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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Randi Weingarten

- v -

Board of Education

INDEX NO. 104080/08

MOTION DATE 8/19/08

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Based on the foregoing, it is hereby

ORDERED that respondents Board of Education of the City School District of the City of New York ("BOE"), Joel Klein, and the City of New York are (1) prohibited from disciplining or altering the employment status of any UFT-represented employee for taking a religious observance day or personal business day in observance of The Feast of Maundy ("Holy Thursday") and (2) prohibited from taking any other negative employment action against such employees pending resolution of a grievance pursuant to the Collective Bargaining Agreement between the UFT and the BOE, until the grievance and arbitration procedures have been completed. And it is further

ORDERED that the respondent's cross-motion to dismiss the petition is denied; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the parties appear in Part 35 for a preliminary conference on April 29, 2009, 2:15 p.m.

This constitutes the decision and order of the Court.

FILED
DEC 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/15/08

J.S.C.
HON. CAROL EDMEAD

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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RANDI WEINGARTEN, as PRESIDENT OF THE UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,

Index No. 104080-2008

Petitioner,

-against-

DECISION/ORDER

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, JOEL KLEIN, as Chancellor of the City School District of the City of New York, and THE CITY OF NEW YORK,

Respondents.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 75 proceeding, the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (the "UFT"), through its President, Randi Weingarten, moves by order to show cause for a temporary restraining order and injunction in aid of arbitration (1) prohibiting the Board of Education of the City School District of the City of New York ("BOE"), Joel Klein, and the City of New York (collectively the "respondents") from disciplining or altering the employment status of any UFT-represented employee for taking a religious observance day or personal business day in observance of The Feast of Maundy ("Holy Thursday") and (2) prohibiting respondents from taking any other negative employment action against such employees pending resolution of a grievance pursuant to the Collective Bargaining Agreement ("CBA") between the UFT and the BOE, until the underlying grievance is

completed.[1]

Factual Background

In September 2000, the BOE issued Chancellor's Regulation C-606 (the "Regulation"), which relates to time off for religious observances.[2] The Regulation provides, in part, that:

> Accommodations shall be made for employees requesting time off for a full time off for a full day or part of a day for Sabbath or holy day observance,[1] except that an accommodation need not be provided (1) in cases of an emergency, (2) if the individual's personal presence is indispensable to the orderly transaction of business . . . or (4) if the individual's personal presence is regularly essential on any particular day or days or portion thereof for the normal performance of that individual's duties.
>
> Each request for such accommodation must be assessed individually to determine whether any of the exceptions listed above apply. Factors which may be considered in making this determination may include, but are not limited to, the following:
>
> - ability to provide required level of services in the individual's absence;
> - the ability to maintain proper supervision; and
> - disruption to the work place.
>
> [1] This includes a reasonable time period for travel between employee's place of employment and employee's home.

As to the procedure for requesting time to observe a religious observance, the Regulation provides, in part, as follows:

> When an employee requests time off for religious observance, such request shall be considered . . ., in the case of a school, by the principal or his/her designee (hereinafter "Responsibility Center Head"). The Responsibility Center Head shall make a good faith effort, with due consideration given to the law, the responsibilities and policies of the Department and the factors listed above, to accommodate any request for time off for religious observance. Efforts to accommodate may include

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[1] This order to show cause was brought on March 19, 2008, the day before Holy Thursday, the same day on which the UFT filed a step 2 grievance against the BOE. The grievance alleges that the BOE violated Articles 2 and 20 of the CBA by denying Holy Thursday as a religious observance Day , and seeks a determination as to whether UFT-represented employees are entitled to a religious observance day to observe Holy Thursday pursuant to the CBA, the Chancellor's Regulations, and past precedent.

[2] The Regulation was later modified in 2005 to include footnote 1.

> consideration of alternative work schedules or use of paid or unpaid leave, inquiry to other employees, consideration of the possibility of reassignment, and consideration of accommodations proposed by the individual seeking accommodation. . . .

The Regulation is incorporated by reference in Article 20 of the CBA.

In 2005, the issue of taking Holy Thursday and Easter Monday off as a religious observance day arose because normal classes were scheduled for Holy Thursday, March 24, 2005, and Easter Monday, March 28, 2005. Thus, on March 15, 2005, the BOE issued a statement in an email, the "Principals' Weekly," to address the observance of Holy Thursday. The Principals' Weekly reads as follows:

> Pursuant to Chancellor's Regulation C-606, an employee's request for time off for religious observance must be decided on a case-by-case basis. In reviewing the request, the principal may discuss with the employee what the religion requires of the employee (e.g., attendance at all day religious services or for only part of the day) and whether arrangements short of a full day off (such as early release time) would suffice. The employee has an obligation under the regulation to consider such alternative arrangements. The principal should also consider the impact the staff member's or members' absence on the day in question will have on students and the school, including the ability to provide instruction and supervision and the disruption to the school due to the volume of requests. Principals should conduct this analysis and arrive at a case by case judgment regardless of whether the school has given the day off for religious observance in the past.
>
> * * *
>
> Finally, if the principal denies a day off for religious observance, it should not be granted as a personal or sick day.

Following the March 15th Principals' Weekly, the BOE and UFT discussed the issue of requests for religious observance. Thereafter, on March 22, 2005, the BOE issued a second notice (the March 22, 2005 email), to which the UFT agreed in advance, to clarify the previous Principals' Weekly, as follows:

> . . . As detailed in [the] Principals' Weekly on March 15, principals WHO RECEIVE, OR WHO HAVE RECEIVED, requests from staff for religious observance days should

> FOLLOW Chancellor's Regulation C-606. Under the regulation, employees who need the day off for religious observance should be allowed a religious observance day unless the employee's presence is essential, such as in order to provide required services to students, to maintain proper supervision or to avoid disruption to the school. . . .
> (Emphasis in the original).

Three years later, on March 13, 2008, the UFT's newspaper reported that members were permitted to take off Holy Thursday. Members were instructed to request a certain form, and that "if their principal gives them any grief regarding the request, they should mention the Joseph Griffin grievance decision [the "Griffin Award"], which allows members to take off Holy Thursday."

BOE's Office of Labor Relations received numerous inquiries from principals regarding how to respond to teachers' requests for time off on Holy Thursday. Thus, to clarify the UFT's statement, the Labor Relations Office issued a statement in the Principals' Weekly dated March 18, 2008, identical to that issued in 2005 (the "2008 Principals' Weekly Statement").

Petition

Petitioner claims that although observance of Holy Thursday has been granted in the past, certain school staff were denied leave in order to participate in this religious observance on March 20, 2008. Some of the teachers who were denied leave, had previously been granted leave, which was recently revoked. Although the March 22, 2005 email indicates that employees should be allowed a religious observance day off unless the employee's presence is essential to provide required services to students, maintain proper supervision, or to avoid disruption to the school, no such circumstances exist here, and the Board failed to articulate such reasons. Denying teachers a day off for religious observances, as articulated in the Principals' Weekly, leaves teachers with the choice of risking discipline or other negative employment actions in

order to participate in their religious practices, and is in violation of the Board's own policy.

Petitioner notes that the granting of religious leave has been the subject of prior grievances. For example, the UFT filed a grievance when the principal of Junior High School 50 revoked permission granted to a school secretary and two teachers for leave to observe the religious Jewish holiday of "Purim." Each of the school employees noted on their applications that they were requesting a "non-attendance" day, which required that each employee pay for the cost of a replacement substitute. After a hearing in 1993, the arbitrator rejected the BOE's argument that Purim was "not a holiday of sufficient import to warrant an employee being granted a non-attendance day." According to the arbitrator, the "collective bargaining agreement requires that a determination to deny non-attendance religious observances must be based upon objective criteria such as, a schools [sic] ability to obtain substitutes or an identifiable adverse educational impact on the student population. The arbitrator further stated, "The Board failed to establish any valid educational, administrative, or economic foundation for its actions." Therefore, the "District acted arbitrarily and capriciously when it denied the grievants a non-attendance day for the Purim Holiday."

Additionally, the grievance by Joseph Griffin alleging, *inter alia,* that an employee was denied the use of two days for non-attendance for two religious observance days, Ash Wednesday and Holy Thursday, was sustained, and the employee was granted two days for non-attendance.

Petitioner points out that BOE utilized the Griffin Award in an April 23, 2001 letter to the principal of a high school in Brooklyn, to respond to the principal's inquiry as to the BOE's policy in granting leave for religious observances. According to the letter, it is the BOE's policy

to "provide reasonable accommodations to employees' religious observance and practice," with "reasonable accommodation" as defined in the Regulation. The letter also notes that there is no comprehensive list of approved holidays as "there is controversy even among spiritual leaders as to the need to abstain from work on some holy days."

As a result of the Board's recent denial of religious observance leave, the UFT filed a step 2 grievance on March 19, 2008. The filing of the grievance is a necessary prelude to arbitration. Petitioner maintains that the underlying grievance will be followed by further steps prior to arbitration, and the resolution of the grievance can take time. Until then, the teachers are in the position of choosing between potential discipline at work or whether to observe Holy Thursday. Any teacher who curtails his or her religious practices under the threat of discipline will be irreparably harmed. And, no later-arrived at decision in the teachers' favor could make the teacher whole. Further, the potential harm to teachers who are forced to chose between facing disciplinary action for being absent from school and their religious beliefs is immeasurable and cannot be remedied by a later-arrived determination of an arbitrator. The potential burden on respondents to maintain the *status quo* and refrain from disciplining teachers until a decision is rendered is minuscule. Forcing teachers to make such a choice further offends fundamental constitutional principals of freedom of religion. Therefore, an order enjoining respondents from taking any negative employment action against any UFT-represented member for taking a religious observance day on March 20, 2008 to observe Holy Thursday is warranted.[3]

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[3] The petition seeks an order granting judgment (1) prohibiting respondents from disciplining or otherwise altering the employment status of or taking any other negative employment action against any UFT-represented member for taking a religious observance day on Holy Thursday, March 20, 2008 in order to observe Holy

footnote 3, contd.

Respondents' Answer

In answering the petition, respondents also cross move for dismissal of the petition, arguing that the court lacks jurisdiction over petitioner's request for an injunction, the petition fails to state a cause of action, petitioner failed to exhaust contractual remedies, and that the petition is moot. Further, respondents aver that they acted reasonably, and were neither arbitrary nor capricious.

According to respondents, the Court lacks jurisdiction because petitioner has not first demanded arbitration as required by CPLR 7502(c), which only permits a preliminary injunction if an arbitration is pending, and not simply when a grievance is filed.

Further, petitioner's challenge to the 2008 Principals' Weekly Statement, is barred by laches, given that such Statement mirrors the March 22, 2005 email, which petitioner never challenged by way of a grievance, arbitration or otherwise. The March 22, 2005 email did not retract any statements made in the earlier March 15th Principals' Weekly, UFT approved the notice in the email, and UFT never brought a contractual or legal challenge to this notice. Nor can any arbitrator determine when schools should remain open, a determination belonging solely to the Legislature and BOE.

Further, any violation of the UFT contract is subject to the grievance and arbitration procedures of such contract, as evidenced by petitioner's filing of a grievance under those procedures. Having failed to exhaust these procedures, the petition must be dismissed.

Even if the Court had jurisdiction, the petition fails to state a cause of action as there is no

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Thursday; (2) enjoining further violations of law by respondents, and (3) awarding petitioner its costs and expense in this proceeding.

likelihood of success on the merits of petitioner's claim. There is no contract clause or law granting an unfettered right to a day off for Holy Thursday. The Regulation has been in place for more than seven years and meets the standard for accommodation of religious observance under all Federal, State, and local laws. Since closing a school or all of BOE's schools constitutes an undue hardship upon the BOE, BOE is not required to grant a religious accommodation as per the New York State Human Rights Law. The factors outlined by the New York State Human Rights Law to determine whether a religious accommodation should be granted are incorporated by the Regulation and the 2008 Principals' Weekly Statement at issue herein. The UFT's argument that its members have an absolute right to a day off on Holy Thursday simply for the asking in untenable, and an order validating this position violates public policy.

Despite the BOE's attempt to accommodate requests to take off Holy Thursday, some teachers disregarded the Regulation, walked out on their students, and essentially shut down the schools in which they were employed to serve. Such teachers deprived their students of instruction, education, and supervision.

Also, nothing in the Griffin Award, which involved the request of only one individual, states that the BOE is required to grant all requests to take off Holy Thursday. Further, the Griffin Award, issued in 1997, precedes and is superceded by the Regulation.

BOE maintains that the 2008 Principals' Weekly Statement addressing the UFT's reliance on the Griffin Award did not encourage principals to deny requests; instead, it encouraged compliance with the Regulation and recommended that principals accommodate as many requests as possible to the extent that they would not disrupt or otherwise negatively impact the operations of their schools, in accordance with the Regulation.

Petitioner's order to show cause seeks to effectively shut down the school system-an effect they achieved in part in 2005. The petition fails to cite to a single individual who had been denied a request to take Holy Thursday off as a religious observance day. Instead, petitioner claims that two UFT members, Allison Gnerre ("Gnerre") and Claudia Jacquet-Payne ("Jacquet-Payne"), had their requests to take off Holy Thursday approved before the March 18, 2008 Principals' Weekly was issued, and were subsequently denied that day off. However, both of their requests were made on March 17, 2008, only three days before the date they wished to take off. Although the principal of their school approved the requests that day, the principal reversed her approval and denied the requests on March 18, 2008, one day before the 2008 Principals' Weekly Statement was released, because she was unable to secure substitute teachers to cover Gnerre's and Jacquet-Payne's classes.[4] In an attempt to accommodate these teachers, Ms. Joseph allowed them to leave early, before noon on Holy Thursday, which was as soon as possible as they could be spared from the school. Therefore, the cases of Gnerre and Jacquet-Payne which the UFT has presented actually support the BOE's position. The BOE's decision to withdraw the

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[4] In her affidavit, Principal Valerie Joseph stated that:

> On Tuesday, March 18, 2008, I advised both Ms. Gnerre and Ms. Jacquet-Payne . . . that I would be unable to accommodate their requests for the entire day off for religious observance because I was unable to find substitute teacher coverage. I also told Ms. Gnerre that I would continue to look for substitute teachers for March 20, and that should I find coverage, I would approve the requests for the full day off. I also advised Ms. Gnerre and Ms. Jacquet-Payne that while their requests for the entire day was not approved, I could accommodate their religious needs by modifying their work schedules to provide for early departure.
>
> Ultimately, I could not secure substitute teacher coverage for these teachers. Therefore, I was unable to approve these requests for the entire day off. However, I was able to modify Ms. Gnerre's and Ms. Jacquet-Payne's schedules for March 20, 2008, such that Ms. Gnerre was able to leave work at 11:05 a.m. and Ms. Jacquet-Payne was able to leave work at 11:50 a.m.
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> * * *
>
> . . . I conveyed this rescission to both Ms. Gnerre and Ms. Jacquet-Payne during the school day on March 18, 2008. At the point I rescinded my approval, I had not seen the March 18th Principal Weekly newsletter.

grant of the entire day and grant these two teachers permission to leave early as soon as they could be spared is entirely in accord with UFT's contract and the Regulation. The BOE did not tell its principals to deny requests to take off Holy Thursday. In the event that the BOE cannot secure substitute teachers, the BOE cannot place its children in a chaotic, unsupervised and unsafe environment.

Further, any claim that the denials of leave violate the First Amendment's freedom of religion clause lacks merit; BOE's practice, including the Regulation and the 2008 Principals' Weekly Statement, is neutral and does not intentionally discriminate against Catholics.

Nor is there any showing of irreparable harm because the UFT members can raise the issue of their right to take a holiday at an Education Law 3020-a disciplinary hearing. In such a hearing, each case will be treated individually, which is far more appropriate to the claims asserted. Moreover, the loss of a job does not constitute irreparable harm, even if the disciplinary process results in the unlikely event of termination of employment. And, the Court could review the disciplinary determination under this arbitration in the context of an Article 75 proceeding.

Finally, the balancing of the equities tip in favor of respondents. Petitioner cannot deny the incalculable harm done to the students, parents, schools and BOE were teachers granted an unfettered right to the same day off simply on request and without exception.

Reply

The narrow issue before the Court is whether petitioners may obtain a stay until an arbitrator decides the issue regarding the 2008 Principals' Weekly Statement. The Statement misstates the standard prescribed by the Regulation by improperly shifting the burden in evaluating applications for religious leave.

When the BOE announced the school schedule for this year, providing for school to be in session on Holy Thursday, the petitioner recommended that it consider including Holy Thursday and Easter Monday as holidays on the school calendar. The BOE denied the inclusion, noting that attendance was within acceptable ranges on such days.

Further, after the commencement of this petition, six teachers at P.S. 2 in Elmhurst, Queens, who were initially granted leave to observe Holy Thursday, were later denied leave after circulation of the 2008 Principals' Weekly Statement. The principal commented that no one was being allowed Holy Thursday as either a personal or religious day. The six teachers reported to work in fear of retaliation from the principal if they failed to appear. At I.S. 92 in St. Albans, three (of 49) teachers who had requested religious observance leave for Holy Thursday were called in by the principal, and asked questions pertaining to the purpose of the holiday, how participants observe it, and what the religious services entail. At P.S. 71 in Ridgewood, the principal originally denied requests for religious observance leave, but, after meeting with UFT representatives, granted some teachers such leave, and permitted others to use their personal days. The principal stated that she would not discipline teachers for taking the agreed-to leave unless directed to do so by the BOE. Yet, upon returning to school, nine teachers who had taken personal days were informed that they would be docked pay for taking leave and that the leave would be recorded as an unauthorized absence. The plight of these nine teachers is troubling because it violates both this Court's March 19, 2008 Order and the agreement reached by the parties with the help of the First Department Court Attorney that "no adverse action will be taken with respect to absence on Holy Thursday pending resolution of" the motion to vacate the stay.

Petitioners maintain that this Court has jurisdiction, even prior to arbitration being

formally requested. As to the issue of laches, petitioner's grievance and instant application for relief were filed within 24 hours after the Principals' Weekly Statement was distributed. Further, the UFT promptly challenged the 2005 Principals' Weekly and obtained an acceptable correction from the BOE. Further, the Court has authority and jurisdiction to issue injunctive relief on the ground that the award to which the applicant may be entitled may be rendered ineffectual without such relief.

A preliminary injunction is necessary to protect the order issued on March 19, 2008 and prevent teachers who relied on such order to take leave from being disciplined upon the lifting of the stay imposed by the order. If the Court accepts respondents' position that the provisional relief sought is now moot, such approach would lead to the type of unchallengeable injustice recognized by the "wrongs capable of repetition yet evading review" exception to the mootness doctrine.

Though this Court need not rule on whether there has been a violation of law or contracts, the 2008 Principals' Weekly Statement will, and has, prompted principals to engage in a religious test to qualify for religious leave. Further, respondents' assessment that attendance on Holy Thursday would be "within acceptable ranges" proves respondents' concern of excessive absenteeism disingenuous.

Finally, the balance of the equities favors petitioner. Having waited until days before Holy Thursday to issue the Statement created an emergency situation that required emergency relief. Refraining from disciplining teachers places no burden on respondents. However, teachers who rely on their contractual and constitutional rights as protected by this Court's order and took leave cannot reverse their actions.

Analysis

Jurisdiction

It cannot be contested that Article 75 pertains to arbitration and does not make reference to "grievance" procedures. However, the rules governing applications for provisional relief in connection with arbitrations are specified in by CPLR 7502(c) under Article 75. Upon examination of the complete section on which respondents' rely, including the language emphasized below which was intentionally omitted from respondents' papers, this Court finds that the Court may entertain petitioners' application, notwithstanding the fact that an arbitration has not yet been commenced.

CPLR 7502(c) provides as follows:

> Provisional remedies. The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending *or that is to be commenced* inside or outside this state . . . but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The court may reduce or expand this period of time for good cause shown. . . .

Thus, whether the Court may grant injunctive relief turns on whether "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief" (*In the Matter of New York State Hous. Fin. Agency Employees' Assn. v New York State Hous. Fin. Agency*, 183 AD2d 435 [1st Dept 1992] [stating, respondent's "argument that there was no arbitrable controversy since grievance procedures had not yet been exhausted and a demand for

arbitration not yet served is at odds with the plain purpose of CPLR 7502(c)]). In light of the "time frames of the grievance procedures, no award could have been rendered" by Holy Thursday (*see id.*). Thus, respondents' claim that the absence of any demand for or pending arbitration deprives this Court of subject matter jurisdiction to entertain the relief sought (Memo of Law, at 14), lacks merit.

Nor is petitioner guilty of laches. Laches, an equitable defense, requires more than a showing of a delay, but also allegations "showing not merely delay but also injury, change of position, intervention of equities, loss of evidence, or other disadvantage resulting from such delay" (*Feldman v Metropolitan Life Ins. Co.*, 259 AD 123, 18 NYS2d 285 [1st Dept 1940]). At the outset, respondents' claim that petitioners' failure to challenge the March 22, 2005 email, which mirrors the Principals' Weekly Statement at issue, bars petitioners' claim at this time. The March 22, 2005 email indicates that employees requesting the day off for religious observances "should be allowed" a day off unless the employee's presence is essential, in accordance with the Regulation. It bears repeating that the Regulation mandates that principals grant employees' request for a religious observance day, unless certain exceptions apply, as determined based on factors totally unrelated to the practices of the religion at hand. That is, the factors pertain to the ability to provide services and maintain proper supervision in the employee's absence and disruption in the workplace. However, the 2008 Statement indicates that when determining whether to grant an employee's request for the day off for religious observance, the principal may discuss what the religion requires of the employee and whether arrangements short of a full day off would suffice. There is no mention of these additional factors in the Regulation or in the previously sent March 22, 2005 email. Therefore, the 2005 Principals' Weekly Statement and the

March 22, 2005 email are not substantially similar so as to bar petitioners' claim regarding the latter for failure to challenge the former. It is noted that petitioners challenged the 2005 Principals' Weekly, the precursor to the March 22, 2005 email, and filed a Step 2 grievance in less than 24 hours after the 2008 Principals' Weekly Statement was issued.

Furthermore, respondents failed to allege any prejudice or injury resulting from any delay, loss of evidence, or change in position based on petitioners' failure to challenge the March 22, 2005 email. Therefore, it cannot be said that petitioner is guilty of laches so as to bar the instant proceeding.

Nor can it be said that petitioner failed to exhaust its contractual remedies. An "aggrieved union member whose employment is subject to the terms of a collective bargaining agreement entered into by his union and employer must first avail himself of the grievance procedure set forth in the agreement before he can commence an action in court" *(Cantres v Board of Educ. of City of New York*, 145 AD2d 359, 535 NYS2d 714 [1st Dept 1988] *citing Matter of Plummer v Klepak*, 48 NY2d 486, *cert denied* 445 US 952 *and Matter of Taylor v Libous*, 87 AD2d 947). However, where the grievance and arbitration procedures contained in a collective bargaining agreement are not meant to be the exclusive remedy to resolves the arbitrable dispute, the employee need not exhaust the grievance and arbitration procedures before commencing a suit at law (*Campbell v Lindsay*, 78 Misc 2d 841, 358 NYS2d 833, *mod. on other grounds* 48 AD2d 621, 367 NYS2d 497, and *affd* 71 AD2d 556, *revd on other grounds, sub nom. McGowan v Mayor*, 53 NY2d 86, 440 NYS2d 595 [where agreement specifically recognized that employees concerned had not waived their right to seek legal redress as an alternative remedy]; *cf. Carter v Department of Correction of the City of New York*, 92 AD2d 465, 459 NYS2d 5 [1st Dept 1983]

[distinguishing Campbell and stating that plaintiffs must exhaust their contractual remedy where agreement revealed that "plaintiffs did not reserve to themselves the use of any alternative remedy such as seeking legal redress]). Here, respondents failed to establish that the grievance and arbitration procedures set forth in the CBA are the exclusive remedies available to the petitioner prior to commencing suit. That petitioner submitted to the grievance procedures, in and of itself, does not establish that petitioner waived any right to seek legal redress before the court. Therefore, respondents' claim that petitioner failed to exhaust contractual remedies is unsupported, and insufficient to warrant dismissal of the petition.

As to respondents' claim that the petition is moot, an exception to the doctrine of mootness exists where there are: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, *i.e.*, substantial and novel issues (*Matter of Hearst Corporation v Clyne*, 50 NY2d 707, 714-15, 431 NYS2d 400, 409 [1980]). Here, there is obviously a likelihood of repetition as the problem has the potential of arising every time Holy Thursday falls on a day school is in session.[5] It is an event that would evade review because when Holy Thursday falls on a school day, teachers applying for a religious observance day may be subject to another or similar Principals' Weekly statement days before the holiday, giving them an insufficient period of time within which to (1) observe and practice their religious beliefs and (2) seek court intervention. In either instance, the issue of whether the teachers who decide to observe Holy Thursday should be disciplined will no longer

[5] It appears that there are occasions where Holy Thursday occurs during the spring recess when school is not in session (see respondents' memorandum of law, page 7).

exist in the particular case by the time a court can review any imposition of discipline. In the present case, the merits of the matter have not been heard in arbitration, and the observance of Holy Thursday has come and gone. Further, the issue involved is significant. As such, this case falls within the exception to the doctrine of mootness and the Court proceeds to address the merits of the Article 75 petition.

Injunctive Relief

Pursuant to CPLR 7502(c), in granting an injunction in aid of arbitration, the Court must consider first, whether the arbitration award would be rendered ineffectual without injunctive relief (*Witham v VFinance Investments, Inc.*, 17 Misc 3d 1136, 851 NYS2d 75 [NY Sup 2007]). Then, the Court must consider: (1) likelihood of petitioner's success on the merits; (2) danger of irreparable harm to the petitioner if the preliminary relief is denied; and (3) a balance of the equities in the petitioner's favor (*id.; see In re Cullman Ventures, Inc.*, 252 AD2d 222, 682 NYS2d 391, 396 [1st Dept 1998] ["[W]e apply the general criteria governing the issuance of injunctive relief to an application for a preliminary injunction under CPLR 7502(c)"]; *Koob v IDS Fin. Serve., Inc.*, 213 AD2d 26, 629 NYS2d 426, 432 [1st Dept 1995]; *Leake v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 213 AD2d 155, 623 NYS2d 220, 221 [1st Dept 1995]["[T]he trial court erred by not entertaining, and granting Merrill, Lynch's application for a preliminary injunction [pursuant to] CPLR § 7502(c), due to the likelihood of the respondent's success on the merits . . . ."]; *Erber v Catalyst Trading, LLC*, 303 AD2d 165, 754 NYS2d 885 [1st Dept 2003][affirming the denial of an injunction in aid of arbitration where the movant

failed to establish likelihood of success on the merits]).[6]

A. The Arbitration Award May Be Ineffectual Without Such Relief

The record indicates that the 2008 Principals' Weekly Statement had a negative impact on teachers' ability to observe Holy Thursday. Namely, six teachers who were initially granted leave to observe Holy Thursday felt compelled to report to work when the permission initially granted by their principal was revoked after the dissemination of the 2008 Principals' Weekly Statement. Any arbitration award would be wholly inadequate and ineffectual to make whole these teachers who forfeited any right the arbitrator finds they had to observe Holy Thursday. Teachers are likely to modify their behavior "to that which is unquestionably safe," for the threat of discipline, or ultimate dismissal from public employment "hangs over their heads like a sword of Damocles," threatening them with dismissal for practicing religious beliefs that might impair the 'efficiency of the service.'" That the arbitrator may ultimately vindicate teacher if it is found

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[6] It is noted that the standard adopted herein reflects the most recent caselaw in the First Department, which historically, applied the sole standard set forth in the statute, CPLR 7502 (*see In re Guarini*, 233 AD2d 196 [1st Dept 1996]; *see also H.I.G. Capital Mgmt., Inc. v Ligator*, 233 AD2d 270, 650 NYS2d 124, 125 [1st Dept 1996] [holding that "rendered ineffectual" standard is "sole applicable standard" in deciding 7502(c) motion; *In re Guarini*, 233 AD2d 196, 650 NYS2d 4, 4-5 [1st Dept 1996] [holding that trial court "properly refused to consider the merits" of arbitrable claim that was basis for petitioner's 7502(c) motion]; *Nat'l Telecomm. Ass'n v Nat'l Communications Ass'n*, 189 AD2d 573, 592 NYS2d 591, 591 [1st Dept 1993]["In arguing that petitioner has failed to demonstrate irreparable harm and a probability of success on the merits, respondent would have this court adopt an inappropriate standard for deciding whether relief should be granted under CPLR 7502(c), under which the ground for entertaining an application ... is whether the award may be rendered ineffectual without it] [internal quotation marks and citations omitted]]; *Drexel Burnham Lambert Inc. v Ruebsamen*, 139 AD2d 323, 531 NYS2d 547, 550 [1st Dept 1988]; *Kobra Int'l, Ltd. v D. Klein & Son, Inc.*, N.Y.L.J., May 28, 1999, at 26 [N.Y.Sup.Ct.1999] ["[Section 7502(c)] should be applied as written, and [whether an arbitral award to which petitioner might be entitled may be rendered ineffectual without provisional relief] should be the only consideration in deciding whether to grant a preliminary injunction ...."]; *see also In re Denihan*, 119 AD2d 144, 506 NYS2d 39, 42 [1st Dept 1986][discussing requirement, under CPLR 7501, that "[i]n determining any matter arising under [Article 75], the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute" (internal quotation marks omitted)), *aff'd* 69 NY2d 725, 512 NYS2d 367 [1987]; Eric J. Wallach, Litigating "Raiding" Cases, 1166 PLI/Corp. 285, 299 [2000] ["In New York State ... the standard for granting temporary or preliminary injunctive relief in aid of arbitration is a significantly less onerous standard than the normal elements."]).

that the discipline imposed was unwarranted "is of little consequence-for the value of a sword of Damocles is that it hangs-not that it drops. For every employee who risks his job by testing the limits of the statute, many more will choose the cautious path and not speak at all" (*Arnett v Kennedy*, 416 US 134, 94 SCt 1633 [1974] [J. Marshall, dissenting]).

B. Likelihood of Petitioner's Success on the Merits

Except for one example, the record fails to indicate that any of the principals noted by petitioner applied the factors outlined in the Regulation in making their determinations to grant a religious observance day to those who asked. There are indications in the record that support petitioner's claim that teachers who qualified for leave on Holy Thursday were nonetheless denied. For example, three of 49 teachers requested a religious observance day, and were subject to questioning about their practices when none was necessary under the factors outlined by the March 22, 2005 email. Likewise, six of 47 teachers of another school were initially granted leave to observe Holy Thursday; but upon revocation of the principals' permission, these teachers reported to work instead of observing their religious holiday, which might have been granted upon application of the March 22, 2005 email. Therefore, there is a likelihood of success on the merits of petitioner's claim.

C. Irreparable Harm

It has been held that the loss of employment is compensable and thus, does not constitute irreparable harm (*De Lury v City of New York*, 48 AD2d 595, 378 NYS2d 49 [1975]; *Stewart v Parker*, 41 AD2d 785, 341 NYS2d 189 [3d Dept 1973]). Here, if teachers take a day off for religious observance without approval from their principals, they may be disciplined, suspended, or fined, which are injuries compensable by money damages. However, the chilling effect upon,

and loss of, one's ability to practice and observe one's religion does constitute irreparable harm (*see Bery v City of New York,* 97 F3d 689, 693-694 [2d Cir 1996], *cert. denied* 520 US 1251, 117 SCt 2408 [1997], *quoting Elrod v Burns,* 427 US 347, 373, 96 SCt 2673 [1976] ["[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"]).

D. Balance of the Equities in the Petitioner's Favor

Undoubtedly, a school's safety is dependent upon the presence of its teachers, administrators and deans. However, the detriment suffered by those who felt compelled to forsake their religious beliefs outweigh any detriment suffered by respondents in withholding discipline against teachers who observed Holy Thursday. Indeed, with the passing of Holy Thursday, respondents' concern of chaos and instability due to teachers observing Holy Thursday proved otherwise.

Conclusion

Based on the foregoing, it is hereby

ORDERED that respondents Board of Education of the City School District of the City of New York ("BOE"), Joel Klein, and the City of New York are (1) prohibited from disciplining or altering the employment status of any UFT-represented employee for taking a religious observance day or personal business day in observance of The Feast of Maundy ("Holy Thursday") and (2) prohibited from taking any other negative employment action against such employees pending resolution of a grievance pursuant to the Collective Bargaining Agreement

between the UFT and the BOE, until the grievance and arbitration procedures have been completed. And it is further

ORDERED that the respondent's cross-motion to dismiss the petition is denied; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the parties appear in Part 35 for a preliminary conference on April 29, 2009, 2:15 p.m. as to the remaining claims in the petition.

This constitutes the decision and order of the Court.

Dated: December 15, 2008

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

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