

Matter of Katz v New York Univ.
2011 NY Slip Op 32999(U)
November 10, 2011
Supreme Court, New York County
Docket Number: 106092/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA JAFFE
J.S.C. Jaffe

PRESENT: _____

PART 5

Index Number : 106092/2011
KATZ, AKIVA
vs.
NEW YORK UNIVERSITY
SEQUENCE NUMBER : 001
ARTICLE 78

CAL # 71

INDEX NO. 106092/11
MOTION DATE 8/16/11
MOTION SEQ. NO. 001
MOTION CAL. NO. 71

this motion to/for Article 78

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

PAPERS NUMBERED	
1	_____
2	_____
3, 4	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

NOV 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/10/11
NOV 10 2011

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

-----X

In the Matter of the Application of:
AKIVA KATZ,

Petitioner,

Index No. 106092/11

Argued: 8/16/11
Motion Seq. No.: 001
Motion Cal. No.: 71

DECISION & JUDGMENT

For a Judgment pursuant to Article 78
of the Civil Practice Law and Rules

-against-

NEW YORK UNIVERSITY,

Respondent.

-----X

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NEW YORK
COUNTY CLERK'S OFFICE

By amended notice of petition dated June 7, 2011, petitioner brings this proceeding pursuant to CPLR Article 78 seeking a judgment requiring respondent to remove from his academic record any indication that he was enrolled in General Physics I and was withdrawn from the course because he committed plagiarism, and awarding him money damages. Respondent opposes, and by memorandum of law dated June 23, 2011, cross-moves for an order

dismissing the petition. Petitioner opposes.

I. BACKGROUND

In the fall of 2007, petitioner matriculated at respondent University which addresses plagiarism as part of its Academic Integrity Policy as follows:

Plagiarism is the severest form of academic fraud. Plagiarism is theft. Obviously, . . . copying all or part of a paper straight from a book, the Internet, or a fellow student is a violation of the principle. But there are other forms of cheating or plagiarizing which are just as serious, for example: . . . presenting as your own facts, ideas, or written text gathered or downloaded from the Internet.

. . .

When in doubt about whether your acknowledgment is adequate and proper, consult your instructor.

(*Id.*, Exh. N).

The AIP also sets forth the procedures for disciplining a student who has committed plagiarism:

- a) The faculty member, with the approval of the Director of Undergraduate Studies, may reduce the student's grade or give the student an F in the course.
- b) If after lowering the grade or assigning an F the department believes a more severe penalty (i.e., probation, suspension, or expulsion) is warranted, it can refer the case to the Dean or his/her representative (Associate Dean for Students) for further action.

In all cases of either (a) or (b), the Director shall inform the Department Chair of any action in writing and send copies of the letter to the Dean and to the student. The letter shall include the nature of the offense, the penalty, and the right of the student to appeal such penalty.

(*Id.*).

Throughout college, petitioner took premedical courses, and during the fall 2010 semester, enrolled in General Physics I, taught by Professor Burton Budick. (Pet.). According to Budick's syllabus, the course included lecture and laboratory components, and each student was

required to complete 11 laboratory reports over the course of the semester, the 10 highest graded reports constituting 20 percent of his or her final grade. (*Id.*, Exh. B). The syllabus also provides that “[the] lab instructor will give you full instructions on what you are expected to do in the laboratory and how to write lab reports.” (*Id.*).

Having received no instructions from his lab instructor, petitioner completed his first lab report by answering the questions regarding the experiment contained in the laboratory manual. (Pet.). He received 38 out of a possible 100 points on the report, a failing grade, and met with his lab instructor, who told him that he needed to do better on his reports and that he could “drop” the grade but provided no instruction as to how to complete future reports. (*Id.*, Exh. P).

Following the meeting, petitioner asked friends who had taken Budick’s course and earned high grades how they had completed their laboratory reports. They responded by sending him their lab reports which included introductory sections detailing the experiment’s objectives, procedures, and underlying theories, along with information paraphrased or copied verbatim from the laboratory manual. (*Id.*, Exhs. G, H, I, J, K, L, M). Based on these reports, petitioner believed that it was permissible to copy information from outside sources and paste it directly into the introductory sections of his report, and he did so in his third one, copying language taken directly from the Internet and his manual, without citation. (*Id.*, Exhs. D, E). The analytical portions of the report contained his original work. (*Id.*).

On October 14, 2010, petitioner was called into a meeting with Budick and Professor David Hogg, NYU’s Director of Undergraduate Studies, during which Budick accused petitioner of plagiarizing his third laboratory report, and told him that he would be assigned a failing grade in the course, that he could be suspended or expelled, that the matter had been referred to NYU

Associate Dean Richard Kalb, and that he must schedule an appointment with Kalb to discuss the matter. (Pet.).

Later that day, Budick emailed petitioner the documents he had sent to Kalb for his review, including the lab report, the section of the laboratory manual pertaining to the experiment, and the results of Google searches demonstrating that petitioner had copied information verbatim from the Internet in his report. (*Id.*, Exh. E).

On October 18, 2010, petitioner, his brother, and his mother met with Kalb, Budick, and Hogg. (*Id.*, Exh. F). Kalb assured petitioner that he would not be suspended or expelled, as this was his first offense, and at his mother's and brother's request, permitted petitioner to explain his actions. (*Id.*). Petitioner then stated that he believed he was not plagiarizing in copying information verbatim without quoting or citing it, as his friends had done so in the past and received high grades, that his laboratory instructor had provided him with no instruction to the contrary, and the course's web page provided no direction as to how laboratory reports should be completed. (*Id.*). He also emphasized that he had made no effort to conceal his copying and pasting and that he did not copy any information in the analytical portions of the report. (*Id.*).

Kalb reviewed the report, confirming that it contained both copied and original material, and examined petitioner's friends' reports. (*Id.*). Budick told petitioner that he should have asked him for guidance as to how to write his report and that he was withdrawing him from the course, assigning him a failing grade, and noting on his academic record that he had committed plagiarism. (*Id.*). Although petitioner presented Budick with the reports on which he relied, Budick refused to review them, and when asked how much originality was required in order to avoid a charge of plagiarism, he responded that there must be "interspersed connecting

sentences” or “some original words,” but did not indicate how many original words are necessary or whether petitioner’s friends had plagiarized their reports. (*Id.*). Budick, Hogg, and Kalb kept no copies of petitioner’s friends’ reports. (*Id.*).

Later that day, petitioner’s laboratory instructor notified his class by email that they were no longer required to include introductory sections in their reports. (*Id.*, Exh. O).

By email of the same date, petitioner asked Hogg to meet to again discuss the matter. (*Id.*, Exh. P). By email dated October 19, 2010, Hogg asked petitioner to provide him with a written summary of what he would like to present to him, and by email of the same date, petitioner explained his actions, alleging that he had sought his friends’ guidance because neither Budick nor his laboratory instructor provided him any instruction, and after noticing that they had copied “word for word” from the laboratory manual, concluded “that the way to write a good report was to do such a copy and paste job; a copied preamble followed by one’s own calculations and data” He admitted becoming presently aware that copying and pasting information in a laboratory report is impermissible, as his friend informed him that a guide to writing lab reports is available online, and it expressly prohibits plagiarism, but maintained that he was unaware of the guide before he wrote the third report, as it was not mentioned on the course’s web page. He maintains the penalty of a failing grade is disproportionate to his offense. (*Id.*).

The same day, petitioner’s mother called Kalb to determine the status of the matter, and was told that Hogg and Budick would make the final decision which he could not overrule. (Pet.).

By email dated October 22, 2010, Budick informed petitioner that “[i]n view of [his] clear act of plagiarism [he] will receive a grade of F for General Physics I” (*Id.*, Exh. Q).

By email dated October 25, 2010, petitioner notified Hogg of Budick's email and requested a response to his October 19 email. In response, Hogg stated that they had "discussed the case, including all available evidence, and the decision of Prof[essor] Budick is confirmed and final." (*Id.*, Exh. P).

By letter dated December 15, 2010, petitioner's counsel explained the matter to Matthew S. Santirocco, Dean of NYU's College of Arts and Sciences, and asked that any evidence of petitioner's enrollment in the course be expunged from his record. (*Id.*, Exh. R). By email dated December 17, 2010, NYU's general counsel proposed that petitioner's grade in the course not be posted to his transcript until January of 2011 so that she could investigate his case, and by email of the same date, petitioner's counsel agreed. (*Id.*, Exh. S).

By letter dated December 26, 2010, Hogg informed petitioner that he approved Budick's decision to withdraw him from the course and assign him a failing grade and that he had a right to appeal this determination to Kalb. (*Id.*, Exh. T).

By letter of the same date, NYU's general counsel responded to petitioner's counsel's December 15 letter, stating that NYU deemed it an appeal of Hogg's determination and that the appeal was denied. (*Id.*, Exh. U).

II. CONTENTIONS

In support of his petition, petitioner asserts that respondent's determination that he had plagiarized his laboratory report is arbitrary and capricious, given Budick's refusal to consider his friends' reports, that he had no notice that copying such information verbatim constitutes plagiarism, and that the penalty of assigning a failing grade is disproportionate to his offense and shocks one's sense of fairness as he did not intend to plagiarize and he may thereby be prevented

from attending medical school. (Pet.). He also claims that there exists an implied contract between him and respondent providing that he would receive credit for the classes he completes commensurate with his performance, which respondent has violated by prohibiting him from completing the course. (*Id.*).

In opposition, and in support of its cross motion to dismiss, respondent contends that its determinations that petitioner plagiarized the report and that he should receive a failing grade are academic in nature and neither arbitrary nor capricious, as its AIP defines plagiarism as including "copying all or part of a paper straight from . . . the Internet," petitioner admitted to doing same, it is impossible to detect all instances of plagiarism, and thus that petitioner has failed to state a cognizable claim under Article 78. (Mem. of Law Supporting Respondent's Motion to Dismiss).

In reply, and in opposition to respondent's cross-motion, petitioner claims that respondent's determinations are disciplinary in nature, as he was thereby denied an opportunity to complete additional course work evaluated on its merits, and maintains that its actions are arbitrary and capricious insofar as Budick treated him differently from students who had included copied sections in their laboratory reports in the past, refused to consider his belief that, absent guidance as to how to complete a report, he was doing so correctly, and later eliminated the sections in which he included copied material from the reports, thereby admitting that copying and pasting information therein had constituted an accepted practice. (Petitioner's Mem. of Law in Opposition). Moreover, petitioner argues that the penalty is shocking to one's sense of fairness, as his report included his original work, and it may prevent him from pursuing his chosen career path. (*Id.*).

In sur-reply, and in reply to petitioner's opposition to its cross-motion to dismiss,

respondent maintains that it made academic determinations regarding petitioner's actions and penalty, noting that, in contrast to cases where disciplinary actions are challenged, petitioner does not claim that it failed to follow its disciplinary procedures. (Reply Mem. of Law Supporting Respondent's Motion to Dismiss). claims that its determinations were neither arbitrary nor capricious, as the AIP prohibits petitioner's conduct regardless of his intentions or beliefs, and other students' conduct and the change in report requirements have no bearing on whether petitioner's actions constituted plagiarism. (*Id.*). Moreover, it denies that the penalty of a failing grade is disproportionate to petitioner's offense and that petitioner has an implied contractual right to continued enrollment in the course, as any contract between them arose from its published policies, and its AIP expressly provides that a student who plagiarizes may be assigned a failing grade. (*Id.*).

III. ANALYSIS

A. Absence of notice of cross-motion

Respondent's motion for an order dismissing the petition is improperly interposed absent a notice of cross-motion seeking such relief. (CPLR 2215; Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C2215:1D [2010 main vol]; Siegel, NY Prac § 249 [3d ed]; see *Rinaldi v Rochford*, 77 AD3d 720 [2d Dept 2010] [to extent plaintiff requested relief in opposition to defendant's motion, relief should have been sought in notice of cross-motion]; *Chun v N. Am. Mtge. Co.*, 285 AD2d 42 [1st Dept 2001] [court had no jurisdiction to grant relief to defendants absent notice of cross-motion]).

B. Academic or disciplinary determination and standard of review

An educational institution's academic determinations regarding students' grades or their

“academic capabilities” or performance are beyond the scope of judicial review absent “bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation.” (*Matter of Susan M. v New York Law School*, 76 NY2d 241, 247 [1990]; *Matter of De Jong v Kings County Hosp. Ctr.*, 27 AD3d 398 [1st Dept 2006]). “This standard has rarely been satisfied in the context of challenges to academic determinations because the courts have repeatedly refused to become involved in the pedagogical evaluation of academic performance.” (*Matter of Susan M.*, 76 NY2d at 246).

In contrast, judicial review of an academic institution’s disciplinary determinations, such as whether a student plagiarized and how he or she should be penalized for doing so, is limited to whether it “substantially adhered to its own published rules and guidelines” and whether the determinations are based on “a rational interpretation of the relevant evidence” such that they are neither arbitrary nor capricious. (*Matter of Katz v Bd. of Regents of the Univ. of the State of New York*, 85 AD3d 1277, 1279 [3d Dept 2011]; *Matter of Dequito v New School for Gen. Studies*, 68 AD3d 559 [1st Dept 2009]; see *Matter of Warner v Elmira Coll.*, 59 AD3d 909 [3d Dept 2009]; *Matter of Quercia v New York Univ.*, 41 AD3d 295 [1st Dept 2007]; see also *Tedeschi v Wagner Coll.*, 49 NY2d 652 [1980]).

Here, as respondent issued no finding as to petitioner’s substantive performance on the laboratory report, determining only that he plagiarized it and that he must be withdrawn from the course and receive a failing grade for it, its determinations were disciplinary in nature. (*Compare Matter of Susan M.*, 76 NY2d 241 [professor’s grading of examination and law school’s decision to expel student on basis of grade point average considered academic determinations], and *Matter of Gilbert v State Univ. of N.Y. at Stony Brook*, 73 AD3d 774 [2d Dept 2010] [student’s

dismissal from medical school on basis of failing clerkship grade considered academic determination], with *Matter of Katz*, 85 AD3d 1277 [college's determination that student plagiarized and that he should receive failing grade in course as result considered disciplinary determination], and *Matter of Dequito*, 68 AD3d 559 [same]). Consequently, whether respondent complied with its AIP and whether its decisions are arbitrary or capricious must be determined.

1. Compliance with disciplinary procedures

Petitioner does not deny that respondent complied with the AIP.

2. Arbitrary and capricious

“A[n educational institution's] disciplinary determination will be upheld and not be deemed arbitrary or capricious if it is based on a rational determination of the relevant evidence” (*Matter of Katz*, 85 AD3d at 1279).

Here, respondent's determination that petitioner plagiarized his laboratory report was based on Google searches of language contained in the report, which evidenced plagiarized Internet sources without quotes or citations, a comparison of his report and the laboratory manual, which reflected that he copied verbatim information from the manual in his report, and his admission that he copied information from these sources and pasted it in his report. Although he may have believed that he did nothing wrong and did not intend to plagiarize, and although neither Budick nor his laboratory instructor provided instruction as to how to complete a report, the AIP does not require that a student's intention be considered in determining whether he or she committed plagiarism, and it expressly provides that a student unsure of whether he or she correctly cited information to consult with his or her professor. And, that others may have

plagiarized in the past, does not render respondent's determination arbitrary or capricious, as the AIP does not mandate that all students who commit plagiarism be penalized similarly. In any event, there is no evidence that Budick determined that others plagiarized and chose to ignore it.

As respondent's determination is supported by evidence in the record, it is neither arbitrary nor capricious.

C. Breach of contract

"Only specific promises set forth in a school's bulletins, circulars, and handbooks, which are material to the student's relationship with the school, can establish the existence of an implied contract." (*Cheves v Trustees of Columbia Univ.*, 2011 WL 5220319, 2011 NY Slip Op 7731 [1st Dept 2011]; *Keefe v New York Law School*, 71 AD3d 569, 570 [1st Dept 2010]).

Here, petitioner offers no evidence that respondent promises in its published materials to provide students with an opportunity to complete work that will be graded on its merits regardless of whether they commit plagiarism. To the contrary, the AIP expressly provides that a student who plagiarizes may be assigned a failing grade in the course in which he or she submitted the plagiarized work. Therefore, petitioner has failed to state a claim for breach of contract. (*See Keefe*, 71 AD3d 569 [no breach of contract claim where student claimed that school breached covenant of good faith and fair dealing in failing to grade course on pass/fail basis, as bulletin does not provide for pass/fail grading system but rather sets forth letter grade scale]).

D. Proportionality of punishment

The standard for reviewing a penalty imposed by an educational institution is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances,

as to be shocking to one's sense of fairness." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; *Matter of Quercia*, 41 AD3d at 297).

Here, although petitioner had a previously unblemished record, did not intend to plagiarize, and included his original work in the report, he admitted to engaging in conduct defined as plagiarism in the AIP, "the severest form of academic fraud." As respondent took into account that this was his first offense in assigning him a failing grade, the least severe of the penalties for plagiarism listed in the AIP, and as he would be absolved of all responsibility for committing this serious ethical violation were NYU to expunge from his academic record any indication that he was enrolled in the course, his penalty is not shocking to one's sense of fairness. (*Cf. Matter of Flores v New York Univ.*, 79 AD3d 502 [1st Dept 2010] [where student admitted to and found guilty of cheating, penalty of expulsion without possibility of reinstatement not shocking to one's sense of fairness]; *Matter of Kickertz v New York Univ.*, 2011 NY Slip Op 50131[U], 30 Misc 3d 1220[A] [Sup Ct, New York County 2011] [where dental student with previously unblemished record found guilty of falsifying patient records in order to obtain academic credit, penalty of expulsion without possibility of reinstatement not shocking to one's sense of fairness, as student committed serious ethical violation]).

E. Money Damages

Compensatory damages are available in an Article 78 proceeding only where they are incidental to the primary relief sought. (CPLR 7806; *Gross v Perales*, 72 NY2d 231 [1988]). Here, as petitioner is not entitled to primary relief he seeks, he is not entitled to compensatory damages.

IV. CONCLUSION

While it is unfortunate that the penalty may have future consequences for petitioner, there is an insufficient legal basis for cleansing his academic record. Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding is dismissed.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: November 10, 2011
New York, New York

Nov 10 2011

FILED

NOV 16 2011

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