Adams v City of New York
2022 NY Slip Op 30082(U)
January 5, 2022
Supreme Court, New York County
Docket Number: Index No. 151889/2021
Judge: Verna Saunders
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART** **36M**

Justice

---X

RANDI ESTHER ADAMS,
Plaintiff,

- v -

THE CITY OF NEW YORK; BILL DE BLASIO, as MAYOR OF THE CITY OF NEW YORK; THE NEW YORK CITY DEPARTMENT OF HEALTH and MENTAL HYGIENE; and DAVE CHOKSHI, as COMMISSIONER,
Defendants.

---X

INDEX NO. 151889/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 38, 39, 40, 41

were read on this motion to/for **ARTICLE 78**.

Petitioner commenced this Article 78 proceeding seeking to challenge the New York City Department of Health and Mental Hygiene's (DOHMH) failure to restore her to payroll following a pre-hearing thirty-day suspension for disciplinary charges and for its failure to reimburse her for losses incurred as a result of the suspension.

On or about September 30, 2020, petitioner, a school nurse employed by DOHMH and assigned to Alfred E. Smith High School, was ordered to leave the school premises. (NYSCEF Doc. No. 3). On December 23, 2020, petitioner was served with disciplinary charges indicating a violation of the Standard of Conduct Rule 3.10, refusing to obey any oral and/or written direct order of a supervisor and Rule 3.24, conduct prejudicial to good order and discipline. (NYSCEF Doc. No. 4, *Notice and Statement of Charges*). Specifically, petitioner was charged with violating DOHMH Office of School Health protocols requiring that "all students and staff must always wear face covering on school grounds," Department of Education protocol requiring all individuals on school property wear a face covering, and the COVID-19 School Health Policy which states that "physical distancing guidelines and mandatory use of face coverings must be enforced for all individuals while on school property."

According to the charge specifications, petitioner was informed that she would be permitted to return to work if she complied with the face covering protocols, but she refused and was absent from work from October 1, 2020, through December 18, 2020. Petitioner was also charged with being absent from work without authorization from March 30, 2020 through August 31, 2020.

With respect to these charges, an OATH pre-trial conference was scheduled for March 1, 2021 and trial was slated to commence on March 16, 2021.

According to petitioner, while she was never formally notified of her suspension, she was effectively suspended without pay as DOHMH refused to allow her to return to work. Petitioner contends she has not been restored to pay roll and thus, DOHMH is in violation of New York State Civil Service Law §75(3) which states that pending the hearing and determination of charges of misconduct an employee may be suspended without pay for a period not exceeding thirty days. Petitioner submits that courts have held that an employee suspended for a period in excess of thirty days may recover back pay provided the delay in disposition of disciplinary charges are not occasioned by the employee. Here, petitioner argues that she was forced to withdraw from work and that she was not served with charges until months after she was instructed to leave school premises. As such, petitioner maintains that any delay in disposition is caused by DOHMH, and petitioner is entitled to back pay, benefits, and restoration to payroll. Petitioner avows that DOHMH's refusal to return her to payroll and reimburse wages and benefit is arbitrary and capricious.

Respondents aver that during the COVID-19 pandemic, petitioner refused to wear a mask or face shield when she reported to Alfred E. Smith Career and Technical Educational High School for her position as a Junior Public Health Nurse. As a result, petitioner was instructed to leave the school if she refused to comply with the mandatory safety guidelines requiring the use of a face mask or shield. Petitioner was also advised that, alternatively, she could request a reasonable accommodation seeking to work remotely provided she tendered support to demonstrate that the accommodation was medically necessary. Respondents argue that petitioner both failed to submit a reasonable accommodation request and to report to work, thus any damages sought are created by her own conduct. Respondents contend that DOHMH, in partnership with the New York City Department of Education (DOE), have a nondelegable duty to manage its agency, including the ability to make decisions regarding management of its employees during the ongoing COVID-19 pandemic and thus, challenges such as petitioner's contentions here are not justiciable.

Respondents further argue that petitioner failed to allege facts constituting a violation of New York State Civil Service Law § 75(3) insofar as petitioner has not provided any facts or evidence to support her claim that she was suspended. Respondents assert that DOHMH's records demonstrate that petitioner was absent from work after September 30, 2020 as she refused to comply with the mask policy. (NYSCEF Doc. No. 21). Specifically, on October 1, 2020, petitioner e-mailed DOHMH asking to be excused from wearing a mask due to medical reasons. Petitioner was informed that she was required to request a reasonable accommodation by completing the requisite forms and providing medical documentation stating the reason for her accommodation. Petitioner was also informed that she could return to work if she complied with safety protocols requiring the use of a mask on school grounds or she could take leave while the accommodation request was being processed. On October 28, 2020, petitioner e-mailed her accommodation request indicating that she is seeking to work from home due to her age however, no medical documentation was provided. In response, DOHMH informed petitioner that an accommodation could not be made on the basis of age but had to be based on disability/medical condition, pregnancy, domestic violence, or religion. Petitioner's response was that her request could be considered medical because persons over 65 years of age were at greater risk of death from contracting COVID-19. As such, respondents argue that petitioner's request for an accommodation based on her fear of contracting COVID-19 directly contradicts

her refusal to wear a mask while on school property. Additional e-mails were exchanged whereby petitioner was informed that medical documentation would be necessary to process her request but according to respondent, no medical information was ever provided thus, the accommodation request was not complete. Respondents maintain that petitioner was aware that she could return to work at any time provided she agreed to comply with the mask requirement, or she would be required to take leave while her request were being processed. (NYSCEF Doc. Nos. 20-27).

Respondents further argue that petitioner has continuously refused to report to work or provide medical documentation supporting a reasonable accommodation. Namely, in January 2021, DOHMH activated all nurses to report to a vaccination site starting January 11, 2021 for a mandatory assignment. Nurses who opted not to accept the assignment would be required to use personal leave or file for a reasonable accommodation. Respondents aver that petitioner refused the assignment indicating to the High School Nursing Director Margaret Ostafin, that she "will not wear a mask" and further that "You are not Mommy telling your little girl to do something over and over again because eventually she will do what Mommy says. I am a registered professional nurse. You are the high school nursing director. New York State has labor laws. New York State has a law about wearing masks. You have to follow those laws." (NYSCEF Doc. No. 35). As a result of her refusal, petitioner was again charged with refusing to obey any oral and/or written direct order of a supervisor and conduct prejudicial to good order and discipline. (NYSCEF Doc. No. 34). Petitioner was also charged with violating Rule 3.6 for being uncivil or discourteous in dealings with the public or another City employee. Hence, respondents contend that petitioner was not suspended from September 30, 2020; she elected not to report to work and comply with safety protocols and she failed to submit a request for a reasonable accommodation complete with the required medical documentation.

Further, respondents contend that the mask policy is not arbitrary or capricious as similar mandates are imposed upon the general public by the governor, as well as, by the United States Center for Disease Control (CDC). Respondents assert that while limited exceptions can be made to the mask mandate, medical documentation is required to support an accommodation. Insofar as petitioner presented no medical documentation to support a deviation from the policy and refused to return to work and comply with the mask policy, respondents argue she is not entitled to compensation.

In reply, petitioner argues, in sum and substance, that she was suspended for a period longer than thirty days in violation of Civil Service Law § 75(3), the matter is justiciable as it pertains to the violation of Civil Service Law, and that all references to alleged misconduct outside of the period raised in the petition, October 30, 2020 through February 4, 2021, should be stricken as unnecessary, scandalous, and prejudicial under CPLR 3024(b).

In an Article 78 proceeding, the scope of judicial review is limited to whether an administrative agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law. (CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991].) A proceeding under Article 78 "shall not be used to challenge a determination ...which is not final or can be adequately reviewed by appeal to a court or to some other body or

officer" (CPLR 7801 [1]). To challenge an administrative determination, the agency action must be final and binding upon the petitioner (*Walton v. New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]). A determination subject to review under Article 78 exists when, first, the agency "reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party" (*id.*).

New York State Civil Service Law § 75(3) states, in pertinent part, that "pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days…."

When applying the applicable law to the facts in this case, this court finds that petitioner has failed to demonstrate entitlement to the relief sought herein.

As a result of the COVID-19 pandemic, in March 2020 a state of emergency was declared in the State of New York. Following the declaration were several executive orders issued by the governor. One such executive order annexed to the respondents' papers includes a directive that persons "over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain or when not maintaining social distance." (NYSCEF Doc. No. 11, Executive Order). Similarly, DOE and DOHMH issued a COVID-19 School Health Policy requiring face masks be worn in addition to other safety protocols including, but not limited to, daily health screenings, temperature screenings, maintaining a distance of six feet when feasible, washing and sanitizing hands regularly, and staying home when sick or after being in close contact with a person with COVID-19. (NYSCEF Doc. No. 12, *COVID-19 School Health Policy*).

In September 2020, when in-person learning resumed, petitioner was asked to leave her assignment at Alfred E. Smith High School due to her refusal to comply with health and safety protocols occasioned by the COVID pandemic, to wit: wearing a face mask or covering on school property. (NYSCEF Doc. Nos. 20-21). The next day, petitioner met with the director of nursing regarding the mask mandate and was informed that she could request a reasonable accommodation. (NYSCEF Doc. No. 22). Petitioner requested an accommodation until the mask mandate was lifted and asserted that she could not wear a mask due to medical reasons. (NYSCEF Doc. No. 23). When asked to provide medical documentation to support her request, she stated that she is over 65 years of age and thus is at greater risk of death if she contracted COVID-19 and should be permitted to work from home. (NYSCEF Doc. No. 24). When petitioner was informed that an accommodation could not be made on the basis of age, she sought permission to return to work without being required to wear a mask. (NYSCEF Doc. No. 25). DOMHM restated to petitioner that if she is unable to tolerate wearing a mask due to a disability or medical condition she would be required to apply for a reasonable accommodation. She was also informed that she may return to her in-school assignment if she agrees to comply with the mask policy or she could elect to take leave while her request was being processed. (NYSCEF Doc. No. 25). Petitioner failed to return to work due to her continuous refusal to comply with the mask policy and she failed to properly apply for a reasonable accommodation as

the requisite medical documentation was not provided. (NYSCEF Doc. Nos. 26 -27). Consequently, this court rejects petitioner's argument that she was forced to withdraw from work and that she was effectively suspended as of September 30, 2020. The record is clear: petitioner does not wear masks, refuses to wear a mask on school property or at any assignment, elected not to return to work due to her refusal to wear a mask, and failed to submit proof of any medical condition prohibiting her from the use of a mask. It is perplexing to this court that petitioner would raise the dangers of COVID-19 for persons over the age of 65 as a basis to work remotely yet request to report to work unmasked and arguably, less protected from contracting COVID-19. Based upon the foregoing, the court finds that petitioner was not suspended from September 30, 2020 through December 18, 2020 as alleged and thus, no violation of New York State Civil Service Law § 75(3) occurred.

With respect to the petitioner's request to deem respondent's submission of allegations dating back to the onset of the pandemic as outside of the scope of controversy, prejudicial, and scandalous, the court rejects this argument as without merit. Firstly, the statement of charges annexed to the petition indicates that petitioner was charged with unauthorized absence from work from March 30, 2020 through August 31, 2020, in addition to the charges pertaining to her failure to comply with mask mandates. Secondly, the full statement of facts, starting from the onset of the pandemic, are salient to the issue of the mask policy and how it came to exist. The facts also illustrate respondents' efforts to keep its employees engaged, working and on payroll during the shut-down and re-opening phases of the pandemic. The facts also show petitioner's rejection of various duties as it pertained to work responsibilities during this time. Specifically, DOHMH sent a series of e-mails outlining remote work provisions, tasks, and assignments. (NYSCEF Doc. Nos. 14-16). However, petitioner failed to report to work remotely or complete the tasks listed. (NYSCEF Doc. No. 17-19). Petitioner's refusal to cooperate with DOHMH regarding remote work responsibilities resulted in her being charged with unauthorized absence from work. Despite same, respondents continued to offer petitioner opportunities to engage and contribute. During the mask policy issue, respondents remained consistent that petitioner was permitted to return to work while her accommodation request was pending, provided she comply with the mask policy. When all DOHMH nurses were activated to a mandatory vaccination site assignment, petitioner opted not to serve as she refused to wear a mask. Further, petitioner's decision not to work due to the mask policy has not been supported by medical documentation. Thus, the facts presented by respondents, demonstrate that petitioner was, in fact, not suspended during the time frame asserted. Petitioner was not formally suspended until February 4, 2021, and April 7, 2021 respectively. (NYSCEF Doc. No. 28, 33).

Moreover, it is arguable that this proceeding is procedurally improper as no final or binding determination was made at the time of its filing and petitioner failed to exhaust all administrative remedies prior to initiating this proceeding. However, assuming *arguendo* that the petition is properly before the court, this court finds that there was no violation of Civil Service Law § 75(3) and that the mask policy was and is not arbitrary or capricious. As articulated by petitioners, to protect the public-at-large against the risks associated with contracting COVID-19, similar mandates are imposed on those navigating public spaces and closely interacting with the public. With the ever-rising death toll caused by this pandemic and the potential severe impact on children and adolescents, schools and municipalities are charged with implementing protocols and guidelines to promote public health and safety during this on-

going emergency. Here, it is inconceivable how petitioner, a school nurse, expects to remain on payroll while refusing to work and failing to provide any medical documentation in support of her request for a reasonable accommodation. Based on the foregoing, the petition is denied. All remaining arguments are either without merit or need not be addressed given the findings above and it is hereby,

ORDERED and **ADJUDGED** that the instant Article 78 petition seeking to challenge the New York City Department of Health and Mental Hygiene's failure to restore petitioner to payroll following a pre-hearing thirty-day suspension for disciplinary charges is denied; and it is further

ORDERED that the proceeding is dismissed, without costs and any relief not expressly addressed herein has nonetheless been considered and is expressly denied.

January 5, 2022

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	X	**CASE DISPOSED**			☐	**NON-FINAL DISPOSITION**	
	☐	**GRANTED**	X	**DENIED**	☐	**GRANTED IN PART**	☐ **OTHER**
APPLICATION:	☐	**SETTLE ORDER**			☐	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**			☐	**FIDUCIARY APPOINTMENT**	☐ **REFERENCE**