

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

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MEDICAL PROFESSIONALS FOR INFORMED
CONSENT, et al.

Petitioners-Appellees,

Index No. CA 23-00161

-against-

MARY T. BASSETT, et al,

Respondents-Appellants.

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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-Appellees' opposition to the motion for stay.
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.
3. PEF and the State of New York are parties to a collective bargaining agreement that governs any disciplinary action brought against PEF members, including thousands of healthcare workers employed in state-run hospitals. That includes hundreds of members who have been

threatened with termination, terminated, or still risk imminent termination, due to the New York State Department of Health (“NYSDOH”) mandate.

4. 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 . . .”

5. 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 . . .”

6. As discussed in greater detail below, in complete disregard and disobedience to the Supreme Court Order, the State’s agencies continued to knowingly and willfully disregarded the clear and unambiguous mandate of the court, by enforcing the invalid and unlawful regulatory vaccine mandate until February 1, 2023, when the agencies finally agreed to adjourn pending vaccination enforcement actions involving PEF members. 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

7. Specifically, the State’s agencies continued the suspensions of unvaccinated staff without pay and, until February 1, 2023, continued to seek and to obtain the termination of unvaccinated staff for alleged violation of the invalid and unlawful DOH Regulation 2.61.

8. As indicated, while the unpaid suspension of PEF’s members continues, the efforts to terminate PEF members have only been paused. If the court grants the State’s requested stay, there will be nothing preventing the agencies from proceeding with efforts to terminate PEF members. Such efforts, if successful, cannot be considered, and should not be considered, “maintaining the

status quo” as asserted by the State in its application. Quite the contrary, if the State’s requested stay is granted by the court, disciplinary proceedings could resume and PEF members are likely be terminated before the State’s appeal can be decided. Such a result cannot be considered *status quo* for PEF or its affected members..

9. The State University of New York, Upstate Medical University (“SUNY Upstate”), State University of New York, Stony Brook University Hospital (“SUNY Stony Brook”), State University of New York Downstate Medical Center (“SUNY Downstate”) and Roswell Park Comprehensive Cancer Center (“Roswell Park”) are all agents of the State of New York.

10. Their employees, including their counsel and Labor Relations/Bureau of Employee Relations staff, are agents and/or employees of the State of New York. Accordingly, SUNY Upstate, Downstate, Stony Brook (collectively “SUNY Hospitals”) and Roswell Park are clearly subject to the court’s Order, as are their counsel and staff.

11. Subsequent to the unlawful adoption of DOH Regulation 2.61, a number of State agencies, including the SUNY Hospitals and Roswell Park, commenced interrogations and disciplinary actions against hundreds of unvaccinated PEF members employed by those agencies for alleged violation of DOH Regulation 2.61.

12. The agencies subsequently suspended unvaccinated members without pay and issued each a formal written Notice of Discipline (“NOD”). In those NODs, the State agencies expressly alleged that the PEF members are covered by the New York State Department of Health Regulation 10 NYCRR Section 2.61 (“DOH Regulation”) and that the PEF members violated the NYS DOH Regulations by failing to receive the first does of the COVID-19 vaccine, as required by the NYS DOH Regulations, specifically 10 NYCRR§ 2.61.

13. Upon receipt of the court’s decision and order, PEF served the SUNY Hospitals and Roswell Park counsel with notice of the order, and sought to dismiss or, in the alternative, adjourn

any pending disciplinary proceedings that were brought based on alleged violation of the invalidated DOH vaccine mandate. Some of those disciplinary proceedings were near completion, awaiting the issuance of awards, and approximately seven more arbitration hearings were scheduled to be conducted over the next few weeks.

14. PEF provided agency counsel with notice that further proceedings in those disciplinary matters would be enforcement and implementation of the invalid regulation, which is expressly prohibited by the court's order. While one matter was adjourned, in the remainder of the disciplinary proceedings, the SUNY Hospitals and Roswell Park opposed efforts to stay pending cases and insisted on proceeding and seeking imposition of the disciplinary penalties of termination until the February 1, 2023 pause of those matters.

15. In response to PEF's requests to dismiss charges or stay pending arbitrations, agency counsel incorrectly and misleadingly asserted that the court's order was automatically stayed upon the filing of the State's Notice of Appeal on or about January 25, 2023.

16. Further, in response to PEF's reference to numerous holdings establishing that no automatic stay results from the appeal of a declaratory and/or prohibitive order, the agency counsel failed to acknowledge the correct status of the court's Order.

17. While the caselaw regarding such a stay is clear, it is also significant that the State has now affirmatively applied for a stay, thus acknowledging that no automatic stay of the Order resulted from the State's filing of its Notice of Appeal.

18. On Friday, January 27, 2023, during the pendency of the Supreme Court Order, an arbitrator issued two separate awards terminating PEF members from employment based upon his finding that the members refused to be vaccinated in violation of the invalid DOH regulation, arguably in reliance on the State's bad-faith assurance that the Supreme Court's Order vacating the DOH

regulation was automatically stayed by the Notice of Appeal. One of those members was employed at SUNY Upstate, in Onondaga County, and the other by Roswell Park in Erie County.

19. Both members had been granted religious exemptions for some time before 10 NYCRR § 2.61 went into effect.

20. Each was only suspended from work without pay and, upon information and belief, now terminated from employment because the DOH regulation prohibits religious accommodation, even if the employee does not pose a direct threat and it is not an undue hardship to accommodate their religious practices.

21. The State was clearly and expressly prohibited by the court's Order from enforcing termination proceedings against these employees in reliance on 10 NYCRR § 2.61, but did so anyway.

22. Another member resigned on January 26, 2023, rather than proceed to hearing when the State refused to adjourn her disciplinary arbitration, which was scheduled for January 27, 2023, for fear that her termination at arbitration would damage her reputation and prospects of future employment in her chosen field. If the State's requested stay is granted, more may be forced to make this type of irreversible choice

23. In addition to the seven pending cases, PEF currently has five more cases that are fully submitted and before arbitrators for decision, and the State agencies continued, until February 1, 2023, to assert that they are not bound by the court's order, and that they would neither consent to dismissal of their disciplinary charges nor to adjournment of those cases until any questions regarding the enforceability of the ordered are addressed on appeal.

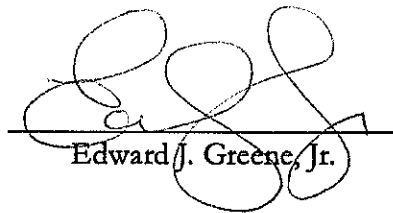
24. Based on the February 1, 2023 agreement to stay these arbitration proceedings, efforts to terminate these members have been paused but, again, nothing will prevent efforts to terminate the employment of these members if the court grant's the State's requested stay.

25. Granting a stay of the Supreme Court Order will not serve the public interest. There are currently thousands of PEF members working in healthcare facilities that are experiencing unprecedented staffing shortages. 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. Staffing shortages existed before the COVID-19 pandemic and before the State imposed vaccine mandate. This is a crisis that was only made more apparent and more acute by the State's adoption of the DOH Regulation 2.61 vaccine mandate, which does not allow covered entities to provide religious exemptions.

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 this Regulation.

27. PEF's members continue to be prejudiced and face imminent and irreparable harm as a result of the State's prior disobedience to the court's Order, and will face the same likely harm if the State's requested stay is granted and disciplinary proceedings resume.

Dated: February 2, 2023



Edward J. Greene, Jr.

Sworn to before me this
2nd day of February 2023.



Notary Public

MARIA BETOR
Notary Public, State of New York
No. 01BE6038216
Qualified in Albany County
Commission Expires March 6, 2026