

Johnson v City of New York

2023 NY Slip Op 31967(U)

June 12, 2023

Supreme Court, New York County

Docket Number: Index No. 157707/2022

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
NEW YORK COUNTY**

PRESENT: HON. LORI S. SATTLER **PART** **02TR**

Justice

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ARIANA JOHNSON,

Petitioner,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE
DEPARTMENT, DISTRICT COUNCIL 37, ERIC ADAMS,
ASHWIN VASAN

Respondent.

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INDEX NO. 157707/2022

MOTION DATE 09/09/2022,
11/14/2022,
02/22/2023

MOTION SEQ. NO. 001 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 22, 23, 24, 25, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 48, 49, 65

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 67, 68, 69, 70, 71, 72, 73, 74, 78, 79, 80, 81

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Petitioner Ariana Johnson (“Petitioner”) commenced this Article 78 proceeding seeking an order and judgment declaring that the denial of her requests for exemption from New York City’s COVID-19 vaccine mandate were arbitrary and capricious. The City of New York (“the City”), the New York City Police Department (“NYPD”), and Eric Adams and Ashwin Vasan in their official capacities (collectively, “City Respondents”) answered the Petition and asserted five defenses, including alleging that the proceeding is time-barred. In Motion Sequence #002, Respondent District Council 37, Petitioner’s union, moves to dismiss the proceeding as against it. Petitioner opposes that motion and cross-moves for sanctions. In Motion Sequence #003, Petitioner moves for leave to file an Amended Petition, which City Respondents oppose.

Petitioner had been employed as a Police Administrative Aide with the NYPD since 2018. On October 20, 2021, the New York City Department of Health and Mental Hygiene (“DOHMH”) issued an order requiring City employees to provide proof that they had been vaccinated against COVID-19 and providing that anyone who had not done so would be excluded from their workplaces beginning November 1, 2021. The City then implemented a procedure whereby employees could apply for an exemption to the mandate and avoid being placed on leave without pay on November 1, 2021 (NYSCEF Doc. No. 6). Employees who submitted exemption requests could continue to work and submit to weekly testing while their applications were pending (*id.*).

Petitioner timely applied for exemptions based on alleged sincerely held religious beliefs and a medical disability. Her application for a religious accommodation was denied on November 7, 2021 (NYSCEF Doc. Nos. 8, 37) and her application based on medical disability was denied on February 8, 2022 (NYSCEF Doc. Nos. 12, 38). A revised denial of her religious accommodation was later sent on February 20, 2022 (NYSCEF Doc. No. 41). Petitioner appealed those determinations to the City of New York Reasonable Accommodation Appeals Panel (“Citywide Panel”). The appeals were denied on April 25, 2022, and Petitioner was notified on that date via email sent to her NYPD email address (NYSCEF Doc. No. 14). The denial provided that Petitioner had seven calendar days to submit proof of vaccination, and if she failed to do so she would be placed on leave without pay (*id.*). The following day, on April 26, 2022, Petitioner received a second email confirming the denial of her request and that she would be placed on leave without pay and also notifying her that if she did not submit proof of vaccination after being placed on leave without pay, her employment would be terminated

(NYSCEF Doc. No. 15). Petitioner was placed on leave without pay beginning May 10, 2022 and was terminated on May 27, 2022. The instant Petition was filed on September 9, 2022.

In the Memorandum of Law accompanying its Answer, City Respondents contend the proceeding must be dismissed as time-barred because the Petition was filed more than four months after the Citywide Panel's final determination. City Respondents argue the date of the final determination is April 25, 2022, when Petitioner's appeal was denied. In response, Petitioner argues the determination is final on the date of her termination, May 27, 2022, and therefore the Petition was timely filed.

Article 78 proceedings "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR § 217). 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 Dept. of Info. Tech & Telecomms.*, 5 NY3d 30, 34 [2005]). A determination generally becomes binding when the aggrieved party is notified (*Musey v 425 E. 86 Apts. Corp.*, 154 AD3d 401, 404 [1st Dept 2017], citing *Westbury v Dept. of Transp.*, 75 NY2d 62, 72 [1989]).

Petitioner was notified on April 25, 2022 that her appeal had been denied and that she would be put on leave without pay, and was notified on April 26, 2022 that her employment would be terminated. Therefore, the four-month statute of limitations began to run at the latest on April 26, 2022. Petitioner had received notice of City Respondents' definitive position on her exemption requests and that their decision would inflict an actual, concrete injury, i.e. leave

without pay and termination. Petitioner concedes there were no further administrative remedies available following the Citywide Panel's determination (Petition ¶ 36).

Petitioner's argument that the statute begins to run as of her termination on May 27, 2022 is not supported by law, as the administrative decision being challenged was made on April 25, 2022 and notice thereof was given on that date and on the following day (*see, e.g., Demerest v N.Y. City Police Dept.*, 2023 NY Slip Op 30232[U] [Sup Ct, NY County 2023] [Kraus, J.]; *Farca v Bd. of Educ. of the City Sch. Dist. of N.Y.*, Sup Ct, NY County, Nov. 9, 2022, Frank, J.). As Petitioner commenced this proceeding more than four months after the statute began to run, it is time-barred and the petition must be dismissed.

In Motion Sequence No. 003, Petitioner seeks leave to file an amended petition. The proposed amended pleading references a February 9, 2023 DOHMH order repealing the vaccine mandate (NYSCEF Doc. No. 73) and a February 6, 2023 document entitled "FAQ regarding New York City Employees and the COVID-19 Vaccine," which provides that employees who had been terminated under the prior order were eligible to be reinstated if they timely submitted a request for reinstatement (NYSCEF Doc. No. 71). The motion papers argue that the Petition must be amended, in part because the policy change evidences that City Respondents' April 25, 2022 determination was not final or binding. City Respondents oppose the motion, arguing, *inter alia*, that the proposed changes would not render the proceeding timely. They contend the February 9, 2023 order merely enables Petitioner to apply for reinstatement or for another position with the City, and does not change the April 25, 2022 determination, which remains final and binding on Petitioner.

While leave to amend a pleading is to be freely given, the request will be denied where the proposed pleading fails to state a cause of action or is palpably insufficient as a matter of law

(*Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept 2001]). The February 9, 2023 order provides: “Paragraph 3 of the October 20, 2021 Order is REPEALED, so that a City employee who does not provide the required proof of vaccination as described in paragraph 2 of that Order no longer need be excluded from the premises at which they work.” The FAQ memo sets forth the procedure for former employees who had been terminated to request reinstatement. Neither of these documents indicate that City Respondents changed their position as to the denial of Petitioner’s exemption requests and subsequent termination. Therefore, the proceeding would be time-barred even if the Court were to permit Petitioner to amend and accordingly, the motion is denied.

Motion Sequence No. 002 is moot in light of the dismissal of this proceeding.

Accordingly, for the reasons set forth herein, it is hereby:

ORDERED that the petition is dismissed in its entirety; and it is further

ORDERED that all other relief sought herein is denied.

This constitutes the Decision and Order of the Court.

6/12/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER