considered it to the extent that it relates to issues raised by the parties (Incorporated Village of East Williston v Public Service Commission of New York State, 153 AD2d 943 [2d Dept 1989]).

agencies shall supply such masks to personnel, free of charge. (10 NYCRR § 2.59 (d).

Personnel is defined in 10 NYCRR § 2.59 (a) (1) to include all employees or affiliates, whether paid or unpaid, "who engage in activities such that if they were infected with influenza, they could potentially expose patients or residents to the disease." There are no exemptions from the regulation for religious, philosophical or other personal reasons. However, recently the Department of Health (DOH) provided guidance that unvaccinated speech therapists tending to a patient may remove the mask.

II. The Predicate Statutes

The Public Health and Health Planning Council (PHC) has considerable statutory powers. PHL § 225 (1) provides that the PHC may consider any matter relating to the preservation and improvement of public health and submit any recommendation regarding such to the Commissioner. Public Health Law § 225 (4) provides that the PHC shall have the power to establish, amend and repeal sanitary regulations, known as the Sanitary Code of the State of New York (the Sanitary Code), subject to approval by the Commissioner. PHL § 225 (5) (a) provides that the Sanitary Code may deal with matters affecting the security of life or health or the preservation and improvement of public health in the State of New York. PHL § 225 (5)(e) provides for the establishment of regulations for the maintenance of hospitals for communicable diseases. PHL § 2800 provides specific guidance to the DOH by stating "...In order to provide for the protection and promotion of health of the inhabitants of the state...the [DOH] shall have the central, comprehensive responsibility for the development and administration of the state's policy

with respect to hospital and related services... for the *prevention*, diagnosis or treatment of human disease...." (emphasis added). PHL § 206 (1)(d) mandates that the Commissioner "investigate the causes of disease...and the effect of...employments...upon the public health". PHL § 2803 (2) authorizes the PHC to adopt rules and regulations to implement the provisions of Article 28 of the PHL, including establishing minimum standards for the operation of health care facilities. PHL §§ 3612 and 4010 (4) make similar provisions regarding certified home health agencies and providers of long term home health care programs and hospice organizations.

The Parties' Positions

I. Petitioner

A. The regulation is arbitrary, capricious, irrational and contrary to law.

Petitioners maintain that the regulation is without a rational basis, because there is no sufficient scientific evidence that establishes that mask wear by asymptomatic unvaccinated healthcare providers prevents the spread of influenza. Petitioners argue that the new regulation is a de facto mandatory flu vaccination requirement, because compliance with the masking is so onerous, it forces them to be vaccinated.

Relying on an affidavit from William Borwegen, a principal at Prevention at Work, LLC,[2]

[2]In addition to this position, Mr. Borwegen is also a Senior Advisor to the Occupational Health and Safety Program at the Service Employees International Union. He has a Bachelor's of Science Degree in Microbiology and Environmental Sciences from Rutgers University and a Master of Public Health degree from the University of Michigan with concentrations in Environmental and Industrial Health. He is a member of many professional organizations including the American Industrial Hygiene Association, the American Public Health Association, the Healthcare Personnel Influenza Vaccination Subgroup of the United States Health and Human Services Department, National Vaccine Advisory Committee, National Foundation for Infectious Diseases.

petitioners assert that the Center for Disease Control (CDC), the United States Health and Human Services Department (HHS) and the Occupational Safety and Health Administration (OSHA) have not recommended the use of surgical masks for this purpose. Mr. Borwegen notes that the influenza vaccination is only 20%-80% effective in reducing the likelihood that the person receiving the vaccination will choose not to visit a doctor to have their flu symptoms treated. He stresses that the vaccination does not prevent the spread of influenza from a vaccinated individual to another individual. An individual could be vaccinated, develop milder symptoms and still spread the virus to others.

In support of their argument that the regulation is arbitrary and not rational, petitioners note that vaccinated asymptomatic healthcare providers are capable of spreading the influenza virus to patients but are not required to wear masks, particularly during the first two weeks when the vaccine is not effective, and that non-vaccinated visitors and patients do not have to wear face masks. The DOH's regulations regarding measles and rubella do not mandate mask wear for healthcare providers who have not demonstrated immunity to the diseases or that they have had the disease. Further, these regulations provide exceptions for employees for whom immunization is medically contraindicated.

Petitioners also raise concerns about the hygienics of mask wearing in that the regulations do not contain procedures for wearing gloves and the washing of hands after glove removal such that the mask may become contaminated. Further, mask wearing may increase the likelihood of respiratory infections for mask wearers.

Petitioners argue that the wearing of the mask impedes communication between healthcare providers and patients, particularly with speech therapists. Petitioners note that the recent informal guidance issued by the DOH that allows speech therapists with a documented medical contraindication to influenza immunization to remove the mask to deliver care, is an arbitrary exception to the general regulation. Also, the mask makes it difficult to talk with the elderly who could be hearing-impaired. The mask may frighten a patient, particularly one suffering from mental illness, in that it may symbolize that the healthcare provider is ill or that the patient is more ill than explained by to him or her by a healthcare provider. They argue that the Public Health Law does not authorize respondents to mandate influenza immunization. Lastly, the regulations do not contain any exemptions from mask wear for religious or medical reasons.

B. The regulation violates the separation of powers doctrine.

Petitioner relies on Boreali v Axelrod, 71 NY2d 1 [1987] and New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Department of Health and Mental Hygiene, 110 AD3d 1 [1st Dept 2013] for the proposition that the DOH exceeded its authority because it violated the separation of powers doctrine. The Boreali Court, in determining whether a statewide smoking ban developed by the PHC was a violation of this doctrine, listed four coalescing circumstances to consider in determining whether an agency exceeded its authority: (1) whether the PHC engaged in the balancing of competing concerns of public health and economic costs; (2) whether the agency engaged in interstitial rule making or had made its

own set of rules without legislative guidance; (3) whether the regulations concerned an area where the Legislature had repeatedly tried and failed to reach an agreement; and (4) whether the regulations did not require the agency to have expertise in the relevant field (Boreali, 71 NY2d at 11-14). The Appellate Division, First Department, applied the same tests to the regulatory prohibition against selling large quantities of "sugary drinks" in Statewide Coalition of Hispanic Chambers of Commerce. In the instant action, petitioners maintain that all four coalescing circumstances are met here: (1) the PHC's analysis was full of economic and social concerns, e.g. the cost of the masks compared to the cost savings from the reduction of influenza; (2) respondents have not merely filled in the gaps to legislation; (3) the Legislature attempted but failed to legislate mandatory influenza vaccinations for the 2009-2010 legislative session with the introduction of a bill that never made it out of committee; and (4) no special expertise or technical competence in the field of health was necessary to implement the rule.

II. Respondents

A. The regulations are not arbitrary or capricious, irrational or contrary to law.

Respondents maintain that the Public Health Law authorizes respondents to issue the regulations which provide for the public health within the health care services setting. They cite PHL §§ 225, 2800, 2803, 3612 and 4010 for the authority to adopt the regulation. Respondents further rely upon Kuppersmith v Dowling, 93 NY2d 90 [1999]) and New York Association of Counties v Axelrod, 78 NY2d 158 (1991), for the premise that a State regulation should be upheld if it has a rational basis and is not unreasonable, arbitrary or capricious. Moreover,

petitioners must establish that the regulation is so lacking in reason that its promulgation is arbitrary.

Respondents argue that the adoption of the regulation by the PHC was done in a deliberative process pursuant to the Public Health Law and the State Administrative Procedure Act (Answer, Frost Affidavit). Specifically, the Sanitary Code, which is adopted by the PHC, may "deal with any matter affecting the security of life or health or the preservation and improvement of public health in the state of New York" (PHL § 225 [5][a]). 10 NYCRR § 2.59 and its conforming amendments went through the Committee on Codes, Regulations and Legislation and the full PHC. The adoption of the regulation went through a comment and a hearing process.

Respondents cite various legislative grants of power to the DOH or the Commissioner over public health. PHL § 2800 gives to the DOH "the central comprehensive responsibility for the development and administration of the state's policy with respect to hospitals and related services." PHL § 206 (l) allows the Commissioner of Health to "establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health". This section also provides that it does not authorize mandatory immunizations except as provided in PHL §§ 2164 and 2165, that pertain to certain childhood vaccines. PHL § 206 (a) provides that the commissioner shall "take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto...". PHL § 206 (d) allows the commissioner to investigate the causes of disease and epidemics and the effect of employments on the public health.

Respondents maintain that because hand washing after the removal of personal protective equipment is standard procedure in infection control practices, there was no need to state such in this regulation. Further, respondents dismissed the petitioners' discomfort argument by countering that the mask is light weight and does not form a seal around the face. Also, any stigma created by mask wearing could be removed by educational incentives at facilities. Guidance has already been issued to speech therapists who have medical contraindications to the vaccine. They may now remove their masks while delivering care to patients (Lutterloh Affidavit, ¶¶ 71-74). Respondents maintain that the requirement for a mask is not a defacto mandate for the vaccination because the regulations provide healthcare workers with a choice to either get the vaccination or to wear a mask.

Based on the affidavit of Dr. Emily Lutterloh, the Director of the Bureau of Healthcare Associated Infections in the Division of Epidemiology of the New York State Department of Health, respondent presented the need for the mask requirement.[3] Dr. Lutterloh indicated that the spread of influenza has been a concern of the DOH for years. Dr. Lutterloh's office was charged by the Commissioner to find ways to reduce the transmission of influenza from healthcare worker to patient or resident. Despite efforts to increase the voluntary vaccination rates, in 2011-2012, hospitals in the State reported an average of 48.4% healthcare personnel vaccination rate.

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[3]Dr. Lutterloh's curriculum vitae is extensive (Lutterloh Affidavit/Exhibit A). Highlights include: Purdue University, (B.S./Aeronautical Engineering); Indiana University School of Medicine (M.D.); Johns Hopkins Bloomberg School of Public Health (M.P.H.); Director of Healthcare Epidemiology and Infection Control Program, New York State Department of Health; and Lieutenant Commander, U.S. Public Health Service. Dr. Lutterloh has various international medical experience in Kenya, Haiti, Angola and Mozambique. She has served as a Diplomate on the American Board of Pediatrics, the American Board of Internal Medicine. She is licensed to practice medicine in New York.

The severity of the 2012-2013 influenza season was one of the motivating factors for the adoption of the regulations. During such season, more than 45,000 cases of influenza had been confirmed and more than 9,500 people had been hospitalized (Lutterloh Affidavit, ¶ 13). There were 14 pediatric influenza-associated deaths during the 2012-13 influenza season in New York (Lutterloh Affidavit, ¶ 15). During 2012-2013, Dr. Lutterloh reported that there were 112 outbreaks in hospitals and 453 outbreaks in nursing homes. The outbreaks involved 1687 patients or nursing home residents and 276 healthcare personnel with confirmed influenza. She cited two studies of outbreaks of influenza at health care facilities in New York State (Lutterloh Affidavit, ¶ ¶ 28, 29/Exhibits N, O). Dr. Lutterloh was certain to a reasonable degree of medical certainty that the transmission was from healthcare workers to patients and residents (Lutterloh Affidavit,¶ 16-17).

Dr. Lutterloh maintained, based upon a CDC document, that healthcare personnel may be infectious while working and may shed the virus before they become symptomatic (Lutterloh Affidavit,¶ 18/Exhibit E). Some healthcare personnel with only mild symptoms and some healthcare professionals who are outright ill come to work (Lutterloh Affidavit, ¶¶ 19-20). Relying on other documents from the CDC, Dr. Lutterloh stated that in 2012-2013, the influenza vaccine was 51% effective (Lutterloh Affidavit, ¶ 42/Exhibits D and Q). The FDA reports that "a face mask is meant to help block large particle droplets, splashes, sprays or splatter that may contain germs (viruses and bacteria) from reaching your mouth and nose. Face masks may also help reduce exposure of your saliva and respiratory secretions to others (Lutterloh Affidavit, ¶ 53/Exhibit T). Influenza, like bacteria, spreads through droplets (Lutterloh Affidavit, ¶ 64).

In contrast to influenza, Dr. Lutterloh noted that health care professionals must demonstrate their immunity to measles/rubella and must undergo regular testing for tuberculosis. Masks do not protect the method of transmission for these diseases. Finally, in an apparent argument to the religious and medically contraindicated exemptions for the rubella/measles vaccination, Dr. Lutterloh maintained that health care facilities could develop policies for a reassignment of duties for personnel who have issues with the influenza vaccine during the flu season (Lutterloh Affidavit, ¶ 82).

B. The regulation does not violate the separation of powers doctrine.

Respondents argue that the separation of powers doctrine is not violated where executive action was a clear implementation of State legislative policy (New York State Health Facilities Assn. v Axelrod, 77 NY2d 340 [1991]). Further, citing Bourquin v Cuomo, 85 NY2d 781, 785 (1995), they note "there need not be a specific and detailed legislative expression authorizing a particular administrative act as long as the basic policy decision has been made by the Legislature." Respondents maintain that Boreali is not applicable, because it only applies to cases where an agency acts in the absence of a legislative statement of policy and a delegation of regulatory authority. Relying on New York State Health Facilities Assn., 77 NY2d at 348, respondents argue that Boreali does not limit agency action where "the basic policy decisions underlying the regulations have been made and articulated by the Legislature."

LAW AND ANALYSIS

I. The regulations are not arbitrary, capricious, or irrational.

"[A]n administrative regulation will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious" (New York State Association of Counties, 78 NY2d at 166 [1991]; see Kuppersmith, 93 NY2d at 96). "...[T]he challenger must establish that a regulation is 'so lacking in reason for its promulgation that it is essentially arbitrary'" (New York State Association of Counties, 78 NY2d at 166 [1991], quoting Matter of Marburg v Cole, 286 NY 202, 212 [1941]). "An agency has no authority to create rules and regulations without a statutory predicate either express or implied" (Kuppersmith, 93 NY2d at 96 [1999]). Courts may overturn an agency rule or regulation when that action is taken without a sound basis in reason or without regard to the facts (Surfside Nursing Home, LLC v Daines, 103 AD3d 637, 639 [2d Dept 2013] [citations omitted]). "An administrative agency's 'rulings, interpretations and opinions' of the statute it is charged with enforcing or implementing are entitled to great weight, to the extent that the interpretation relies on the special competence which the agency is presumed to have developed in its statutory administration" (Jennings v Commissioner, New York State Department of Social Services, 71 AD3d 98, 109 [2d Dept 2010] [quoting Skidmore v Swift & Co., 323 US 134, 140 [1944]).

The Court agrees with respondents that the regulations at issue are not irrational, unreasonable, arbitrary or capricious. The Commissioner and the PHC have broad powers to regulate the standards for the best practices to engender optimal health for the people of New York. The genesis for these powers is scattered within the Public Health Law. Pursuant to PHL §

206 (1) (a), the Commissioner "shall take cognizance of the interests of health and life of the people of the state, and all matters pertaining thereto". PHL § 2800 provides, "...In order to provide for the protection and promotion of the health of the inhabitants of the state,...the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services and all public and private institutions...serving principally as facilities for the prevention, diagnosis or treatment of human disease...". PHL § 206 (1) (d) allows the Commissioner to "investigate the causes of disease...and the effect of...employment...upon the public health". The PHC also has plenary powers to require the wearing of masks for those who choose not to get the flu vaccine. Pursuant to PHL § 225 (5) (a), the Sanitary Code as enacted by the PHC may "deal with any matters affecting the security of life or health or the preservation and improvement of the public health in the state of New York...". According to PHL § 225 (5) (e), the PHC may establish regulations for the maintenance of hospitals for communicable diseases and pursuant to PHL § 225 (5) (h) may designate the communicable diseases which are dangerous to the public health.

Here, the foregoing establishes that there is sufficient statutory predicate for the subject regulations. Further, the petitioners have not established that the regulations are unreasonable or that they were promulgated without regard to facts. Dr. Emily Lutterloh, whose background and training is extensive in infectious diseases, provided a thoughtful and informative affidavit. Given the low percentage rate of 48.4% for healthcare personnel vaccination and her assessment of the severity of the 2012-2013 influenza season, the Commissioner requested the development of procedures to reduce the transmission of the virus from healthcare workers to patients. While

mandatory vaccines are not generally authorized by PHL § 206 (l), giving healthcare personnel the option to receive the influenza vaccination is not a de facto mandatory requirement as argued by the petitioners, but appears to be a reasonable choice to prevent the spread of influenza in health care facilities. Petitioners argue that there is no scientific evidence to establish that mask wearing prevents the spread of influenza. However, Dr. Lutterloh notes that according to the FDA, the face mask is meant to block large droplets, splashes and sprays and reduce the exposure of saliva and respiratory secretions to others. The CDC maintained that a person may shed the influenza virus before showing symptoms. Therefore, the masking requirement appears reasonable given the Commissioner is charged with protecting the health of the inhabitants of this State.

Petitioners other arguments, such as the lack of regulations regarding mask disposal, and not requiring vaccinated personnel to wear the mask during the two week period that the vaccine is not effective, are not fatal to the overall regulation and may be considered as further amendments by the PHC.

II. The regulations do not violate the separation of powers doctrine.

The Court finds that the regulations were not promulgated in violation of the separation of powers doctrine. As noted in Ritterband v Axelrod, 149 Misc 2d 135, 141 (Sup Ct, Albany County 1990), "[t]he Legislature may lawfully confer discretion upon an administrative agency if it limits the field in which the discretion is to operate, and provide standards to govern its exercise." "Agencies, as creatures of the Legislature, act pursuant to specific grants of authority

conferred by their creator...an agency is 'clothed with those powers expressly conferred by its authorizing statute, *as well as those required by necessary implication* [citations omitted]. Where an agency has been endowed with broad power to regulate in the public interest, we have not hesitated to uphold *reasonable acts* on its part designed to further the regulatory scheme' " (emphasis added) (Matter of Campagna v Shaffer, 73NY2d 237, 242 [1989] [quoting Matter of City of New York v State of New York Commn. on Cable Tel., 47 NY2d 89, 92 [1979]). PHL § 2800 was found to be a valid delegation of legislative authority and the standard for administrative action contained therein to be a satisfactory standard (Ritterband, 149 Misc 2d at 141, citing Levine v Whalen, 39 NY2d 510 [1976]). Precise or rigid formulas are not needed in order to provide flexibility for the adaptation of legislative policy to infinitely varying conditions (Levine, 39 NY2d 510).

The Court finds, contrary to respondent's arguments, that the facts of the instant action, where the respondents relied on a broad enabling statutes for the implementation of the regulations, require an analysis under Boreali, 71 NY2d 1 (1997). In Boreali, the Court addressed whether regulations prohibiting smoking in certain public places, promulgated by an administrative agency acting under a general grant of authority, specifically PHL § 225 (5) (a) which authorizes the PHC to "deal with any matters affecting...the public health", was a violation of the separation of powers doctrine. The Court noted that the broad enabling statute was not in of itself an unconstitutional delegation of legislative authority. While the Court noted that other legislative delegations of general authority have been upheld, it found that "a number of coalescing circumstances" were present that supported its finding that "the difficult-to-define line

between administrative rule-making and legislative policy-making" was transgressed. These coalescing circumstances, as noted below, are not present in the instant action.

The first Boreali factor is whether the exceptions to the regulations are based solely upon economic and social concerns without foundations in public health. The Boreali Court was concerned with a regulatory scheme "laden with exceptions based solely upon economic and social concerns...with 'waivers' based on financial hardship, [that] have no foundation in considerations of public health" (Boreali, 71 NY2d at 12). The exceptions to mask wearing under the regulations are for vaccinated health care personnel and speech therapists, both with foundations in the public health. This is not an overhaul to behavior that affects the public at large or the economy. Indeed, the only economic factor at issue affects the health care facilities and that is to provide masks with costs estimated at only 10 cents to 25 cents, which the DOH estimated to be $100.00 to $250.00 per facility for 1000 masks (Petition/Exhibit A, p. 4). The first Boreali factor is not present in the instant action.

The second Boreali factor is whether the agency merely filled in the details of broad legislation, termed interstitial rule-making, rather than creating its own comprehensive set of rules without legislative guidance. "The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after affixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" (Nicholas v Kahn, 47 NY2d 24, 31 [1979]). While rigid legislative formulas may not be necessary, examining the enabling legislation is required to ascertain whether the agency was delegated the power to make

the rules. A review of the Approval Message of Governor Nelson A. Rockefeller for Chapter 795 of 1965, which is now PHL § 2800, indicates that " [t]his bill...is designed to insure that the people of this State have available hospital and related services of the highest quality..." and authorizes "the Commissioner of Health to inspect and certify the fitness and adequacy of hospitals...". Such language appears more than adequate for the PHC to require masks for unvaccinated heath personnel during flu season, as the measure runs to the quality and fitness of the hospitals in this State. The Court further finds that the regulations were promulgated by an open and thorough process by the PHC. Further, the Commissioner is mandated to investigate the cause of disease and the effect of employments on the public health PHL § 206 (1) (d). This language supports the use of mask wear by healthcare professionals at work for alleviating the transmission of influenza to the patients or the public.

The third factor is whether the agency acted in an area that the Legislature repeatedly tried but failed to reach agreement on the issue. In Boreali, the Court noted that the repeated failures by the Legislature did not automatically entitle the agency to impose its own solution and difficult social problems should be resolved by elected representatives, rather than appointed administrators. Here, the petition notes that in the 2009-2010 legislative session, a bill was introduced to mandate influenza vaccinations for personnel that did not meet a religious exemption or a medical contraindication. The bill never made it out of committee (Petition, paragraphs 70, 71/Exhibit E). The introduction of one bill does not does not exemplify repetitive attempts to legislate in this area of concern. The third Boreali factor has not been met.

The fourth factor is whether no special expertise or technical competence in the field of health was involved in the development of the regulation. Dr. Lutterloh's affidavit is replete with facts and analysis that indicate to the Court that special expertise in health was required for the regulation, in terms of studying the problem and weighing options and concerns, to formulate the health policy. The fourth Boreali factor has not been met.

Based upon the foregoing, the Court concludes that petitioners have failed to satisfy their burden of proving that 10 NYCRR section 2.59 and its conforming regulations are unreasonable, irrational, arbitrary, capricious, and in violation of the separation of powers doctrine. Their petition, therefore, is dismissed.

This constitutes the Decision and Judgment of this Court. The original Decision and Judgment is being returned to the attorney for respondent. A copy of the Decision and Judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this Decision and Judgment, and delivery of a copy of the Decision and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with regard to filing, entry and Notice of Entry.

Dated: Albany, New York
June 4, 2014

Judith A. Hard
Judith A. Hard
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated November 25, 2013; Verified Petition, dated November 25, 2013, with Exhibits A through H; Affidavit of Gale Baptiste-Graham, sworn to November 14, 2013; Affidavit of Roberta Stafford, sworn to November 14, 2013; Affidavit of Jodie DeSocio, sworn to November 21, 2013; Affidavit of John Horan, sworn to November 21, 2013; Affidavit in Support of Petition, sworn to by William Keith Borwegen on November 21, 2013; and Appendices A through G.
2. Brief on Behalf of Petitioners, dated November 26, 2013.
3. Brief on Behalf of the New York State Nurses Association as Amicus Curiae, dated January 21, 2014.
4. Answer, dated January 24, 2014; Affidavit of Colleen M. Frost, sworn to January 14, 2014, with Exhibits A through E; and Affidavit of Emily C. Lutterloh, M.D., M.P.H., sworn to January 23, 2014, with Exhibits A through BB.
5. Petitioners' Reply, dated February 13, 2014, with Exhibits A through B; Reply Affidavit of William Keith Borwegen, sworn to February 9, 2014, with Exhibits A through E; Reply Affidavit of Jodie DeSocio, sworn to February 3, 2014; Reply Affidavit of John Horan, sworn to January 27, 2014; and Affidavit of Anita Stanard, sworn to on February 6, 2014, with Exhibit A.
6. Reply Brief on Behalf of Petitioners, dated February 14, 2014.
7. Memorandum of Law in Opposition to the Petition, dated January 24, 2014.
8. Transcript of oral argument held on March 4, 2014.