

**O'Reilly v Board of Educ. of the City Sch. Dist. of the  
City of N.Y.**

2022 NY Slip Op 30173(U)

January 20, 2022

Supreme Court, New York County

Docket Number: Index No. 161040/2021

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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CHRISTINE O'REILLY,

Petitioner,

- v -

THE BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, COMMUNITY
SCHOOL DISTRICT 24 OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK

Respondents.

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INDEX NO. 161040/2021
MOTION DATE 01/18/2022
MOTION SEQ. NO. 001

DECISION + ORDER,
JUDGMENT ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 20, 21,
22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for ARTICLE 75 & 78.

The petition to inter alia annul respondents' determination that petitioner be placed on
leave without pay and to vacate the underlying arbitration award is denied.

Background

This dispute concerns respondents' requirement that teachers get a Covid-19 vaccine or
seek an accommodation from respondents. Respondents explain that when the UFT (petitioner's
union) sought to bargain the implementation of respondents' "Vaccine Only" mandate, an
arbitrator stepped in to resolve the parties' dispute. That decision, dated September 10, 2021,
included the ability for teachers to seek medical and religious accommodations (NYSCEF Doc.
No. 4). It also provided that an unvaccinated employee who did not request an exemption could
be placed on leave without pay by respondents (id.).

The arbitrator's decision further provided that an employee placed on leave without pay could seek separation from respondents and, if the employee followed certain directives, then they could receive various benefits such as enhanced reimbursement for unused leave. Teachers could also choose to extend their leave without pay in exchange for receiving health benefits.

Petitioner, a tenured teacher, chose to ignore all of these options. She did not show proof she received a vaccination or that she tried to get an exemption and was placed on leave without pay pursuant to an email dated October 2, 2021 (NYSCEF Doc. No. 5). On October 13, 2021, she received another email informing her that she was going to receive her paycheck for the period ending October 15, 2021 and that while she was on leave without pay, she would receive medical benefits (NYSCEF Doc. No. 6).

Petitioner complains that she was not afforded notice and an evidentiary hearing as required by Education Law §§ 3020 and 3020-A. She argues that she was effectively terminated when she was placed on leave without pay and seeks a mandamus to compel respondents to give her a hearing. Petitioner maintains her dismissal entitles her to due process under the Education Law. Petitioner also claims that the arbitrator exceeded his power and his decision violates public policy.

Respondents point out that petitioner did not provide proof that she received a Covid-19 vaccine nor did she allege that she sought an exemption or accommodation from respondents. They observe that she seeks an order demanding that she be allowed to return to work without complying with the vaccine mandate. Respondents contend that the original vaccine mandate was heavily litigated and those challenges were unsuccessful; they also point to a challenge to the current policy (as espoused in the arbitrator's decision) and observe that a request for a preliminary injunction to stop the current policy was denied in federal court.

They argue that petitioner does not have standing to challenge the arbitration award because it was made to resolve a dispute between the UFT and respondents. Respondents contend that the failure to name UFT as a necessary party also compels the Court to dismiss this proceeding.

Petitioner contends that she does not question the legality of the vaccine mandate and instead insists that the arbitrator's award should be vacated only as it applies to her. She insists there is no evidence that this mandate is now a condition of employment and it is only a condition to enter a DOE building.

### **Discussion**

As an initial matter, it is important to clarify what the instant proceeding is, and isn't, about. It *is* about whether respondents are entitled to enforce the arbitrator's award; it is *not* about the validity of the vaccine mandate itself. That issue, as petitioner acknowledges, is not a part of this proceeding and is the subject of various litigation in both federal and state courts. This proceeding is petitioner's effort to argue, essentially, that respondents' decision to place her on leave without pay should have entitled to her receive the typical process provided to teachers under the provisions of the Education Law that apply to disciplinary hearings.

The Court agrees with respondents that placing petitioner on leave without pay was not discipline under the Education Law and instead was merely a response to petitioner's refusal to comply with a condition of employment. Courts considering various vaccine mandates have reached a similar conclusion (*We The Patriots USA, Inc. v Hochul*, 17 F4th 266, 294 [2d Cir 2021], *op clarified*, 17 F4th 368 [2d Cir 2021] [noting that vaccination was a condition of employment in the healthcare field]; *Garland v New York City Fire Dept.*, 2021 LRRM (BNA)

464267 [EDNY 2021] [concluding that the Fire Commissioner was, in light of the ongoing pandemic, entitled to require vaccination as a condition of employment]).

That same logic applies here. Discipline involves alleged misconduct, not a prerequisite to doing the job in the first instance. And the Court observes that respondents did not force petitioner or other UFT members to get vaccinated as in the case cited by petitioner (*c.f. C.F. v New York City Dept. of Health and Mental Hygiene*, 191 AD3d 52 [2d Dept 2020] [upholding a vaccine mandate, with medical exemptions, for measles in certain parts of Brooklyn]). In other words, petitioner's attempt to characterize her placement on leave without pay as analogous to committing misconduct is misguided. Instead, after extensive negotiations and an arbitration that included petitioner's union, respondent imposed a condition of employment that required teachers to get a vaccine or apply for certain accommodations. Alternatively, teachers could seek to leave their jobs by a date certain and get an *enhanced* payment for accrued time off or could opt to extend the leave without pay until September 5, 2022 and still get health benefits. For some reason, petitioner chose not to do anything.

The fact is that the UFT and respondents disagreed about the vaccine mandate and opted for an arbitration, which ultimately permitted exemptions and other options for teachers unwilling to get the vaccine. Those options provided petitioner with all the due process required. The timeline shows that she received ample notice. The arbitrator's decision is dated September 10, 2021 and she received the notice that she was being placed on leave without pay on October 2, 2021.

To be clear, petitioner does not allege that respondents improperly denied her requested exemption or accommodation or failed to fulfill another obligation created in the arbitrator's decision. In fact, she does not claim she tried to utilize any of the other options available to her.

Accordingly, the Court is unable to find that the decision to place her on leave without pay was arbitrary or capricious. Instead, she simply doesn't like the arbitrator's decision and doesn't want to follow it despite specifically stating that she does not question the legality of the mandate. That narrow and novel argument fails. As there is no issue of fact (there is no dispute plaintiff did not submit proof she got a vaccine or seek another option), there is no need for a trial pursuant to CPLR 7804(h).

Moreover, setting aside the merits discussion above, the Court also dismisses the petition on the ground that petitioner failed to include a necessary party (her union). Petitioner seeks to challenge the application of that arbitrator's decision and did not include a party that participated in the arbitration.

### **Summary**

The Court understands petitioner's apparent frustration with the additional condition of employment imposed by the arbitrator's decision. But frustration with that condition does not entitle her to an individualized and personalized exemption from the arbitrator's findings. She could have raised her dissatisfaction with her union and considered seeking relief against her union if it didn't act as she wished. Instead, petitioner seeks an end run around challenging the legality of the mandate by classifying it as discipline- a completely different situation. The requirement to follow the mandate at issue is, as stated above, a condition of employment and petitioner admits that she did not satisfy that condition or seek an exemption. Therefore, respondents were permitted to put her on leave without pay.

Accordingly, it is hereby

ORDERED that the cross-motion to dismiss is granted; and it is further

ADJUDGED that the petition is dismissed and the Clerk is directed to enter judgment accordingly upon presentation of proper papers therefor.

1/20/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE