

**Olivierre v Board of Educ. of the City Sch. Dist. of the
City of N.Y.**

2023 NY Slip Op 31848(U)

June 1, 2023

Supreme Court, New York County

Docket Number: Index No. 101178/2022

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 02TR

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MAWULI M OLIVIERRE,

Petitioner,

- v -

THE BOARD OF EDUCATION OF THE CITY SCHOOL
 DISTRICT OF THE CITY OF NEW YORK AND
 COMMUNITY SCHOOL DISTRICT 13 OF THE BOARD
 OF EDUCATION OF THE CITY OF NEW YORK, UNITED
 FEDERATION OF TEACHERS CITY OF NEW YORK,
 NEW YORK CITY DEPARTMENT OF HEALTH AND
 MENTAL HYGIENE, ASHWIN VASAN, ERIC ADAMS

Respondent.

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INDEX NO.	<u>101178/2022</u>
MOTION DATE	<u>02/21/2023</u>
MOTION SEQ. NOS.	<u>001</u>

**DECISION + ORDER ON
 MOTION**

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26
 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Pro se petitioner Mawuli M. Olivierre (“Petitioner”) brought this Article 78 petition seeking an order and declaratory judgment that the denial of his request for a religious exemption from respondent Board of Education of the City School District of the City of New York’s (“DOE”) COVID-19 vaccine mandate was arbitrary and capricious, annulling the termination of his employment by DOE for noncompliance with the vaccine mandate, and awarding him back pay. Petitioner further seeks a declaratory judgment finding that the vaccine mandate violates various provisions of the federal and state constitutions, that the mandate is arbitrary and capricious, and for certification of a class of similarly situated individuals pursuant to Rule 23 of the Federal Rules of Civil Procedure and for judgment to apply to all such individuals.

Respondents DOE, Community School District 13, New York City Department of Health and Mental Hygiene (“DOHMH”), Ashwin Vasan in his official capacity as DOHMH

Commissioner, and Eric Adams in his official capacity as Mayor (collectively “City Respondents”) oppose the petition and cross-move for an order dismissing the petition as time-barred or otherwise failing to state a cause of action pursuant to CPLR §§ 7804(f), 3211(a)(5), and 3211(a)(7).

On August 24, 2021, the then-Commissioner of DOHMH issued an order requiring all DOE employees to show proof of COVID-19 vaccination by September 27, 2021 (NYSCEF Doc. No. 6, the “vaccine mandate”). Unsuccessful negotiations between DOE and respondent United Federation of Teachers (“UFT”) regarding the effects of the DOE’s order led to an arbitration decision issued by Martin Scheinman that established processes for DOE to provide accommodation requests and exemptions for employees. The decision also provided the option for noncomplying DOE employees to separate from service while retaining certain benefits or to be placed on extended leave without pay with health benefits. Finally, the decision allowed the DOE to seek to unilaterally separate unvaccinated employees placed on leave without pay who had not opted for separation or extended leave without pay with benefits provided by the decision, beginning on December 1, 2021.

Petitioner was employed by DOE from March 1998 to April 7, 2022, first as a school aide and then as a social studies teacher beginning in 2002; Petitioner was granted tenure in 2007. He maintains that his sincere religious beliefs prevent him from receiving a COVID-19 vaccination. On or about September 20, 2021, Petitioner submitted his [first] request for a religious exemption from the DOE’s vaccine mandate. DOE denied the request on September 22, 2021, finding that Petitioner’s application “failed to meet the criteria for a religious based accommodation.” Petitioner appealed the denial the following day to the arbitrator, which was denied without explanation on September 28, 2021. He received a letter on October 1, 2021

instructing him not to return to work, and was informed the next day that he was being placed on leave without pay.

On December 2, 2021, Petitioner appealed the denial of his exemption request to the Reasonable Accommodation Appeals Panel (“Citywide Panel”). This appeal was denied in a decision dated March 28, 2022 on the basis that DOE had demonstrated that “it would be an undue hardship to grant [an] accommodation . . . given the need for a safe environment for in-person learning.” The Citywide Panel decision advised Petitioner that he had seven calendar days to either comply with the vaccine mandate and return to work or to remain unvaccinated and extend his leave without pay, and that failure to do either would subject him to termination.

DOE terminated Petitioner effective April 7, 2022. Petitioner maintains that he was informed of his termination in a letter dated April 11, 2022. The letter stated that Petitioner was terminated based on his failure to comply with the vaccine mandate or to extend his leave without pay. In an August 22, 2022 letter, DOE informed Petitioner that he had the opportunity to be rehired to his position on the condition that he receive a COVID-19 vaccine. He refused to do so, citing his religious convictions and his belief that the offer was coercive. Petitioner commenced this proceeding on December 12, 2022.

City Respondents now cross move to dismiss the petition as time barred. They contend that the statute of limitations began to run when the Citywide Panel denied Petitioner’s final administrative appeal on March 28, 2022 and that it therefore expired on July 28, 2022. Petitioner argues that his petition is timely as it was brought within four months of the DOE’s August 22, 2022 letter offering him his job back on the condition that he be vaccinated. Alternatively, he argues that the statute of limitations began to run on September 20, 2022, when

the DOHMH issued an order that rescinded the COVID-19 vaccine mandate for participation in “high risk extracurricular activities.”

An Article 78 proceeding must be commenced “within four months after the determination to be reviewed becomes final and binding upon the petitioner” (CPLR 217[1]). An agency action is final and binding upon a petitioner when the agency has “reached a definitive position on the issue that inflicts actual, concrete injury” and where “the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party” (*Best Payphones, Inc. v Dep’t of Info. Tech & Telecomms.*, 5 NY3d 30, 34 [2005]).

Here, the four month statute of limitations began to run, at the latest, when DOE notified Petitioner of his termination on April 11, 2022. At that time, City Respondents’ action was final and binding upon Petitioner. City Respondents reached a definitive position on the issue of Petitioner’s request for a religious exemption from the vaccine mandate with the Citywide Panel’s March 28, 2022 decision affirming the denial of Petitioner’s request. An actual, concrete injury was inflicted on Petitioner when he was terminated for failing to either comply with the vaccine mandate or to extend his leave without pay. Finally, there were no further administrative remedies available to prevent Petitioner’s injury as the Citywide Panel was the last opportunity for Petitioner to challenge the denial of his religious exemption request.

Petitioner’s argument that the statute of limitations began to run only with the August 22, 2022 letter is unavailing. While it is true that where “ambiguity regarding finality is to be resolved against the agency” where an agency creates ambiguity and the “impression of nonfinality” (*Matter of Burch v New York City Health & Hosps. Corp.*, 118 AD3d 454 [1st Dept 2014] [internal quotations and citations omitted]), no such ambiguity about the finality of City

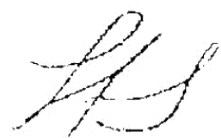
Respondents’ action is created by the August 22 letter. The letter, sent over four months after Petitioner was notified of his termination, states that Petitioner was terminated due to his noncompliance with the vaccine mandate and that he would be rehired only if he were to become fully vaccinated. It does not indicate that City Respondents changed their position. Full vaccination remained a condition of employment, and Petitioner’s employment status – terminated for failure to comply with the vaccine mandate – remained the same.

Similarly unavailing is Petitioner’s alternate argument that the statute of limitations began to run after the issuance of the September 20, 2022 DOHMH order rescinding the vaccine mandate for participation in “high risk extracurricular activities.” That order concerned a different DOHMH order, issued December 10, 2021, than the vaccine mandate challenged by Petitioner. The rescission of a different order, without reference to the vaccine mandate for DOE employees, creates no ambiguity as to the finality of City Respondents’ action against Petitioner.

The Court therefore finds that the Petition was untimely, and it is accordingly:

ORDERED and ADJUDGED that the application is denied and the petition is dismissed, without costs.

6/1/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE