

<p>Matter of Goddard v City Univ. of N.Y. (CUNY), Hunter Coll.</p>
<p>2013 NY Slip Op 33503(U)</p>
<p>November 22, 2013</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 100885/13</p>
<p>Judge: Jr., Alexander W. Hunter</p>
<p>Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u>(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.</p>
<p>This opinion is uncorrected and not selected for official publication.</p>

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

Index Number : 100885/2013

PART 33

GODDARD, NOEL

vs

CITY UNIVERSITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 17, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

|| No(s). 1-4

Answering Affidavits — Exhibits _____

|| No(s). 5-14

Replying Affidavits _____

|| No(s). 17

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

*decided in accordance with the
decision and Judgment annexed hereto.*

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).

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

Dated: 11/20/13

, J.S.C.

<p>1. CHECK ONE:</p>	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
2. CHECK AS APPROPRIATE:	MOTION IS:	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
3. CHECK IF APPROPRIATE:		<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> DO NOT POST	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE	

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

X

In the Matter of the Application of
Noel Goddard,

Index No.: 100885/13

Petitioner,

Decision and Judgment

-against-

City University of New York (CUNY), Hunter College,

Respondent.

X

HON. ALEXANDER W. HUNTER, JR.

Petitioner's application for an order pursuant to CPLR Article 78, annulling respondent's decision not to reappoint petitioner and deeming petitioner reappointed; granting monetary damages for humiliation, mental anxiety, and emotional distress; granting attorney's fees and costs; and granting punitive damages, is denied and the proceeding is dismissed without costs and disbursements to either party. Respondent's cross motion to dismiss is granted.

Petitioner Noel Goddard was an assistant professor at Hunter College. Respondent is City University of New York ("CUNY") h/s/a City University of New York, Hunter College ("Hunter College"). Hunter College is a senior college in the CUNY system, but is not a legally cognizable entity separate and apart from CUNY. The president of Hunter College is Jennifer Raab ("President Raab").

By letter dated May 17, 2007, petitioner was offered a position as an untenured assistant professor at Hunter College in the department of physics and astronomy, effective September 7, 2007 (the "offer letter"). The offer letter stated that the terms of employment would be governed by CUNY's bylaws and the collective bargaining agreement (the "CBA") between CUNY and the Professional Staff Congress-CUNY. Petitioner accepted the offer of employment and was subject to annual reappointment until she attained tenure. The letter provided for early tenure if petitioner "demonstrate[d] exceptional accomplishments in research, teaching, and service, relative to the expectations for tenure." (Petition exhibit A).

Petitioner alleges that in or about November 2009, President Raab was informed that petitioner and Hunter College's Chief Operating Officer Leonard Zinnanti were involved in a romantic relationship. Thereafter, petitioner alleges that President Raab was unusually interested in petitioner's reappointment.

In or about September 2012, the physics department voted against reappointing petitioner. Petitioner was informed that she had 10 days to appeal the decision to the dean of arts and sciences. President Raab recused herself from petitioner's reappointment process and offered

petitioner a distinguished lecturer position in the biology department or provost's office, which petitioner rejected.

Petitioner appealed to the division of math and sciences, which overturned the decision of the physics department to not reappoint petitioner. On November 20, 2012, the full faculty personnel and budget committee voted to deny petitioner's reappointment, however the vote was nullified and a revote was taken in December 2012.

On December 5, 2012, petitioner was notified that she would not be reappointed for the 2013-2014 academic year. Petitioner was informed that she could appeal the decision to Chancellor Matthew Goldstein ("Chancellor Goldstein"), as President Raab had previously recused herself. On or about December 14, 2012, petitioner appealed the decision of the full faculty and budget committee to deny her reappointment. At or about the same time, President Raab offered petitioner an alternate position of associate dean for student success in exchange for discontinuing the reappointment process, which petitioner rejected.

On February 18, 2013, petitioner received a letter from Chancellor Goldstein informing her that the decision of the full faculty personnel and budget committee was upheld. Pursuant to article 9 of the CBA, petitioner requested the reasons for non-reappointment. On March 5, 2013, Chancellor Goldstein provided petitioner with a letter explaining that, based on his academic judgment, petitioner was not reappointed because her scholarly record and professional growth was inadequate.

Petitioner commenced the instant proceeding challenging respondent's decision not to reappoint her on the grounds that the decision was arbitrary and capricious, an abuse of discretion, and in bad faith. Petitioner avers that: (1) President Raab participated in a significant portion of petitioner's reappointment process despite having a conflict of interest; (2) President Raab dissuaded petitioner from trying to be reappointed in her tenured track position by offering her other, non-tenured track positions; (3) President Raab continued to participate in petitioner's reappointment process even after recusal; (4) petitioner was not permitted to defend herself during the reappointment process; (5) the full faculty personnel and budget committee was denied petitioner's defense material prior to voting on her reappointment; and (6) Chancellor Goldstein disregarded Hunter College's reappointment standards.

Respondent cross-moves to dismiss the petition for lack of subject matter jurisdiction and failure to state a cause of action on the ground that petitioner failed to exhaust her administrative remedies and pursue her sole remedy of arbitration pursuant to the CBA.

Petitioner opposes respondent's cross motion to dismiss on the grounds that she exhausted her administrative remedies prior to filing the proceeding and that evidence demonstrated that the appeal process was abused. Petitioner averred that she is not required to exhaust an administrative remedy that is futile, and that the appeals process for reappointment and the grievance procedure laid out in the CBA is duplicative.

Respondent submits a reply memorandum of law in further support of its cross motion to dismiss the petition on the grounds that it would not have been futile for petitioner to file a grievance under the CBA and that the grievance procedure provided for in the CBA is petitioner's sole remedy.

It is well-settled that a petitioner must exhaust all available administrative remedies before obtaining judicial review of agency actions. See DiBlasio v. Novello, 28 A.D.3d 339, 341 (1st Dept. 2006). A petitioner whose terms of employment are subject to a collective bargaining agreement must pursue the grievance procedure outlined in that agreement prior to seeking relief through an article 78 proceeding. See Hosp. v. Seniuk, 86 A.D.2d 667, 668-669 (2nd Dept. 1992); Jensen v. Klein, 2010 NY Slip Op 30175(U) (Sup Ct, New York County 2010). Moreover, a petitioner is obligated to arbitrate his or her grievance under an applicable collective bargaining agreement and failure to do so operates as a bar to an article 78 proceeding. See Ciccone v. Jacobson, 262 A.D.2d 78, 79 (1st Dept. 1999).

An exception exists to the exhaustion of remedies doctrine, whereby if the pursuit of the administrative remedy is futile or leads to irreparable harm, a petitioner need not exhaust his or her administrative remedies. Community Sch. Bd. Nine v. Crew, 224 A.D.2d 8, 13 (1st Dept. 1996); Matter of Barele, Inc v. City of New York Human Resources Admin., 2010 NY Slip Op 30760(U) (Sup Ct, New York County 2010). Application of these exceptions lies in the court's discretion. See Community Sch. Bd. Nine, 224 A.D.2d at 13. This court finds that the exception to the exhaustion of remedies doctrine does not apply to the instant proceeding.

Petitioner was covered by a collective bargaining agreement, which reads in relevant part that the process "set forth [in article 20] will be the sole method used for the resolution of all complaints and grievances." A grievance is defined as an allegation by an employee or employee's union that there was a breach of the terms of the CBA or an "arbitrary or discriminatory application of, or a failure to act pursuant to the Bylaws and written policies of the Board related to the terms and conditions of employment." (Raymond Aff., exhibit A, section 20.2). Grievances related to reappointment shall be filed within 30 days of notification. (Id. at section 20.4). Any grievance not filed within 30 days "shall be deemed waived by the grievant." Id. The grievance process in section 20.4 required petitioner to submit a grievance to the President of Hunter College or her designee, an appeal to the Chancellor or his designee, and an appeal to arbitration whereby the decision of the arbitrator is binding on all parties. (Id. at section 20.4 and 20.6). Here, petitioner failed to appeal to arbitration pursuant to section 20.4 of the CBA. Accordingly, this court finds that petitioner failed to exhaust her administrative remedies.

Petitioner avers that it was futile for her to follow the grievance procedure and appeal to arbitration as set forth in article 20 of the CBA because an arbitrator could not overturn Chancellor Goldstein's decision based on his academic judgment. Petitioner's argument is without merit, as an arbitrator could hear petitioner's grievance and rule: (1) whether Hunter

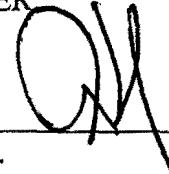
College's action violated a term of the CBA; or (2) whether Hunter College's action was not in accordance with the bylaws or written policies of the board, or (3) that the claimed academic judgment in respect of the reappointment constituted an arbitrary or discriminatory application of the bylaws or written policies of the board. Thus it would not have been futile for petitioner to appeal to arbitration as set forth in article 20 of her CBA. Accordingly, petitioner failed to exhaust her administrative remedies for which arbitration is her sole remedy and the proceeding is dismissed. Neiman v. Kingsborough Community College, 146 A.D.2d 612 (2nd Dept. 1989).

Accordingly, it is hereby

ADJUDGED that petitioner's application for an order pursuant to CPLR Article 78, annulling respondent's decision not to reappoint petitioner and deeming petitioner reappointed; granting monetary damages for humiliation, mental anxiety, and emotional distress; granting attorney's fees and costs; and granting punitive damages, is denied and the proceeding is dismissed without costs and disbursements to either party. Respondent's cross motion to dismiss is granted.

Dated: November 22, 2013

ENTER:



J.S.C.

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).