

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

2024 NY Slip Op 30080(U)

January 5, 2024

Supreme Court, Kings County

Docket Number: Index No. 843/2022

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of January 2024

HONORABLE FRANCOIS A. RIVERA

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MICHELLE BAPTISTE,

Petitioner,

DECISION & ORDER

Index No.: 843/2022

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK AND COMMUNITY SCHOOL DISTRICT 17 OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, UNITED FEDERATION OF TEACHERS CITY OF NEW YORK, NEW YORK, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, ASHWIN VASAN, MD IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, AND ERIC ADAMS, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK,

Respondents.

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On December 16, 2022, petitioner Michelle Baptiste, proceeding pro se, commenced the instant Article 78 proceeding under motion sequence number one, by filing a notice of petition, and petition with accompanying documents with the Kings County Clerk's Office (KCCO). On December 21, 2022, the petitioner filed an amended petition with the KCCO. On June 29, 2023, the petitioner filed a second amended verified petition with the KCCO.

By notice of cross motion filed on July 28, 2023, under motion sequence number five, - respondents, the Board of Education of the City School District of the City of New York (hereinafter BOE), Community School District 17 of the BOE of the City of New York, the City of New York (hereinafter the City), the New York City Department of Health and Mental Hygiene (hereinafter DOHMH), Ashwin Vasana, MD, in his official capacity as the

Commissioner of DOHMH, and Eric Adams, in his official capacity as Mayor of the City of New York (“collectively, City Respondents”) moved through their counsel, Sylvia O. Hinds-Radix, Corporation Counsel of the City of New York for an order pursuant to section 7804(f) and Rule 3211 of the New York Civil Practice Law and Rules dismissing the Second Amended Verified Petition in this matter as time-barred and for failure to state a claim upon which relief can be granted, and an order granting the City Respondents such other and further relief as the Court deems just and proper.

SALIENT PROCEDURAL BACKGROUND

The amended notice of petition, filed on December 21, 2022, with the KCCO, was scheduled to be heard on January 19, 2023.

On January 11, 2023, Elyssa H. Cislucyis, Esq. filed a notice of appearance on behalf of the United Federation of Teachers (UFT) with a request to convert to e-filing with the KCCO.

By notice of motion filed on March 29, 2023, under motion sequence number two, the City Respondents moved for an order granting an extension of time to respond to the amended petition pursuant to §§ 2004, 2005, and 3012(d) of the New York Civil Practice Law and Rules, and adjourning until May 4, 2023, the return date of the Amended Verified Petition.

By notice of motion filed on March 29, 2023, under motion sequence number three, UFT sought an order and judgment dismissing the amended verified petition.

The Court granted UFT’s request for conversion to e-filing and set the return date of the petition to April 6, 2023. On April 6, 2023, the Court marked the petition off the calendar due to the petitioner’s failure to appear for oral argument.

On May 12, 2023, the petitioner and UFT filed a stipulation of discontinuance of the action as asserted against UFT. The stipulation rendered UFT’s motion seeking dismissal of the petition under motion sequence three academic.

By order to show cause filed on April 26, 2023, filed under motion sequence number four, petitioner sought an order restoring the amended petition to the active calendar. The City Respondents consented to petitioner’s request.

By decision and order dated May 23, 2023, the Court restored the amended petition to the active calendar. The Court set a briefing schedule with a return date of August 7, 2023.

By stipulation filed on June 5, 2023, with the KCCO, the petitioner and the City Respondent agreed that the petitioner could amend her verified petition for a second time if the petitioner did so by June 30, 2023. They further agreed that in the event the City Respondents cross-moved to dismiss the petition, the City Respondents would serve their cross-motion on or before July 28, 2023; petitioner would serve opposition papers on or before August 25, 2023; and the City Respondents would serve their reply papers, if any, on or before August 31, 2023. Furthermore, in the event the City Respondents answered the petition, they would serve their

answer on or before August 11, 2023, and petitioner would serve reply papers, if any, on or before August 25, 2023.

In accordance with the stipulation, the petitioner filed her second amended verified petition with the KCCO on June 29, 2023, and the City Respondents filed the instant cross-motion to dismiss the second amended verified petition on July 28, 2023.

On June 29, 2023, the petitioner filed her second amended verified petition with the KCCO. The second amended verified petition annexed thirty-eight exhibits labeled A through AL and alleged forty-seven allegations of fact in support of an order: (1) annulling the respondents determination to deny petitioner's request for a religious accommodation to the COVID-19 vaccine mandate, (2) granting the religious accommodation, (3) granting an award of back pay from October 4, 2021, (4) granting reinstatement to her previous job and job title (5) granting an award for legal fees and expenses position as a teacher with seniority, (3) a judgment that awards Petitioner backpay and pension credit from October 4, 2021, to the present, and (4) costs and legal fees, and granting such other further relief as the Court deems just and proper.

LAW AND APPLICATION

On August 24, 2021, Dr. Dave Chokshi, the prior Commissioner of DOHMH, issued an order requiring all Department of Education (DOE) employees to show proof of at least one dose of vaccination against COVID-19 by September 27, 2021¹ (hereinafter the DOE Order). The DOE Order stated, in pertinent part, that by September 27, 2021, City employees needed to provide proof to the agency or office where they work that: (1) they have been fully vaccinated against COVID-19; or (2) they have received a single-dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or (3) they have received the first dose of a two dose COVID-19 vaccine. The DOE and United Federation of Teachers ("UFT"), the bargaining unit for teachers employed by DOE, attempted to negotiate the impact of the DOE Order. When the negotiations reached an impasse and, on September 10, 2021, Arbitrator Martin F. Scheinman issued a decision to resolve the impasse, establishing: (1) a process for exemptions and accommodation requests; (2) options to voluntarily separate from service with

¹ See DOE Order, dated August 24, 2021, annexed to the Affirmation of Steven E. Smith as Exhibit "1."

certain benefits or extend LWOP with health benefits for employees who did not comply with the DOE Order; and (3) that starting December 1, 2021, DOE could seek to unilaterally separate employees who had been placed on Leave Without Pay (LWOP) due to vaccination status and had not either opted for separation or extended such LWOP pursuant to the provisions set forth in Arbitrator Scheinman's decision.²

On or about September 20, 2021, petitioner, a former teacher with DOE, submitted a religious accommodation request to be exempt from the vaccine mandate. The request included a letter setting forth her objection to the mandate.³ On September 21, 2021, petitioner was informed that her Religious Exemption Request was denied by email because her application failed to meet the criteria for a religious exemption.⁴ On or about September 22, 2021, the petitioner appealed the independent arbitrator. Petitioner's appeal to the independent arbitrator was denied.⁵ Thereafter, on October 4, 2021, petitioner was placed on LWOP.⁶

On November 19, 2021, petitioner received an email informing her of a second opportunity to appeal the denial of her Religious Exemption Request, this time to the Citywide Reasonable Accommodations Appeals Panel (hereinafter the Citywide Panel)⁷.

² See In the Matter of the Arbitration Between Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFL-CIO, re: Impact Bargaining ("Impact Arbitration Award" or "IAA"), dated September 10, 2021, annexed to the Smith Affidavit as Exhibit "2."

³ See Petitioner's Religious Exemption Request, annexed to Petition as Exhibit "F."

⁴ See September 21, 2021, Denial of Petitioner's Religious Exemption Request, annexed to the Petition as Exhibit "G."

⁵ See Arbitrator Appeal Denial Email, annexed to the Petition as Exhibit "K,"

⁶ See October 2, 2021 Email Notice of Placement on LWOP, annexed to the Petition as Exhibit "M."

⁷ See November 19, 2021, Email Notice of Citywide Panel Appeal Opportunity, annexed to the Petition as Exhibit "O."

On December 3, 2021, Petitioner filed an appeal to the Citywide Panel.⁸ On January 26, 2022, petitioner received an email notifying her that her appeal to the Citywide Panel was denied.⁹

The email stated that the Citywide Panel found that Petitioner's request did not meet the legal parameters for a reasonable accommodation and DOE has demonstrated that it would be an undue hardship to grant this accommodation to Petitioner given the need for a safe environment for in-person learning. The email also informed Petitioner that this determination represented the final decision with respect to her reasonable accommodation request.

On February 3, 2022, Petitioner received a notice by email that she had an option, as a DOE employee, to extend her LWOP status through September 5, 2022, and remain eligible for health insurance, after which she needed to show proof of COVID-19 vaccination to return to work or be deemed to have resigned from her position; this email also notified petitioner that she needed to indicate her intention to remain on LWOP by February 10, 2022, or face termination of her employment.¹⁰

On February 18, 2022, petitioner received an email from the Division of Human Resources of the DOE informing her that her employment with DOE was terminated, effective that day, because she failed to comply with the DOE vaccine mandate and to extend her LWOP status¹¹.

On August 23, 2022, Petitioner received a notice from DOE, dated August 22, 2022, offering her the opportunity to be reinstated if she showed proof of vaccination against

⁸ See Petitioner's Appeal to Citywide Panel, annexed to the Petition as Exhibit "Q."

⁹ See Denial of Petitioner's Appeal to Citywide Panel, dated January 26, 2022, annexed to the Petition as Exhibit "T."

¹⁰ See LWOP Extension Notice Email, dated February 3, 2022, annexed to the Petition as Exhibit "U."

¹¹ See Termination Email, dated February 18, 2022, annexed to the Petition as Exhibit "X."

COVID-19 by September 20, 2022.¹² DOE employees could return to work only if they showed proof of vaccination. Petitioner did not show proof of vaccination.

On December 16, 2022, petitioner commenced this proceeding by filing a verified petition. Petitioner amended the petition on December 20, 2022. On April 6, 2023, the date scheduled for oral argument of the petition, the petitioner did not appear, and the Court consequently marked the petition off the calendar. On April 26, 2023, petitioner filed an order to show cause to restore this matter to the calendar, which City Respondents did not oppose. Thus, following a hearing on May 23, 2023, this case was restored to the calendar, returnable August 7, 2023, and with a new briefing schedule, by order dated May 23, 2023¹³.

The City Respondents agreed by stipulation dated June 2, 2023, to permit Petitioner to amend the petition for a second time by June 30, 2023; the stipulation contained a new briefing schedule which required the City Respondents to file a cross-motion, if any, by July 28, 2023.¹⁴ Petitioner filed her Second Amended Petition on June 29, 2023.¹⁵

On February 9, 2023, the Board of Health (“BOH”) issued an order (“BOH Order”) amending the earlier DOE Order such that DOE employees no longer needed to show proof of COVID-19 vaccination or else be excluded from the workplace.¹⁶

Petitioner commenced the instant Article 78 proceeding seeking an order: (1) annulling the City Respondents determination to deny petitioner’s request for a religious accommodation to the COVID-19 vaccine mandate, (2) granting the religious accommodation, (3) granting an award of back pay from October 4, 2021, (4) granting reinstatement to her previous job and job

¹² DOE’s Notice of Opportunity to Return to Work, dated August 22, 2022, annexed to the Petition as Exhibit “AI.”

¹³ See Order, dated May 23, 2023, NYSCEF Document No. 26.

¹⁴ See Stipulation Permitting Petitioner to Amend Her Petition a Second Time, dated June 2, 2023, NYSCEF Document No. 27.

¹⁵ See Notice of Second Amended Petition, dated June 29, 2023, NYSCEF Document No. 29.

¹⁶ See BOH Order, dated February 9, 2023, annexed to the Smith affidavit as Exhibit 3.

title (5) granting an award for legal fees and expenses position as a teacher with seniority, (3) a judgment that awards Petitioner backpay and pension credit from October 4, 2021, to the present, and (4) costs and legal fees, and granting such other further relief as the Court deems just and proper.

The City Respondents filed a cross-motion seeking to dismiss the petition for, among other reasons, being time-barred. On a cross-motion to dismiss a petition pursuant to CPRL Article 78, the standard of review is the same as that of a motion to dismiss an action. When considering a motion to dismiss pursuant to CPLR § 3211(a)(7), a court must accept the facts alleged in the complaint as true, accord the petitioner the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Oluwo v. Sutton*, 206 A.D.3d 750, 752-53 [2nd Dept. 2022]).

In a special proceeding challenging an administrative agency decision under Article 78 of the CPLR, a court's review is limited to whether the administrative decision was in violation of lawful procedures, arbitrary and capricious, or an abuse of discretionary power (See CPLR §7803(3); *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 230-31 [1974]). For purposes of this review, when there is no reasonable legal or factual basis for an administrative action, it is considered arbitrary (*C.F. v. N.Y.C. Dept. of Health & Mental Hygiene*, 191 A.D.3d 52, 69 (2d Dept. 2020)). In reviewing the administrative decision, a court may not substitute its judgment for that of the agency responsible for making the determination (*see, Hilbertz v. City of New York*, 210 A.D.3d 1089, 1091 (2nd Dept. 2022)).

CPLR section 217 provides that a proceeding under Article 78 must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner (CPLR § 217(1); *Matter of Ranco Sand & Stone Corp. v. Vecchio*, 27 N.Y.3d 92, 98 [2016]). To

challenge an administrative determination, the agency action must be final and binding upon the petitioner (*Ranco Sand & Stone Corp. v. Vecchio*, 27 N.Y.3d 92, 98 [2016]). A determination is final and binding within the meaning of CPLR 217 when the decisionmaker arrives at a definitive position on the issue that inflicts an actual, concrete injury (*Stop-The-Barge v Cahill*, 1 NY3d 218, 223 [2003], quoting *Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]) and the petitioner seeking review has been aggrieved by it (*Matter of Yarbough v Franco*, 95 NY2d 342, 346 [2000]). Thus, the four-month statute of limitations begins running on the date on which the administrative determination has its impact on the petitioner (*Matter of Salomon v. Town of Wallkill*, 174 A.D.3d 720, 721 [2nd Dept. 2019]).

The final and binding determination from which the four-month limitations period is measured is the point when the challenged action has its impact and is not extended by the petitioner's pursuit of administrative remedies (see *Kahn v. N.Y.C. Dept. of Educ.*, 79 A.D.3d 521, 522 (1st Dept. 2010), aff'd, 18 N.Y.3d 457, 467-68 [2012]).

On the branch of the petition seeking an order annulling petitioner's request for a religious accommodation to the COVID-19 vaccine mandate and granting the religious accommodation, the statute of limitations began to run on January 26, 2022. That was the date that the petitioner received a decision on her appeal of the denial of her religious accommodation request. That was the date on which the administrative determination regarding her religious accommodation request had its impact upon the petitioner and therefore became final and binding. To file a timely petition, the petitioner needed to commence this proceeding within four months of the final and binding determination, which would have been May 26, 2022. An Article 78 proceeding is commenced by filing a notice of petition or order to show cause and a petition capital (CPLR 304). Claims asserted in such proceedings are deemed interposed for statute of

limitations purposes at the time of the filing (see, CPLR 203[c]) (*Matter of Grant v Senkowski*, 95 NY2d 605 [2001]). Here, the petitioner commenced this proceeding on December 16, 2022, the date of the filing of the first Verified Petition. Consequently, the petitioner filed the instant proceeding over six months too late (*Ranco Sand & Stone Corp.*, 26 N.Y.3d at 98).

Petitioner contends that the letter petitioner received from DOE in August 2022, which offered employees terminated for their refusal to comply with the vaccine mandate an opportunity to return only if they got vaccinated, restarted the statute of limitations clock. Petitioner further argued, that the letter at the very rendered ambiguous whether the denial of petitioner's Religious Exemption Request and her subsequent termination were final and binding. The Court found both arguments meritless. The DOE letter of August 2022 unambiguously stated that the opportunity for reinstatement was available only to terminated employees if they become fully vaccinated, showing proof of at least one dose of the vaccine by September 6, 2022, and proof of being fully vaccinated by October 21, 2022. There was, therefore no option for unvaccinated individuals such as the petitioner to return to work.

On the branch of the petition seeking an order granting an award of back pay from October 4, 2021, and granting reinstatement to the previous job and job title the statute of limitations began to run on February 18, 2022. That was the date that the petitioner received an email from the Division of Human Resources of the DOE informing her that her employment with DOE was terminated, effective that day, because she failed to comply with the DOE vaccine mandate and to extend her LWOP status. Consequently, on December 16, 2022, when the petitioner filed the instant proceeding, petitioner was again six months too late (*Ranco Sand & Stone Corp.*, 26 N.Y.3d at 98).

As a condition precedent to the commencement of any action under New York State law against a school district, New York's Education Law § 3813(1) requires that a written verified claim be presented to the governing body of the school district within three months of accrual of such a claim. N.Y. Educ. Law § 3813(1) (McKinney's 2004) (*Bucalo v. E. Hampton Union Free Sch. Dist.*, 351 F. Supp. 2d 33, 34–35 (E.D.N.Y. 2005)). The New York Court of Appeals has interpreted the statute as follows: “The Legislature has spoken unequivocally that no action or proceeding may be prosecuted or maintained against any school district or board of education unless a notice of claim has been presented to the governing body, and this court may not disregard its pronouncement.” *Parochial Bus Sys., Inc. v. Bd. of Educ.*, 60 N.Y.2d 539, 549 [1983]). Thus, a failure to present a claim within ninety days of its accrual is a fatal defect. (*Id.*) Education Law notice of claim requirements do not apply when a litigant seeks only equitable relief (*Sheil v Melucci*, 94 AD3d 766 [2nd Dept 2012]). In the case at bar petitioner seeks equitable relief and monetary damages. Therefore, the notice of claim requirement is applicable here.

Petitioner claims that she was not required to file a notice of claim because she was claiming discrimination, and that even if she was required to file one, she not only did so, but also she showed that DOE had actual knowledge within 90 days of the accrual of her claim. Although the City Respondents have claimed that the petitioner did not comply with New York's Education Law § 3813(1), they presented no evidence demonstrating the petitioner's alleged failure to do so. Nor did the petitioner present any documentary evidence substantiating her claim that she complied with, New York's Education Law § 3813(1). Under these circumstances, the Court rests its determination solely on the basis that the petition is untimely/

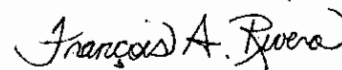
CONCLUSION

The Article 78 proceeding brought by petitioner Michelle Baptiste is denied in its entirety as time-barred and is dismissed.

The cross-motion by the Board of Education of the City School District of the City of New York, Community School District 17 of the Board of Education of the City of New York, the City of New York, the New York City Department of Health and Mental Hygiene, Ashwin Vasan, MD, in his official capacity as the Commissioner of DOHMH, and Eric Adams, in his official capacity as Mayor of the City of New York for an order pursuant to section 7804(f) and Rule 3211 of the New York Civil Practice Law and Rules dismissing the instant Article 78 proceeding by petitioner Michelle Baptiste is granted.

The foregoing constitutes the decision, order, and judgment of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.