

Serafin v New York State Dept. of Health

2021 NY Slip Op 32077(U)

September 24, 2021

Supreme Court, Albany County

Docket Number: 908296-21

Judge: Christina L. Ryba

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

GREGORY SERAFIN, on behalf of
himself and on behalf of others similarly situated;
AZIMA RASIWALA, D.O., on behalf of
herself and on behalf of all others similarly situated;
KATHLEEN MCGOWAN, on behalf of herself
and on behalf of all others similarly situated;
DEBORAH CONRAD, on behalf of herself
and on behalf of all others similarly situated;
RENEE ROGERS, on behalf of herself
and on behalf of all others similarly situated;
and DAVID DIPIETRO, MEMBER OF THE
ASSEMBLY FOR NEW YORK'S 147th ASSEMBLY
DISTRICT, on his own behalf in his official capacity
and on behalf of all similarly situated members of the
New York State Legislature,

DECISION AND ORDER
Index No. 908296-21

Petitioners,

-against-

NEW YORK STATE DEPARTMENT OF HEALTH;
NEW YORK STATE PUBLIC HEALTH AND HEALTH
PLANNING COUNCIL; HOWARD ZUCKER, NEW
YORK STATE COMMISSIONER OF HEALTH

Respondents.

(Albany County Supreme Court, Part 1)
(Justice Christina L. Ryba, Presiding)

APPEARANCES:

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Ryba, J.,

Pending the outcome of the underlying action for declaratory and injunctive relief, petitioners seek a temporary restraining order (“TRO”) enjoining respondents New York State Department of Health, the New York State Public Health and Health Council, and Howard Zucker, New York State Commissioner of Health (hereinafter “Respondents”) from applying or enforcing 10 NYCRR § 2.61 which provides that “covered entities” - which includes the hospitals and nursing homes where petitioners work - “shall continuously require personnel to be fully vaccinated against COVID-19, with the first dose for the current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities” (10 NYCRR § 2.61 [c]). The challenged regulation was adopted on an emergency basis pursuant to emergency rule-making procedures of the State Administrative Procedure Act (“SAPA”) and is effective only for the 90-day period of August 26, 2021 through November 23, 2021.

The Court heard oral argument via Teams on September 23, 2021 at which time respondents opposed the TRO, arguing in part that the emergency regulation was adopted in full compliance with all SAPA requirements applicable to emergency rule making. Petitioners argue, however, that the emergency regulation lacks a statutory basis, is unconstitutional, violates petitioners’ substantive due process rights and represents an impermissible circumvention of the public hearing and notice and comment requirements that ordinarily accompany rule making.

For reasons set forth below, petitioners’ application for TRO is **denied in part and granted in part**. “A temporary restraining order may be granted pending a hearing for preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had” (CPLR 6301).

Here, the regulatory impact statement for the adoption of 10 NYCRR § 2.61 states, among other things, that “Public Health Law 225(5) authorizes the Public Health and Health Planning Council (PHHPC) to issue regulations in the State Sanitary Code pertaining to any matters affecting the security of life or health or the preservation and improvement of public health in the State of New York, including designation and control of communicable diseases and ensuring infection control at healthcare facilities and any other premises.” The regulatory impact statement further states that Public Health Law § 2800 specifies that “hospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health.” Within the “Needs and Benefits” section of the regulatory impact statement it provides in part that, “the Centers for Disease Control and Prevention (CDC) has identified a concerning national trend of increasing circulation of the SARS-CoV-2 Delta variant.” Furthermore, it states that “recent New York State data show that unvaccinated individuals are approximately 5 times as likely to be diagnosed with COVID-19 compared to vaccinated individuals. Those who are unvaccinated have over 11 times the risk of being hospitalized with COVID-19.” Therefore, “in response to this significant public health threat, through emergency regulation, the Department is requiring covered entities to ensure their personnel are fully vaccinated against COVID-19, and to document evidence thereof in appropriate records.”

In view of the foregoing and considering all of the evidence and arguments offered by the parties, the Court concludes that petitioners have not demonstrated a likelihood of success on the merits of their claim that 10 NYCRR § 2.61 lacks a statutory basis and was adopted in violation of constitutional and regulatory requirements. Moreover, the Court is not persuaded that petitioners have demonstrated that a balance of equities favors them and outweighs the public

interest. Indeed, the emergency regulation indicates that the “Department has determined that these emergency regulations are necessary to control the spread of COVID-19 in the identified regulated facilities or entities.” Furthermore, according to the Department of Health, “current circumstances and the risk of spread to vulnerable resident and patient populations by unvaccinated personnel in these settings necessitate immediate action and pursuant to [SAPA] Section 202(6), a delay in the issuance of these emergency regulations would be contrary to public interest.” Finally, in light of petitioners’ failure to demonstrate a likelihood of success on the merits and a balancing of equities in their favor, the Court need not consider whether petitioners satisfied the final prong of irreparable harm. In any event, while the irreparable nature of the alleged legal harm was debated by the parties at oral argument, this Court finds that early consideration of the merits of the underlying proceeding may ameliorate the claimed harm.

However, notwithstanding the Court’s conclusion that petitioners have not demonstrated their entitlement to a TRO with respect to the COVID-19 vaccination mandate set forth in 10 NYCRR § 2.61, the Court finds that the regulation impermissibly prohibits covered entities from considering requests for a religious exemption from the vaccination mandate. 10 NYCRR § 2.61 provides a single exemption from the vaccination mandate as follows (emphasis added):

“covered entities are also required to review and make determinations on medical exemption requests, and provide reasonable accommodations therefore to protect the well-being of the patients, residents and personnel in such facilities.”

Notably, one of the petitioners in this matter has submitted a sworn affidavit indicating that she “would pursue a religious exemption to this vaccine requirement if one was available.” She further avers that she is “unwilling to compromise [her] religious beliefs” to comply with the vaccination mandate. Given the failure to provide employees of covered entities the opportunity to seek a religious exemption, and in view of recent developments in comparable cases within the

State (see, e.g., Dr. A. Nurse A., et al v. Kathy Hochul, 1:21 CV-1009 [J. Hurd, September 14, 2021]), the Court finds it appropriate to enjoin respondents from enforcing 10 NYCRR § 2.61 to the extent that it prohibits covered entities from reviewing and making determinations on religious exemption requests.

With regard to the remaining request for temporary relief enjoining and restraining respondents from enforcing or applying 10 NYCRR § 2.61 on the effective dates of the vaccine mandates, notwithstanding review and determinations on medical and religious exemptions, the request is **denied**.

For all the foregoing reasons, plaintiffs' request for TRO is **denied in part and granted in part**, without costs; and it is

ORDERED that petitioners' application for a temporary order enjoining and restraining respondents from enforcing or applying 10 NYCRR § 2.61 is granted in part, only to the extent that respondents are barred from enforcing any requirement that covered entities cannot consider or grant an application for a religious exemption from the vaccination mandate set forth in 10 NYCRR § 2.61; and it is further

ORDERED that all other requests for temporary relief are otherwise DENIED.

This constitutes the Decision of the Court, the original which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, counsel for petitioner shall promptly serve notice of entry on all other parties (see Uniform Rules for Trial Courts [22 NYCRR § 202.5-b [h][1], [2]).

**SO ORDERED,
ENTER.**

Dated: September 24, 2021



Hon. Christina L. Ryba
Supreme Court Justice

