

**Police Benevolent Assn. of the City of N.Y., Inc. v
de Blasio**

2022 NY Slip Op 35028(U)

February 16, 2022

Supreme Court, Richmond County

Docket Number: Index No. 85229/2021

Judge: Lizette Colon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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POLICE BENEVOLENT ASSOCIATION OF THE CITY OF
NEW YORK, INC., on behalf of its members, PATRICK
J. LYNCH, as President of the Police Benevolent
Association of the City of New York, Inc., DANIEL
MURRO, CORY PILZER, CHRISTIAN PINEZ, ZANETA
BOJARSKA, TIANA GULIAMO, THOMAS LEONARDO,
MICHAEL GAGLIANO, DANIEL ORLEANS, and MATT
NALWASKY,

Present:
HON. LIZETTE COLON

Plaintiffs-Petitioners,

-against-

DECISION AND ORDER

BILL de BLASIO, in his official capacity as Mayor of
the City of New York; DAVID CHOKSHI, in his official
capacity as Health Commissioner of the City of New
York; DERMOT SHEA, in his official capacity as Police
Commissioner of the City of New York; NEW YORK
CITY DEPARTMENT OF HEALTH AND MENTAL
HYGIENE, NEW YORK CITY BOARD OF HEALTH, and
NEW YORK CITY POLICE DEPARTMENT,

Index No. 85229/2021

Defendants-Respondents.

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Colon, J.,

This Article 78 proceeding presents a challenge to municipal policies in
relation to the COVID-19 pandemic. While certain scientific issues are in dispute, the
government actions being challenged are clear. Petitioner Police Benevolent
Association of the City of New York, Inc. ("PBA") is the designated collective

bargaining unit for approximately 24,000 officers in the New York City Police Department ("NYPD"), with petitioner Patrick Lynch being the president of the PBA. The nine individually named petitioners are NYPD officers presently assigned to commands within Staten Island / Richmond County. Respondent Department of Health and Mental Hygiene ("DOHMH") is a New York City ("City") agency with jurisdiction over public health issues, with respondent New York City Department of Health ("DOH") being a board located within DOHMH. NYPD is the City's law enforcement agency and is charged with, inter alia, supervising the uniformed and civilian employees located therein. At the time of the original filing of this action, Respondent Mayor DeBlasio was the chief executive for the City while Respondents David Chokshi and Dermot Shea were the Commissioners of DOHMH and NYPD, respectively. After the 2021 elections and currently, Mayor Eric Adams is the chief executive for NYC, David Chokshi remains the Commissioner of DOHMH and the NYPD Commissioner is Keechant Sewell.

Starting in March of 2020, the City issued the first of many emergency orders in relation to the COVID-19 pandemic. The City generally, and through its agencies, has issued orders applicable to the general-public, to particular industries / activities, and to its workforce. As it pertains this action, on August 31, 2021, Mayor DeBlasio issued Executive Order No. 78 establishing a mandatory program for most

City employees. The order required that City employees either receive the full required dosage of a Centers for Disease Control ("CDC") or World Health Organization ("WHO") approved vaccine or submit to a system of weekly testing for COVID-19. The order applied to, inter alia, NYPD employees, including petitioners. The order required full vaccination or testing to commence by September 13, 2021. Petitioners have referred to the program under this order as "Vax or Test." The Vax or Test program was implemented by the NYPD for its employees, with the agency issuing operations orders and providing verbal instructions to its workforce.

On October 20, 2021, Dr. Chokshi, as Commissioner of DOHMH, issued an order mandating that most City employees provide proof of having received at least one dose of a COVID-19 vaccine by the close of business on October 29, 2021. The order further directs that any employee who had not submitted such vaccination proof must be excluded from their City location of employment on November 1, 2021. The DOHMH order includes the provision that "Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law." That same date, Mayor DeBlasio issued Executive Order No. 83, referencing Dr. Chokshi's order. The new executive order expressly modified Executive Order 78 to repeal those passages that allowed for a City employee to elect to either receive an approved vaccination or undergo a weekly testing program. Petitioners have

referred to the orders of October 20, 2021 as the "Vaccine Mandate."

On October 21, 2021, the City released a document entitled "FAQ on New York City employees Vaccine Mandate." The FAQ includes information about requesting accommodations and the ramifications for employees who are not in compliance with the Vaccine Mandate. Per the FAQ, "Medical or religious accommodations will only be granted in limited circumstances." The FAQ then provides more detailed information about the general grounds for seeking accommodations, the administrative process for seeking such accommodations and the appellate process for any denials. The FAQ also notes that any employees not in compliance on November 1, 2021 are to be placed on Leave Without Pay ("LWOP"). Once on LWOP, formal termination proceeding would be permitted to move forward, although the FAQ does not provide any express requirements as to permanent termination. The LWOP requirement does not apply to employees who have a pending application for a reasonable accommodation. NYPD has produced a form to be completed by any employee who sought a reasonable accommodation from the Vaccine Mandate based upon medical or religious grounds. All such requests are to be evaluated through the NYPD's Equal Employment Opportunity ("EEO") Division.

In its submission of November 15, 2021, petitioners allege that

“approximately 100 of the PBA’s members” have been on LWOP due to a failure to comply with the Vaccine Mandate. In that same submission, petitioners allege that approximately 3,900 PBA members have applied for a reasonable accommodation from the Vaccine Mandate for medical or religious reasons. Although petitioners fear that accommodation requests will be denied by respondents, there is nothing in the record before the court relating to denial of any applications.

Petitioners filed the verified petition on October 26, 2021. Petitioners plead three causes of action seeking declaratory judgment, vacatur and injunctive relief. Upon filing the petition, petitioners also presented the court with a proposed order to show cause (Motion 001) seeking, inter alia, a temporary restraining order. On October 27, 2021, Respondents submitted an affidavit in opposition to the proposed order to show cause, with Petitioners filing a reply in support. On October 27, 2021, a virtual hearing was conducted before this court and the order to show cause was signed, but the request for a temporary restraining order was denied. On October 29, 2021, the Appellate Division, Second Department (J. Connolly) signed an order to show cause, but likewise declined to grant Petitioners’ request for a temporary restraining order. On November 5, 2021, Respondents filed a cross-motion (Motion 002) to dismiss the verified petition. Petitioners filed a memorandum of law in support of the motion for injunctive relief and in opposition

to the cross-motion to dismiss on November 15, 2021, with respondents filing an affirmation in further support of the cross-motion to dismiss on November 18, 2021. On November 19, 2021, oral argument was heard in person at the courthouse, 26 Central Avenue and on December 6, 2021 this court denied Petitioners' motion for a preliminary injunction and Respondents' cross-motion was granted in part, the second cause of action was dismissed and the first and third causes of action were denied. On December 22, 2021, Respondents filed their Answer with a memorandum of law in support and on January 7, 2022 the Petitioners filed a memorandum of law in reply. The claims first raised by plaintiff in its verified reply in support of petition, shall not be considered in this action.

DISCUSSION

Although the reliefs sought by petitioners are effectively the same – stopping the enforcement of the Vaccine Mandate – they are premised upon different theories, CPLR Article 78 and the New York State Constitution.

As it pertains to the instant action, Article 78 reads:

The only questions that may be raised in a proceeding under this article are:

...

3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed;

CPLR §7803(3)

To be sustained, an agency determination must generally be reasonable and rational. (see *New York State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 [1991]; *Mid-State Mgmt. Corp. v. N.Y. City Conciliation & Appeals Bd.*, 112 A.D.2d 72, 75-76 [1st Dept. 1985], *affirmed* 66 NY2d 1032 [1985].) The determination must be supported with some factual basis, lest it be deemed an arbitrary action and annulled. (see *New York State Ass'n of Counties v. Axelrod*, 78 N.Y.2d at 166; *Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.*, 18 N.Y.3d 329, 334 [2011].) While the court must do more than conduct a pro-forma inquiry, it is not the role of the courts to substitute its judgment for that of the government body, even if the court may have preferred to rule differently than the government. (see *Peckham v. Calogero*, 12 NY3d 424, 431 [2009]; *Arrocha v. Bd. of Educ.*, 93 NY2d 361, 363 [1999].) The review of the City action must not demand perfection, as "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 AD2d 627, 628 [1st Dept. 2000].

Petitioners assert that the Vaccine Mandate is arbitrary and lacks a rational basis for six distinct reasons. First, petitioners argue that there is no basis for the City to have moved on from the earlier Vax or Test policy. Since some of the science and data relating to COVID-19 was known prior to the implementation of

the Vax or Test policy, petitioners argue that respondents effectively are not permitted to rely upon that information in crafting new policies or regulations. Additionally, petitioners urge the court to impose upon the respondents a burden to demonstrate that Vax or Test was not effective before modifying the policy. The court cannot agree. Respondents have submitted medical and scientific information upon which they relied in concluding that, although the Vax or Test had certain benefits, the Vaccine Mandate presents a better level of protection from a public health standpoint. In establishing and thereafter modifying its public health protocols, respondents are not obliged to ignore data or science even if said information may have been available earlier in the process. Rather, one would expect respondents to avail themselves of as much information as possible, and make a decision based upon a totality of evidence and opinions, even if some conflicts in data or expert opinions may exist.

Petitioners' second and third contentions seem to be directly at odds with each other. Petitioners' second contention (and to a degree their first) argue that the nature of the work of PBA members does not put them at risk for COVID-19 infections. Yet petitioners' third contention is that approximately one-third of uniformed NYPD members have had COVID-19. Aside from petitioners' own assertion that approximately 10,000 of the PBA's 24,000 members have already

contracted COVID-19, the court finds it difficult to agree that NYPD officers are at a significantly diminished risk for COVID-19 merely because they wear masks and patrol areas outdoors. NYPD officers have constant contact with members of the general population both on the streets and inside buildings / confined spaces. As is the nature of police work, NYPD officers have little ability to predict who they will “come in contact with” or the health status of those individuals. Petitioners’ claim that 10,000 of their members have “natural immunity” due to prior COVID-19 infections is at the core of their scientific argument. Petitioners have submitted an affidavit from a practicing academic epidemiologist who opines that “natural immunity” provides a better level of protection than vaccinations. Respondents have countered with their own information tending to show that “natural immunity” is difficult to gauge both in terms of the extent of the immunity and the duration. Respondents further argue that it is beneficial for those with prior COVID-19 infections (who would presumably have a level of “natural immunity”) to receive a vaccination. It must be noted that nothing in the record tends to show that a person who has “natural immunity” is harmed by receiving a vaccination.

Petitioners next argue that the putative impacts of loss of employment are greater than the benefits of the Vaccine Mandate. Although there may not be quantitative manner to evaluate the benefits and detriments to the Vaccine

Mandate, respondents have put forth support for their argument that it is necessary to prevent serious illness and death. While the loss of employment is a potentially significant harm, a policy designed to protect the public health from serious illness and death arguably strikes that balance.

Petitioners' fifth and sixth claims are directed to reasonable accommodations for medical and religious purposes. Petitioners argue that the accommodation process is too narrow and too vague, despite the reservation of such rights in the announcement of the Vaccine Mandate. Respondents have issued a FAQ document which includes discussion of the accommodation process for the City generally, with NYPD creating a discrete application for such requests. Furthermore, despite petitioners' claims of confusion in applying for reasonable accommodations, per petitioners' own data, of the 4,000 PBA members who are not vaccinated, 3,900 have in fact applied for said accommodations. To conclude that such applications are not being processed or decided fairly is, at this point, purely speculative.

While petitioners have remedies at law as to most of the alleged harm from employment loss, such as reinstatement of pay, rank seniority etc., even considering the loss of medical benefits as "irreparable harm," the damage to the public health of the City, absent the Vaccine Mandate, could be measured in terms of hospitalizations and deaths. Similarly, while employment rights are significant,

equity must favor a policy which respondents have enacted to decrease serious illness and death.

A mandatory vaccination is not per se violative of the due process requirements of the United States Constitution. (*see Jacobson v Massachusetts*, 197 U.S. 11 [1905]; *Phillips v City of New York*, 775 F3d 538, 542 [2nd Cir. 2015].) Due process rights under the New York State Constitution are closely aligned with, but not always identical to, those under the United States Constitution (*see People v. P.J. Video*, 68 NY2d 296, 303 [1986]). While certain government actions in New York are subject to a heightened scrutiny, no court has applied such a standard to mandatory vaccination rules.

Petitioners argue that even under a conventional rational basis review, the Vaccine Mandate violates State Constitutional due process requirements. The factual basis for arguing the irrationality of the respondents' actions largely replicates the actions noticed in petitioners' first cause of action under Article 78. Therefore, as noted above, petitioners failed to establish a claim for violation of the State Constitution. The power of respondents to require vaccinations generally is clear.

An Article 78 proceeding is a special proceeding. It may be summarily determined upon the pleadings, papers, and admissions to the extent that no

triable issues of fact are raised. (CPLR 409 [b]; 7801, 7804 [h].) Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial. (CPLR 7804 [h]; *Matter of York v McGuire*, 99 AD2d 1023 [1984], affd 63 NY2d 760 [1984]). Upon the final submissions of all parties and in consideration thereof, Petitioners' action seeking relief under CPLR Article 78 for a determination that the Respondents' determination and actions were arbitrary and capricious, an abuse of discretion, and a violation of the Due Process Clause of Article I, §6 of the NYS Constitution is denied.

Accordingly, it is hereby:

ORDERED and ADJUDGED, that the petition is denied, and the proceeding is dismissed.

Dated: February 16, 2022

ENTER,

A handwritten signature in black ink, appearing to read "Lizette Colon", written over a horizontal line.

Hon. Lizette Colon, J.S.C.