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

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In the Matter of the Application of
JAMES NOVA,
Petitioner,

Index No.: 158587/2022

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Against

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

Respondents.

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PETITIONER'S MEMORANDUM OF LAW IN REPLY TO RESPONDENTS' ANSWER AND IN FURTHER SUPPORT OF PETITIONER'S ARTICLE 78 SPECIAL PROCEEDING

By: Attorneys for Petitioner

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I. LEGAL ARGUMENT

A. *The Denial and Termination Are Arbitrary and Capricious, Affected by Error of Law, and Abuse of Discretion*

Respondents' denied Inspector Nova's religious exemption request and terminated him on the basis of "potential undue hardship" (Dkt. 28 at 1) and "Does Not Meet Criteria." (Dkt. 9 at 1). These conclusory determinations are devoid of rationale and must be annulled. Respondents are prohibited from creating new evidence and arguments for litigation.

1. Respondents' Denials Are Conclusory and Lack Rationale

Respondents' conclusory denials lack justification as to why accommodating Inspector Nova constituted a "potential undue hardship," even though Respondents were accommodating him when the decisions were rendered and for the eight months prior. Even now, Respondents fail to aver why weekly testing instead of vaccination is not reasonable, even though according to NYC's FAQs on its website, an allowable "accommodation from the vaccination mandate that will not cause undue hardship and/or disruption is weekly testing and submission of negative PCR results." FAQ on New York City Employees Vaccine Mandate, https://www1.nyc.gov/assets/dcas/downloads/pdf/guidelines/faq-vaccine-mandate.pdf.

Now, *for the first time*, Respondents allege they denied Inspector Nova's request because he posed a "direct threat to the public and his co-workers" (Resp. Mem. of Law, Dkt. 22 at 2) and because of "FDNY's need for a safe and healthy work environment." (*Id*. at 5). In doing so, Respondents have concocted after-the-fact justifications that are legally insufficient and unsupported by the record. Respondents' after-the-fact justification did not appear anywhere in its two denials. This Court cannot rely on after-the-fact rationales and arguments, especially where the rationality for same is unsupported by relevant evidence. Had Respondents provided any justification for their decisions, this Court would have something to evaluate. Respondents had

over eight months to generate their rationale. Respondents cannot make new arguments for the first time in this proceeding. *Punnett v. Evans*, 26 A.D.2d 396, 399 (1st Dep't 1966) ("[T]he courts will not sanction an administrative denial which has neither offered the applicant an opportunity to present his case to the agency nor apprised the court of review with a basis for the finding against the applicant"). In reviewing alleged arbitrary and capricious administrative determinations, a reviewing court's function is limited to "whether the record contains sufficient evidence to support the rationality of the . . . determination." *Atlas Henrietta, LLC v. Town of Henrietta Zoning Bd. of Appeals*, 995 N.Y.S.2d 659, 665–66 (Sup. Ct. 2013). Respondents' reasoning is entirely lacking and should be annulled. *Koch v. Sheehan*, 21 N.Y.3d 697, 704 (2013) (annulling determination on the ground that the decision was arbitrary and capricious because of the "inadequate record support for the decision.").

By way of a recent example, the Supreme Court in New York County held that the denial of a religious exemption to the COVID-19 vaccine mandate was arbitrary and capricious because "the reasons for the denial were vague and conclusory." *Loiacono v. the Bd of Educ. of the City of New York, et al*, Index no.154875/2022. Respondents' after-the-fact statements during litigation do "not suddenly transform the denial into one that contains logical reasoning." *Id.* "Of course, submitting after-the-fact reasoning to justify a decision is not proper as it is not a part of the administrative record." *Id*. Here, the record contains insufficient evidence to support the rationality of Respondents' denials, and this Court should set them aside. *Atlas Henrietta, LLC*, 46 Misc. 3d at 332.

Even if Respondents were permitted to proffer after-the-fact arguments created for litigation, their Affirmations are inapt. Respondents failed to produce any writing created and dated by a panel member when the final decision was rendered. Rather, Eric Eichenholtz

submitted an affirmation dated December 5, 2022, that purports to rationalize the panel's decision made six months prior. (Dkt. 24). In doing so, Respondents acknowledge that the denial was unlawful.

Further, even if the Court allows Respondents to supplement the record with after-the-fact submissions created for litigation, the Court should require those submissions should be detailed affidavits by the *decision-makers* explaining the grounds for the final determination. *See* CPLR 7804(e). The Affirmations filed by Respondents lack probative value because they were not made by any individuals on the City Panel who made the ultimate determination. *See Mtr of Battaglia v. Schuler*, 60 A.D.2d 759 (4th Dep't 1977) (finding an Answer in an Article 78 proceeding deficient because affiant did not purport to have first-hand knowledge of the facts). Additionally, Respondents' Affirmations do not purport to be based on statements from any of the actual panel decision-makers, none of whom are identified by Respondents. Respondents' Affirmations must be rejected.

2. Respondents Failed to Apply the Correct Standard for Undue Hardship

Respondents have thoroughly argued that the Citywide Panel considered undue hardship using the Title VII standard, which is "more than a 'de minimis,' or a minimal cost to accommodate an employee's religious belief." (Eichenholtz Aff., Dkt. 24 at 5 ¶ 16); (Nguyen Aff., Dkt. 25 at 7 ¶ 29); (Respondents Answer, Dkt. 21 at 13 ¶ 92); (Resp. Memo. of Law, Dkt. 22 at 6). *See also* Eichenholtz Dep. 8:16-9:12, May 24, 2022, Case No. 1:2022-cv-00752, attached hereto as **Exhibit K**.[1] However, the NYCHRL imposes a higher burden on employers, defining undue hardship as an accommodation requiring "a significant interference with the safe

[1] *See also* Eichenholtz Dep., Exhibit K at 65:1-70:2; 239:4-12; 290: 23-25, 291:1-7; 291:19-25, 292:1-12; 292-303; 284:6-25, 285:1-12; 239:13-20.

or efficient operation of the workplace." N.Y.C. Admin. Code § 8-107(3)(b). Even now, Respondents' representatives' affidavits never mention the NYCHRL standard for undue hardship, but both cite the Title VII standard. (Eichenholtz Aff., Dkt. 24 at 5 at ¶ 17); (Nguyen Aff., Dkt. 25 at 8 ¶ 34).

3. Respondents' Have Not Met their Burden Under Any Standard for Undue Hardship

Even using Title VII's lower burden of undue hardship, Respondents cannot prevail because the record in the matter alleged a "potential" undue hardship rather than an actual one. (Dkt. 28 at 1).

> To prove undue hardship, the employer will need to demonstrate how much cost or disruption a proposed accommodation would involve. **An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information.**

EEOC Compliance Manual on Religious Discrimination § 12-IV(B) available at https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (emphasis added). *See also Jamil v. Sessions*, No. 14-CV-2355 (PKC) (RLM), 2017 U.S. Dist. LEXIS 31815, at *37-38 (E.D.N.Y. Mar. 6, 2017) (rejecting employer's speculative undue hardship relating to officer morale, seniority system, budgetary constraints, and safety concerns and collecting cases).

The plain language of FDNY's denial alleges a "potential" undue hardship and is inherently speculative and hypothetical. Now, in an insidious attempt to cure this defect, Respondents allege *for the first time* that they denied Inspector Nova's request because he posed a "direct threat to the public and his co-workers" (Resp. Mem. of Law, Dkt. 22 at 2) and because of "FDNY's need for a safe and healthy work environment." (*Id*. at 5). The record does not support this after-the-fact attempt to cure the unlawful denial and must be rejected.

4. Respondents Make Different Determinations on Identical Facts

At its core, Respondents' only argument is that it is too dangerous to accommodate Inspector Nova. "FDNY concluded that there was simply no accommodation available that would allow Inspector Nova to safely work as an Inspector with the FDNY, which involves close interactions with vulnerable New Yorkers and working in close quarters with other employees at a firehouse." (Resp. Mem. of Law, Dkt. 22 at 6). *See also*, *id.* at 2, 5. Respondents further justify terminating Inspector Nova because:

> vaccination is a critical condition of employment for a public-facing fire operations employee whose core job responsibilities include closely interacting with other firefighters in their fire stations and intimately interacting with the most vulnerable members of the public. . . . (Resp. Memo. of Law, Dkt. 22 at 14).
>
> [T]he risk of contagion posed by unvaccinated fire operations personnel—especially given the FDNY's life-saving mission—constituted an undue hardship to the agency. (*Id*. at 2).
>
> Fire operations personnel are also at an increased risk of infection with COVID-19, given their close living quarters and occupational contact with the public, as well as potentially reduced pulmonary function given their exposure to smoke and particulate matter. (*Id*. at 8).

Respondents also suggest that allowing Inspector Nova to mask and test "would present unacceptable risk to others." (Resp. Mem. of Law, Dkt. 22 at 9). Despite Respondents' rhetoric, they have been, and are currently, accommodating unvaccinated Fire Operations members throughout the pandemic. For example, Don Nguyen, Assistant Commissioner of FDNY, admits in an undated affidavit that FDNY "granted 35 reasonable accommodations for Fire Operations members from the vaccine mandate. 29 . . . for medical reasons, and six . . . for religious reasons." (Nguyen Aff., Dkt. 25 at 9 ¶ 41). Respondents fail to explain how they can accommodate other Fire Operations members who engage in "close interactions with vulnerable New Yorkers and

work in close quarters with other employees at a firehouse," but not Inspector Nova. (Resp. Mem. of Law, Dkt. 22 at 6). Furthermore, FDNY allows accommodated employees to submit routine PCR test results and remain in full-duty positions. *See Rivicci v. New York City Fire Department, et al*., Index No. 85131/2022, Dkt. 47, attached herein as **Exhibit L**, wherein two full-duty firefighters verify that they have accommodations, continue to share living quarters with other firefighters, and have prolonged contact with the public. *Id*. Additionally, Andrew Ansbro, President of the Uniformed Firefighters Association of Greater New York, confirms that FDNY is accommodating full-duty firefighters. *Id*. The City is also accommodating uniformed members of the NYPD who have close contact with other officers and the public. *See* Sergeant Cely DeColongon Affidavit, *Rivicci v. New York City Fire Department, et al*., Index No. 85131/2022, Dkt. 48, attached herein as **Exhibit M**. Perhaps most egregious, FDNY permits other unvaccinated Fire Operations employees who were denied a religious exemption to continue working. Email from I. Mendez attached hereto as **Exhibit N**.

"Capricious action in a legal sense is established when an administrative agency on identical facts decides differently." *Italian Sons & Daughters, Inc. v. Common Council of Buffalo*, 453 N.Y.2d 962 (4th Dep't 1982). Respondents have presented no rational basis to treat Inspector Nova differently than other fire operations employees or City workers. Because Respondents have allowed some accommodations but denied same to Inspector Nova without justification, their decision was arbitrary and capricious and must be annulled.[2]

[2] In addition, Respondents' conduct clearly violates the New York City Human Rights Law ("NYCHRL"). "It is also illegal for an employer to harass or discriminate against an employee based on the presumption that they have contracted or are more likely to contract COVID-19 due to their actual or perceived . . . religion . . . . " https://www.nyc.gov/site/cchr/community/covid-employment.page

5. Inspector Nova Does Not Pose More of a Threat Than the Vaccinated

Respondents' position that Inspector Nova's unvaccinated status poses a "direct threat to the public and his co-workers" is derisory. (Resp. Memo. of Law, Dkt. 22 at 2). Respondents accommodated Inspector Nova for over eight months throughout the height of the pandemic and they continue to accommodate other unvaccinated Fire Operations employees. Based on their own behavior, Respondents cannot justify their termination of Inspector Nova.

Respondents' determination and termination of Inspector Nova are also not supported by science. "There [is] not be a meaningful difference in the risk of infection (and subsequent transmission) between an individual that complied with the mandate and an unvaccinated individual." (Affidavit of Harvey A. Risch, Dkt. 10 at 8 ¶ 10). Respondents' argument also ignores that on August 11, 2022, the CDC updated its guidance for the prevention of COVID-19 to:[3]

- Recognize the immunity and protection provided to those who have previously recovered from a COVID-19 infection: "The risk for medically significant illness increases with age, disability status, and underlying medical conditions but is considerably reduced by immunity derived from vaccination, previous infection, or both, as well as timely access to effective biomedical prevention measures and treatments."

- Confirm that "[h]igh levels of immunity and availability of effective COVID-19 prevention and management tools have reduced the risk for medically significant illness and death."

- No longer differentiate based on a person's vaccination status because "breakthrough infections occur, though they are generally mild, and persons who have had COVID-19 but are not vaccinated have some degree of protection against severe illness from their previous infection."

[3] *Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States*, CDC (August 2022), https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm.

B. ***Legality of the Vaccine Mandate***

To the extent that the Second and Third Defenses in the Answer argue that the vaccine mandate at issue is lawful and proper, these defenses are rebutted by recent New York State Supreme Court decisions in *Police Benevolent Assn. of the City of New York v City of New York*, 2022 WL 4398685 (Sup. Ct., NY County 2022) and *Garvey v. City of New York et al*., Index No. 85163/2022, Decision and Order dated October 24, 2022, which invalidated the vaccine mandate on constitutional and statutory grounds, finding it arbitrary and capricious. The City of New York has filed Notices of Appeal in these cases.

C. ***Inspector Nova Is Entitled to Attorneys' Fees and Backpay***

Inspector Nova seeks reinstatement with back pay in salary and lost benefits, as well as attorneys' fees. "An Article 78 court, however, may award reinstatement and back pay, injunctive and declaratory relief, and attorney's fees." *Latino Officers Ass'n v. City of New York*, 253 F. Supp. 2d 771, 782 (S.D.N.Y. 2003). Inspector Nova has dedicated his life to the service of our City. Yet, Respondents tossed him aside and deprived him of his livelihood based on his sincere religious beliefs. Nothing can remedy the discrimination suffered by Inspector Nova. However, this Court can provide him with backpay and attorneys' fees, at least putting him financially as close to the position he would have been in had Respondents not wrongfully terminated him. Simply reinstating Inspector Nova is not a just resolution of this proceeding. *Loiacono v. Bd. of Educ*., Index No. 154875/2022, Dkt. 64 (Article 78 reinstating terminated teacher, awarding backpay of $121,544.17 plus interest rate of 9% annum from the date of loss of pay); *Hannon v. Westbury Union Free Sch. Dist. Bd. of Educ*., 15 N.Y.S.3d 693 (2d Dep't 2015) (granting Article 78, reinstating petitioner with backpay); and *Saliba v. New York City Hous. Auth*., 679 N.Y.S.2d

121, 122 (1st Dep't 1998) (determination unanimously modified, on the law, to direct payment of back pay where petitioner was reinstated to his position).

Inspector Nova is entitled to reasonable attorneys' fees and litigation costs incurred in the prosecution of this matter because the denial of his request for a reasonable accommodation was not substantially justified. *Auguste v. Wing*, 703 N.Y.S.2d 38 (1st Dep't 2000) (award of attorney's fees to recipient was warranted in article 78 proceeding); *Graves v. Doar*, 928 N.Y.S.2d 771 (2d Dep't 2011) (the award of an attorney's fee was not an improvident exercise of discretion in hybrid article 78 proceeding); *Perez v. New York State Dept. of Labor*, 697 N.Y.S.2d 718 (3d Dep't 1999) (the state's position was not substantially justified in Article 78 proceeding reinstating employee where the agency's determination was annulled due to absence in the record of a written designation appointing a hearing officer, "thus, the employee was entitled to recover attorney's fees incurred in the action").

II. REPLY TO NEW ALLEGATIONS IN ANSWER

To the extent not expressly admitted herein, all allegations in the Answer are denied. No response is required to Affirmative Defenses, but to the extent a response is required, they are denied. In response to the "Wherefore" clause in the Answer, Inspector Nova denies that Respondents are entitled to any relief whatsoever and aver that the Petition should be granted in its entirety.

III. CONCLUSION

Based on the foregoing, this Court should reinstate Inspector Nova as an Inspector with the FDNY with an accommodation in place, award back pay in salary and benefits, as well as any such other and further relief that the Court may deem just, fit, and proper, together with attorneys' fees and costs and disbursements of the proceeding.

Dated: December 12, 2022
New York, NY

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I, Nicky Tenney, affirm under penalty of perjury pursuant to CPLR §2106, that the total number of words in the foregoing PETITIONER'S MEMORANDUM OF LAW IN REPLY TO RESPONDENTS' ANSWER AND IN FURTHER SUPPORT OF PETITIONER'S ARTICLE 78 SPECIAL PROCEEDING, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, and signature block, is 2,805.

Dated: December 12, 2022

Respectfully submitted,
SIRI & GLIMSTAD LLP

/s/ Nicky Tenney
Nicky Tenney