

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

2023 NY Slip Op 32352(U)

July 13, 2023

Supreme Court, New York County

Docket Number: Index No. 156145/2022

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

-----X

TINA LYNCH,

Petitioner,

- v -

THE BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, COMMUNITY
SCHOOL DISTRICT 21 OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, UNITED FEDERATION OF
TEACHERS,

Respondents.

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INDEX NO. 156145/2022
MOTION DATE 04/21/2023
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

By notice of motion, petitioner moves for an order granting reargument and reconsideration of the decision and order dated January 25, 2023, by which the petition was denied and the proceeding was dismissed. Respondents oppose and by notice of cross motion, move for an order adjourning the return date of the instant motion in order to submit opposition papers. It appears that the cross motion was resolved by a referee, who extended respondents' time to oppose the motion (NYSCEF 75), and they subsequently submitted their opposition.

I. PRIOR DECISION (NYSCEF 59)

This proceeding arises from the termination of petitioner's employment as a tenured teacher with respondents during and as a result of the COVID-19 pandemic. In sum, in response to respondents' policy requiring all Department of Education (DOE) employees to receive a vaccine against COVID-19 before being allowed enter and work in DOE buildings, petitioner applied for a religious exemption, citing her religious beliefs against receiving a COVID-19

vaccine. After petitioner's application was denied, and her employment with the DOE was terminated, petitioner commenced the instant proceeding.

By decision and order dated January 25, 2023, the petition was denied on the grounds that DOE's reasons for denying religious exemption requests, in general and in petitioner's case, were not irrational, arbitrary, or capricious.

II. ANALYSIS

At the outset, I observe that petitioner's memorandum of law in support of this motion is 46 pages long, and although plaintiff does not submit a word count certification even though required to do so (22 NYCRR 202.8-b[c]), a review of the memorandum reflects that it contains more than 10,500 words, far above the permitted 7,000 word limit (22 NYCRR 202.8-b[a]), which in and of itself may warrant denial of the motion. Nevertheless, the motion is addressed.

A. Motion to reargue

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrive at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks and citations omitted], *lv dismissed and denied* 80 NY2d 1005 [1992]; *see Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]).

Here, petitioner does not demonstrate that any issue of fact or law was overlooked or misapprehended. Rather, she makes the same arguments that she previously made, which were considered and rejected (*William P. Pahl Equip. Corp.*, 182 AD2d at 27 [reargument not designed to give unsuccessful party successive opportunities to reargue issues already decided]).

Moreover, while petitioner argues that the majority of justices in this court have found that respondents' policy was arbitrary and capricious and that she is the victim of "the unfortunate arbitrary and capricious assignment of her case to a Judge in the City of New York" who ruled otherwise (NYSCEF 66, p. 7), not only are the other courts' decisions not binding on me, but petitioner does not acknowledge the cases wherein the vaccination policy was upheld (*see e.g., Matter of Lebowitz v The Bd. of Educ. of the City of New York*, 2022 WL 6776229 [Sup Ct, New York County 2023, Love, J.]; *Matter of Hogue v The Bd. of Educ. of the City Sch. Dist. of the City of New York*, 2022 WL 7109657 [Sup Ct, New York County 2022, Love, J.]; *Matter of Maniscalco v The Bd. of Educ. of the City Sch. Dist. of the City of New York*, 2022 WL 797971 [Sup Ct, New York County 2022, Kotler, J.]; *Matter of Bryan v The Bd. of Educ. of the City Sch. Dist. of the City of New York*, 2022 WL 14044362 [Sup Ct, New York County 2022, Engoron, J.]). Nor did petitioner distinguish the cases cited in the prior decision.

Petitioner's arguments regarding the New York City Human Rights Law are improperly raised for the first time here as she did not assert a NYCHRL claim in her petition (NYSCEF 1), which she acknowledges in the memorandum of law she filed in support thereof ("Petitioner would be well within her rights to assert a [NYCHRL] religious accommodation claim" [NYSCEF 3, p. 16]). In any event, petitioner's assertion that respondents failed to engage her in a cooperative dialogue as required by the NYCHRL has no merit (*see e.g., Matter of Marsteller v City of New York*, AD3d , 2023 WL 4065500 [1st Dept 2023] [petitioner failed to show that process for resolving accommodation requests did not comply with NYCHRL, as respondents offered information on process for reviewing accommodation requests, informed employees how to apply for exemption and to appeal denials, petitioner availed himself of process, respondents explained denial, and parties further engaged in appeals process]).

Similarly, petitioner's newly-asserted New York State unspecified constitutional religious freedom argument may not be considered for the first time on reargument, and, in any event, it is unavailing (*see Kane v De Blasio*, 623 F Supp 3d 339 [SD NY 2022] [City policy requiring workers in school settings to be vaccinated not unconstitutional]).

There is also no merit to petitioner's argument that this court erred in considering respondents' position statement (*see Marsteller*, 2023 WL 4065500 [where there has been no administrative hearing, "an agency may submit an official's affidavit to explain the information that was before the agency and the rationale for its decision, and this Court may consider such an affidavit even though it was not submitted during the administrative process"]).

Leave to reargue is thus denied.

B. Motion to renew

Pursuant to CPLR 2221(e), a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion."

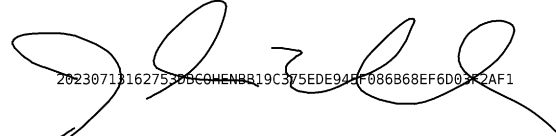
The new evidence proffered by petitioner - respondents' issuance of a policy in February 2023 which effectively repealed the vaccination mandate - is mentioned only in her counsel's affirmation, and she does not explain why the new policy is relevant to whether the prior policy was irrational, arbitrary and capricious, nor does she submit any supporting authority. In any event, "judicial review [of an Article 78 petition] is limited to the facts and record adduced before the agency" (*Matter of Benjamin v Dept. of Hous. Preservation*, 187 AD3d 433, 433 [1st Dept 2020]). As the new policy would not change the prior decision, leave to renew is denied.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioner’s motion for leave to reargue and renew is denied; and it is further

ORDERED, that respondents’ cross motion is denied as academic.



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7/13/2023
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE