

Board of Health Pub. Review Comm. v New York City, Board of Health of the City of N.Y.

2014 NY Slip Op 32327(U)

September 4, 2014

Supreme Court, New York County

Docket Number: 100847/2013

Judge: Donna M. Mills

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9/4/14
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

BOARD OF PUBLIC HEALTH COMMITTEE,

INDEX No. 100847/13

Petitioner,

MOTION DATE _____

-v-

Motion Seq. No. 02

NEW YORK CITY, et al.,

Respondents.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

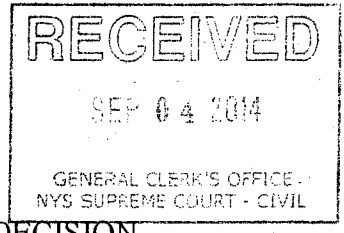
1, 2, 3, 5

Answering Affidavits- Exhibits _____

4, 6

Replying Affidavits _____

CROSS-MOTION: YES NO



Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 9/7/14

Donna M. Mills
J.S.C.
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

S/O

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 58

<p>-----X BOARD OF HEALTH PUBLIC REVIEW COMMITTEE, and all similarly situated food establishments in the City of New York and all affected by Defendants' improper conduct and action,</p> <p style="text-align: right;">Petitioners,</p> <p style="text-align: center;">-against-</p> <p>NEW YORK CITY, BOARD OF HEALTH OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGEINE, DR. THOMAS FARLEY, in his Official Capacity as Commissioner of the New York City Department of Health and Mental Hygiene, NEW YORK CITY CORPORATE COUNSEL,</p> <p style="text-align: right;">Respondents. -----X</p>	<p>Decision and Order</p> <p>Index No. 100847/2013</p>
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Recitation (CPLR 2219 [a]) of papers used on this Article 78 proceeding and cross motion:

Papers	Exhibits
<i>Petitioners</i>	
Notice of Motion	
Attorney Affirmation (Grimaldi)*	
Attorney Affirmation (Sementilli)*	
Additional Attorney Affirmation (Grimaldi)*	
Additional Attorney Affirmation (Sementilli)*	
<i>Respondents</i>	
Notice of Cross Motion to Dismiss	
Affidavit of Quintian	A-V
Affidavit of Marcus	
Memorandum in Support of Cross Motion	
Memorandum in Further Support of Cross Motion	

**The court notes any number of date and service irregularities with these documents. However, in the interest of justice, noting that the respondents acknowledge notice of the nature and content of the petition, and with due regard for the preference of this court to determine matters on the merits, this court overlooks these irregularities. See e.g. 3105 Grand Corp. v City of New York, 262 App Div 17 (2d Dept 1941), affd 288 NY 178 (1942); see also CPLR 3212.*

Donna Mills, J.:

This hybrid declaratory judgment/Article 78 petition arises with regard to the food inspection procedures and concomitant powers of respondents the Board of Health of the City of New York (BOH), and the New York City Department of Health and Mental Hygiene (DOHMH). Petitioners, who comprise some forty restaurant owners in the borough of the Bronx, complain that the food inspectors for the BOH levy fines excessively, inconsistently, beyond their powers, without notice of inspection, and unconstitutionally. Respondents cross-move to dismiss the petition.

Background

Without a high degree of specificity, petitioners describe the current state of affairs with regard to food inspections as generally unfair and legally unconstitutional. From what the court can discern of the somewhat incoherent submissions of the petitioners, they complain that food inspectors of the BOH impose excessive fines and fees on restaurant owners without regard for the economic hardship being levied, and with particular, and improper, regard for a policy of revenue-generation. They also complain that those fines and fees are deposited in a pension fund for the BOH, which has no oversight or appropriate auditing mechanisms.

Petitioners also argue that the food inspectors do not give notice of their intention to conduct inspections, sometimes causing severe economic loss to business owners, who sometimes are unable to continue to serve food during inspections. In addition, the fines and fees levied as a result of the inspections are inconsistent, because the food inspectors have varying degrees of expertise, and procedurally unfair, as supervisors sometimes

make follow-up visits to locations that have been fined, sometimes increasing the fines greatly upon discovering violations that were purportedly overlooked.

At the core of the petition is the complaint that certain provisions of the New York City Charter (Charter) establish and provide rules for the BOH that are unconstitutional. More specifically, the petitioners object to Charter sections 556 (c) (2) and (c) (9), 558 (b) and (c), and 1043. As a backdrop, it is useful to note that the Charter provides in section 551 (a) that “[t]here shall be a department of health and mental hygiene, the head of which shall be the commissioner of health and mental hygiene The department shall have and exercise all powers of a local health department set forth in law.”

Charter section 556 addresses supervision of matters affecting public health. Section 556 (c) (2) provides that the BOH shall “supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health; exercise control over and supervise the abatement of nuisances affecting or likely to affect the public health.” Meanwhile, section 556 (c) (9) provides that the BOH shall “supervise and regulate the food and drug supply of the city and other businesses and activities affecting public health in the city, and ensure that such businesses and activities are conducted in a manner consistent with the public interest and by persons with good character, honesty and integrity.”

Section 558 of the Charter addresses the management of the health code for the city (Health Code). Subsection (b) of that section specifies powers that the petitioners claim the BOH is exercising improperly with regard to the Health Code: To wit:

“(b) The board of health from time to time may add to and alter, amend or repeal any part of the health code, and may

therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state or this charter, and may provide for the enforcement of the health code or any orders made by the commissioner or the board of health, by such fines, penalties, forfeitures and imprisonment as may be prescribed therein or otherwise by law.”

The breadth of the powers granted in subsection (b) is described in subsection (c). More specifically, subsection (c) provides, among other items, that “[t]he board of health may embrace in the health code all matters and subjects to which the power and authority of the department extends.”

Charter section 1043 (a) provides, with regard to the authority and powers delegated, that “[e]ach agency is empowered to adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law. No agency shall adopt a rule except pursuant to this section.” Subsections (b) and (d) of section 1043 set forth procedures for adopting rules by providing for the publication of the proposed rule and allowing an opportunity for public comment. Charter section 1041 (5) (a) sets forth the definition of a “rule” as including, but not being limited to, among other possibilities, “any statement or communication which prescribes (i) standards which, if violated, may result in a sanction or penalty; (ii) a fee to be charged by or required to be paid to any agency; [or] (iii) standards for the issuance, suspension or revocation of a license or permit”

The court notes that the Health Code enacted by the BOH (*see* § 558 [b]) provides that: “[t]he Department may inspect any premises, matter or thing within its jurisdiction, including but not limited to any premises where an activity regulated by this Code is

carried on” 24 RCNY Health Code § 3.01 (a). With regard to the exercise of the powers granted,

“[i]n order to determine whether the provisions of this Code or the provisions of other law which the Department has the authority to enforce are being complied with, the Department may investigate or authorize an investigation to be made of any matter, incident, thing, person or event within its jurisdiction.”

24 RCNY Health Code § 3.01 (b).

In addition, Article 81 of the Code grants the general power to inspect food service establishments, and

“[w]here the Department seeks a fine or monetary penalty for a violation of this Code or any other State or local law or regulation enforced by the Department, it shall bring a proceeding at either the Health Tribunal at OATH or at the Environmental Control Board, and such proceedings shall be governed by the procedures of such Tribunal or Board, as the case may be.”

RCNY Health Code § 3.12 (b).

Finally, Health Code section 3.11 (a) provides that

“any person who is determined to have violated this Code or any other applicable law or regulation, or who holds, or is required to hold, a permit from the Board or the Commissioner or who is registered, or required to be registered, with the Department shall 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 applicable law or regulation relating to such businesses, trades, occupations and other activities. Each such violation shall be a separate and distinct offense, and in the case of a continuing violation, each day's continuance thereof shall be a separate and distinct offense.”

Petitioners argue that these statutory provisions, together with the process of

restaurant inspection and violation enforcement, are unfair and unconstitutional. As the underpinning for this position, the petitioners cite the New York State Constitution, article 9, section 1 (a), which provides that “[e]very local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof,” and that the Charter, in turn, provides that “[t]here shall be a council which shall be the legislative body of the city. In addition to the other powers vested in it by this charter and other law, the council shall be vested with the legislative power of the city.” Charter § 21.

Petitioners maintain that these two provisions mean that the appointees of the executive, that is to say, the BOH, may not intrude upon the legislative prerogatives of the City Council. In essence, the petitioners argue that the powers exercised by the BOH impinge upon the separation of powers intended by the New York State Constitution and, indeed, the United States Constitution. *See Subcontractors Trade Assn. v Koch*, 62 NY2d 422, 427 (1984) (“the underlying structure of our representative system of government consists of three branches in which all governmental power is distributed -- the executive, legislative and judicial. Respect for this structure and the system of checks and balances inherent therein requires that none of these branches be allowed to usurp powers residing entirely in another branch In New York City, the City Council is the body vested with legislative power” [citations omitted]).

As further support for their position, petitioners cite various public statements made by Mayor Bill de Blasio, former City Council Speaker Quinn, and the president of a local union representing DOHMH inspectors, Fritz Reed, as quoted in news sources, and in transcripts before the City Council, implying that the system of violations and

inspections have policy flaws, is unfair, and needs to be changed.

In addition, the petitioners argue that the Health Department Pension Fund (the Pension Fund) created under subchapter 3 of the New York City Administrative Code (§§ 13-616 through 13-628), should also be declared unconstitutional because the fines and fees collected by food inspectors are deposited into the Pension Fund, and it is unregulated and unaudited, which creates a moral hazard and a conflict of interest.

More specifically, § 13-617 of the Administrative Code states that the Pension Fund shall consist, among other items, of,

“[e]xcept as provided in subdivision c of this section, all moneys collected from fines and penalties for violations of the health code or health laws in the city, including fines for violations of orders issued pursuant to sections 17-104, 17-107, 17-108 and 17-165 of the code and all moneys received from the issuance or granting of permits by the board of health of the department of health and mental hygiene and by the commissioner of health and mental hygiene pursuant to the health code.”

Administrative Code § 13-617 (a) (2).

The exception noted in the foregoing section is for

“the event that the assets in the sources enumerated in paragraphs one and three of subdivision a of this section shall be sufficient, during an ensuing fiscal year, to pay all pensions, allowances, benefits, grants, awards, and payments pursuant to this subchapter during such fiscal year or when the city shall make appropriation for such year pursuant to paragraph four of subdivision a of this section, the moneys collected during such year pursuant to paragraph two of subdivision a and subdivision b of this section shall be paid into the general fund of the city.”

Administrative Code § 13-617 (c).

The petitioners also challenge the constitutionality of the office of administrative

*9]
trials and hearings (OATH) as being intrinsically unfair and not independent. The Charter (§ 1048) provides that

“[t]here shall be an office of administrative trials and hearings which shall conduct adjudicatory hearings for all agencies of the city unless otherwise provided for by executive order, rule, law or pursuant to collective bargaining agreements. The office shall be directed by the chief administrative law judge, who shall be an attorney admitted to practice for at least five years in the state of New York.”

Petitioners therefore ask that this court declare that sections 556 (c) (2) and (9) of the Charter, the Health Code, the depositing of fines and fees into the Pension Fund, and the system of trials and hearings, are all unconstitutional. In addition, petitioners ask that this court stay all fines levied under the current scheme, reorganize the appeal process so that it is consistent with the petitioners' due process rights, and declare a moratorium on enforcement of all violations that have been the subject of adjudication. Finally, petitioners seek compensatory damages of 50 million dollars, and punitive damages of 100 million dollars.

Respondents cross-move to dismiss the petition on the grounds that the BOH has the properly constituted authority to administer the Health Code, the allegations with regard to deposits in the Pension Fund are incorrect in fact and in law, due process rights are not violated by the procedures of the office of administrative trials and hearings, the fines levied by the BOH are neither improper nor excessive, and petitioners are not entitled to punitive damages as a matter of law.

Standards

Petitioners bring a hybrid declaratory judgment/Article 78 action. On the one hand, they seek a declaratory judgment pursuant to CPLR 3001. That section provides that “[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.”

On the other hand, petitioners invoke Article 78 of the CPLR to pose the question of whether the BOH is proceeding, or is about to proceed, without, or in excess of, its jurisdiction. *See* CPLR 7803 (2). On this petition, if the court finds that there is a triable issue of fact the respondents will be directed to interpose an answer, and the matter will be tried forthwith. *See* CPLR 7804 (h). Notably, under Article 78, petitioners are not entitled to punitive damages. *See* CPLR 7806 (“[a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity”).

Respondents cross-move to dismiss pursuant to CPLR 3211 (a) (7). Thus, the petition will be afforded a liberal construction (*see* CPLR 3026), and the court accepts the facts as alleged therein as true, according the petitioners the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory (*see Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). In assessing the petition, the court will freely consider all the affidavits submitted by the petitioners to remedy any defects in the complaint (*Rovello*, 40 NY2d at 635) and the criterion will be whether the petitioners

have a cause of action, not whether they have stated one. *See Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *Rovello*, 40 NY2d at 636; *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Despite this, the court notes that inherently incredible, unsupported, or flatly contradicted facts, as well as allegations consisting of bare legal conclusions are insufficient to defeat a motion to dismiss. *See Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 (1st Dept 1991).

Parameters of Relief Sought

As a preliminary matter, the petitioners' application for a declaratory judgment is denied on the ground that they have not stated any justiciable controversy. *See* CPLR 3001 (“[i]f the court declines to render such a judgment it shall state its grounds”). The Board of Health Review Committee is not itself a restaurant business that has suffered fines, and the petitioners have not otherwise named any specific parties that have been injured by the purportedly unconstitutional practices of the BOH.

In essence, petitioners are seeking an advisory opinion, and not a declaration. The “function of the courts is to determine controversies between litigants. They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function. *Self-Insurer's Assn. v State Indus. Commn.*, 224 NY 13, 16 (May 1918, Cardozo, J.); *see also New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 529-530 (1977) (refusal to give advisory opinions is not a matter of judicial prudence or restraint; it is constitutionally commanded [citation omitted]).

Moreover, the petitioners themselves indicate that the City Council should develop and establish a proper scheme for food inspections and restaurant regulation. In this regard, they directly suggest that the matter of which they complain is solvable by the

legislative branch, and not by the courts. *See Matter of Schulz v Silver*, 212 AD2d 293, 295 (3d Dept 1995) (“[a] justiciable controversy is one solvable by a court rather than some other forum and, with regard to the separation of powers doctrine, it has to do with whether a matter is resolvable by the judicial branch of government by way of interpreting or enforcing a statutory mandate or by the executive and/or legislative branches in the exercise of their purely political function”). The application for a declaration pursuant to CPLR 3001 is denied, and to the extent that the petition states such a cause of action, it is dismissed.

Analysis

In essence, all of the allegations and complaints of the petition resolve into two questions. First, did the City Council violate the separation of powers doctrine by improperly and unduly delegating its authority to legislate to the BOH? Second, are the actions of the BOH in promulgating a scheme of fines and fees collection, that is, the method of exercising the delegated authority, constitutional?

Delegation of Authority

As noted above, section 558 of the Charter confers the power on the BOH to “add to and alter, amend or repeal any part of the health code” in a manner “not inconsistent with the constitution, laws of this state or this charter,” and levy “fines, penalties, forfeitures and imprisonment as may be prescribed therein or otherwise by law.” Thus, as noted above, this raises the question of whether the delegation of such powers to the BOH is a violation of the separation-of-powers doctrine, or otherwise contrary to the constitution (presumably either the United States or the New York State constitution).

The court finds, giving full credence to every allegation made in the petition, that the City Council did not violate the separation-of-powers doctrine, and that the BOH has not violated any constitutional provisions.

The First Department and the Court of Appeals have both addressed this specific question. In *People v Blanchard* (288 NY 145, 147-48 [1942]), the Court of Appeals noted that

“the main business of safeguarding the public health has always of necessity been done by local boards or officers through sanitary by-laws or ordinances which have been accorded the force of law. Consequently the Sanitary Code is to be taken to be a body of administrative provisions sanctioned by a time-honored exception to the principle that there is to be no transfer of the authority of the Legislature.”

Citations omitted. Thus, in the special case of the Health Code, the City Council is authorized to make such arrangements to delegate power as are necessary to protect the public health, even if such delegations might not be allowed in other areas.

The First Department reiterated and confirmed this special exception in *People v Weil* (286 App Div 753, 757 [1st Dept 1955]), by noting that

“[t]he board of health of the City of New York is invested with the power, extraordinary as to administrative agencies, to formulate standards as well as to issue orders enforceable [sic] by penal sanctions. Indeed, subdivision b of section 558 of the city charter goes so far as to authorize the board of health to prescribe fines, penalties, forfeitures and imprisonment” in the Sanitary Code for the enforcement of that code or the board’s order; and, accordingly, section 224 of the Sanitary Code makes provision for punishment for its violation. The Sanitary Code may, therefore, be taken to be a body of administrative provisions sanctioned by a time-honored exception to the principle that there is to be no transfer of the authority of the Legislature. [Citations and internal quotation marks omitted.]”

See also Paduano v City of New York, 45 Misc 2d 718, 720 (Sup Ct, NY County), *affd* 24 AD2d 437 (1st Dept 1965), *affd* 17 NY2d 875 (1966) (identifying the powers of the BOH under Charter §§ 556 and 558 to enact provisions for the furtherance and protection of health as a long-established and constitutional exercise of power); *People ex rel.*

Knoblauch v Warden of Jail of Fourth Dist. Magistrate's Ct., 216 NY 154, 161-62 (1915) (that the Charter adds “provisions for the security of life and health, and therein confer additional powers on the department of health [is] not inconsistent with the constitution or laws of this state”).

While this standard allows for the delegation of authority with regard to safeguarding the public health, it does not extend to the creation of entirely new legislation-like rules that essentially usurp powers not so delegated. An illustration of the limits on the use of delegated authority is given by decision in the recent “sugary pop ban” attempted by the DOHMH. In *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health and Mental Hygiene* (___ NY3d ___, 2014 NY Slip Op 04804, quoting *Citizens for Orderly Energy Policy v Cuomo*, 78 NY2d 398, 410 [1991]) the Court of Appeals first notes that “the legislative branch may [declare] ‘its policy in general terms by statute, [and] endow administrative agencies with the power and flexibility to fill in details and interstices and to make subsidiary policy choices consistent with the enabling legislation.’” However, the Court of Appeals went on to note that the DOHMH devised “an entirely new rule that significantly change[d] the manner in which sugary beverages are provided to customers at eating establishments[, and] not an auxiliary selection of means to an end” The actions of the DOHMH reflected “a new policy choice.” *Id.*

Here, unlike the situation with the sugary pop ban, “the basic policy decisions underlying the [challenged] regulations have been made and articulated by the Legislature.” *Bourquin v Cuomo*, 85 NY2d 781, 785 (1995), quoting *Matter of New York State Health Facilities Assn. v Axelrod*, 77 NY2d 340, 348 (1991). The DOHMH did not make any new rules without benefit of legislative guidance, it simply filled in the details of established legislation. This is a long-standing method for the proper exercise of legislative power. *See e.g. Wayman v Southard*, 23 US 1, 42–43 (1825, Chief Justice Marshall) (“[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . [A] general [statutory] provision may be made, and power given to those who are to act under such general provisions to fill up the details”); *accord Boreali v Axelrod*, 71 NY2d 1, 9-10 (1987). The court finds, therefore, that the City Council did not violate the separation of powers doctrine by improperly delegating the authority to enforce the general provisions of its legislation to the BOH.

Promulgation and Enforcement of Authority Delegated

Turning from the actual delegation of power, petitioners rely heavily, nonetheless, on the analysis in *Boreali* (71 NY2d 1) to suggest that in *promulgating and enforcing* the Health Code, the BOH ran afoul of the constitutional separation-of-powers doctrine. The court agrees that the exercise of delegated powers may be examined using the analysis given in *Boreali*.

Boreali provides a set of four “coalescing circumstances” a court might use to chart the course between administrative rule-making and legislative policy-making.

Those factors are: (i) whether the agency engaged in the balancing of competing concerns of public health and economic cost, thus acting on its own idea of sound public policy; (ii) whether the agency created its own comprehensive set of rules without benefit of legislative guidance; (iii) whether the challenged rule governs an area in which the legislature has repeatedly tried to reach agreement in the face of substantial public debate and vigorous lobbying by interested factions; and (iv) whether the development of the rule required expertise in the field of health.

In applying the test under *Boreali*, courts have been cautioned that

“while none of these circumstances, standing alone, is sufficient to warrant the conclusion that the [examined body or agency] has usurped the Legislature’s prerogative, all of these circumstances, when viewed in combination, paint a portrait of an agency that has improperly assumed for itself the open-ended discretion to choose ends, which characterizes the elected Legislature’s role in our system of government.”

Boreali, 71 NY2d at 11 (citation and internal quotation marks omitted).

Here, the BOH did not engage, nor was it even alleged that they engaged, in any balancing of competing concerns of public health and economic cost. The Pension Fund, discussed below, was established decades before any of the grading and fine systems used by the BOH were adopted. The BOH also did not, nor is it properly alleged that it did, create its own comprehensive set of rules without benefit of legislative guidance. Nor is there any evidence or suggestion that the challenged system of fines and fees are a subject upon which the legislature has repeatedly tried to reach agreement in the face of substantial public debate and vigorous lobbying by interested factions. Finally, as noted above (*see* Delegation of Authority section, *supra*), while some level of expertise was

needed in developing the Health Code itself, the expertise was more in the fashion of “filling up the details,” and the delegation of the authorization to fill in specialized details such as the Health Code, as necessary to public health, may be broader than the delegation that might be allowed in other areas.

Make-up of the BOH

Although the petitioners do not make any cogent claims with regard to the make-up of the BOH, they do indicate that there is insufficient expertise on the BOH, and that this fact leads in some regard to the unfairness and unconstitutionality that is the subject of this petition. The make-up of the BOH is given by Charter § 553, which provides that

“[t]here shall be in the department a board of health, the chairperson of which shall be the commissioner. In addition to the chairperson, the board shall consist of ten members, five of whom shall be doctors of medicine who shall each have had not less than ten years experience in any or all of the following: clinical medicine, neurology or psychiatry, public health administration or college or university public health teaching. The other five members need not be physicians. However, non-physician members shall hold at least a masters degree in environmental, biological, veterinary, physical, or behavioral health or science, or rehabilitative science or in a related field, and shall have at least ten years experience in the field in which they hold such degree. One member of the board shall be the chairperson of the mental hygiene advisory board, as set forth in section 568 of the charter, provided that such chairperson shall meet the requirements for board membership of either a physician or non-physician member.”

There are no allegations in the petition that the BOH is not so constituted, or that such constitution of the BOH is insufficient with regard to required expertise. The bare allegation of petitioners that supervisors find more violations is not meaningful: supervisors would naturally be better at finding violations than trainees.

BOH Review Process

Petitioners also challenge the constitutionality of the office of administrative trials and hearings (OATH) as being intrinsically unfair and not independent. Petitioners imply that as OATH is not technically independent of the Department of Health or the BOH, due process would be violated because of a lack of impartiality, and they argue that, moreover, as fines must be paid before hearings are granted before OATH, further aspects of due process are jeopardized.

This position is without merit. The Supreme Court of the United States has stated that “the combination of investigative and adjudicative functions does not, without more, constitute a due process violation” *Withrow v Larkin*, 421 US 35, 58 (1975). In addition, “a bare allegation of bias or prejudgment does not suffice to state a claim that due process has been violated.” *New York State Inspection, Sec. and Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v New York State Pub. Empl. Relations Bd.*, 629 F Supp 33, 39-40 (ND NY 1984). Indeed, “[i]n order to overcome the presumption that administrators who serve as adjudicators are unbiased, those allegations must reveal either actual prejudice or some disqualifying pecuniary or institutional interest.” *Id.* at 40; *see also Schweiker v McClure*, 456 US 188, 194-195 (1982). A fortiori, OATH, established under the Charter, and serving under the direction of the chief administrative law judge, enjoys a coextensive presumption.

In all events, the court is unconvinced that the mere use of administrative judges results in insuperable effrontery to due process. *See e.g. Jaouad v City of New York*, 39 F Supp 2d 383, 388 (SD NY 1999) (reliance on institutional connection to infer violation of due process rights insufficient); *see also Van Harken v City of Chicago*, 103 F3d 1346,

1352-53 (7th Cir), *cert denied* 520 US 1241 (1997) (scheme for adjudicating parking violations alleged to infringe on due process rights). To find otherwise would do violence to administrative procedure throughout the state, and, indeed, set challenge to a system of judicial review enshrined in federal law. *See e.g.* 5 USCA §§ 701 (a) and 704 (judicial review is not allowed of actions so designated by law).

Petitioners also argue that access to justice is being impeded due to the requirement that fines be paid before challenges to violations may be made. This sweeping generalization is without merit. It is a routine matter for bonds to be posted, fines to be levied, civil forfeitures to be executed, or bills to be paid before appeals can be heard. This is because civil fines cannot be avoided by compliance. *See e.g. Saharoff v Stone*, 638 F2d 90, 92 (9th Cir 1980) (requiring the posting of a bond before appeal will be heard is not a violation of due process); *accord All Aire Conditioning v City of New York*, 979 F Supp 1010, 1020 (SD NY 1997), *affd* 166 F3d 1199 (2d Cir 1998) (“[t]he conditioning of an appeal on the posting of a bond undeniably is constitutional”); *see also Southern Pac. Transp. Co. v Commercial Metals Co.*, 456 US 336, 352 (1982) (act or omission of a carrier will not “preclude it from enforcing payment of the full amount by a person liable therefor [citation omitted]”).

Excessiveness of Fines and Fees

The petitioners expand on the issue of fines to assert that the fines themselves are unconstitutional because they are excessive. This is presumably a reference to both the United States and New York constitutions that admonish that no “excessive fines [be] imposed.” US Const 8th Amend; NY Const, art I, § 5. Courts have interpreted fines as excessive if they: (i) constitute payment to the government as punishment for an offense;

and (ii) are in an amount “grossly disproportionate” to the gravity of the offense. See *United States v Mackby*, 261 F3d 821, 829 (9th Cir 2001), citing *United States v Bajakajian*, 524 US 321, 327-328 (1998); accord *Street Vendor Project v City of New York*, 10 Misc 3d 978, 982 (Sup Ct, NY County 2005), *affd* 43 AD3d 345 (1st Dept 2007).

Here, the fines are not a penalty for any offence, but, rather, are instituted to secure compliance with the Health Code. Such fines are not the intended subject of the above-referenced constitutional provisions. See *Street Vendor Project v City of New York*, 10 Misc 3d at 982, citing *Kirsh v City of New York*, 1995 WL 383236, *8, 1995 US Dist LEXIS 8896, *24 (SD NY, June 27, 1995); see also *Matter of Seril v New York State Div. of Hous. & Community Renewal*, 205 AD2d 347, 347 (1st Dept 1994). The amount of the fines are not open to challenge under the constitutional provisions presented by petitioner.

Pension Fund Deposits

Petitioners are also concerned with how the revenue for fines and fees are expended. They argue that an untenable conflict of interest arises from the fact that the revenues are placed in the Pension Fund, which is unaudited. This allegation is flatly contradicted by the statutory provisions for the Pension Fund, which state, at least as of 1985, that the Fund is “continued only for the benefit of members of such fund on October first, nineteen hundred twenty.” Administrative Code § 13-616. The Code goes on to indicate that “[i]n the event that the assets . . . of [the Pension Fund] shall be sufficient, during an ensuing fiscal year, to pay all pensions, allowances, benefits, grants, awards, and payments pursuant to this subchapter during such fiscal year . . . the moneys

collected during such year . . . shall be paid into the general fund of the city.”

Administrative Code § 13-617 (c). Unless the food inspectors have been working for over 90 years, they can expect no direct benefit from deposits into the Pension Fund. Giving the petitioners the benefit of every available inference, the court is faced with the inescapable conclusion that no monies are deposited in to the Pension Fund, and that all monies collected are deposited into the general fund. Indeed, the respondents have submitted credible evidence to that effect. *See Quintian* aff ¶ 3.

Conclusion

The court concludes that the City Council did not improperly delegate its authority to the BOH. Moreover, the *Boreali* factors, which circumscribe the exercise of delegated powers, are largely not present; the only factor that is arguably present enjoys additional leeway due to the subject matter of the alleged policy-making. In addition, the petitioners have presented no indication of why the make-up of the BOH is improper or ill-advised. Nor, even if such a conclusion could be made, does the court perceive that it has the power to simply order the BOH reconstituted to fit the court’s own vision of the best arrangements, in preference to those of the legislature. Finally, the system of fines and fees, and their collection and deposit, present no circumstances that the court finds untoward, unconstitutional, or, indeed, unusual.

Not only are the petitioners not entitled to the relief they seek, which includes an improper application for punitive damages, as a matter of law, but they ask that this court exceed its powers. “The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and

by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.” NY Const art XVII, § 3. This court is not in the position to review the merits of the legislature’s public-policy decisions and substitute its own wisdom therefor. *See e.g. People v Parilla*, 109 AD3d 20, 29 (1st Dept 2013). As the petition is patently deficient, it is adjudged that it is dismissed with costs and disbursements to respondents.

Settle order on notice.

Dated:

9/4/14

Enter:


J.S.C.
DONNA M. MILLS, J.S.C.