

**Matter of Rizvi v New York Coll. of Osteopathic
Medicine of N.Y. Inst. of Tech.**

2010 NY Slip Op 33962(U)

March 17, 2010

Supreme Court, Nassau County

Docket Number: 23760/09

Judge: Edward W. McCarty III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. EDWARD W. MC CARTY, III
Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

In the Matter of the Application of
SYED BILAL RAZA RIZVI,
Petitioner(s),

For Judgment pursuant to Article 78 of the Civil
Practice Law and Rules,

INDEX No. 23760/09

-against-

NEW YORK COLLEGE OF OSTEOPATHIC
MEDICINE OF NEW YORK INSTITUTE OF
TECHNOLOGY,

MOTION DATE: 2/8/10
MOTION SEQ.#001-002

Respondent(s).

The following papers read on this motion:

- Notice of Motion/Order to Show Cause xx
- Cross-Motion
- Answering Affidavit x
- Replying Affidavits x

Petition (#001) by petitioner for judgment pursuant to CPLR Article 78: (1) directing respondent to rescind its dismissal of petitioner as a student, without appeal, pursuant to respondent's letter to petitioner dated August 10, 2009; (2) directing respondent to authorize, approve and otherwise take all actions necessary to enable the petitioner to register for and take the COMLEX Level II CE examination (hereinafter, "the Exam") which Exam petitioner was required to take and pass as a condition of graduation from respondent; (3) directing respondent to recognize petitioner as a student in good standing until such time as petitioner sits for and takes the Exam; (4) in the event petitioner passes the Exam, directing respondent to confer a degree of Doctor of Osteopathic Medicine upon petitioner as a student who has met all of respondent's requirements to graduate, is denied; and motion (#002) by respondent for an order pursuant to CPLR 3211(a)(1) and

(7) and 7804(f) striking petitioner's first and second causes of action and dismissing the petition for failure to state a cause of action, is granted.

Petitioner was a student at respondent New York College of Osteopathic Medicine of New York Institute of Technology, having been admitted on or about August 2003.

Respondent required that students complete their degree requirements within six years from their initial date of enrollment. In order to graduate, students must, *inter alia*, have exhibited professional conduct and excellent moral and ethical behavior. Students must also have passed the COMLEX Level I, COMLEX Level II CE and PE examinations of the National Board of Osteopathic Medical Examiners, and the COMLEX II CE and PE scores must be received by respondent prior to the student's graduation date.

In May 2006, petitioner requested a one year leave of absence from respondent school in order to conduct clinical research at the Mayo Clinic. Petitioner's research proposal was approved by respondent's Associate Dean for Academic Affairs on June 14, 2006. Petitioner did not in fact participate in the research program at the Mayo Clinic, purportedly due to financial problems his family was experiencing. During his leave of absence he unsuccessfully pursued a research position at Stony Brook University.

Petitioner returned to respondent school for the 2007-2008 academic year, which was his fourth year at respondent school. Petitioner completed and passed two clerkships. However, petitioner's grades in those clerkships were changed from pass to fail on the ground that "multiple unauthorized absences discovered post clerkship and falsification of academic record via PDA logs." As a result of these course failures, petitioner was dismissed from respondent school, with the right to appeal such dismissal. Petitioner's appeal of his dismissal to respondent's Student Progress Committee was unsuccessful, but he was allowed to further appeal to the Dean of respondent school. The Dean offered petitioner the opportunity to repeat the entire fourth year curriculum on probation. Probation was defined to mean that should petitioner fail any clerkship, he would be dismissed, without the right of appeal. Petitioner accepted the Dean's terms for re-matriculation for the 2008-2009 academic year.

Petitioner completed his clerkship and course work. He took and passed the COMLEX Level II PE examination on March 20, 2009, after two previous failures.

However, he failed the COMLEX Level II CE examination which he took on April 15, 2009. Petitioner met with the Dean who gave him permission on May 14, 2009 to re-take the COMLEX Level II CE examination on June 29, 2009, and advised petitioner in writing that: "Failure to achieve a passing score to satisfy graduation requirements will result in immediate academic dismissal from NYCOM without an appeal."

Petitioner felt unable to take the Exam on June 29, 2009, purportedly because of a debilitating case of the flu, and re-scheduled the Exam online to July 7, 2009. Petitioner alleges that a representative of the National Board of Osteopathic Medical Examiners, which administers the Exam, advised him that the Exam results would be released on or about August 8, 2009. On June 25, 2009, respondent's Assistant Dean advised petitioner that if he did not take the Exam as originally scheduled on June 29, 2009, he would be automatically dismissed. Petitioner's attempts to discuss this issue with respondent's administration in an effort to change their decision were unsuccessful. Petitioner took the Exam on June 29, 2009 and failed, and was therefore dismissed as a student, without appeal, on August 10, 2009.

Petitioner thereafter commenced this Article 78 proceeding on November 19, 2009, in which he argues that respondent's refusal to permit him to take the Exam on July 7, 2009 instead of June 29, 2009, and his dismissal by respondent for failing such June 29, 2009 Exam were arbitrary, capricious and unlawful.

The Court of Appeals has held: "that the determinations of educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review [cites omitted], that review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute." (See, *Matter of Susan M. v New York Law School*, 76 NY2d 241, 246.)

It is clear to this Court that respondent school's determination to dismiss petitioner for failing to pass the COMLEX Level II CE examination after taking it for a second time on June 29, 2009, while on probation, was properly based on academic considerations, and was not arbitrary or capricious. (See, *Matter of Williams v State University of New York - Health Science Center at Brooklyn*, 251 AD2d 508.) Therefore, petitioner's second cause of action is hereby dismissed.

Petitioner's first cause of action alleges that respondent's refusal to allow petitioner to take the Exam on July 7, 2009 instead of June 29, 2009 was arbitrary, capricious and unlawful because respondent through its representatives and agents had actual knowledge and/or should have known that petitioner was ill and unable to properly prepare for and/or sit for the Exam, and that the results for both the June 29, 2009 Exam and the July 7, 2009 Exam would be released by August 7, 2009. However, petitioner does not deny that he never presented any of respondent's representatives with a doctor's note or any other proof to establish his purported illness. Therefore, it can hardly be said that respondent's refusal to postpone the second taking of an Exam by a probationary student because of an undocumented, unsubstantiated illness claimed by petitioner was either arbitrary or capricious. Moreover, petitioner's claim that the results of both the June 29, 2009 Exam and the July 7, 2009 Exam would both be reported in time to meet his graduation requirements was also undocumented and unsubstantiated at the time petitioner requested a further delay of the Exam. The only proof petitioner offers as to the timing of the reporting of the Exam results was an August 7, 2009 e-mail, which post-dated respondent's decision as to when petitioner should take the Exam. In the absence of such confirmed information, it was neither arbitrary nor capricious for respondent to refuse petitioner a postponement of his second attempt at passing the Exam.

Petitioner's argument that respondent's decision as to when petitioner must take the Exam was not an academic determination, improperly takes this decision out of context. Instead, such decision must be viewed in light of the totality of petitioner's record at respondent school. In such context, the documentary evidence presented by respondent provides additional support for the conclusion that respondent's denial of petitioner's request to postpone the Exam was neither arbitrary nor capricious. Absent a finding of arbitrariness or capriciousness, petitioner's first cause of action must also be dismissed.

Having dismissed the only two causes of action in petitioner's petition, said petition is hereby denied and this proceeding hereby dismissed.

This order concludes this matter.

Date 3-17-10

ENTERED
 X X X
 MAR 22 2010
 J.S.C.
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE

