

Matter of Schweit v New York City Fire Dept.
2023 NY Slip Op 32853(U)
August 17, 2023
Supreme Court, New York County
Docket Number: Index No. 150837/2023
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
PAUL SCHWEIT,

Petitioner,

- v -

NEW YORK CITY FIRE DEPARTMENT and THE CITY OF
NEW YORK,

Respondents.

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INDEX NO. 150837/2023
MOTION DATE 05/05/2023
MOTION SEQ. NO. 001

**DECISION, ORDER, AND
JUDGMENT**

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, 31, 32, 33, 34 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 an October 24, 2022 determination of the City of New York Reasonable Accommodation Appeals Panel (the Panel) that affirmed a December 8, 2021 New York City Fire Department (FDNY) denial of his request for a reasonable accommodation exempting him, on religious grounds, from the City’s mandatory COVID-19 employee vaccination requirement, which denial had been supplemented by a January 7, 2022 explanation letter. He further seeks back pay and benefits for the period beginning November 1, 2021, when he was placed on leave without pay for refusing to comply with the vaccine mandate, until July 27, 2022, the date on which he was retroactively reinstated to employment by virtue of obtaining a medical exemption from the vaccine mandate. The FDNY and the City of New York cross-move pursuant to CPLR 7804(f), 3211(a)(5), and 3211(a)(7) to dismiss the petition on the grounds that, inasmuch as the vaccine is no longer mandated but optional, the proceeding has been rendered academic, and because the claim for back pay and benefits is time-barred in any event. The cross motion is granted, and the petition and proceeding are dismissed.

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 that 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 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 cross-move for dismissal on other grounds, the court will

address those contentions without reaching the issue of whether a necessary party has not been joined.

In an administrative order dated August 24, 2021, as supplemented December 13, 2021, the Commissioner of the New York City Department of Health and Mental Hygiene (NYC DOHMH) had 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 October 20, 2021, the NYC DOHMH Commissioner issued an order requiring City employees, including FDNY employees, 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.

The petitioner was a firefighter for the FDNY. As of October 31, 2021, he had declined to be vaccinated against the COVID-19 virus and, hence, the FDNY placed him on leave without pay as of November 1, 2021. On November 1, 2021, he submitted to the FDNY a request for a reasonable accommodation exempting him from the COVID-19 vaccination requirement on the ground that his Christian faith made it impossible for him to take any type of vaccination. He cited several passages from both the Old and New Testaments of the Bible, including 2 Timothy 3:16-17, 1 Corinthians 6:19-20, Romans 12:1, Psalms 139:13-16, Jeremiah 1:5, Psalms 127:3, and Exodus 20:13, most of which discuss one’s faith and trust in the almighty, and speak of the sanctity of life and of the human body. In this regard, he asserted that he avoided, whenever possible, “knowingly receiving foreign toxins with harmful or unknown effects, while also maximizing nutrition and cultivating a healthy natural immune system in accordance with God’s design.” The petitioner further asserted, without any medical, scientific, or expert support, that he

“firmly believe[d] that the experimental COVID vaccine ingredients are contaminants that are harmful to my body, and that in addition to the known health risks, there are many unknown risks due to the lack of standard testing and long-term study of these substances.

“The COVID-19 vaccines are unique in that they do not contain the typical viral ingredients, but rather they have never-before-used (at least to this extent) components and designs such as synthetic mRNA and lipid nanoparticles. Very little is scientifically known about these substances in humans including their short term or long term effects on the body.”

In a determination dated December 8, 2021, the FDNY denied his request for a reasonable accommodation exempting him, on religious grounds, from the City’s mandatory, COVID-19 employee vaccination requirement, holding that “[t]he asserted basis for the accommodation is insufficient to grant the requested accommodation, particularly in light of the potential undue hardship to the Department.” In a supplemental explanation letter dated January 7, 2022, the FDNY further asserted that

“[y]our request for a religious exemption from the vaccine mandate was denied because the asserted religious basis seeking the exemption was insufficient in light of the potential undue hardship to the Department. Given the state of the public health emergency, the nature of the Department’s life-saving mission, and the impact to the safety and health of Department members and the public that Department members regularly interact with, the requested accommodation could not be granted.”

The petitioner appealed the adverse determinations to the Panel, again explaining his beliefs and contending that the vaccine mandate constituted a fundamental violation of his rights.

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 NYC DOHMH order, and directed that “covered entities,” including the FDNY,

“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 FDNY employees and officers.

On July 28, 2022, the petitioner again requested the FDNY to grant him a reasonable accommodation excusing him from the vaccine mandate, this time on medical grounds, asserting that he had severe allergic reactions to Polyethylene Glycol 2000 and Polysorbate 80, which were ingredients in all COVID-19 vaccinations. On September 23, 2022, the FDNY provisionally granted the petitioner's request for an exemption on medical grounds, explaining that "the Department continues to review the documentation you submitted in support of your request for an exemption." The FDNY further explained that

"[d]uring this provisional period, you are not required to be vaccinated against COVID-19 as a condition of continued employment. As a condition of this provisional exemption, you may work but must submit to weekly testing and provide proof of a negative PCR result. You must also wear a face covering while in a shared indoor City workspace, when conducting city business outside, or when interacting with members of the public. The failure to comply with these terms will result in the modification or revocation of the accommodation."

The petitioner was then reinstated to paid employment as of October 3, 2022, and his "leave without pay" status was terminated. The FDNY awarded him back pay retroactive to July 28, 2022, the date he had submitted his request for a medical exemption.

In a determination dated October 24, 2022, the Panel ultimately affirmed the FDNY's denial of the petitioner's application for a religious exemption from the vaccine mandate, concluding that "the record does not support a religious R[easonable] A[ccommodation] that exempts the employee from the vaccine mandate and if granted presents an undue hardship on the agency."

The petitioner commenced this proceeding on January 26, 2023. In his petition, the petitioner asserted that the FDNY'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. He specifically requested that he be

awarded back pay and benefits from November 1, 2021 until July 27, 2022, the period during which he had been placed on leave without pay.

On February 9, 2023, and thus while this proceeding was pending, the New York City Board of Health issued an administrative order, which provided as follows:

“WHEREAS, on October 31, 2021, the Commissioner issued a ‘Supplemental Order to Require COVID-19 Vaccination for City Employees and Employees of Certain City Contractors,’ delaying until November 8, 2021, application of the October 20, 2021 Order for certain employees or contractors, and requiring additional City contractors not covered by the October 20, 2021 Order to ensure that certain of their employees, provide proof that they had been vaccinated against COVID-19 (the ‘October 31, 2021 Order’); and

“WHEREAS, on November 1, 2021, the Board of Health ratified and continued both the October 20, 2021 Order and the October 31, 2021 Order; and

“WHEREAS, as of February 1, 2023, 331,955 City employees, representing 96% of all City employees, have completed a primary series of vaccination, and high vaccination rates correlate with lower rates of hospitalization and death; and

“WHEREAS, as of January 26, 2023, more than 6.6 million adults residing in New York City, representing 99% of all such adults, have received at least one dose of vaccination against COVID-19, and more than 5.9 million adults residing in New York City, representing 90% of all such adults, have completed a primary series of vaccination, and high vaccination rates correlate with lower rates of hospitalization and death; and

“WHEREAS, the high rate of vaccination among adults in New York City has proven effective in lessening the burden of COVID-19 on the City’s healthcare system;

“NOW THEREFORE BE IT RESOLVED, the Board of Health hereby orders that the October 20, 2021 Order, and the October 31, 2021 Order, as ratified and continued by the Board of Health on November 1, 2021, are hereby AMENDED as follows:

“1. 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.*

“2. Paragraph 4 of the October 20, 2021 Order, and paragraph 2 of the October 31, 2021 Order, are MODIFIED, so that a City human services contractor or other City contractor described in those paragraphs no longer needs to require their covered employees to provide proof of vaccination against COVID-19”

(emphasis added).

The court concludes that the petitioner's demand that he be reinstated to employment, and his request that the Panel's denial of his request for a religious exemption be annulled, have been rendered academic, not only because he had been reinstated to his position of employment on October 3, 2022 by virtue of a medical exemption, but because the Board of Health no longer requires him to be vaccinated against the COVID-19 virus (*see Matter of Lee v City of New York*, Index No. 158364/2022 [Sup Ct, N.Y. County, Mar. 1, 2023]). Where, as here, a party obtains the relief that he or she seeks, the matter has been rendered academic (*see Flessas v Heyman*, 107 AD2d 608 [1st Dept 1985]). Those claims thus must be dismissed.

Although the petitioner's claim for back pay from November 1, 2021 through July 27, 2022 has not been rendered academic, it is time-barred by the four-month limitations period of CPLR 217. The four-month limitations period applicable to a public employee's claim for back pay does "not begin to run until respondents notified petitioner of their determination denying his request" (*Matter of Hawkins v New York City Tr. Auth.*, 26 AD3d 169, 170 [1st Dept 2006]). Here, the FDNY, in its September 23, 2022 determination, awarded the petitioner back pay retroactive only through July 27, 2022 and thus effectively denied his request for additional back pay as of that date. The petitioner thus had until January 23, 2023 to commence a proceeding to review that determination. Since he did not commence this proceeding until January 26, 2023, that claim must be dismissed as time-barred.

Even if the court were to address the merits of the petition, the court would be constrained to conclude that the FDNY and the Panel's determinations to deny the petitioner's request for a religious exemption from the vaccine mandate and to place him on leave without pay from November 1, 2021 through July 27, 2022 were not arbitrary and capricious, affected by an error of law, or violative of the First Amendment or the New York City Human Rights Law. Rather, those determinations were rational, lawful, and were supported by the administrative record (*see Matter of Marsteller v City of New York*, 217 AD3d 543 [1st Dept 2023]; *Matter of*

Matyas v Board of Educ. of City School Dist. of City of N.Y., 2023 NY Slip Op 32327[U], 2023 NY Misc LEXIS 3444 [Sup Ct, N.Y. County, Jul. 11, 2023] [Kelley, J.].

In light of the foregoing, it is

ORDERED that the respondents' cross motion to dismiss the petition is granted; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

8/17/2023

DATE

JOHN J. KELLEY, J.S.C.

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