

Brousseau v New York City Police Dept.
2022 NY Slip Op 33734(U)
November 1, 2022
Supreme Court, New York County
Docket Number: Index No. 157739/2022
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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JEFFREY BROUSSEAU,

Petitioner,

- v -

THE NEW YORK CITY POLICE DEPARTMENT, THE
CITY OF NEW YORK

Respondents.

INDEX NO. 157739/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-33
were read on this motion to/for Article 78.

The petition is granted to the extent that petitioner is entitled to a religious exemption from the vaccine mandate imposed on police officers in New York City.

Background

Petitioner is a police officer with the NYPD. He submitted an application requesting an exemption from the COVID-19 vaccine mandate on October 24, 2021 (NYSCEF Doc. No. 1 at 4). In his letter, petitioner stated that he was born and raised in the Catholic faith and his understanding of the Bible led him to believe that “immunizations [are] contrary to [his] sincere and genuine religious belief,” (NYSCEF Doc. No. 4). As a result, he claimed he could not get a vaccine because it interfered with his religious beliefs (*id.*).

On November 30, 2021, respondents denied petitioner’s initial request for a religious exemption (NYSCEF Doc. No. 31). The denial simply stated that petitioner’s request was denied (*id.*). Petitioner appealed this decision on December 5, 2021, and wrote a second letter detailing

his religious objections to receiving the COVID-19 vaccine (NYSCEF Doc. No. 32).

Respondents re-issued their initial denial on February 8, 2022 in a “form letter” in which three boxes were checked as reasons for the denial (NYSCEF Doc. No. 33). These reasons were “Objection was personal, political, or philosophical”, “Insufficient or missing religious documentation,” and “Written statement does not set forth how religious tenets conflicts with vaccine requirement,” (*id.*). Finally, on August 31, 2022, respondents denied petitioner’s appeal to a City Wide panel in an email simply stating, “Does Not Meet Criteria,” (NYSCEF Doc. No. 19). Petitioner commenced this proceeding, and the Court granted a temporary restraining order preventing petitioner from being terminated from his position.

Petitioner contends that the agency’s denial of his exemption was arbitrary and capricious because respondents did not cite any specific item from the record to support their denial. Additionally, petitioner argues that the respondent’s decision is arbitrary and capricious because professional athletes and performing artists are not subject to the vaccine mandate despite working in spaces operated by New York City.

In opposition, respondents claim that petitioner was informed of the basis for the denial of his request. Respondents contend the final decision had a rational basis, and that the form letter with explanatory boxes was recently approved by a court as containing sufficient explanations. Moreover, respondents argue that petitioner waived the argument that the February 8, 2022 denial did not adequately explain the reasons for denying the request because petitioner failed to indicate he ever received the second denial and did not address this letter in his petition. Additionally, respondents state that the documents petitioner submitted did not support his claim that his religious beliefs precluded him from becoming vaccinated. Respondents also state that petitioner’s concern regarding the use of animal products in development of the vaccines is

misguided as no animal products were used in developing any of the vaccines. Finally, respondents contend that petitioner did not establish that his purported religious beliefs were sincere because he did not provide any information demonstrating how his religious beliefs conflict with the vaccine requirement. Respondents request that if the Court does not deny the petition, the Court remand the matter back to respondents for re-consideration of petitioner's claims.

Discussion

In an article 78 proceeding, “the issue is whether the action taken had a rational basis and was not arbitrary and capricious” (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*id.*). “If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable” (*id.*). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

The Court grants the petition only to the extent that petitioner is entitled to a religious exemption from the Covid-19 vaccine mandate and may not be terminated by the NYPD due to a lack of Covid-19 vaccine.

In support of his application for a religious exemption, petitioner pointed to his religious upbringing and his views about the vaccines. In response to this letter, respondents issued a blanket denial with no explanation. When petitioner appealed, respondents issued a second denial with three reasons checked off. The issue for this Court is the three reasons cited are conclusory and vague. They do not assess petitioner's specific reasons for requesting a religious

exemption or analyze why respondents do not credit petitioner's assertions. There is no evidence, from that decision (or any other in this record), that respondents even read petitioner's application.

The first reason identified was that petitioner's "Objection was personal, political or philosophical." While that may be a rational justification for denying a request for a religious exemption, it must be supported by an explanation as to *why* petitioner's objections were not religious in nature. Respondents' memorandum of law in opposition provided a robust analysis of petitioner's claims and gave a clear rationale behind the conclusions respondent reached (NYSCEF Doc. No. 26) – had this been in the initial denial or in the City Wide panel's decision, then that would have been more than enough for this Court to uphold the decision. But it wasn't. And the issue is not what the respondents' lawyers in Supreme Court think – the issue is what was the basis of the decision denying petitioner's request. Because there is no indication as to why the decision was made, the Court is left to guess or speculate about whether respondents viewed petitioner's objection as personal or political or philosophical, two of these three reasons, or, maybe, all three.

Of course, respondents cannot supplement the record by raising a justification for the first time in this proceeding. "Notably, a fundamental principle of administrative law long accepted limits judicial review of an administrative determination solely to the grounds invoked by the respondent, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis.

Consequently, neither Supreme Court nor this Court may search the record for a rational basis to support respondent's determination, or substitute its judgment for that of respondent" (*Matter of*

Figel v Dwyer, 75 AD3d 802, 804-05, 907 NYS2d 75 [3d Dept 2010] [internal quotations and citations omitted]).

The second reason, that petitioner provided “Insufficient or missing religious documentation,” is also unaccompanied by any explanation whatsoever. There is no indication as to what constitutes sufficient documentation or what documents are missing from petitioner’s request. Once again, respondents’ attorneys describe the process for finding a religious belief to be “sincere” in their opposition brief, and indicate that scientific or health-related personal beliefs are not sincerely held religious beliefs (NYSCEF Doc. No. 26 at 8). Again, this is what respondents’ counsel now argues, but because respondent did not put it in its decision, this Court has no idea what the decision maker below thought. Finding “insufficient or missing religious documentation” does not translate to finding an insincere religious belief.

The third reason – “Written statement does not set forth how religious tenets conflicts with vaccine requirement”—also contains no explanation. Similar to the second reason, respondents failed to elaborate on what more petitioner could have stated to indicate how his religious tenets prevent him from receiving the vaccine. Respondents had the opportunity to demonstrate why petitioner’s belief that the vaccine contained cells derived from animal tissues is wholly irrational and reeks of online disinformation campaigns. Respondents could have said leaders of the Catholic Church have decided that the vaccine does not conflict with Catholic beliefs. But they did not – they just checked a vague a box, which does nothing to create a record that this Court (or the petitioner) can rely on to understand the reasoning (if any) behind respondents’ decision.

Finally, after petitioner appealed to a City Wide Panel, petitioner was met with yet another decision devoid of any reasoning. The Panel simply found that petitioner “did not meet

criteria.” That determination is a textbook example of an arbitrary and capricious finding. It is completely lacking any reasoning. It does not indicate that anyone even read petitioner’s application. That decision could have been made by the flip of a coin and so the Court is unable to evaluate whether respondents had a rational basis for it. Even if the City Wide Panel incorporated or referenced the initial denial (*it did not*), the determination would still be irrational because the initial denial had no reasoning behind it either. Overall, there is no indication that anybody even read petitioner’s arguments until well after this proceeding was filed.

Critically, the Court emphasizes that the respondents set up a process by which petitioner and other police officers could request a religious exemption. This is not a situation, such as where an agency fires a probationary employee, where a governmental agency need not provide any reason for its decision (*e.g., Soto v Koehler*, 171 AD2d 567, 567 NYS2d 652 [1st Dept 1991]). Petitioner was entitled to a determination that addressed his specific reasons for requesting a religious exemption. Respondents need not write a book explaining their rationale; a brief explanation that acknowledged petitioner’s specific request was all that was necessary. But respondents did not do that.

Respondents’ request that the Court remand this proceeding for further consideration of petitioner’s arguments is denied. This Court cannot remand a matter just so one side – here, the agency -- can have another bite at the apple; that is unfair to the other side. Remand is appropriate, for example, where critical documents were only recently discovered and never considered or circumstances have changed to warrant both sides a “do-over”. Here, respondents had the chance to address petitioner’s arguments and provide a rationale for denying his request but decided instead to check a few boxes or give a four word “does not meet criteria” without

ever giving any indication whatsoever that anyone even read his request. Under these circumstances, because no reasons specific to petitioner were given for the determinations, this Court finds the decision was arbitrary and capricious. Therefore, the petition for an exemption from the Covid vaccine requirement is granted.

Petitioner's Other Claims

Petitioner's other requests for relief are denied. Among these claims are a request that the Court enjoin respondents from enforcing the vaccine mandate altogether, a declaration that respondents violated petitioner's constitutional rights and that respondents be enjoined from violating petitioner's constitutional rights. Petitioner failed to meet his burden and the Court denies this form of relief.

The vaccine mandate on city employees has been consistently upheld by various courts (*see e.g., Broecker v New York City Dept. of Educ.*, 21-CV-6387(KAM)(LRM), 2022 WL 426113 [ED NY 2022]; *Garland v New York City Fire Dept.*, 574 F Supp 3d 120 [ED NY 2021]).¹ Based on these decisions, there is no basis to find that the vaccine mandate violates petitioner's constitutional rights and, specifically, the free exercise clause. In fact, a vaccine mandate does not violate the free exercise clause under the New York State Constitution at all (*see C.F. v New York City Dept. of Health and Mental Hygiene*, 191 AD3d 52, 139 NYS3d 273 [2d Dept 2020] [finding that a vaccine mandate for measles did not violate the free exercise clause]).

¹ The Court recognizes, however, that a court of coordinate jurisdiction recently invalidated the vaccine mandate with respect to police officers as an impermissible new condition of employment (*see Police Benevolent Assn. of the City of New York v City of New York*, 2022 WL 4398685 [Sup Ct, NY County 2022]) and that notices of appeal have been filed in that case. That matter could, of course, preempt the individual dispute raised in this proceeding.

In other words, this proceeding is limited solely to petitioner's individual exemption request and respondents' arbitrary and capricious denial with respect to that application.

The Court also denies petitioner's request for legal fees (contained in the wherefore clause of the petition) as he did not cite any basis for this relief.

Summary

This Court recognizes that there have been many proceedings commenced by city employees who refused to get vaccinated; however, this decision is limited to the individual determination that respondent provided to this petitioner. That determination was wholly irrational because it was conclusory in nature and did not illustrate how petitioner failed to meet the necessary criteria for an exemption. Asserting boilerplate justifications without assessing petitioner's individual reasons is not a basis to terminate a police officer's employment.

However, the Court rejects petitioner's apparent effort to assert a facial challenge to the vaccine mandate itself or for relief relating to his constitutional rights. Petitioner's religious freedom was clearly protected because the very existence of a religious exemption request process, including a City Wide Panel appeal, demonstrates an opportunity for petitioner and those similarly situated to raise religious objections to the mandate.

The fact is that petitioner utilized the process afforded to him to seek an exemption from the vaccine mandate. He submitted the initial exemption request and then pursued an appeal. The minimum the respondents should do is show that they considered the employee's specific arguments and explain why an exemption is not appropriate. Here, the respondents did not even do that. Even after reading the respondents' decision, neither the petitioner nor this Court has any idea why the decision was made. As stated above, the City Wide Panel decision did not

incorporate or reference the initial denials of petitioner’s request. Respondents’ lackluster and wholly unsupported response is arbitrary and capricious and cannot serve as a basis to terminate him.

Accordingly, it is hereby

ORDERED that the petition is granted only to the extent that respondents’ determination denying petitioner’s application for a religious exemption is vacated; and it is further

DECLARED that petitioner is entitled to a religious exemption from the COVID-19 vaccine mandate and petitioner may not be terminated from the NYPD based upon the lack of the COVID-19 vaccine; and it is further

ORDERED that the petition is denied with respect to the remaining relief requested; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of petitioner and against respondents along with costs and disbursements upon presentation of proper papers therefor.

11/1/2022

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: