

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ONONDAGA

In the Matter of the application of

DONNA CHITTENDEN, individually, and WAYNE SPENCE, as the President of The New York State Public Employees Federation, AFL-CIO,

Petitioners,

For an Order Pursuant to *CPLR* Article 75,
Vacating an Arbitration Award,

- against -

STATE UNIVERSITY OF NEW YORK; JOHN B. KING, JR. as Chancellor of the STATE UNIVERSITY OF NEW YORK; the BOARD OF TRUSTEES of the STATE UNIVERSITY OF NEW YORK; DR. MERRYL H. TISCH as chair of the BOARD OF TRUSTEES of the STATE UNIVERSITY OF NEW YORK; STATE UNIVERSITY OF NEW YORK UPSTATE MEDICAL UNIVERSITY; and MANTOSH DEWAN as President of STATE UNIVERSITY OF NEW YORK UPSTATE MEDICAL UNIVERSITY,

Respondents.

MEMORANDUM ON PUBLIC POLICY

Index No. 002431/2023

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DATED: March 29, 2024

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PRELIMINARY STATEMENT

This proceeding is brought pursuant to *Civil Practice Law and Rules* (“*CPLR*”) Article 75 in the nature of an application to vacate an arbitration award issued by Arbitrator Joel M. Douglas (“Douglas”) on December 20, 2022 (“Award”) because it violates the public policy of the State of New York and because the Award is totally irrational. This brief identifies the public policy considerations invoked in this proceeding and otherwise supplements Petitioner’s previous Memorandum of Law and Reply.

The Constitution of the United States codifies the belief that a non-tyrannical government functions best under the separation of powers doctrine; that branches of the government are each assigned authority to either legislate, execute or judicially review matters of law, and that each branch should only operate within their designated powers lest any branch over-exercise their authority and result in a loss of a state of equilibrium in governance. *James Madison, The Federalist, No. 47 and 48 in The Federalist Papers, (1788)*. <https://guides.loc.gov/federalist-papers/full-text>. The State of New York has adopted the separation of powers doctrine within its distribution of power allocated among the legislative branch (Article III), the executive branch, (Article IV) and the Judiciary (Article VI). https://www.nysenate.gov/sites/default/files/admin/structure/media/manage/filefile/a/2024-02/586_ny_state_constitution_-_generic_version2.pdf

In this matter, the Court is presented with an executive-branch vaccine mandate that was never promulgated by the legislative branch; rather it was an exercise of unprecedented emergency powers that the executive branch exercised during the COVID-19 pandemic, without legislative approval and amidst shifting and evolving science. Only with the fullness of time, has judicial review actually examined whether or not those exercises of power were valid, and the Supreme Court of New York has answered strongly in the negative. Ms. Chittenden is a victim of that invalid executive excess and her remedy lies within this proceeding.

STATEMENT OF FACTS

The facts are more fully set forth in the Petitioner's Petition. To summarize, Petitioner Donna Chittenden is a member of PEF, and beneficiary of a Collective Bargaining Agreement ("CBA") existing between the State of New York and members of the PS &T Unit. She worked as a Nurse 2 with Respondent State University of New York – Upstate Medical University ("Upstate"). During her time there, she had a spotless disciplinary history.

On or about November 24, 2021, Upstate issued a Notice of Discipline (“NOD”) to Ms. Chittenden seeking Ms. Chittenden’s dismissal from service and the loss of any accrued annual leave, alleging that Ms. Chittenden was noncompliant with State Department of Health Regulation 10 NYCRR Section 2.61 (the “Regulation”), as she did not receive the COVID-19 vaccine. Each of the five charges in the NOD alleged that Ms. Chittenden was required by the Regulation to be vaccinated. Each and every charge in the NOD was expressly based on non-compliance with the DOH regulation; without the regulation, there would have been no charges.

Pursuant to the CBA, the AAA designated Arbitrator Joel M. Douglas (“Douglas”), from the panel of arbitrators agreed upon by the State and PEF, to hear the case and render a final and binding award determining whether she was guilty of the charges, and if so, what the appropriate remedy would be, in addition to determining the appropriateness of Ms. Chittenden’s lengthy suspension without pay. An arbitration hearing before Arbitrator Douglas was held on March 2, 2022. (*See* December 20, 2022, final and binding Opinion and Award) Ms. Chittenden was ultimately found guilty of all charges, and Arbitrator Douglas then deliberated over a fair and appropriate punishment. (*Id.*) Arbitrator Douglas held that the penalty of termination sought by Upstate was appropriate. (*Id.*)

In January of 2023, the Supreme Court, Onondaga County, concluded that the Regulation promulgated by the Department of health was “beyond the scope of Respondents’ authority ...” *Medical Professionals for Informed Consent, et al. v. Bassett, et al.*, Index No. 8575-2022 (State Supreme Court, Onondaga Co. Jan. 13, 2023). 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

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