NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART **25**

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In the Matter of the Application of
HOWARD ROBINSON,

Petitioner,

- against -

FORDHAM UNIVERSITY,

Respondent,

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

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Index №. 812584/2021E

Hon. **MARY ANN BRIGANTTI**
Justice of the Supreme Court

The following papers numbered 1 to 72 were read on these motions **(Seq. No.** 1) for **Article 78 (Body or Officer)** noticed on **November 22, 2021** and duly submitted as **Nos.** on the Motion Calendar of **January 23, 2023**

Sequence No.	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	1-7
Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	54-69
Reply Affidavit	71-72

This petition is decided in accordance with the accompanying memorandum decision.

Dated: DECEMBER 21, 2023

Hon. _____
Mary Ann Brigantti, J.S.C.

1. CHECK ONE..... ☒ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.....
3. CHECK IF APPROPRIATE.....

☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

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DECISION and ORDER
Index No. 812584/2021E

HON. MARY ANN BRIGANTTI

Upon the foregoing papers, the petitioner Howard Robinson ("Petitioner") seeks a judgment pursuant to Article 78 of the CPLR, vacating the decision of the respondent Fordham University ("Respondent"), finding Petitioner responsible for sexual misconduct and then firing him.

Respondent moved pre-answer to dismiss the petition pursuant to CPLR 7804(f) and 3211(a)(1) and (7). By decision and order dated November 9, 2022 (the "Prior Order"), this Court denied Respondent's motion and directed it to file an answer. Respondent thereafter answered the petition and submitted new affidavits and additional exhibits in opposition. Petitioner submitted an affirmation and memorandum of law in reply.

The pertinent facts of this matter and summary of the complete investigative record are outlined in the Prior Order which is incorporated by reference.

Standard of Review

"In [CPLR] article 78 proceedings, 'the doctrine is well-settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; … the courts have no right to review the facts as to weight of evidence, beyond seeing to it that there is 'substantial evidence'" (*Matter of Pell*, 34 N.Y.2d at 230 [cleaned up]). "The approach

is the same when the issue concerns the exercise of discretion by the administrative tribunal: The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious'" (*Matter of Pell v. Board of Education of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 [1974] [cleaned up]). Determinations are considered arbitrary if they are "without sound basis in reason" and "generally taken without regard to the facts" (*id.* at 231; *see also Wander v. St. John's Univ.*, 147 A.D.3d 1009 [2d Dept. 2017]). In other words, the test "relates to whether a particular action should have been taken or is justified" and whether the action "is without foundation in fact" (*Pell* at 231 [cleaned up]).

CPLR article 78 proceedings are considered the "appropriate vehicle" for challenging employment determinations made by colleges and universities, "because they ensure that the over-all integrity of the educational institution is maintained and, therefore, protect more than just the individual's right to employment" (*Klinge v. Ithaca College*, 244 A.D.2d 611, 613 [3rd Dept. 1997], citing *Gray v. Canisius College of Buffalo*, 76 A.D.2d 30 [4th Dept. 1980]). However, the amount of judicial intervention is "limited in scope" due to the "recognition of the special skills and sensitivities required in managing an academic institution" (*id.*). Therefore, "[j]udicial scrutiny, while greater than that provided in cases involving at-will employment, is limited to determining " '…whether the institution has acted in good faith or [whether] its action was arbitrary or irrational'" (*id*., citing *Gray*, 76 A.D.2d 30, quoting *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 658 [1980]).

In the context of a terminated university employee, an article 78 proceeding can challenge "whether the employer contravened any of its own rules or regulations" (*O'Neill v. New York Univ.*, 97 A.D.3d 199, 213 [1st Dept. 2012], quoting *Matter of Hanchard v. Facilities Dev. Corp.*, 85 N.Y.2d 638, 641-42 [1995]). In other words, "[t]he standard of review is whether the employer 'substantially abided by its own policies in terminating petitioner's employment'" (*id*., quoting *Hancard* at 642; *see also*

Matter of Lai v. St. John's Univ., 155 A.D.3d 627 [2d Dept. 2017]; *see also Matter of Constantine v. Teachers Coll.*, 85 A.D.3d 548 [1st Dept. 2011]). While the employer need not perfectly adhere to every procedural requirement to demonstrate substantial compliance, multiple failures can, taken together, constitute a lack of substantial compliance (*Matter of Doe v. Skidmore Coll.*, 152 A.D.3d 932, 935 [3rd Dept. 2017]).

A university's disciplinary decision may also be annulled where the determination lacks a rational basis (*Doe v. Cornell University*, 163 A.D.3d 1243, 1245 [3rd Dept. 2018]). "When a university has not substantially complied with its own guidelines *or* its determination is not rationally based upon the evidence, the determination will be annulled as arbitrary and capricious" (*Hyman v. Cornell University*, 82 A.D.3d 1309, 1310 [3rd Dept. 2011][emphasis added], citing *Matter of Warner v. Elmira Coll.*, 59 A.D.3d 909, 910 [3rd Dept. 2009], and *Basile v. Albany College of Pharmacy of Union University*, 279 A.D.2d 770, 771 [3rd Dept. 2001], *lv. denied*, 96 N.Y.2d 708 [2001]). A determination that is only supported by a "mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based" (*Matter of Chiano*, 26 A.D.2d 469, 473 [1st Dept. 1966]; *see also Basile*, 279 A.D.2d at 771; *Fain v. Brooklyn College of City University of New York*, 112 A.D.2d 992, 994 [2d Dept. 1985]).

Applicable Law and Analysis

(A) Respondent's Decision to Adjudicate this complaint under its "Non-Title IX" Procedure rendered its disciplinary determination Arbitrary and Capricious

This Court adheres to its prior reasoning and finds that Respondent improperly adjudicated this complaint under its "non-Title IX" procedure instead of its "Title IX" procedure. A complaint is adjudicated under Respondent's "Title IX" procedure where, as relevant here, the complained-of conduct constitutes "[u]nwelcome conduct that a reasonable person would consider so severe, pervasive,

and objectively offensive that it effectively denies a person equal access to a University education program or activity" (Sexual and Related Misconduct Policy and Procedures For the Fordham University Community at p. 10 [the "Policy"]). This definition mirrors the definition of "sexual harassment" found in the amended federal regulations (34 CFR 106.30[a]).

As noted in the Prior Order, whether gender-oriented harassment is actionable under Title IX "depends on a constellation of surrounding circumstances, expectations and relationships including … the age of the … victim and number of individuals involved" (*Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 [1999]). The alleged behavior must "be serious enough to have a systemic effect of denying the victim equal access to an education program or activity" (*id*. at 652). The *Davis* Court noted that the relationship between the accuser and the accused is relevant to determining whether a single instance of misconduct could have such a "systemic effect on a program or activity" to satisfy the "pervasiveness" element of the definition (*id*. at 653). "Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment" (*id*.). "[A] single event could meet the standard of pervasiveness if it were 'sufficiently threatening or repulsive, such as a sexual assault'" (*T.Z. v. City of New York*, 634 F.Supp.2d 263, 270 [E.D.N.Y. 2009][collecting cases]; *compare Martinetti v. Mangan*, US Dist Ct, SD NY, No. 17-CV-5484, Karas, J. 2019]["…a single instance of sexual harassment is typically insufficient to establish liability under Title IX unless 'the conduct consists of extreme sexual assault or rape'"][internal citation omitted]). These cases and the regulations, however, do not specifically exclude single-instance, non-sexual assault or rape circumstances from the definition of "sexual harassment."

This case does not involve "peer harassment" since the complainant was a student, and the respondent was her professor. The complainant alleged that her professor masturbated in front of her while teaching a class over Zoom while other students were in breakout rooms. After receiving the

complaint and before any investigation took place, Respondent suspended Petitioner without pay, suspended his email access, and barred him from entering the campus. While Respondent may have been permitted to do this under the terms of the applicable collective bargaining agreement, these actions nevertheless indicate that Respondent considered the conduct to be severe enough as to warrant such extreme measures. Respondent's answering papers do not provide information explaining what factors are normally followed when determining whether an accused faculty member is suspended without pay, suspended from email, and barred from campus pending an allegation of misconduct. In addition, the complainant filed a federal lawsuit against Respondent under Title IX which alleged *inter alia* severe emotional distress, further underscoring that the complained-of conduct "effectively den[ied] [the victim] equal access to the recipient's education program or activity" (34 CFR §106.30[a]).

Respondent's decision to adjudicate this matter as a "non-Title IX" violation of its sexual misconduct Policy indisputably afforded Petitioner less due process protections when compared to what he was entitled to under a "Title IX" adjudication. If the "Title IX" procedure was followed, Respondent would have been required to hold a live hearing with the opportunity for cross-examination of the other parties or witnesses in real time (34 CFR §106.45[b][6][i]). Despite the fact that his career, reputation, and livelihood were at stake, Petitioner was denied the opportunity to ask questions of his accuser, which the Supreme Court has recognized to be a " 'significant and critical right' " (*Matter of Doe 1 v. State Univ. of N.Y. at Buffalo*, 219 A.D.3d 1663, 1664 [4th Dept. 2023], quoting *Matter of A.E. v. Hamilton Coll.*, 173 A.D.3d 1753, 1755 [4th Dept. 2019]; *Chambers v. Mississippi*, 410 U.S. 284, 295 [1973]). This Court therefore finds that Respondent's failure to follow the "Title IX" procedure rendered its subsequent disciplinary determination arbitrary and capricious (*id.*).

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Even assuming *arguendo* that Respondent properly followed the "non-Title IX" procedure, it failed to substantially comply with its Policy by (1) failing to apply a "preponderance of the evidence" standard during the investigation, and (2) failing to provide the subject video to Petitioner at the outset of the investigation.

(B) Respondent failed to apply a "preponderance of the evidence" as Required by the Policy

The Policy requires Respondent to apply a "preponderance of the evidence" standard in determining the facts of an investigation – "i.e., that it is more likely than not that the alleged misconduct occurred" (Policy, Section VIII, Part C [d][4][ii], at page 42). In addition, the accused respondent is "presumed not to have violated the Policy and Procedures until an outcome is issued" (*id*., Part C[d][4][i]). When applying the standard of review, the evidence submitted in support of a charge or claim must "appeal to the decision maker as more nearly representing what took place than the evidence opposed" to the charge or claim (New York Pattern Jury Instructions 7:28). "If the evidence in support of a claim does not outweigh the evidence opposed to it, or if the evidence weighs so evenly that the decision-maker is unable to say there is a preponderance on either side, there must a finding against the party who had the burden of proof on that question" (*id*.). A university's failure to adhere to its stated preponderance of the evidence standard during a disciplinary proceeding can be considered a breach of the investigative policy published by the university (*see, e.g., Doe v. Syracuse University*, US Dist. Ct., ND NY, 5:18-CV-377 at *11 Hurd, J., 2019]). The court's review is limited to whether "there was enough evidence which, if believed, could have supported the University's decision" (*Doe v. Colgate University*, ND NY, 5:15-CV-1069, 2017 WL 4990629, *11-12, Kahn, J., 2017], *aff'd*, 760 F. App'x 22, 30 [2d Cir. 2019]). In this case, after considering Respondent's answer and the additional affidavits submitted in opposition to the petition, this Court adheres to the findings contained in the Prior Order.

Vice Provost Jonathan Crystal ("Crystal")'s January 26, 2021 outcome letter (the "Outcome Letter") specifically found it more likely than not that Petitioner: (1) used his hands to masturbate while on Zoom call of September 10, 2020, while the complainant was in the class and other students were in breakout rooms, and (2) Petitioner was "shaking aggressively, saying 'Oh fuck yeah' multiple times, grunting, breathing heavily, and grinding [his] teeth" while he and the complainant were in the Zoom class, with his computer camera on and his chest and upper arms and top of his head visible, and while the other students in the class were in breakout rooms. One of Crystal's "most significant" findings in support of the determination was the video recording itself that depicted Petitioner grunting, clenching his teeth, breathing irregularly, and making movements that "suggest[ed]" Petitioner was "in fact, masturbating," and the "breakout session lasted long enough" for Petitioner to masturbate. As noted in the Prior Order, however, the conduct as depicted in the video did not alone satisfy the definition of "sexually explicit activity" as prohibited under the Policy. The video did not depict any actual masturbation or nudity, and Petitioner's hands are not visible. In addition, while the Outcome Letter upheld the conduct alleged in charge "(b)" of the complaint regarding Petitioner's alleged derogatory utterances, Crystal made no specific finding confirming that the video depicted Petitioner saying " 'Oh fuck yeah' multiple times." Moreover, the investigative record reveals that the complainant was in fact prompted by Petitioner to join a breakout room with the rest of her classmates, as indicated by a large prompt appearing on screen that partially obscures Petitioner's face during the video. Complainant, for her own reasons, did not click on that prompt as directed that would have sent her away from the main Zoom room with Petitioner.

As previously noted by this Court, besides the inconclusive video, Respondent pointed to no other proof which, if believed, would have supported a finding that Petitioner was, more likely than not, masturbating in front of the complainant. Respondent instead placed the burden on Petitioner to explain

his conduct on the video and prove he was not masturbating. Petitioner did so by explaining to the investigator that he was experiencing a powerful urge to urinate as exacerbated by "Flomax" medication that he had been prescribed to treat an enlarged prostate. Petitioner supported these contentions with medical records from various treating physicians, and Respondent had the opportunity to interview Petitioner's wife who further confirmed this medical condition. Petitioner also explained that the video depicted him suppressing an urge to urinate while he was trying to compose an email to send to his students with a PowerPoint attachment.

According to the Outcome Letter, Crystal did not dispute Petitioner's medical condition but found that it did not credibly explain Petitioner's conduct on the video. According to Crystal, the explanation was not credible because Petitioner failed to follow through with an email. Specifically, Petitioner failed to send the email he was purportedly writing to his students and did not offer evidence that the email was urgent and needed to be sent immediately. The investigative record, however, revealed that Petitioner, in fact, did send an email with a PowerPoint attachment at 10:19AM – the time when he was allegedly masturbating on camera (Investigative Record at HR000125) - yet although what Petitioner stated was a mistake, he only sent the email to himself and not his students. Thus, regardless of the reason why he was composing the email or to whom it was sent, the factual record showed that Petitioner was using his hands to type an email with an attachment at the precise time that he was recorded allegedly manipulating his genitals. Petitioner also stated that he could be heard audibly typing and using his mousepad during the video – something that the Outcome Letter and the supplemental affidavit submitted by Crystal do not address or refute.

Crystal further found that Petitioner's credibility was lacking because, contrary to his statements, the other students interviewed during the investigation reported that Petitioner did not join their breakout rooms on September 10. Respondent's Title IX Coordinator and investigator Kareem Peat ("Peat"),

however, only interviewed three (3) out of the nineteen (19) students who were in the class that day. One student stated that he was fairly sure that Petitioner did not join their breakout rooms. Another stated Petitioner "couldn't figure out" how to join the breakout rooms, and another was not even in class that day. As will be expanded on *infra*, the record demonstrates that Petitioner had not viewed the video prior to his initial investigative interview with Peat. Once he was permitted to see the video, Petitioner explained it refreshed his memory as to the "timeline" of pertinent events, which had occurred some weeks prior to the investigation. In any event, the Outcome Letter did not explain how the alleged inconsistency in Petitioner's recollection of joining the students' breakout rooms supported a finding that he was masturbating- something not directly shown on the video.

At both of his interviews, Petitioner stated that he suffers from erectile dysfunction, he has very low libido and low testosterone, he has depression and diabetes, which all effect his ability to have erections. Petitioner's wife was interviewed and told the investigator, among other things, that Petitioner had a low libido and his erectile dysfunction made sexual intercourse impossible. Petitioner also submitted his medical records from various physicians documenting his decreased libido and erectile dysfunction. Crystal did not dispute Petitioner's medical condition, but he nevertheless conclusorily determined that it was more likely than not that Petitioner was masturbating in class, because in his opinion, "neither erectile dysfunction nor low libido prevents a person from manipulating or attempting to manipulate their genitals in a sexual manner" (Investigative Record at HR000582), and his determination was supported by Ms. Robinson's statement that she and Petitioner engaged in "cuddling" and mutual "stroking" during their anniversary on June 12, 2020 (*id.*).

Since Respondent did not meaningfully weigh unrebutted exculpatory evidence in making its determination, the Court finds that it failed to properly apply the "preponderance of the evidence" standard as required by its Policy.

(C) Respondent deviated from its Policy by failing to provide the Subject Video to Petitioner at the Outset of its Investigation

Respondent's Policy states: "[t]he parties are provided an opportunity to review and present relevant evidence….A meaningful opportunity to respond to the evidence includes providing reasonable opportunity to provide responsive evidence and information. The opportunity to review evidence is subject to applicable federal, state, and local laws" (Policy, Section VIII, Part C [d][4][iii], at page 42).

The complained-of incident occurred on September 10, 2020. Petitioner was first interviewed by Peat several weeks later, on October 5, 2020. At the onset of this proceeding, Respondent was in possession of the video recording made by the complainant depicting Petitioner's conduct on September 10. Petitioner was not shown the video recording at this initial interview, and he was unaware of its existence. It was not until October 26, 2020, that Petitioner was provided with the video and had an opportunity to respond to it.

Petitioner was therefore denied a meaningful opportunity to review and respond to the critical evidence in this case – the video taken by the complainant- at the outset of this investigation. As noted above, the video constituted the sole piece of affirmative evidence purportedly demonstrating that Petitioner was masturbating in front of the complainant. Indeed, the Outcome Letter and Respondent's answering submissions make clear that the termination decision was largely based on Petitioner's conduct depicted on the video which "suggest[ed]" that Petitioner was "in fact, masturbating" and Respondent upheld the allegation that Petitioner was using sexually-charged language (despite the absence of evidence or a specific confirmation of that allegation). Nevertheless, Petitioner was not afforded the opportunity to view this critical piece of evidence before he was first interviewed by Respondent's investigator.

This deviation from the Policy prejudiced Petitioner. The Outcome Letter notes that Petitioner's explanations – including the unrefuted medical evidence - for his behavior on video were not credible. In an affidavit (NYSCEF Doc.# 71) Crystal states that the change in Petitioner's account from October 5 to October 26 made him question Petitioner's credibility as he "did not think Petitioner's claims and explanations, or lack thereof, were consistent with the record." At the time of his October 5 interview, however, Petitioner was unaware of the video and he did not recall anything unusual about that day which was nearly one month earlier, and he had taught more than one section of the same class (Petition at 40). It was not until he saw the video prior to October 26 that his recollection was refreshed as to what occurred that day and the timeline of events (Record at HR000022). Nevertheless, Petitioner's differing accounts of what occurred that day were used against him in resolving this disciplinary proceeding. Had Respondent been given the opportunity to review the main piece of evidence supporting the complaint before his October 5, 2020 interview, he would have had a chance to meaningfully respond to the allegations in the complaint.

The above-described deviations demonstrate that Respondent did not substantially comply with its Policy during the investigative and adjudication phases of this disciplinary proceeding (*see generally Matter of Doe v. Skidmore College*, 152 A.D.3d 932; *see also A.E.*, 173 A.D.3d 1753; *see generally Mozdziak v. State University of New York Maritime College*, 210 A.D.3d 491, 491 [1st Dept. 2022]).

(D) Respondent's Determination Lacks a Rational Basis

Administrative determinations must be rationally based on the evidence and "[a] mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based" (*Matter of Chiano*, 26 A.D.2d at 473 [cleaned up]). Respondent's determination was based on a video that did not provide direct evidence that Petitioner was

masturbating. The investigative record demonstrates that Petitioner was typing an email during the time he was allegedly masturbating. There is no other affirmative evidence supporting a finding that Petitioner was masturbating. Respondent made this determination notwithstanding unimpeached medical evidence that Petitioner suffered from an enlarged prostate and had frequent powerful urges to urinate, he has a low libido and cannot achieve an erection. Respondent further upheld the charge in the complaint that Petitioner said " 'Oh fuck yeah' multiple times" even though this was not depicted in the video and no such finding was actually made in the Outcome Letter. That Petitioner could possibly still manipulate his genitals, and the fact that he engaged in some intimacy with his wife on their anniversary, on this record is precisely the sort of "scintilla of evidence to justify a suspicion" that Petitioner was masturbating – which is insufficient to find that a determination had a rational basis. "…[I]f the college or university makes its determination not in the exercise of its sound and honest discretion but rather in bad faith or in a manner which is arbitrary and capricious, this action 'could never receive the sanction of a court in which even the semblance of justice was attempted to be administered'" (*Matter of Gray*, 76 A.D.3d at 34, quoting *People ex rel Cecil v. Bellevue Hospital Medical College*, 60 Hun 107, N.Y.Sup. Gen Term, 1891, *aff'd on opn below*, 128 N.Y. 621 [1891]).

Conclusion

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is granted, and it is further,

ORDERED and ADJUDGED, that Respondent's determination finding Petitioner responsible for sexual misconduct and terminating his employment is annulled, and it is further,

ORDERED and ADJUDGED, that Petitioner is reinstated to his faculty position, and it is further,

ORDERED and ADJDUGED, that Petitioner is awarded salary withheld from him from the date of his termination through the date of his reinstatement.

This constitutes the Decision, Order, and Judgment of this Court.

ENTER

Dated: DECEMBER 21, 2023

Mary Ann Brigantti, J.S.C.