

**Loiacono v Board of Educ. of the City Sch. Dist. of
the City of N.Y.**

2022 NY Slip Op 30758(U)

March 31, 2022

Supreme Court, New York County

Docket Number: Index No. 161076/2021

Judge: Laurence Love

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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. LAURENCE LOVE **PART** **63M**

Justice

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ELIZABETH LOIACONO,

Petitioner,

- v -

THE BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, COMMUNITY
SCHOOL DISTRICT 75 OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK

Respondent.

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INDEX NO. 161076/2021

MOTION DATE 01/18/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the Petition is resolved as follows:

On December 10, 2021, Petitioner commenced the instant hybrid Article 75 and Article 78 Petition seeking to compel the Respondents to allow Petitioner all of her due process rights and remedies under Sections 3020 and 3020-a of the State Education Law and vacating the decision of Arbitrator Martin F. Scheinman, dated September 10, 2021 wherein Petitioner argues that the Arbitrator exceeded his power in violation of the law and denied Petitioner the right to grieve the disciplinary actions of the Respondent, denied Petitioner the right to grieve the constructive firing of the Petitioner and effectively terminated and disciplined Petitioner without due process of the law enjoined by the state education law.

Petitioner contends that she began teaching in 2001, became a tenured teacher in 2004 and has remained a teacher in good standing since that time. On August 23, 2021, Mayor Bill DeBlasio and NYC Commissioner of Health and Mental Hygiene, David A. Chokshi, MD, announced a "Vaccine Only" mandate for Department of Education Employees, requiring all DOE employees

to show proof of at least one dose of vaccination against COVID-19 by September 27, 2021. On or about September 1, 2021, the United Federation of Teachers filed a Declaration of Impasse with the Public Employment Relations Board. The result of that Impasse was an arbitration with Martin F. Scheinman appointed as arbitrator. On September 10, 2021, the resulting arbitration decision was published, holding *inter alia* that teachers affected by the vaccine mandate could apply for medical and religious exemptions and further provided that employees who did not request an exemption could be placed on leave without pay by respondents and 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 did not provide Respondents with proof that she has been vaccinated, nor does she allege to have requested an exemption or accommodation from the DOE. On October 4, 2021, Petitioner was placed on leave without pay, resulting in the instant Petition.

Petitioner contends 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.

The applicable standard in an Article 78 proceeding is “whether [the] determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion.” CPLR § 7803(3). Administrative action is arbitrary when it is taken “without sound basis in reason” and “without regard to the facts.” *See Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974). “Even if the Court would have acted differently in the agency’s position, it may not substitute its judgment for that of the government. *See, e.g., Peckham v. Calogero*, 12


N.Y.3d 424, 431 (2009). “The decision need not be the best which could have been made and need not be free from flaws—it must only have a rational basis.” *Walker v. Franco*, 275 A.D.2d 627, 628 (1st Dep’t 2000).

It is well settled that the decisions of public health officials to declare mandatory vaccine requirements are not arbitrary, capricious or an abuse of discretion. See, e.g., *C.F. v. New York City Dept. of Health & Mental Hygiene*, 191 A.D.3d 52, 64-65 (2d Dep’t 2020). Further, the protections of Education Law § 3020-a are not relevant to this action. Section 3020-a hearings are not required in the context of employment qualifications “unrelated to job performance, misconduct, or competency.” *O’Connor v. Bd. of Educ.*, 48 A.D.3d 1254, 1255 (4th Dep’t 2008); see also, *Brown v. Bd. of Educ.*, 2009 N.Y. Misc. LEXIS 5475, *9-10 (Sup. Ct. N.Y. Co. 2009) (“The termination of Petitioner did not implicate the procedural protections of Education Law § 3020-a because Petitioner’s termination was due to her legal ineligibility to serve as a teacher, rather than any alleged misconduct or incompetence on her part.”) A vaccine mandate is a condition of employment, see, *We the Patriots USA, Inc. v. Hochul*, Nos. 21-2179, 21-2566, 2021 U.S. App. LEXIS 32880, at *52- 53 (2d Cir. Nov. 4, 2021) *opinion clarified*, No. 21-2179, 2021 U.S. App. LEXIS 33691 (2d Cir. Nov. 12, 2021); Additionally, Federal Courts ruling on the identical issue have reached the same conclusion, see, *Broecker v. N.Y.C. Dep’t of Educ.*, No. 21-CV-6387, 2021 U.S. Dist. LEXIS 226848, at *18-19 (E.D.N.Y. Nov. 24, 2021); *Garland, et al. v. New York City Fire Department, et al.*, No. 21 CV 6586 (KAM)(CLP), 2021 U.S. Dist. LEXIS 233142 (E.D.N.Y. Dec. 6, 2021). As such, Petitioner is not entitled to Article 78 relief.

Petitioner further contends that the arbitrator exceeded his powers in reaching his September 10, 2021 decision. Where, as here, the arbitration decision is the result of compulsory arbitration, judicial review pursuant to Article 75 requires a finding that that the arbitrator’s

determination was made “in accord with due process and supported by adequate evidence.” *Lackow v. Dep’t. of Educ. (or “Bd.”) of the City of N.Y.*, 51 A.D.3d 563, 567 (1st Dep’t 2008). “§ 3020(4)(a) authorizes the DOE and the UFT to enter into a collective bargaining agreement modifying the procedures set forth in § 3020-a.” *Adams v. N.Y. State Educ. Dep’t*, 2010 U.S. Dist. LEXIS 15635, at *31 (S.D.N.Y 2008). Here, Petitioner’s union has clearly done so and as such, Petitioner has been afforded due process. Further, Petitioner lacks standing to challenge the terms of the Impact Arbitration Award, *See Matter of Donas v. N.Y. City Dep’t of Env’tl. Protection*, 60 Misc 3d 1221(A), 2018 N.Y. Slip. Op. 51192(U), *12 (Sup. Ct., New York Co. 2018), and Petitioner has failed to join a necessary party, the United Federation of Teachers. As such, the instant Petition must be denied in its entirety.

ORDERED that the instant Petition is DENIED and DISMISSED in its entirety.

<u>3/31/2022</u> DATE					 LAURENCE LOVE, J.S.C.		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE