

Olsen v Fire Dept. of the City of N.Y.

2024 NY Slip Op 32471(U)

July 19, 2024

Supreme Court, New York County

Docket Number: Index No. 159654/2022

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 35M

Justice

-----X INDEX NO. 159654/2022

THOMAS OLSEN

MOTION SEQ. NO. 001

Petitioner

- v -

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

**DECISION + ORDER ON
MOTION**

Respondents

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

For the reasons that follow and upon hearing oral arguments, the Petition is denied and this proceeding is dismissed.

Background

On October 20, 2021, the Commissioner of the New York City Department of Health and Mental Hygiene (DOHMH), issued an order requiring all CITY OF NEW YORK (CITY) employees to show proof of at least receiving one dose of a vaccination against the COVID-19 virus by 5:00 p.m. on October 29, 2021. Any CITY employee who did not provide such proof was to be excluded from the premises on November 1, 2021. Reasonable accommodations required by law were permitted as exceptions to the vaccination mandate (NYSCEF Doc. 4).¹

The CITY established additional procedures to address the anticipated influx of reasonable accommodation requests. These procedures included a requirement that any reasonable accommodation request was to be submitted on or before October 27, 2021. Additionally, the

¹ <https://www.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-vaccination-requirement-city-employees.pdf>

CITY set up a panel, the City of New York Reasonable Accommodation Appeals Panel (CITYWIDE PANEL), to address the appeals of any denied requests (*see* Affirmation of E. Eichenholtz, Chief Assistant Corporation Counsel for Employment Policy and Litigation within the New York City Office of the Corporation Counsel, submitted on behalf of Respondents [Eichenholtz Aff.], NYSCEF Doc. 31).

On November 1, 2021, Petitioner THOMAS OLSEN, a firefighter employed by Respondent FIRE DEPARTMENT OF THE CITY OF NEW YORK (FDNY), was placed on leave without pay for failing to adhere to the COVID-19 vaccination mandate (NYSCEF Doc. 1).

Petitioner then submitted a religious accommodation request dated November 5, 2021. He then supplemented his request with a document titled "Religious Exemption Statement" on November 15, 2021 (NYCSEF Doc. 5, 22).

By letter dated December 1, 2021, FDNY denied Petitioner's request. The denial letter also included language that if Petitioner wished to appeal, he must do so within seven days (NYCSEF Doc. 6, 23). On December 9, 2021, Petitioner submitted his appeal (NYCSEF Doc. 7, 25). By letter dated January 7, 2022, FDNY issued a supplemental denial letter (NYCSEF Doc. 8, 24) and the CITYWIDE PANEL denied Petitioner's appeal by email letter dated July 11, 2022 (NYCSEF Doc. 10).

Petitioner then commenced this Article 78 proceeding to vacate, nullify and set aside Respondents' July 11, 2022 denial. The Petition also seeks that Petitioner is granted religious accommodation, awarded backpay and attorney's fees, and find that Respondents violated Petitioner's rights under the New York City Human Rights Law (NYCHRL).

Discussion

Respondents Determination Was Not Irrational, Arbitrary or an Abuse of Power

By law, the judicial scope in deciding Article 78 matters is limited only to deciding whether the governmental agency had a rational basis for its determination, whether the determination was arbitrary and capricious or whether there was an abuse of discretion (*see* CPLR 7803; *Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cnty.*, 34 NY2d 222 [1974]; *Gilman v N.Y. State Div. of Hous. & Community Renewal*, 99 NY2d 144 [2002]). As the law recognizes that deference must be given to agencies' interpretation and application of their regulations including compliance with Covid-19 vaccination mandates. (*Gaines v. New York State Div. of Hous. & Cmty. Renewal*, 90 NY2d 545 [1997]; *Marsteller v. City of New York*, 217 AD3d 543 [1st Dept 2023]; *Lee v. City of New York*, 221 AD3d 505 [1st Dept 2023]).

Here, FDNY's initial denial found that the basis for Petitioner's accommodation was insufficient to grant the request particularly in light of the potential undue hardship to the FDNY (NYCSEF Doc. 6, 23). A supplemental denial was then issued by letter dated January 7, 2022 which asserted that the "[Petitioner's] 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" (NYCSEF Doc. 8, 24).

Following a review of Petitioner's request by the CITYWIDE PANEL, it denied the appeal, finding that "FDNY has established an undue hardship if [the religious accommodation] were to be granted" (NYCSEF Doc. 10, 26).

Similarly, to this Petition, in *Marsteller*, a New York City Police Officer's religious accommodation were denied by the NYPD. The court, in evaluating whether the denial was arbitrary and capricious, found sufficient an affidavit by a NYPD's Executive Director of the Equal Employment Opportunity Division, which provided the general procedures for accommodation requests in light of the COVID-19 vaccine mandate, the number of requests NYPD received, and the evaluation criteria for the religious accommodation requests. On behalf of the City, an affirmation of E. Eichenholtz was submitted outlining the general procedures for the Citywide Panel, religious accommodation request criteria, and analysis of the petitioner's appeal. The court found that the denials were not arbitrary, and the First Department affirmed. Significantly, in relying upon the respondents' affidavits concerning their denials, the First Department held that "where... there was 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 the court may consider such an affidavit even though it was not submitted during the administrative process" (*Marsteller* 217 AD3d at 544, citing *Robins v. NYC Off. of Chief Med. Exam'r*, 212 AD3d 541 [1st Dept 2023]).

Here, as there was no administrative hearing, the Court accepts the affirmations on behalf of Respondents (*Marsteller* 217 AD3d at 544). D. Nguyen, Assistant Commissioner of the Equal Employment Opportunity Office (EEO Office) for the FDNY (Nguyen Aff.) submitted an affirmation (NYSCEF Doc. 32). Therein, the Nguyen Aff. attests that a copy of the DOIHMH order was sent to all FDNY commands (NYSCEF Doc. 21). Further, the affirmation provides details

regarding the general procedures of the Reasonable Accommodation Unit, both before and after the DOIHMH order as well as the amount of requests received (over 2,000). The Nguyen Aff. also states that the EEO Office's procedures for evaluating reasonable accommodation requests were guided by EEOC guidelines, such as whether the applicant "behaved in a manner markedly inconsistent with the professed belief" (NYSCEF Doc. 32). FDNY's EEO Office also "considered whether the accommodation presented an undue hardship on FDNY operations" and was guided by the New York City Commission on Human Rights². (*Id.*). Specifically, the FDNY considered: "(1) the state of the public health emergency at the time the request was made; (2) the nature of FDNY's life-saving mission; and (3) the impact to the safety and health of FDNY members and the public that FDNY members regularly interact with, the requested religious accommodation could not be granted based on undue hardship." (*Id.*)

With respect to Petitioner's denial, on behalf of the CITY the Eichenholtz Aff. sets forth the general procedures for the CITYWIDE PANEL to evaluate an appeal of any religious accommodation request denial (NYSCEF Doc. 31). The CITYWIDE PANEL also relied upon EEOC guidelines in evaluating whether the applicant demonstrated a sincerely held religious belief concerning the matter at issue, as social, political or personal preferences. (*Id.*) After reviewing all of Petitioner's submissions, the CITYWIDE PANEL found that Petitioner did not demonstrate other instances of vaccine/medicine refusal and that the request was motivated by personal preference. Specifically, the Panel found that the "...Petitioner did not explain how he had a specific belief consistent with his refusal of the vaccines at issue here. Here, Petitioner, at best, cited purportedly religious concepts along with his personal beliefs concerning the contents of vaccines to justify his vaccine refusal" (NYSCEF Doc. 31). Nor did Petitioner submit to

² <https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Vax-Employment-Guidance.pdf>

Respondents evidence of routine religious services attended, prior history of refusing vaccines or any other personal details demonstrating a sincerely held religious belief/practice. (NYSCEF Doc. 7, 25).

The CITYWIDE PANEL also considered but did not agree with Petitioner's belief that the vaccine contained "neurotoxins, hazardous substances, attenuated viruses, animal cells, foreign DNA, albumin from human blood, carcinogens and chemical wastes (NYSCEF Doc. 7, 25). The CITYWIDE PANEL in its determination also considered Petitioner's role at the Department and the cumulative affect granting the 100s of similar requests would have on a Department charged with the responsibility of performing "critical first responder services "(*Id.*).

Furthermore, this Court notes that while Petitioner's request was untimely, Respondents nonetheless considered it on the merits and did not deny it as untimely. Whether Petitioner's request was deemed submitted on November 5, 2021, or on November 15, 2021, at a minimum Petitioner was over a week late and waited until after he was placed on leave without pay to move for a religious accommodation.

In addition, Petitioner's papers assert that his religious exemption request are grounded in his Catholic-Christian beliefs. Yet this Court may only examine the reasons and fairness behind Respondent's regulation and may not substitute its judgement for that of Respondents and cannot make any determination as to the authenticity of Petitioner's religious exemption request (*see Pell*, 34 NY2d 222). However, this Court does note that, that prior to the filing of this Petition, Pope Francis (who this Court takes judicial notice as the head of the Catholic Church), was himself vaccinated and encouraged all individuals of Catholic faith to receive the COVID-19 vaccine.³

³ <https://www.npr.org/sections/coronavirus-live-updates/2021/08/18/1028740057/in-a-message-to-americans-pope-francis-says-getting-vaccinated-is-an-act-of-love>

Accordingly, upon review of all the documents submitted, this Court finds that Respondents' determination was not irrational, arbitrary and capricious or an abuse of discretion.

Petitioner's Request for a Religious Accommodation

Petitioner also seeks an Order granting his religious accommodation request.

On February 9, 2023, the New York City Board of Health amended the COVID-19 vaccination mandate for CITY employees, repealing the provision that CITY employees were to be excluded from their work premises if they did not show proof of vaccination.⁴

Accordingly, that branch of the Petition seeking a religious accommodation is denied as the relief requested is now moot. (*Vignali v. City of New York*, 222 A.D.3d 419 [1st Dept 2023]).

Petitioner's Rights Under NYCHRL §8-107(3)(a) Were Not Violated

The Administrative Code of the City of New York § 8-107, or the New York City Human Rights Law (NYCHRL), provides, in part:

It shall be an unlawful discriminatory practice for an employer or an employee or agent thereof to impose upon a person as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such person to violate, or forego a practice of, such person's creed or religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day or the observance of any religious custom or usage, and the employer shall make reasonable accommodation to the religious needs of such person. (Administrative Code of the City of New York § 8-107[3][a]).

Here, Respondents' determination was not a violation of NYCHRL as under the circumstances Respondents did not engage in discriminatory practice[s] to coerce, intimidate, threaten, or interfere with, or attempt, coerce, intimidate, threaten, or interfere with Petitioner exercising his religious beliefs.

⁴ <https://home.nyc.gov/assets/doh/downloads/pdf/notice/2023/boh-order-amend-covid-vaccine-req-city-employees.pdf>

Further, the COVID-19 vaccine mandate has been upheld and found not to violate due process (see *Garland v. New York City Fire Dep't*, 574 F. Supp. 3d 120, 127 [E.D.N.Y. 2021]; *Garland v. New York City Fire Dep't*, No. 23-663, 2024 WL 445001, [2d Cir. Feb. 6, 2024]; *Broecker v. New York City Dep't of Educ.*, 585 F. Supp. 3d 299 [E.D.N.Y. 2022], *aff'd*, No. 23-655, 2023 WL 7485465 [2d Cir. Nov. 13, 2023], and *aff'd*, No. 23-655, 2023 WL 8888588 [2d Cir. Dec. 26, 2023]). Moreover, the CITY established accommodation requests evaluation and an appeals process. (*Marsteller*, 217 AD3d at 545; see also *Lynch v. Bd. of Educ. of City Sch. Dist. of City of New York*, 221 AD3d 456 [1st Dept 2023]). Accordingly, Petitioner has not shown that Respondents under these circumstances violated the New York City Human Rights Law.

Thus, it is hereby:

ORDERED and ADJUDGED that the Petition for relief pursuant to Article 78 is denied in its entirety and the proceeding is dismissed; and it is further

ORDERED that, within 20 days from entry of this order, Respondents shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

This constitutes the decision and order of the court.

7/19/2024
DATE


DENISE M DOMINGUEZ, 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"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE