SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

BS167329 February 5, 2019
JOHN DOE VS THE TRUSTEES OF THE STATE OF CA,ETC,ET AL 9:32 AM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: B Hall

CSR: J Hollifield/CSR 12564
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): Mark McClellan Hathaway and Jenna Parkers (x)

For Respondent(s): Katherine Anne Winder (x)

NATURE OF PROCEEDINGS: HEARING ON PETITION FOR WRIT OF MANDATE

Matter comes on for hearing and is argued.

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Petitioner's exhibit 1 (administrative record) is admitted into evidence.

The court adopts its tentative ruling as modified this date as the order of the court and is set forth in this minute order.

Petitioner John Doe ("Petitioner") seeks an administrative writ of mandate directing Respondents The Trustees of the California State University and Timothy P. White ("Respondents") to set aside an administrative decision to expel Petitioner from all campuses of the California State University ("CSU") system.

Factual Background

Title IX Investigation

The writ petition arises from a Title IX investigation at California State University Fresno ("CSUF") involving two separate complaints of sexual misconduct against Petitioner made by Jane Roe 1 and Jane Roe 2. 1

On or about April 16, 2016, an individual identified as "Witness C" submitted a complaint to the president of CSUF alleging that Petitioner "was putting something (not clarified what drug it was) in women's drinks at parties … and sleeping with them." (AR 36, 194.) Roe 1 and Roe 2 chose to move forward with the formal complaint process under CSU's Executive Order 1097, a system-wide sexual misconduct policy. (AR 37.) CSUF's interim Title IX Coordinator, Erin Boele, commenced an investigation, which included interviews of Roe 1, Roe 2, Petitioner,

"Witness A", and "Witness C" in April and May 2016. (AR 37, 396.) During the investigation, Boele reviewed text messages between Petitioner and Roe 1 and Roe 2. (Ibid.)

On or about June 5, 2016, Boele issued a confidential investigative report to CSUF's Dean of Students and Director of Student Conduct regarding the allegations of sexual misconduct made by Roe 1 and Roe 2 against Petitioner. Boele concluded that Petitioner engaged in non-consensual sexual intercourse with Roe 1 in July 2015 because Roe 1 was 17 years old at the time and incapable of giving consent. (AR 41-42.) Boele concluded that Petitioner engaged in non-consensual sexual contact with Roe 2 in April 2016 because Roe 2 was incapacitated at the time of the first sexual encounter. (AR 45.) Petitioner was not given a copy of this report at the time. (See AR 36, 124.)

Notices

In an undated email, titled "Notice of Report of Possible Executive Order 1097 (Revised June 23, 2015) Violation," Boele informed Petitioner: "University has initiated an investigation into reports that you may have engaged in sexual misconduct which includes sexual assault and sexual harassment against fellow CSU students. The report alleges that you took part in non-consensual sexual intercourse with two different female students on or around July 30, 2015 and April 2, 2016." (AR 447.)

In a July 1, 2016 letter, titled Notice of Investigation Outcome, Boele wrote that "university has completed their investigation" and "the investigation determined that the allegations were substantiated." (AR 47.) CSUF later discovered that it inadvertently failed to send this letter to Petitioner. (AR 185.)

On July 11, 2016, Assistant Dean of Students Jamie Pontius-Hogan notified Petitioner, "following an investigation by the Title IX Coordinator, you have been found to have sexually assaulted two Fresno State students (one due to age of consent during the month of July 2015; one due to incapacitation on or about April 2, 2016)." The letter did not notify Petitioner of any appeal rights related to these findings. The letter stated that "the sanctions under consideration for this matter include Suspension or Expulsion". (AR 84.)

On July 27, 2016, Pontius-Hogan notified Petitioner that a sanctions hearing pursuant to Executive Order 1098 had been set for August 12, 2016. (AR 86.)

Sanctions Hearing

A sanctions hearing was held on August 12, 2016. (AR 90-91.) Petitioner was told that since he did not appeal the investigation findings, "the outcome of the investigation will not be in question today." (AR 91.) Neither Roe 1 nor Roe 2 attended the sanctions hearing. (See AR 97.) Following the sanctions hearing, Petitioner attempted to appeal the investigation findings, but his appeal was denied as untimely. (AR 184.)

On August 23, 2016, CSUF notified Petitioner that Vice President for Student Affairs Frank Lamas, Ph.D., determined that the appropriate sanction was expulsion from the CSU system (all campuses.) (AR 115.)

On September 6, 2016, Petitioner appealed the sanction on the grounds of prejudicial procedural errors which impacted the investigation, and new evidence not available at the time of the investigation. (AR 430.) CSU's Systemwide Title IX Compliance Officer denied the appeal on September 15, 2016. (AR 450.)

Writ Petition; Chancellor's Office Orders CSUF to Reopen Administrative Proceedings

On January 10, 2017, Petitioner filed his petition for writ of administrative mandate.

On June 2, 2017, CSU's Chancellor's Office informed Petitioner that it had learned that CSUF had not sent Petitioner the July 1, 2016 Notice of Investigation Outcome (NOIO), and that the Chancellor's Officer had directed CSUF to issue a new NOIO "and to provide you with a copy of the investigation report along with the names of all complainants and witnesses." (AR 452.) The Chancellor's Office informed Petitioner that his prior September 6, 2016 appeal of the investigation findings, which had been denied as untimely, would be "reopened" and that Petitioner could submit additional information in support. (Ibid.)

On June 28, 2017, Petitioner appealed on the grounds that the investigation findings were not supported by the evidence, and the investigation made several procedural errors that precluded Petitioner from receiving a fair process, including failing to provide an opportunity to question the complainants, withholding evidence, and conducting a biased investigation. (AR 121-133.)

On August 10, 2017, following a review of Petitioner's appeal, the Chancellor's Office remanded the case back to CSUF to reopen the investigation with regard to Roe 2's complaint. The Chancellor's Office did not remand the matter with regard to Roe 1 on the basis that Petitioner had acknowledged that Roe 1 was a minor at the time of the sexual intercourse. (AR

183-186.)

On September 8, 2017, CSUF emailed Petitioner the preliminary amended investigation report. He was granted until September 15, 2017 to respond. (AR 415.)

On September 18, 2017, Boele sent her amended Confidential Investigative Report to CSUF's Dean of Students and Director of Student Conduct. (AR 387.) The report affirmed the original findings of sexual misconduct as to Roe 1 and Roe 2. (AR 389.) On September 20, 2017, Boele informed Petitioner of the investigation outcome and indicated that he could appeal the findings to the Chancellor's Office. (AR 191.) On October 2, 2017, Petitioner submitted an updated appeal based on Boele's amended findings, arguing that the findings were not supported by the evidence and that numerous procedural errors occurred. (AR 454-471.) On November 3, 2017, the Chancellor's Office denied the appeal. (AR 416.)

On November 27, 2017, Petitioner was informed that the proposed sanction was expulsion and that a sanctions hearing had been scheduled for December 13, 2017. (AR 420.) On January 2, 2018, the Vice President of Student Affairs notified Petitioner that he imposed the sanction of expulsion. (AR 426.)

Additional Procedural History

Respondents filed an answer to the petition on June 6, 2017. At a TSC on February 13, 2018, counsel advised the court that there was a dispute as to whether the administrative process had been exhausted. At a TSC on March 3, 2018, counsel advised the court that a second administrative hearing was held and that Petitioner did not intend to amend the petition. The court set the petition for hearing and set a briefing schedule.

On December 21, 2018, Petitioner filed his opening brief in support of the writ petition. The court has received Respondents' opposition, Petitioner's reply, the joint appendix, and the administrative record.

Standard of Review

Under CCP section 1094.5(b), the pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of

discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b); see Topanga Assn. for a Scenic Community v. County of Los Angeles, (1974) 11 Cal. 3d 506, 515.)

"A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law." (Nasha L.L.C. v. City of Los Angeles (2004) 125 Cal.App.4th 470, 482.)

ANALYSIS

Petitioner contends that, for various reasons, the administrative procedure was unfair. (Opening Brief (OB) 12-17.) Petitioner further contends that the evidence does not support the findings. (OB 17-19.)

Exhaustion of Administrative Remedies

Respondents contend that Petitioner failed to exhaust his administrative remedies because he did not appeal the sanction imposed on January 2, 2018. (Oppo. 2-3.) Exhaustion of administrative remedies is "a jurisdictional prerequisite to judicial review." (Cal. Water Impact Network v. Newhall County Water Dist. (2008) 161 Cal.App.4th 1464, 1489.)

Petitioner appealed the sanctions imposed by CSUF on September 6, 2016. (AR 430-431.) Petitioner submitted various administrative appeals challenging CSUF's investigative findings and sanctions, and the fairness of the procedure. (See AR 121-133, 184, 427-429, 430-431, 454-471.) On February 12, 2018, Petitioner sent a "Request for Clarification of Case Status" to the Chancellor's Office asking whether he was expected to file an appeal of the most recent sanctions decision. Petitioner stated that if an appeal was expected, "please accept my September 6, 2016 sanction appeal as my appeal submission." (AR 429.)

Respondents' exhaustion defense is not persuasive. In his writ briefs, Petitioner challenges the fairness of the administrative procedure and the investigative findings, not the sanctions decision. Respondents do not dispute that, in his various administrative appeals, Petitioner exhausted the arguments at issue in his writ petition and writ briefs. Moreover, Petitioner appealed the sanctions imposed by CSUF on September 6, 2016, and requested that CSUF consider that sanctions appeal for the January 2, 2018 sanctions decision. Those actions were sufficient to exhaust administrative remedies with regard to the sanctions.

Petitioner exhausted his administrative remedies.

Fair Procedure

"Generally, a fair procedure requires 'notice reasonably calculated to apprise interested parties of the pendency of the action ... and an opportunity to present their objections.'" (Doe v. University of Southern California (2016) 246 Cal.App.4th 221, 240 [hereafter Doe v. USC].) "Although no particular form of student disciplinary hearing is required under California law, a university is bound by its own policies and procedures." (Doe v. Regents of the University of California (2016) 5 Cal.App.5th 1055, 1078.)

Jurisdiction to Adjudicate Reports Made by Non-Students

As part of his fair procedure arguments, Petitioner contends that "the record does not support that CSUF had jurisdiction to adjudicate claims made by Roe 1 and Roe 2" under Executive Order 1097 ("EO 1097"). (OB 13-14.)

EO 1097 states that "this procedure provides Students a process to address alleged violations of this policy by the CSU, a CSU Employee, another Student, or a Third Party." (AR 10.) The policy defines "Student" as "an applicant for admission to the CSU, an admitted CSU Student, an enrolled CSU Student, a CSU extended education Student, a CSU Student between academic terms, a CSU graduate awaiting a degree, a CSU student currently serving a suspension or interim suspension, and a CSU Student who withdraws from the University while a disciplinary matter (including investigation) is pending." (AR 29.)

According to Boele's investigation notes, Roe 2 had "dropped out" of CSUF at some unspecified time. (AR 359.) In an appeal, Petitioner stated that Roe 2 took a leave of absence from CSUF starting in December 2015, before the April 2016 incident. (AR 122.) In her amended investigation report, Boele described Roe 2 as "an unenrolled student from Fresno State University" at the time of the incident. (AR 393.) In opposition, Respondents have not disputed that EO 1097 only authorizes CSU to investigate sexual misconduct complaints of "Students" and that an "unenrolled student" is not a "Student" within the policy. (Oppo. 4; see Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc. (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].) Accordingly, based on Boele's report and Respondents' lack of opposition, the court concludes that CSUF was not authorized to adjudicate Roe 2's complaint.

Boele described Roe 1 in her amended report as an "incoming Freshman to Fresno State University" at the time of the incident in July 2015. (AR 393.) Petitioner has not shown, with evidence, that this statement was inaccurate. Under EO 1097, a "Student" would appear to include an admitted, incoming student. Based on the record presented, the court is unable to conclude CSUF lacked authority to adjudicate the complaint as to Roe 1.

Notice of Allegations regarding Roe 1, and Opportunity to Respond

Petitioner contends that CSUF failed to provide notice of the allegation that Roe 1 was incapable of consent to sexual intercourse because she was 17 in July 2015, and that this lack of notice violated his right to a fair procedure. (OB 14.) The court agrees.

Under EO 1097, the accused student shall be given notice of the charges and a description of the allegations prior to or during his initial interview. (AR 15.) There is no evidence Boele informed Petitioner of the charges regarding Roe 1 prior to or during his interview. (See AR 36-45.)

Roe 1's initial complaint was based on an allegation that she was incapable of consent to sex in July 2015 due to incapacitation by intoxication. (AR 38.) In her June 2016 report, Boele found Petitioner guilty of misconduct with regard to Roe 1 based on a different allegation, i.e. that Roe 1 was under the age of 17. (AR 41.) Petitioner was not given a copy of this report before findings were made. (See AR 36, 124.)

In an undated email, Boele informed Petitioner that CSUF had initiated a sexual misconduct investigation of complaints that he "took part in non-consensual sexual intercourse with two different female students on or around July 30, 2015 and April 2, 2016." (AR 447.) This email did not notify Petitioner that Roe 1 was a complainant, or of an allegation that she was incapable of giving consent due to her age.

The July 11, 2016 letter notified Petitioner that "you have been found to have sexually assaulted two Fresno State students (one due to age of consent during the month of July 2015; one due to incapacitation on or about April 2, 2016)." (AR 84.) The letter did not identify Roe 1 as the complainant for the July 2015 incident. This evidence establishes that Petitioner was not given notice of the allegation that Roe 1 was incapable of consent due to age prior to the August 23, 2016 sanctions decision.

In opposition, Respondents contend that this procedural error was cured because Petitioner

"received notice of the remand in August 2017" and received the NOIO following remand in September 2017. (Oppo. 4.) This argument is unpersuasive.

On June 2, 2017, the Chancellor's Office informed Petitioner that it had learned that CSUF had not sent Petitioner the July 11, 2016 NOIO, and that the Chancellor's Officer had directed CSUF to issue a new NOIO "and to provide you with a copy of the investigation report along with the names of all complainants and witnesses." (AR 452.) The Chancellor's Office informed Petitioner that his prior September 6, 2016 appeal of the investigation findings, which had been denied as untimely, would be "reopened" and that Petitioner could submit additional information in support. (Ibid.) In his subsequent appeal filed June 28, 2017, Petitioner appeared to admit some facts regarding Roe 1, including that she "was four months shy of her eighteenth birthday" in July 2015. (AR 121-122.) Apparently, Petitioner had received Boele's June 2016 report by the time he filed this appeal. However, Petitioner did not have notice of the allegation about Roe 1's age during a procedure in which he could pose questions to Roe 1, including about her age, or challenge Boele's investigative findings, including her basis for concluding that Roe 1 was under the age of 18.

Significantly, the August 10, 2017 remand letter admitted the lack of notice as to both Roe 1 and Roe 2: "the record does not reflect that the Parties were advised or offered the evidence upon which the findings would be based or given an opportunity to respond to such evidence." (AR 185.) Nonetheless, the Chancellor's Office did not remand the matter with regard to Roe 1 on the basis that Petitioner had allegedly acknowledged that Roe 1 was a minor at the time of the sexual intercourse. (AR 183-186.) Given the lack of notice or opportunity to respond to the Roe 1 allegations, it was fundamentally unfair for Respondents to rely on statements made in Petitioner's June 28, 2017 appeal document about Roe 1's age.

Respondents contend that Petitioner admitted Roe 1 was under the age of 18 in his interview with Boele. (See Oppo. 4, citing AR 399.) Respondents cite to Boele's amended report after the remand. Boele did not include this statement in her original report or investigative notes. (AR 41, 348-350, 358-359.) Given this inconsistency, this aspect of the amended report deserves little credence. 2 Moreover, the Chancellor's Office did not remand the matter for further proceedings with respect to Roe 1. The amended report, prepared after remand, does not cure the failure to give notice of the allegations with respect to Roe 1.

Based on the foregoing, Petitioner did not receive adequate notice of the allegations as to Roe 1. He also did not receive adequate opportunity to respond.

Opportunity to Question Complainants; Single Investigator Procedure

In the opening brief, Petitioner argued that the administrative procedure was unfair because the findings as to both Roe 1 and Roe 2 turned on credibility, and Petitioner had no opportunity to question either of the complainants or any witnesses. (OB 14-16.) Petitioner also suggested that the sole-investigator Title IX adjudication model to resolve complaints without a live hearing and impartial adjudicators is unfair. (OB 16-17.) Respondents declined to address these arguments in their opposition brief.

In Doe v. Regents of the University of California (2016) 5 Cal.App.5th 1055, the Court of Appeal stated that "where the Panel's findings are likely to turn on the credibility of the complainant, and the respondent faces very severe consequences if he is found to have violated school rules, we determine that a fair procedure requires a process by which the respondent may question, if even indirectly, the complainant." (Id. at 1084.) The Court of Appeal provided additional guidance on this issue in Doe v. Claremont McKenna College (August 8, 2018) 25 Cal.App.5th 1055:

We hold that where, as here, John was facing potentially severe consequences and the Committee's decision against him turned on believing Jane, the Committee's procedures should have included an opportunity for the Committee to assess Jane's credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee's asking her appropriate questions proposed by John or the Committee itself. That opportunity did not exist here. (Id. at 1057-1058.)

(See also Doe v. University of Cincinnati (8th Cir. 2017) 872 F.3d 393, 401-402 [same]; accord Doe v. Baum (6th Cir. 2018) 903 F.3d 575, 578 [same]; see also Doe v. University of Southern California (Dec. 11, 2018) 2018 WL 6499696; Doe v. Regents of University of California (2018) 28 Cal.App.5th 44, 60.)

On January 4, 2019, after the opening brief was filed, the Court of Appeal provided further guidance on the procedures required in sexual misconduct disciplinary proceedings where the determination pivots on witness credibility. (See Doe v. Allee (2019) 30 Cal.App.5th 1036.) The court set forth the following rule:

[W]e hold that when a student accused of sexual misconduct faces severe disciplinary sanctions,

and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross–examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. That factfinder cannot be a single individual with the divided and inconsistent roles occupied by the Title IX investigator in the USC system. (See 2019 WL 101616 at 20 [emphasis added].)

Petitioner contends that the findings as to Roe 1 turned on credibility because Roe 1 initially claimed Petitioner sexually assaulted her while she was incapacitated due to intoxication. (OB 15.) However, CSUF did not find that Roe 1 was incapacitated due to intoxication. The findings as to Roe 1 were based on the belief Roe 1 was under the age of 18 at the time of the incident in July 2015. Such findings may not necessarily depend on witness credibility, for instance if the victim's age and the date of sexual intercourse were undisputed. However, Petitioner was not given sufficient notice of the charge as to Roe 1 or a sufficient opportunity to respond. Accordingly, the findings must be set aside.

Petitioner contends that the findings as to Roe 2 turned on credibility. (OB 16.) The court agrees. Respondents have conceded this point by not responding in their opposition. CSUF found that Roe 2 was incapacitated due to intoxication. The amended report states that Boele "included Complainant B's credibility on this issue as a significant factor weighing in favor of her claim of being incapacitated." (AR 406.) Petitioner never had an opportunity to "cross–examine [Roe 2], directly or indirectly, at a hearing in which the witnesses appear in person or by other means (e.g., videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments." (See Allee, supra.) Furthermore, Allee instructs that the Title IX investigator (i.e. Boele) could not serve as the factfinder in this procedure.

The court has concluded above that CSUF lacked authority under EO 1097 to adjudicate Roe 2's complaint. Even if CSUF did have authority over Roe 2's complaint, then the procedure was unfair for these additional reasons.

Substantial Evidence Review

The court concludes that the substantial evidence test would apply to Respondents' findings. (See e.g. Doe v. University of Southern California (2016) 246 Cal.App.4th 221, 238, 239, 248-249; Doe v. Regents of the University of California (2016) 5 Cal.App.5th 1055, 1073-1074.)

However, because of the procedural errors discussed above, the court need not determine whether the findings are supported by substantial evidence.

Scope of Court's Writ

Petitioner contends that the court should issue a writ setting aside Respondents' decision and "order no further administrative action." (OB 19, citing Ashford v. Culver City Unified School Dist. (2005) 130 Cal.App.4th 344, 350-351.) Petitioner contends that remand is not appropriate "given the duration of the proceedings and CSUF's repeated failures to comply with due process and its policies." Respondents' position on this issue is unclear.

Ashford, cited by Petitioner, does not provide much helpful guidance here. Ashford did not hold that the court may issue a writ ordering no further administrative action based on procedural errors similar to those discussed above. 3

CCP section 1094.5(f) provides: "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

Conclusion

The petition is GRANTED. The court will issue a writ directing Respondents to set aside the administrative decision with respect to Roe 1 and Roe 2, and the sanction of expulsion.

Should Respondents elect to initiate new administrative proceedings against Petitioner, they shall do so in a manner consistent with a fair procedure and the views expressed herein.

FOOTNOTES:

1- In the investigation reports, Jane Roe 1 is referred to as "Complainant A" and Jane Roe 2 is referred to as "Complainant B." (AR 36-37.)
2- In his October 2, 2017 appeal, Petitioner also stated "I never told Erin Boele that I knew [Roe

1] was 17 years old when we had sex in July 2015." (AR 465.)
3- Ashford has also been disapproved of by Voices of the Wetlands v. State Water Resources Control Bd. (2011) 52 Cal.4th 499. Petitioner does not address that subsequent, negative authority.

Petitioner's exhibit 1 is ordered returned forthwith to the party who lodged it, to be preserved unaltered until a final judgment is rendered in this case and is to be forwarded to the court of appeal in the event of an appeal.

Counsel for petitioner is to give notice and is to prepare, serve and file the proposed judgment and proposed writ within twenty days. The court will hold the proposed judgment ten days for objections unless approved by opposing counsel as to form and content.