Matter of Gonzaque v Helene Fuld Coll. of Nursing
2023 NY Slip Op 34313(U)
December 8, 2023
Supreme Court, New York County
Docket Number: Index No. 151808/2023
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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In the Matter of

NATALIE GONZAQUE,

Petitioner,

- v -

HELENE FULD COLLEGE OF NURSING,

Respondent.

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INDEX NO. 151808/2023

MOTION DATE 08/08/2023

MOTION SEQ. NO. 001

DECISION, ORDER + JUDGMENT ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this CPLR article 78 proceeding, the petitioner seeks judicial review of an October 27, 2022 Helene Fuld College of Nursing (HFCN) determination finding that she violated HFCN's academic integrity policy and student standards of conduct, and thereupon dismissed her as a student at HFCN. HFCN answered the petition and filed the administrative record, which includes letters, webcam images, audio and visual evidence, and other relevant documentation. The petition is denied, and the proceeding is dismissed.

The petitioner alleged that, in autumn 2022, she entered her final semester as a student at HFCN, where she was enrolled in a non-nursing class titled Professional Foundations. The petitioner further alleged that, at that time, HFCN instituted a new education software program that had been provided Assessment Technologies Institute (ATI). According to the petitioner, ATI's software was to be utilized in the Professional Foundations class for homework assignments, although the professor who taught the class never explained how the software was to be employed, or the significance of the assignment or examination to be completed using the software program. On October 12, 2022, the petitioner completed an assignment

through the ATI software program, which ATI characterized as an examination. While she worked on the assignment, her computer's video camera was covered, so that ATI could not monitor her conduct to assure that she was not cheating. On October 17, 2023, HFCN notified the petitioner that its Academic Standards Committee (ASC) had reviewed the October 12, 2022 incident, and recommended that she be given a score of zero for that assignment. The ASC further advised the petitioner that she had been flagged on a prior occasion for the same type of irregularity, and that any future infractions may result in her dismissal from HFCN.

The petitioner appealed the ASC's recommendation, and met with an appeals committee on October 19, 2022. On October 21, 2022, the appeals committee issued its determination, which supported the ASC's recommendation and imposed additional requirements including, inter alia, that the petitioner receive a failing grade for the course, with the opportunity to retake it the next time it was offered, and that she was to sit for all tests on campus with a live proctor. The appeals committee further advised the petitioner that if she did not wish to comply with those additional requirements, it would "support" the recommendation that she immediately be dismissed from HFCN. Finally, the petitioner was advised that she had an opportunity to take a final appeal to the president of HFCN, but that she needed to do so within five days of the appeals committee's determination.

The petitioner alleged that, on October 26, 2022, she called the president's office and was offered an appointment to discuss the appeals committee's recommendation on that date. She nonetheless declined the opportunity to meet with the president because she first wished to get advice from one of her professors, and would not be able to confer with that professor until October 28, 2022, after which she planned to schedule an appointment for that date. The petitioner, however, did not obtain the president's permission to extend the five-day deadline. On October 27, 2023, the petitioner received a letter from the president stating that she had reviewed ASC's recommendations, and noted that the petitioner chose not to appeal the matter from the appeals committee to the president within the applicable five-day period. The letter

also stated that video recording of the assignment at issue, as well as the previous warning notices given to the petitioner, had been reviewed, and had been determined to be a violation of HFCN's academic integrity policy. As a result, the petitioner was dismissed from the college, effective immediately.

With respect to the earlier infraction that the ASC had identified, the petitioner had been flagged for an irregularity on September 26, 2022, when, during a "capstone exam," her "webcam appeared to go black at the start of the test and remained black throughout." The petitioner was flagged again on October 12, 2022, as described above, for covering her "webcam at start of test, is kicked out due to technical issues, and when they get back into the test they cover the webcam again. Webcam is covered throughout test." After each of those occurrences, the ATI team respectively sent the petitioner a set of messages entitled "Testing Concern Part 1" and "Testing Concern Part 2" on September 29, 2022, and "2nd Anomaly Issue Part 1" and "2nd Testing Anomaly Part 2" on October 13, 2022. Thereafter, on October 17, 2022, the petitioner again was flagged, this time for being "seen with a phone during the test." According to the petitioner, apart from the October 12, 2022 incident, which she claims was the first allegation of an academic integrity violation made against her, she was not put on notice of the alleged irregularities, and was not provided with an opportunity to address them with the HFCN. The petitioner further asserted that the alleged infractions in October 2022 were for ungraded homework assignments, and not graded exams.

The petitioner now contends that dismissal from enrollment at HFCN was a severely disproportionate punishment for the infraction of having her camera covered and using her cell phone during an ungraded homework assignment. She further contends that HFCN failed to follow its own policies regarding the disciplinary process by failing to place her on notice about prior infractions that had been considered in the appeal committee's decision, and by failing to permit her to make her final appeal to the president.

In its answer, HFCN asserted that, even if the October 12, 2022 examination had been an ungraded homework assignment, as claimed by the petitioner, she nonetheless violated ATI's proctoring rules, despite expressly agreeing to abide by them. As explained by HFCN, prior to participating in the remote assessments proctored by ATI, students are presented with a screen delineating certain instructions, rules, and disclaimers. ATI advises students that, by continuing forward, they are agreeing to be monitored by webcam, microphone, and desktop, that the use of electronic devices are not allowed, and that the students must remain on-screen and in total view of the webcam throughout the assessment. The instructions further advise that the failure to abide by the rules may result in invalidation of scores, and a report of misconduct to the school and/or law enforcement authorities. At the bottom of the screen is an "I Agree" box that, once clicked, will permit entry to the site where the examination or assessment is administered. A student's failure to click that box would bar them from working on the assignment.

HFCN further asserted that the petitioner violated the academic honesty policies set forth in the student handbook, which warns against use of electronic devices during exams, and prohibits cheating in various forms, including, but not limited to, class and take-home examinations, laboratory assignments, and homework assignments. Lastly, HFCN asserted that the petitioner failed to exhaust her administrative remedies by not timely requesting an appeal to the president. As explained by HFCN, both the appeals committee and the student handbook advised students that appeals must occur within five business days of receiving the written disciplinary recommendation letter from the appeals committee, wherein "the 5 day count starts as day 1 with the date noted on the letter." Therefore, petitioner's window for taking her final appeal would have ended on October 27, 2022, since the letter was sent on Friday, October 21, 2022, and weekend days are not counted. HFCN contends that, while the petitioner claimed to have contacted the president's office on October 26, 2022, and was offered an appointment to discuss the matter, she still failed to assert any right to an appeal, since she

declined the offer to meet until October 28, 2022, at the earliest, which would have been after the time to appeal had expired. In any event, HFCN contended that, even if the petitioner had timely appealed, the president ultimately would have imposed the same punishment of dismissal, given the petitioner's multiple transgressions regarding both ATI's and HFCN's rules.

Initially, the court agrees with HFCN that the petition must be denied for the petitioner's failure to exhaust her administrative remedies. Where a statute, ordinance, rule of practice, or regulation requires or permits an administrative appeal, and a party has an opportunity to pursue it, he or she must exhaust all administrative appeals before seeking judicial review (*see Matter of Carter v State of New York*, 95 NY2d 267, 271-272 [2000]; *Matter of Carter v Annucci*, 166 AD3d 1189, 1190 [3d Dept 2018]), and judicial review of the initial administrative determination is thereafter foreclosed (*see Matter of Harrell v New York City Housing Auth*., 300 AD2d 54 [1st Dept 2002]). A petitioner's failure to exhaust administrative remedies requires dismissal of a CPLR article 78 petition (*see Matter of Sanders v Bratton*, 258 AD2d 422, 423 [1st Dept 1999]) on the ground that the court lacks subject matter jurisdiction to entertain the petition (*see Indemini v Beth Israel Med. Ctr.*, 4 NY3d 63, 66 [2005]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 474-475 [1st Dept 2003]; *Gelbard v Genesee Hosp*., 211 AD2d 159, 160 [4th Dept 1995]; *Patrowich v Chemical Bank*, 98 AD2d 318, 323 [1st Dept 1984] [applying federal law]). Inasmuch as the petitioner did not pursue her final administrative appeal to HFCN's president in a timely fashion, she is foreclosed from judicial review.

Even if the court were to consider the merits of the petitioner's claims, it would be constrained to deny the petition in any event.

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off*., 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd*., 31 NY3d

523, 528 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [1st Dept 2008]; *Matter of Rumors Disco v New York State Liquor Auth.*, 232 AD2d 421, 421 [2d Dept 1996]). Inasmuch as the petitioner made no allegations that HFCN's determination was affected by an error of law, HFCN's determination to dismiss the petitioner from enrollment as a student at its institution must be confirmed unless it was arbitrary and capricious or made in the absence of proper procedure.

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (*see Matter of BarFreeBedford v New York State Liq. Auth.,* 130 AD3d 71, 77-78 [1st Dept 2015]; *Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 624 [1st Dept 2015]), or where the decision-making entity fails to consider all of the factors it is required by statute or regulation to consider and weigh (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 608 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

A determination must be set aside on the ground that it was made violation of lawful procedure where the decision-making entity fails to follow the procedures articulated in its own rules and regulations, or in a procedural guidebook that it promulgated, and the failure is more than merely technical, but deprives a petitioner of substantive rights and "undermined the integrity and fairness" of the process (*Matter of Kolmel v City of New York*, 88 AD3d 527, 528-529 [1st Dept 2011]).

A private college's disciplinary determination is arbitrary and capricious where the university fails substantially to adhere to the substance of its own published rules and guidelines governing disciplinary proceedings (*see Matter of Doe v Skidmore Coll.*, 152 AD3d 932, 935 [3d Dept 2017], citing *Rensselaer Socy. of Engrs. v Rensselaer Polytechnic Insts.*, 260 AD2d 992,

993 [3d Dept 1999]). The determination may only be annulled where the determination either was made in the absence of substantial compliance with both the substantive and procedural elements of those rules and guidelines, or where the determination lacked a rational basis (*see Matter of Doe v Skidmore Coll.*, 152 AD3d at 935). Perfect adherence to every procedural requirement, however, is not necessary to show substantial compliance (*id.*).

The petitioner's contentions that HFCN failed to follow its own policies are without merit. In the first instance, the petitioner claimed that HFCN did not put her on notice of the prior infractions that it had considered and weighed in the decision to dismiss her. The petitioner, however, received messages on September 29, 2022 and October 13, 2022, in what appears to be a student portal operated by ATI. According to ATI, those messages were neither opened nor read by the petitioner, although she apparently opened other messages unrelated to the testing irregularities, and messages that were sent to her both before and after the subject incidents. In fact, in a screenshot of the message center on that student portal, which HFCN submitted to the court, it appears that the petitioner may indeed have opened one of the messages sent by ATI on September 29, 2022, along with two unrelated messages, as indicated by the fact that it is not in bold lettering, while the other messages concerning testing irregularities appear in bold lettering. Finally, the petitioner was given an additional notice in the October 17, 2022 letter from ASC, which stated not only that the petitioner had been flagged on October 12, 2022, but was "also flagged on a prior occasion for the same type of irregularity."

The court rejects the petitioner's contention that HFCN did not allow her to pursue a final appeal to the president. According to the petitioner, she contacted the president's office during the five-day window for the final appeal, and was offered an appointment to discuss the appeal committee's recommendation on that date. The petitioner, however, without obtaining the president's permission, declined the appointment in lieu of one at a later date, after the time to appeal would have expired. The petitioner's explanation was that she was unsure of the ramifications of scheduling a meeting with the president, based on the language from the appeal

committee's decision letter, which stated "the committee identifies that if Ms. Gonzaque does not wish to comply with the above recommendations, then the Appeals Committee has no other choice than to support the recommendation that she be dismissed from the College, effective immediately." The petitioner, however, erroneously interpreted this to mean that no final appeal was available since any disagreement with the committee's recommendation would result in her dismissal. The court disagrees with the petitioner, as the language provided that the committee would *support* a dismissal recommendation, and did not implicitly or expressly state that its recommendation was final. Indeed, the decision stated in bold, italicized, and underlined font that "the appeals committee only makes recommendations, and that the final decision lies with the president." Thus, HFCN substantially followed its own disciplinary policies, and rendered a determination that was not arbitrary and capricious.

The standard for reviewing an administrative penalty is whether the punishment was so disproportionate to the offenses as to be shocking to the court's sense of fairness (*see Matter of Lackow v Department of Educ. of City of N.Y.*, 51 AD3d 563, 569 [1st Dept 2008]; *see also Matter of Mapp v Burnham*, 8 NY3d 999, 1000 [2007]; *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Harris v Mechanicville Cent. School Dist.*, 45 NY2d 279, 285 [1978]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]), thus "constituting an abuse of discretion as a matter of law" (*Matter of Perez v Rhea*, 20 NY3d 399, 402 [2013]; *Matter of Kreisler v New York City Tr. Auth.*, 2 NY3d 775, 776 [2004]; *Matter of Featherstone v Franco*, 95 NY2d at 554). This standard of review is a "rigorous" one, and it is well settled that the "court lacks any discretionary authority or interest of justice jurisdiction in reviewing the penalty" (*Matter of Featherstone v Franco*, 95 NY2d at 554; *see Matter of Ellis v Mahon*, 11 NY3d 754, 755 [2008]; *Matter of Torrance v Stout*, 9 NY3d 1022, 1023 [2008]; *Matter of Rutkunas v Stout*, 8 NY3d 897, 899 [2008]). Thus, in reviewing a penalty, a court generally may not engage in a

"balancing test" that weighs the "facts and their implications against" the petitioner's behavior (*Matter of Kelly v Safir*, 96 NY2d 32, 39 [2001]).

HFCN's determination to dismiss the petitioner from its college of nursing was neither disproportionate to the offense nor shocking to one's sense of fairness. The petitioner was flagged for the same irregularity on three different occasions, one of which occurred on the same day as the ASC rendered it initial determination. While the petitioner claimed that the assessments at issue were ungraded homework assignments, ATI's instructions prior to each assessment were quite particular about the prohibition on the use of electronic devices during the assessment, and the requirement that a student always remain visible on the screen. The petitioner accepted ATI's terms, as demonstrated by her ability to access the assessments. Moreover, if the petitioner were unsure of the ATI's rules, HFCN's student handbook clearly advised students to check with their course instructor or advisor when in doubt about their intentions regarding cheating. The court notes that the syllabus for the course at issue denoted the assessments as weekly homework that is credited, and worth a total of 7% of the student's overall grade. Additionally, the syllabus stated that,

> "[e]ach week, an ATI Capstone content review will address pertinent nursing topics . . . The 'prepare' section will provide weekly tips for preparation of NCLEX exam, concept reviews for each topic and pre-assessment quiz. After completion of this prepare section, you will move on to the '*test*' section and complete weekly content assessment."

[emphasis added]. Whether the petitioner's assignments constituted homework or a test, they nonetheless were graded assessments that HFCN wanted to be completed with some level of integrity, as outlined in its student handbook. Thus, while matters involving nonacademic discipline generally are open to judicial scrutiny, HFCN exercised justified, honest discretion that, given the totality of the circumstances, this court may not second-guess (*see Beilis v Albany Med. Coll. of Union Univ.*, 136 AD2d 42, 45 [3d Dept 1988] [finding that a one-year forced leave of absence was fair where incident at issue was petitioner's second involvement with cheating in two months]).

In light of the foregoing, it is,

ORDERED the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

12/8/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**

151808/2023 GONZAQUE, NATALIE vs. HELENE FULD COLLEGE OF NURSING
Motion No. 001