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

PRESENT: HON. JOAN B. LOBIS PART 6
Justice

ZARTOSHTI, AFSHIN

Plaintiff(s).

- V -

COLUMBIA UNIVERSITY

Defendant(s).

INDEX NO 104231/09

MOTION DATE 6/26/09

MOTION SEQ NO 001

MOTION CAL NO

The following papers, numbered 1 to 53, were read on this Article 78 Petition

	PAPERS NUMBERED
	So-ordered stip: 1
Notice of Motion / Order to Show Cause – Affidavits – Exhibits	Petition 2-16
Answering Affidavits – Exhibits	Answer 17, 18-49
Replying Affidavits	Reply 50-53

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this petition is decided in accordance with the accompanying decision, order, and 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).

Dated: 8/12/09

JOAN B. LOBIS, J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Application of

AFSHIN ZARTOSHTI,

Petitioner,

Index No. 104231/09

For a Judgment under Article 78 of the CPLR annulling the determination affirming a disciplinary penalty imposed against Petitioner,

Decision, Order, and Judgment

-against-

COLUMBIA UNIVERSITY,

Respondent.

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JOAN B. LOBIS, J.S.C.:

Petitioner, Afshin Zartoshti, brings this Article 78 proceeding, seeking to annul the determination by respondent, Columbia University ("Columbia" or the "University") to change petitioner's grades in two courses to "Fs" and suspend him for two years. Petitioner asks that Columbia be directed to reinstate him immediately as a student in good standing and expunge his records of any reference to any disciplinary actions taken against him. Petitioner argues that respondent's determination was arbitrary and capricious because (1) respondent did not comply with its own procedures when it made its determination; (2) the evidence supporting the determination was insufficient; and, (3) the sanctions imposed were unreasonable.

A review of the papers supporting and in opposition to this petition indicates the following. Petitioner was a full time student at the Institute of Human Nutrition ("IHM"), part of the College of Physicians and Surgeons at Columbia, from September 2007 until August 2008. In

May 2008, Dr. Kathleen Keller, a professor of clinical nutrition, informed Dr. Sharon Akabas, the Associate Director of IHM, that Richa Garg, another student, told Dr. Keller that she had witnessed petitioner sharing answers with Student V[1] during final examinations for both clinical nutrition and biochemistry. Dr. Keller and Dr. Buchman, the biochemistry professor, were both present during the respective examinations. Although neither Dr. Keller nor Dr. Buchman reported that they had observed this behavior, they both recalled that while petitioner usually sat in the front of the room during class, petitioner sat in the back of the classroom next to Student V during these examinations. Another student, Ruchi Jain, reported that she observed similar behavior during the biochemistry final.[2]

After her communication with Dr. Keller, Dr. Akabas obtained copies of every students' answer sheets for the midterms and final examinations from both courses. Each exam included a multiple choice section. For every examination, petitioner's and Student V's answers, both correct and incorrect, were nearly identical. This conformity of answers was not present in any of the other students' answer sheets. Dr. Akabas reviewed a statical analysis of these answer sheets and determined that it would be virtually impossible for such identical answers to have occurred by coincidence or without each student's participation.

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[1] Pursuant to an Order dated June 26, 2009, the student who allegedly participated in the cheating with petitioner will be referred to as "Student V" in order to protect this student's privacy, as set forth in 20 U.S.C. §1232 g(b) and the regulations thereto (34 C.F.R. Part 99).

[2] Petitioner has since received a statement from Ms. Jain, dated August 25, 2008, denying this alleged admission of guilt.

Dr. Akabas—together with Dr. Deckelbaum, the Director and functioning Dean of IHN—determined that a Dean's Discipline Committee (the "Committee") was needed to review the evidence regarding the allegations of cheating by petitioner and Student V. Although there is debate as to whether Dr. Akabas and Dr. Deckelbaum were part of the Committee or were merely present at the meetings, it is undisputed that Dr. Linda Lewis, Dr. Jeri Nieves and Dr. Bernard Erlanger, faculty members at IHM, were part of the Committee.

On June 15, 2008, petitioner received an e-mail from Dr. Akabas informing him that there was "a concern of irregularities on [petitioner's] exams;" that a Committee has been formed to review these irregularities; that petitioner was to speak with the Committee on June 18; and, that petitioner could bring an advisor (who was not a lawyer) to this meeting. Petitioner replied to this e-mail and asked what Dr. Akabas meant by "irregularities." Dr. Akabas replied, "[p]lease see message below" and attached her previous e-mail.

Before meeting with petitioner, the Committee (together with Dr. Akabas and Dr. Deckelbaum) met to discuss the matter and the disciplinary procedures and process. The Committee was also provided with a statistical analysis of the answer sheets and written statements of both the course instructors and Ms. Garg, the student who first came forward to report the alleged cheating.

On June 18, petitioner, accompanied by a student advisor, met with the Committee, Dr. Akabas, and Dr. Deckelbaum. He was informed that the Committee was assembled in order to determine whether he had cheated on his examinations. Petitioner was shown the same statistical

analysis that was given to the Committee and was asked if he had cheated on his examinations; petitioner denied cheating. He was then asked if he was confronted by another student about cheating, to which he answered, "no." After speaking privately with his advisor, petitioner stated that he had in fact been confronted by another student about his cheating. Petitioner and his advisor offered an argument that a classmate may have cheated from petitioner's examination without his knowledge.

After this meeting, the Committee heard from Ms. Garg and Ms. Jain separately. Ms. Garg stated that she observed petitioner and Student V tap pencils, point to questions, and flip the examination pages during the clinical nutrition final examination. Ms. Garg stated that at one point during the examination, she observed Student V kick petitioner's chair, at which point petitioner immediately turned his examination page. Ms. Jain, Student V's roommate, told the Committee that she had been having disagreements with Student V. Ms. Jain reported that during one of these disagreements, she told Student V that she would report her and petitioner's cheating. Ms. Jain then told the Committee that petitioner later telephoned Ms. Jain and pled with her not to "turn us in".

Dr. Akabas informed petitioner, via e-mail, that a second meeting would be held on July 8, 2008, in order to "offer [petitioner] another opportunity to discuss the irregularities of concern on [petitioner's] exam." Petitioner requested that Andrea Kim be his advisor during this second meeting. However, Dr. Akabas denied petitioner's request to have Ms. Kim present because Ms. Kim was present during one of the examinations and was a potential witness. Petitioner attended the second meeting with a different student advisor, and generally denied any participation in pencil tapping, chair kicking, or cheating.

The Committee determined that both petitioner and Student V were involved in cheating. The Committee decided that both students should receive failing grades in the two courses, but that both students would be permitted to retake these courses after a two-year period of suspension. Dr. Deckelbaum informed petitioner of the Committee's determinations via letter. In his letter, he also informed petitioner that he had a right to appeal.

Petitioner appealed to the Dean of the College of Physicians and Surgeons, Lee Goldman. In his appeal, petitioner argued (a) procedural irregularities, (b) evidentiary errors, and (c) lack of fairness. The Executive Committee of the Faculty Council of the College of Physicians and Surgeons reviewed petitioner's appeal and made a recommendation to Dean Goldman that the Committee's decision be upheld. On January 13, 2009, Dean Goldman sent a letter to petitioner denying his appeal. This proceeding followed.

Determinations of universities, both public and private, are subject to review under Article 78. See Trahms v. Columbia Univ., 245 A.D.2d 124, 125 (1st Dep't 1997); Weidemann v. State Univ. of New York, 188 A.D.2d 974, 975 (3d Dep't 1992). The role of the court is to consider whether the "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed . . . ." C.P.L.R. § 7803. Historically, New York courts have given a high level of deference to universities when reviewing university academic decisions. See Tedeschi v. Wagner College, 49 N.Y.2d 652, 658 (1980). The courts give such a high level of deference in order to preserve the fundamental notion of academic freedom and "are

reluctant to impose the strictures of traditional legal rules" in order to preserve the integral "subjective judgment of professional educators." Id. at 658. Therefore, "the issue reviewed in such a case is whether the institution has acted in good faith or its action was arbitrary or irrational." Id. Accordingly, petitioner must show that the University's determination was arbitrary and irrational in order to warrant judicial intervention.

The record reflects that Columbia substantially complied with its own procedures. Unlike a student at a state institution, a student at a private university is not afforded "the full panoply of due process guarantees." Mu Chapter of Delta Kappa Epsilon Alumni Corp. v. Colgate Univ., 176 A.D.2d 11, 13 (3d Dep't 1992). Instead, when reviewing a determination made by a private university, judicial intervention will be warranted if the court concludes that the private university did not substantially observe a university established procedural rule or guideline. Tedeschi, supra, 49 N.Y.2d 660. Therefore, in order to warrant judicial intervention in this instance, petitioner must show that the University failed to substantially comply with one of its own published procedural guidelines. Petitioner has failed to do so.

Columbia has established and published its own set of procedural guidelines, the "Dean's Discipline," designed to govern the actions taken by the University in this type of disciplinary situation. Petitioner contends that Columbia failed to abide by its own rules in various ways, depriving petitioner of his rights. Petitioner argues that the University (1) failed to follow its own rules when it did not provide him with adequate written notice of the specific charges against

petitioner prior to the convening of a disciplinary panel, and (2) failed to follow its own rules regarding Committee membership.[3]

Columbia's procedures do not require written notice of the nature of the charges. The Dean's Discipline sets forth:

> Ordinarily, a disciplinary proceeding begins with a written communication from the Office of the Dean of Students requiring the student to attend a disciplinary hearing to respond to a specified charge. (In rare cases, the proceeding may begin with an oral communication requiring the presence of a student at a hearing).

The use of "ordinarily" coupled with the second sentence contained in parentheses, indicates that although written notice of the specified charge is ordinary procedure, as little as oral communication requiring a student's presence will substantially comply with this guideline. Columbia substantially complied with its own procedural guidelines when Dr. Akabas e-mailed petitioner and explained that there was a "concern of irregularities" on his exams. While there was no mention of cheating in the e-mail communication, petitioner was informed verbally of the specific nature of the charges and the evidence during the first meeting on June 18, 2009. A second meeting was scheduled for July 8, 2008. Petitioner was given ample time to develop a defense between the first and second meetings, which were held twenty days apart.

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[3] Petitioner also mentions other arguments seemingly meant to be grouped under the umbrella assertion of non-compliance with procedural guidelines. These tangential arguments are unavailing. They include: petitioner's contention that he was deprived his right to have an advisor of his choosing at the meeting; that Dr. Akabas was biased against him; that Student V did not receive punishment for his or her participation in the cheating; and, that his appeal was reviewed in an untimely manner.

Petitioner relies on Starishevsky v. Hofstra Univ., 161 Misc. 2d 137 (Sup. Ct. Suffolk Co. 1994), when he claims that Dr. Akabas' e-mail did not comport with the notion of fundamental fairness because it did not specifically lay out the charges against him. Petitioner's reliance on Starishevsky is misplaced. Although the Starishevsky court held that within the notice "[t]he dates and nature of the conduct which is the subject of the inquiry must be sufficiently precise to allow for the presentation of an intelligent defense" (id. at 145), the situation in Starishevsky can easily be distinguished from petitioner's situation. First, unlike petitioner, Starishevsky was not a student. Starishevsky was employed by Hofstra University as a psychologist and an as administrator and faculty member. Second, although Starishevsky was given notice of specific charges, the panel disciplined Starishevsky on completely unrelated charges in contradiction to the notice previously given. Id. at 146. Here, in contrast, petitioner was informed of a concern of irregularities, was verbally informed of the specific charge of cheating, and was ultimately disciplined for cheating, not for an unrelated charge for which notice was not given.

Similarly, petitioner's reliance on Ebert v. Yeshiva Univ., 4 Misc. 3d 699 (Sup. Ct. N.Y. Co. 2004), is also misplaced. In Ebert, the court ruled that judicial intervention was needed because the university failed to give advance notice of the exact charges against Ebert, which denied him the opportunity to defend himself effectively. However, unlike petitioner herein, Ebert was given no written or oral notice prior to his meeting with the disciplinary panel. Furthermore, the meeting in which he was informed of the charges against him was Ebert's sole opportunity to respond to the charges. Id. at 702. Here, petitioner was informed via e-mail that there was a concern of irregularities on his exams, was informed of the specific nature of the charges at the first meeting,

and was given an additional opportunity to defend himself at a second meeting twenty days after the first.

The composition of the Committee was not substantially contrary to the guidelines contained in the Dean's Disciplinary procedures. The procedures set forth that the disciplinary Committee is to be comprised of the Associate Dean for Students Affairs and two other members of the Faculty of the College of Physicians and Surgeons, appointed by the Dean of the College of Physicians and Surgeons. The Committee consisted of Dr. Linda Lewis, Dr. Jeri Nieves and Dr. Bernard Erlanger. Although Dr. Lewis was not the acting Associate Dean for Student Affairs at the time of the proceedings, Dr. Lewis had held the position of Associate Dean for Student Affairs for twenty-six years prior to the proceedings and her presence was, therefore, in substantial, although not literal, compliance with the guidelines. Because of Dr. Lewis' twenty-six years of experience in this role, her presence in place of the present Associate Dean for Student Affairs was reasonable. Dr. Lewis' presence, in place of the Associate Dean for Student Affairs, did not prejudice petitioner, nor did it deprive him of a fair hearing.

Also, petitioner argues that Dr. Akabas' and Dr. Deckelbaum's presence at the Committee meetings was substantially contrary to the protocol set forth in the Dean's Discipline. However, petitioner has failed to show that Dr. Akabas or Dr. Deckelbaum had a vote in the final determination of the Committee[4], nor has petitioner provided evidence to show that their presence

[4] Dr. Akabas's and Dr. Deckelbaum's affidavits state that, although they were present and participated in the meetings, they did not take part in the Committee's final vote and recommendation.

in any way violated the procedures set forth in the Dean's Discipline. The Dean's Discipline is silent as to whether other individuals may be present or participate in the proceedings. Without evidence showing that Dr. Akabas' or Dr. Deckelbaum's presence somehow substantially violated the guidelines set forth by respondent, petitioner's arguments must be rejected.

Petitioner also makes various arguments regarding the evidence reviewed by the Committee. Petitioner argues that the statistical evidence was inconclusive. However, petitioner does not provide a competing reasonable statistical evaluation or theory in order to explain the nearly identical answer sheets on four examinations. The Committee's review of the statistical evidence, and its reliance on it as the main evidence against petitioner, is not arbitrary or irrational and does not warrant judicial intervention.

Although petitioner does not rely on Basile v. Albany College of Pharmacy of Union Univ., 279 A.D.2d 770 (3d Dep't 2001), wherein the court ruled that the University's determination, based solely on a statistical compilation, was arbitrary and capricious, this case is instructive, and is readily distinguishable from the present matter. First, Albany College's determination was based solely on statistical evidence (id. at 771), while Columbia's determination here was corroborated by witness statements. Second, Basile rebutted the statistical evidence with an affidavit from an expert statistician. Id. Petitioner did not provide any evidence from an expert. Lastly, the Basile court reasoned that sole reliance on a statistical compilation was unreasonable, because petitioners in that proceeding took the examinations in separate rooms "under the watchful eye of a proctor, who discerned no evidence of cheating." Id. at 772. Here, in contrast, not only were petitioner and Student V in the same room, but Ms. Garg observed pencil tapping, chair kicking, and paper turning.

Similarly, petitioner's contentions regarding Ms. Jain's statement do not show that the Committee's determination was arbitrary and capricious. First, petitioner argues that Ms. Jain has withdrawn her statement regarding petitioner's alleged admission and that this withdrawal warrants judicial review and intervention. This argument is not compelling. The Committee member affidavits indicate that each Committee member made his or her determination based primarily on the statistical evaluation of the answer sheets. Although Ms. Jain's statement was used to corroborate this statistical evidence, it is reasonable to conclude that the Committee would have come to the same determination with or without Ms. Jain's statement. Petitioner did not obtain Ms. Jain's retraction until well after the Committee's determination was made; the statement eliminates only petitioner's alleged admission of guilt. The retraction does not provide any evidence that petitioner did not in fact participate in the alleged cheating.

Second, petitioner argues that the Committee's reliance on Ms. Jain's statement substantially violated respondent's own procedural guidelines because petitioner was not informed of Ms. Jain's statement prior to the Committee's determination and was, therefore, unable to obtain a retraction in time to present it as evidence. However, the Dean's Discipline procedures do not give petitioner the right to be informed of every witness' statement. In fact, the Dean's Discipline specifically states, "the student need not be present to hear other witnesses and there is no formal cross examination of witnesses or objecting to evidence."

Finally, petitioner argues that the penalty is excessive because the Committee's recommendation allegedly advised a suspension until September 2009 and petitioner was ultimately

suspended until the Spring Semester, 2010. Petitioner argues that the penalty was excessive because it ignored the Committee's recommendation. The University's response is that the two courses petitioner will be allowed to retake after his period of suspension are offered only during the Spring Semester and, accordingly, the suspension was altered in order to accommodate this scheduling issue. Under Article 78, judicial scrutiny of a university's disciplinary determination may not include a ruling that alters the penalty imposed by the university unless the penalty is so excessive that it is "shocking to one's sense of fairness." Gagliani v. Hofstra Univ., 118 A.D.2d 572 (2d Dep't 1986). Here, the penalty imposed on petitioner was not so excessive as to be "shocking to the conscience." Whatever the reason for the alleged enlargement of the period of suspension, an enlargement of the recommended period of suspension by one academic semester cannot reasonably be described as so excessive as to be "shocking to the conscience." Id.

For all of these reasons, the petition is denied and this proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: August 12, 2009

JOAN B. LOBIS, J.S.C.