

Soares v Helene Fuld Coll. of Nursing
2017 NY Slip Op 30398(U)
March 1, 2017
Supreme Court, New York County
Docket Number: 157283/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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Eneas Soares,
Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

DECISION, ORDER and JUDGMENT
Index No. 157283/2016
Seq: 001

-against-

ARLENE P. BLUTH, JSC

Helene Fuld College of Nursing,
Respondent.
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For the following reasons, the petition is denied and this proceeding is dismissed.

In this petition brought pursuant to CPLR Article 78, petitioner seeks to be reinstated to respondent's program (the "College"), to compel respondent to pass petitioner in a course (Nursing 224) and to grant him a degree in Nursing. Additionally, petitioner seeks reimbursement of tuition paid, special damages for loss of a career opportunity, emotional and psychological damages and damages to his professional reputation.

In its answer, respondent asserts that the petition must be denied because, inter alia, respondent's determination, that petitioner failed Nursing 224 in Fall of 2015 which resulted in termination from the College, was not arbitrary and capricious or affected by an error of law.

This is the second Article 78 proceeding that involving these parties and petitioner's failing grade in Nursing 224 ("Medical Surgical Nursing II").

Petitioner's Prior Article 78 Proceeding

In the first proceeding (Index No. 100331/15), petitioner took Nursing 224 in the summer of 2014 and received a failing grade. In addition to taking steps to appeal that grade, petitioner authored and posted an online petition (which he and 100 other students signed) to protest respondent's grading policies. Thereafter, respondent suspended him from the College for one year, ordered him to write letters of apology and required him to take a certified continuing education classes. In her decision, order and judgment dated 9/25/15, the court (Lobis, J.) annulled petitioner's one year suspension¹, ordered that petitioner be reinstated as an active student in the College and directed respondent to give petitioner the opportunity to take Nursing 224 again. The court denied petitioner's claims for monetary relief sought as exceeding the scope of CPLR §7806.

In accordance with the court's directive, respondent reinstated petitioner in the fall of 2015 and petitioner took Nursing 224 once again. Petitioner subsequently received a failing grade in the course. By letter dated May 10, 2016 (exh F to Answer), respondent's president notified petitioner that because he failed two courses in the same discipline (Nursing 224), he was dismissed from the College. The letter further advised petitioner of the procedure to appeal his dismissal.

¹Justice Lobis expressly held that the sanction of suspension was grossly disproportionate to petitioner's act of posting an online criticism of respondent, and impinged on his free speech rights. No such disciplinary proceeding is at issue in the instant Article 78 proceeding.

The Instant Article 78 Proceeding

Here, petitioner alleges that respondent “breached its own terms and conditions set for graduation and acted arbitrarily and capriciously, irrationally, and in bad faith toward Petitioner in not giving him a passing grade in Nursing 224 “because his grades were illegally altered” by a professor (Petition, paras. 17, 28). Petitioner claims that Professor Heather Lashley changed the grading system “in the eleventh hour” causing many students to fail.

In support, petitioner alleges “upon information and belief” that Professor Heather Lashley² “was terminated for altering student’s grades so that they would have to repeat the nursing classes pertaining to NUR 224” and “the New York State Department of Education was monitoring her and had her removed from the school due to this outrageous conduct” (para. 14).

Respondent’s Answer

Respondent opposes the petition on the following grounds: (I) petitioner failed to exhaust his administrative remedies because he did not appeal either his final course grade or his dismissal from the College in accordance with respondent’s grievance policy requirements, (ii) the proceeding was not timely commenced, (iii) petitioner has not demonstrated that respondent acted arbitrarily or capriciously or in bad faith, and respondent did not alter the grading policy after the course had commenced, and (iv) petitioner’s claim for money damages are beyond the scope of CPLR §7806.

²Petitioner does not state that Prof. Lashley was his professor in Nursing 224 in the fall of 2015. In fact, in the Answer, respondent indicates that Prof. McGregor was the instructor in the course (see exh L to Answer).

(I) Failure to Exhaust Administrative Remedies

Respondent submits, inter alia, its 2014-2015 Catalog, which was in effect at the time of the events described in the petition, and was provided to all students, including petitioner. This Catalog sets forth the grievance policy for students to appeal from adverse decisions (exh G to Answer). The grievance policy required a student to notify his instructor, in writing, within 10 days of learning of a failing grade, that he was initiating a grievance. It further provided that within 5 days of the instructor's refusal to change the grade, the student should request, in writing, a meeting with respondent's President. Within five days of any refusal by the President to change the grade, the student was advised to request, in writing, a meeting with the Executive Committee of respondent's faculty. Finally, within 5 days of any refusal by the Executive Committee to change the grade, the student was advised to request, in writing, a meeting with the Executive Committee of respondent's Board of Trustees.

Respondent states that on 2/5/16 petitioner discovered that he failed Nursing 224 when petitioner accessed his final exam grade through respondent's online grade management system; the required passing grade for the course was 78; petitioner's overall course grade average was 76.69³. Respondent further indicates that upon learning of his final grade, petitioner met with his Nursing 224 course instructor, Delores McGregor, on February 8, 2016; she reviewed petitioner's final exam "Scantron" computer answer sheet and found that it was graded correctly.

Respondent states that petitioner did not thereafter request a meeting with the President, the Executive Committee of respondent's faculty or the Executive Committee of respondent's Board

³Respondent states that petitioner was the only student to fail Nursing 224 in the fall of 2015. Of the twenty students enrolled, 17 passed, two withdrew, and one student (petitioner) failed (Answer, para. 64)

of Trustees. Based on the foregoing, respondent asserts that petitioner failed to pursue the internal appeal of his failing course grade.

Additionally, respondent asserts that petitioner failed to appeal his dismissal from the College, citing to the 2014-2015 Catalog which provided that students with a second failure in a discipline will be subject to dismissal and set forth the procedures for filing a grievance (exh G to Answer, p. 28). Petitioner admitted receipt of the May 10, 2016 letter which informed him that because he failed Nursing 224 twice, he was dismissed from the College (see Petition, para. 15 and exh F to Answer). Respondent notes that although this dismissal letter set forth the procedure for an appeal from said dismissal, and stated that petitioner had to take an appeal no later than May 25, 2016, petitioner took no action to challenge his dismissal. Based on the foregoing, respondent asserts that petitioner failed to pursue the internal appeal of his dismissal from the College.

(ii) Statute of Limitations

Petitioner commenced this Article 78 proceeding on August 30, 2016. Respondent alleges that its determination not to confer upon Petitioner a passing grade in Nursing 224, Fall 2015 semester occurred no later than February 5, 2016 when petitioner's final grade in the course was electronically posted. Accordingly, respondent asserts that because this proceeding was commenced more than four months from the date petitioner was advised that he failed Nursing 224, this proceeding is time-barred.

(iii) Petitioner Has Not Demonstrated That Respondent's Determinations Were Arbitrary, Capricious or Affected by an Error of Law

Respondent asserts that petitioner has not met his burden of demonstrating that respondent acted arbitrarily or capriciously because the petition is based on speculation and lacks

any supporting evidence. Specifically, petitioner's assertions that the end of June 2016 he heard from another student that (1) Professor Lashley was accused of illegally altering grades in Nursing 224, causing him and others to failed the course, and (2) the New York State Department of Education was investigating Prof. Lashley, are mere speculation. Respondent states that Prof. Lashley left "on her own accord" on April 27, 2016, and the Department of Education never advised respondent that it was at any time monitoring Prof Lashley (Answer, para. 69).

Moreover, respondent notes that petitioner was graded in accordance with the course-grading requirements contained in the 2015 Course Overview provided to all students, including petitioner. That overview provided that in order to pass Nursing 224, a student had to receive a grade of C+/78%. Respondent points out that while there was a minor change made to the grading policy for Nursing 224 in 2015 (the overall course grade no longer included the online quizzes), this change was set forth in the 2015 Course Overview when the course began, and petitioner was timely apprised of same⁴. Finally, respondent points out that this change was not made solely by Prof. Lashley but by the Faculty Committee which was responsible for establishing grading policies, of which Prof. Lashley was a member.

(iv) Money Damages

Respondent asserts that petitioner's claims for money damages must be denied, citing to CPLR §7806. This provision provides that "restitution or damages granted to the petitioner must

⁴"While Petitioner appears to allude to this difference as an "eleventh hour" change to the grading system (Petition, para. 13), he cannot dispute, and implicitly concedes (through his use of the term "eleventh hour", which means just in time), that he was aware of the grading policies for 2015 NUR224 prior to the commencement of the course...." See Answer, para. 63.

be incidental to the primary relief sought by petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity in an action.”

Petitioner’s Reply

In his reply affidavit sworn to December 10, 2016, petitioner claims that he did not pursue internal appeals of either his final course grade or dismissal from the College because he first heard from another student, at the end of June 2016, that Prof. Lashley was accused of illegally altering grades in Nursing 224 “causing me and others to fail” (Reply, para. 12). Petitioner did not address any of the other arguments respondent’s raised in its Answer.

Analysis

It is undisputed that petitioner (1) did not follow the grievance procedures set forth in the 2014-2015 Catalog after he received a failing grade in Nursing 224, and (2) did not comply with the appeal procedures set forth in the May 10, 2016 dismissal letter. Accordingly, the petition is denied based on petitioner’s failure to exhaust administrative remedies.

Additionally, respondent has demonstrated there was a rational basis for failing petitioner in Nursing 224 in the fall of 2015; petitioner’s grade point average in the course (76.69%) was below the stated passing average (78%). Respondent also demonstrated that there was a rational basis for petitioner’s dismissal from the College; he was subject to dismissal in accordance with the 2014-2015 Catalog because he failed Nursing 224 twice.

As the Court of Appeals held in *Susan M. v New York Law School*, 76 NY2d 241, 247 557 NYS2d 297(1990), in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student’s challenge to a grade or other

academic determination relating to a substantive evaluation of the student's academic capabilities is beyond the scope of judicial review.

The Court stated:

Unlike disciplinary actions taken against a student (Tedeschi v. Wagner Coll., supra), institutional assessments of a student's academic performance, whether in the form of particular grades received or actions taken because a student has been judged to be scholastically deficient, necessarily involve academic determinations requiring the special expertise of educators (Board of Curators v. Horowitz, 435 U.S. at 90, 98 S.Ct. at 955, supra). These determinations play a legitimate and important role in the academic setting since it is by determining that a student's academic performance satisfies the standards set by the institution, and ultimately, by conferring a diploma upon a student who satisfies the institution's course of study, that the institution, in effect, certifies to society that the student possesses the knowledge and skills required by the chosen discipline (citations omitted). Thus, to preserve the integrity of the credentials conferred by educational institutions, the courts have long been reluctant to intervene in controversies involving purely academic determinations (Matter of Olsson v. Board of Higher Educ., 49 N.Y.2d, at 413, 426 N.Y.S.2d 248, 402 N.E.2d 1150, supra).
Id. 76 NY2d at 245-46, 557 NYS2d at 299-300.

The record establishes that petitioner failed to comply with several of respondent's internal appeal procedures and academic rules. *See Lipsky v Ferkauf Graduate School of Psychology*, 127 AD3d 582, 582-83, 8 NYS3d 105, 106 (1st Dept 2015). Petitioner did not earn a passing grade in Medical Surgical Nursing II in the fall of 2015, and thereafter, he was dismissed from the College because that was the second time he failed that course. Petitioner's position that respondent acted arbitrarily and capriciously and/or in bad faith is predicated upon nothing more than unsupported claims involving Prof. Lashley. *See Ochei v Helene Fuld College of Nursing of North General Hosp.*, 22 AD3d 222, 223, 802 NYS2d 28, 29 (1st Dept 2005). Thus, even if petitioner had exhausted his administrative remedies, petitioner has not met his burden of demonstrating here that the challenged decisions were arbitrary, capricious or

contrary to law. Quite simply, he failed the course twice, and the School's rules are two strikes and you're out. It is not the Court's role to interfere with such academic decisions.

To the extent that petitioner seeks monetary relief, the petition is denied. In *Gross v Perales*, 72 NY2d 231, 532 NYS2d 68 (1988), the Court of Appeals held that money is incidental if a grant of the relief that is the primary aim of the Article 78 proceeding would make it a "statutory duty" of the respondent to pay the petitioner the sum sought. Here the primary focus of this proceeding was to have respondent give petitioner a passing grade in Nursing 224 and place him on the eligible list of graduating students (Petition, para. 32). Because petitioner's claims for tuition reimbursement, special damages for loss of a career opportunity, emotional and psychological damages and damages to his professional reputation are not incidental to the relief sought, these claims are denied.

Accordingly, it is

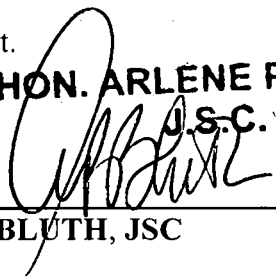
ORDERED AND ADJUDGED that the petition is denied and the proceeding is hereby dismissed.

The Clerk shall enter judgment accordingly.

This is the Decision, Order and Judgment of the Court.

Dated: March 1, 2017
New York, New York

HON. ARLENE P. BLUTH
J.S.C.



ARLENE P. BLUTH, JSC