At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of September, 2023.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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NATHALEE HOLLINSHEAD,
Petitioner,
-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Respondent.

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DECISION AND JUDGMENT

Index No. 509120/22

Mot. Seq. No. 1, 3

The following e-filed papers read herein:	NYSCEF Doc No.:
Notice of Petition, Petition, and Exhibits Annexed	1-6, 15
Answer with Exhibits Annexed	24-32

In this CPLR article 78 proceeding, petitioner Nathalee Hollinshead ("petitioner"), a former managerial employee of respondent New York City Health and Hospitals Corporation, doing business as NYC Health + Hospitals ("respondent" or "HHS"), seeks an order rescinding: (1) respondent's decision to terminate her employment, effective November 29, 2021; (2) respondent's allegedly arbitrary and capricious decision not to extend religious exemption and reasonable accommodation previously granted to her; and (3) respondent's denial, as a general matter, of religious exemption to employees who hold sincere religious concerns on the issue of the COVID-19 vaccine mandates. By decision and order, dated April 10, 2023, the Court granted respondent's pre-answer motion to dismiss (in Seq. No. 2) solely to the extent of dismissing co-respondent New York City Department of Health & Mental Hygiene (the "City DOH") from this proceeding, and otherwise denied respondent's motion (the "prior order") (NYSCEF Doc No. 19). Thereafter, respondent answered the petition (NYSCEF Doc No. 24). On August 10, 2023,

the Court heard oral argument, reserving decision on the merits of the petition (in Seq. No. 1). The remaining portion of litigation – respondent's motion (in Seq. No. 3) for extension of time to answer the petition – has not been objected to, and has been mooted out, by the filing of its answer.

Background

Respondent employed petitioner, a New York State-licensed clinical social worker, as the "Director of Complex Care (Functional)" in its Brooklyn-based, Community Care division from March 2, 2020 to November 29, 2021 (NYSCEF Doc No. 24 [Verified Answer, ¶ 1]). Her duties, as a managerial employee, included oversight of all care-coordination activities specific to service delivery to certain special populations, such as the "Health and Recovery Plans" for adults with significant behavioral problems, and the "Assisted Outpatient Treatment" programs for the individuals who were referred for mental health treatment (NYSCEF Doc No. 6 [Description of Petitioner's Job Title]).

On August 18, 2021, New York State Commissioner of Health issued an "Order for Summary Action" (the "State DOH Commissioner's Order") under the authority vested in him/her by Public Health Law § 16, which permits the State DOH Commissioner to issue a short-term order – effective for a maximum of 15 days – if he/she identifies a condition that in his/her view constitutes a "danger to the health of the people." After making findings about the dangers of COVID-19, the State DOH Commissioner's Order required certain healthcare facilities to ensure that their personnel were fully vaccinated against COVID-19 by September 27, 2021 (part of NYSCEF Doc No. 25). The State DOH Commissioner's Order included (in § [c] [2] thereof) a religious exemption for personnel

who held "a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer."

On August 26, 2021, or eight days after the State DOH Commissioner's Order was issued, the New York State Department of Health (the "State DOH") adopted an emergency rule directing hospitals and other healthcare entities to "continuously require" certain of their employees to be fully vaccinated against COVID-19 beginning on (as relevant here) October 7, 2021 (10 NYCRR § 2.61) (the "State Mandate" or "Section 2.61") (part of NYSCEF Doc. No. 25). Unlike the State DOH Commissioner's Order, the State Mandate omitted (and still omits) a religious exemption.[1] As an emergency regulation, the State Mandate was in effect for a maximum of 90 days, which initially expired on November 23, 2021, but has been subsequently renewed. Indeed, the State Mandate has remained in effect to date, although the State DOH no longer prospectively enforces it starting May 24, 2023 (as more fully described below).

Pursuant to Section 2.61, petitioner, as a "Community Care" employee, was required to receive her first COVID-19 vaccination before October 7, 2021 (NYSCEF Doc No. 30 [New York State Vaccine Mandate for Health Care Workers; Frequently Asked Questions]).

By paper application, dated September 3, 2021 and by email re-submission, dated September 24, 2021, petitioner requested respondent's Office of Equal Employment Opportunity ("EEO") to grant a religious exemption from the State Mandate (NYSCEF

[1] "The absence of a religious exception to a law does not, on its own, establish non-neutrality such that a religious exception is constitutionally required" (*see Riley v New York City Health & Hosps. Corp.*, 2023 WL 2118073, *5 [SD NY Feb. 17, 2023] [internal quotation marks omitted]).

Doc Nos. 26-27). As the basis for the religious exemption, she has asserted (and respondent has not challenged) that she is a born-again Christian with a sincerely held religious opposition to the COVID-19 vaccine (NYSCEF Doc No. 26 [Petitioner's September 3, 2021 letter]).

By email to petitioner, dated September 29, 2021, the EEO responded that:

> "After a review of [her] job duties[,] th[e] [EEO] has determined that there are no reasonable accommodations available which would permit [petitioner] to perform [her] essential job functions. As such, [the EEO] has approved a leave of absence without pay for a period of sixty (60) days, from September 27, 2021 through November 26, 2021. Prior to the expiration of this approved leave of absence[,] th[e] [EEO] will review [petitioner's] request to determine whether additional leave can be granted or if the Operational needs of [petitioner's] department have changed[,] such that the grant of additional leave poses an undue burden on the [HHS] System" (NYSCEF Doc No. 28).

By a subsequent email to petitioner, dated November 16, 2021, the EEO advised her that:

> "Th[e] [EEO] has reviewed [her] request to determine whether additional leave beyond November 26, 2021 could be granted or if the grant of additional leave would pose an undue burden on the [HHS] System. Following that review[,] it has been determined that no additional leave can be granted. [Petitioner] will receive further information from Human Resources about an option that would allow [her] to voluntarily resign from the [HHS] System on or before December 31, 2021. If [she] choose[s] to elect this option[,] [she] must do so before the expiration of [her] leave on November 26, 2021. However, should [she] choose not to elect that Voluntary Resignation option, [she] will be separated from employment on or after [Saturday,] November 27, 2021" (NYSCEF Doc No. 29).

Thereafter, by letter, dated November 29, 2021, respondent's human-resources department notified petitioner that:

> "According to [the HHS] records, [she] remain[ed] non-compliant with the COVID-19 vaccination requirement. [Petitioner is] therefore no longer an

> employee of [respondent] effective [Monday,] November 29, 2021" (NYSCEF Doc No. 15).

On March 28, 2022, petitioner timely commenced this CPLR article 78 proceeding. As noted, respondent has answered the petition, thus making the matter ripe for determination on the merits. The well-established standard of review has been omitted in this decision and judgment in the interest of brevity. Additional facts are noted when relevant to the discussion below.

Discussion

As a threshold matter, it must be clarified that the State Mandate (rather than the City regulation) is at stake here because respondent, as a public benefit corporation, is independent of the City of New York, and (with certain exceptions not applicable here), is *not* an agency of the City (*see Brennan v New York*, 59 NY2d 791, 792 [1983]). This clarification is necessary because the petition (in ¶ 19 thereof) incorrectly relies on the order, dated October 20, 2021, of the *City* DOH requiring employees of all City agencies to show proof of vaccination.[2]

It bears noting that the vaccine mandate of Section 2.61 remains in effect to date, although the State DOH has not been enforcing it prospectively. By "Dear Administrator" letter, dated May 24, 2023, the State DOH advised that:

> "At this time, the New York State regulatory requirement 10 NYCRR Section 2.61 (Prevention of COVID-19 Transmission by Covered Entities -

[2] Likewise, the petition (in ¶¶ 3 and 13 thereof) alleges that: (1) the City DOH "had issued an order compelling all New York City front-line health care workers, with a few time-based exception[s], to be vaccinated against the Covid-19 or face termination of employment by New York City"; and (2) the City DOH is "an administrative agency in the executive branch of New York City's Government. The [City] DOH also includes the Board of Health which has eleven . . . members appointed by the Mayor of the City of New York. . . ." As indicated, the City DOH has been dismissed from this proceeding by the prior order. Where, as here, the equivalent of (footnote continued)

> 10 NYCRR Section 2.61) that personnel in covered entities be fully vaccinated against COVID-19 is being recommended for repeal by the [State DOH] . . . [,] subject to consideration by the Public Health and Health Planning Council ('PHHPC'). Effective immediately, the [State DOH] will cease citing providers for failing to comply with the requirements of Section 2.61 while the repeal is under consideration by PHHPC. *The [State DOH] may*, however, *continue to seek sanctions against providers based on previously cited violations that allegedly occurred*" (emphasis added).[3]

The State Mandate in Section 2.61 has been subject to material litigation in two recent cases before the New York state courts. First, on January 13, 2023, the Onondaga County Supreme Court granted the request from an organization of medical professionals to enjoin the State Mandate, holding that its promulgation was an ultra vires act of the State DOH (*see Medical Professionals for Informed Consent v Bassett*, 78 Misc 3d 482 [Sup Ct, Onondaga County 2023]). The *Medical Professionals* court held that the State Mandate exceeded the State DOH's rule-making authority under the Public Health Law, violated the separation of powers doctrine, and was arbitrary/capricious. The ruling was appealed, and on February 27, 2023, the Fourth Judicial Department stayed the enforcement of the underlying decision/order during the pendency of the appeal (*see Medical Professionals for Informed Consent v Bassett*, 2023 NY Slip Op 62807[U] [4th Dept 2023]). Oral

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a summary judgment motion follows a motion to dismiss, the doctrine of law of the case stemming from the prior order is inapplicable, inasmuch as the scope of review applicable to each motion is distinct (*see Bernard v Grenci*, 48 AD3d 722, 724 [2d Dept 2008] [collecting authorities]).

[3] The "Dear Administrator" letter is available at (*see* https://www.health.ny.gov/facilities/adult_care/dear_ administrator_letters/docs/dal_23-09.pdf (last accessed Sept. 21, 2023).

argument before the Fourth Judicial Department was held on May 24, 2023,[4] but, to date, no decision has been issued.

Second, on August 17, 2023, the Erie County Supreme Court, by a memorandum decision of that date, similarly invalidated the State Mandate of Section 2.61 (*see Matter of Cooper v Roswell Park Comprehensive Cancer Ctr.*, ___ Misc 3d ___, 2023 NY Slip Op 23265 [Sup Ct, Erie County 2023]). To date, however, no order implementing the *Matter of Cooper* memorandum decision has been entered (*see* NY St Cts Elec Filing Doc No. 29, "Order [Proposed]" in *Matter of Cooper v Roswell Park Comprehensive Cancer Ctr.*, Sup Ct, Erie County, index No. 805274/2023 [last checked Sept. 21, 2023]).[5]

Separately from the foregoing, the State Mandate of Section 2.61 has been subject to significant litigation in federal courts. At the time of petitioner's request for religious exemption in September 2021, a federal district court in the Northern District of New York had temporarily enjoined the State DOH from "enforcing any requirement that employers deny religious exemptions from COVID-19 vaccination" (*Dr. A v Hochul*, 2021 WL 4189533, *1 [ND NY Sept. 14, 2021]). However, the district court's temporary injunction was promptly (*i.e.*, within approximately six weeks) vacated on appeal (*see We the Patriots USA, Inc. v Hochul*, 2021 WL 5103443 [2d Cir Oct. 29, 2021], *opinion issued* 17 F 4th

[4] *See* NY St Cts Elec Filing Doc No. 25, Transcript of Arguments in *Medical Professionals* before the Fourth Judicial Department, in *Matter of Cooper v Roswell Park Comprehensive Cancer Ctr.*, Sup Ct, Erie County, index No. 805274/2023.

[5] Separately from the foregoing, state-court actions to enjoin the implementation of Section 2.61 were unsuccessful (*see Cattaraugus County v New York State Dept. of Health*, 2021 WL 5097517 [Sup Ct, Albany County Oct. 12, 2021]; *Serafin v New York State Dept. of Health*, 2021 WL 5097516 [Sup Ct, Albany County Oct 8, 2021]).

266, 274 [2d Cir Nov. 4, 2021], *clarified* 17 F 4th 368 [2d Cir Nov. 12, 2021], *cert denied sub nom Dr. A. v Hochul*, 142 S Ct 2569 [2022]).[6]

In addition, a long line of cases in the Southern, Eastern, and Northern Districts of New York have each considered the application of the State Mandate of Section 2.61 to the individuals whose religious beliefs were in conflict with receiving a COVID-19 vaccine. Those decisions dismissed the religious-discrimination, failure-to-accommodate claims, and substantive due process claims, as predicated on the termination of employment following the affected employees' refusal to comply with the State Mandate, with the courts explaining that "regardless of the current status of Section 2.61, the regulation was in effect at the time of [the plaintiff's] request for a religious exemption, and it therefore would have been an undue hardship for [the defendant] to comply with his request" (*Wilson v New York Society for Relief of Ruptured & Crippled, Maintaining Hospital for Special Surgery*, 2023 WL 5766030, *5 [SD NY Sept. 7, 2023]; *see also Mace v Crouse Health Hosp., Inc.*, 2023 WL 5049465, *8 [ND NY Aug. 8, 2023] [*Medical Professionals* (and its progeny, *Matter of Cooper*) have "no bearing on whether Defendant violated Plaintiff's rights by following the [state] law [*i.e.*, Section 2.61] as it then

[6] As one federal district court astutely observed:

> "That a court had temporarily, and then preliminary, enjoined enforcement does not mean employers were free, let alone required, to ignore the State Mandate. Were the rule otherwise, employers would be required to accurately predict the outcome of litigation in order to avoid liability for discrimination on the one hand, or liability for violating state law on the other. Indeed, the wisdom of complying with the State Mandate notwithstanding, the temporary relief was demonstrated by the Second Circuit's prompt vacatur of the injunction. . . ."

(*Dennison v Bon Secours Charity Health Sys. Med. Group, P.C.*, 2023 WL 3467143, *5 [SD NY May 15, 2023] [internal citations omitted]); *see also Cagle v Weill Cornell Medicine*, 2023 WL 4296119, *5 [SD NY June 30, 2023] [same]).

existed"]; *Algarin v NYC Health + Hosps. Corp.*, 2023 WL 4157164, *4 [SD NY June 23, 2023] ["Plaintiff's reliance on (*Medical Professionals*), a New York Supreme Court decision that found that (the State) DOH exceeded its authority in promulgating Section 2.61, is misplaced. . . . (T)hat decision was not issued until January 13, 2023 and therefore [the defendant] was obliged to follow Section 2.61 at the time that employment actions were taken with respect to Plaintiff in 2021. . . . (Further,) the May 24, 2023 letter from the (State) DOH stating that, effectively immediately, the (State) DOH will not enforce Section 2.61 prospectively while repeal is being contemplated does not change the fact that Section 2.61 was in force and effect in 2021 at the time of the employment actions with respect to Plaintiff."]; *Dennison v Bon Secours Charity Health Sys. Med. Group, P.C.*, 2023 WL 3467143, at *6, n 8 [SD NY May 15, 2023] ["That the Onondaga County Supreme Court (in *Medical Professionals*) invalidated the State Mandate in 2023 . . . does not change the outcome here. (A) 2023 ruling has no bearing on the actions of Defendants in 2021."]). *See further Corrales v Montefiore Med. Ctr.*, 2023 WL 2711415, *7 [SD NY Mar. 30, 2023]; *Riley v New York City Health & Hosps. Corp.*, 2023 WL 2118073, *5 [SD NY Feb. 17, 2023]).[7]

The Court has considered petitioner's remaining contentions and found them unavailing. Petitioner's substantive due process claim is groundless (*see e.g., Serafin v*

[7] Of interest, the federal district court's decision in *Algarin* (cited in the text above) was relied on by the Third Judicial Department in rejecting the claimant's reliance on *Medical Professionals* in the context of the State Department of Labor's denial of the unemployment insurance benefits to the claimant – a security guard for his former employer, a major medical center – whose employment was terminated on October 30, 2021, following his refusal, on religious grounds, to be vaccinated against COVID-19 (*see Matter of Parks v Commissioner of Labor*, ___ AD3d ___, 2023 NY Slip Op 04470, 2023 WL 5612202 [3d Dept Aug. 31, 2023]). Citing *Algarin*, the Third (footnote continued)

New York State Dept. of Health, 2021 WL 5097516, *7 [Sup Ct, Albany County Oct. 8, 2021]).

Conclusion

Accordingly, it is

ORDERED AND ADJUDGED that (in Seq. No. 1) the verified petition is *denied* and the proceeding is *dismissed* without costs and disbursements; and it is further

ORDERED that (in Seq. No. 3), respondent's motion for extension of time to serve its answer is *denied as moot*; and it is further

ORDERED that respondent's counsel is directed to electronically serve a copy of this decision and judgment with notice of entry on petitioner's counsel and to electronically serve an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and judgment of the Court.

E N T E R,

J. S. C.

Judicial Department found the claimant's request to take judicial notice of the holding in *Medical Professionals* as "unpersuasive under these circumstances" (2023 WL 5612202, *2).