

Matter of Flores v New York Univ.

2009 NY Slip Op 32834(U)

November 30, 2009

Supreme Court, New York County

Docket Number: 112583/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 5

Index Number : 112583/2009

FLORES, LEN

VS.

NEW YORK UNIVERSITY

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

1, 2, 3,

4, 5

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 04 2009

NEW YORK

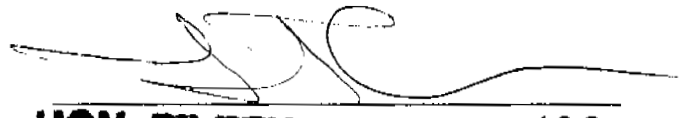
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH

ACCOMPANYING DECISION / ORDER

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

Dated: 11/30/09



HON. EILEEN A. RAKOWER *s.c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
In the Matter of the Application of
LEN FLORES

Index No.
112583/09

-against-

Petitioner,

Respondent,

NEW YORK UNIVERSITY,

FILED
DEC 04 2009
NEW YORK
COUNTY CLERK'S OFFICE

DECISION
and ORDER

Mot. Seq.
001 & 002

-----X
HON. EILEEN A. RAKOWER:

Petitioner Len Flores ("Petitioner") brings this proceeding pursuant to CPLR Article 78 for an order annulling his dismissal from the New York University College of Dentistry ("NYUCD" or "the College") for violating NYUCD's Code of Ethics and Professional Conduct ("the Code").

Petitioner is a male of Filipino ancestry from East Long Angeles, California. He states that he suffers from Attention Deficit Hyperactivity Disorder ("ADHD"), and that he "is the product of a disadvantaged background with a goal to return and serve the minority population in his underprivileged home neighborhood." Petitioner is also a member of the United States Armed Forces, having signed up for the Armed Forces Health Professions Scholarship Program with the U.S. Navy, which pays for Petitioner's NYUCD education in exchange for his commitment to serve in the U.S. Navy for a specified period of time.

On February 5, 2009, formal disciplinary charges were brought against Petitioner pursuant to §II(A)(3) of the NYUCD Code. This section holds that it is a violation of the Code to, *inter alia*, "cheat[] or plagiari[ze] during any examination, quiz, or assigned academic activity;" or to "misrepresent[] one's own academic or clinical work." An investigation into Petitioner's alleged misconduct was prompted by several fellow second-year, or "2D" NYUCD students who reported Petitioner's alleged repeated misconduct and unprofessional behavior to the College the previous day.

Pursuant to the Code, an Investigating Panel ("the Panel") was appointed by the Chair of the NYUCD Council on Ethics and Professionalism. The Panel consisted of faculty member Alla J. Wheeler; and Jeanna Tolli, a student. Wheeler and Tolli interviewed the complaining students, Petitioner, and two individuals whom Petitioner recommended the Panel interview with respect to Petitioner's character.

The Panel interviewed Ryan Woody, a 2D, who signed an affidavit alleging that, on July 25, 2008, he observed Petitioner take beers from a reception and bring them into a lecture, where he proceeded to drink a beer, and distribute beers to other students. He also stated that Petitioner ran a fund raiser in which there were neither receipts, nor an accounting of the proceeds which were raised. Woody stated that, while he has never observed Petitioner cheating, he had been told that Petitioner used finger signals to cheat.

In an interview with D2 Hunter Martin, Martin signed a statement concerning the incident with the beers. Martin also signed a statement that Petitioner has a reputation for being "sketchy," and for cheating. Martin stated that she had never personally observed Petitioner cheating.

In an interview with D2 Rustin Reidhead, Reidhead signed statements stating that, in four separate instances in the Spring 2008 semester, he observed Petitioner violate the rules during practicals by removing his typodont from the mannequin head to perform work on it.

In an interview with D2 Catherine Le, Le signed four statements. One statement pertained to Petitioner's alleged cheating during an Organ Systems, Basic Tissues and Facial Growth and Development Conference, wherein Petitioner obtained answers by looking at another student's paper and relaying the answers to other students via hand signals. In another statement, Le alleged that she observed Petitioner remove the tooth from a mannequin head during an exam in Spring 2008. The third statement involved the incident with the beers. In her fourth written statement, Le stated that Petitioner organized a "Lunch & Learn" seminar in which he introduced fellow students to a laser eye surgeon. The surgeon disclosed to the audience that Petitioner would receive \$1,000 per referral to the doctor, and stated that Petitioner would donate some of the proceeds to charity, as well as return \$150 to each student who received the surgery. Le stated that, while she never observed Petitioner cheating on an exam or a quiz, she had heard that

Petitioner cheats, and that she is “fed up” with Petitioner getting away with cheating.

D2 Class President Matthew Lamb was interviewed by the Panel as well. Lamb wrote and signed a letter in support of the above students. Lamb stated that he had been told that Petitioner cheats and has been caught cheating during a practical, but had no firsthand knowledge of either.

The Panel interviewed Petitioner as part of its investigation. The Panel’s March 13, 2009 report states that Petitioner admitted that he sat behind a fellow student with the intention of looking at his paper to cheat during a quiz. However, Petitioner in his petition denies that he ever admitted to cheating, and states that, while he did admit to “glancing at another student’s quiz answers on a single occasion,” it was done inadvertently and not with the intention to cheat. The Panel also interviewed two individuals whom Petitioner recommended that they speak with concerning Petitioner’s good character.

Based upon their investigation, the Panel found that there was a preponderance of the evidence to support a violation of NYUCD Code §II(A)(3). Accordingly, a hearing was held pursuant to NYUCD Code §IV(C) on April 14, 2009. Petitioner appeared at the hearing with his father and Jane Rosenthal, who at the time was the Assistant Director of Academic Advisement and Student Retention at NYUCD, as advisors.

After the hearing, the Council on Ethics and Professionalism concluded that Petitioner

committed an ethical violation of the Code when he cheated from a fellow student. In addition he committed a violation when during a practical examination, in clear violation of the stated rules, he removed a typodont from the [mannequin] head, checked his work and then returned it to the head and continued working.

Based on the above, the Council recommended dismissal from NYUCD without the possibility of readmission.

By letter dated April 16, 2009, NYUCD Dean Richard Vogel informed Petitioner that he concurred with the Council's findings and was therefore dismissing him from the College. By letter dated May 1, 2009, Petitioner, by counsel, appealed his dismissal pursuant to Code §IV(D). As part of his appeal, Petitioner submitted numerous letters from friends, family, former coworkers and fellow students attesting to Petitioner's good character and asking that Petitioner not be dismissed from the College.¹ By letter dated May 7, 2009, Dean Vogel advised Petitioner that the Review Board unanimously voted to deny his appeal, and that he was thereby disenrolled from the College. The instant Petition ensued.

Petitioner argues that his dismissal from NYUCD was arbitrary and capricious, as it was based on "slandorous hearsay" from a few students who did not personally observe Petitioner cheat. Further, Petitioner alleges that the students who reported him discriminated against him on the basis of Petitioner's Filipino ancestry, his learning disability, his economically disadvantaged upbringing, and his military service. Annexed to the petition as exhibits are copies of Petitioner's Service Agreement with the U.S. Navy; the 2/5/09 letter informing Petitioner that he was being charged with a violation of the Code; the Panel's 3/13/09 report; the Council's 4/14/09 report; Dean Vogel's 4/16/09 letter advising Petitioner of his decision to dismiss Petitioner; the NYUCD Code; a handwritten letter dated 4/30/09 from Dr. Bucklan, the professor of the class in which the alleged typodont incident occurred, wherein Dr. Bucklan states that removing a typodont during a practical would be a "critical error" resulting in failure of the practical, but not a violation of the Code; a 9/24/07 letter verifying Petitioner's disability and recommending several accommodations for Petitioner; an undated letter from Mr. Lamb concerning Petitioner's appeal; Petitioner's good character letters; the annual report of NYUCD's Council on Ethics and Professionalism; Petitioner's 5/1/09 written appeal; and the 5/7/09 letter dismissing Petitioner from the College.

Respondent NYUCD has cross-moved to dismiss the Petition pursuant to CPLR §3211(a)(1), based upon the documentary evidence annexed to the Petition. NYUCD argues that its decision to dismiss Petitioner was in compliance with the NYUCD Code and was the product of the exercise of honest discretion, and thus is entitled to deference from the court.

¹The court notes that Code §IV(D)(3) holds that appeals "shall be limited to a review of the full report of the Council for the purpose of determining whether the Council acted fairly in light of the charges and evidence presented at the hearing."

Petitioner has submitted an affirmation in opposition, and NYUCD has responded with a reply memorandum. In addition, Petitioner submits a sur-reply, which contains a notarized letter from Jane Rosenthal, who appeared at Petitioner's hearing as an advisor. In her letter, Rosenthal states that Petitioner never admitted to cheating on the quiz during his hearing.

It is well settled that "judicial review of an educational institution's disciplinary determination involving nonacademic matters is limited to whether the institution substantially adhered to its own published rules and guidelines and was not arbitrary and capricious" (*Qurecia v. New York University*, 2007 NY Slip Op 5439, *2 [1st Dept. 2007]) (citations omitted). With respect to the magnitude of the sanction imposed by the university, a reviewing court can only overturn the punishment imposed if it is "so disproportionate as to shock one's sense of fairness" (*id.*; see also *Pell v. Board of Education*, 34 N.Y.2d 222, 233 [1974]).

Here, the court finds that NYUCD's decision must be upheld because the College substantially complied with its own Code, and its determination was rationally based after consideration of all the evidence before it. While Petitioner disputes that he explicitly admitted to cheating on a quiz, Petitioner himself states in the petition that he "admitted to briefly glancing at another student's quiz on a single occasion." While Petitioner maintains that this was inadvertent - and was in fact the product of his ADHD - Petitioner's facially plausible explanation does not render NYUCD's contrary finding (*i.e.*, that Petitioner looked at the student's quiz to obtain answers) unreasonable or arbitrary. Accordingly, the court cannot disturb NYUCD's findings of fact and assessments of witness credibility (*see Ebert v. Yeshiva Univ.*, 28 A.D.3d 315, 316 [1st Dept. 2006]). Finally, where Petitioner was found to have cheated on a quiz, the court cannot conclude that the penalty of expulsion was so disproportionate to the offense as to shock the conscience.

Wherefore it is hereby

ADJUDGED that the Petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: November 30, 2009



EILEEN A. RAKOWER, J.S.C.

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