

Demerest v New York City Police Dept.

2023 NY Slip Op 30232(U)

January 24, 2023

Supreme Court, New York County

Docket Number: Index No. 158479/2022

Judge: Sabrina Kraus

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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. SABRINA KRAUS **PART** **57TR**

Justice

-----X

MATTHEW DEMEREST,

Plaintiff,

- v -

NEW YORK CITY POLICE DEPARTMENT, CITY OF NEW
YORK

Defendant.

-----X

INDEX NO. 158479/2022

MOTION DATE 01/05/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 18, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40

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

BACKGROUND

This is an Article 78 proceeding brought by Petitioner, a former Police Officer with the NYPD, to challenge the Citywide Panel's denial of his request for a reasonable accommodation from the NYPD's Vaccine Mandate.

ALLEGED FACTS

On October 20, 2021, Dave A. Chokshi, M.D., M.S.C., the former- Commissioner of the New York City Department of Health and Mental Hygiene, issued an Order that rescinded the vaccination or testing requirement for City employees, and instead, required all City employees to provide proof of vaccination against COVID-19.

On October 26, 2021, Petitioner filed a reasonable accommodation request against the vaccine mandate. Specifically, Petitioner claimed that he had a "sincerely held religious belief[] as a Christian[, which] requires him to refuse a COVID-19 vaccine."

On November 8, 2022, the NYPD denied Petitioner's accommodation request because his "[o]bjection appear[ed] to be based on verifiable false information, misinformation, fear of unknown origin of vaccine or side effects" and [n]o demonstrated history of vacation/medicine refusal."

Petitioner appealed the NYPD's denial to the Citywide Panel and submitted two-self authored letters in support of his challenge.

On April 12, 2022, based on "all the documentation [Petitioner] submitted," the Citywide Panel denied Petitioner's accommodation request. Petitioner was notified that he had "seven calendar days... to submit proof of vaccination." Petitioner failed to provide proof of vaccination.

On June 3, 2022, Petitioner was terminated from the NYPD.

PENDING APPLICATIONS FOR RELIEF

On October 3, 2022, Petitioner filed a notice of petition and petition seeking an order pursuant to CPLR §7803 declaring that Respondents' denial of Officer Demerest's request for religious accommodation is arbitrary, capricious, an error of law, and an abuse of discretion, and related relief.

On December 13, 2022, Respondents cross-moved for an order pursuant to Sections 3211(a)(5) and 3211(a)(7) of the New York Civil Practice Law and Rules, dismissing the Petition.

On January 5, 2023, the petition and cross-motion were marked fully submitted and the court reserved decision.

As the court finds the petition is time barred, the cross-motion to dismiss the petition is granted.

DISCUSSION

The Verified Petition Is Time-Bared

Pursuant to CPLR § 217(1), an Article 78 proceeding must be filed “within four months after the determination to be reviewed becomes final and binding upon the petitioner.” The Court of Appeals has explained that:

An administrative determination becomes “final and binding” when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. “First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be . . . significantly ameliorated by further administrative action or by steps available to the complaining party.”

Walton v. N.Y. State Dep’t of Corr. Servs., 8 N.Y.3d 186, 194 (N.Y. 2007). An agency determination is “final and binding” within the meaning of CPLR § 217(1) “when the petitioner is aggrieved by the determination. A petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted.” *Carter v. State*, 95 N.Y.2d 267, 270 (N.Y. 2000).

The Citywide Panel issued its decision on Petitioner’s appeal on April 12, 2022. This determination represented the final decision with respect to Petitioner’s reasonable accommodation request. Petitioner was notified that he had “seven calendar days from the date of [the] notice to submit proof of vaccination.”

Petitioner had four months from the issuance of the Citywide Panel’s decision, i.e., until August 12, 2022, to commence an Article 78 proceeding to seek judicial review of that decision. However, Petitioner did not do so, waiting over six-months, until October 3, 2022, to file this proceeding. As a result, the Citywide Panel’s decision is final and may not be re-litigated here.

Petitioner’s claim to be challenging his termination from the NYPD on June 3, 2022, is a nullity. The date that Petitioner received notice that his appeal was denied starts the clock on the

four-month statute of limitations, “as it is the administrative decision and the facts underlying that decision that Petitioner challenges in the instant [proceeding].” *Farca v. the Bd. of Educ., et al.*, NYSCEF Doc. No. 59 (Sup. Ct. N.Y. Cnty. Nov. 9, 2022).

Petitioner claims that Respondents should be estopped from asserting the defense that the petition is time-barred because they have previously taken inconsistent positions regarding similar matters. However, Respondents’ positions in previous vaccine challenges are not relevant to the instant proceeding. *See Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 230-31 (1974).

Petitioner claims that Respondents’ denial of his request for religious accommodation and termination were closely related amounting to continuing violations. However, an employer’s rejection of an employee’s proposed accommodation for religious practices is a discrete act that does not give rise to a continuing violation and that statute of limitations applicable to a failure-to-accommodate claim therefore begins to run on the date that the denial is communicated to the employee. *See Zacharowicz v. Nassau Health Care Corp.*, 177 F. App’x 152, 154 (2d Cir. 2006); *Elmenayer v. ABF Freight Sys.*, 318 F.3d 130, 134-35 (2d Cir. 2003).

As noted above, Petitioner’s reasonable-accommodation request was finally denied on April 12, 2022, making his attempt to re-litigate the reasonable-accommodation request here untimely.

The NYPD Is Not a Proper Party to This Proceeding

Plaintiff’s claims against the NYPD fail as a matter of law because, as an agency of the City of New York, it is not a proper party to this proceeding. “All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law.” N.Y. City Charter,

Chp. 17, §396. “There is no exception at law which removes NYPD from this rule.” *McCullough v. City of N.Y.*, Index No. 150263/2022, 2022 N.Y. Slip. Op. 33098[U], *7 (Sup. Ct. N.Y. Cnty. 2022). Accordingly, the NYPD is not a proper party to this proceeding and all claims against it must be dismissed.

While Petitioner asserts it should be entitled to amend its pleading, no motion to amend is pending before this court.

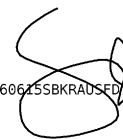
WHEREFORE it is hereby:

ADJUDGED that the motion to dismiss the petition is granted and the petition is dismissed; and it is further

ORDERED that, within 20 days from entry of this order, Respondents shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that this constitutes the decision and order of this court.



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1/24/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: