

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

2023 NY Slip Op 31855(U)

June 2, 2023

Supreme Court, New York County

Docket Number: Index No. 159689/2022

Judge: Laurence L. Love

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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. LAURENCE L. LOVE **PART** **63M**

Justice

-----X

DANE BATH, CHRISTINA WHITEHEAD, THOMAS
COZART

Petitioner,

- v -

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

Respondent.

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INDEX NO. 159689/2022

MOTION DATE 03/30/2023,
03/30/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 16, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 19

were read on this motion to/for EXTEND - TIME.

Upon the foregoing documents, and after oral argument, the instant Petition and Respondent's motion seeking an adjournment are resolved as follows:

Respondents' motion seeking an extension of time to respond to the instant Petition is Granted.

Petitioners, Dane Bath ("Bath"), Christina Whitehead ("Whitehead"), and Thomas Cozart ("Cozart"), filed the instant Petition on November 10, 2022, alleging as follows: On October 20, 2021, the Commissioner of the New York City Department of Health and Mental Hygiene ("Health Department") issued a COVID-19 vaccine mandate (the "Mandate") requiring all NYC employees and certain city contractors to show proof of vaccination against COVID-19 by October 29, 2021. At the time, Bath was employed by the FDNY and Whitehead was employed by the NYPD. Cozart was and remains employed by the NYPD. On November 4, 2021, Bath filed a "Reasonable

Accommodation Application for a COVID-19 Vaccine Exemption” and similar applications were filed by Whitehead on October 22, 2021 and Cozart on October 27, 2021, citing their sincerely held religious beliefs in said applications. In a letter dated April 25, 2022, the FDNY Office of Equal Employment Opportunity denied Bath’s appeal of the denial of his religious exemption to the vaccine mandate. Thereafter, in e-mails dated July 28, 2022 and September 21, 2022, Whitehead and Cozart were informed of the final denials of their Reasonable Accommodation Appeals. The Court notes that the instant Petition contains only Petitioners’ applications and Respondents’ final denials, omitting the initial determinations on the applications.

Pursuant to CPLR § 217(1), an Article 78 proceeding must be filed “within four months after the determination to be reviewed becomes final and binding upon the petitioner.” As discussed in *Walton v. N.Y. State Dep’t of Corr. Servs.*, 8 N.Y.3d 186, 194 (2007), “An administrative determination becomes ‘final and binding’ when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. ‘First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be . . . significantly ameliorated by further administrative action or by steps available to the complaining party.’”

Here, Bath received a final denial of his “Reasonable Accommodation” request on April 25, 2022, the final decision with respect to said request. In an agency-wide memo sent by the FDNY Chief of Operations on October 21, 2021, members of the FDNY were informed that “Requests for exemptions must be submitted by email to the EEO Office at EEORA@fdny.nyc.gov by 10/27 in order for the employee to not be placed on unpaid leave status on 11/1.” As Bath was placed on leave without pay on November 1, 2021, the latest date for the calculation of the Statute of Limitations is April 25, 2022 and as such, the instant Petition was

required to be filed by August 25, 2022. Same cannot be viewed as a continuing violation as an employer's rejection of an employee's proposed accommodation for religious practices is a discrete act that does not give rise to a continuing violation and that statute of limitations applicable to a failure-to-accommodate claim therefore begins to run on the date that the denial is communicated to the employee. See *Zacharowicz v. Nassau Health Care Corp.*, 177 F. App'x 152, 154 (2d Cir. 2006); *Elmenayer v. ABF Freight Sys.*, 318 F.3d 130, 134-35 (2d Cir. 2003). Even if the time is calculated from Bath's actual termination on June 10, 2022, the Petition remains untimely. As such, the instant Petition must be dismissed as to Petitioner Bath as untimely.

As this Petition applies to Cozart, it is undisputed that Cozart has not suffered any adverse employment actions as a result of his refusal to be vaccinated against Covid-19. On February 9, 2023, the City of New York lifted the Covid-19 vaccine mandate and as such, Cozart is no longer required to obtain said vaccine. As it is further undisputed that Cozart has worked continuously since the timely submission of his Reasonable Accommodation request on October 27, 2021, and was never placed on leave or terminated, this Petition is moot as applied to Cozart.

The applicable standard in a CPLR Article 78 proceeding is "whether [the] determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). Administrative action is arbitrary when it is taken "without sound basis in reason" and "without regard to the facts." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974); see *Ward v. City of Long Beach*, 20 N.Y.3d 1042, 1043 (2013). "[T]he Court may not upset the agency's determination in the absence of a finding...that the determination had no rational basis." *Mid-State Mgmt. Corp. v. New York City Conciliation and Appeals Bd.*, 112 A.D.2d 72, 76 (1st Dep't 1985), affirmed 66 N.Y.2d 1032 (1985). The Court may not substitute its judgment for that of the government. See, *Peckham v. Calogero*, 12 N.Y.3d 424, 431

(2009) (“[E]ven if the court concludes that it would have reached a different result than the one reached by the agency,” the court “must sustain the determination,” provided that it is “supported by a rational basis.”); *Arrocha v. Bd. of Educ.*, 93 N.Y.2d 361, 363 (1999). Accordingly, Respondents must only establish that there was a rational basis for the determination.

Petitioners argue both that the entire Public Sector Mandate and the denial of Petitioners’ Religious Accommodation Requests were arbitrary and capricious. As applied to the Public Sector Mandate as a whole, Petitioners argue that “the Mandate was rendered arbitrary and capricious as of August 19, 2022 when the CDC updated its guidance as it relates to the prevention and management of COVID-19, followed by Mayor Adams’ rescission of all other NYC mandates.” However, said arguments by Petitioners’ are entirely misplaced. The question is not whether the Vaccine mandate was arbitrary and capricious on August 19, 2022 and thereafter, but rather whether its establishment was unlawful in October of 2021. There should be no need for this Court to reiterate the COVID-19 pandemic history and methods utilized by Governments worldwide to best fight this terrifying unprecedented situation to best protect the public. As we are all aware, New York was one of the locations hardest hit by COVID-19 and numerous emergency protections were put in place to help reduce COVID exposure and allow those infected to be treated as effectively as possible. Vaccines, as they became available were clearly a key aspect in moving COVID-19 from a pandemic to a manageable health concern. Those were the circumstances in which the October 2021 mandates must be evaluated, not new CDC guidelines almost a year later when circumstances changed, in large part due to the widespread success of vaccines. The circumstances that developed after Petitioners were terminated from their employment almost a year later are irrelevant.

The subject vaccination mandate has been found to be proper on multiple occasions, See *Police Benevolent Ass'n of the City of New York, Inc. v. de Blasio*, No. 85229/20121 (N.Y. Sup., Rich. Cty.); *In the matter of the Application of Andrew Ansbro, as President of the Uniformed Firefighters Ass'n v. de Blasio*, No. 159738/2021, (N.Y. Sup, N.Y. Cty); *In the matter of the Application of Corr. Officers' Benevolent Ass'n, Inc. v. City of New York*, No. 161034/2021 (N.Y. Sup, N.Y. Cty) and has been found to be a lawful condition of employment See *Ansbro v. Nigro*, Index No. 531749/2021 (September 21, 2022); *Garland v. New York City Fire Dept.*, 2021 U.S. Dist. LEXIS 233142 at *25. "Given the state of public health emergency that our nation finds itself in due to the Coronavirus, the more transmissible [...] variants, and the nature of Plaintiffs' job as firefighters and EMT employees, interacting with members of the public on an emergency basis, and living in close quarters during their shifts, the [DOHMH] Commissioner was within his powers to require COVID-19 vaccination as a qualification of employment for FDNY employees." As such, the mandate is not arbitrary and capricious.

In support of the branch of the Petition related to Whitehead's application, the Petition contends that the denial of said application was arbitrary and capricious on the grounds that there was inadequate record to support the decision as the form denial was not individualized, constituted an error of law under the NYCHRL, See, N.Y.C. Admin. Code § 8-107(3)(a) and constituted an abuse of discretion.

In support of her application, Whitehead described her religious objections as follows:

I am requesting an exemption from the COVID-19 vaccination mandate because it is in a direct violation of my religious beliefs and practices. I am a Christian who has a personal relationship with Jesus Christ. My faith is consistent with the word of God (bible) and the holy spirit who guides me, ("But the Helper, the Holy Spirit, whom the Father will send in my name, he will teach you all things and bring to your remembrance all that I have said to you." _John 14:26 ESV). My religious beliefs is that my body, and other people's

body (including babies and fetus's) is a temple of God and I should not defile it ("Do you not know that you are God's temple and that God's Spirit dwells in you? If anyone destroys God's temple, God will destroy him. For God's temple is holy, and you are that temple." _ 1Corinthians 3:16-17) .("Since we have these promises, beloved, let us cleanse ourselves from every defilement of body and spirit, bringing holiness to completion in the fear of God." _ 2Corinthians 7:1). I am required to present my body holy and acceptable to God as directed in the bible, ("I appeal to you therefore, brothers, by the mercies of God, to present your bodies as a living sacrifice, holy and acceptable to God, which is your spiritual worship." _Romans 12:1) The Pfizer and Moderna Vaccines both contain mRNA technology which is according to the cdc website " mRNA vaccines use mRNA created in a laboratory to teach our cells how to make a protein" This protein is called a "spike protein". There have been several accounts reported of the dangers of spike protein and mRNA technology used in these vaccines. These vaccines including the Johnson and Johnson are made by growing the viruses in aborted fetal cells. (source: Children's Hospital of Philadelphia) My religious beliefs goes against the killing of unborn children in the mothers womb and using the body of a unborn fetus for vaccine purposes or any other purpose. My belief is that it is a defilement of God's temple which is the human body and I cannot partake in that in any way. In The Bible Job 33:15-8 it states, "He speaks in dreams, in visions of the night, when deep sleep falls on people, as they lie in their beds. 16 He whispers in their ear and terrifies them with warnings.17 He makes them turn from doing wrong; he keeps them from pride. 18 He protects them from the grave, from crossing over the river of death." I have had multiple dreams where God has instructed me in this manner (as in the bible) not to take these vaccines. Taking this vaccine would be in direct violation of my spiritual worship as it states in Romans 12:1. I follow the Bible and the holy spirit who leads me into all understanding and the revelation of Jesus Christ my Lord and savior. That is why taking this vaccine is against my religious beliefs including my spiritual worship of God.

Petitioners specifically argue that The New York City Department of Law's guidance explicitly acknowledges that "if a worker says that they [sic] cannot take the vaccine because it was developed and/or tested using fetal cells that may have been the result of an abortion, the worker may qualify for a religious exemption." However, Petitioners omit the sentence immediately following same "Does worker takes medications such as ibuprofen (Advil),

acetaminophen (Tylenol), or any other medications similarly developed or tested using fetal cell derivative lines? Such behavior would be inconsistent with this religious belief and generally means the worker would be denied an accommodation.”

Petitioners further argue that Whitehead’s final notice that her religious accommodation was denied because her request “does not meet criteria.” And that the NYPD provided no further explanation, renders it insufficient. However, as noted *supra*, Petitioners failed to include the complete appeal record, but same was provided by Respondents.

In its letter of February 15, 2022, Whitehead was informed that her Reasonable Accommodation Request was denied because there was “[i]nsufficient or missing religious documentation,” the “[s]tatement does not appear to be written by the application/generic statement does not support the candidate’s request,” the “[w]ritten statement does not set forth how religious tenets conflicts with vaccine requirement,” and there was “[n]o demonstrated history of vaccination/medicine refusal.”

While an agency should generally not question whether a request for religious accommodation is based on a sincerely held belief, as discussed in *Kane v. de Blasio*, 575 F. Supp. 3d 435, 442 (S.D.N.Y. 2021), *aff’d sub nom. Keil v. City of New York*, No. 21-3043-CV, 2022 WL 619694 (2d Cir. Mar. 3, 2022), questions regarding “(1) whether the employee has previously been vaccinated; (2) other substances that the employee considers foreign or impermissible and that violate the employee’s religious beliefs; (3) whether the employee takes other medications developed or tested using fetal cell derivative lines; and (4) other occasions that the employee has acted in accordance with the employee’s cited religious beliefs outside the COVID-19 context”...”is geared towards developing a factual basis for reaching a conclusion as to whether any particular Plaintiff’s beliefs are sincerely held and religious in nature, both of which are

permissible inquiries and questions of fact. See *United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) (“[W]hile the ‘truth’ of a belief is not open to question, there remains the significant question whether it is ‘truly held.’ This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact”); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94 (E.D.N.Y. 1987).”

The cited reasons in the NYPD’s February 15, 2022 letter are sufficiently clear. It cannot be denied that Whitehead’s application appears to be a cut and paste of various bible verses, which could arguably be applied to a host of foods and/or medications thereby raising additional legitimate contextual questions that warrant further inquiry. Here, the NYPD panel correctly indicated that Whitehead failed to include any mention of a previous history of vaccination or medicine refusal. In fact, there is no explanation of Whitehead’s personal history in her application. This is most significant as it is undisputed that Whitehead provided no new rationale nor evidence in support of her appeal and as such, the denial of her Religious Accommodation request must stand based upon its numerous infirmities.


The Court also must address, the portion of Petitioner’s application discussing the possible side effects of mRNA vaccines buried within her application citing mainly religious concerns. Same are not relevant here as “objections to a COVID-19 vaccination requirement that are purely based on social, political, or economic views or personal preferences, or any other nonreligious concerns (including about the possible effects of the vaccine), do not qualify as religious beliefs...”

<https://www.eeoc.gov/wysk/what-youshould-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>

The Court has no desire to infringe on or question the religious beliefs of anyone, including Petitioners, but has been placed in the position where a fair evaluation of the agencies findings

must be made within the context of an Article 78 proceeding. Here, the agency’s findings that Whitehead failed to establish a sincerely held religious was simply not arbitrary and capricious. Thus, the issue of whether she must be provided a reasonable accommodation is irrelevant. Petitioner contends that the NYCHRL requires NYPD to engage in a cooperative dialogue prior to making a determination as “It shall be an unlawful discriminatory practice for an employer . . . to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation...” N.Y.C. Admin. Code § 8-107 (28)(a)(1). See also N.Y.C. Admin. Code § 8-107 (28)(e). However, Respondents are not required to engage in a “cooperative dialogue” until a petitioner established that he or she was or may be entitled to an accommodation due to a “sincerely held” religious belief. See *Baker v. Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006) (employer must offer a reasonable accommodation after the employee establishes a prima facie case); and *Muhammad v. N.Y.C. Transit Auth.*, 52 F. Supp. 3d 468, 483 (E.D.N.Y. 2014). As such, Petitioner has not established a violation of NYAC §8-107(3)(a). As such, it is hereby

ORDERED that the instant Petition is DENIED in its entirety.

<u>6/2/2023</u> DATE			 <hr/> HON. LAURENCE L. LOVE, JSC
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED		<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input 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