

**Davila v City of New York**

2023 NY Slip Op 33024(U)

August 31, 2023

Supreme Court, New York County

Docket Number: Index No. 156349/2022

Judge: Judy H. Kim

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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. JUDY H. KIM **PART** **05RCP**

*Justice*

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REBECA DAVILA,

Petitioner,

- v -

THE CITY OF NEW YORK, PRESTON NIBLACK AS  
COMMISSIONER OF THE NEW YORK CITY  
DEPARTMENT OF FINANCE,

Respondents.

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**INDEX NO.** 156349/2022

**MOTION DATE** 08/01/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26

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

Upon the foregoing documents, the motion by respondents the City of New York (the “City”) and Preston Niblack, as Commissioner of the New York City Department of Finance (“DOF”) to dismiss the Petition is granted for the reasons set forth below.

On December 14, 2015, petitioner began working for the DOF’s Office of the Sheriff as a Deputy Sheriff (NYSCEF Doc. No. 1 [Petition at ¶¶2, 5]). On October 20, 2021, the Commission of the New York City Department of Health and Mental Hygiene (“DOHMH”) issued an order requiring all City employees to submit proof of their COVID-19 vaccination by October 29, 2021 (the “DOHMH Order”). On October 21, 2021, petitioner applied for a religious exemption from the DOHMH Order<sup>1</sup> (Id. at ¶14).

<sup>1</sup> While the Petition alleges that petitioner also had serious medical concerns about receiving the vaccine given her prior history of cancer (NYSCEF Doc. No. 1 [Petition at ¶14]), nothing in the Petition indicates that petitioner sought a medical accommodation for this reason.

On March 2, 2022, the DOF denied petitioner’s request for a religious exemption (Id.; NYSCEF Doc. No. 14 [Denial Letter]). On March 9, 2022, petitioner appealed that denial (NYSCEF Doc. No. 1 [Petition at ¶15]). On March 21, 2022, the City’s Reasonable Accommodation Appeals Panel (the “Appeals Panel”) denied her appeal and the DOF notified petitioner of same via email on that same date (Id.; NYSCEF Doc. No. 17 [Appeal Denial]). On March 30, 2022, the DOF notified petitioner that her employment would be terminated if she did not submit proof of vaccination against COVID-19 by April 1, 2022 (NYSCEF Doc. No. 18 [Warning Letter]). Petitioner failed to do so and on April 1, 2022, the DOF notified petitioner that her employment was terminated, effective April 4, 2022 (Id. [Termination Notice]).

On August 1, 2022, petitioner commenced this proceeding seeking an order: (i) declaring that the denial of her religious accommodation and subsequent termination were arbitrary and capricious under CPLR §7803(3) and that her termination—without being afforded an opportunity to make an explanation and to submit facts in opposition required under Civil Service Law §50(4)—was an abuse of discretion under CPLR §7803(3); and (ii) directing respondents to rescind petitioner’s termination and declare her exempt from the DOHMH’s Order. In the alternative, petitioner argues that the denial of her religious exemption request was not supported by substantial evidence (CPLR §7803[4]) and seeks an order transferring this proceeding to the Supreme Court of New York, Appellate Division, First Department to address this issue.

Respondents now cross-move, pursuant to CPLR §3211(a)(5), to dismiss the Petition on the grounds that it is barred by the four-month statute of limitations applicable to Article 78 proceedings and, pursuant to CPLR §3211(a)(7), to dismiss the Petition for failure to state a cause of action under CPLR §7803. Petitioner opposes the cross-motion.

## DISCUSSION

Respondents' motion to dismiss the Petition as untimely is granted. Pursuant to CPLR §217(1), an Article 78 "proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR §217[1]). An agency action is final and binding upon the petitioner when the agency has reached "a definitive position on the issue that inflicts actual, concrete injury" and "the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (Best Payphones, Inc. v Dept. of Info. Tech. & Telecom., 5 NY3d 30, 34 [2005] [internal quotations omitted]). "A determination generally becomes binding when the aggrieved party is notified" of that determination (Johnson v The City of New York, 2023 NY Slip Op 31967[U] [Sup Ct, NY County 2023] citing Musey v 425 E. 86 Apts. Corp., 154 AD3d 401, 404 [1st Dept 2017]).

Here, the Appeals Panel's March 21, 2022 denial of petitioner's religious accommodation constituted a final decision that inflicted an actual, concrete injury (See e.g., Demerest v New York City Police Dept., 2023 NY Slip Op 30232[U] [Sup Ct, NY County 2023]; see also Mendez v Fire Dept. of the City of New York, 2023 NY Slip Op 31589[U] [Sup Ct, NY County 2023]). Petitioner does not dispute that she was notified of the denial of her appeal on March 21, 2022. Therefore, the four-month statute of limitations began to run on that date and elapsed on July 21, 2022. Since petitioner commenced this special proceeding eleven days thereafter, on August 1, 2022, her claims arising out of the denial of her religious exemption request are untimely. Petitioner's argument, in opposition, that the limitations period for such claims began to run on the date her employment was terminated—i.e., April 4, 2022—is incorrect (See Musey v 425 E. 86 Apts.

Corp., 154 AD3d 401, 404 [1st Dept 2017]). Accordingly, all claims stemming from the denial of petitioner's appeal for a religious accommodation are therefore dismissed.

To the extent that petitioner's claim that her termination violated CPLR §7803(3) arises out of her April 4, 2022 termination—and is therefore timely—this claim fails on its merits. First, while CPLR §7803(3) permits a court to review “whether a determination was ... an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed” (CPLR §7803[3] [emphasis added]), this provision is inapplicable here because petitioner's termination was neither a penalty nor a disciplinary action but the result of her failure to satisfy a “qualification of employment unrelated to job performance, misconduct, or competency” (Matter of O'Reilly v Bd. of Educ. of the City Sch. Dist. of the City of New York, 213 AD3d 560 [1st Dept 2023] [internal citations omitted]).

Finally, petitioner's argument that her termination violated Civil Service Law §50(4) is also incorrect. CSL §50(4) permits state civil service department and municipal commissions to terminate the employment of a civil servant if an investigation uncovers conduct by that individual which, if known at the time of hiring, would have disqualified him or her for the position in question, as long as that individual is provided, prior to termination, “a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification” (CSL §50[4]). Since this written statement requirement applies only to terminations resulting from investigations of “pre-appointment conduct” it has no bearing here, where the conduct at issue—the failure to timely obtain a COVID-19 vaccination—occurred during petitioner's employment (See Matter of Johnson v Kelly, 35 AD3d 297, 298 [1st Dept 2006]).

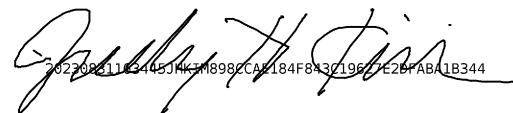
In light of the foregoing, it is

**ORDERED** and **ADJUDGED** that the Petition is denied, respondents' cross-motion granted, and this proceeding is dismissed; and it is further

**ORDERED** that within thirty days from entry of this order, counsel for the City of New York and Preston Niblack, as Commissioner of the New York City Department of Finance shall serve a copy of this order, with notice of entry, on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Exiling" page on this court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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8/31/2023

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: