SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** 56M

Justice

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INDEX NO. 158265/2022

In the Matter of

MOTION DATE 02/03/2023

BRIAN DANIELS,

MOTION SEQ. NO. 002

Petitioner,

- v -

THE NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 1, 2, 3, 4, 5, 6, 7, 8, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

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 a September 21, 2022 determination of the City of New York Reasonable Accommodation Appeals Panel (the Panel). That determination affirmed a February 8, 2022 New York City Police Department (NYPD) Equal Employment Opportunity Division (EEOD) determination that had denied his request for a reasonable accommodation exempting him from the City's mandatory COVID-19 employee vaccination requirement on religious grounds. The respondents---NYPD and City of New York---answer the petition and submit the administrative record. The petition is granted to the extent that the September 21, 2022 determination is annulled as arbitrary and capricious, the denial of the petitioner's request for a religious exemption from the COVID-19 vaccination mandate is vacated, and the matter is remitted to the Panel for further consideration and a new discretionary determination that explicates, with the necessary detail, the reasons for its determination. The petition is otherwise denied.

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 Envtl. 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 Envtl. Protection*, 29 AD3d 318, 319 [1st Dept 2006]; *Matter of Emmett v Town of Edmeston*, 3 AD3d 816, 818 [3d Dept 2004], *affd* 2 NY3d 817 [2004]). The petitioner did not name the Panel as a party respondent, even though it was the agency 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 Envtl. 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 defend this proceeding on the merits, however, the court declines to direct the joinder or intervention of the Panel (*see* CPLR 1001[b][1], [2]), and will address the parties' substantive contentions.

On October 20, 2021, the Commissioner of the New York City Department of Health and Mental Hygiene (NYC DOHMH) issued an order requiring City employees, including NYPD officers, 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. By administrative order dated December 13, 2021, the NYC DOHMH Commissioner 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 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 order, and directed that "covered entities," including the NYPD,

> "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 NYPD employees and officers.

The petitioner was a police officer assigned the NYPD's Emergency Services Unit Squad 6, in South Brooklyn. On or about October 27, 2021, the petitioner submitted, to the NYPD, a request for a reasonable accommodation exempting him from the COVID-19 vaccination requirement on the ground that his Baptist 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 that generally equated the human body with a sacred temple, and discussed the concept of "purity," including Romans 12:2, Proverbs 16:2, Psalms 119:9, I Corinthians 6:19-20, and Psalms 91:1-16. As the petitioner phrased it

> "[t]hese are just a few of the many scriptures [sic] that help me to hold strong to my belief and my faith in the holy word that compel[ ] me to make sure that I treat my body as a temple and give me strength to continue to hold strong against the pressures of modern society that try to violate Such beliefs by forcing a vaccine in my Temple. The right to choose is more important than ever before in my blood and all the things that make up my spiritual physical and mental being will stay as pure as they can be in this world and the next. I would greatly appreciate the chance to be exempt from this vaccine mandate as it would destroy my spiritual health and force me to go against all that I believe and all that I am trying to be in god's eyes."

The petitioner conceded that his parents had him vaccinated with numerous childhood vaccines, but that, as an adult, he never had vaccines administered to him, although he did not provide any information as to whether he received all of the vaccinations required to qualify for entry into the NYPD police academy. The petitioner also submitted a boilerplate affidavit by Dr. Harvey A. Risch, which has been submitted along with the petitions of dozens of other City employees seeking exemptions from the vaccine mandate. Dr. Risch averred that even those who are vaccinated with the COVID-19 vaccine nonetheless might experience breakthrough infections, and that the effectiveness of vaccines wanes more rapidly in connection with the more recently discovered variants of the virus.

In its February 8, 2022 determination, the NYPD EEOD wrote that, "[a]fter careful review of your application and the documents you submitted, the reasonable accommodation is DENIED due to the following reasons," and thereupon checked off three boxes on a pre-printed form, indicating that its reasons for the determination were that there was "[i]nsufficient or missing religious documentation," that the petitioner's written statement did "not set forth how religious tenets conflict[ ] with vaccine requirement," and that the petitioner presented "[n]o demonstrated history of vaccination/medicine refusal." It provided no further explanation as to why those boxes were checked.

In a letter dated February 14, 2022, the petitioner appealed to the Panel, again asserting that he held strong religious beliefs that vaccines of any sort somehow violated the tenets of his religion, and that compelling him to receive a vaccination was "unethical." He further asserted

that he had only received prior vaccinations because his parents compelled him to do so. Although he claimed to have been raised in a church setting, presumably by his parents, he did not accuse his parents of violating the tenets of the Baptist church in having him receive all childhood vaccinations that were necessary to enroll him in school.

In its September 21, 2022 appeals determination, the Panel, although adopting the reasons identified in the NYPD's February 8, 2022 decision, otherwise denied the petitioner's administrative appeal without further explanation. This proceeding ensued.

In his petition, the petitioner asserted that the NYPD'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. In support of their answer, the respondents submitted, among other things, an affirmation of Eric J. Eichenholtz, an attorney for the City, and Michael Melocowsky the Executive Director of the NYPD EEOD, both of whom explained the NYPD's procedures for the submission and determination of requests for reasonable accommodations. Eichenholtz described the composition of the Panel, and how its members reviewed each application for a religious accommodation. As he explained it,

> "With respect to religious accommodation requests, Title VII requires employers to accommodate only those religious beliefs that are 'sincerely held' and directly conflict with the City Order. In accordance with EEOC guidance, employers may request that an employee explain the religious nature of their belief and the Citywide Panel and/or a City agency may therefore make this request of an employee. Additionally, if the City has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the City is justified in seeking additional supporting information. The Citywide Panel also relies upon the EEOC's guidance with respect to evaluating those 'factors that - either alone or in combination - might undermine an employee's assertion that he sincerely holds the religious belief at issue [which] include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.'"

Eichenholtz further explained that, when an applicant for a religious accommodation professes that it would violate his or her religious beliefs to be vaccinated with a product that contained or was developed with cells of aborted fetuses or fetal cells, the Panel would undertake a review as to whether there was a factual basis for that claim, such as prior refusals to accept other vaccines or medications developed or tested with fetal cells, or prior refusals to accept any vaccination or medication whatsoever. The respondents also referred to the United States Equal Employment Opportunity Commission's (EEOC's) guidance that "personal preferences, or any other nonreligious concerns (including about the possible effects of the vaccine), do not qualify as religious beliefs," and that to qualify as a religious belief, the cited belief "should be . . . part of a comprehensive religious beliefs system and is not simply an isolated teaching."

"As of September 26, 2022," and, thus, while this proceeding was pending, the NYPD issued an administrative directive that "the New York City Police Department will voluntarily refrain from placing any uniformed member of service (including Detectives, Sergeants, and Captains), on leave without pay or terminating them due to their non-compliance with the vaccine mandate." Although that directive rendered academic the petitioner's motion for a preliminary injunction prohibiting the NYPD from terminating his employment or docking his pay (SEQ 001), the subject matter of the petition itself remains a live controversy, inasmuch as the petitioner remains subject to the vaccine mandate, even though he is no longer subject to the most severe penalties for noncompliance.

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept

2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [1st Dept 2008]; *Matter of Rumors Disco v New York State Liquor Auth.*, 232 AD2d 421, 421 [2d Dept 1996]). Inasmuch as the petitioner made no allegations that the Panel's determination was made in violation of lawful procedure, the Panel's determination to deny the petitioner's administrative appeal must be confirmed unless it was arbitrary and capricious or affected by an error of law.

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (*see Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 624 [1st Dept 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 608 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Consequently, an agency determination is arbitrary and capricious where the agency provides only a "perfunctory recitation" of relevant statutory factors or other required considerations as a basis for its conclusions (*Matter of BarFreeBedford v New York State Liq. Auth.,* 130 AD3d 71, 78 [1st Dept 2015]; *see Matter of Wallman v Travis*, 18 AD3d 304, 308 [1st Dept 2005] ["perfunctory discussion"]), provides no reason whatsoever for its determination (*see Matter of Rhino Assets, LLC v New York City Dept. for the Aging, SCRIE Programs*, 31 AD3d 292, 294 [1st Dept 2006]; *Matter of Jones v New York State Dept. of Corrections & Community Supervision*, 2016 NY Misc LEXIS 15778, *1-2 [Sup Ct, Erie County, Jul. 28, 2016]), or provides only a post hoc rationalization therefor (*see Matter of New York State Chapter, Inc., Associated Gen. Contrrs. of Am. v New York State Thruway Auth.*, 88 NY2d 56, 756 [1996]; *Matter of L&M Bus Corp. v New York City Dept. of Educ.*, 71 AD3d 127, 135 [1st Dept 2009]).

> "Notably, a fundamental principle of administrative law long accepted limits judicial review of an administrative determination solely to the grounds invoked by the respondent, and if those grounds are insufficient or improper, the court is

> powerless to sanction the determination by substituting what it deems a more appropriate or proper basis. Consequently, neither Supreme Court nor this Court may search the record for a rational basis to support respondent's determination, or substitute its judgment for that of respondent"

(*Matter of Figel v Dwyer*, 75 AD3d 802, 804-805 [3d Dept 2010] [internal quotation marks and citations omitted]).

"Courts have rarely singled out error of law by name . . . as a question for consideration in an Article 78 proceeding" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7803:1). "The question of whether an administrative agency's determination is affected by an error of law is often implicit in the nature of the grievance, and will often turn on the underlying substantive law applicable to the determination" (*Matter of Held v State of New York Workers' Compensation Bd.,* 2008 NY Slip Op 52741[U], *7, 2008 NY Misc LEXIS 10881, *20-21 [Sup Ct, Albany County, Jul. 7, 2008]; *see also* 14-7803 Weinstein-Korn-Miller, NY Civ Prac P 7803.01[3]). Hence, an administrative determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,* 39 NY2d 86, 92 [1976]; *see generally Matter of CVS Discount Liquor v New York State Liq. Auth.*, 207 AD2d 891, 892 [2d Dept 1994]), or where its determination violates some other statutory or constitutional provision (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,* 39 NY2d at 93 [Fuchsberg, J., concurring] ["an order which is specifically and expressly forbidden by . . . statute is an error of law"]).

Initially, only the Panel's administrative determination is subject to review in this proceeding. When an administrative agency renders a determination on an administrative appeal from the decision of another agency, the agency rendering the initial determination generally is not a proper party to any CPLR article 78 challenge to the appellate determination, as the initial determination has been superseded. Rather, only the determination of the administrative appeal is subject to judicial review (*see Matter of Rivera v Blass*, 127 AD3d 759

[2d Dept 2015]; *Matter of Safran v Shah*, 119 AD3d 590, 590-591 [2d Dept 2014]; *Matter of Berman v New York State Dept. of Social Servs.*, 107 AD3d 509 [1st Dept 2013]; *Matter of Baker v Mahon*, 72 AD3d 811, 813 [2d Dept 2010]; *see also Matter of Holland v New York City*, 271 AD2d 609 [2d Dept 2000]; *Jiggetts v Grinker*, 148 AD2d 1, 21 [1st Dept 1989], *revd on other grounds* 75 NY2d 411 [1990]; *see generally Matter of Armacida v Reitz,* 141 AD3d 713 [2d Dept 2016]; *Matter of TAC Peek Equities, Ltd. v Town of Putnam Val. Zoning Bd. of Appeals,* 127 AD3d 1216 [2d Dept 2015]; *Matter of Johnson v Scholastic, Inc.*, 52 AD3d 375, 375 [1st Dept 2008]; *Matter of Solid Waste Servs., Inc. v New York City Dept. of Envtl. Protection*, 29 AD3d 318, 319 [1st Dept 2006]). Where, as here, the joinder of the agency that rendered the initial determination is necessary to give complete relief to the petitioner, that agency may be a proper party for that limited purpose only, and not for the purpose of reviewing its determination.

Inasmuch as the Panel's determination sets forth absolutely no rationale whatsoever for its conclusions, other than to incorporate the conclusory reasons articulated by the NYPD EEOD, the Panel's determination is facially arbitrary and capricious, and may be annulled on that ground alone (*see Matter of Quagliata v New York City Police Dept,* 2023 NY Slip Op 30836[U], *9-10, 2023 NY Misc LEXIS 1190, *14 [Sup Ct, N.Y. County, Mar. 17, 2023] [Kelley, J.]; *Matter of Moscatelli v New York City Police Dept.*, 2022 NY Slip Op 34393[U], *8, 2022 NY Misc LEXIS 8341, *12-13 [Sup Ct, N.Y. County, Dec. 22, 2022] [Kelley, J.]; *Matter of Deletto v Adams*, 2022 NY Slip Op 33129[U], *6, 2022 NY Misc LEXIS 5571, *7 [Sup Ct, N.Y. County, Sep. 13, 2022]).

Even were the court directly to review the NYPD EEOD's initial determination, it nonetheless would be constrained to conclude that the initial determination also was arbitrary and capricious. The NYPD EEOD's determination is a prime example of a determination that sets forth only the most perfunctory discussion of reasons for administrative action. The court has nothing before it that would enable it to analyze how the pre-printed "reasons" that were checked off on its determination letter related to or defeated the petitioner's request for

accommodation. This type of conclusory administrative determination would require the court to speculate as to the thought processes of the person who checked the boxes, and provide its own reasons for those choices, an approach prohibited by longstanding rules of law. (*see Matter of Quagliata v New York City Police Dept,* 2023 NY Slip Op 30836[U], *10-11, 2023 NY Misc LEXIS 1190, *14-15; *Matter of Moscatelli v New York City Police Dept.*, 2022 NY Slip Op 34393[U], *8, 2022 NY Misc LEXIS 8341, *13, *Matter of Deletto v Adams*, 2022 NY Slip Op 33129[U], *3-4, *6, 2022 NY Misc LEXIS 5571, *5-6). Here, it is unexplained as to why the petitioner's religious documentation was missing or insufficient, or why his written statement did not set forth how religious tenets conflicted with the vaccine requirement. Moreover, the NYPD EEOD's bald conclusion that the petitioner had "[n]o demonstrated history of vaccination/ medicine refusal" cannot serve as the basis for an administrative determination where, as here, he was not asked to provide such examples.

The court's conclusion in this regard should not be construed as a ruling that the petitioner's contentions would have constituted a proper basis for an exemption had the petitioner's stated reasons for his request for an exemption, and his discussion of religious doctrine, properly been analyzed and explained by the Panel or the NYPD EEOD in the challenged decisions. That would have required a forthright engagement by those agencies with the religious contentions and arguments raised by the petitioner in his application, which was not done here. It would also have required some actual inquiry by the decision makers into the petitioner's prior behavior concerning vaccines and medications, particularly the absence from his statements that he refrained from taking any medication, including pills, syrups, and ointments, all of which also are absorbed into the body. Had those agencies taken that approach, their determinations might have survived judicial scrutiny, as the petitioner provided scanty proof that his rejection of vaccinations is an accepted tenet of Baptist doctrine, as opposed to a personal interpretation of doctrine by a lay person or even a few members of the clergy with whom he consulted, but who he does not identify. Since the agencies did not pursue

such an inquiry here, the court is constrained by long-established principles of administrative law to annul the challenged determination (*see Matter of Moscatelli v New York City Police Dept.*, 2022 NY Slip Op 34393[U], *9, 2022 NY Misc LEXIS 8341, *14-15),

With respect to the errors of law that the petitioner alleged, namely, the violation of his First Amendment right to the free exercise of religion and discrimination in employment on the basis of religion, the petitioner has not established either that the City's vaccine mandate was premised upon religion, as he has not demonstrated that his conclusions about the alleged proscription of desecrating the human body with vaccinations is an established Baptist doctrine, or merely his personal interpretation of his obligations as a practicing Baptist (*see generally F.F. v State of New York*, 65 Misc 3d 616 [Sup Ct, Albany County 2019]). Nor has he demonstrated that he had previously declined to be treated with drugs such as acetaminophen, albuterol, aspirin, ibuprofen, Tylenol, Pepto Bismol, Tums, Lipitor, Senokot, Motrin, Maalox, Ex-Lax, Benadryl, Sudafed, Preparation H, Claritin, Prilosec, and Zoloft, all of which were either developed, improved, or recently tested by their manufacturers for adverse side effects using stem cells from aborted fetuses, and all of which are absorbed into the body. With respect to these causes of action, the court further notes that declaratory relief is not available as a remedy in a CPLR article 78 proceeding (*see Matter of Cuffy v Pesce*, 178 AD3d 695, 695 [2d Dept 2019]; *Matter of Krichevsky v Dear*, 172 AD3d 1370, 1370 [2d Dept 2019]; CPLR 3017). Rather, only a judgment annulling or vacating an administrative determination is available in a CPLR article 78 proceeding where a petitioner establishes an error of law, and the court concludes here that the adverse determinations against the petitioner cannot be annulled or vacated on that ground (*see Matter of Moscatelli v New York City Police Dept.*, 2022 NY Slip Op 34393[U], *9-10, 2022 NY Misc LEXIS 8341, *15-17).

The petitioner also relies, in part, on the decision in the declaratory judgment action entitled *Matter of Police Benevolent Assn. of City of N.Y., Inc. v City of New York* (2022 NY Slip Op 33185[U], 2022 NY Misc LEXIS 5420 [Sup Ct, N.Y. County, Sep. 23, 2022] [Lyle Frank, J.]).

The judgment in that action declared that the City's vaccine mandate was invalid to the extent that it had been employed to impose a "new condition of employment" to "current P[olice] B[enevolent] A[ssociation] members" that had not been the subject of collective bargaining. That determination, however, was stayed by operation of law when the City appealed it to the Appellate Division (*see* CPLR 5519[a][1]), and it was recently reversed by that Court (*see Matter of Police Benevolent Assn. of City of N.Y., Inc. v City of New York*, _____AD3d_____, 2023 NY Slip Op 01874 [1st Dept, Apr. 11, 2023]). In its decision and order, the Appellate Division dismissed the petition as barred by res judicata, in light of the decision of the Supreme Court, Richmond County, dismissing an identical petition in *Matter of Police Benevolent Assn. of City of N.Y., Inc. v de Blasio* (Index No. 85229/2021 [Sup Ct, Richmond County, Feb. 16, 2022]).

Under the circumstances presented here, it is appropriate for the court, upon the vacatur and annulment of the Panel's determination, to remit the matter to the Panel so that it may properly articulate its reasons for rejecting the petitioner's contention that he had legitimate religious objections to receiving a COVID-19 vaccination (*see Matter of Weill v New York City Dept. of Educ.*, 61 AD3d 407, 408 [1st Dept 2009] [remitting to a Board of Education panel considering a teacher's allegedly inappropriate conduct so that it may articulate its reasons for rejecting petitioner's excuse for failing timely to request a hearing]; *see also Matter of Office Bldg. Assoc., LLC v Empire Zone Designation Bd.*, 95 AD3d 1402, 1404-1406 [3d Dept 2012]).

The court declines to award attorneys' fees to the petitioner since it is denying relief to him in connection with his First Amendment cause of action, presumably asserted pursuant to 42 USC § 1983, and his cause of action alleging violation of the New York City Human Rights Law, which are the only claims that he asserted for which attorneys' fees may be awarded. City agencies generally are not otherwise liable for an award of attorneys' fees in CPLR article 78 proceedings, as they are not State agencies within the meaning of the Equal Access to Justice Act (CPLR art 86) (*see Matter of Herman v New York City Dept. of Hous. Preserv. & Dev.*, 147 AD3d 756, 757 [1st Dept 2017]).

The parties' remaining contentions are without merit.

The court notes that, inasmuch as the matter is being remitted to the decision-making agency for a new discretionary determination, this paper constitutes an order, not a judgment, within the meaning of CPLR 5701(b)(1) for the purposes of appellate review (*see Matter of Mid-Island Hospital v Wyman*, 15 NY2d 374 [1965]; *Matter of Clermont Tenants Assoc. v New York State Div. of Hous. & Community Renewal*, 73 AD3d 658 [1st Dept 2010]; *Matter of Valentin v New York City Police Pension Fund*, 16 AD3d 145 [1st Dept 2005]).

Accordingly, it is

ORDERED that the petition is granted to the extent that the September 21, 2022 determination of the City of New York Reasonable Accommodation Appeals Panel, denying the petitioner's appeal of a February 8, 2022 New York City Police Department Equal Employment Opportunity Division determination, that had denied his request for a reasonable accommodation exempting him from the City's mandatory COVID-19 employee vaccination requirement, is annulled as arbitrary and capricious, the matter is remitted to the City of New York Reasonable Accommodation Appeals Panel for a new discretionary determination that properly articulates the basis for its determination, and the petition is otherwise denied

This constitutes the Decision and Order of the court.

4/24/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE