

Lebowitz v Board of Educ. of the City of N.Y.
2022 NY Slip Op 33436(U)
October 6, 2022
Supreme Court, New York County
Docket Number: Index No. 154876/2022
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE

PART

63M

Justice

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ELIZABETH LEBOWITZ,

Petitioner,

- v -

THE BOARD OF EDUCATION OF THE CITY OF NEW
YORK, COMMUNITY SCHOOL DISTRICT 18 OF THE
BOARD OF EDUCATION OF THE CITY OF NEW YORK,
UNITED FEDERATION OF TEACHERS

Respondent.

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INDEX NO. 154876/2022MOTION DATE 07/20/2022MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, and after oral argument held on July 20, 2022, the instant Petition and Respondent's cross-motion seeking dismissal of the instant Petition are resolved as follows:

Petitioner, Elizabeth Lebowitz ("Petitioner" or "Lebowitz") commenced the instant Petition by filing same on June 9, 2022, seeking an Order pursuant to CPLR Article 78 annulling the Respondents determination denying Petitioner a religious exemption and reasonable accommodation to a required series of Covid-19 vaccinations. Said Petition alleges as follows:

Petitioner, became a tenured teacher with the New York City Department of Education in 2000 ("DOE"). On or about August 24, 2021, Mayor DiBlasio and NYC DOHMH Commissioner David A. Chokshi announced a mandate requiring DOE employees to provide proof of vaccination before entering DOE buildings. The United Federation of Teachers challenged said requirement resulting in an arbitration decision by Arbitrator Martin F. Scheinman setting forth, *inter alia*, a procedure for evaluating religious and medical exemptions to the mandatory vaccination policy.

In accordance with said policy, on or about September 20, 2021, Petitioner submitted a request for religious accommodation and on September 22, 2021 same was denied by the DOE on the grounds that “Per the Order of the Commissioner of Health, unvaccinated employees cannot work in a Department of Education (DOE) building or other site with contact with DOE students, employees, or families without posing a direct threat to health and safety. We cannot offer another worksite as an accommodation as that would impose an undue hardship (i.e. more than a minimal burden) on the DOE and its operations.” Petitioner appealed said determination on September 23, 2021 and received confirmation that the appeal was forwarded to Scheinman Arbitration and Mediation Services (“SAMS”). On or about October 1, 2022, the parties attended an appeal hearing and thereafter on October 6, 2022 petitioner submitted a letter from Rabbi Avraham R. C. Sofer outlining her religious beliefs. On October 27, 2022, said appeal was denied. Thereafter, Petitioner appealed to a Citywide Panel. On February 15, 2022, Petitioner received a final denial of her appeal on the grounds that the “DOE has demonstrated that it would be an undue hardship to grant this accommodation to appellant given the need for a safe environment for in-person learning.” Said denial resulted in the filing of the instant Petition.

At the outset, while the Court is not and will not be questioning the sincerity of Petitioner’s religious beliefs, Petitioner’s accommodation letter, which Petitioner failed to annex to her Petition, clearly indicates that she is an Orthodox Jew who lives in Hewlett within Nassau County and the letter from Rabbi Sofer indicates that his synagogue is located at 1025 East 13th Street, Brooklyn NY 11230. It is difficult to understand how Petitioner would be a member of a Brooklyn based orthodox synagogue under those circumstances but as stated same is not relevant for this discussion.

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.” *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974); see *Ward v. City of Long Beach*, 20 N.Y.3d 1042, 1043 (2013). “[T]he Court may not upset the agency’s determination in the absence of a finding...that the determination had no rational basis.” *Mid-State Mgmt. Corp. v. New York City Conciliation and Appeals Bd.*, 112 A.D.2d 72, 76 (1st Dep’t 1985), affirmed 66 N.Y.2d 1032 (1985). The Court may not substitute its judgment for that of the government. See, *Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009) (“[E]ven if the court concludes that it would have reached a different result than the one reached by the agency,” the court “must sustain the determination,” provided that it is “supported by a rational basis.”); *Arrocha v. Bd. of Educ.*, 93 N.Y.2d 361, 363 (1999). Accordingly, Respondents must only establish that there was a rational basis for the determination.

The September 22, 2021 initial determination specifically cites undue hardship as the reason for denial. Petitioner fails to include a copy of the October 27, 2021 decision of the independent arbitrator for this Court’s consideration, including only an e-mail informing Petitioner of the decision and placing Petitioner on Leave Without Pay status. The February 15, 2022 City of New York Reasonable Accommodation Appeals Panel determination also states that the “DOE has demonstrated that it would be an undue hardship to grant this accommodation to appellant given the need for a safe environment for in-person learning.”

Petitioner contends that Lebowitz’s request to work remotely full time would eliminate the need for her to take the required vaccination. Were Petitioner the only person in this situation, the request to work remotely full time would be entirely reasonable. However, as over 3,300 DOE

staff have requested religious accommodations, allowing all of them this same exemption would cause the DOE to bear significant and unreasonable costs. The DOE asserts in its Position statement that “as a general matter, relieving school-based employees of their school-based functions imposes an undue hardship on DOE by requiring the DOE to identify—or create—alternative assignments outside of school buildings. Allowing such employees to remain in school settings unvaccinated, even with other safeguards like masking and testing, would present an unacceptable risk to schoolchildren, staff, and others.” Respondents continue “that creating such alternative assignments poses an undue hardship. The DOE has expended and would continue to expend significant resources to create alternative assignments that amount to employees with exemptions generally performing non-essential functions while DOE pays for a second person to perform the essential functions of the exempted employee’s position.”

While Petitioner objects to the consideration of said Position statement as it is undated and unsigned, it is entirely responsive to the issue of whether the requested accommodation is reasonable based upon the standards set forth in the NYC Religious Accommodation Guidelines annexed to Petitioner’s Petition. Specifically, the agency is directed to consider: the nature and cost of the accommodation, the overall financial resources of the facility and agency, and the type of operations of the agency. The number of individuals who will need the accommodation is also specifically listed as a factor to consider.

On these subjects the Position statements specifically alleges that “Other than a small program for medically fragile students, all DOE school programs are currently conducted in person, and all DOE staff are expected to work in person.” “This employee’s position necessarily requires them to be in close contact for prolonged periods of time indoors with students, many still unvaccinated.” “More than 3,300 DOE staff have requested religious exemptions (far greater than

the number of requests for medical exemptions). In light of these numbers, granting an exemption from the Vaccine Mandate would require the DOE to bear significant costs and operational difficulties. These include (1) identifying or creating sufficient alternative assignments, and (2) hiring and training additional staff to perform the exempted employee's essential job functions while continuing to pay the exempted employee—effectively requiring the DOE to pay two salaries for one position, and to rely on a replacement for an undetermined period of time. Such costs and uncertainty negatively impact the ability of schools to plan, budget, and effectively support students.” The rest of the Position statement further establishes exactly why accommodating the requests of Petitioner would result in an undue hardship. Respondents having established a rational basis for denying the instant religious accommodation, it is hereby

ORDERED that the instant Petition is DENIED in its entirety; and it is further

ORDERED that Respondents' cross-motion seeking dismissal of the instant Petition is GRANTED in its entirety.

10/6/2022

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

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REFERENCE

LAURENCE L. LOVE, J.S.C.