

**Matter of Fluellen v Hanley**

2006 NY Slip Op 30518(U)

May 24, 2006

Supreme Court, New York County

Docket Number: 108269/2005

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 52

Index Number : 108269/2005

FLUELLEN, NADINE

vs  
HANLEY, JAMES F.

Sequence Number : 001

ARTICLE 78

INDEX NO. 108269/05

MOTION DATE 04/05/06

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ ~~is the basis~~ on this motion to/for Article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1  
234  
5, 6, 7

Cross-Motion:  Yes  No

Upon the foregoing papers, ~~it is ordered~~ that this <sup>petition</sup> ~~motion~~ and cross motion are decided in accordance with the annexed decision, under & judgment.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representatives must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/24/06

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM : PART 52

-----X  
In the Matter of the Application of  
NADINE FLUELLEN,

Petitioner,

Index Number            108269/2005  
Submission Date        April 5, 2006  
Mot. Seq. No.           001

For Relief Pursuant to Article 78 of the  
Civil Practice Law and Rules,

-against-

JAMES F. HANLEY, AS COMMISSIONER OF  
THE CITY OF NEW YORK OFFICE OF  
LABOR RELATIONS and NEW YORK CITY  
HEALTH AND HOSPITALS CORPORATION,  
Respondents.

**DECISION, ORDER AND  
JUDGMENT**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served by the County Clerk.  
Appear in person at the County Clerk's Office to obtain entry, counsel or authorized representative must appear in person at the County Clerk's Office.

**For the Petitioner:**  
Kousoulas & Associates P.C.  
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**For the Respondents:**  
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Corporation Counsel of the City of New York  
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Papers considered in review of this petition to reverse and reinstate, and cross-petition to dismiss:

<b>Papers</b>	<b>Numbered</b>
Notice of Petition and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion, Affirmation, and Memo of Law.....	<u>2, 3, 4</u>
Petitioner's Memo of Law in Opp, Affidavit.....	<u>5, 6</u>
Respondent's Reply Memo of Law.....	<u>7</u>

**PAUL G. FEINMAN, J.:**

In this Article 78 proceeding, petitioner seeks reversal of respondent's determination to terminate her employment and reinstatement to her former position. Alternatively she asks that the proceeding be remanded for further consideration. Respondent cross-moves to dismiss the petition. For the reasons which follow, the petition is denied and the cross-motion to dismiss is granted.

*Factual Allegations and Procedural Background*

Petitioner is a former employee of co-respondent New York City Health and Hospitals Corporation (HHC), where she worked from March 1997 to March 2004 as a Senior Health Care Program Analyst for the Early Intervention Program (Ver. Pet. ¶ 13). Until August 23, 2003, she worked in the Bronx Regional office; thereafter she was reassigned to a temporary position in HHC's central office. Respondent Hanley's office carried out the grievance procedure commenced by petitioner against HHC (Ver. Pet. ¶ 14).

On September 3, 2003, HHC's deputy director of Human Resources Services wrote to petitioner a letter informing her that pursuant to Corporate Operating Procedure 20-33 (hereinafter "COP 20-33"),<sup>1</sup> HHC requested that petitioner submit to a psychiatric examination on September 9, 2003, based on observations of her behavior beginning in May 2003, in order "to determine your fitness to perform the full duties of your position" (Ver. Pet. Ex. B). The letter set forth specific behaviors at issue and noted that the psychiatrist would advise whether she was medically fit to continue to perform her duties. It stated that she was on "temporary assignment pending the outcome of" the examination. It noted that medical problems were not an acceptable excuse on a continuing basis for unsatisfactory job performance, and that it is HHC's policy to encourage employees whose medical problems make them unable to satisfactorily perform their job duties, to get "diagnostic and remedial care." If she were found medically unfit, she could be required to take a leave of absence for up to one year. If she were found medically fit, then disciplinary action would be undertaken against her.

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<sup>1</sup>COP 20-33 addresses "unsatisfactory job performance resulting from medical disabilities." (Ver. Pet. Ex. O).

Petitioner did not appear for the psychiatric examination on September 9, 2003. On September 8, 2003, she wrote a letter requesting a 30-day postponement so that she could confer with her attorney (Ver. Pet. Ex. C). Also on September 8, 2003, petitioner formally submitted a written grievance against her program and HHC (Ver. Pet. Ex. D). Her grievance complained of retaliation for “speaking out and exposing inefficiencies,” and of violations of COP 20-33 sections IV.C.1 and IV.C.5, including the failure to inform her that her alleged unfitness to perform her job could be related to a psychological problem, failure to provide an opportunity to voluntarily take a medical leave of absence, and improper threats of disciplinary action in violation of COP 20-33 and Civil Service Law § 72.

HHC sent petitioner a Notice and Statement of Charges dated September 15, 2003 which set forth eight specific allegations (“specifications”) concerning alleged inappropriate behavior and informed her that a Step 1 (A) disciplinary conference was scheduled for October 1, 2003 at which she could appear with representation if she desired (Ver. Pet. Ex. E). It indicated that she would receive a written decision following the conference and had five days from receipt of the decision to proceed in accordance with the Grievance Procedure set forth in her collective bargaining agreement

On October 23, 2003, petitioner requested a medical leave of absence to obtain treatment by a physical therapy for uterine fibroids, a condition which she had been experiencing for several months (Ver. Pet. Ex. G).<sup>2</sup> Apparently petitioner’s then-attorney believed that by this

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<sup>2</sup>Included in petitioner’s Exhibit G is a note from her gynecologist dated July 9, 2003 stating that petitioner had “chronic pelvic pain, fibroids, possible endometriosis” which was exacerbated by stress, and a note from her dermatologist also dated July 9, 2003 stating that petitioner was being treated for “widespread atopic eczema,” and that he had recommended she

request, the matter was resolved (Ver. Pet. Ex. H). However, although respondent agreed to the request for medical leave on October 23, 2003, it stated that “as repeatedly discussed in our previous telephone conversations,” the request for leave did not dispense with disciplinary charges (Ver. Pet. Ex. I).

The Step 1(A) hearing took place on October 23, 2003. Petitioner did not attend (Ver. Pet. Ex. J). A union representative, Shirley Gray, appeared and stated that the union would not defend the charges as its position was that the charges were improper in accordance with “Section 75” [of the Civil Service Law] (Ver. Pet. Ex. J, p. 2). After the testimony of witnesses concerning the allegations contained in the specifications, the charges were held to be sustained, with the exception of the fifth specification, and it was determined to terminate petitioner’s services (Ver. Pet. Ex. J, p. 6-7). The union timely notified HHC of petitioner’s intent to appeal (Ver. Pet. Ex. K).

On January 14, 2004, petitioner prepared two documents for the hearing officer, one replying to the charges contained in the specifications and in particular responding to the claim that she failed to appear for the psychiatric examination, and the other setting forth her appeal of the denial of her grievance (Ver. Pet. Ex. L). On January 16, 2004, a Step II informal conference was held concerning both the alleged violation of COP 20-33 and her grievance. The review officer’s reports were issued on February 18, 2004 to the union. The report addressing the charges against petitioner sets forth the documentary and testimonial evidence concerning petitioner’s actions. As concerns the specification alleging petitioner failed to report to the

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go on a vacation to get away from the “stress, heat & high humidity.”

psychiatrist on September 9, 2003, the review officer held that her request had been denied on September 8, 2003 (Ver. Pet. Ex. N, p. 3). As concerns the remaining specifications charging petitioner with inappropriate behaviors, the hearing officer found that “the preponderance of credible evidence proves [petitioner] guilty of the subject charges,” and that “the penalty of termination is appropriate (Ver. Pet. Ex. N, p. 6). The second report, concerning petitioner’s grievance, also described the evidence and after review found no violation of COP 20-33 and not basis to substantiate the grievance (Ver. Pet. Ex. M, p. 4).

On about March 1, 2004, the union sent a request for a Step III review (Ver. Pet. ¶ 31). A Step III hearing was held by co-respondent Office of Labor Relations on November 24, 2004, concerning both the disciplinary charges and petitioner’s grievance alleging violation of the Operating Procedures, and the Step III Reply was issued on February 18, 2005 (Ver. Pet. Ex. A). The Step III hearing officer found that the testimony and documentary evidence presented at the hearing substantiated the charges against petitioner and demonstrated that the penalty was warranted; it found that the violation she alleged in her grievance was not established, and denied the grievance. According to the Step III Reply, the files in this matter were closed, but in a footnote addressed to the union, indicated that it had 15 days to proceed to arbitration or its right to do so would be deemed waived and abandoned.

Petitioner commenced this proceeding by filing her notice of petition and petition on June 14, 2005. The petition alleges that HHC violated its own policy, COP 20-33, by requiring petitioner to undergo a psychiatric examination when, according to the procedure, only where the employee refuses to voluntarily take a medical leave of absence and disciplinary action is not an effective response, is a medical examination requested (Ver. Pet. ¶ 33, citing COP § IV.C.1 [Ex.

O)). The petition alleges that she never refused a voluntary leave of absence and that HHC therefore improperly requested a medical examination as though she had, in fact, refused to take a leave of absence (Ver. Pet. ¶¶ 34-35, citing COP § IV.C). It also contends that it was arbitrary and capricious for the review officer to find that HHC “refused” petitioner’s request for a postponement of the medical examination, as there is no documentary proof that her request received any response (Ver. Pet. ¶ 37). The petition seeks to have the determination reversed and to have petitioner reinstated to her position with retained seniority and back wages or, in the alternative, to have the proceeding remanded for further consideration.

Respondents cross-petition seeking to dismiss the petition on the basis that petitioner has failed to exhaust her administrative remedies.

#### *Legal Analysis*

An Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (CPLR 7801[1]). CPLR 217(1) provides that an Article 78 proceeding must be commenced within four months of the date of the final determination (*Carter v State of New York*, 95 NY2d 267, 270 [2000]). An agency determination is deemed final “when the petitioner is aggrieved by the determination” (*Blondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). “In analyzing the Statute of Limitations issue we must first ascertain what is the determination sought to be reviewed” (*Martin v Ronan*, 44 NY2d 374, 380 [1978]). If there is further administrative action that could be taken to prevent or ameliorate the harm, then commencement of an Article 78 proceeding is premature (*see, Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520, *cert denied* 479 U.S. 985 [1986]).

Respondents’ cross-motion to dismiss argues that petitioner’s employment is governed by

the collective bargaining agreement between the Office of Labor Relations and HHC on behalf of the City of New York and the Organization of Staff Analysts, in effect from July, 1, 2002 to June 30, 2005 (Eck. Aff. in Supp. of Cross-Mot. Ex. 1 [hereinafter Agreement]). Article VI of the Agreement sets forth the grievance procedure. Section 2 of Article VI concerns grievances, and Section 5 concerns disciplinary procedures. Section 2 provides that an employee or the union may appeal a Step II grievance proceeding to the Commissioner of Labor Relations in writing within working days 10 days of receipt of the Step II determination (Agreement pp. 16-17). An appeal from a Step III determination may only be made “solely by the Union to the Office of Collective Bargaining for impartial arbitration within fifteen (15) work days of receipt of the Step III determination.” The Step IV arbitration is final and binding and enforceable in accordance with CPLR Article 75.

Under the Agreement, the four steps for disciplinary procedures are labeled A-D. After the Step A initial conference, the employee may choose to proceed in accordance with Civil Service Law § 75, or Section 7.5 of the HHC Personnel Rules and Regulations, or with the grievance procedure set forth in the Agreement (Agreement p. 19). If an employee chooses the Agreement’s grievance procedure, he or she appeals to the agency head or designated representative in Step B, and then to the Commissioner of Labor Relations in Step C. If an employee is not satisfied with Step C’s determination by the Commissioner of Labor Relations, “the Union with the consent of the grievant may proceed to arbitration pursuant to the procedures set forth in STEP IV.” (Agreement pp. 18-19).

Respondents note that petitioner chose to use the grievance procedure set forth in the Agreement and thus should have proceeded through Step D’s arbitration prior to seeking judicial

review.<sup>3</sup> Neither petitioner nor the union sought arbitration within 15 days of receiving the Step III determination issued on February 18, 2005 (which also decided the Step C grievance), but instead commenced the instant proceeding in June 2005. Respondents thus argue that petitioner waived her right to appeal and failed to exhaust her administrative remedies as set forth in her collective bargaining agreement, and that therefore the Article 78 proceeding is premature.

Petitioner argues, in her opposition to the cross-motion, that the heart of her claim is that respondents' actions in requiring her to undergo a psychiatric examination and seeking to discipline her for various inappropriate actions, "converted" a Civil Service Law § 72 "leave for ordinary disability" proceeding, into a Civil Service Law § 75 "removal and other disciplinary action" proceeding. She contends, without explanation, that her only recourse was to commence the instant proceeding because the union grievance procedure does not permit the claims that form the basis of her petition (Pet. Memo of Law in Opp. unnumbered p. 6). She also argues that pursuing the grievance process was futile because although COP 20-33 is designed to address an employee's fitness for duty as contemplated by Civil Service Law § 72, it does not contain provisions for reinstatement after medical leave, a provision guaranteed under that section of the Civil Service Law.

Petitioner's argument concerning the inability of the administrative process to address her claim of "conversion," is improper as it was not contained in her petition (*Bailey v AGR Realty Co.*, 260 AD2d 322 [1<sup>st</sup> Dept. 1999] [declining to address arguments in support of the motion

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<sup>3</sup>To the extent that petitioner orally argued that Rule 7:5:7(a) of the HHC personnel rules and regulations allows an employee to commence an Article 78 proceeding without pursuing the four steps outlined in the Agreement, this argument is unavailing as petitioner chose not to pursue the Rule 7 appeals procedure.

brought forth for the first time in the reply papers]), and is also unpersuasive. Her grievance explicitly sought to challenge HHC's inconsistent positions in treating her as if her job performance was due to a medical disability but rather than offering leave pursuant to COP 20-33, chose to discipline her. These arguments were brought before each step of the disciplinary hearing, and were not found persuasive. Specifically, the Step III hearing officer did not find a violation of COP 20-33. Whether the hearing officer applied the law in a manner that was arbitrary and capricious is not before this court, as the petition is premature and the court therefore lacks jurisdiction over the matter. To the extent that petitioner now explicates her claim as being one of improper conversion from a proceeding concerning leave into a proceeding concerning removal, this was not so stated in her September 8, 2003 notice of grievance (Ver. Pet. Ex. D),<sup>4</sup> and thus has never gone through the required administrative appeals process so as to be ripe for review by the court pursuant to CPLR Article 78.

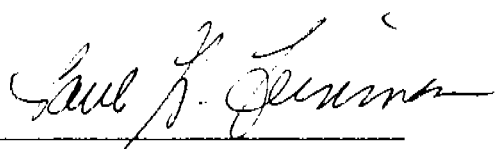
Because petitioner failed to exhaust her administrative remedies, the court lacks jurisdiction over this proceeding (CPLR 7801[a]). The petition must therefore be denied. The cross-motion to dismiss is accordingly granted. It is

ORDERED that the cross-motion to dismiss is granted.

ORDERED and ADJUDGED that the petition is denied for failure to exhaust administrative remedies and the proceeding is dismissed.

This is the decision, order and judgment of this court.

ENTER :



J.S.C.

Dated: May 24, 2006  
New York, New York

<sup>4</sup>As noted above, at the time the Statement of Decision was not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel representing the union representative must appear in person at the County Clerk's Desk (Room 1408).

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel representing the union representative must appear in person at the County Clerk's Desk (Room 1408).