

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

ANDREW SCHIEFER,

**AFFIRMATION OF
ERIC J. EICHENHOLTZ**

Petitioner,

Index No. 155983/2022

FOR A JUDGMENT PURSUANT TO ARTICLE 78

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK AND
COMMUNITY SCHOOL DISTRICT 79 OF THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK, UNITED
FEDERATION OF TEACHERS,

Respondents.

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ERIC J. EICHENHOLTZ, an attorney admitted to practice before the Courts of the State of New York, affirms, pursuant to the Civil Practice Law and Rules (“CPLR”) and under penalty of perjury, that the following is true and correct:

1. I am the Chief Assistant Corporation Counsel for Employment Policy and Litigation within the New York City Office of the Corporation Counsel. I have held this position since October, 4, 2021. In this capacity, I oversee the Law Department’s Labor and Employment Law, Affirmative Litigation, Worker’s Compensation and E-Discovery Divisions. I also provide legal advice and counsel to City agencies and officials in employment matters. Prior to October 4, 2021, I served as the Chief of the Labor and Employment Law Division within the Office of the Corporation Counsel. As Chief of the Labor and Employment Law Division I oversaw all litigation brought against the City arising out of the City’s role as an employer.

This Affirmation is based on my own personal knowledge, as well as the books and records of the City of New York, and statements made to me by other employees of the City of New York. I submit respectfully this Affirmation in order to provide the Court with information regarding the review of Andrew Schiefer's application for appeal of the denial of his requested religious accommodation.

Background Information on the Citywide Panel

2. On October 20, 2021, Commissioner of the New York City Department of Health and Mental Hygiene ("DOHMH") Dave A. Chokshi, M.D., issued an order requiring all City employees to show proof of at least one dose of a vaccination against COVID-19 by 5:00 p.m. on October 29, 2021 (the "City Order").

3. In response to the City Order, the City established additional procedures specific to requests for vaccination-related accommodations in an effort to address the anticipated increase in accommodation requests that would be made by City employees. These procedures specified that a reasonable accommodation was to be submitted by an employee to their agency's EEO Officer on or before October 27, 2021. Any employee who is or was denied a reasonable accommodation by their agency has the right to appeal that denial to the City of New York Reasonable Accommodation Appeals Panel ("Citywide Panel").

4. The Citywide Panel was created specifically in response to the City Order to consider appeals filed by employees whose accommodation requests had been denied by their respective agency.

5. The purpose of the Citywide Panel is to ensure that employees who are denied a reasonable accommodation can have their appeals heard and considered consistent with the standards established by the Americans with Disabilities Act ("ADA"), Title VII of the Civil

Rights Act of 1964 (“Title VII”), the New York State Human Rights Law, and the New York City Human Rights Law. The Citywide Panel evaluates appeals under the standards set by those laws and consistent with the guidance issued by the U.S. Equal Employment Opportunity Commission (“EEOC”) to assist employers in implementing COVID-19 related strategies compliant with Title VII and the ADA. This EEOC guidance specifically addresses accommodation requests made in response to an employer-issued vaccine mandate.

6. The Citywide Panel is comprised of representatives from the Office of the Corporation Counsel (“Law Department”), the New York City Department of Citywide Administrative Services (“DCAS”), the New York City Department of Health and Mental Hygiene (“DOHMH”) and the City Commission on Human Rights (“CCHR”). The composition of the Citywide Panel was specifically designed to utilize the extensive subject matter expertise and knowledge-base of individuals employed at these City agencies with respect to medical and religious accommodation requests.

7. Furthermore, in order to tailor the Citywide Panel to best evaluate accommodation requests, the composition of the Citywide Panel that considers a particular request changes depending on the nature of the request. When the appeal concerns a request for a medical accommodation, the Law Department, DCAS and DOHMH panel members consider the appeal. If the appeal concerns a request for an accommodation based on a religious need, the Law Department, DCAS and CCHR consider the appeal.

8. Each case is reviewed by three Panel members (one Panel member from each applicable agency). As detailed below, following a thorough review of the appeal, each Panel member exercises their agency’s vote on the Citywide Appeal for that particular appeal. Each agency may vote to affirm the denial of the accommodation or to reverse the agency decision and

grant the accommodation. When there is disagreement amongst the three agencies concerning the outcome, the majority rules.

9. Each agency separately reviews each request, although the Panel members can confer if they deem it necessary. Once all three agencies have voted, either myself or the General Counsel of DCAS, Sanford Cohen, will perform a final review of the case for quality assurance purposes and finalize the case. Once the case is finalized, the agency and employee are notified of the appeals panel's decision.

10. Prior to reaching the appellate level, with respect to agency-level denials, all City employees who are denied a vaccine mandate accommodation by their agency are provided with written information on the appeals process, including a link to the City's online appeals request portal: www.nyc.gov/vaxappeal. An employee may submit an appeal via the online review request portal, which will automatically notify their agency EEO Officer of the appeal. Upon notification of the appeal, the agency's EEO Office will upload all records concerning the agency's denial of the reasonable accommodation request within one business day.

11. Once the Citywide Panel is in receipt of an appeal, it is reviewed to determine whether supplemental information is necessary from either the agency or the employee in order to make a determination on the appeal. If such information is necessary, the Panel makes that request to the agency, the employee or both.

12. The applicable panel members then review all the materials provided by the agency and the employee. In so reviewing, the Panel utilizes the below-described standards which comport with city, state and federal law.

13. The Citywide Panel considers whether the requested religious accommodation presents an undue hardship on City operations. EEOC guidance provides that

requiring an employer to bear more than a “de minimis,” or a minimal, cost to accommodate an employee’s religious belief is an undue hardship.

14. It is with these guiding principles in mind that the Citywide Panel considers each and every appeal put before it. Once the panel members have had sufficient time to review all materials provided, each agency votes as to whether to affirm the denial or grant the requested accommodation.

15. Prior to voting on an appeal, any Citywide Panel member may request that the request be remanded back to the agency. This request is not subject to a vote. Any request by a Panel member for a remand results in a request being sent to the agency for further review or continued cooperative dialogue at the agency level. A Panel member may remand back to the agency in advance of a vote for a multitude of reasons, including because: (1) information is missing from the record on appeal; (2) the agency appeared to have overlooked information that had been previously submitted; (3) the employee raised a new matter for the first time on appeal that merits agency review; or (4) the Panel member believes additional cooperative dialogue between the agency and employee is needed to better understand the employee’s request. Again, these remands are designed to ensure that the employee’s request for an accommodation is accorded all reasoned consideration and attention under the circumstances.

16. The above-described process is uniform for all City agencies and employees.

17. With respect to DOE employees, any DOE employee who submitted a request for a religious accommodation to DOE and had that request denied, was afforded the opportunity to appeal that denial before a neutral arbitrator. In the event the arbitrator affirmed the denial, the DOE employee was subsequently given the opportunity to submit an additional

appeal to the Citywide Panel. Once an appeal is filed with the Citywide Panel, the process applies described in Paragraphs 5 through 16 above. The Citywide Panel does not accept appeals of denials of medical accommodations from DOE employees.

Petitioner's Appeal to the Citywide Panel

18. By letter dated August 1, 2021, Petitioner requested a religious exemption which was denied by the DOE. The request was denied by the DOE because the accommodation would impose an undue hardship on the DOE and its operations.

19. On or about September 19, 2021, Petitioner appealed via the collective bargaining agreement process involving the DOE and Petitioner's Union, the United Federation of Teachers. This appeal was denied by an arbitrator on September 24, 2021.

20. Petitioner next appealed the denial of his accommodation request to the Citywide Panel. The Citywide Panel received a letter dated November 22, 2021 from Coyle Law Group LLP regarding Petitioner's appeal.

21. The Citywide Panel requested additional information regarding Petitioner's appeal. The request for additional information included the following:

1. Whether you have previously taken any vaccinations.
2. If you have stated that you have a personal religious aversion to foreign or other impermissible substances entering your body, please describe this with more clarity, including describing any other commonly used medicines, food/drink and other substances you consider foreign/impermissible or that violate your religious belief.
3. If you have stated that you cannot take the vaccine because of an objection to using derivative fetal cells in the development of a vaccine, please provide more information about your stated objection and whether there are other medications or vaccinations that you do not take because of this objection.

4. Any additional occasions you have acted in accordance with the cited belief outside the context of a COVID-19 vaccination, to the extent not previously described in the documentation already submitted.

22. Petitioner provided the additional information which focused on Petitioner's religious beliefs regarding vaccines. Petitioner wrote that he has not previously taken any vaccinations, does not consume alcohol and does not take over-the-counter medications. Additionally, Petitioner's answer to the fourth question was "not applicable."

23. DOE sent a position statement in support of its denial of Petitioner's accommodation request. This position statement included reasoning as to why granting the accommodation request would be an undue hardship. The reasons provided by the DOE as to why granting the request would be an undue hardship include that Petitioner would not be able to perform the essential functions of the position, mainly serving students attending school in-person. Additionally, over 3,300 DOE staff requested religious exemptions and DOE lacks flexibility to transfer existing DOE staff to fill gaps created by DOE employees granted exemptions due to state law and applicable collective bargaining agreements. Granting an exemption would require the DOE to bear significant costs and operational difficulties including having to pay additional employees to perform the essential functions of the exempted employee's position. DOE stated the undue hardship will only grow with each exemption granted.

24. After a review of all the documentation provided by both Petitioner and the DOE, including Petitioner's appeal and supplemental response to the Panel's question as well as DOE's position statement, all three members of the Citywide Panel voted to affirm the denial of the reasonable accommodation.

25. The Panel voted unanimously to affirm the denial of the reasonable accommodation for substantially the same reasons as indicated in the DOE's position statement.

26. Thus, on July 27, 2022, the Citywide Panel denied Petitioner's appeal and affirmed the DOE's denial of Petitioner's reasonable accommodation request because granting the accommodation would be an undue hardship given the need for a safe environment for in-person learning.

Dated: New York, New York
September 22, 2022



ERIC J. EICHENHOLTZ