

At an IAS Term, City Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 19th day of December 2022.

P R E S E N T:

HON. GINA ABADI,
J.S.C.

MELANIE KAMBOURIS, AMANDA SEMEL, ANDREW FOSSATTI, ANNA STITHOS, CANDICE WITTMER, CATHERINE PETRONE, COURTNEY KASSEBAUM, DANIELLE ELAZE, DANIELLE CALAPAI, DIANA HARRISON, ERICA WILHELM, ERIETA MYFTARAJ, GENEVIEVE GIOELI, GREGORY MAST, HENNA FOSSATTI, JACQUELINE LANGONE, JENA FORGIONE, JENNIFER VILLALTA, JENNIFER FICETO, JESSICA MAST, KIM MARINELLI, LAUREN HORAN, LISA IRVINE, MARSIDA ASHAFI, STEFANIE RUDE, SUZANNA CIANCI, TIFFANY KLEIN, VICKY STITHOS, RESMIGE GIOVANNA, KATHERINE GANIARIS,

Index No.: 518863/2022

Motion Seq: 1 & 2

DECISION/ORDER

Petitioners,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, DAVID C. BANKS, in his Official capacity as Chancellor and DANIEL WEISBERG in his official capacity as First Deputy Chancellor,

Respondents.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>NYSCEF Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed.....	<u>3 - 38, 48, 49-57, 59</u>
Opposing Affidavits (Affirmations).....	<u>42 - 46, 58</u>
Reply Affidavits (Affirmations).....	<u>47</u>

Upon the foregoing papers in this hybrid special proceeding pursuant to CPLR Articles 78 and 63 seeking declaratory and injunctive relief, petitioners move by order to show cause

(OSC), motion sequence 1, for: 1) a declaratory judgment finding that respondent New York City Department of Education (DOE) violated tenured petitioners' rights pursuant to Education Law [EL] §§ 3020 and 3020-a; 2) a declaratory judgment that the DOE's determination deprived petitioners of property without due process of law guaranteed under article 1 section 6 of the New York State Constitution; 3) a declaratory judgment that the DOE took disciplinary action without a just cause; 4) a declaratory judgment that the DOE's determination is null, void, and unenforceable; 5) a temporary, preliminary, and permanent injunction enjoining the DOE from enforcing the determination; 6) a temporary restraining order and a preliminary injunction reinstating petitioners, unless, and until, the DOE lawfully commences disciplinary proceedings; 7) a declaratory judgment that the DOE took disciplinary action in violation of lawful procedure pursuant to CPLR 7803; and 8) an award of back pay and any other compensation petitioners would have received but for the DOE's determination. By subsequent OSC, motion sequence 2, petitioners seek: 1) a temporary restraining order staying the DOE's determination to assign petitioners to reassignment centers; 2) a temporary restraining order staying the DOE from altering petitioners' employment status that they had prior to April 19, 2022, unless, and until, the DOE commences disciplinary proceedings set forth in EL §§ 3020, 3020-a, and in accordance with petitioners' due process rights guaranteed under NY Const. art I, § 6; 3) a preliminary and permanent injunction annulling the DOE's determination to reassign petitioners; 4) a preliminary injunction reinstating petitioners; and 5) attorneys' fees and costs.

Factual and Procedural Background

The 30 petitioners in this proceeding are employees of the DOE, 27 of whom are teachers or school professionals with tenure. On August 24, 2021, Dr. Dave A. Chokshi, Commissioner of the New York City Department of Health and Mental Hygiene, issued an order (Vaccine

Mandate Order) requiring all employees of the DOE to submit proof, by September 27, 2021, that they were fully vaccinated against Covid-19; or received a single dose vaccine, or the second dose of a two-dose vaccine; or received the first dose of a two-dose vaccine, with the additional requirement to provide proof of the second dose thereafter. Petitioners thereafter submitted purported proof of compliance with the Vaccine Mandate Order by uploading to the relevant DOE web portal CDC Covid-19 Vaccination Record Cards (Vaccination Cards) indicating receipt of the vaccine.

Following submission of the Vaccination Cards, petitioners received an e-mail from the DOE, dated April 19, 2022, which stated:

“We have received information that the proof of vaccination that you uploaded to the DOE Vaccine Portal, pursuant to the New York City Health Commissioner’s Order requiring vaccination of all NYCDOE staff, was fraudulent. Compliance with that Order is a condition of NYCDOE employment. Since we have reason to believe that you have not complied with that Order, effective Monday, April 25, 2022, **you are being placed on Leave Without Pay** with benefits until further notice. You should not report to your school/work location after the April vacation and your school/office will be notified of this change in your status” (emphasis in original).

NYSCEF Docs No 5 and 45.

According to the DOE, the Special Commissioner of Investigation for the New York City School District (“SCI”) informed the DOE’s Division of Human Resources (“DHR”) of a list of DOE employees “implicated” in a “fraudulent vaccination operation investigation, for whom SCI had determined that there was a high probability that they had not in fact received required vaccinations,” contrary to the information the employees had submitted to the DOE. *See* Affidavit of Mallory O. Sullivan, NYSCEF Doc No 44. In his affidavit, SCI Deputy Commissioner Gerald P. Conroy avers that while the Vaccination Cards submitted by these

employees “purport to show that the employees received the required COVID-19 vaccination. . . evidence obtained by SCI to date demonstrates that this is very likely to be untrue.” Conroy states that his affidavit is based “upon personal knowledge and upon information and belief, the sources being the files of [SCI], documents obtained from the DOE, the New York State Department of Health (pursuant to an SCI subpoena), two district attorneys’ offices within the State of New York, as well as conversations with representatives of the aforementioned offices and four additional law enforcement agencies.” Affidavit of Gerald P. Conroy, NYSCEF Doc No 45.

The placement of petitioners on leave without pay resulted in the filing of the instant Article 78 petition along with the initial OSC, motion sequence 1, setting forth petitioners’ request for declaratory and injunctive relief, including reinstatement to their assignments with pay. The OSC, motion sequence 1, was signed on July 1, 2022 by Justice Karen B. Rothenberg.

On or about August 8, 2022, the DOE sent each petitioner an e-mail stating:

“We are writing with an update to the prior notice you received regarding the proof of vaccination that you uploaded to the DOE Vaccine Portal.

“Effective September 6, 2022, you will be returned to payroll. Upon your return, NYCDOE will conduct an internal investigation related to whether the proof that you uploaded is fraudulent.

“You will be reassigned during the pendency of such investigation. This assignment is pending; please check your email on or after September 1, 2022 for directions on where to report.”

NYSCEF Doc No 54.

Following petitioners reassignment, petitioners brought a subsequent OSC, motion sequence 2, seeking a preliminary and permanent injunction annulling the DOE’s determination reassigning petitioners pending investigation of the validity of their Vaccination

Cards and to restore petitioners to their previous assignments. The OSC, motion sequence 2, was signed by Justice Richard Velasquez on August 30, 2022 and did not grant the preliminary injunction.

Discussion

In an article 78 proceeding, the court considers “only whether the determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was an abuse of discretion.” *Matter of Halpert v Shah*, 107 AD3d 800, 801 (2d Dept 2013); see CPLR § 7803(3); *Matter of Ward v City of Long Beach*, 20 NY3d 1042 (2013); *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 770 (2d Dept 2005). “Under this standard, courts examine whether the action taken by the agency has a rational basis and will overturn that action only where it is taken without sound basis in reason or regard to the facts, or where it is arbitrary and capricious.” *Matter of Halpert*, 107 AD3d at 801-802 (citations and internal quotation marks omitted); see *Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 (2010); *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009); *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974); *Matter of Deerpark Farms, LLC v Agricultural & Farmland Protection Bd. of Orange County*, 70 AD3d 1037, 1038 (2d Dept 2010).

In addition, the decision to grant or deny an injunction lies within the sound discretion of the Supreme Court. See *Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d 1165, 1166-1167 (2d Dept 2020); *Matter of Goldfarb v Ramapo*, 167 AD3d 1009, 1010 (2d Dept 2018). “A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction.” *144-80 Realty*

Assocs. v 144-80 Sanford Apartment Corp., 193 AD3d 723, 725 (2d Dept 2021) quoting *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 (2d Dept 2009); see *Icy Splash Food & Beverage, Inc., v Henckel*, 14 AD3d 595, 596 (2d Dept 2005). Moreover, “[i]njunctive relief is to be invoked only to give protection for the future . . . to prevent repeated violations, threatened or probable, of the [parties’] rights.” *Swartz v Swartz*, 145 AD3d 818, 828-29 (2d Dept 2016) (internal quotation marks and citations omitted); see *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d at 408.

Here, the essential argument of petitioners is that the determinations of the DOE, in both placing them on leave without pay and further assigning them to a reassignment center, or “rubber room” rather than the classroom was arbitrary and capricious and contrary to law insofar as these actions constituted disciplinary actions without affording petitioners their due process rights pursuant to EL §§ 3020, 3020-a and the New York State Constitution.

EL § 3020 provides, in relevant part:

“1. No person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article or in accordance with alternate disciplinary procedures contained in a collective bargaining agreement covering his or her terms and conditions of employment.”

EL § 3020-a provides the exclusive method of disciplining a tenured teacher in New York and requires the filing of charges (EL § 3020-a [1]), a determination of whether probable cause exists to bring a disciplinary proceeding (EL § 3020-a [2]) and a hearing before an arbitrator (EL § 3020-a [3]) prior to the imposition of “a reprimand, a fine, suspension for a fixed time without pay or dismissal.” EL § 3020-a (4).

Contrary to the DOE's argument, the reassignment of the petitioners *with pay* does not render the petition and original OSC moot, as petitioners seek, in the second OSC as well as the original OSC, reinstatement of petitioners' employment status and assignments that they held prior to April 19, 2022, unless, and until, respondents commence disciplinary proceedings as set forth in EL §§ 3020 and 3020-a. In this matter, the reassignments did not involve transfers to similar teaching positions at other locations or assignments which involved the application of petitioners' areas of expertise. Instead, the reassignments were made to centers where, according to one petitioner, teachers are given "tedious" and "mindless" assignments and tasks. Affidavit of Melanie Kambouris, NYSCEF Doc No. 55. The reassignment was not made pending a hearing on specified charges,¹ even though the DOE made a clear accusation of wrongdoing by the petitioners. Thus, the court finds that, in this instance, the reassignments constitute a form of discipline which may only be effectuated pursuant to the procedures of EL §§ 3020 and 3020-a.²

The DOE likewise cannot skirt the disciplinary procedure requirements by claiming that petitioners failed to meet a condition of employment in failing or refusing to be vaccinated. Courts have indicated that the dismissal of New York City employees or placement of the employees on leave without pay for failure to comply with the Vaccine Mandate Order, without first undergoing statutory disciplinary procedures, is permissible since non-vaccination constitutes a failure to satisfy a "condition of employment" as opposed to misconduct. *See New York City Mun. Labor Comm. v City of New York*, 75 Misc 3d 411, 415 (Sup Ct., NY County) ("all of the statutes which plaintiffs point to prescribe the procedures for removal of a protected

¹ Placement of a tenured teacher in a reassignment center is not dissimilar to a suspension with pay, which is allowable "pending a hearing on the charges and the final determination thereof." EL § 3020-a (2)(b).

² To the extent the court in *Matter of McElroy v Board of Educ. of Bellmore-Merrick Cent. High School Dist.*, 5 Misc 3d 321 (Sup Ct, Nassau County 2004), determined that the reassignments of the petitioners therein did not amount to discipline, this court is not bound by a court of coordinate jurisdiction and the facts of said case are otherwise distinguishable from this matter.

employee charged with delinquencies in the performance of his [or her] job. Since the terminated employees' failure to be vaccinated is unrelated to the performance of their job, these statutes simply do not apply") (citations and internal quotation marks omitted); *O'Reilly v Bd of Educ. of the City School Dist. of the City of New York*, 2022 NY Slip Op 30173[U], **3-4 (Sup Ct, NY County 2022) ("The Court agrees with respondents that placing petitioner on leave without pay was not discipline under the Education Law and instead was merely a response to petitioner's refusal to comply with a condition of employment . . . Discipline involves alleged misconduct, not a prerequisite to doing the job in the first instance"). However, this matter does not involve a situation where petitioners' failure or refusal to comply with the Vaccine Mandate Order is at issue. Instead, petitioners maintain that they have, in fact, complied with the mandate and that the allegations are false. The DOE's decision to place petitioners on leave without pay (and subsequent reassignment) was not grounded in the undisputed failure or refusal of petitioners to be vaccinated, but in an accusation based on information gleaned from outside agencies that the Vaccination Cards uploaded by petitioners were probably fraudulent. Submission of fraudulent Vaccination Cards could clearly be characterized as misconduct, if not a crime. While petitioners, in such instance, would have also failed to satisfy a condition of employment, that failure would be inextricably intertwined with an act of misconduct, thus triggering the disciplinary procedure requirements of EL §§ 3020 and 3020-a. The DOE cannot cloak a misconduct claim in a failure to satisfy a condition of employment claim as means to avoid its obligation to afford the tenured petitioners their rights under the statute.

Accordingly, petitioners have demonstrated that the DOE's initial placement of tenured petitioners on leave without pay, and subsequent reassignment, was in violation of their rights under EL §§ 3020 and 3020-a, and therefore arbitrary and capricious. Furthermore, the tenured

petitioners have demonstrated their entitlement to permanent injunctive relief to prevent future and continuing violations of their rights under EL §§ 3020 and 3020-a. *See 144-80 Realty Assocs.*, 193 AD3d at 725; *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d at 408. In this regard, the court finds that the petitioners have demonstrated a danger of irreparable harm resulting from their continued absence from the classroom, and that the equities balance in their favor.

In light of this court's determination that the DOE's actions were in violation of EL §§ 3020 and 3020-a, the court sees no need to address petitioners' argument that such action was also in violation of petitioners' due process rights under article 1, section 6 of the New York State Constitution.

Accordingly, petitioners' orders to show cause, motion sequences 1 and 2, are granted as to the tenured petitioners to the following extent:

It is hereby

ORDERED, ADJUDGED AND DECLARED that 1) the respondent DOE's initial determination placing tenured petitioners on leave without pay, and subsequently assigning them to reassignment centers, was in violation of the tenured petitioners' rights pursuant to EL §§ 3020 and 3020-a, and 2) that the DOE's determination is hereby declared null, void, and unenforceable; and it is further

ORDERED that tenured petitioners shall be reinstated to the assignments they held prior to their placement on leave without pay on April 19, 2022; and it is further

ORDERED that tenured petitioners shall be awarded any back pay withheld during the period they were placed on leave without pay; and it is further

ORDERED that the DOE is permanently enjoined from placing tenured petitioners on leave without pay or reassigning them to reassignment centers without the DOE first commencing disciplinary procedures pursuant to EL §§ 3020 and 3020-a; and it is further

ORDERED that the motions are in all other respects denied.

The foregoing constitutes the decision, order and judgment of the court.

ENTER:



HON. GINA ABADI
J.S.C.

KINGS COUNTY CLERK
FILED
2022 DEC 30 AM 9:43

