

no substantive finding as to whether granting the requested accommodation would have amounted to an undue hardship to the appointing authority. The appellant, however, forcefully argues that he was wrongfully disciplined because the appointing authority should not have denied his accommodation. In this regard, part of the appellant's accommodation request is that he be permitted to work while wearing personal protective equipment, such as a mask. Whether those measures would amount to an undue hardship to the appointing authority is unclear, as the ALJ did not engage in any fact-finding as to that issue, but rather, in part, dismissed the appellant's claims of improper denial of his accommodation since the appellant assumed:

without any factual, statistical or other reasonable basis for doing so, that the prevalence of the virus in the workplace has significantly diminished and that the need for vaccination has dropped in direct proportion to his assumed facts. The Appellant's Counsel's argument is based on mere conjecture, while the Respondent's argument is grounded in scientific data compiled and analyzed by the CDC and CMS.

However, the Commission believes that the above presents issues of fact that requires a hearing to establish the appropriateness of the accommodation denial and how or if those facts impact any determination as to the appellant's guilt regarding the charges.

ORDER

The Civil Service Commission remands this matter to the Office of Administrative Law for further proceedings as outlined above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 3RD DAY OF MAY, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO.: CSV 06233-22

CSC DKT. NO.: 2023-103

**IN THE MATTER OF VICTOR OBIEFUNA,
DEPARTMENT OF HEALTH, GREYSTONE
PARK PSYCHIATRIC HOSPITAL.**

William A. Nash, Esq., for appellant, Victor Obiefuna

Gary W. Baldwin, DAG, Attorney General, for respondent, Dept. of Health,
Greystone Park Psychiatric Hospital (Matthew J. Platkin, Attorney General
of New Jersey, attorney)

Record Closed: February 1, 2023

Decided: March 17, 2023

BEFORE: **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

By way of a Final Notice of Disciplinary Action (FNDA) dated June 24, 2022, with an effective date of March 21, 2022, Appellant Victor Obiefuna ("Appellant" or "Obiefuna") was removed from his job as a Human Service Technician at the Greystone Park Psychiatric Hospital.

The FNDA specified that he was removed because he violated Governor Murphy's Executive Order 238, which required him to receive vaccinations and boosters against the

COVID-19 virus and to submit proof of being vaccinated. Obiefuna's refusal to be vaccinated against the Covid-19 virus and his failure to submit proof of vaccination were deemed to be a failure to carry-out a workplace order and so, he was charged with Conduct Unbecoming a Public Employee under N.J.A.C. 4A:2-2.3(a)(6) and with Other Sufficient Cause under N.J.A.C. 4A:2-2.3(a)(12). The Disciplinary Hearing held on May 23, 2022 resulted in both charges being sustained.

According to the Job Specification of "Human Services Technician" (DOH045 to DOH048), Human Services Technicians work in close physical contact with patients, residents, their families, and other hospital staff members. Vaccinations were required by the New Jersey Governor's Executive Order Number 238 issued January 19, 2022 ("EO238"), which was based on the Centers for Medicare and Medicaid Services ("CMS") November 5, 2021 Interim Final Rule, designated as "CMS-3415-IFC", also known as the "CMS Rule". This Interim Final Rule establishes requirements regarding COVID-19 vaccine immunization of staff among Medicare- and Medicaid-certified providers and suppliers. Executive Order 238 includes language recognizing that the U.S. Department of Justice, Office of Legal Counsel issued an opinion concluding that Section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. Section 360b-3 does not prohibit public or private entities from imposing vaccination requirements. Moreover, Executive Order 238 notes that on January 13, 2022 the United States Supreme Court, in Biden v. Missouri, 595 U.S. ____ (2022), 142 S.Ct. 735, upheld the Interim Final Rule (CMS-3415-IFC), requiring most Medicare and Medicaid-certified providers and suppliers staff (including health care workers) to be vaccinated against COVID-19 in order to participate in the Medicare and Medicaid programs. Based on the above, Executive Order 238 mandated that Providers in New Jersey must require their staff to have received the first dose of the vaccine by January 27, 2022 and all doses to complete a primary series of the vaccine by February 28, 2022, or within three weeks of becoming eligible, whichever is later.

In accordance with Executive Order 238, the New Jersey Department of Health issued a directive to all personnel advising them of the vaccination requirements and advising them that failure to comply with the vaccination requirements would result in termination from employment.

Greystone Park Psychiatric Hospital operates under the New Jersey Department of Health. It has an Administrative Procedure in place for employees who seek workplace accommodations due to conflicts between religious beliefs and workplace requirements. The above-referenced Administrative Procedure provides for an interactive process (i.e., an application for a religion-based accommodation and a dialogue between the employer if additional information is required to complete the application) whereby the request is examined on an individual basis. Obiefuna is a Muslim. On January 13, 2022, he filed an application for a religious accommodation seeking to be exempted from receiving the COVID-19 vaccination. His position is that taking the vaccination would violate his religious beliefs. He cited several medical and several apparently religious-based reasons as well as citing several verses from the Quran in support of his application. On March 15, 2022, the Department of Health issued a letter to Obiefuna denying his application for a religious exemption from the vaccination requirement and giving its reasons therein. In the matter at bar, Obiefuna alleges that Respondent-DOH wrongfully denied him a religious-based exemption from the requirement that employees such as himself were to be vaccinated with the COVID-19 vaccine.

In this Motion for Summary Decision, the Respondent (“DOH” or “Greystone”) seeks an affirmance of its determination to remove Obiefuna from his job and dismissal of Obiefuna’s appeal.

PROCEDURAL HISTORY

As noted above, on March 15, 2022 the Department of Health denied Obiefuna’s request for an exemption from the vaccination requirement. On March 18, 2022 the Department of Health filed a Preliminary Notice of Disciplinary Action against Obiefuna noting that his religious exemption request was denied on March 15, 2022 and alleging that he did not comply with the deadline for receiving the COVID-19 vaccine as required thus violating the Interim Final Rule and Executive Order 238.

The PNDA contained charges of violations of N.J.A.C. 4A:2-2.3(a) (6) Conduct Unbecoming a Public Employee, and N.J.A.C. 4A:2-2.3 (a)(12) Other Sufficient Cause. The proposed penalty stated in the PNDA was removal from employment.

A Departmental Hearing was held on May 23, 2022 before Hearing Officer Roslyn Eversley at which the representatives of the Department of Health and the employee presented their arguments. Apparently, there was no transcript of the hearing. The hearing officer's decision was issued on June 22, 2022 in which she ruled that the institution (Department of Health / Greystone Park Psychiatric Hospital) had met its burden of proof by a preponderance of the credible evidence on all charges and so the penalty of removal was sustained. Thereafter, on June 24, 2022, the Department of Health issued a Final Notice of Disciplinary Action removing Obiefuna from his employment effective on March 21, 2022.

On July 7, 2022 Obiefuna's Union Representative, Gary Little, filed a Major Disciplinary Appeal form with the Civil Service Commission. On July 19, 2022 the Director of the Division of Appeals and Regulatory Affairs, Nicholas F. Angiulo, referred the matter to the Office of Administrative Law, where it was filed on July 26, 2022 as a contested case.

The matter was assigned to John P. Scollo, ALJ on July 29, 2022, who held an Initial Telephone Conference on August 16, 2022. The judge issued a Pre-Hearing Order on August 17, 2022, which among other things set forth a schedule by which the parties would conduct discovery.

On October 3, 2022 the Appellant-Obiefuna filed a Motion to Compel Discovery. On October 17, 2022, Respondent-DOH/Greystone filed Opposition papers. On October 27, 2022 the Appellant filed Reply papers. Subsequently, on November 30, 2022, the parties submitted the bate-stamped documents for the Tribunal's review. On January 11, 2023 this Tribunal issued its decision on the Discovery Motion ruling that DOH/Greystone's Responses to the Appellant's Document Requests were adequate and that some of Appellant's discovery demands were improper.

On November 16, 2022, Respondent's counsel filed a Motion for Summary Decision. The Summary Decision Motion was held in abeyance pending the Tribunal's ruling on Appellant's Discovery Motion. After the ruling on the Discovery Motion was issued, the Appellant's counsel, on January 23, 2023, filed his Opposition papers in response to the Respondent's Summary Decision Motion. On February 1, 2023 Respondent filed Reply papers. This writing is the Tribunal's Initial Decision Summary Decision.

THE PARTIES' POSITIONS AND ARGUMENTS

The Position of Respondent-DOH/Greystone

The Respondent-DOH/Greystone's position is that the subject Executive Orders are a legitimate exercise of New Jersey's power and authority to protect the public in general and patients, residents, and staff members of its medical institutions in particular. Respondent recognizes its duty to prevent those at risk from getting sick and to take steps to prevent the spread of the Covid-19 virus. In light of the CDC's expertise, which informed the decision of the DHHS and CMS to make vaccination of covered employees mandatory, Respondent argues that it has a rational basis for the mandatory vaccination policy.

The Respondent points out that by the nature of their duties, which require daily repeated interactions with patients, residents, and fellow staff members, covered employees like Obiefuna cannot safely function in their care-giving job duties unless they are adequately vaccinated against the Covid-19 virus and its many variants. Obiefuna is a Human Services Technician. His job duties require him to make direct, unavoidable contact with patients, residents, and other staff members. Some examples of Obiefuna's work are caregiving for patients who must be bathed, dressed, and provided with other services which require frequent, close, personal contact.

Obiefuna's job duties cannot be performed remotely. There are no other job positions available where he could be assigned as an accommodation. Obiefuna's use of

personal protective equipment (PPE), like a mask, is laudable. However, the use of PPE does not absolutely protect Obiefuna from the virus nor would PPE absolutely prevent Obiefuna from spreading the virus if he were carrying it. According to the CDC, Covid-19 vaccinations reduced the transmissibility of Covid-19 and prevented severe illness. According to the CDC, the best preventative against Covid-19 is vaccination and booster vaccinations. According to the CDC, unvaccinated workers pose a health risk to others. That is how the State of New Jersey Department of Health formulated its policy and promulgated its vaccination mandate.

The DOH's vaccination mandate allows its employees to apply for exemptions, one of which is a religious exemption. Applying for a religious exemption is not a guarantee of obtaining an exemption. A worker who is granted a religious exemption from the vaccine mandate must still be tested for Covid-19 weekly or twice-weekly as required by Executive Order 252 (2021).

Respondent argues that being unvaccinated is not conducive to the safe performance of the job duties of a Human Services Technician. In Obiefuna's case, the Respondent found that the number of job duties of a Human Services Technician could not be reduced due to the needs of the residents and patients. Respondent found that Obiefuna's job duties require him to be in close, frequent, personal contact with patients, residents, and fellow staff members. Such close contact requires vaccination as the preferred way of promoting everyone's safety. Since Obiefuna's job duties could not be performed remotely, since there were no other available positions in which to place Obiefuna as an accommodation, since close contact was unavoidable, and since Obiefuna refused vaccination, the Respondent realized that Obiefuna was no longer capable of performing his job duties in a safe manner, and so, Respondent argues that it had no choice but to terminate Obiefuna from his position for failing to comply with the vaccination requirement.

The Appellant did not raise the issue of progressive discipline. Nonetheless, the Respondent made an argument that the concept of progressive discipline does not apply to the matter at bar and that termination was its only option.

The following is an analysis of the subject of progressive discipline and its applicability to the matter at hand. The goal of progressive discipline is to correct the employee's inappropriate actions and to enhance his job performance in order to rehabilitate him. Here, Obiefuna's consent to be vaccinated would have helped promote the safety of himself, co-workers, residents, and patients. His refusal to be vaccinated exposes the same classes of people to unnecessary risk of contracting a deadly virus. His refusal was willful and is not expected to change because he is not expected to change his religious beliefs. This is not a matter where any attempts at correction are possible because Obiefuna's decision to refuse vaccination was based on his religious beliefs and he is entitled to hold his religious beliefs. The Respondent takes no position regarding whether his religious beliefs are correct or incorrect, reasonable or unreasonable. However, the Respondent argues that it is entitled to set workplace rules, which the employee must follow in order to continue working. The Respondent's vaccine mandate for covered workers was promulgated to promote the safety of employees, residents and patients. It is a valid policy. Respondent argues that Obiefuna's refusal to be vaccinated goes against a safety-promoting policy and must be considered egregious and severe misconduct. It would follow that progressive discipline is not appropriate under the circumstances of this matter.

The Position of Appellant-Obiefuna

Counsel for Obiefuna raised five arguments, numbered one through five in his Brief. Appellant makes two procedural arguments in his Numbered Paragraph One and Numbered Paragraph Five. Appellant also makes three substantive arguments in his Numbered Paragraphs Two, Three, and Four. The substantive arguments all allege that there are unresolved issues of material fact which make the granting of an Order for Summary Decision inappropriate.

Appellant's First Procedural Argument (Numbered Paragraph One)

The argument contained in Numbered Paragraph One concerns a procedural question regarding whether Respondent's Motion for Summary Decision is deficient because it was not accompanied by a Statement of Undisputed Material Facts in accordance with N.J. Court Rule 4:46-2(a). Appellant argues that because Respondent's Motion for Summary Decision was only accompanied by his Brief and his Certification of Counsel attesting to the authenticity of his exhibits (in accordance with N.J.A.C. 1:1-12.5(b), the Motion lacked several elements and must therefore be denied.

Appellant's counsel notes that the procedure for a Motion for Summary Decision in the OAL (N.J.A.C. 1:1-12.5(b)) is similar to the procedure for a Motion for Summary Judgment in Superior Court (Superior Court Rule 4:46-2(a)). He argues that here, in the OAL, the requirements of R. 4:46-2(a) governing Summary Judgment should apply because the OAL Rule, N.J.A.C. 1:1-12.5(b), closely follows R. 4:46-2(a).

Appellant's counsel argues that R.4:46-2(a) requires that the movant submit a Statement of Material Facts in numbered paragraphs citing to the portion of the record which demonstrates that the fact is established and is uncontroverted. He further argues that here the Respondent did not provide such a Statement of Material Facts with his motion, and thus the Motion for Summary Decision is deficient and therefore must be denied.

Appellant's Second Procedural Argument (Numbered Paragraph 5)

The argument contained in Numbered Paragraph Five concerns a procedural question regarding jurisdiction. The Appellant states that the Respondent has incorrectly argued that the OAL does not have jurisdiction over this matter (i.e., that the matter should have been brought in another forum). Appellant argues that the Civil Service Commission properly referred this matter to the OAL and that the OAL has jurisdiction over this matter.

Appellant's First Substantive Argument (Numbered Paragraph Two)

The substantive argument contained in Numbered Paragraph 2 is that there is a genuine issue of fact regarding whether or not Respondent engaged in an interactive process with Obiefuna. Counsel contends that the Respondent did not engage in the "interactive process" set forth in the Administrative Procedure – Religious Accommodation for Employees" form (Bates-stamped documents DOH063-DOH065). Counsel argues that the Respondent should have explored options with Obiefuna as to how it could maintain safety in the workplace while Obiefuna remained in his position while unvaccinated. Perhaps then, the Respondent would have been able to determine if it would be appropriate to grant a reasonable accommodation to Obiefuna which would allow him to use PPE in lieu of being vaccinated. Counsel argues that it is up to the trier of fact to determine whether Respondent should have explored such options and, as such, it renders Summary Decision inappropriate.

Appellant's Second Substantive Argument (Numbered Paragraph Three)

The substantive argument contained in Numbered Paragraph Three is that that there is a genuine issue of fact regarding whether the granting of Obiefuna's request for a religious exemption would pose an undue hardship for the Respondent given the fact that Obiefuna used personal protective equipment (PPE) in the early days of the Covid-19 pandemic and continued to use PPE up to the day of his termination.

Counsel argues that at the early stages of the Covid-19 pandemic, Obiefuna used personal protective equipment (PPE) and was able to successfully fulfill the functions of his job safely and without interruption. However, once the vaccination mandate was put into effect, the Respondent found that Obiefuna's use of the same PPE presented an "undue hardship" for the Respondent. The gist of Counsel's argument is summed-up as, "How it could be that an undue hardship arose when the workplace circumstances (the presence of the virus and the use of PPE) had not changed?" He argues that this is a fact question and, as such, it renders Summary Decision inappropriate.

Appellant's Third Substantive Argument (Numbered Paragraph Four)

The substantive argument contained in Numbered Paragraph Four is that there is a genuine issue of fact regarding whether Obiefuna's continued use of PPE in a purportedly "safer" work environment, where most of the workers have already been vaccinated, would still pose an undue hardship to the Respondent. Here, Appellant's Counsel is extending the argument presented in Paragraph Number Three. He argues that since the vaccinating of most of Obiefuna's co-workers has made the workplace safer, there is a fact question regarding whether Obiefuna's use of PPE alone is an adequate safety measure. He argues that this change in circumstances (a lessened chance of infection) means that Obiefuna's use of PPE alone will not pose an undue hardship on the Respondent. Therefore, the Respondent should make a reasonable accommodation, in light of Obiefuna's request for a religious exemption, allowing him to work unvaccinated, but using PPE. Counsel argues that this is a fact question and, as such, renders Summary Decision inappropriate.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Having had the opportunity to review the Motion, Opposition, Reply papers and all exhibits attached thereto, I **FIND** that the following **FACTS** are undisputed.

I **FIND** it is undisputed that Appellant Victor Obiefuna was employed as a Human Service Technician at Greystone Park Psychiatric Hospital (the facility) until the effective date of his removal, March 21, 2022.

I **FIND** it is undisputed that the job specifications (i.e., the job description) of a Human Services Technician requires that a Human Services Technician must work in close physical proximity with residents of the facility, with their family members, and with other members of the facility's staff.

I **FIND** it is undisputed that the job duties of a Human Services Technician cannot be performed remotely.

I **FIND** it is undisputed that the Respondent's claim that there were no other positions available for it to offer to Obiefuna is uncontested by Obiefuna's Opposition papers.

I **FIND** it is undisputed that Executive Order 238 mandates that providers, including the Greystone facility, must require all members of their staff to receive the first dose of the COVID-19 vaccination by January 27, 2022 and to receive the second dose of the vaccination by February 28, 2022, or within three weeks of becoming eligible, whichever is later.

I **FIND** it is undisputed that the Greystone Park Psychiatric Hospital is affiliated with the New Jersey Department of Health and is subject to Executive Order 238.

I **FIND** it is undisputed that in accordance with Executive Order 238, the New Jersey Department of Health issued a directive to all its personnel advising them of the vaccination requirements and proof-of-vaccination reporting requirements stated in Executive Order 238 and advised them that failure to comply with the vaccination requirements and reporting requirements could result in termination from employment.

APPLICABLE LAW

Note: Italics have been supplied by this Tribunal.

The Standards for Summary Decision

The Uniform Administrative Procedure Rules are published pursuant to N.J.S.A. 52:14F-5. A Motion for Summary Decision in an OAL action is substantially similar to a Motion for Summary Judgment in the Superior Court. The UAPR's Rules governing

Summary Decision Motions are found at N.J.A.C. 1:1-12.5 and the Rules governing Summary Judgment Motions are found at New Jersey Rules of Court, Rule 4:46.

N.J.A.C. 1:1- 12.5 contains six sections lettered (a) through (f). For purposes of this Initial Decision, only sections (a) and (b) need to be recited here. Sections 12.5(a) and (b) provide:

(a) A party may move for summary decision upon all or any of the substantive issues in a contested case. Such motion must be filed no later than 30 days prior to the first scheduled hearing date or by such date as ordered by the judge.

(b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. Such response must be filed within 20 days of the service of the motion. A reply, if any, must be filed no later than 10 days thereafter. If the adverse party does not so respond, an Order granting summary decision, if appropriate, shall be entered.

An evidential hearing in a contested case is not needed if there are no disputed issues of fact. Frank v. Ivy Club, 120 N.J. 73 (1990), certiorari denied 498 U.S. 1073 (1990). Summary disposition by an administrative law judge is permissible if undisputed facts indicate that particular disposition is required. Matter of Robros Recycling Corp., 226 N.J. Super. 343 (App. Div. 1988), certification denied 113 N.J. 638 (1988).

Actions Taken and Rules Promulgated by the U.S. Department of Health and Human Services (DHHS), Centers for Medicare and Medicaid Services ("CMS")

On December 28, 2021, the Centers For Medicare and Medicaid Services ("CMS"), an agency within the U.S. Department of Health and Human Services, specifically the Directors of its Quality, Safety, and Oversight Group (QSOG) and the Directors of its Survey and Operations Group (SOG), issued Memorandum QSO-22-07-ALL to State Agency Directors advising them that on November 5, 2021, the CMS published an "Interim Final Rule with comment period" ("IFC") for providing guidance and survey procedures for assessing and maintaining compliance with its regulatory requirements. Recapitulating the background of its efforts to combat the Covid-19 pandemic, the memorandum noted that on December 11, 2020, the CMS recommended that health care personnel and residents of long-term care (LTC) facilities be offered the Covid-19 vaccine. Then on May 13, 2021, the CMS published an Interim Final Rule with comment period requiring that all LTC facilities educate their staffs and residents about the benefits and potential side effects associated with the Covid-19 vaccine and to offer the vaccine. Then on September 9, 2021 the CMS issued a regulation requiring that all Medicare and Medicaid providers and suppliers must require that all nursing home staff be vaccinated against Covid-19 within certain graduated time parameters or face enforcement actions, depending upon the percentages of staff and residents vaccinated and depending upon the severity of the deficiency.

Executive Orders 238 and 290

Invoking the power to declare a public health emergency under the Emergency Health Powers Act, N.J.S.A. 26:13-1 et seq., and invoking the emergency powers granted to the governor of New Jersey in the New Jersey Civilian Defense and Disaster Control Act, N.J.S.A. App. A 9-33 et seq., et seq., Governor Philip D. Murphy issued Executive Order 283 on January 19, 2022. In Executive Order 283, Governor Murphy stated that the Centers for Disease Control and Prevention (CDC) recognized that new variants of the Covid-19 virus were spreading in New Jersey; that vaccines were effective at preventing severe illness, hospitalizations, and death from Covid-19 and its variants and that

vaccinated people receiving boosters are likely to have stronger protection against contracting and transmitting Covid-19; and that the CDC advised that additional action in the form of increasing the number of vaccinated and boosted people would be necessary; and that on November 11, 2021 the CMS issued its "Omnibus Covid-19 Health Care Staff Vaccination Interim Final Rule" (CMS-3415-IFC), which the United States Supreme Court upheld on January 13, 2022. CMS-3415-IFC (a/k/a "the CMS Rule" or the "Interim Final Rule") requires that the staffs of most Medicare and Medicaid-certified providers and suppliers to be vaccinated and boosted against Covid-19 in order for the providers and suppliers to continue to participate in Medicare and Medicaid programs.

Executive Order 238 requires all providers and suppliers subject to the CMS Rule to require certain members of their staff (employees working in congregate and health care settings) to receive the Covid-19 vaccination and its boosters by designated dates (January 27, 2022 and February 28, 2022) and for the staff members to provide adequate proof that they have been vaccinated and boosted. Executive Order 238 provided for a process wherein accommodations for employees to request an exemption from the vaccine requirement based on the employee's disability, medical condition, or a sincerely held religious belief, practice, or observance subject to his or her agreement to undergo weekly or twice weekly testing for Covid-19 as required by Executive Order 252 (2021). Executive Order 238 provided for the implementation of a disciplinary process for staff members and facilities who did not comply with the vaccination and boosting schedules. Executive 238 authorizes its supplementation by either the Commissioner of the Department of Health and / or the State Director of the Office of Emergency Management without being subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. [Italics supplied.]

Executive Order 290, dated March 2, 2022, states that on July 6, 2021 the United States Department of Justice, Office of Legal Counsel issued an opinion concluding that Section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. Section 3666bbb-3 does not prohibit public or private entities from imposing vaccination requirements while vaccinations are only available pursuant to Emergency Use Authorization (EUA); and stated that the federal Centers for Medicare and Medicaid Services ("CMS"), a Department

within the U.S. Department of Health and Human Services, issued the Omnibus Covid-19 Health Care Staff Vaccination Interim Final Rule (CMS-3415-IFC) ("CMS Rule"), which was upheld by the United States Supreme Court in Biden v. Missouri, 2022 U.S. LEXIS 495; 595 U.S. ____; 142 S.Ct. 647; 211 L.Ed. 2d 433 on January 13, 2022, requiring most Medicare and Medicaid-certified providers' and suppliers' staff to be vaccinated against Covid-19 in order to participate in the Medicare and Medicaid programs. Executive Order 290 also modified (i.e., shortened) the timeframes for compliance with Executive Order 283.

Biden v. Missouri

In Biden v. Missouri, the Supreme Court of the United States considered arguments about whether injunctions, issued by federal district courts and affirmed by federal appellate courts, should remain in place or lifted. The injunctions stayed the implementation of the Secretary of the U.S. Department of Health and Human Service's November 5, 2021 Interim Final Rule. The Interim Final Rule required facilities participating in Medicare and Medicaid programs to ensure that their covered staff would be vaccinated against Covid-19. The Court recognized that in 42 U.S.C. 1395 (at various sub-parts) Congress authorized the Secretary of Health and Human Services (the "Secretary") to promulgate, as a provider's or a facility's participation in Medicare or Medicaid programs, "such requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution". Biden, at 142 S.Ct. 650-51. The Supreme Court pointed out that "healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare, not simply sound accounting." Biden, at 142 S.Ct. 652 -53. The Court wrote that even the Respondents (the States of Louisiana and Missouri) conceded that "[T]he Secretary certainly has authority to implement all kinds of infection control measures at these facilities." Biden, at 142 S.Ct. 653. The Court noted that these conditions include programs that hospitals must implement to govern the "surveillance of prevention and control of ... infectious diseases". Biden, at 142 S.Ct. 652-53. The Court went on to write that, "Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers

around the country are ordinarily required to be vaccinated for diseases such as Hepatitis B, Influenza, and Measles, Mumps, and Rubella." Biden, 142 S.Ct. at 653.

The Court held, "We accordingly conclude that the Secretary did not exceed his statutory authority [per 42 U.S.C.S. Section 1395x(e)(9)] in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the Interim Final Rule must ensure that their employees be vaccinated against Covid-19." Id. [Bracketed material supplied.]

The Court went on to hold that the Interim Final Rule is not arbitrary and capricious and that there was good cause (the onset of the winter flu season, the rapid spread of the disease, and the need for rapid implementation of the rule) to delay notice and comment on the Interim Final Rule. Biden, 142 S.Ct. at 653-54. The Court also was careful to distinguish between a federal agency's (here the DHHS's) exercise of powers not delegated by the Congress and the wisdom of not limiting the swift exercise of powers already delegated by the Congress in times of unprecedented circumstances. Biden, 142 S. Ct. at 654. The Supreme Court lifted the injunctions. Biden, 142 S. Ct. at 654-55.

LEGAL ANALYSIS AND CONCLUSIONS

Analysis and Conclusions Regarding the Appellant's First Procedural Argument in Numbered Paragraph One

In regard to Counsel's argument presented in his First Numbered Paragraph, I note that the rule governing Summary Judgment in The New Jersey Rules of Court (hereinafter cited as "Court Rules" or "R.") and the rule governing Summary Decision in the Uniform Administrative Procedure Rules (hereinafter cited as "OAL Rules" or "N.J.A.C. 1:1-___") are similar, but not identical.

N.J.A.C. 1:1-12.5(b) states that when a party moves for Summary Decision he need only file the Motion itself, his Brief, and he may, at his discretion, file supporting Affidavits.

Unlike Court Rule 4:4-2, N.J.A.C. 1:1-12.5(b) does not require the movant to submit a Statement of Undisputed Facts with references to the record.

Appellant's Counsel argues that the Respondent should be required to submit a Statement of Undisputed Material Facts with references to the record because "the Summary Decision rule closely follows the New Jersey Court Rule which Respondent has failed to comply with." This argument is not persuasive because, as provided in N.J.A.C. 1:1-1.3(a), "In the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes." Thus, only when the OAL Rules are lacking specificity is it then proper to look to the Court Rules for guidance. However, when the OAL Rules fully address a matter of procedure, as here, then there is no need to look to the Court Rules.

I **CONCLUDE** that N.J.A.C. 1:1-12.5(b) governs the Motion for Summary Decision under consideration, not Court Rule 4:46-2. I **CONCLUDE** that Counsel's assertion is simply incorrect because there N.J.A.C. 1:1-12.5(b) does not require movants to file a Statement of Material Facts. It follows, and I **CONCLUDE** that Respondent's motion is not deficient for lack of a Statement of Undisputed Material Facts.

Analysis and Conclusions Regarding Appellant's Second Procedural Argument in Numbered Paragraph 5

The argument contained in Numbered Paragraph Five concerns a procedural question regarding jurisdiction. The Appellant states that the Respondent has incorrectly argued that the OAL does not have jurisdiction over this matter (i.e., that the Respondent is saying that the matter should have been brought in another forum). Appellant argues that the Civil Service Commission properly referred this matter to the OAL and that the OAL has jurisdiction over this matter.

In regard to the Appellant's Second Procedural Argument, contained in Numbered Paragraph 5, argument, I **CONCLUDE** that Appellant's Counsel has misconstrued what

the Respondent said about the pursuit of remedies. The Respondent did not say that the OAL lacked jurisdiction to hear Obiefuna's appeal. The Respondent merely stated that while the OAL had jurisdiction over the removal appeal, Obiefuna could seek other forms of relief elsewhere. I **CONCLUDE** that the Tribunal is not obligated to deny the Motion on the basis of Appellant's argument presented in Numbered Paragraph Five.

Analysis and Conclusions Regarding the Appellant's First Substantive Argument in Numbered Paragraph Two

In regard to Counsel's First Substantive argument presented in his Numbered Paragraph Two, Counsel contends that the Respondent did not engage in the "interactive process" set forth in the Administrative Procedure – Religious Accommodation for Employees" form (Bates-stamped documents DOH063-DOH065). Counsel argues that the Respondent should have explored options with Obiefuna as to how it could maintain safety in the workplace while Obiefuna remained in his position while unvaccinated. Counsel overlooks the fact that the language set forth in the "Administrative Procedure – Religious Accommodation for Employees" document (Section: AD-HR-0922; Issued 4/3/12; Revised 6/26/15 unchanged 4/5/21)(DOH 063 to DOH064) makes it clear that the applicant has the ability to communicate with Greystone/DOH and to make and seek clarifications. Moreover, the first page of the "Religious Exemption / Accommodation Request Form" (DOH065) makes it clear that the employee is free to supplement his application if he wishes. I **CONCLUDE** that the interactive process is satisfied merely by the filling-out of the application and by Greystone/DOH's consideration of same. Nothing more is required for the interactive process to proceed. I **CONCLUDE** that the Tribunal is not obligated to deny the Respondent' motion on the basis of the Appellant's argument presented in Numbered Paragraph Two.

Analysis and Conclusions Regarding the Appellant's Second Substantive Argument in Numbered Paragraph Three

In regard to Counsel's argument presented in his Numbered Paragraph Three, Counsel maintains that workplace circumstances (the presence of the virus and

Obiefuna's use of PPE) have not changed; only the rules have changed so as to require vaccination. However, Counsel ignores the fact that the CDC, starting in October, 2020 and continuing into 2021 determined that the Covid-19 virus was mutating and spreading and that the development of vaccines allowed governmental authorities and health providers to take greater steps in checking the spread of the virus. Counsel also ignores the fact that the development and use of vaccines meant that people could now be protected against the virus better than before the use of the vaccines. The availability of vaccines to combat the spread of the Covid-19 virus led the CMS on November 5, 2021 to issue CMS-3415-IFC (the "CMS Rule" or the "Interim Rule") requiring that staff in Medicare and Medicaid-certified providers and suppliers to be vaccinated against Covid-19.

I therefore **CONCLUDE** that the workplace circumstances have indeed changed because after the development, approval, and use of the vaccines, the governmental authorities and medical providers acquired additional means (the vaccines) of combatting the virus. I **CONCLUDE** that the Respondent acted within its authority when it decided that Covid-19 vaccinations (with the added option of using PPE to compliment the vaccine) would be a better way of protecting people than the use of PPE alone.

I **CONCLUDE** that allowing some unvaccinated caregivers to work in frequent, close, personal contact with patients, residents, and staff would have exposed said people to a greater risk of contracting Covid-19 and would thus have interfered with the Respondent's efforts to prevent the spread of the Covid-19 virus in the DOH's facilities. I **CONCLUDE** that the Tribunal is not obligated to deny the Respondent's motion on the basis of the Appellant's argument presented in Numbered Paragraph Three.

Analysis and Conclusions Regarding the Appellant's Third Substantive Argument in Numbered Paragraph Four

In regard to Counsel's substantive argument presented in his Numbered Paragraph Four, Counsel maintains that there is a genuine issue of fact regarding whether Obiefuna's continued use of PPE in a purportedly "safer" work environment, where most of the

workers have already been vaccinated, would still pose an undue hardship to the Respondent. Here, Appellant's Counsel is extending the argument presented in Numbered Paragraph Three. He argues that since the vaccinating of most of Obiefuna's co-workers has made the workplace safer, there is a fact question regarding whether Obiefuna's use of PPE alone is an adequate safety measure.

He argues that this change in circumstances (a lessened chance of infection) means that Obiefuna's use of PPE alone will not pose an undue hardship on the Respondent. Therefore, the Respondent should make a reasonable accommodation, in light of Obiefuna's request for a religious exemption, allowing him to work unvaccinated, but using PPE. Counsel argues that this is a fact question and, as such, renders an Order granting Summary Decision Motion would be inappropriate.

In regard to Counsel's argument presented in Numbered Paragraph Four, Counsel assumes, without any factual, statistical or other reasonable basis for doing so, that the prevalence of the virus in the workplace has significantly diminished and that the need for vaccination has dropped in direct proportion to his assumed facts. The Appellant's Counsel's argument is based on mere conjecture, while the Respondent's argument is grounded in scientific data compiled and analyzed by the CDC and CMS. In Brill v. Guardian Life Insurance Company, 142 N.J. 520, 529 (1995), the New Jersey Supreme Court discussed what a "genuine issue of material fact" is and what a genuine issue of material fact is not. Justice Coleman wrote:

By its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute.

Amplifying his point, Justice Coleman reached back to Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954), where the Supreme Court wrote:

[I]f the opposing party [in a summary judgment motion] offers ... only facts which are immaterial or of an insubstantial nature,

a mere scintilla, "Fanciful, frivolous, gauzy, or merely suspicious," he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.

The Appellant's argument relies on incomplete, incorrect, or unproven information. Rather than presenting authentic, reliable facts, the Appellant presents mere conjecture. In accordance with the guidance given by the Supreme Court in Judson and Brill, I **CONCLUDE** that a genuine issue of material fact cannot be established on mere conjecture. I **CONCLUDE** that the Tribunal is not obligated to deny the Respondent's motion on the basis of the Appellant's argument presented in Numbered Paragraph Four.

Analysis and Conclusions Regarding the Respondent's Arguments

In regard to the Respondent's Counsel's arguments, I make the following observations and / or conclusions.

I **CONCLUDE** that the issuance of Executive Orders 238 and 290 are each a legitimate exercise of New Jersey's power and authority to protect the public in general and, in particular, to protect patients, residents, and staff members who work in its medical institutions.

The Governor of New Jersey issued Executive Order 238 and Executive Order 290 based on information from the Centers for Disease Control (CDC) that the Covid-19 virus is deadly and that vaccines developed to protect people against this virus are efficacious. I **CONCLUDE** that the CDC is a reputable authority on the subject of public health and that the Governor's Executive Orders were issued pursuant to the recommendations made by the CDC.

I **CONCLUDE** that in following the Governor's Executive Orders, the DOH had a reasonable basis for formulating and promulgating its Covid-19 vaccination mandate (i.e.,

the subject vaccination requirement and the proof-of-vaccination reporting requirement) for covered employees.

American law, having its roots in the English Common Law, recognizes the right of an employer to set workplace rules. This principal is fundamental, and except for the requirement that such rules should be reasonable and that employees must be given fair notice of the workplace rules, it has not been changed. I **CONCLUDE** that Respondent-DOH, like any employer, is entitled to set workplace rules.

The DOH's vaccine mandate was based on authoritative information from the CDC and was promulgated to promote the safety of patients, residents, and staff members at DOH-affiliated medical institutions and thus, I **CONCLUDE**, its purpose was to promote the orderly, efficient, and safe operation of DOH facilities.

The DOH received and followed Executive Order 238 and Executive Order 290. I **CONCLUDE** that the DOH had a duty to implement these Executive Orders as workplace rules and did so.

Although the subject workplace rule required Obiefuna to become vaccinated and to provide proofs-of-vaccination, he refused to do so. I therefore **CONCLUDE** that the DOH was justified in bringing charges of Conduct Unbecoming a Public Employee and Other Sufficient Cause against Obiefuna.

The charges of Unbecoming Conduct and Other Sufficient Cause being sustained by a hearing officer, I **CONCLUDE** that the DOH had the right to impose discipline.

I **CONCLUDE** that Obiefuna's conduct (refusing vaccination and refusing to provide proof of vaccination) was willful and egregious. I **CONCLUDE** that the DOH made the reasons for the vaccination mandate clear. I **CONCLUDE** that the DOH clearly and sufficiently warned its employees that failure to be vaccinated and / or to report their vaccination status could result in termination of employment. I **CONCLUDE** that there is

no appropriate lesser penalty available than termination. I **CONCLUDE** that termination is an appropriate means of discipline under the circumstances of this matter.

I **CONCLUDE** that Obiefuna has not demonstrated that he was subjected to arbitrary treatment, and / or disparate treatment and / or that he was subjected to invidious discrimination on the basis of his religious affiliation or his religious beliefs.

ORDER

Based upon the foregoing, it is on this seventeenth (17th) day of March, 2023 **ORDERED** that the Respondent's Motion for Summary Decision is **GRANTED**.

It is also **ORDERED** that a copy of this **ORDER** shall be served upon all parties by email immediately; and it is further

ORDERED that all counsel shall acknowledge receipt of this Order within five (5) days of the date set forth herein.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked

“Attention: Exceptions.” A copy of any exceptions must be sent to the judge and to the other parties.

March 17, 2023
DATE



JOHN P. SCOLLO, ALJ

Date Received at Agency:

March 17, 2023

Date Mailed to Parties:

March 17, 2023

db