Matter of Hall v Hofstra Univ., 2018 N.Y. Misc. LEXIS 1314

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Supreme Court of New York, Nassau County

April 3, 2018, Decided

003540/17

Reporter
2018 N.Y. Misc. LEXIS 1314 * | 2018 NY Slip Op 50549(U) **

[**1] In the Matter of Thomas Hall, Petitioner, against Hofstra University, Respondent.

Notice:

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

University's, no-contact, Complainant's, parties, violence, public safety, witnesses, annexed, boat, procedures, Advisor, ban, interview, orders, sanctions, dating, Acknowledgement, semester, formal charge, reflects, prepare, pepper, prompt, hit, restrained, slapped, disciplinary proceeding, violation of the policy, initial interview, disciplinary

Counsel: **[*1]** For the Petitioner: Mayer Baron PLLC, Hauppauge, New York.

For the Respondent: Cullen & Dykman LLP, Garden City, New York.

Judges: Hon. Randy Sue Marber, J.S.C.

Opinion

Upon the foregoing papers, the Order to Show Cause (Mot. Seq. 01) by the Petitioner, pursuant to CPLR Article 78, challenging a determination, made after a hearing, by the Respondent, HOFSTRA UNIVERSITY (hereinafter the "University"), suspending the Petitioner for one (1) academic semester based upon a finding of non-academic misconduct; the motion [**2] (Mot. Seq. 02) by the Respondent, seeking an Order

pursuant to CPLR 3016 (i), expunging and redacting the name and identifying information of the complainant and all University student witnesses who testified at the hearing or submitted statements; and the motion (Mot. Seq. 03) by the Respondent, seeking an Order pursuant to CPLR §§ 3211 (a)(1), (a)(7) and 7804 (f), dismissing the Petition on the grounds that the Petitioner fails to state a claim and based upon documentary evidence, are decided as hereinafter provided.

Preliminarily, the Court notes that the parties resolved that portion of the Petitioner's Order to Show Cause which sought a temporary stay pending the hearing and determination of the Article 78. By So Ordered Stipulation dated November **[*2]** 1, 2017, the Petitioner was permitted to re-enroll for the Spring 2018 semester and until graduation upon (i) meeting with the Dean of Students; and (ii) agreeing to continue therapy. The parties agreed that the events giving rise to this proceeding would not be discussed at the meeting. The Petitioner was not required to admit fault to re-enroll. The Court has since been apprised that the Petitioner re-enrolled at the University for the Spring 2018 semester. The Petitioner is scheduled to graduate this May following his successful completion of the semester. The foregoing thus renders moot that portion of the Petitioner's application which seeks reinstatement to his prior status as a fulltime student in good standing at the University.

By this Article 78 proceeding, the Petitioner challenges the University's determination finding him "responsible" for a charge of "dating violence" and resultant sanctions pursuant to the University's Student Policy Prohibiting Discriminatory Harassment, Relationship Violence and Sexual Misconduct (the "Policy) [*See* Policy, annexed as Ex. "A" to Affidavit of Heather DePierro, Assistant Dean of Students and Director of Community Standards at the University **[*3]** ("DePierro Aff.")].

Pursuant to the Policy, Dating Violence is defined as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the student [*Id.* at p. 24]. Examples of dating violence set forth in the Policy include, *inter alia*, slapping, kicking, pinching, biting, pulling hair or punching a girlfriend; threatening to hit, harm, or use a weapon on a boyfriend or a boyfriend's family; and pushing grabbing or choking an intimate partner [*Id.*]. The Policy provides that "Complaints against students should be initiated "as soon as possible" after the incident takes place with the Department of Public Safety. In order to facilitate investigation of a Complaint, "prompt reporting" is encouraged " [*Id.* at p. 50]. The "Conduct Procedures" of the Policy "are provided for the prompt and equitable resolution of Complaints brought by University students alleging Relationship Violence by a student" [*Id.*] The process set forth therein (not including appeals) "may last up to 60 days, depending on a variety of factors including the severity, extent and complexity of the allegations, or availability of witnesses" [*Id.*]

On April 29, 2016, the Complainant, E.R., filed **[*4]** a handwritten Complaint with the Office of Public Safety at the University regarding an alleged charge of dating violence that occurred at the Complainant's sorority formal the night before, April 28, 2016. [*See* R.D. Complainant Statement dated 4/29/16, annexed to DePierro Aff. as Ex. "B"]. The formal was held on a boat that sailed out of Freeport, New York. Specifically, the Complainant

alleged that after "arguing with [her] boyfriend", the Petitioner acted aggressively towards her, pushed and cornered her, and threw pepper in her eyes. [*Id.*] The Complainant further complained of an alleged act of dating violence that occurred a few weeks earlier at her home where the Petitioner allegedly put his hands around her neck. [*Id.*] Notably, the Complainant did not allege in her initial [**3] handwritten statement that she committed any acts of physical violence against the Petitioner.

On April 29, 2016, an investigation ensued by the University. The Complainant was interviewed by Karen O'Callaghan, Director of Public Safety ("Director O'Callaghan") and Field Supervisor Joann Bottiglia ("Bottiglia") [*See* DePierro Aff. at ¶18; *see also* Case Report dated 4/29/16 Prepared by Bottiglia, annexed to **[*5]** DePierro Aff. as Ex. "I"]. A Case Report prepared by Bottiglia reflects that the Complainant slapped the Petitioner in the face to wake him up while he was asleep on the boat. It further reflects that the Complainant threw pepper on the Petitioner and "backhand slapped his groin area" [*Id.*]. The Complainant alleged that the Petitioner had "no pain reaction" and "then stepped forward as if to hit her" [*Id.*]. The Complainant requested that the Petitioner be issued a "no contact" order, and that he be banned from her residence at Estabrook Hall, a dormitory at the University [*Id.*]. She declined to file a police report at that time [*Id.*]

Pursuant to the Policy, upon receipt of a complaint, the University may take interim measures to protect reporting individuals and the larger University community as necessary pending the outcome of the conduct process [*See* Policy at p. 44, annexed to DePierro Aff. as Ex. "A"]. Interim measures may include no-contact orders, which are required under the Policy to be "mutual — i.e. neither student involved will be permitted to contact the other — unless the University determines, in its discretion, that a non-mutual order is appropriate." [*Id.* at p. 45]. The failure of either student **[*6]** to adhere to interim measures is considered a violation of the Policy and may lead to disciplinary action [*Id.*]. With specific regard to no-contact orders, the University's Policy affords students a "Review Process", providing that either student "shall upon written request" to the appropriate University designee be afforded "a prompt review, reasonable under the circumstances, of the need for and terms of any no-contact order that directly affects him or her, including potential modification" of such terms [*Id.* at p. 45]. Moreover, the Policy regulates the duration of no-contact orders as follows:

All interim no-contact orders will expire at the earlier of:

(1) a final resolution of a Complaint made to Public Safety in accordance with the Conduct Procedures below;

(2) a final resolution in an Alternative Resolution process; or

(3) where students have not taken the steps necessary to make a Complaint as described in How to Make a Complaint and Begin the Disciplinary Process, fourteen days following the issuance of the no-contact orders, unless otherwise directed by the University. The time period for all other interim protections and accommodations will be determined by the University in its discretion. **[*7]**

[*See* Policy at p. 45].

In response to the Complaint, the University issued "no-contact orders" to both parties [*See* DePierro Aff at ¶6]. The record reflects that the Petitioner's no-contact order was issued on April 29, 2016, which not only prohibited contact with the Complainant, but also prohibited him "**from entering *any* Hofstra University residence hall**" [*See* Petitioner's No-Contact Order, dated 4/29/16, annexed to DePierro Aff. as Ex. "I" (emphasis in original)]. On April 29, 2016, the University imposed this interim sanction by distributing a "Ban Flyer" to all residence halls with instructions to contact Public Safety if the Petitioner attempted entry [*See* Bottiglia Case Report, annexed to DePierro Aff. as Ex. "I"].

While DePierro's Affidavit is silent as to the dates of the parties' respective no-contact [**4] orders (stating only that the parties were mutually issued the same), the record reflects that the Complainant's no-contact order was not issued until May 12, 2016, two weeks later [*Id.*]. The complainant's no-contact order provided that failure to adhere to the terms therein would be "deemed a violation of Hofstra's Code of Community Standards" [*Id.*].

On May 4, 2016, Robert McDonald, Associate **[*8]** Director of Public Safety ("AD McDonald"), conducted an interview of the Petitioner. However, AD McDonald did not prepare a report to memorialize the interview in the Case File.

On May 5, 2016, AD McDonald conducted a telephone interview of an eye witness to the incident, Peter J. (June) Thompson "June Thompson", a security guard on the boat that evening [*See* Respondent's Motion to Dismiss at Ex. "I"]. June Thompson's name and contact information was provided to AD McDonald by the Petitioner. AD McDonald prepared a written witness statement based on his telephone interview of June Thompson. The statement reflects that June Thompson saw the Petitioner arguing with a female who appeared to be his girlfriend and kept an eye on the Petitioner. He then observed the Complainant "throw pepper at Thomas who then became quite upset." [*Id.*]. June Thompson then witnessed "another male on the boat stepped between the female and Thomas and Thomas became excited and threatened to throw the male overboard." [*Id.*] At that point, June Thompson intervened, restrained the Petitioner and calmed him down [*Id.*].

Following the initial investigation, the parties attempted to reach an alternative resolution **[*9]** under the University's Policy, which efforts were ultimately unsuccessful [*Id.* at ¶7]. Pursuant to the Policy, the Petitioner was not obligated to agree to any alternative resolutions proposed, and instead had the option to proceed with a formal hearing [*See* Policy at p. 49].

Satisfied with the no-contact order, the Complainant chose not to proceed with a formal proceeding and no further action was taken at that time.

On February 2, 2017, over nine (9) months later, the Complainant filed a second handwritten Complaint with Public Safety, alleging that, after unsuccessful attempts at reaching an alternative resolution and the Petitioner's refusal to sign the no-contact order,

she sought to proceed with formal proceedings before the Board of Community Standards regarding the April 28, 2016 incident because she did "not feel safe on or off campus, and [feared] for [her] safety". [*See* Complainant's 2/2/17 Statement, annexed to DePierro Aff. as Ex. "B"].

It is undisputed that following the April 28, 2016 alleged incident, there were no further incidents concerning the Petitioner. Nor did the Petitioner contact the Complainant at any time after the no-contact order was issued. It is also not in dispute that **[*10]** no action was taken by the University immediately following the initial Complaint.

The University's Policy reflects that "where grounds for further proceedings have been found", the accused is issued a "Referral to the Office of Community Standards" [*See* Policy at p. 50].

On March 13, 2017, the Petitioner received a Referral to the Office of Community Standards [*See* Referral, dated 3/13/17, annexed to DePierro Aff. as Ex. "I"].

On March 20, 2017, the University presented the Petitioner with formal charges for allegedly violating the Policy based on the original complaint of April 28, 2016. The Charge Form specified the facts upon which the charges were based [*See* Charge Form dated 3/29/17, annexed to DePierro Aff. as Ex. "D"]. In response, the Petitioner did not accept responsibility for said charges and chose to resolve the matter by convening an Administrative Board hearing to state his case and answer the charges brought against him.

On or about March 29, 2017, as required by the University's Policy, the Petitioner was provided with an "Acknowledgement of Student's Rights & Conduct Procedures for Violations of Policy Prohibiting Relationship Violence" [*See* Petitioner's Signed Acknowledgement dated **[*11]** 3/29/17, annexed as Ex. "B" to Affidavit of Dawn Marzella, Program Coordinator for the University's Office of Community Standards]. By signing the document, the accused student, the Petitioner here, acknowledges that sanctions for violations of the Policy may include, *inter alia*, probation, suspension, expulsion, and a "ban from the residence halls" [*Id.*]. The Acknowledgment further provides that upon receipt of the complaint, the University may take steps to protect the complainant and the larger University community as necessary, including, *inter alia*, issuing no-contact orders. The record is devoid of any evidence demonstrating that the Petitioner signed an Acknowledgement prior to being banned from entering any residence halls.

The University affords students the right to be accompanied by a "student Advisor" to help the student prepare during the course of the proceedings [*See* Advisor Form, annexed to Marzella Aff. as Ex. "C"]. Advisors must sign an Advisor Form to be permitted to assist and advise students. The Advisor Form limits the role of Advisors in that they are prohibited from addressing the hearing Board or any witnesses during the hearing process. The Acknowledgment of **[*12]** Rights & Conduct Procedures (signed by the Petitioner on 3/29/17) also limits the student's right to inspect the Case File. Specifically, students are not permitted to take copies or images of any proposed evidence [*Id.*].

On or about April 7, 2017, the Petitioner retained the law firm of Mayer Baron PLLC to "assist and advise" him in preparation for and at the hearing. Peter Mayer, Esq., the Petitioner's counsel, signed the requisite Advisor Form. On April 11, 2017, Mr. Mayer accompanied the Petitioner to the University to prepare for the hearing. Also present during the inspection was Dawn Marzella, Program Coordinator for the University's Office of Community Standards, who was assigned to attend the inspection by the Petitioner and his Advisor of the University's Case File regarding the subject disciplinary proceeding [*See* Marzella Aff. at ¶2]. In this regard, counsel alleges, in pertinent part, that while he was permitted to review the Case File, he was prohibited from taking any notes regarding the Case File which contained the witness statements and other evidence in support of the charges. Mr. Mayer contends that a University staff member warned him that he would be asked to leave **[*13]** if he made another attempt to take notes. Counsel further claims that he was precluded from engaging in private attorney-client communications with the Petitioner as a University staff member did not permit them to close the door during their review of the Case File.

Marzella attests that the Petitioner and Mr. Mayer were furnished a conference room in which the Case File was made available [*See* Marzella Aff. at ¶5]. Marzella concedes she "remained in that same room, as [she does] during all similar case file examinations, to make sure that nothing is removed from the Case File, that no documents are altered, and copies are not made." [*Id.* at ¶5]. Marzella alleges that they appeared to be attempting to make copies of Case File documents with their phone camera. She confirmed that "only the student is permitted to take notes." [*Id.*] Marzella admits that she was asked to leave the room so the Petitioner and his counsel may engage in private attorney-client communications [*Id.* at ¶6]. Yet, she insisted on remaining in the room. Marzella asserts that "they were free to step out of the room at any time to have a private conversation". [*Id.*]. When Marzella briefly left the room to seek assistance **[*14]** in addressing their complaints, "either Mr. Hall or his advisor attempted to block [her] [**5] view of the conference room." [*Id.* at ¶7]. At that point, Claudia Andrade, the Assistant Dean of Students, came to Marzella's assistance and "reiterated the University's Case File inspection procedures to Mr. Hall and his advisor." [*Id.* at ¶8]. Contrary to Mr. Mayer's contention, Marzella asserts that she "never threatened to remove Mr. Hall's advisor from campus or provided him with an ultimatum". However, no affidavit is submitted by Claudia Andrade addressing these claims. Based on the foregoing, the Petitioner and his counsel allege that they were denied the right to adequately prepare for the hearing by being denied "meaningful access" to the Case File.

On April 12, 2017, an audiotaped hearing was held before a three-member panel (the "Board") [*See* Transcript of Administrating Hearing, annexed as Exhibit "O" to Petitioner's Order to Show Cause]. DePierro (Assistant Dean of Students and Director of Community Standards) served as the Hearing Officer and non-voting facilitator for the Board's deliberations. DePierro explained that the Board was to determine (i) whether the accused student is **[*15]** "responsible" for the charges, requiring a finding that it was "more likely than not" that the accused student violated the University's policy prohibiting relationship violence; or (ii) whether the Petitioner is "not responsible". Upon a finding of "responsible", DePierro was to determine the sanctions. [*See* Hearing Tr. at pp. 2-4].

The Complainant testified that the Petitioner "cornered [her] against a wall and raised his arm clenching his fist, which is when witnesses intervened". She further alleged that it "took three employees to restrain him" and that the Petitioner "screamed and threatened [her] friends and [her] for the remainder of the night " [*Id.* at p. 5]. Initially, the Complainant did not voluntarily testify about her physical assaults upon the Petitioner. Subsequently, however, the Complainant repeatedly conceded to engaging in conduct that comported with the Petitioner's account of the events. To this end, the Complainant admitted that immediately prior to the incident, the Petitioner was sleeping by himself on a different level of the boat when she went looking for him [*Id.* at p. 99, 115]. When the Complainant found the Petitioner, she "looked at him for a while to confirm that he was asleep, and **[*16]** he didn't move and his eyes were shut for more than five seconds " [*Id.* at p. 115]. The Complainant then slapped the Petitioner to wake him up [*Id.* at p. 100, 116]; and "confronted him about his aggressive behavior" [*Id.* at p. 100]. The Complainant also admitted that she threw pepper on the Petitioner's pants "because he did not like getting dirty." [*Id.* at p. 117]. While the Complainant testified that she included this conduct in her initial Complaint, no such conduct was reflected in her handwritten Complaint dated April 29, 2016, or the subsequent Complaint dated February 2, 2017 [*Id.* at pp. 100, 116-117; *see also* Respondent's Ex. "B"]. When asked by the Board whether the Petitioner was "physically restraining [her] from leaving the situation", the Complainant described the close proximity of the chairs and tables which prevented her from getting around him.

The Petitioner testified, in pertinent part, that after they were arguing earlier in the evening, the Complainant was ignoring him while hanging out with her sorority sisters [*Id.* at p. 71]. Consistent with the Complainant's testimony, the Petitioner testified that immediately prior to the incident, he was minding his own business waiting for the trip to be over on the lower level of the boat. The Complainant then found **[*17]** him, slapped him in the face and told him to wake up [*Id.* at pp. 71-72]. As per the Petitioner, "[t]he altercation kind of escalated from there" and they were yelling at each other. The Complainant then hit the Petitioner in the groin with her backhand [*Id.* at p. 72]. The Petitioner conceded that he started yelling a little bit more because he was in pain. The Complainant then "picked up the pepper and threw it at [him]". [**6] The Petitioner denied ever hitting or threatening to hit the complainant. Rather, a physical altercation ensued with another male on the boat (a date who accompanied one of the Complainant's friends at the formal). The male intervened by grabbing the Petitioner. This is when security guards intervened and restrained the Petitioner. [*Id.* at p. 73]. The Petitioner testified that the "security guards were not trying to restrain [him] from [Complainant] or trying to keep [him] away from her. They were trying to keep him away from the other guy on the ship. [*Id.* at p. 74]. The Petitioner did concede to putting up a little bit of a fight with the security guards because they were trying to bring him to the ground and "wrestle" him.

The only eye witness to the incident that testified at the hearing was C.W., the Complainant's **[*18]** good friend and sorority sister [*Id.* at p. 17]. C.W. did not witness any events leading up to when the Petitioner and the Complainant were "sitting next to each other" on the first level of the boat [*Id.* at pp. 19-20]. While C.W. observed the two arguing, she testified that she never saw the Petitioner touch or hit the Complainant [*Id.* at p. 11, 18, 25]. Rather, the only physical contact C.W. observed was the Complainant towards the

Petitioner to "separate herself" from him [*Id.* at pp. 18, 25-26]. When asked whether the parties used their arms against one another, C.W. testified:

No, I didn't say use your arms against one another. I don't remember that happening, but I do know that [Complainant was using her arms to separate [the parties] from each other. I didn't see you guys — I'm going to be honest. I did not see you guys touch each other. I saw her using her arms to kind of like power away and separate herself. [*Id.* at p. 18].

C.W. unequivocally denied observing the Petitioner hit, swing at, grab or physically contact the Complainant, which contradicted her earlier handwritten witness statement wherein she alleged that the parties were "using their arms against each other" and that "[the Petitioner] was trying to grab [Complainant] " [*See* Respondent's Exhibit **[*19]** "I", Witness Statement of "Jane Doe 1"]. C.W. decided to get the complainant out of the situation by carrying her over the table because "[Complainant] was crying and cowering away" while the Petitioner was "yelling at her" — not because the Petitioner was "swinging at her" [Id. at pp. 19-20]. She testified that the Complainant did not have the ability to get out of the area herself as "the seats were very close to each other the tables were very close to each other there wasn't a lot of space in between the rows where the different tables were [and Complainant] was also against the side of the boat the wall of the boat" [*Id.* at p. 12].

Director O'Callaghan and AD McDonald were called to testify regarding their involvement in the University's investigation following the incident [*Id.* at pp. 26-28, 44]. While they conceded to taking notes during the Petitioner's initial interview, neither investigator reduced such notes to a writing to be included in the Case File or the evidentiary record before the Board [*Id.* at pp. 63-64]. However, Director O'Callaghan did retain notes from her initial interview of the Complainant. Referring to her notes, Director O'Callaghan confirmed the Complainant's admission that she was first to strike the Petitioner while **[*20]** he was asleep on the boat. [*Id.* at pp. 27-28]. During her testimony, Director O'Callaghan did not recall the details of the Complainant's claims that she was held up against the wall, restrained, or grabbed by the Petitioner. Nor was such conduct reflected in her notes [*Id.* at pp. 28, 32-33].

AD McDonald reviewed Director O'Callaghan's notes from her initial interview of the Complainant. Despite having reviewed the foregoing admissions by the Complainant, AD McDonald testified that he did not believe the Complainant was aggressive towards the Petitioner [*Id.* at pp. 61-62]. In response to inquiries from the Board concerning whether the [**7] investigation revealed any physical violence "either way" between the parties, AD McDonald's testimony comported with the Petitioner's account of the events, to wit, that the Complainant threw pepper at the Petitioner. AD McDonald further testified that the security guard, June Thompson, intervened between a physical altercation between the Petitioner and another male on the boat — not the Complainant.

It was discovered during AD McDonald's testimony that, following his initial interview of the Petitioner in May 2016, he had no further communication with the Petitioner until March 2017 — after the Complainant **[*21]** decided to proceed with formal charges [*Id.* at pp. 51-52]. At the initial interview on May 4, 2016, the Petitioner provided AD McDonald

with June Thompson's business card and requested that he serve as a witness on the Petitioner's behalf. At that time, the Petitioner also asked AD McDonald to ascertain the name of the Freeport boat and to secure any available video surveillance [*Id.* at pp. 51, 56-57]. However, formal charges were not brought, and the Petitioner was not required to prepare for a hearing, until March/April 2017. At that time, the Petitioner renewed his requests to AD McDonald to have June Thompson called as a witness and obtain any available video surveillance. At the hearing, AD McDonald testified that he did not make any attempts to ascertain the identity of the boat or secure the video surveillance because it was "not [his] role" to do so, and purportedly outside his jurisdiction [*Id.* at pp. 53, 57]. As to June Thompson, AD McDonald testified:

MR. HALL: Did you try to reach out to him [June Thompson] any other time?

MR. MCDONALD: No, I did not.

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MR. HALL: Did you try to bring him here for the hearing today?

MR. MCDONALD: I did not.

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MR. HALL: would his testimony of — been favorable to myself if he was here today to speak **[*22]** on my behalf?

MR. MCDONALD: I interviewed him on May 5th, and then you and I had a conversation in March of this year [2017]. And you asked if you could recant your witness, Mr. June Thompson, and I informed you it doesn't work that way. And you had asked for the telephone number, and I gave you the telephone number via an email, and you told me it was a fax number. That was the only number I had. That was the number I used to contact him. So if you're asking me from what's here on this piece of paper, what I interviewed him, would it be helpful to you, do you want my answer?

MR. HALL: Would him being here today to — so in her statement — in his statement it clearly says that it shows her throwing pepper on my [*sic*] and not the other way around, correct?

MR. MCDONALD: That's what it says.

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MR. HALL: So, you know with that in his initial statement, you know, you could say that his testimony here would be favorable?

MR. MCDONALD: Well, I'm not the one to judge what other people say, but it also says that you had to be restrained. [*Id.* at pp. 54-56].

Subsequently, the Board questioned the Petitioner as to why he sought June Thompson's contact number from AD McDonald when the Petitioner initially furnished **[*23]** the information [*Id.* at p. 88]. The Petitioner responded that he had been given AD McDonald Thompson's business card [**8] during the initial interview in 2016, and misplaced the number after not hearing anything regarding the case for nearly a year. Upon learning of the formal charges, the Petitioner requested Thompson's contact number specifically for the purpose of securing his appearance [*Id.*].

The evidence presented at the hearing shed light on the circumstances surrounding the lengthy delay between the Complainant's initial complaint to Public Safety in April 2016, and the formal charge issued by the University in March 2017 [*Id.* at pp. 7-8]. In this regard, the University's stated reasons mimic the Complainant's second handwritten Complaint of February 2, 2017. In this Complaint, the Complainant explained that she wanted to "file a formal complaint regarding the incident that transpired on 4/28/16 because Petitioner declined the alternative resolutions, as well as declined [*sic*] to sign the no contact order" [*See* DePierro Aff. at Ex. "B"]. It is undisputed that the Petitioner's no-contact order was in full force and effect despite the fact that he never signed it [*Id.* at pp. 33, 39].

Director O'Callaghan testified at the hearing **[*24]** that the delay was due, at least in part, to the Complainant's upcoming travel plans for a study abroad program. The Complainant told Director O'Callaghan that she wanted to use that time to consider her course of action relating to the Complaint. DePierro attests in her Affidavit submitted in support of the University's motion to dismiss that the delay was also because the Petitioner was not registered for the Fall 2016 semester. She further claims that, upon both students' return to campus for spring 2017 semester, alternative resolution having been unsuccessful, the formal charge was issued in March 2017. [*See* DePierro Aff. at ¶36].

The Complainant's real reason for not seeking to formally proceed earlier than February 2017 was discovered when she testified at the hearing. In this regard, the Complainant testified that she had no interest in pursuing the Complaint originally. The impetus for the formal charge was in or about February 2017, when the University's former Title IX Coordinator verbally informed the Complainant that the Petitioner sought to appeal the no-contact order [*Id.* at pp. 133-134]. The Complainant testified that she was never provided with the Petitioner's purported written appeal. **[*25]** It is undisputed that the Petitioner never in fact formalized his request by filing a written appeal. However, upon being told this information, the Complainant "felt fearful enough to go through with [the Complaint] despite [her] previous feelings of not wanting to because [she] felt that after eight months [Petitioner] was still trying to not leave [her] alone " [*Id.* at p. 134]. Her belief was admittedly not based upon any personal knowledge regarding whether the Petitioner sought to appeal all or part of the no-contact order. Nor was it based upon any attempt by the Petitioner to contact her [*Id.* at pp. 123, 134].

The Complainant again confirmed the reason for deciding to proceed with formal charges ten (10) months later when the Petitioner objected to an Absentee Witness Statement drafted on April 5, 2017, that was read into the record at the hearing, on the grounds that the statements were not contemporaneously made with the events described therein [*Id.* at pp. 66-67]. In response to the Petitioner's objection, the Complainant conceded that the "statements were gathered recently, and [the Complaint] was pursued recently" because "[Petitioner] wanted the no contact order lifted [and] it frightened [her] that eight months later **[*26]** [the Petitioner] was still wanting to contact [her]." [*Id.* at pp. 68-69].

The Complainant's reason for choosing to commence a formal proceeding in February 2017 was addressed a third time during the parties' closing statements at the hearing. In his closing, the Petitioner testified before the Board that the formal complaint was prompted by the [**9] Title IX coordinator's notification to the Complainant regarding his inquiry into the no-contact order [*Id.* at p. 141]. The Petitioner submitted to the Board that the Title IX coordinator's notification was improper because he had not in fact filed a written appeal of the no-contact order. Yet, the Title IX coordinator "tipped [Complainant] off" that he was going to pursue such recourse [*Id.*]. In his closing, the Petitioner testified that he wants the no-contact order to remain in effect with respect to the prohibition against the parties contacting one another. However, the Petitioner requested that the Board lift the ban prohibiting him from entering all residence halls and remove the ban posters with his picture posted at the University [*Id.*]. As the Petitioner subsequently explained, his inquiry into the no-contact order was limited to lifting the ban from residence **[*27]** halls and removing the ban poster from campus.

In her closing, the Complainant again admitted that she initially did not request a formal hearing and merely sought a no-contact order issued to the Petitioner preventing him from contacting her and entering only the dormitory in which she resided [*Id.* at p. 142]. However, upon receiving notice "eight months later" that the Petitioner sought to have the no-contact order lifted, she "knew [she] had to move forward with the hearing" and "reopened the case because [she] did not feel safe knowing that [the Petitioner] is a student in this campus." [[*Id.* at p. 143].Evidence adduced at the hearing also addressed the two-week delay in the issuance of the Complainant's no-contact order. Director O'Callaghan testified that "it could have just been a function of schedules and not being able to get [complainant] in to sign the no contact order." [*Id.* at pp. 38-39]. It was ultimately discovered that the Petitioner requested a no-contact order to be issued to the Complainant after she showed up at the Petitioner's residence with her uncle on May 6, 2016, without notice, and demanded the immediate return of her personal items [*Id.* at pp. 75-76, 94-95, 132]. The Petitioner was not home at the time and the Complainant was **[*28]** confronted with a member of the Petitioner's family. The Complainant conceded that she warned the Petitioner's family that she would "take further action" if her property was not returned by next day. [*Id.* at p. 97]. The Complainant readily acknowledged at the hearing that Public Safety had previously directed her not to contact the Petitioner [*Id.* at p. 47]. She also acknowledged that the Petitioner had already made arrangements for the exchange of personal belongings through the Public Safety office as instructed [*Id.* at p. 98, 104-105]. In response to the Board's inquiries in this regard, the Complainant testified:

MS. HERBERT: Before you went to [the Petitioner's] house to get your belongings, did public safety make you aware that they would help to make that exchange?

[COMPLAINANT]:They did.

MS. HERBERT: How come you didn't wait for that?

[COMPLAINANT]: I didn't wait because I had gone to them I don't know how many days. I think it was around a week and a half. I had requested that in the alternative resolution that I proposed multiple times. I said please just give me my things back. When he referenced that I texted his mom after, I said in the text I didn't want to take this to the police, and I don't want Tom to get in trouble, **[*29]** however, those are my belongings, and if I don't receive them then I will have no choice but to take further action. **And I didn't wait on public safety because I was going to study abroad in about a week, and to be honest didn't trust that I would receive my things back And I guess I can't say that he refused**, but he knew I needed my things. Public safety contacted him, and a week and a half later I still had not received them.

***

and I did alert public safety as soon as that happened, that I went to his house. I said I didn't know if that was something that was the smartest idea, but I was desperate for my things and I'm leaving soon, and I wanted to get them back. [*Id.* at pp. 105-106 (emphasis supplied)].

The record is devoid of any evidence that the Complainant was disciplined for violating the no-contact order that was in full force and effect, although not signed, and Public Safety's directives.

Following the hearing, the Board determined that the Petitioner was "responsible" for the charge of "dating violence". Specifically, the Board found it more likely than not that the Petitioner threatened to harm the Complainant and attempted to hit her with his fist. [*See* Administrative Conduct Board Decision, **[*30]** dated 4/13/17, annexed to DePierro Aff. as Ex. "K"].

The University afforded the parties an opportunity to submit "written impact statements" prior to issuing sanctions. In pertinent part, the Petitioner reiterated that he sought the no-contact orders to remain in effect as it regards the prohibition on the parties contacting one another. He merely seeks to lift the portion of his no-contact order which banned him from all residence halls at the University, and discontinue the display of his name and likeness from the walls of the University that say he is not allowed into the residence halls " [*See* Petitioner's Impact Statement dated 4/13/17, annexed to DePierro Aff. as Ex. "L"].

By letter dated April 28, 2017, DePierro notified the Petitioner that the sanctions included suspension from the University for one (1) academic semester as of May 21, 2017, *i.e*. until the Spring 2018 semester [*See* Notice of Sanctions, dated 4/28/17, annexed to DePierro Aff.

as Ex. "M"]. The penalty imposed also required the Petitioner to fulfill certain pre-conditions in order to be considered for re-enrollment. The University required, in sum and substance:

(1) participation in a counseling program to address **[*31]** healthy decisions regarding anger management strategies and personal relationships;

(2) a written statement to the Dean of Students which must include

a. a supporting letter from the counselor or agency confirming his progress

b. a summary of how he has used his time away to address the issues that led to the suspension

c. an action plan to be implemented to achieve his academic and personal goals; and

(3) a personal interview with the Dean of students before being approved to return as a student. [*See* Notice of Sanctions, Ex. "M"]

Thereafter, the Petitioner utilized the University's appeal procedures by filing two levels of appeal [*See* DePierro Aff., Ex. "N" through "S"]. Both appeals were denied with the University's final decision being issued on June 15, 2017. The instant Article 78 challenging the University's determination followed.

Legal Analysis

At the outset, the University's motion (Seq. 02) seeking an Order, pursuant to CPLR §3016(i), directing the Clerk of the Court to redact the names and identifying biographical information of the Complainant and all Hofstra student witnesses to the disciplinary proceeding, is **GRANTED** [22 NYCRR § 216.1 (a)]. Upon weighing the competing interests involved, and in the exercise **[*32]** of its discretion, the Court agrees that unfettered access to the documents at issue may result in harm to a compelling interest, *i.e.*, disclosure "could impinge on the privacy rights" of the Complainant or other student witnesses, who are not parties to this proceeding [*Mancheski v. Gabelli Group Capital Partners*, 39 AD3d 499, 502-503, 835 N.Y.S.2d 595 (2d Dept. 2007); [**10] *Lennox Industries, Inc. v. Honeywell Intern., Inc.*, _Misc.3d._, 2014 WL 917037 at 1 [Supreme Court, New York County 2014]. Significantly, the University's Policy emphasizes the private nature of the disciplinary process since it provides, *inter alia*, that University hearings are not open to members of the University community or to the public. Moreover, the Court finds that there exists no compelling public interest otherwise requiring that the documents at issue remain available for public inspection and also notes that the sealing request is limited in its scope and application.

The Court will next address the Petitioner's application to annul the University's findings and the University's motion to dismiss the proceeding.

Courts have a "restricted role" in reviewing determinations of colleges and universities (*Powers v. St. John's Univ. School of Law*, 25 NY3d 210, 10 N.Y.S.3d 156, 32 N.E.3d 371 (2015), quoting *Maas v. Cornell Univ.*, 94 NY2d 87, 92, 721 N.E.2d 966, 699 N.Y.S.2d 716 [1999] (internal quotation marks omitted); *Aryeh v. St. John's University*, 154 AD3d 747, 63 N.Y.S.3d 393 (2d Dept. 2017)]; *Cavanagh v. Cathedral Preparatory Seminary*, 284 AD2d 360, 361, 725 N.Y.S.2d 889 (2d Dept. 2001); *Tedeschi v. Wagner College*, 49 NY2d 652, 658-660, 404 N.E.2d 1302, 427 N.Y.S.2d 760 (1980); *Matter of Ebert v. Yeshiva Univ.*, 28 AD3d 315, 813 N.Y.S.2d 408 (1st Dept. 2006)].

A court reviewing a private university's disciplinary determination must determine "whether the university substantially adhered to its own published **[*33]** rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious" [*Matter of Rensselaer Socy. of Engrs. V. Rensselaer Polytechnic Inst.*, 260 A.D.2d 992, 993, 689 N.Y.S.2d 292 (3d Dept. 1999); *Matter of Basile v. Albany Coll. of Pharm. of Union Univ.*, 279 AD2d 770, 771, 719 N.Y.S.2d 199 (3d Dept. 2001), *lv denied* 96 N.Y.2d 708, 749 N.E.2d 208, 725 N.Y.S.2d 639 (2001)]. The determination must be annulled where a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules or imposes a penalty so excessive that it shocks one's sense of fairness [*Powers v. St. John's Univ. School of Law*, 25 NY3d at 216, (internal citations omitted); *citing Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 234, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974)].

Here, the Petitioner's claims that the University's disciplinary process lacked fundamental fairness and did not comply with applicable law are without merit. The Petitioner submits that he was denied due process based upon the University's failure to call exculpatory witnesses on the Petitioner's behalf and the Board's consideration of witnesses' hearsay statements who were unavailable for cross-examination at the hearing. The Petitioner's arguments are rejected as the Respondent, University, is not a public university. Thus, the University's relationship with its students "is essentially a private one such that, absent some showing of State involvement, [its] disciplinary proceedings do not implicate the 'full panoply of due process **[*34]** guarantees'" [*Matter of Rensselaer Socy. of Engrs. V. Rensselaer Polytechnic Inst.*, 260 AD2d 992, 994, 689 N.Y.S.2d 292 (3d Dept. 1999), *quoting Matter of Mu Ch. of Delta Kappa Epsilon v Colgate Univ.*, 176 AD2d 11, 13, 578 N.Y.S.2d 713 [3d Dept. 1992]; *see also Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944, 6 N.Y.S.3d 546, 29 N.E.3d 893 (2015); *Matter of Ebert v. Yeshiva Univ.*, 28 AD3d 315, 315, 813 N.Y.S.2d 408 (1st Dept. 2006)]. In school disciplinary proceedings, a private university's interviews concerning witnesses' accounts of statements are admissible, even if such statements constitute hearsay being offered for the truth of the matter asserted [*Matter of Budd v. State Univ. of NY at Geneseo*, 133 AD3d 1341, 19 N.Y.S.3d 825 (4th Dept. 2015), *lv. denied* 26 N.Y.3d 919, 26 N.Y.S.3d 764, 47 N.E.3d 94 (2016)]. Moreover, the right to cross-examine witnesses is limited in administrative proceedings [*See Matter of Kosich v. New York State Dept. of Health*, 49 AD3d 980, 983, 854 N.Y.S.2d 551 (3d Dept. 2008), *appeal*

dismissed 10 N.Y.3d 950, 892 N.E.2d 856, 862 N.Y.S.2d 463 (2008)]. In this matter, as the witnesses possessed information that was based upon personal observations, the Court finds no error in the Board's consideration [**11] of the interview notes or statements pertaining to them. Nor does the Court find any error in the University's failure to call witnesses on the Petitioner's behalf. The Petitioner was afforded the opportunity to submit a written request for proposed witnesses to be called at the hearing. It is undisputed that he neglected to submit a witness list in writing at least seven (7) days prior to the hearing in accordance with the University's Policy.

The Petitioner also challenges the University's determination on the grounds that it failed to substantially comply with its own policies and procedures. While perfect adherence to every procedural requirement **[*35]** is not necessary to demonstrate substantial compliance (*Matter of Beilis, supra*), the Court finds that, in several respects, the Respondent failed to substantially comport with its own Policy, causing significant prejudice to the Petitioner.

As an initial and most prejudicial matter, the University failed to promptly adjudicate the Complaint pursuant to its "Conduct Procedures" [*See* Policy at p. 50]. Explicit in its terms is the requirement that the University act with reasonable promptness following reports of alleged violations of the Policy prohibiting dating violence. The entire process, excluding appeals, is reflected to "last up to 60 days", depending on a variety of factors — none of which are presented here. The Policy is replete with references that promptness is required at each state of the process — i.e. reporting of complaints, investigations into complaints, and the conduct of hearings. Indeed, the Notice of Hearing" is required to be scheduled "reasonably promptly following the initiation of the Complaint" [*See* Policy at p. 52]. The record before this Court unequivocally reflects that the University materially delayed initiating formal proceedings.

"Suspension for causes unrelated to academic achievement involve determinations **[*36]** quite closely akin to the day-to-day work of the judiciary" [(*Tedeschi v. Wagner Coll.*, 49 NY2d at 658. "Recognizing the present day importance of higher education to many, if not most, employment opportunities, the courts have, therefore, looked more closely at the actions of educational institutions in such matters" [(*Id.* at 658; *citing* *Klinge v. Ithaca Coll.*, 244 AD2d 611, 613, 663 N.Y.S.2d 735 (3d Dept. 1997)].

Here, it is undisputed that over ten (10) months elapsed from the filing of the original Complaint and the Petitioner's Referral to the Office of Community Standards. The nearly one-year delay ostensibly served as the imposition of a significant penalty against the Petitioner. As an initial illustration, the University imposed an interim sanction by issuing a ban from all residence halls and distributing a ban poster with the Petitioner's photograph and instructions to contact Public Safety should he attempt entry. The "Acknowledgment of Student's Rights & Conduct Procedures for Violations of Policy Prohibiting Relationship Violence" defines the ban from residence halls as a sanction that may be imposed "for violations of the Policy" [DePierro Aff., Ex. "B"]. The University departed from its procedures by issuing this interim sanction, without having provided the Petitioner with an Acknowledgement, **[*37]** nor having found him guilty of violating the Policy. To be sure,

the Acknowledgment provides that no-contact orders may be issued upon receipt of a complaint as an "interim measure". Implicit in the term is the temporary nature of its imposition.

Moreover, the provisions addressing no-contact orders in the Policy contain safeguards, such as time restrictions and a review process afforded to students affected by its terms. The University's unreasonable delay in affording the Petitioner a prompt review of the charges effectively fixed a significant punishment indefinite in its duration. When the Petitioner attempted to utilize the review process afforded to him pursuant to the Policy as a student affected by a term in the no-contact order, he was met with having to defend himself against a [**12] stale charge. Indeed, no new incidents occurred and the Petitioner in no way violated the no-contact order that was in place. An investigation into the circumstances surrounding the Complainant's second Complaint filed in February 2017 may have revealed the reason for the delay. Not only did the University fail to conduct even the most rudimentary investigation, but upon learning the Complainant's **[*38]** basis for failing to proceed formally until February 2017 at the hearing, or during the appeal process, the University failed to correct its error.

While a charge of dating violence amply justifies interim measures as may be necessary to prevent further harm, the actual sanction imposed here, without any limit in its duration or consideration for its necessity, was, in this Court's opinion, a substantial departure from the University's own procedures.

The University's proffered reasons for the lengthy delay do not serve as legitimate justification. The Petitioner's failure to sign the no-contact order issued in April 2016 and his declination of alternative resolutions certainly existed immediately following the filing of the initial Complaint. There was no change in circumstances, other than the claim that the Petitioner was not registered for classes in the Fall 2017 semester. However, in light of the Complainant's unwavering testimony concerning what prompted the second belated Complaint admittedly based upon the same April 2016 incident, the University should have adhered to its own procedures by closing the case due to inactivity, or at the very least, inquiring into the reason for **[*39]** the delay.

The University appears to place great import on the Petitioner's declination of alternative resolutions that were proffered. Nowhere in its Policy does it warn students that further disciplinary action could result from declining such measures. To the contrary, the Policy provides that any alternative resolution must be voluntarily agreed upon by both parties.

The prejudice to the Petitioner was compounded by the University's failure to promptly adjudicate the Complaint as the lengthy delay crippled the Petitioner's ability to adequately prepare a defense. By way of example, June Thompson was available immediately following the incident evidenced by AD McDonald's telephone interview conducted in May 2016. A year later, however, the Petitioner could not ascertain Thompson's whereabouts because the contact number was no longer in service and/or disconnected. At the hearing, the Board questioned the Petitioner as to why he did not secure Thompson on his own. The Petitioner candidly responded that he had lost the information over the long time period

that elapsed and immediately contacted AD McDonald — the investigator to whom he gave the original business card — in order to secure **[*40]** his appearance. As expected from lengthy delays, the Petitioner could no longer find the witness. To be clear, the Court does not find error on the part of the University for failing to call June Thompson as a witness. Rather, the Court finds error in the significant delay, one of the results of which was the inability to locate a witness who may likely have been available had the matter been adjudicated promptly.

The Court finds that the University also substantially departed from its own procedures by failing to apply the Policy in an even-handed fashion. In this regard, the University failed to discipline the Complainant for her admitted violations of the Policy. The Case File and the hearing transcript are replete with admissions by the Complainant that she acted as the initial aggressor and physically assaulted the Petitioner on multiple occasions. The parties were clearly separated on the boat immediately prior to the incident. The Complainant then went looking for the Petitioner, slapped him, taunted him by throwing pepper on his pants (because she knew the Petitioner did not like getting his clothes dirty), and backhand slapped his groin area. She [**13] admittedly was the instigator **[*41]** who initiated contact with the sleeping Petitioner. Other than the parties, not a single eye witness who testified at the hearing stated that the Petitioner struck or threatened to strike the Complainant. Notwithstanding the overwhelming evidence presented to the Board, the Complainant was never disciplined.

Lastly, it bears noting that the University also failed to discipline the Complainant for admittedly engaging in "self-help" measures to obtain her belongings after being directed not to contact the Petitioner; and after arrangements were made to exchange the parties' belongings through Public Safety. In fact, the Complainant's no-contact order reflects that a violation of a term therein would be deemed a violation of the University's Code of Conduct. Yet, once again, no action was taken against the Complainant.

As an aside, the Court finds troubling the imposition of a prohibition with respect to an Advisor's review of the Case File. Counsel for the Petitioner was admittedly stymied from taking notes during his review of the case file. While the University contends that only the Petitioner was permitted to take notes, the purported rule imposed upon counsel is not reflected anywhere **[*42]** in the Policy or the Advisor Form. The University's conduct in this regard further thwarted the Petitioner's ability to adequately prepare a defense.

It is clear that dating violence is a matter of legitimate concern to the Respondent — as it should be. Given this record, however, the Court cannot in good conscience find the University's determination was rendered in accordance with its published procedures. Nor does the Court find that it was based upon the University's exercise of honest discretion after a full review of the operative facts. The various deviations, taken together, renders the University's determination arbitrary and capricious so as to warrant judicial intervention.

Accordingly, it is hereby

ORDERED, that the Petitioner's Order to Show Cause (Mot. Seq. 01), pursuant to Article 78, seeking to annul the determination of the Respondent University in finding him responsible for dating violence and imposing resultant sanctions, is **GRANTED**, and the findings and sanctions are **ANNULLED**; and it is further

ORDERED, that the Notice of Sanctions dated April 28, 2017 shall be expunged from the Petitioner's student file, consistent with the terms of this Order; and it is further

ORDERED [*43], that the Respondent's motion (Mot. Seq. 02) seeking an Order directing the Clerk of the Court to redact the names and identifying information of the Complainant and any student witnesses relating to the underlying disciplinary proceeding, is **GRANTED**; and it is further

ORDERED, that the Respondent's motion (Mot. Seq. 03) seeking an Order dismissing the Petition, is **DENIED**.

All matters not specifically addressed herein are **DENIED**.

The foregoing constitutes the decision and order of the Court.

DATED: April 3, 2018

Mineola, New York

Hon. Randy Sue Marber, J.S.C.