

Lebowitz v Board of Educ. of the City of N.Y.

2023 NY Slip Op 31136(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 154876/2022

Judge: Laurence L. Love

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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. LAURENCE L. LOVE **PART** **63M**

Justice

-----X

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.

-----X

INDEX NO. 154876/2022

MOTION DATE 01/23/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, the instant motion is decided 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.

In an Order dated October 6, 2022, this Court Denied the Petition in its entirety, finding as follows:

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.

Petitioner now moves for leave to renew and reargue this Court’s decision. A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, *Schneider v. Solowey*, 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410 [2d Dept 1985]). A “motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor it is designed for litigants to present the same arguments already considered by the court” (see, *Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Simon v. Mehryari*, 16 AD3d 664 [2d Dept 2005]). A motion to renew must be based upon new facts that were not offered in the prior motion, and the party must set forth a reasonable justification for the failure to present such facts in the prior motion (see, CPLR § 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636 [2d Dept 2000]; *McNeill v. Sandiford*, 270 AD2d 467 [2d Dept

2000]; *Shapiro v. State*, 259 AD2d 753 [2d Dept 1999]); or the motion must demonstrate that there has been a change in the law that would change the prior determination (see, CPLR § 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, supra).


In support of the portion of the motion seeking leave to renew, Petitioner contends that in a secondary arbitration award issued June 27, 2022, arbitrator Scheinman acknowledged that only five hundred teachers applied for a religious accommodation out of three thousand three hundred DOE employees, submits a document that Petitioner alleges tells “the arbitrator how best to deny religious accommodation request from teachers and UFT members” and further highlights the decisions of other Justices of the Supreme Court concerning similar issues, who ruled to the contrary.

In support of the portion of the motion seeking leave to reargue, Petitioner contends that the Court did not consider whether granting Petitioner’s accommodation would be an undue hardship upon Respondents. Petitioner further contends that Respondent failed to comply with the Citywide EEO Policy promulgated by DCAS, that Respondents failed to establish an undue hardship as relying upon Respondent’s position statement was improper and contends that Petitioner can do her job duties from home.

The Court notes that Petitioner has failed to establish a reasonable justification for Petitioner’s failure to submit its new exhibits prior to this Court’s underlying decision especially as Petitioner filed a letter to the Court on October 5, 2022, advising the Court of the decision in *Loiacono v. Board of Education*, Index No. 154875/2022. The document that Petitioner alleges tells “the arbitrator how best to deny religious accommodation request from teachers and UFT members” does nothing of the sort, only clarifying that none of the three vaccines contain any fetal tissue. The decisions submitted are not binding upon this Court and were swiftly appealed by

Respondents. Further, while Petitioner contends that there were only five hundred teacher appeals decided by the arbitration process, and not 3,300, a distinction denied by Respondents, same would not change this Court’s reasoning. Contrary to Petitioner’s contentions, the Court has considered all three of its arguments in its original decision and finds them to be without merit.

ORDERED that the instant motion is DENIED in its entirety.

<u>4/12/2023</u> DATE	 LAURENCE L. LOVE, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE