| **Matter of Schoening v Board of Coop. Educ. Servs., First Supervisory Dist., Eastern-Suffolk BOCES** |
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| 2018 NY Slip Op 33060(U) |
| November 16, 2018 |
| Supreme Court, Suffolk County |
| Docket Number: 00809/2018 |
| Judge: William B. Rebolini |
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Short Form Order

## SUPREME COURT - STATE OF NEW YORK

## I.A.S. PART 7 - SUFFOLK COUNTY

**PRESENT:**

**WILLIAM B. REBOLINI**
**Justice**

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| In the Matter of the Application of Jeffrey Schoening,<br><br>Petitioner,<br><br>For a Judgment under Article 78 of the Civil Practice Law and Rules<br><br>-against-<br><br>Board of Cooperative Educational Services, First Supervisory District, Eastern-Suffolk BOCES,<br><br>Respondent. | Index No.: 00809/2018<br><br>Motion Sequence No.: 001; MOTD<br>Motion Date: 3/19/18<br>Submitted: 8/8/18<br><br>Motion Sequence No.: 002; MD<br>Motion Date: 5/23/18<br>Submitted: 8/8/18<br><br>Attorney for Petitioner:<br><br>Rothman Rocco LaRuffa, LLP<br>3 West Main Street, Suite 200<br>Elmsford, NY 10523 |
| Clerk of the Court | Attorney for Respondent:<br><br>Littler Mendelson, P.C.<br>290 Broadhollow Road, Suite 305<br>Melville, NY 11747 |

Upon the following papers filed and considered relative to this matter:

Notice of Petition dated February 15, 2018 and Verified Petition pursuant to Article 78 acknowledged by Petitioner on February 15, 2018, Supporting Declaration sworn to on February 14, 2018, Exhibits A through D annexed thereto; Notice of Cross-Motion to Dismiss of Respondent dated May 3, 2018 pursuant to CPLR 404 (a), 3211 (a)(7) and 7804 (f), Supporting Affirmation dated May 3, 2018, Exhibits A through C annexed thereto, Supporting Memorandum of Law dated May 3, 2018, Petitioner's Opposition to Cross-Motion and Reply in further support of petition dated May 29, 2018; Exhibit A annexed thereto; Reply Affirmation in further support of motion to dismiss dated June 8, 2018, Exhibit A annexed thereto, and Reply Memorandum of Law dated June 8, 2018; it is

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***ORDERED*** that the cross-motion by Respondent to dismiss the verified petition is denied; and it is further

***ORDERED*** that the verified petition is granted, only to the extent that the matter is remanded to the executive officer or designee pursuant to Article 3 (D) of the collective bargaining agreement to provide Petitioner with a hearing in accordance with the terms of this decision and order.

This is an Article 78 proceeding wherein Petitioner Jeffrey Schoening ("Petitioner") seeks an order vacating and annulling the determination of Respondent Board of Cooperative Educational Services, First Supervisory District, Eastern-Suffolk BOCES ("Respondent"), dated October 17, 2017, upholding Respondent's determination to terminate Petitioner's employment on the grounds that said determination is arbitrary and capricious and without rational basis, violates the fundamental fairness doctrine, and constitutes a disregard of Petitioner's due process rights and further directing Respondent to reinstate Petitioner's employment with full back-pay and benefits with no loss of seniority or work hours. Respondent cross-moves to dismiss the petition on the grounds that Petitioner has failed to exhaust his administrative remedies and cannot seek a judicial review of the determination unless and until the grievance procedures set forth in the collective bargaining agreement are followed. Petitioner opposes the motion and Respondent replies.

The verified petition and Petitioner's supporting declaration allege Petitioner was hired in or about June 2012 by Respondent as a "custodial worker I", a laborer class position. Petitioner was represented by the United Public Service Employees Union (the "Union") and the terms and conditions of his employment was governed by a collective bargaining agreement ("CBA") between Respondent and the Union. At a meeting held on or about May 30, 2017, Respondent provided the Union and Petitioner with notice that it intended to terminate Petitioner's employment based upon his poor performance and inappropriate comments made while at work. After the meeting, Respondent sent Petitioner a correspondence dated June 1, 2017 indicating therein that his employment was terminated effective immediately. By correspondence dated June 2, 2017, the Union requested a post-termination hearing pursuant to Article 3 (D) of the CBA. Respondent appointed Ryan J. Ruf, Respondent's associate superintendent for management services and Respondent's executive officer's designee pursuant to Article 3 (D) of the CBA, to serve as the hearing officer. On October 2, 2017,the hearing was held at Respondent's facility during working hours at which time Respondent presented its evidence in support of Petitioner's termination. At the hearing, Petitioner and his union representative were permitted to present evidence to dispute the charges. However, even though the Union demanded that Respondent produce Petitioner's accusers, Petitioner was not afforded the right to confront or cross-examine those employees or to call those employees as witnesses on his behalf in order to dispute the charges against him. According to the verified petition, at the proceedings on October 2, 2017, Respondent insisted that Petitioner was only entitled to a meeting not a hearing, and further that he was not entitled to question anyone about the circumstances surrounding his discharge. Indeed, Respondent does not dispute Petitioner's allegations regarding the hearing process that occurred on October 2, 2017. By correspondence dated October 17, 2017, the hearing officer stated:

> I have reviewed the agency's records regarding your performance and conduct, the information summarized during the **October 2, 2017 meeting**, and your response to these performance and conduct issues. Based upon this review, I uphold the agency's determination to terminate your employment effective June 1, 2017 (emphasis added).

By correspondence dated November 6, 2017, the Union sent a "response to final determination" to Respondent and argued therein that Article 3 (D) of the CBA provides that Petitioner is entitled to a hearing and an opportunity to confront those employees who accused him of poor work performance and inappropriate comments during work hours. The Union did not request that its November 6, 2017 correspondence be deemed a grievance nor did the Union indicate that it would be filing a grievance over its interpretation of Article 3 (D) of the CBA.

Article 3 (D) of the CBA governs the procedures for those individuals in the laborer class position to challenge their termination from employment. Specifically, Article 3 (D) of the CBA provides:

> Non-competitive and labor class employees who have been employed by the [Respondent] ESBOCES for at least two consecutive years on a full-time basis and who are discharged shall be entitled to a hearing before the Executive Officer or designee. The determination of the Executive Officer shall be final and binding.

An Article 78 proceeding can be brought to challenge a final determination (*see* CPLR §7801). There is no dispute that the hearing officer's decision to uphold the termination of Petitioner's employment by Respondent was final and binding. The issue herein is the term "hearing" in Article 3 (D) of the CBA and what that entails. Petitioner asserts that a "hearing" should afford the Petitioner with the right to confront his accusers and cross-examine them or allow him to call those employees as witnesses as part of his defense. Respondent moves to dismiss the petition and asserts that Petitioner was required to file a grievance with regard to the interpretation of the term "hearing" and follow the grievance procedures set forth in Article 10 of the CBA. Being that Petitioner did not file a grievance, Respondent argues he has not exhausted his administrative remedies and the Article 78 proceeding should be dismissed. Petitioner, however, argues that the remedial provisions found in Article 10 of the CBA would be futile and thus he was excused from exhausting those remedies.

Generally, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (***Watergate II Apts. v. Buffalo Sewer Auth.***, 46 NY2d 52, 57, 412 NYS2d 821 [1978]; *see also* ***Matter of Perretta v. Mulvey***, 77 AD3d 758, 908 NYS2d 601 [2d Dept 2010]; ***Matter of Mirenberg v. Lynbrook Union Free School Dist. Bd. of Educ.***, 63 AD3d 943, 881 NYS2d 159 [2d Dept 2009]; ***Matter of Laureiro v. New York City Dept. of Consumer Affairs***, 41 AD3d 717, 837 NYS2d 746 [2d Dept 2007]). It is well settled that an aggrieved union member must first avail himself of the grievance procedures set for in the collective bargaining agreement before he can commence an action in court (*see*

***Plummer v. Klepak,*** 48 NY2d 486, 423 NYS2d 866 [1979]; ***McLaughlin v. Hankin,*** 132 AD3d 675, 17 NYS3d 499 [2d Dept. 2015]; ***Hammond v. Village of Elmsford,*** 8 AD3d 484 [2d Dept. 2004]; ***Brown v. County of Nassau,*** 288 AD2d 216, 733 NYS2d 107 [2d Dept. 2001; ***Elliott v. Arlington Central School District,*** 143 AD2d 662, 532 NYS2d 876 [2d Dept. 1988]). "[A]bsent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency" (***Galin v. Chassin***, 217 AD2d 446, 447, 629 NYS2d 247 [1st Dept 1995 ]; *see* ***Matter of Tahmisyan v. Stony Brook Univ.***, 74 AD3d 829, 831, 902 NYS2d 617 [2d Dept 2010]). An Article 78 proceeding brought prior to the exhaustion of the grievance procedure provided for in a collective bargaining agreement is subject to dismissal (*see* ***Ambrosino v. Village of Bronxville,*** 58 AD3d 649, 873 NYS2d 312 [2d Dept. 2009]). This includes terminations of employment and grievances concerning the interpretation of a specific term in the collective bargaining agreement (*see* ***Ambrosino v. Village of Bronxville,*** 58 AD3d 649, 873 NYS2d 312 [2d Dept. 2009]). However, there are exceptions to the exhaustion doctrine that apply when the agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to administrative remedies would be futile or would cause irreparable injury (*see* ***Watergate II Apts. v. Buffalo Sewer Auth.***, *supra*; ***Matter of Pitts v. City of N.Y. Off. of Comptroller***, 76 AD3d 633, 906 NYS2d 337 [2d Dept 2010]; ***Matter of Laureiro v. New York City Dept. of Consumer Affairs***, *supra*; *see also* ***Town of Oyster Bay v. Kirkland***, 81 AD3d 812, 815, 917 NYS2d 236 [2d Dept 2011]).

Here, Petitioner chose to assert his rights to a hearing pursuant to Article 3 (D) of the CBA, which is a specific provision for certain employees and relates directly to discharges, unlike Article 10 of the CBA which involves disputes concerning the interpretation or application of terms in the CBA. Petitioner was not required to file a grievance concerning his termination but instead invoked his rights under Article 3 (D) of the CBA, which provides for a hearing. Because Petitioner chose the more specific remedy after his discharge found in Article 3 (D), a final and binding determination was made by the hearing officer. Indeed, that final and binding determination upheld the Petitioner's termination of employment. During the hearing process, it was determined by the hearing officer that Petitioner would not be afforded the opportunity to confront his accusers, call witnesses, or cross-examine those employees who provided information or statements to Respondent and the hearing officer which formed the basis for their respective determinations. The five step grievance process Respondent argues Petitioner should have followed regarding the interpretation of the term "hearing" provides for interim decisions by the executive officer or designee and a final determination by the Board of Respondent. Being that Respondent discharged Petitioner after a meeting and that the executive officer's designee upheld Respondent's decision to terminate his employment, pursuing those grievance procedures would be futile and would not have altered the decision to discharge Petitioner (*see* ***Watergate II Apts. v. Buffalo Sewer Auth.***, *supra*; ***Matter of Pitts v. City of N.Y. Off. of Comptroller***, 76 AD3d 633, 906 NYS2d 337 [2d Dept 2010]; ***Matter of Laureiro v. New York City Dept. of Consumer Affairs***, *supra*; *see also* ***Town of Oyster Bay v. Kirkland***, 81 AD3d 812, 815, 917 NYS2d 236 [2d Dept 2011]; *cf.* ***Amorsano-LePore v. Grant,*** 24 Misc.3d 1229 (A), 899 NYS2d 57 [Westchester Cty. 2007] *aff'd* 56 AD3d 663, 869 NYS2d 110 [2d Dept. 2008](deprivation of due process at hearing could have been addressed by arbitrator and thus administrative review process was not futile). Moreover, the arbitration process found in Article

10 of the CBA is advisory and not binding. The final decision is made by the Board of Respondent, not an independent arbitrator, thus the pursuit of the grievance process in Article 10 of the CBA would have been futile (*see* ***Love v. Grand Temple Daughters, IBPOE of W,*** 37 AD2d 363, 325 NYS2d 368 [1st Dept. 1971]; *see also* ***Clavin v. Mitchell,*** 131 AD3d 612, 15 NYS3d 211 [2d Dept. 2015]). Notwithstanding Respondent's arguments, a final and binding decision was rendered by the executive officer's designee pursuant to Article 3 (D) of the CBA. That appointed hearing officer determined during the hearing process that Petitioner was not entitled to confront his accusers or present witnesses. Petitioner now is seeking relief from that final and binding decision made by the executive officer's designee to uphold the termination of Petitioner's employment without a fair hearing. Thus, Petitioner was not obligated to exhaust the grievance and arbitration provision of Article 10 of the CBA in order to challenge that final and binding determination.

The court now addresses the issue of whether the determination made by the hearing officer appointed pursuant to Article 3 (D) of the CBA, had a rational basis and was not arbitrary and capricious (*see* ***Ward v. City of Long Beach,*** 20 NY3d 1042, 1043, 962 NYS2d 587 [2013]; ***Halperin v. City of New Rochelle,*** 24 AD3d 768, 770, 809 NYS2d 98 [2d Dept. 2005]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*see* ***Matter of Pell v. Board of Eduction of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck,*** 34 NY2d 222, 356 NYS2d 833 [1974]).

At the heart of this petition, is the definition of "hearing" under the CBA and whether denying Petitioner the opportunity to confront his accusers and present witnesses afforded him a "hearing" as that term is defined in Article 3 (D) of the CBA. "When interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations can be realized" (***New Rochelle Police Superiors Officers Assoc. v. City of New Rochelle,*** 33 AD3d 683, 684, 823 NYS2d 104, 106 [2d Dept. 2006]). The term "hearing" should be interpreted to mean a "fair hearing."[1] A fair hearing has been determined to include certain due process rights, those being the opportunity to present evidence and confront and cross-examine adverse witnesses (*see* ***Mathews v. Eldridge,*** 424 US 319, 333, 96 SCt 893 [1976]; ***Goldberg v. Kelly,*** 397 US 254, 270, 90 S.Ct. 1011 [1970]; ***March v. New York City Board/Department of Education,*** 157 AD3d 555, 69 NYS3d 49 [1st Dept. 2018]; ***Ajeleye v. New York City Department of Education,*** 112 AD3d 425, 976 NYS2d 68 [1st Dept. 2013]; ***Duncan v. New York City Department of Education,*** 124 AD3d 463, 1 NYS3d 89 [1st Dept. 2015]; ***Matter of Pesce v. Commn'r of Sanitation of the City of New York,*** 234 AD2d 77, 650 NYS2d 700 [1st Dept. 1996]; ***Matter of Erdman v. Ingraham,*** 28 AD2d 5, 280 NYS2d 865 [1st Dept. 1967]).

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[1] The term hearing has been defined by courts in the context of collective bargaining agreements, unlike other terms which may be considered ambiguous and create a question of fact as to the intent of the parties to the collective bargaining agreement (*see* ***Spano v. Kings Park Central School District,*** 61 AD3d 666, 877 NYS2d 163 [2d Dept. 2009)(term "continued service" in collective bargaining agreement was vague, creating a question of fact).

Indeed, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner" (*see* ***Nassau County Sheriff's Correction Officers Benevolent Assoc. V. Nassau County,*** 137 AD3d 1145, 1147, 28 NYS3d 377, 380 [2d Dept. 2016] *citing* ***Matter of Kigin v. State of N.Y. Workers' Compensation Bd.,*** 24 NY3d 459, 469, 999 NYS2d 800 [2014]). A "meaningful hearing" includes the right of an aggrieved party to present witnesses and cross-examine adverse witnesses ***(Matter of Kigin v. State of N.Y. Workers' Compensation Bd.,*** 24 NY3d 459, 469, 999 NYS2d 800 [2014])(claimant afforded meaningful hearing at which testimony of witnesses was considered and claimant had the opportunity to cross-examine an adverse witness).

At bar, Petitioner is seeking to assert his right to a "hearing" under Article 3 (D) (*see, e.g.,* ***Dombroski v. Bloom,*** 170 AD2d 805, 565 NYS2d 907 [3d Dept. 1991]). The hearing officer interpreted the term hearing in Article 3 (D) to amount to a meeting, as his determination of October 17, 2017 makes several references to the "meeting" held on October 2, 2017. Because the hearing officer interpreted the term hearing under Article 3 (D) of the CBA to equate to a meeting, Petitioner was not given the opportunity to confront or cross-examine his accusers or present witnesses on his own behalf. Indeed, the hearing officer incorrectly interpreted the term hearing to be the equivalent of a meeting. The reference to a meeting, and not a hearing, in the grievance and arbitration procedures found in Article 10 of the CBA, could only mean that the hearing in Article 3 (D) of the CBA should have been more than a meeting, otherwise the term meeting (as found in Article 10) would have been used in Article 3 (D), rather than the term hearing. The interpretive maxim "expressio unius est exclusio alterious," that is, the expression of one thing is the exclusion of the other, applies here (***Realtime Data, LLC v. Melone,*** 104 AD3d 748, 961 NYS2d 275 [2d Dept. 2013]). By invoking Article 3 (D), Petitioner chose his avenue of redress, which was a hearing, not a meeting. By not affording Petitioner a hearing under Article 3 (D) of the CBA and only providing him with a meeting, by Respondent's own admission, the hearing officer's determination was arbitrary and capricious and lacked a rational basis.

Accordingly, the verified petition is granted, only to the extent that the matter is remanded to the executive officer or designee to provide Petitioner with a hearing under Article 3 (D) of the collective bargaining agreement.

Dated: 11/16/2018

William B. Rebolini

**HON. WILLIAM B. REBOLINI, J.S.C.**

**__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION**