

**Matter of Quagliata v New York City Police Dept.**

2023 NY Slip Op 30836(U)

March 17, 2023

Supreme Court, New York County

Docket Number: Index No. 158420/2022

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JOHN J. KELLEY **PART** **56M**

*Justice*

-----X

In the Matter of

MARCHELO QUAGLIATA,

Petitioner,

- v -

NEW YORK CITY POLICE DEPARTMENT and CITY OF  
NEW YORK,

Respondents.

-----X

**INDEX NO.** 158420/2022

**MOTION DATE** 11/30/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 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, 28, 29, 30

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

In this proceeding pursuant to CPLR article 78, the petitioner seeks judicial review of a September 21, 2022 determination of the City of New York Reasonable Accommodation Appeals Panel (the Panel). That determination affirmed a February 15, 2022 New York City Police Department (NYPD) Equal Employment Opportunity Division (EEOD) determination that had denied his request for a reasonable accommodation exempting him from the City's mandatory COVID-19 employee vaccination requirement on religious grounds. He also seeks reinstatement to his position with the NYPD, along with back wages and benefits. The respondents---NYPD and City of New York---answer the petition and submit the administrative record. The petition is granted to the extent that the September 21, 2022 determination is annulled as arbitrary and capricious, the denial of the petitioner's request for a religious exemption from the COVID-19 vaccination mandate is vacated, and the matter is remitted to the Panel for further consideration and a new discretionary determination that explicates, with the necessary detail, the reasons for its determination. The petition is otherwise denied.

In the first instance, the court notes that, in a proceeding pursuant to CPLR article 78, the governmental agency that rendered a final determination in connection with a dispute, or that performed the challenged action, must be named as a party (see *Matter of A&F Scaccia Realty Corp. v New York City Dept. of Env'tl. Protection*, 200 AD3d 875, 877 [1st Dept 2021]; *Matter of Centeno v City of New York*, 115 AD3d 537, 537 [1st Dept 2014]; *Matter of Solid Waste Servs., Inc. v New York City Dept. of Env'tl. Protection*, 29 AD3d 318, 319 [1st Dept 2006]; *Matter of Emmett v Town of Edmeston*, 3 AD3d 816, 818 [3d Dept 2004], *aff'd* 2 NY3d 817 [2004]). The petitioner did not name the Panel as a party respondent, even though it was the agency made the final, reviewable determination here. For reasons that the court cannot fathom, the New York City Corporation Counsel did not defend this proceeding on the ground that the Panel was a necessary party that was neither named nor joined. Nonetheless, “[a] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal” (*Onewest Bank, FSB v Fernandez*, 112 AD3d 681, 682 [2d Dept 2013]; see *Deutsche Bank Natl. Trust Co. v Winslow*, 180 AD3d 1000, 1001 [2d Dept 2020]; see generally *Transportation Ins. Co. v Simplicity, Inc.*, 61 AD3d 963, 963-964 [2d Dept 2009] [Supreme Court improperly dismissed complaint sua sponte for failure to join necessary party]). The court further notes, however, that the defense of failure to join a necessary party may be raised by motion “at any time” (see CPLR 3211[e]; *GMAC Mortgage, LLC v Coombs*, 191 AD3d 37, 43-44 [2d Dept 2020]). Consequently, “a court may, at any stage of a case and on its own motion, determine whether there has been a failure to join necessary parties” (*Matter of A&F Scaccia Realty Corp. v New York City Dept. of Env'tl. Protection*, 200 AD3d at 877; see *Matter of Lezette v Board of Educ., Hudson City School Dist.*, 35 NY2d 272, 282 [1974]). By virtue of that authority, the court may sua sponte direct a party's joinder or intervention (see *Country Wide Home Loans, Inc. v Harris*, 136 AD3d 570, 571 [1st Dept 2016]).

In light of the Corporation Counsel's tactical determination to defend this proceeding on the merits, the court declines to direct the joinder or intervention of the Panel, and will address the parties substantive contentions.

On October 20, 2021, the Commissioner of the New York City Department of Health and Mental Hygiene (NYC DOHMH) issued an order requiring City employees, including NYPD officers, to receive vaccinations protecting them from the COVID-19 virus on or before October 29, 2021. That administrative order further provided that “[a]ny City employee who has not provided . . . proof [of vaccination] must be excluded from the premises at which they work beginning on November 1, 2021.” The order also permitted employees to apply for a reasonable accommodation from the vaccine mandate. By administrative order dated December 13, 2021, the NYC DOHMH Commissioner required City agencies to exclude from employment staff members who were not vaccinated against the COVID-19 virus, but provided the opportunity for City employees to apply for a reasonable accommodation exemption from the requirement, based, among other things, on religious grounds. On March 24, 2022, New York City Mayor Eric Adams issued Emergency Executive Order No. 62, referable to the ongoing COVID-19 pandemic. In that executive order, the Mayor incorporated the provisions of the December 13, 2021 order, and directed that “covered entities,” including the NYPD,

“shall continue to require that a covered worker provide proof of vaccination, unless such worker has received a reasonable accommodation. Covered entities shall continue to keep a written record of their protocol for checking covered workers' proof of vaccination and to maintain records of such workers' proof of vaccination.”

The executive order defined “covered workers” to include NYPD employees and officers.

The petitioner was a police officer assigned the NYPD's 123rd Precinct. On October 22, 2021, the petitioner submitted, to the NYPD, a request for a reasonable accommodation exempting him from the COVID-19 vaccination requirement on the ground that his Catholic faith made it impossible for him to take medications and vaccinations that were developed employing embryonic stem cells. Specifically, he wrote in his request that

“[t]he undersigned is seeking a religious accommodation from the City of New York's COVID 19 vaccine requirement because of my sincerely held beliefs as a devout Christian. In Corinthians 6:19-20, The Bible commands followers to honor God by caring responsibly for our bodies as temples of the Holy Spirit. I believe that receiving any COVID-19 vaccine would violate the bible's command to honor God with my body because of the involvement of fetal stem cell lines in the COVID-19 vaccines' development (Johnson & Johnson) and testing (Moderna and Pfizer). The Bible teaches that a developing fetus in the womb was created by God and is a life that deserves to be protected, see Psalm 139. Therefore, receiving a COVID-19 vaccine would violate my deeply held beliefs about, first honoring god in caring for my body, and second, advocating for the protection of sacred life. See Proverbs 13:8-9, Jeremiah 22:3, James 1:27.”

In its February 15, 2022 determination, the NYPD EEOC wrote that, “[a]fter careful review of your application and the documents you submitted, the reasonable accommodation is DENIED due to the following reasons,” and thereupon checked off two boxes on a pre-printed form, indicating that its reasons for the determination were that the “[o]bjection was personal, political, or philosophical” and that there was “[n]o demonstrated history of vaccination/medicine refusal.” It provided no further explanation as to why those boxes were checked.

In a letter dated February 19, 2022, the petitioner appealed to the Panel, asserting that “I believe that if I were to receive this vaccination I would be prevented from worshipping my Creator in the way that I see fit, and that which is protected under the First Amendment of Freedom of Religion.” He further asserted that

“[t]he Bible says that man has free will, which in turn means we have the right to decide what medication and vaccinations we put into our bodies. Mandates that force vaccinations go against the Word of the Lord. The medical establishment, as well as most friends and family apply pressure and guilt to others in society to participate in the vaccination process. We are told that if we do not vaccinate, we put ourselves and everyone around us in jeopardy. However, the beliefs that I hold true take precedent in order for me to ensure that my body is clean, and my faith is strong. God has communicated to me that to address my lawless, healthy, God-given body, the procedure of vaccination would be a sin against my conscience.”

Although the petitioner apparently is not a physician or scientist, he claimed to have conducted “much individual research” to “understand how these vaccines were developed,” asserted that “aborted fetal cells” were used to conduct testing on both Pfizer and Moderna vaccines, and averred that, due to the uncertainty as to long-term effects, he could not “comply with being

forced to put genetically modified mRNA protein strands into my body that may affect my means to having a family in the future.” Although he essentially admitted that he had received numerous vaccinations as a child, he claimed that he “never received any vaccines that were [his] choice as a grown adult man.” The petitioner also contended that his objection to getting vaccinated was indeed religious, and not merely political or philosophical.

In its September 21, 2022 appeals determination, the Panel, although adopting the reasons identified in the NYPD’s February 15, 2022 decision, otherwise denied the petitioner’s administrative appeal without further explanation. This proceeding ensued.

In his petition, the petitioner asserted that the NYPD’s determination to reject his request for a reasonable accommodation was arbitrary and capricious and affected by errors of law, in that it violated both the Free Exercise clause of the First Amendment to the United States Constitution and the New York City Human Rights Law (Admin. Code of City of N.Y. §§ 8-101, *et seq.*) by discriminating against him on the basis of his religion. In support of their answer, the respondents submitted, among other things, an affirmation of Eric J. Eichenholtz, an attorney for the City, who explained the NYPD’s procedures for the submission and determination of requests for reasonable accommodations. He described the composition of the Panel, and how its members reviewed each application for a religious accommodation. As he explained it,

“With respect to religious accommodation requests, Title VII requires employers to accommodate only those religious beliefs that are ‘sincerely held’ and directly conflict with the City Order. In accordance with EEOC guidance, employers may request that an employee explain the religious nature of their belief and the Citywide Panel and/or a City agency may therefore make this request of an employee. Additionally, if the City has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the City is justified in seeking additional supporting information. The Citywide Panel also relies upon the EEOC’s guidance with respect to evaluating those ‘factors that - either alone or in combination - might undermine an employee’s assertion that he sincerely holds the religious belief at issue [which] include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.”

Eichenholtz further explained that, when an applicant for a religious accommodation professes that it would violate his or her religious beliefs to be vaccinated with a product that contained or was developed with cells of aborted fetuses or fetal cells, the Panel would undertake a review as to whether there was a factual basis for that claim, such as prior refusals to accept other vaccines or medications developed or tested with fetal cells. The respondents also referred to the United States Equal Employment Opportunity Commission's (EEOC's) guidance that "personal preferences, or any other nonreligious concerns (including about the possible effects of the vaccine), do not qualify as religious beliefs," and that to qualify as a religious belief the cited belief "should be . . . part of a comprehensive religious beliefs system and is not simply an isolated teaching."

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (see CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [1st Dept 2008]; *Matter of Rumors Disco v New York State Liquor Auth.*, 232 AD2d 421, 421 [2d Dept 1996]). Inasmuch as the petitioner made no allegations that the Panel's determination was made in violation of lawful procedure, the Panel's determination to deny the petitioner's administrative appeal must be confirmed unless it was arbitrary and capricious or affected by an error of law.

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (see *Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 624 [1st Dept 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh (see *Matter of Kaufman v Incorporated Vil. of Kings*

*Point*, 52 AD3d 604, 608 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made “without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Consequently, an agency determination is arbitrary and capricious where the agency provides only a “perfunctory recitation” of relevant statutory factors or other required considerations as a basis for its conclusions (*Matter of BarFreeBedford v New York State Liq. Auth.*, 130 AD3d 71, 78 [1st Dept 2015]; see *Matter of Wallman v Travis*, 18 AD3d 304, 308 [1st Dept 2005] [“perfunctory discussion”]), provides no reason whatsoever for its determination (see *Matter of Rhino Assets, LLC v New York City Dept. for the Aging, SCRIE Programs*, 31 AD3d 292, 294 [1st Dept 2006]; *Matter of Jones v New York State Dept. of Corrections & Community Supervision*, 2016 NY Misc LEXIS 15778, \*1-2 [Sup Ct, Erie County, Jul. 28, 2016]), or provides only a post hoc rationalization therefor (see *Matter of New York State Chapter, Inc., Associated Gen. Contrrs. of Am. v New York State Thruway Auth.*, 88 NY2d 56, 756 [1996]; *Matter of L&M Bus Corp. v New York City Dept. of Educ.*, 71 AD3d 127, 135 [1st Dept 2009]).

“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, 804-805 [3d Dept 2010] [internal quotation marks and citations omitted]).

“Courts have rarely singled out error of law by name . . . as a question for consideration in an Article 78 proceeding” (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7803:1). “The question of whether an administrative agency's determination is affected by an error of law is often implicit in the nature of the grievance, and will often turn on the underlying substantive law applicable to the determination” (*Matter of Held*

*v State of New York Workers' Compensation Bd.*, 2008 NY Slip Op 52741[U], \*7, 2008 NY Misc LEXIS 10881, \*20-21 [Sup Ct, Albany County, Jul. 7, 2008]; see also 14-7803 Weinstein-Korn-Miller, NY Civ Prac P 7803.01[3]). Hence, an administrative determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule (see *Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo*, 39 NY2d 86, 92 [1976]; see generally *Matter of CVS Discount Liquor v New York State Liq. Auth.*, 207 AD2d 891, 892 [2d Dept 1994]), or where its determination violates some other statutory or constitutional provision (see *Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo*, 39 NY2d at 93 [Fuchsberg, J., concurring] ["an order which is specifically and expressly forbidden by . . . statute is an error of law"]).

Initially, only the Panel's administrative determination is subject to review in this proceeding. When an administrative agency renders a determination on an administrative appeal from the decision of another agency, the agency rendering the initial determination generally is not a proper party to any CPLR article 78 challenge to the appellate determination, as the initial determination has been superseded. Rather, only the determination of the administrative appeal is subject to judicial review (see *Matter of Rivera v Blass*, 127 AD3d 759 [2d Dept 2015]; *Matter of Safran v Shah*, 119 AD3d 590, 590-591 [2d Dept 2014]; *Matter of Berman v New York State Dept. of Social Servs.*, 107 AD3d 509 [1st Dept 2013]; *Matter of Baker v Mahon*, 72 AD3d 811, 813 [2d Dept 2010]; see also *Matter of Holland v New York City*, 271 AD2d 609 [2d Dept 2000]; *Jiggetts v Grinker*, 148 AD2d 1, 21 [1st Dept 1989], *rev'd on other grounds* 75 NY2d 411 [1990]; see generally *Matter of Armacida v Reitz*, 141 AD3d 713 [2d Dept 2016]; *Matter of TAC Peek Equities, Ltd. v Town of Putnam Val. Zoning Bd. of Appeals*, 127 AD3d 1216 [2d Dept 2015]; *Matter of Johnson v Scholastic, Inc.*, 52 AD3d 375, 375 [1st Dept 2008]; *Matter of Solid Waste Servs., Inc. v New York City Dept. of Env'tl. Protection*, 29 AD3d 318, 319 [1st Dept 2006]). Where, as here, the joinder of the agency that rendered the

initial determination is necessary to give complete relief to the petitioner, that agency is a proper party for that limited purpose only, and not for the purpose of reviewing its determination.

The court rejects the respondents' affirmative defense that the petitioner failed to exhaust his administrative remedies, as he clearly availed himself of the right to appeal the NYPD's initial determination to the Panel. It also rejects their affirmative defense that the proceeding is time-barred. The final determination here was rendered on September 21, 2022, when the Panel denied the petitioner's administrative appeal, and not on February 15, 2022, when the NYPD issued its initial determination. Hence, the petitioner's commencement of this proceeding on September 30, 2022 rendered it timely, as that date was well within the applicable four-month limitations period of CPLR 217.

Inasmuch as the Panel's determination sets forth absolutely no rationale whatsoever for its conclusions, other than to incorporate the conclusory reasons articulated by the NYPD EEOD, the Panel's determination is facially arbitrary and capricious, and may be annulled on that ground alone (see *Matter of Moscatelli v New York City Police Dept.*, 2022 NY Slip Op 34393[U], \*8, 2022 NY Misc LEXIS 8341, \*12-13 [Sup Ct, N.Y. County, Dec. 22, 2022] [Kelley, J.]; *Matter of Deletto v Adams*, 2022 NY Slip Op 33129[U], \*6, 2022 NY Misc LEXIS 5571, \*7 [Sup Ct, N.Y. County, Sep. 13, 2022]).

Even were the court directly to review the NYPD EEOD's initial determination, it nonetheless would be constrained to conclude that the initial determination also was arbitrary and capricious. The NYPD EEOD's determination is a prime example of a determination that sets forth only the most perfunctory discussion of reasons for administrative action. The court has nothing before it that would enable it to analyze how the pre-printed "reasons" that were checked off on the supplement memorandum related to or defeated the petitioner's request for accommodation. This type of conclusory administrative determination would require the court to speculate as to the thought processes of the person who checked the boxes, and provide its own reasons for those choices, an approach prohibited by longstanding rules of law.

(see *Matter of Moscatelli v New York City Police Dept.*, 2022 NY Slip Op 34393[U], \*8, 2022 NY Misc LEXIS 8341, \*13, *Matter of Deletto v Adams*, 2022 NY Slip Op 33129[U], \*3-4, \*6, 2022 NY Misc LEXIS 5571, \*5-6). Here, it is unexplained as to why the petitioner's professed beliefs were merely political or philosophical, as opposed to religious. In the absence of any explanation as to why the petitioner's statement did not articulate his beliefs in this regard, the NYPD EEOD determination is arbitrary and capricious. Moreover, the NYPD EEOD's bald conclusion that the petitioner had "[n]o demonstrated history of vaccination/ medicine refusal" cannot serve as the basis for an administrative determination where, as here, he was not asked to provide such examples, although he claimed in his appeal letter that he had indeed previously refused vaccinations on the ground of religious opposition to the use of fetal stem cells, despite having received vaccinations prior to attaining his majority.

The court's conclusion in this regard should not be construed as a ruling that, had the petitioner's stated reasons for his request for an exemption, and his discussion of religious doctrine, properly been analyzed and explained by the Panel or the NYPD EEOD in the challenged decisions, the petitioner's contentions would have constituted a proper basis for an exemption. That would have required a forthright engagement by those agencies with the religious contentions and arguments raised by the petitioner in his application, which was not done here. It would also have required some actual inquiry by the decision makers into the petitioner's prior behavior concerning vaccines and medications. Had those agencies taken that approach, their determinations might have survived judicial scrutiny, as the petitioner provided scanty proof that the rejection of vaccinations or medications that have been developed, improved, or tested using fetal stem cells is an accepted tenet of Catholic doctrine, as opposed to a personal interpretation of doctrine by a lay person or even a few members of the clergy. Since the agencies did not pursue such an inquiry here, the court is constrained by long-established principles of administrative law to annul the challenged determination (see *Matter of*

*Moscatelli v New York City Police Dept.*, 2022 NY Slip Op 34393[U], \*9, 2022 NY Misc LEXIS 8341, \*14-15),

With respect to the errors of law that the petitioner alleged, namely, the violation of his First Amendment right to free exercise of religion and discrimination in employment on the basis of religion, the petitioner has not established either that the City's vaccine mandate or the termination of his own employment were premised upon religion, as he has not demonstrated that his conclusions about sin, the use of embryonic stem cells in the development and improvement of various vaccinations and medications, and the alleged proscription of desecrating the human body via any genetic manipulation that mRNA vaccinations might generate, are established Catholic doctrine, or merely his personal interpretation of his obligations as a practicing Catholic (*see generally F.F. v State of New York*, 65 Misc 3d 616 [Sup Ct, Albany County 2019]). Nor has he demonstrated that he had previously declined to be treated with drugs such as acetaminophen, albuterol, aspirin, ibuprofen, Tylenol, Pepto Bismol, Tums, Lipitor, Senokot, Motrin, Maalox, Ex-Lax, Benadryl, Sudafed, Preparation H, Claritin, Prilosec, and Zoloft, all of which were either developed, improved, or recently tested by their manufacturers for adverse side effects using stem cells from aborted fetuses. With respect to these causes of action, the court further notes that declaratory relief is not available as a remedy in a CPLR article 78 proceeding (*see Matter of Cuffy v Pesce*, 178 AD3d 695, 695 [2d Dept 2019]; *Matter of Krichevsky v Dear*, 172 AD3d 1370, 1370 [2d Dept 2019]; CPLR 3017). Rather, only a judgment annulling or vacating an administrative determination is available in a CPLR article 78 proceeding where a petitioner establishes an error of law, and the court concludes here that the adverse determinations against the petitioner cannot be annulled or vacated on that ground (*see Matter of Moscatelli v New York City Police Dept.*, 2022 NY Slip Op 34393[U], \*9-10, 2022 NY Misc LEXIS 8341, \*15-17).

The petitioner also relies on the decision in the declaratory judgment action entitled *Police Benevolent Assn. of City of N.Y., Inc. v City of New York* (2022 NY Slip Op 33185[U],

2022 NY Misc LEXIS 5420 [Sup Ct, N.Y. County, Sep. 23, 2022] [Lyle Frank, J.]. The judgment in that action declared that the City's vaccine mandate was invalid to the extent that it had been employed to impose a "new condition of employment" to "current P[olice] B[enevolent] A[ssociation] members" that had not been the subject of collective bargaining. It appears that the petitioner was indeed a PBA member at the time that the NYPD EEOC denied his request for an exemption and the Panel denied his administrative appeal. The court recognizes that a "court of coordinate jurisdiction is precluded from issuing any ruling at variance with an existing order or judgment that is binding upon the party seeking to vacate or modify its terms" (*Arroyo-Graulau v Merrill Lynch Pierce, Fenner & Smith, Inc.*, 135 AD3d 1, 9 [1st Dept 2015]), and thus is bound to give effect to Justice Frank's ruling. Relief may thus also be granted to the petitioner on the ground that the vaccine mandate was vacated with respect to PBA members.

Under the circumstances presented here, it is appropriate for the court, upon the vacatur and annulment of the Panel's determination, to remit the matter to the Panel so that it may properly articulate its reasons for rejecting the petitioner's contention that he had legitimate religious objections to receiving a COVID-19 vaccination (*see Matter of Weill v New York City Dept. of Educ.*, 61 AD3d 407, 408 [1st Dept 2009] [remitting to a Board of Education panel considering a teacher's allegedly inappropriate conduct so that it may articulate its reasons for rejecting petitioner's excuse for failing timely to request a hearing]; *see also Matter of Office Bldg. Assoc., LLC v Empire Zone Designation Bd.*, 95 AD3d 1402, 1404-1406 [3d Dept 2012]).

In light of the vacatur of the Panel's determination and the remittal of the matter to the Panel for reconsideration, there is no need to address whether the penalty of termination of employment constituted an abuse of discretion.

The court declines to award attorneys' fees to the petitioner since it is denying relief to him in connection with his First Amendment cause of action, presumably asserted pursuant to 42 USC § 1983, and his cause of action alleging violation of the New York City Human Rights Law, which are the only claims that he asserted for which attorneys' fees may be awarded. City

agencies generally are not otherwise liable for an award of attorneys' fees in CPLR article 78 proceedings, as they are not State agencies within the meaning of the Equal Access to Justice Act (CPLR art 86) (see *Matter of Herman v New York City Dept. of Hous. Preserv. & Dev.*, 147 AD3d 756, 757 [1st Dept 2017]).

The parties' remaining contentions are without merit.

The court notes that, inasmuch as the matter is being remitted to the decision-making agency for a new discretionary determination, this paper constitutes an order, not a judgment, within the meaning of CPLR 5701(b)(1) for the purposes of appellate review (see *Matter of Mid-Island Hospital v Wyman*, 15 NY2d 374 [1965]; *Matter of Clermont Tenants Assoc. v New York State Div. of Hous. & Community Renewal*, 73 AD3d 658 [1st Dept 2010]; *Matter of Valentin v New York City Police Pension Fund*, 16 AD3d 145 [1st Dept 2005]).

Accordingly, it is

ORDERED that the petition is granted to the extent that the September 21, 2022 determination of the City of New York Reasonable Accommodation Appeals Panel, denying the petitioner's appeal of a February 15, 2022 New York City Police Department Equal Employment Opportunity Division determination, that had denied his request for a reasonable accommodation exempting him from the City's mandatory COVID-19 employee vaccination requirement, is annulled as arbitrary and capricious, the matter is remitted to the City of New York Reasonable Accommodation Appeals Panel for a new discretionary determination that properly articulates the basis for its determination, and the petition is otherwise denied

This constitutes the Decision and Order of the court.

  
JOHN J. KELLEY, J.S.C.

3/17/2023  
DATE

CHECK ONE:

CASE DISPOSED

GRANTED  DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT  REFERENCE