

Matter of Kharnak v City Col. of the City Univ. of N.Y.
2014 NY Slip Op 32065(U)
August 5, 2014
Supreme Court, New York County
Docket Number: 100306/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Kharnak, Mitchell,

INDEX NO. 100306/2014

-v-

MOTION DATE _____

CITY College of CUNY

MOTION SEQ. NO. 1

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1-5

Answering Affidavits — Exhibits _____ | No(s) 6

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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 representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/5/2014



HON. EILEEN A. RAKOWER J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
In the MANNER OF THE APPLICATION OF
MITCHELL KHARNAK,

Index No.
100306/2014

Petitioner,

-against-

**DECISION
and ORDER**

CITY COLLEGE OF THE CITY
UNIVERSITY OF NEW YORK,

Mot. Seq. 01

Respondent,

UNFILED JUDGMENT

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and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

HON. EILEEN A. RAKOWER:

Mitchell Kharnak, pro se, ("Petitioner") brings this Petition pursuant to Article 78 of the CPLR for equitable and monetary relief against City College of the City University of New York ("CUNY" or "Respondent"). Specifically, Petitioner seeks "to mandate CUNY City College to permanently delete the ME 14500 Computer Aided Drafting (CAD) ["Mechanical Engineering"] course from all records and transcripts," to refund Petitioner the remaining amount for the course entitled "Math 20300" which Petitioner withdrew from, and to reimburse Petitioner for any and all court related costs concerning this matter.

As set forth in the Verified Petition, Petitioner, a former CUNY undergraduate student, was enrolled as a mechanical engineering major at CUNY during the fall of 2013. Among other classes, Petitioner was enrolled in Math 20300 and Mechanical Engineering 14500, which form the basis of this Petition.

As for Math 20300, Petitioner claims that although CUNY allowed Petitioner to withdraw from this course and refunded him \$978.50 for the course, the cost of the course was \$980 and Petitioner is owed \$1.50.

As for Mechanical Engineering 14500, Petitioner claims that although CUNY given him a full refund for the class and CUNY allowed Petitioner to

withdraw from Math 20300, CUNY refused to allow Petitioner to withdraw from Mechanical Engineering 14500.

Petitioner submits a Note of Petition and Verified Petition, which annexes the following exhibits: an excerpt of e-mail correspondence from December 28, 2012 to January 17, 2013, between Petitioner and Deborah Hartnett, the Senior Advisor and Chief of Staff to the President of CUNY, regarding the Mechanical Engineering 14500 course; an excerpt depicting Petitioner's initial e-mail correspondence regarding Mechanical Engineering 14500 dated September 25, 2012; an excerpt of an email correspondence between Petitioner and Professor Wolf regarding Petitioner's concerns about Math 20300; and an e-mail correspondence between Dean Mars, Ms. Hartnett and Petitioner from October 3, 2012 to November 14, 2013 regarding Math 20300.

Respondent cross-moves to dismiss the Petition pursuant to CPLR 217(1); 3211(a)(1), (2), (5), and (7); 7894(f); 7801(1); 7803; 7804(f); and 7806. Respondent contends that Petitioner failed to exhaust all administrative remedies, his claim is not within the statute of limitations and Respondent's actions were not arbitrary and capricious.

In support of its cross motion, Respondent submits the Affidavit of Ms. Hartnett, which annexes the following exhibits: Exhibit 1 is an e-mail chain from October 7, 2013 to October 11, 2013 between Ms. Hartnett, Ms. Coico and Petitioner; Exhibit 2 is a printout of the Fall 2013 Academic Calendar; Exhibit 3 is a printout of CUNY's Undergraduate Bulletin which sets forth the college's policies; Exhibit 4 consists of several e-mails between Petitioner and a few of the college's administrators regarding Math 20300 and Mechanical Engineering 14500; Exhibit 5 is a copy of an e-mail from Ms. Hartnett to Petitioner indicating the cancellation of Math 20300 and reimbursement of tuition for that course; and Exhibit 6 is an e-mail explaining the Math 20300 refund.

Respondent also submits the Affirmation of William J. Taylor, Jr., which attaches several exhibits: Exhibit 1 is a copy of the Petition; Exhibit 2 is a printout from the website of CUNY; Exhibit 3 is a printout from the website of CUNY, entitled "Tuition & Fees 2013"; Exhibit 4 is a copy of a November 1, 2013 e-mail chain containing e-mails between Ms. Hartnett; Exhibit 5 is a copy of a printout from the website of CUNY, entitled "Grove School of Engineering -Undergrad: Academic Standards"; and Exhibit 6 is a copy of an e-mail dated October 23, 2013 from Petitioner to Ms. Hartnett.

Math 20300

In response to Petitioner's claim that he is owed an additional refund for Math 20300, Ms. Harnett avers in her affidavit:

In his Petition, Mr. Kharnak disputes the amount of this reimbursement, asserting that he should have been paid \$980 but received only \$978.50. Mr. Kharnak is mistaken on this point. When he was dropped from Math 20300, Mr. Kharnak no longer had the credits necessary to qualify as a full-time student, which in turn affected the calculations for his tuition and other expenses- and caused the proper amount of reimbursement to be the amount that was paid, \$978.50 ... I should also note that it is my understanding that, before commencing this Article 78 proceeding, Mr. Kharnak never challenged the amount of his reimbursement to the City College Bursar's Office or any other responsible entity or official at the College.¹

Mechanical Engineering 14500

As set forth in the Petition, Petitioner alleges that after the Mechanical Engineering 14500 class commenced, Petitioner contacted the Chair of the college's mechanical engineering department to voice his complaint that the course was "being taught by an instructor with limited English language skills."

Ms. Harnett alleges in her Affidavit that she authorized full reimbursement for the course Mechanical Engineering 14500 to Petitioner but denied Petitioner's request to remove it from all academic records and transcripts because the September 17, 2013 deadline to drop a class had passed.

Ms. Hartnett's Affidavit contends that on October 22, 2013, she advised Petitioner in an in-person meeting, that, in order to avoid receiving an academic grade in Mechanical Engineering 14500, Petitioner would need to withdraw from the course himself, by the Fall 2013 withdrawal deadline of November 8, 2013. As evidenced in the *Undergraduate Bulletin*, if Petitioner withdrew before the deadline, the course would appear on his transcript with a grade of "W" and it would not be factored into his overall grade point average.

¹ Exhibit 6 to Ms. Harnett's Affidavit sets forth how the reimbursement was calculated.

As set forth in Respondent's Exhibit A and the Petition, despite Ms. Hartnett's advice, Petitioner did not withdraw and received an "F" for the course. On December 30, 2013 and January 21, 2013, Ms. Hartnett sent Petitioner an e-mail informing him that he would need to appeal the grade to the Grove School of Engineering Committee on Course and Standing, which is also reflected in Respondent's Exhibit A. Petitioner claims in his Petition that this is not an academic or grade matter and therefore not under the jurisdiction of an academic appeals committee. Petitioner asserts in his Petition the Math 20300 course provides a "directly comparable situation" to that of Mechanical Engineering 14500 and the course should therefore be removed from his transcript.

With respect to the Math 20300 class, Petitioner also sought to withdraw from the class after the deadline to drop a class and receive a full refund had passed. On October 4, 2013, Dean Mars notified Petitioner via e-mail that he would "submit a form to the Registrar requesting [him to] be deregistered from Math 20300 and [Petitioner would be] given a full refund on the basis of improper advising." See Exhibit 4 of Ms. Hartnett's Affidavit, Based on Dean Mars' decision, Ms. Hartnett authorized the deletion of Math 20300 from Petitioner's academic record and his full reimbursement for the course, which can be seen in Exhibit 5. As such, CUNY retroactively dropped Petitioner from Math 20300 and this became effective August 27, 2013.

A party who objects "to the act of an administrative agency must exhaust administrative remedies before being permitted to litigate in a court of law." *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52 (1978). Courts "are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency." *Galin v. Chassin*, 217 A.D.2d 446, 447 (1995). Judicial review of these matters, if necessary, should await petitioner's exhaustion of administrative remedies. See *Davis v. Waterside Hous. Co. Inc.*, 274 A.D.2d 318 (2000).

Here, Petitioner failed to exhaust his administrative remedies because he did not appeal his grade to the Grove School of Engineering Committee on Course and Standing.

The procedure for academic appeals at CUNY is set forth in the College's *Undergraduate Bulletin* and it that states the School's Committee on Course and Standing are charged with "oversight and enforcement of [matters regarding the academic standards, and rules, and in general has jurisdiction over all of the courses offered by that School]." It also states that students "have the right to

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appeal to the appropriate Committee on Course and Standing any decision made by individual faculty members or administrators about these academic matters.” Under CUNY’s policy, Petitioner must first make an appeal to the Grove School of Engineering Committee on Course and Standing.

In opposition, Petitioner argues that the grade he received for the course is immaterial to this case and that this is not an academic matter but rather is “concerning the validity of having a course represented on any transcript or record that has been fully refunded.” He further contends CUNY’s grant of a full refund essentially implies they have “conceded to the fact that the Petition has not officially enrolled in the course,” and therefore an appeals committee “has no jurisdiction” to hear this matter.

Here, Petitioner is still seeking to have an academic grade removed from his transcript. This is a matter for the Grove School of Engineering Committee on Course and Standing and Petitioner failed to appeal to this committee as mandated by the *Undergraduate Bulletin*.² Therefore, Petitioner failed to exhaust his administrative remedies regarding Mechanical Engineering 14500.

In addition, CPLR § 217 provides that an Article 78 proceeding must be commenced “within four months after the determination to be reviewed becomes final and binding upon [P]etitioner.”

² The Court of Appeals stated:

In order for society to be able to have complete confidence in the credentials dispensed by academic institutions, however, it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis. Indeed, the value of these credentials from the point of view of society would be seriously undermined if the courts were to abandon their long-standing practice of restraint in this area and instead began to utilize traditional equitable estoppel principles as a basis for requiring institutions to confer diplomas upon those who have been deemed to be unqualified.

Olsson v. Bd. of Higher Educ., 49 N.Y.2d 408, 413 (1980).

Here, the four-month statute of limitations began running on October 22, 2013, when Respondent communicated to Petitioner that a final decision had been rendered and that the grade would not be removed from his transcript. Petitioner did not commence this Article 78 proceeding until April 10, 2014, more than four months after the final decision was rendered. As such, the Petitioner is time-barred.

Petitioner argues CUNY's final decision was made on January 21, 2014 because Ms. Harnett e-mailed him then. However, this e-mail did not change CUNY's final decision made in an e-mail on October 22, 2013 - it only reiterated information regarding Petitioner's right to appeal the final decision to the Grove School of Engineering Committee on Course and Standing. Though Petitioner continued to request that Mechanical Engineering 14500 be removed from his transcript, a "request for reconsideration of an administrative determination will not extend the four-month limitations period." *Matter of Eldaghar v. N.Y.C. Hous. Auth.*, 34 A.D.3d 326, 326 (2006); see *De Milio v. Borghard*, 55 N.Y.2d 216, 222 (1982) (noting that "the rule that the four-month limitations period begins to run on the date that the determination to be reviewed becomes final and binding would be completely emasculated if the [P]etitioner could extend the commencement of this period by merely requesting reconsideration be given to a prior decision...").

Furthermore, an agency's action is an "arbitrary action" when it is "without sound basis in reason and is generally taken without regard to the facts." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974); CPLR § 7803. It is also settled that "a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." *Matter of Diocese of Rochester v. Planning Bd. of Town of Brighton*, 1 N.Y.2d 508, 510 (1956) (citing *People ex. rel. Hudson-Harlem Co. v. Walker*, 282 N.Y. 400 (1940); *Matter of Levy v. Bd. of Stds & Appeals*, 267 N.Y. 347(1935)). The standard for "arbitrary and capricious" has been even more difficult to satisfy in challenges to academic determinations "because the courts have repeatedly refused to become involved in the pedagogical evaluation of academic performance." *Susan M. v. New York Law Sch.*, 76 N.Y.2d 241, 246 (1990).

Petitioner contends in his Affidavit in Opposition that CUNY's actions were "arbitrary," "capricious" and "irrational" because it did not follow its own precedent. Petitioner argues that since his grade for Math 20300 had been dropped, his grade for Mechanical Engineering 14500 should be deleted from his transcript. However, for the Math 20300 course, Dean Mars sent Petitioner an email on October 4 2013 notifying him that the course would be deleted from his transcript.

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This provided the academic institution with a sound basis for removing this course from Petitioner's transcript. In contrast, as evidenced by Ms. Hartnett's Affidavit, she had repeatedly told Petitioner the Mechanical Engineering 14500 course would be refunded and could only be withdrawn with a grade of a "W" if he withdrew before the deadline, which he did not do. Petitioner was never advised that this course would be removed from his transcript, as evidenced by both parties' exhibits.

As Petitioner has failed to exhaust all administrative remedies and in the alternative failed to timely commence this action, the Petition is denied and the cross-motion to dismiss is granted.

Wherefore, it is hereby,

ORDERED and ADJUDGED the cross-motion to dismiss is granted, and the Petition is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.



J.S.C.

HON. EILEEN A. RAKOWER

Dated: AUGUST 5, 2014

UNFILED JUDGMENT

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