

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

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MEDICAL PROFESSIONALS FOR INFORMED
CONSENT, et al.

Petitioners-Respondents

Index No. CA 23-00161

-against-

MARY T. BASSETT, et al,

Respondents-Petitioners

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STATE OF NEW YORK)
) SS.
COUNTY OF ALBANY)

EDWARD J. GREENE JR., ESQ., being duly sworn, deposes and says:

1. I make this affidavit in support of Petitioner-Respondents’ motion to vacate this court’s order in the above proceeding, staying the Decision and Order below pending this court’s final disposition of this appeal.

2. I am General Counsel for the New York State Public Employees Federation, AFL-CIO (“PEF”). PEF is a labor union representing approximately 50,000 professional, scientific, and technical employees in the State of New York, including thousands of nurses employed in State hospitals and facilities, and more than thirty of whom remain suspended without pay.

3. These same PEF members continue to face possible termination for alleged violation of the at-issue DOH vaccine mandate which, ironically, DOH has represented it need not and will not enforce.

4. In light of the representations of the Respondents-Petitioners' Counsel at oral argument, that the vaccine mandate is no longer needed and will no longer be enforced, there is no longer any need for the stay, and no risk of harm to Respondent-Petitioners or the public in its absence.

5. Conversely, as discussed in greater detail below, there is significant and irreparable harm to dozens of PEF's members who remain suspended without pay and face termination of their employment for alleged past violation of the vaccination mandate, many with no means of recovering backpay, regardless of the outcome of this appeal. To be clear, every day that the Stay remains in place, dozens of PEF members are unable to work and are losing a day of pay that they cannot recover.

6. Further, thousands of PEF members are currently working in hospitals and facilities that are dangerously understaffed, in part, as a direct result of the at-issue vaccine mandate. These facilities employing PEF members either believe they are unable, or are simply unwilling, to hire or rehire unvaccinated staff due to the uncertainty of the outcome of this litigation. As a result, PEF's members are working longer hours, unable to get time off, and are working in dangerously understaffed workplaces.

7. Based on conversations that I have had with agencies employing PEF members, and conversations that my staff and colleagues have had with agency human resources and labor relations personnel, the State University of New York, their hospitals, and Roswell Park Cancer Institute remain unable or unwilling to take a position on whether unvaccinated staff will be rehired or allowed to return to work in those facilities.

8. While the State took the position at oral argument before this court that the litigation has been rendered moot by their decision to no longer enforce the regulation, that is clearly not the case.

9. Dozens of PEF members have pending disciplinary actions and remain suspended without pay based on their failure to be vaccinated in violation of the DOH vaccine mandate. Their careers and livelihoods are very much dependent upon the outcome of this litigation and the legality of the at-issue DOH regulation and, it appears, the agencies and facilities employing these members similarly need an answer to this question.

10. It is also unclear, based on the position expressed by the State at oral argument and communications subsequently issued from DOH, whether the DOH mandate will be rescinded retroactively or prospectively. *See* NYSCEF Doc. No. 14 (noting that DOH will “cease citing providers for failing to comply” moving forward but will “continue to seek sanctions against providers based on previously cited violations that allegedly occurred”). This is not an academic or hypothetical question, but a question that will directly and immediately impact on dozens of PEF members, but will also likely impact on thousands of healthcare workers around the State.

11. For all of the reasons discussed herein below, we urge this court to vacate its Stay of the Decision and Order below, as that Stay allows a number of State hospitals to continue to suspend unvaccinated PEF members, without pay, and to continue disciplinary arbitrations against these same members, seeking to terminate their employment in State hospitals.

12. PEF and the State of New York are parties to a collective bargaining agreement (“CBA”) that governs any disciplinary action brought against PEF members, including thousands of healthcare workers employed in state-run hospitals. Hundreds of those PEF members have been threatened with termination, terminated, or are still at risk of imminent termination, due to the New York State Department of Health (“NYSDOH”) mandate.

13. Article 33 of PEF’s CBA with the State provides a grievance process to resolve disputes regarding the proposed discipline of PEF members. This contractual disciplinary process culminates in binding arbitration, if a case cannot be resolved by settlement.

14. Subsection 33.4(a) of the CBA also allows the employing agencies and facilities to suspend members without pay when the “employee’s continued presence on the job represents a potential danger to persons or property or would severely interfere with operations,” pending resolution of the disciplinary grievance.

15. During the more than twelve months preceding the Decision and Order below, hundreds of PEF members were suspended without pay and issued notices of discipline, seeking their termination from employment, all for allegedly failing to be vaccinated as required by the DOH vaccine mandate at-issue in this litigation, under the aforementioned contractual process.

16. Subsequently, on January 13, 2023, the Supreme Court, Onondaga County, concluded that New York State Department of Health Regulation 2.61 (10 NYCRR Section 2.61) (“Supreme Court Order”), which mandated that certain healthcare workers be vaccinated, is unlawful as “beyond the scope of Respondents’ authority . . .”

17. The court expressly ordered “that the relief sought by the Petition seeking a declaration that the Mandate, 10 NYCRR section 2.61, as being beyond the scope of Respondents’ authority and is therefore null, void, and of no effect, so that the Respondents, their agents, officers and employees are prohibited from implementing or enforcing the Mandate is GRANTED . . .”

18. At the time that the case below was decided, on January 13, 2023, thirty-one PEF members remained suspended without pay, and each of those members was either awaiting their arbitration hearing or awaiting their arbitration awards, each based on charges of violating the DOH vaccine mandate. Twenty-four of those members were awaiting arbitration hearings, and seven more had completed arbitration hearings but were awaiting the arbitrators’ issuance of awards,

19. As discussed in greater detail below, in complete disregard and disobedience to the January 13, 2023 Supreme Court Order, most of the State’s agencies employing PEF members facing discipline for allegedly violating the DOH vaccine mandate, continued to knowingly and willfully

disregard the clear and unambiguous mandate of the court below, by continuing to enforce the invalid and unlawful regulatory vaccine mandate upon unvaccinated PEF members by continuing suspensions without pay and by continuing disciplinary proceedings seeking their termination from employment.

20. In light of the Decision and Order below, PEF sought, with some success, agreements to put most of the pending arbitrations involving the DOH vaccine mandate on hold, at least until the application for a stay was decided by this court.

21. In two of these cases however, including one in Onondaga County and another in Erie County, the State insisted on obtaining arbitration awards and, over the objections of PEF and before any stay of the Decision and Order below was issued by this court, the arbitrator upheld the unpaid suspension of the members and found just cause to terminate the members by awards dated January 27, 2023 for violation of the DOH Vaccine Mandate. Both members were terminated as a result of these awards, despite the clear prohibition in the Decision and Order below against implementation or enforcement of the DOH Vaccine Mandate.

22. Once this court granted the State's application for a stay of the Decision and Order below on February 28, 2023, rather than maintain the *status quo ante*, all of the State hospitals resumed their efforts to move forward with the remaining arbitrations, and conditioned any postponements on our members' agreement to toll back pay liability during the time between any adjournment and the decision of this court on appeal. Most of our members agreed to tolling agreements to await full and final resolution of the legality of the DOH mandate. These tolling agreements, extracted by the State agencies, presented our members with a Hobson's choice, and resulted in a number of agreements that prejudice members' rights to back pay, even if the State's regulation is ultimately determined to be unlawful and the members prevail at arbitration.

23. Further, while most of those matters have been paused, pending this court's decision on the pending State application for a stay of the Supreme Court Order, or until further notice, one case remains scheduled for arbitration on June 16, 2023. Absent vacatur of this court's stay, that case will be tried and decided without any certainty as to the status of the DOH vaccine mandate.

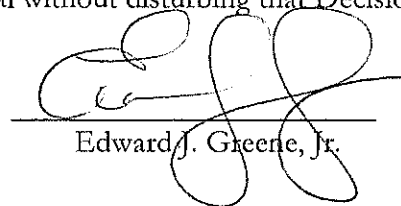
24. Accordingly, PEF's members continue to be prejudiced by the Stay, as the State's agencies continue the suspension of approximately twenty-nine unvaccinated staff without pay, all of whom continue to face potential termination for alleged violation of the same DOH Regulation 2.61 vaccine mandate that has already been found to be unlawful below, and which the State has announced it has no further need to enforce, as per its representations to this court at oral argument in this appeal.

25. Continuing the stay of the Supreme Court Order will not serve the public interest. As noted, thousands of PEF members continue to work in dangerously understaffed healthcare facilities. These shortages jeopardize patient care, and jeopardize the safety of both patients and staff. Long hours, lack of time off, and crushing workloads lead to staff burnout which, in turn, leads to more staff exiting the workplace and the profession.

26. Moreover, hundreds of PEF members who have already been terminated or left State service as a result of the State's vaccine mandate are suffering irreparable harm each day they continue to be barred from seeking any job in their field within covered facilities because of the uncertainty regarding the status of this vaccine mandate.

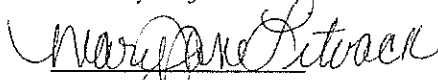
27. We urge the court to vacate the stay of the Decision and Order below, and respectfully request that the court expeditiously dismiss this appeal without disturbing that Decision and Order.

Dated: June 5, 2023



Edward J. Greene, Jr.

Sworn to before me this
5th day of June 2023.



Mary Jane Litvack
Notary Public

MARYJANE LITVACK
Notary Public, State of New York
No. 01L16421964
Qualified in Saratoga County
Commission Expires September 13, 2025