STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
SALINA J. SCHWARTZ,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY
SUPERVISION, (Albion Correctional Facility),

Respondents,

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST3909 Index No. 4635-12

Appearances: Steven A. Crain and Daren J. Rylewicz
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DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner is employed at Albion Correctional Facility as a Stores Clerk I. For

several years petitioner has been approved by DOCCS for intermittent leave under the Federal Family and Medical Leave Act ("FMLA", see 29 USC Title 29, Chapter 28, § 2601 et seq.; 29 CFR 825.202). On Friday April 27, 2012 the petitioner was absent from work. She charged her absence that day to accrued leave and to her FMLA time. The following Monday she was absent upon a pre-approved deficit reduction leave. On Tuesday the petitioner reported to the Correctional Facility with a note from her personal physician clearing her for work. DOCCS refused to allow her to return to work until she was cleared for duty by an Employee Health Services (EHS) physician and an EHS psychiatrist. By letter dated May 7, 2012 the petitioner was informed that she would be evaluated by EHS on May 14, 2012 and May 22, 2012. On May 11, 2012 CSEA sent a letter on petitioner's behalf to DOCCS arguing that DOCCS had improperly placed the petitioner on involuntary leave, in violation of Civil Rights Law § 72, FMLA, and the New York Human Rights Law. Daniel F. Martuscello, the Director of Human Resources DOCCS responded in a letter dated May 21, 2012 in which he indicated that the examinations were scheduled in accordance with Civil Service Rule 21.3 and Article 10.17 of the parties' Collective Bargaining Agreement ("CBA"). The petitioner was subsequently cleared for work, effective on June 6, 2012. The petitioner commenced the above-captioned CPLR Article 78 proceeding seeking review of DOCCS action in requiring her to be examined by its medical personnel, and denying her request to immediately return to work. She seeks to have twenty days of leave time she charged while out of work restored. She seeks payment of $140.00 representing five weeks of hazardous leave pay, she lost. She contends that by denying her return to work after having presented her doctor's clearance, the respondent has rendered her continued absence

involuntary. The petitioner indicates that she was informed by an employee of DOCCS that had she simply called in sick on April 27, 2012, and used her ordinary sick leave, she would have been allowed to return to work, without being required to be examined by EHS medical personnel. She maintains that it was her use of intermittent FMLA leave which prompted respondent to require the EHS examinations, and that this was improper.

In lieu of serving an answer to the petition the respondent has formally moved pursuant to CPLR 3211 (a) (2) and (7) to dismiss the proceeding arguing that the court lacks subject matter jurisdiction and the petition fails to state a cause of action. In support of the motion to dismiss the respondent submits an affidavit by John Shipley. Mr. Shipley states he is employed by respondent as Director of Labor Relations and is familiar with contract management, union grievance issues, and employment disputes. Mr. Shipley states that an employee is required to grieve all disputes concerning terms and conditions of employment. Mr. Shipley indicates that no grievance was ever filed by the petitioner pursuant to the CBA. Respondent argues that the Court lacks subject matter jurisdiction of petitioner's First Claim, which is predicated upon alleged violations of the FMLA, and that the petitioner failed to exhaust her administrative remedies by not filing a grievance pursuant to the union contract. The respondent also argues that the injunctive relief which the petitioner seeks is so broad that it fails to state a cause of action. In opposition, petitioner's attorney argues that the grievance process does not apply to the challenged action; that the petition presents a question of law, not a violation of the contract; and that the injunctive relief requested is not overly broad.

The Court turns first to the issue with respect to subject matter jurisdiction of over

petitioner's claim under FMLA. "It is fundamental that Article VI, § 7 of the NY Constitution establishes the Supreme Court as a court of general original jurisdiction in law and equity" (ABN AMRO Bank, N.V. / Barclays Bank PLC v MBIA Inc., 17 NY3d 208, 222-223 [2011], quotations omitted). "Under this grant of authority, the Supreme Court is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed" (id.). The respondent cites 29 CFR 825.701 (a) in support of its argument, which recites:

> "Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, *and States may not enforce the FMLA*. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. []" (29 CFR 825.701 [a], emphasis supplied)

The Court observes that FMLA § 2617, entitled "Enforcement", recites, in part, as follows:

> "Right of action. An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees []" (29 USC § 2617 [a] [2]).

While the federal regulation (29 CFR 825.701 [a]) apparently proscribes what the Court perceives to be state administrative action to enforce FMLA, FMLA appears to expressly confer upon employees the ability to enforce FMLA in state court (see 29 USC § 2617,

supra). Under such circumstances, and by reason of Supreme Court's very broad general jurisdiction in law and equity, the Court finds that respondent's argument with respect to the Courts' lack of subject matter jurisdiction has no merit.

"It is hornbook law that 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 v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375; see also Town of Oyster Bay v Kirkland, 19 NY3d 1035, 1038 [2012]; Matter of East Lake George House Marina v Lake George Park Commission, 69 AD3d 1069, 1070 [3rd Dept., 2010]; Matter of Connor v Town of Niskayuna, 82 AD3d 1329, 1330-1331 [3d Dept., 2011]; Matter of Connerton v Ryan, 86 AD3d 698, 699-700 [3d Dept., 2011]). "This doctrine furthers the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency (see, 1 NY Jur, Administrative Law, § 5 pp 303-304), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgement'" (Watergate v Buffalo Sewer, supra, citing, Matter of Fisher [Levine], 36 NY2d 146, 150, and 24 Carmody-Wait 2d, NY Prac, §145:346). As stated in Watergate v Buffalo Sewer (supra), the exhaustion rule need not be followed in certain limited circumstances, such as where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, where resort to an administrative remedy would be futile, or where its pursuit would cause irreparable injury (see, id.). While it is true that the exhaustion rule is

not an inflexible one (see Watergate II Apts. v. Buffalo Sewer Auth., supra), in the instant case, the petitioner has not established that the grievance process does not cover sick leave disputes with DOCCS, or that resort to an administrative remedy would be futile or that its pursuit would cause irreparable injury. Accordingly, the Court concludes that the petitioner must first complete the contract grievance process before she can challenge the determination in court.

The Article 34, § 34.1 of the CBA recites, in part, as follows:

> "(a) A contract grievance is a dispute concerning the interpretation, application or claimed violation of a specific term or provision of this Agreement. Other disputes which do not involve the interpretation, application, or claimed violation of a specific term or provision of this Agreement including matters as to which other means of resolution are provided or foreclosed by this Agreement, or by statute or administrative procedures applicable to the State, shall not be considered contract grievances. []
>
> "(b) Any other dispute or grievance concerning a term or condition of employment which may arise between the parties or which may arise out of an action within the scope of authority of a department or agency head and which is not covered by this Agreement shall be processed up to and including Step 3 of the grievance procedure, except those issues for which there is a review procedure established by law or pursuant to rules or regulations filed with the Secretary of State."

Thus, generally speaking, any dispute concerning the interpretation, application or claimed violation of a specific term or provision of the CBA must initially proceed through all four steps of the grievance process (which are set forth in CBA § 34.4). All other disputes with regard to employment must proceed through the first three steps of the grievance process, unless an alternate review procedure has been established (as relevant here) by law.

It is alleged in petitioner's First Claim that DOCCS' action in routinely requiring individuals who elect to take Family Medical Leave to undergo medical examinations before permitting them to return to work is a "negative job action". As a part of the foregoing, it is alleged that such action has a "chilling effect" on requests for Family Medical Leave, since such employees may lose accrued leave and wages while out of work. It is further alleged that respondents' actions constitute a form of retaliation against the petitioner for having taken FMLA leave, which is itself a violation of FMLA. The petitioner alleges that the respondent has violated her rights under 29 USC § 2615 (a) (1), (2); 29 CFR § 825.216 (a), § 825.220 (b) and § 825.312 (a) and (b).

§ 2615 of FMLA, entitled "Prohibited Acts" recites:

> "(a) Interference with rights.
>
> (1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS §§ 2611 et seq.].
>
> (2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [29 USCS §§ 2611 et seq.]." (29 USCS § 2615)

In the Court's view, allegations concerning acts of interference with, or violation of petitioner's rights under FMLA fall outside the scope of CBA § 34.1 (a), since they are not "a dispute concerning the interpretation, application or claimed violation of a specific term or provision of this Agreement" (CBA 34.1 [a]). While this circumstance, ordinarily, would then require the matter to be treated as "any other dispute or grievance concerning a term or

condition of employment []", requiring the employee to proceed through Step Three of the grievance process (CBA § 34.1 [b]), the Court finds that FMLA § 2617 (a) (2), which authorizes an action in state or federal court, constitutes a "review procedure established by law" under CBA § 34.1 (b). As such, the Court finds that there was no need for the petitioner to file a grievance under CBA § 34.1 (b) (see e.g. Sokol v Granville Cent. Sch. Dist. Bd. of Educ., 260 AD2d 692, 693-694 [3d Dept., 1999], Held: Because the petitioner had alleged violations of his statutory rights [in that case, under the New York Education Law], direct resort to the courts was permissible).

Separate and apart from the foregoing, paragraph 49 of the petition expressly cites FMLA § 2615 (a) (2), which makes it unlawful "for any employer to discharge or in any other manner *discriminate against* any individual for opposing any practice made unlawful by this title [29 USCS §§ 2611 et seq.]" (29 USC § 2615 [a] [2], emphasis supplied). It is well settled that where a collective bargaining agreement is in effect, an employee does not ordinarily lose his or her right to a judicial forum with respect to a claim of discrimination (see Ambrosino v Village of Bronxville, 58 AD3d 649 [2d Dept., 2009], citing Grovesteen v New York State Pub. Emples. Fed'n, 265 AD2d 784 [3d Dept., 1999]). "[I]n order for a collective bargaining agreement to effect a waiver by an employee of his or her rights to a judicial forum, the waiver must be 'clear and unmistakable'" (Ambrosino v Village of Bronxville, supra, at 652). More importantly, Article 25 of the CBA contains the following provisions:

> § 25.2 The state agrees to continue its established policy against all forms of illegal discrimination with regard to race, creed, color, national origin, sex, age, disability, marital status, political

> affiliation, the proper exercise by an employee of the rights guaranteed by the Public Employees Fair Employment Act, or discrimination based on sexual orientation.
>
> § 25.3 Claims of discrimination shall not be subject to review under the provisions of Article 34 of this Agreement."

Thus, to the extent that the petitioner's First Claim alleges that the actions of DOCCS' employees against the petitioner constitute a form of discrimination, and irrespective of whether the dispute here might otherwise be deemed "any other dispute" within the meaning of CBA § 34.1 (b) (supra), the Court finds that it is not subject to review under CBA Article 34. The Court concludes that respondent's motion to dismiss petitioner's First Claim on grounds of failure of the petitioner to exhaust her administrative remedies must be denied.

Turning to petitioner's Second Claim, which is predicated on the New York State Human Rights Law (see Executive Law Article 15, § 290 et seq.), the petitioner alleges that by reason of the exercise of her rights under FMLA, the respondent has improperly treated her as a person with a disability under Executive Law § 292 (21)[1]. She alleges that the respondent discriminates against employees on the basis of a documented medical condition, and causes such employees to be perceived as persons having disabilities by others. Under Executive Law § 296, it is an unlawful and discriminatory practice:

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[1]"21. The term 'disability' means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." (NY Exec. Law § 292)

> "(a) [f]or an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, *disability*, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." (Executive Law § 296, emphasis supplied)

Again, because the basis of petitioner's Second Claim are allegations of disability-based discrimination arising during the course of her employment, matters expressly exempted from the provisions of CBA Article 34 (see CBA § 25, supra), the motion to dismiss must be denied.

The Court next turns to petitioner's Third Claim, predicated on a violation of Civil Service Law § 72. The petitioner alleges that DOCCS' action in failing to permit the petitioner to return to work in the circumstances present here, resulted in her involuntary absence from employment, which invokes all of the procedural protections afforded her under Civil Service Law § 72. In a similar case involving Section 72 of the Civil Service Law, Matter of Rissinger v State Univ. of N.Y. at New Paltz (199 AD2d 745 [3d Dept. 1993]) the Appellate Division held that "[i]nasmuch as the agreement contains provisions relating to sick leave, this broad language encompasses petitioner's claim that she was improperly placed on sick leave. Thus, we find that she was obligated to pursue the grievance procedures set forth in the collective bargaining agreement." Here, §10.17 of the CBA governs medical examinations of employees who have been absent from work due to illness or injury (see CBA § 10.17 [a]). It authorizes the respondent to cause an employee who has been absent due to illness or injury to be examined by a physician of its choice before

allowing the employee to return to work (id.). It provides a deadline of twenty days for DOCCS to complete the examination (see CBA 10.17 [b]). In the Court's view, the issue is one clearly covered by the CBA, and required the petitioner to comply with the grievance procedure set forth in CBA § 34.1. While it is clear that "[a] doctor's certificate will not be routinely required for absences of four days or less" (see CBA § 10.16 [b])., the issue concerning the appropriateness of requiring a physician's examination for the one day FMLA leave here, is one which could have been addressed within the context of the grievance process. As a consequence, the Court finds that petitioner was required to pursue the grievance procedure set forth in Article 34 of the CBA. The Court concludes that petitioner's Third Claim must be dismissed by reason of failure to exhaust her administrative remedies.

Lastly, addressing respondent's argument that petitioner's request for injunctive relief is excessively broad, as pointed out by the respondent, it is improper to issue an injunction which compels a respondent to "follow the law" and/or "do right in the future" (see Matter of Willkie v Delaware County Bd. of Elections, 55 AD3d 1088, 1091-1092 [3d Dept., 2008]). Such relief is "unnecessary and inappropriate" (id.).

The respondent specifically objects to two paragraphs in the wherefore clause of the petition:

> "Petitioner seeks a determination and judgment that: []
>
> e. DOCCS cease and desist from any action toward employees such as Petitioner who provide documentation to substantiate an absence that negatively impacts that group of employees on that basis and/or causes those employees to be perceived as persons with disabilities;
>
> f. DOCCS comply with the statutory provisions intended to

> protect employees utilizing pre-approved intermittent FMLA leave; []"

The Court observes that the grant of "such equitable relief as may be appropriate, including employment, reinstatement, and promotion" is authorized under FMLA § 2617 (see 29 USC 2617 [a] [1] [B]). The Court finds that paragraph e fails to identify the specific future act for which the petitioner seeks an injunction. Similarly, paragraph f seeks a general order directing respondent to obey the FMLA. The Court concludes that both paragraphs are impermissibly broad, and must be dismissed (see Matter of Willkie v Delaware County Bd. of Elections, supra).

The Court concludes that the motion to dismiss must be denied with respect to petitioner's First and Second Claims, and granted with respect to her Third Claim, as well as paragraphs e and f of the wherefore clause of the petition.

Accordingly it is

ORDERED that the motion to dismiss the petition is denied with respect to the First and Second Claims of the petition; and it is further

ORDERED, that the motion to dismiss is granted with respect to the Third claim , and with respect to paragraphs e and f of the wherefore clause of the petition; and it is

ORDERED, that respondent be and hereby is directed to serve and file an answer within twenty (20) days of the date hereof; and it is further

ORDERED, that respondent re-notice the proceeding in conformity with CPLR 7804 (f); and it is further

ORDERED, that the proceeding, after being re-noticed, shall be referred to the

undersigned for disposition.

This shall constitute the decision and order of the Court. The Court will retain the papers until final disposition of the proceeding.

ENTER

Dated: June 20, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Verified Petition dated August 14, 2012 , Petition, Supporting Papers and Exhibits
2. Notice of Motion to dismiss dated October 17, 2012
3. Affidavit of John Shipley sworn to October 15, 2012 with exhibit
4. Affirmation in opposition to motion by Leslie C. Perrin, Esq. dated November 13, 2012
5. Reply affirmation by Laura A. Sprague, Esq. dated November 15, 2012.