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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF POWERS,

Appellant,

-against-

ST. JOHN'S UNIVERSITY SCHOOL OF LAW,

No. 28  
(papers sealed)

Respondent.

-----

20 Eagle Street  
Albany, New York 12207  
February 10, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 28, Matter of Powers  
2 v. St. John's University School of Law.

3 Counselor, would you like any rebuttal  
4 time?

5 MR. ACEVEDO: Two minutes, please, Your  
6 Honor.

7 CHIEF JUDGE LIPPMAN: Two minutes, okay  
8 counsel, go ahead.

9 MR. ACEVEDO: May it please the court, my  
10 name is Roland Acevedo and I represent the appellant,  
11 David Powers. The central issue throughout this case  
12 has been the same, whether St. John's Law School  
13 acted arbitrary and capriciously - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but let me ask  
15 you another question first. Did your client  
16 truthfully tell St. John's what happened, or did he  
17 try to hide facts that were damaging to him?

18 MR. ACEVEDO: He told them truthfully.  
19 There were two parts to the question.

20 CHIEF JUDGE LIPPMAN: Fully truthfully?

21 MR. ACEVEDO: Absolutely, Your Honor.

22 CHIEF JUDGE LIPPMAN: Go ahead. Tell us  
23 how.

24 MR. ACEVEDO: Number one, it asked, had he  
25 ever been charged with, pled guilty to, or convicted

1 of a crime? He answered yes. There's no question  
2 that was accurate. Then the second part was: please  
3 explain.

4 CHIEF JUDGE LIPPMAN: Right.

5 MR. ACEVEDO: And in that explanation part,  
6 in italics, they said, if a conviction has been  
7 sealed or expunged, you still have to reveal that.  
8 So the focus was on convictions, but nonetheless, he  
9 gave them exactly what they asked for: the relevant  
10 facts, the nature of the offense, the dates, the  
11 courts, the sentence, and the crime that he was  
12 convicted of.

13 JUDGE PIGOTT: Was he convicted of one or  
14 two?

15 MR. ACEVEDO: He was only convicted of one  
16 crime. He entered a conditional plea and he was  
17 allowed to withdraw that plea once he satisfied the  
18 requirements - - -

19 CHIEF JUDGE LIPPMAN: Did they know that -  
20 - - that there was an issue of selling here?

21 MR. ACEVEDO: Did who know?

22 CHIEF JUDGE LIPPMAN: St. John's?

23 MR. ACEVEDO: They - - - they - - - they -  
24 - -

25 CHIEF JUDGE LIPPMAN: What did they - - -

1           what could get out of his revelation - - - statements  
2           that he gave them - - - what did they get - - - could  
3           they tell the difference between possession and  
4           distribution?

5                       MR. ACEVEDO: Well, first of all, he was -  
6           - -

7                       CHIEF JUDGE LIPPMAN: And does it matter?

8                       MR. ACEVEDO: It doesn't matter, Judge; it  
9           doesn't matter one bit, because their contention,  
10          first of all, that they have a policy that excludes  
11          people with criminal records for drug distribution  
12          doesn't apply to Mr. Powers, because he doesn't have  
13          a criminal record for drug distribution. His only  
14          conviction - - -

15                      CHIEF JUDGE LIPPMAN: But I think - - -  
16          isn't their argument that there's a difference  
17          between possession and distribution?

18                      MR. ACEVEDO: Well, they use that argument  
19          with respect to - - - as - - - their - - - their  
20          position for the gatekeeper for the bar. There's no  
21          rhyme or reasoning to their position.

22                      CHIEF JUDGE LIPPMAN: Let me - - - let me  
23          ask you this on a broader, fairness level - - -  
24          policy level. You seek admission to law school.  
25          Obviously, your - - - a criminal background is a very

1 serious issue. Is it - - - in this particular case,  
2 was your client, in the most generic sense - - - I  
3 understand he consulted with an attorney as to what  
4 was appropriate to - - - to say; do you think he was  
5 forthright in the broadest sense of - - - of - - -  
6 the law school wants to make a determination based on  
7 a lot of factors.

8 Was your client forthright? Did he - - -  
9 did - - - or - - - or was he saying - - - and I don't  
10 mean this in a judgmental way; I just mean it in the  
11 most generic way - - - or was he saying, gee, if I  
12 give too much information, I'm not going to be  
13 getting into the law school, therefore, I have to  
14 shade this information somewhat - - - and I get it -  
15 - - under advice of counsel.

16 But what I'm saying to you in a most  
17 policy, fairness perspective, what did your client  
18 do? Why - - - why is it right that we say to St.  
19 Johns at this point, you know what? You know, you -  
20 - - you really are wrong in whatever the - - - the  
21 sanction that the - - - that - - - that they  
22 ultimately decided, not letting him come back to the  
23 law school.

24 MR. ACEVEDO: Mr. Powers is the poster boy  
25 for rehabilitation, Judge. The po - - -

1 CHIEF JUDGE LIPPMAN: I get that. I get  
2 that, but what - - -

3 JUDGE READ: Maybe - - - yeah, maybe St.  
4 John's made a bad decision, but isn't it theirs to  
5 make?

6 JUDGE STEIN: He - - -

7 MR. ACEVEDO: Correct, but the - - -

8 CHIEF JUDGE LIPPMAN: But that's - - -  
9 that's what - - - what Judge Read is saying, that's  
10 exactly what I want to know. What - - - who's - - -  
11 who's right here? Was he totally forthright and they  
12 are being unreasonable? Or was he kind of, you know,  
13 not telling the total truth, because he knew if he  
14 did, their policies or whatever it is would - - -  
15 would basically result in his not being admitted?

16 MR. ACEVEDO: I believe he was forthright.  
17 He knew nothing about this - - -

18 CHIEF JUDGE LIPPMAN: He wasn't trying to  
19 hide anything?

20 MR. ACEVEDO: Well, it - - - it would only  
21 make sense to hide something if he knew about their  
22 unwritten, undisclosed policy.

23 JUDGE ABDUS-SALAAM: Why, counsel, didn't  
24 he say he was - - - he pled guilty to distributing  
25 LSD and other controlled substances, instead of it

1 maybe looking like he was just guilty of possessing  
2 drugs, as opposed to also selling? Even if it was,  
3 you know, now and then, as he later explained, he  
4 wasn't a usual seller. He wasn't a big seller. He  
5 just sold drugs occasionally to support his own  
6 habit. But he didn't tell that to St. John's when he  
7 applied, did he?

8 MR. ACEVEDO: He didn't, Judge.  
9 Hindsight's always twenty-twenty. He - - - he relied  
10 on the - - - the advice of counsel, and counsel told  
11 him to just disclose the conviction. That's really  
12 what the character committee's interested in when  
13 they decide these issues.

14 CHIEF JUDGE LIPPMAN: Counsel, let me ask  
15 you another question. If - - - we know we have the  
16 New Jersey Expungement Statute, right?

17 MR. ACEVEDO: Correct.

18 CHIEF JUDGE LIPPMAN: If he knew at the  
19 time that his record had been expunged, did he have  
20 to say to St. John's that, you know, I've been  
21 convicted at all or would that - - - would that had  
22 freed him really of any - - - as I understand these  
23 expungement statutes, and you know, we have some  
24 discussion in New York today as to whether we should  
25 have an expungement statute, and as I understand the

1 purpose of it, it's to be able to say, whether it's  
2 employment or housing or education, that - - - to say  
3 with a clear conscience, I wasn't convicted of  
4 anything.

5 If he had known that it was - - - his  
6 record had been expunged, did that change the equa -  
7 - - would that have changed the equation at all?

8 MR. ACEVEDO: It wouldn't under these  
9 facts, though I contend - - - and under the law, it  
10 should. That's the whole purpose of expungement - -  
11 -

12 CHIEF JUDGE LIPPMAN: Well, that's - - -  
13 that's what I mean. If - - -

14 MR. ACEVEDO: The - - -

15 CHIEF JUDGE LIPPMAN: Would that have been  
16 inconsistent with the - - - the spirit of the  
17 expansion - - - expungement statute of New Jersey?

18 MR. ACEVEDO: We - - - we argue that  
19 exactly in the trial court. We argue that the - - -  
20 the ruling - - - that St. John's violated the  
21 language of the expungement order and the spirit of  
22 the expungement statute, by going into this whole  
23 background.

24 JUDGE PIGOTT: Can - - - can I take you  
25 back a little bit, because I - - - in looking at this

1 record, I have a number - - - a number of questions.  
2 One of them being that what St. John's says in its -  
3 - - in its papers is that the committee on  
4 admissions, "Any action taken by the committee is  
5 solely within the committee's discretion and is  
6 final".

7 Now, whatever decision was made was made in  
8 2005. The only thing in here that I see other than a  
9 bunch of e-mails, is from a dean, who - - - there's  
10 no - - - there's no pedigree. He simply says he was  
11 a dean designate and then became the dean of  
12 admissions sometime in 2010, which was at least five  
13 years after this dean of - - - this admissions  
14 committee admitted this person.

15 And missing from here are the - - - are the  
16 references. I think there were three listed there -  
17 - - none of them in the record that I can see - - -  
18 and a decision by a committee that's not identified.  
19 And I'm wondering if that committee, when they looked  
20 at this - - - because I agree with you. I think this  
21 - - - this person is - - - is a poster child for - -  
22 - for rehabilitation.

23 But we don't know what that - - - that  
24 commission may have - - - that dean - - - that  
25 admissions committee may have had all of this in

1 front of them, but we don't know that, because  
2 there's nothing in here from that admissions  
3 committee saying anything.

4 MR. ACEVEDO: The first time I ever heard  
5 about this unwritten policy that they're relying on  
6 was in response to our argument that their gatekeeper  
7 function didn't hold according to the facts.

8 JUDGE PIGOTT: Well, I - - - when you're  
9 talking about gatekeeper, I mean, the Appellate  
10 Divisions tend to think they know who should be  
11 admitted and who shouldn't.

12 MR. ACEVEDO: Correct.

13 JUDGE PIGOTT: It struck me that this young  
14 man was deciding - - - he was confident enough that  
15 he was going to ask the Second Department if he - - -  
16 if he was still qualified, and was looking for St.  
17 John's to help, you know, not that they were going to  
18 go all the way back and say, not only are we not  
19 going to help you, but we're going to throw you out  
20 of law school and rescind your admission.

21 MR. ACEVEDO: That's certainly true. He  
22 would have never asked for that advanced ruling, Your  
23 Honor, if he knew it was going to lead here. We  
24 submit that St. John's had all the buzzwords to know  
25 that this could have been a drug distribution charge.

1 He said it was a drug deal.

2 CHIEF JUDGE LIPPMAN: So you think it was a

3 - - -

4 MR. ACEVEDO: He said it was a plea  
5 bargain.

6 CHIEF JUDGE LIPPMAN: With the advice of  
7 the counsel, he was basically sending that message  
8 without explicitly stating it?

9 MR. ACEVEDO: I don't think he was. I  
10 don't think he was trying to portray himself as a  
11 drug user, because he saw no difference.

12 CHIEF JUDGE LIPPMAN: No, no, no. But what  
13 I'm saying to you - - - you thi - - - I'm trying to  
14 make your argument for you.

15 MR. ACEVEDO: I'm sorry.

16 CHIEF JUDGE LIPPMAN: That - - - that your  
17 argument is he was trying to give a true picture - -  
18 -

19 MR. ACEVEDO: Of course.

20 CHIEF JUDGE LIPPMAN: - - - of what went  
21 on, whether he explicitly said it was distribution as  
22 well as possession.

23 MR. ACEVEDO: Correct, Your Honor.

24 CHIEF JUDGE LIPPMAN: Okay, let's - - -  
25 let's hear from your adversary, the Law School, and

1           then we'll - - - we'll - - - you'll have your  
2           rebuttal.

3                       MR. KEANE:   Good afternoon, my name is  
4           Michael Keane with the law firm of Garfunkel Wild.  
5           We represent St. John's University School of Law.

6                       CHIEF JUDGE LIPPMAN:   Counsel, let me ask  
7           you the same question I asked your adversary.  If  
8           assuming that - - - that he knew that his record had  
9           been expunged in New Jersey, and that the whole  
10          purpose of these expungement statutes are to allow  
11          someone to say that I wasn't convicted and not be  
12          doing something wrong, do you think that - - - that  
13          he could have then not put anything in about the  
14          conviction?  If you - - - if you assume that the - -  
15          - that's the purpose of the expungement statute, that  
16          it had been expunged, could he do that?  Would that  
17          be legitimate?

18                      MR. KEANE:   The answer is - - - is no.  And  
19          - - -

20                      CHIEF JUDGE LIPPMAN:   Why not?

21                      MR. KEANE:   - - - and by - - - and by the  
22          way, Mr. Powers agrees, because he - - - he put in  
23          writing two times when he tried to supplement his  
24          application that he knew and he knows he has to - - -  
25          to reveal expunged convictions.

1 CHIEF JUDGE LIPPMAN: But - - - but - - -  
2 but tell me why?

3 MR. KEANE: But we did not - - - we did not  
4 ask him whether he'd ever been charged with a crime.  
5 Well, we did ask him that, but we've also asked him,  
6 did you - - - were you charged with a conviction or a  
7 charge that has been expunged? So - - -

8 JUDGE PIGOTT: That's part of your  
9 application?

10 MR. KEANE: It is, yes. And he said yes.  
11 And then he gave a bunch of half-truths. But - - -

12 CHIEF JUDGE LIPPMAN: Yeah, yeah, but what  
13 I'm asking you is - - -

14 MR. KEANE: But with the second view is - -  
15 - I understand - - -

16 CHIEF JUDGE LIPPMAN: - - - assuming it was  
17 expunged, could he have - - - it was expunged, could  
18 he have said no?

19 MR. KEANE: The answer is we don't believe  
20 so.

21 CHIEF JUDGE LIPPMAN: Why not?

22 MR. KEANE: Our question - - -

23 CHIEF JUDGE LIPPMAN: Why not?

24 MR. KEANE: Our question follows the  
25 question in the New Jersey Bar and the New York Bar

1 application that all four departments use. So this  
2 question you're asking - - -

3 CHIEF JUDGE LIPPMAN: I get - - - I get  
4 that.

5 MR. KEANE: Okay.

6 CHIEF JUDGE LIPPMAN: I understand it. I'm  
7 asking you to think a little bit out of the box here  
8 - - -

9 MR. KEANE: We - - - we - - -

10 CHIEF JUDGE LIPPMAN: - - - and think about  
11 young people whose lives are ruined because of a  
12 single mistake at one point in their life, and where  
13 policymakers say, not right.

14 Let's - - - if it's - - - whatever the  
15 particular requirements of the statute are, one  
16 offense so many years ago, whatever age, whatever the  
17 statute is, we want to make sure that this young  
18 person's life is not ruined. And they expunge the  
19 record. And again, it's my understanding of those  
20 statutes, is the whole purpose is just like this.  
21 That you have something, whether it's housing,  
22 education, whatever it is, that you're able to say  
23 no.

24 You're saying - - - and I'm not  
25 criticizing; I'm asking you - - - you're saying, no,

1 it doesn't matter that that's the purpose. If we ask  
2 you, you have to answer it. And my only question to  
3 you is, if that's what you're saying, why is that?

4 MR. KEANE: Well, I'll - - - I'll say two  
5 reasons.

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MR. KEANE: One, this is a New Jersey  
8 Expungement Statute. In - - - in New York - - - in  
9 New Jersey, we cite case law at 270, 272 of the  
10 record, that - - - where the cases look at it and  
11 say, it's a limited statute, where the expungement  
12 order means that certain law enforce - - -  
13 enforcement agencies shall remove certain records.  
14 If other state agencies or other nonspecified  
15 agencies find this expunged information, they can use  
16 it, and we cite cases where people have lost licenses  
17 for that.

18 The second - - - the second reason is  
19 because, again, we did not just ask for convictions,  
20 we - - - or charges. We asked, including expunged  
21 charges.

22 CHIEF JUDGE LIPPMAN: Well, I know that.  
23 That's my question to - - -

24 MR. KEANE: So if we are violating - - -

25 CHIEF JUDGE LIPPMAN: But that's my

1 question. I'm sorry; Judge Pigott, go ahead.

2 MR. KEANE: I understand that. So if we  
3 are violating something, I - - - we think that's a  
4 legislative issue.

5 JUDGE PIGOTT: Well, let me ask you, it's -  
6 - -

7 MR. KEANE: That it's not a public policy  
8 issue - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 JUDGE PIGOTT: In your - - - in your brief,  
11 you say, "because he seemingly turned his life around  
12 and successfully rehabilitated himself, the Law  
13 School granted him admission". And later on you say  
14 that the committee on admissions - - - "Any action  
15 taken by the committee is solely within the  
16 committee's discretion and is final".

17 There's no doubt that this kid turned his  
18 life around and has been rehabilitated. I mean, he's  
19 summa cum laude out of college. He's got a CPA.  
20 He's worked for a major CPA firm. And then somewhere  
21 along the line, somebody got it in their head that  
22 they were going to - - - that they were going to  
23 rescind his application. Not ask him to withdraw,  
24 not - - - not let him go to some other school, but  
25 rescind his application.

1 Did you give him his money back?

2 MR. KEANE: No. Why - - - we - - - there  
3 was - - - there's nothing - - -

4 JUDGE PIGOTT: Because you're rescinding  
5 it. You're not giving him credit - - -

6 MR. KEANE: No, no, I didn't - - -

7 JUDGE PIGOTT: Let me finish.

8 MR. KEANE: Yes.

9 JUDGE PIGOTT: You're not giving him credit  
10 for - - - for what he did there. You - - - you could  
11 - - - you could have said, we'll give you the  
12 opportunity to withdraw, because under our rules,  
13 this would have been - - - you know, we would not  
14 have admitted you in the first place. But you've  
15 chosen to - - - to eliminate him from - - - from any  
16 of the courses he successfully took. You're keeping  
17 his money.

18 And you're doing it in a strange way,  
19 because as I walk through this thing, at one point,  
20 Mr. Cunningham - - - who I don't think was at the  
21 school when this kid was admitted; I'm not even sure  
22 he knows what the standards were at that time. None  
23 of the references that he put in his application are  
24 in the file.

25 And then Dean Cunningham talks about, he

1 talked to Dean Harrison and he talked to Dean Simons  
2 at the same time. Later on he talked to four deans,  
3 and then somehow somebody then sent a one-paragraph  
4 letter to him, to - - - to - - - to the student here,  
5 saying we're rescinding it. I - - - I don't know who  
6 made the decision.

7 MR. KEANE: Well, you said a lot there,  
8 Your Honor, but let me - - -

9 JUDGE PIGOTT: I know. I tried.

10 MR. KEANE: Let me - - - let me start with  
11 the basic misunderstanding you're having of the  
12 record. And - - - and here's the problem with  
13 raising an argument on appeal. This rescission  
14 argument was never raised below, but - - -

15 JUDGE PIGOTT: But let's talk about this.

16 MR. KEANE: But - - - but - - - and - - -  
17 and - - -

18 JUDGE PIGOTT: Let me interrupt you just to  
19 say this - - - just to say this. You were told,  
20 according to your papers, in November of '08, that  
21 this - - - that this issue came up. You didn't do  
22 anything with it. It - - - it wasn't until 2010 - -  
23 -

24 MR. KEANE: Well - - -

25 JUDGE PIGOTT: - - - that you made a

1 determination. All I'm suggesting to you is, when we  
2 talk about due process, and we talk about  
3 administrative determinations, shouldn't there be  
4 some explanation by somebody who was either there in  
5 '05, if it's Dean Cunningham to say, I'm a graduate  
6 of a law school; that I was made the dean on certain  
7 dates; that - - - that this is when I - - - when I  
8 graduated from college.

9 I mean, we know nothing about Dean  
10 Cunningham, and we know nothing about this process,  
11 except it seemed like every dean in St. John's at  
12 some point had a meeting with somebody, and they all  
13 decided somehow that this was finally what was going  
14 to happen. I think they got together and said, why  
15 don't we let him withdraw?

16 MR. KEANE: Your Honor, you have a - - - a  
17 horrible misunderstanding of the record, or you're  
18 missing something here.

19 CHIEF JUDGE LIPPMAN: While you're  
20 straightening out the record, also tell me where it  
21 says that your policy distinguishes between  
22 possession and distribution? So straighten that out  
23 too.

24 MR. KEANE: Okay, certainly. When you - -  
25 - when we find there is a major omission on an

1 application, the student is charged right in the  
2 application to make the addition and cure the  
3 omission. Once that occurs, it goes back to the  
4 admissions committee, and that's what occurred here.  
5 Dean Harrison was the admissions officer and it says  
6 that in Dean Cunningham's, the dean of students,  
7 affidavit.

8 JUDGE PIGOTT: That's hearsay. That's  
9 hearsay. All - - - all of this is hearsay. The - -  
10 - Dean Cunningham says, well, I met with Dean  
11 Harrison who did this. We don't know what Harrison  
12 said or when. You - - - we got Dr. Turano in here  
13 someplace; I - - - I forget where she falls into all  
14 of this.

15 It's all - - - I would have thought there  
16 should have been a hearing somewhere where these  
17 people would come in and say, yeah, this is the worst  
18 guy we ever saw, and thank God, St. John's was able  
19 to catch him before he went to the Second Department  
20 and got admitted as an attorney.

21 MR. KEANE: So - - -

22 JUDGE PIGOTT: Because I think he would  
23 have gotten admitted, by the way.

24 MR. KEANE: But the - - - going - - - going  
25 back to the original question, the - - - the - - -

1 Dean Harrison, the dean of admissions, considered it,  
2 as is the standard policy. And he explained that had  
3 the true facts been known, he would not have been  
4 admitted. Now - - -

5 CHIEF JUDGE LIPPMAN: Because - - - because  
6 the policy is distribution rather than possession?

7 MR. KEANE: That is the factor - - -

8 JUDGE PIGOTT: And where - - -

9 MR. KEANE: - - - that would have weighed  
10 against him.

11 CHIEF JUDGE LIPPMAN: But where is that?  
12 Where is that?

13 MR. KEANE: Yeah. Un - - - under - - -

14 CHIEF JUDGE LIPPMAN: Is there a written  
15 policy - - -

16 MR. KEANE: There is - - -

17 CHIEF JUDGE LIPPMAN: Is it - - - does it  
18 apply across the board to everyone who applies to St.  
19 John's? And if so, where does it say that?

20 MR. KEANE: You have to consider - - - and  
21 it - - - you won't find it in writing, but you have  
22 to consider what's happening here. This is an  
23 admissions committee. This is a - - - what the case  
24 - - -

25 CHIEF JUDGE LIPPMAN: If the kid knew - - -

1 if the kid knew that distribution was the death knell  
2 of his application, maybe he wouldn't have applied.

3 MR. KEANE: I - - - I would imagine that  
4 there are admission committees out there that say, if  
5 you put on your application you're an active member  
6 of a hate group, they won't get into any law school.

7 JUDGE PIGOTT: Well, then why - - - why - -  
8 -

9 MR. KEANE: But that's not in writing  
10 anywhere. There are scores of factors that  
11 admissions committees - - -

12 JUDGE PIGOTT: Mr. Keane, before we go too  
13 far, I - - - because your light is on - - - but one  
14 of things that apparently, Dr. - - - Dean Cunningham  
15 says, is that three to five kids a week - - - a week  
16 - - - come in and want to amend their - - - their  
17 application for admission because of - - - because  
18 they're smoking marijuana, and he says, small  
19 quantities.

20 And I didn't know what small quantities  
21 meant, because if you take the New Jersey Statute and  
22 compare it to the New York statute, that may be on -  
23 - - the only thing this kid did. I mean, that - - -  
24 they were fairly small amounts of - - - of drugs  
25 being involved here. I don't know what New Jersey

1 exactly did and I don't know how it matches up with  
2 New York, but neither does St. John's, and if you do,  
3 it's not in your record.

4 MR. KEANE: Yes, it - - - it's in the  
5 record. I - - -

6 JUDGE PIGOTT: Where?

7 MR. KEANE: Your Honor, it's in the record  
8 - - -

9 JUDGE PIGOTT: Where?

10 MR. KEANE: In - - - in Dean Cunningham's  
11 affirmation when he describes the meeting he had with  
12 him. The - - - the admissions committee here - - - I  
13 mean, some admission committees have a minimum GPA  
14 min - - - they require certain courses. I was told  
15 by an admission committee I didn't get into the  
16 school because I was a double engineering major, and  
17 we don't like technical backgrounds.

18 CHIEF JUDGE LIPPMAN: But let me - - - let  
19 me just ask you one - - -

20 MR. KEANE: It's preposterous to say they  
21 all go in writing.

22 CHIEF JUDGE LIPPMAN: Let me ask you one  
23 final question that I'm just trying to get my arms  
24 around.

25 MR. KEANE: Um-hum.

1 CHIEF JUDGE LIPPMAN: The misperception of  
2 the record that - - - that we may have is that this  
3 went back to the - - - and you tell me if I'm stating  
4 it - - - this went back to the admissions committee,  
5 and then pursuant to their existing policies, they  
6 made this decision. That's your basic argument.

7 MR. KEANE: They - - - yes. It went to  
8 Dean Harrison, head of the office - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. KEANE: - - - and it was looked at as a  
11 new application, and they determined this applicant  
12 would not have gotten in - - -

13 CHIEF JUDGE LIPPMAN: Okay.

14 JUDGE PIGOTT: That - - - that was in your  
15 record at, I think, 87, and it says, "Cunningham met  
16 with Harrison at some point". "At some point". "And  
17 Harrison said that the petitioner would not have been  
18 admitted in 2005". And it's on that basis - - - I  
19 mean, shouldn't we have Harrison's affidavit?

20 MR. KEANE: He - - - he actually said more  
21 than that. He said he would not have gotten past the  
22 screening policy.

23 JUDGE PIGOTT: Shouldn't we have had - - -  
24 I'm quoting your - - - your - - - your petition, but  
25 where's Harrison? Where's his affidavit? Why - - -

1           why do we got everything hearsay from Cunningham - -  
2           -

3                     MR. KEANE: Well - - -

4                     JUDGE PIGOTT: - - - who still has not  
5           explained where he was in '05?

6                     MR. KEANE: Well, he - - - he was the Dean  
7           of Students at the time and at the school, and I  
8           think supplying the dean - - -

9                     JUDGE PIGOTT: At what - - - at what time?

10                    MR. KEANE: At the time this misconduct - -  
11           - at the time action was taken on the - - -

12                    JUDGE PIGOTT: In 2010?

13                    MR. KEANE: - - - intentional omission on  
14           the application.

15                    JUDGE PIGOTT: In 2010?

16                    MR. KEANE: Yes.

17                    JUDGE PIGOTT: He was not there is 2005.

18                    MR. KEANE: But he didn't make the  
19           decision; Dean Harrison did.

20                    JUDGE PIGOTT: That's my point, and we  
21           don't have Harrison's affidavit.

22                    MR. KEANE: Well, we - - - you - - - you  
23           got the - - - you got the statement from the  
24           quarterback of the process, who walked it through and  
25           did everything. I would imagine that there might be

1 fifteen people who might have touched this. We did  
2 not put in fifteen affirmations.

3 JUDGE PIGOTT: Well, you would agree that  
4 this is a pretty important decision for this - - -  
5 this petitioner? I mean - - -

6 MR. KEANE: Well, ac - - -

7 JUDGE PIGOTT: - - - you've effectively  
8 prevented him from going to law school, it seems to  
9 me.

10 MR. KEANE: No, no, now, you see - - - and  
11 we reject that. He - - - he - - - he is in the  
12 situation where he is today because of his own  
13 deceit. He said in the record at 35 he had - - - he  
14 applied to nineteen schools and he could have gotten  
15 in to some - - - some of those. Had he been  
16 forthright on his application, he would have been  
17 denied from the outset - - -

18 CHIEF JUDGE LIPPMAN: Let me - - -

19 MR. KEANE: - - - and in one of those other  
20 schools.

21 CHIEF JUDGE LIPPMAN: Counsel, let me - - -  
22 let me ask you one question. He still has his  
23 credits, is that what you're arguing?

24 MR. KEANE: It's right here. That's a new  
25 argument that came on appeal. There's nothing in the

1 record that says that his credits were voided.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MR. KEANE: It said it was rescinded, and  
4 on appeal, appellant in his papers said rescinded - -  
5 -

6 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

7 MR. KEANE: - - - plaintiff's credits were  
8 voided.

9 CHIEF JUDGE LIPPMAN: Thank you.  
10 Appreciate it.

11 Counsel?

12 MR. KEANE: And these literally are the  
13 classes he took and his grades.

14 CHIEF JUDGE LIPPMAN: Counsel, thank - - -  
15 thank you, appreciate it.

16 Counselor, rebuttal? Go ahead.

17 MR. ACEVEDO: With respect to his credits,  
18 he attempted to get - - -

19 CHIEF JUDGE LIPPMAN: Does he still have  
20 his credits?

21 MR. ACEVEDO: No. He attempted to get a  
22 certificate of good standing at the school, or  
23 whatever it's called, so he could transfer. The  
24 school wouldn't give it to him. So his - - - his  
25 whole history - - -

1 JUDGE ABDUS-SALAAM: Does he want his  
2 grades? He just wants the certificate of good  
3 standing?

4 MR. ACEVEDO: He - - - he would like to go  
5 to another law school if he can't finish his  
6 education there, but St. John's will not give him any  
7 proof that he's a student in good standing so he  
8 could transfer.

9 CHIEF JUDGE LIPPMAN: Counsel, is this - -  
10 - is the - - - your adversary says this is moot. Is  
11 this moot, this whole thing?

12 MR. ACEVEDO: Absolutely not moot.

13 CHIEF JUDGE LIPPMAN: Why - - - why isn't  
14 it moot?

15 MR. ACEVEDO: They cite - - -

16 CHIEF JUDGE LIPPMAN: The ABA or whatever  
17 the amount of time - - -

18 MR. ACEVEDO: They cite to an outdated ABA  
19 standard, Your Honor, that says that the legal  
20 education has to be completed within eighty-four  
21 months of commencing study.

22 CHIEF JUDGE LIPPMAN: Right.

23 MR. ACEVEDO: That ABA standard was amended  
24 in 2014, August. And it now says that there's an  
25 exception to the eighty-four men - - - I - - -

1 eighty-four-month rule in extraordinary  
2 circumstances, and we submit that this would be  
3 extraordinary as they come.

4 CHIEF JUDGE LIPPMAN: You submit that this  
5 is - - - if this isn't extraordinary, what is  
6 extraordinary, in your view?

7 MR. ACEVEDO: Exactly right.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. ACEVEDO: This is a once-in-a-lifetime  
10 event.

11 CHIEF JUDGE LIPPMAN: What else, counselor?

12 JUDGE FAHEY: Can I just ask one thing  
13 here? Dismissal versus rescission of admission, was  
14 it raised below? Did the AD rule on it?

15 MR. ACEVEDO: We argued below that the  
16 penalty was excessive. And the penalty involves the  
17 rescission.

18 JUDGE FAHEY: In the context I'm putting it  
19 to you, the - - - which is, you know, my - - - my  
20 reading of it, was it raised that way?

21 MR. ACEVEDO: I - - - it was raised in the  
22 context of the penalty, not - - - not that rescission  
23 went beyond what's in the application. So we've  
24 always argued, and the Appellate Division ruled that  
25 the penalty here was not excessive.

1                   We contend it always - - - it was for this  
2                   reason: three to five students per week are allowed  
3                   to amend, and some of those students have totally  
4                   failed to disclose criminal conduct. Mr. Powers  
5                   discloses, even if you accept their argument that  
6                   it's partially, and he gets rescinded? And they're  
7                   allowed to - - -

8                   JUDGE PIGOTT: Well, let me follow up - - -

9                   MR. ACEVEDO: - - - to amend and stay in  
10                  the school?

11                  JUDGE PIGOTT: Before your light goes on -  
12                  - - I mean, your opponent is sitting there with  
13                  something that's not in the record, saying he gets  
14                  his credits. And you're telling us he doesn't.

15                  MR. ACEVEDO: That's been the course of  
16                  this whole case, where - - -

17                  JUDGE PIGOTT: Well, some - - - wait,  
18                  somebody's right and somebody's wrong. Who's right  
19                  and who's wrong here?

20                  MR. ACEVEDO: Well, I - - -

21                  JUDGE FAHEY: I'm with Judge Pigott on  
22                  that. I just want to know what the - - - whether he  
23                  got them or not, you know?

24                  JUDGE READ: I assume if St. John's says he  
25                  has his credits, he has his credits.

1 MR. ACEVEDO: Your Honor, he tried to - - -

2 JUDGE READ: Well, isn't there a difference  
3 between the certificate in good standing and being  
4 able to transfer his grades?

5 MR. ACEVEDO: Well, he couldn't transfer.  
6 What - - - what good are the credits if they won't  
7 say he's a student in good standing and he could  
8 transfer? To transfer from school A to school B, you  
9 need something from school A that says he's a student  
10 in good standing. If they submit something - - -

11 JUDGE READ: I don't have to say I - - - he  
12 completed X hours of courses and - - - and got  
13 acceptable grades, and to send a transcript?

14 MR. ACEVEDO: They wouldn't give him that.

15 JUDGE READ: They won't do that?

16 MR. ACEVEDO: They wouldn't when he  
17 requested it, Your Honor. This also goes beyond  
18 that, because this decision has tremendous impact in  
19 his professional life. Because he holds high  
20 fiduciary responsibilities in his positions, he's  
21 often vetted.

22 JUDGE READ: Is this because of - - - of  
23 the - - - they said it was intentional?

24 MR. ACEVEDO: Because it says that he  
25 misrepresented under oath.

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CHIEF JUDGE LIPPMAN: Okay, counsel.

MR. ACEVEDO: Thank you very much.

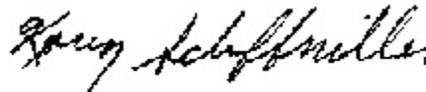
CHIEF JUDGE LIPPMAN: Thank you both.  
Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Powers v. St. John's University School of Law, No. 28, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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