

Kagel v DeFleur

2010 NY Slip Op 32201(U)

August 18, 2010

Supreme Court, Broome County

Docket Number: 2010-1087

Judge: Ferris D. Lebus

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse in Binghamton, New York, on the 30th day of July, 2010.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

SARA R. KAGEL,

Petitioner,

vs

LOIS B. DEFLEUR, in her official capacity as
President of the STATE UNIVERSITY
OF NEW YORK AT BINGHAMTON,

Respondent.

DECISION

Index No. 2010-1087
RJI No. 2010-0781-M

APPEARANCES:

COUNSEL FOR PETITIONER:

ALL COUNSEL P.C.
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FERRIS D. LEBOUS, J.S.C.

Petitioner, Sara R. Kagel, filed this Article 78 proceeding seeking a judgment finding that respondent's failure to refund tuition paid is invalid, ordering a tuition refund to petitioner in an amount in excess of \$25,000, together with fees and expenses incurred in this action.

Respondent, Lois B. DeFleur, in her official capacity as President of the State University of New York at Binghamton, opposes the petition in all respects.

The court heard oral argument from counsel on July 30th, 2010.

BACKGROUND

On October 13, 2003, petitioner, Sara R. Kagel, signed an Application for Admission for Out-of-State Applicants to Binghamton University. On said Application, petitioner truthfully checked the box "No" in response to the question "Are you a New York state resident?", while also reporting that she had graduated from Yeshivah of Flatbush high school in Brooklyn, New York. Petitioner was accepted into Binghamton University and over the course of the next four years was charged approximately \$43,570 in tuition as an out-of-state resident. In May 2009, petitioner graduated from Binghamton University.

At some point after graduation, petitioner learned that Education Law § 355 (2)(h)(8) seemingly mandated that respondent should have charged her for tuition and fees at the same rate as a resident of New York because she graduated from a New York qualifying high school. On October 19, 2009, petitioner inquired of respondent via an e-mail from her uncle, Ira Akselrad, to

one Alfredo Vidal regarding the possibility of a tuition refund. Mr. Vidal's connection to respondent, if any, is not clear on this record, but there is no dispute that Mr. Akselrad's e-mail found its way to the Office of the University Counsel.

By way of letter dated December 23, 2009, Barbara Westbrook Scarlett, Associate Counsel in the Office of the University Counsel, responded to petitioner stating, in sum and substance, that her request for a tuition refund was untimely and contrary to SUNY and Binghamton campus policies. Ms. Scarlett concluded her letter as follows:

[i]f you have any additional extenuating information or documentation such as the campus's documented failure to act on timely submitted evidence of your NYS residency, please submit same and I will reconsider my recommendation. Unfortunately, financial hardship is not an extenuating circumstance.

(Scarlett letter dated December 23, 2009; emphasis added).

On January 15, 2010, petitioner's counsel sent a letter facsimile to Ms. Scarlett confirming a telephone conversation between counsel on that date in which he relayed "some additional information" (Lee letter dated January 15, 2010; emphasis added). Mr. Lee wrote "[w]hen you and I spoke today, you advised that you were continuing to evaluate our request, this letter notwithstanding, and I suggested some additional information that we believe you should consider. I am writing to reiterate that information (Lee letter dated January 15, 2010; emphasis added). In closing, Mr. Lee noted "I hope you find this information helpful in your reconsideration of Ms. Kagel's refund request" (Lee letter dated January 15, 2010; emphasis

added).

The next written communication is another letter facsimile from plaintiff's counsel dated January 28, 2010 which confirms yet another telephone conversation the prior week between counsel and further states that "[w]hen we spoke, you advised that you were reconsidering the question of Ms. Kagel's request for a refund of overpaid tuition" (Lee letter dated January 28, 2010; emphasis added).

Apparently there was no further response from University counsel and this litigation ensued with the Notice of Petition and Petition being filed on April 23, 2010.

DISCUSSION

The statutory time period within which to commence a special proceeding against a body or officer of the state is within four months following that body or officer's "final" determination (CPLR § 217 [1]). For purposes of judicial review pursuant to CPLR Article 78:

[a]dministrative actions as a rule are not final 'unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process' [citation omitted]. To determine if agency action is final, therefore, consideration must be given to 'the completeness of the administrative action' and 'a pragmatic evaluation [must be made] of whether the 'decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury' [citations omitted]

Thus, a determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an

administrative proceeding. There must additionally be a finding that the injury purportedly inflicted by the agency may not be 'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party' [citations omitted].

(Matter of Essex County v Zagata, 91 NY2d 447, 453 [1998]).

In the instant case the only administrative determination at issue is University Counsel's letter dated December 23, 2009 which contains an invitation to submit further information. Petitioner, via counsel, did submit additional information to University Counsel by way of telephone conferences and letters dated January 15, 2010 and January 28, 2010 in response to which University Counsel purportedly promised further consideration. Since University Counsel has yet to formally reply to the same the court does not consider University Counsel's letter dated December 23, 2009 a final order. Consequently, this Article 78 petition is premature.

CONCLUSION

Accordingly, for the reasons stated the petition will be dismissed.

This constitutes the decision, order and judgment of the court.

Dated: August 18, 2010
Binghamton, New York

s/ Ferris D. Lebous _____
Hon. Ferris D. Lebous
Justice, Supreme Court

