KUNIN v. POMONA COLLEGE
Case Number: 20STCP02712
Hearing Date: April 27, 2022
Court's Reconsideration Motion Hearing Date: November 2, 2022

ORDER GRANTING PETITION FOR WRIT OF MANDATE AFTER RECONSIDERATION

On September 8, 2022, after the court issued its Order Granting Petition for Writ of Mandate on September 6, 2022, the court advised the parties it was considering changing its order pursuant to *Le Francois v. Goel* (2005) 35 Cal.4th 1094. The court indicated it believed it may have erred in finding the underlying agency decision should be evaluated under the court's independent judgment. The court noted its September 6, 2022 order granting the petition made findings under both independent judgment and substantial evidence such that the court's underlying decision granting the writ would not be affected. The court's September 6, 2022 order found no evidence (regardless of the standard of judicial review) to support College's finding of retaliation by Petitioner. The court provided the parties with an opportunity to be heard on the issue and allowed both briefing and argument.

Having considered the parties positions further, the court grants reconsideration, reconsiders the order and modifies the order to reflect the court's proper standard of review. The court finds—as to this particular decision by Respondent—proper judicial review under Code of Civil Procedure section 1094.5 is by substantial evidence.

The court has interlineated its earlier decision to reflect the change, has added a section concerning the standard of review, and reissues it here. The interlineation is intended to leave the court's prior decision and rationale intact.

Petitioner, Aaron Kunin, seeks a writ of mandate compelling Respondent, Pomona College (College), to set aside its August 12, 2020 disciplinary decision requiring him to complete certain training and prohibiting him from holding the position of Chair of the English Department any time prior to the Fall of 2030. The discipline followed an investigation by College into claims of racial discrimination and retaliation by fellow colleagues, Professors Valorie Thomas and Kyla Tompkins. Petitioner seeks relief pursuant to Code of Civil Procedure section 1094.5. College opposes the Petition.

The Petition is granted.

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STATEMENT OF THE CASE[1]

Petitioner is an Associate Professor of English at College. (AR 544, 1439.)

Professor Valorie Thomas is a Professor of English and Africana Studies at College. (AR 544, 548, 704.)

Professor Kyla Tompkins is an Associate Professor of Gender and Women's Studies as well as English at College. (AR 544, 704.)

On October 3, 2019, Thomas and Tompkins filed a complaint with College against Petitioner. "[T]he primary allegations involved race discrimination and retaliation; in addition, concerns were expressed regarding gender bias as to specific actions taken by [Petitioner] in his role as Chair of the English Department." (AR 516.) The details of the events as relevant to this dispute are set forth below.

Proposed Course on Ralph Ellison and Subsequent Objections

In September 2016, Petitioner proposed to the then-Chair of the English Department, Professor Kevin Dettmar, that he (Petitioner) teach a seminar course during the Spring of 2017 on Ralph Ellison, a 20th Century African American author. (AR 545.) Thomas and Tompkins each informed Dettmar they objected to Petitioner teaching such a course due to their concerns Petitioner did not have the training necessary to teach it. (AR 676, 737.) Dettmar responded to their concerns by informing them he had asked Petitioner to reconsider teaching the course. (AR 545, 738.) Petitioner thereafter withdrew his proposal to teach the course. (AR 545, 738.)

About a month later, however, on October 1, 2016, Petitioner proposed he teach a seminar course on Ralph Ellison, entitled "Ralph Ellison's America;" Dettmar shared Petitioner's proposal with the English Department. (AR 546.)

On October 2, 2016, Tompkins emailed Petitioner and informed him she believed he was unqualified to teach the course. (AR 546.) On October 3, 2016, Thomas emailed the English Department objecting to Petitioner teaching the Ralph Ellison course. (AR 547.)

Petitioner then emailed Thomas and apologized; he requested they meet in person. (AR 547.) On October 12, 2016, Petitioner and Thomas met in Petitioner's office to discuss Petitioner teaching the proposed Ralph Ellison course. (AR 547.) During the discussion, Thomas informed Petitioner she would not object to him teaching the course. (AR 547.)

On May 30, 2017, Petitioner and Thomas met again to discuss Petitioner's plan to teach a course on Ralph Ellison and blues music in the Fall of 2017. (AR 548.) Petitioner informed

[1] Many of the undisputed facts are taken from the investigator's report.

Thomas he was also interested in teaching a seminar course on writers (including Ralph Ellison) who criticize sociology (later entitled "Five American Writers"). (AR 548.)

In the Fall of 2017, Petitioner taught a course on Ralph Ellison. (AR 548.)

Robert's Rules of Order and Funding Policies

On July 1, 2018, Petitioner became Chair of the English Department, replacing Dettmar. (AR 549.) Upon becoming Chair, Petitioner scheduled one-on-one meetings with department faculty to discuss implementing new procedures for department meetings and business, including the approval of faculty-requested funding. (AR 549.) Petitioner sought to implement new procedures to ensure he treated everyone in the department equally. (AR 534.)

At College, there are various sources of funds for a department faculty member (1) a faculty member's discretionary "opportunity" funds; (2) funds through the Dean's office, such as WIG grants; or (3) department funds, which includes the sizeable Warren Fund (with a balance of approximately $1 million). (AR 534.)

On September 11, 2018, Petitioner held his first meeting with the department as Chair. (AR 550.) The department's members present voted and agreed to adopt a "loose" version of *Robert's Rules of Order* to govern the department's approval of faculty requests for funding. (AR 550.) The rules adopted by the department provided: (1) all deliberation of department business had to occur at a meeting, either in person or via telephone or video participation; (2) Petitioner, as Chair, could unilaterally grant all department funding requests up to $1,000, however, the department members had to vote on all funding requests of $1,000 or more at an in-person meeting; and (3) department faculty could not "hot dog slice" requests, meaning department faculty could not make multiple requests under $1,000 for the same event or purpose to circumvent the in-person requirement for requests for $1,000 or more. (AR 533, 550.)

Thomas' February 11, 2019 Request for $300 in Funding for Zines

On February 1, 2019, Thomas emailed Petitioner informing him she would like to "submit a request for what used to be called a 'course improvement grant.' " (AR 1665.) Thomas reported she intended to purchase zines, or small print-works, for her students in "ENG 124 Afrofuturisms." (AR 1665.) Petitioner responded to Thomas: "I think the course improvement grant is called a WIG grant, and it's administered by Jan Roselle in the Dean's office. The application form should be available on the Dean's website." (AR 1665.) Thomas advised Petitioner she would "pursue the WIG grant." (AR 1665.)

On February 11, 2019, ten days after their communication about a WIG grant, Thomas emailed Petitioner advising she was "pressed for time" and would be unable to obtain a WIG grant to timely purchase the zines for her students. (AR 1418.) Thomas asked Petitioner if she could use

department funds to place the order for the zines and later reimburse the department with the WIG grant money she anticipated receiving. (AR 1418.)

Petitioner told Thomas she could use Petitioner's individual "opportunity funds," as opposed to department funds, and then later reimburse Petitioner's opportunity funds when Thomas obtained the WIG grant. (AR 1418.) Petitioner also informed Thomas, "[i]f for some reason the [WIG] grant doesn't come through—if they have already burned through the entire WIG fund or if we missed a deadline or something—I'm okay with that." (AR 1418.) Thomas responded, "[t]hank you, and I'll submit the WIG request asap. If those funds aren't available you can take the reimbursement out of my opp[ortunity] funds for next year if that's doable. . . . Much appreciated." (AR 1418.)

A few months later, on May 15, 2019, Thomas emailed Petitioner requesting "the English Department available budget be used to cover the $300 cost of the zines for my ENG 124 class this semester." (AR 1830.) Petitioner responded to Thomas stating Petitioner used his "own opportunity funds to pay" for Thomas' zines, "and [their] agreement was that my fund would be reimbursed out of the WIG grant that you were applying for." (AR 1829.) Thomas responded:

> "Please would you just cut the static and reimburse your $300 opportunity funds out of the restricted funds; it was just not necessary for you to make me apply to WIG for that in the first place. There is plenty of precedent for such application of the restricted funds especially for small amounts in time sensitive situations - many times faculty have used it to pay for things like class parties and refreshments, field trips, have even used it to mount installations and build giant puppets in Joshua Tree (Dick Barnes), and have used them to build an entire small theater (Steve Young) with a stage, lights, a sound board, and blackout curtains, that used to be in the classroom across from Cr 10 -- those funds are regularly used for any and everything." (AR 1828.)

Petitioner responded:

> "You don't have to convince me about the use of [WIG] grants. As I said below, I agree with you. I have never advocated a policy of 'going to [WIG] first.' However, if our colleagues vote that a request should go to [WIG], or if you propose submitting a request to [WIG], then you should submit your request to [WIG]. In the case of the zines, I insisted that the money to reimburse my opp[ortunity] funds should come from the [WIG] grant because applying for a [WIG] grant was the plan you originally proposed, and that was the plan I originally approved. When you submit multiple requests for the same object or purpose, that is hot dog slicing, which is not allowed under the rules that we created for the department in September 2018. If the money isn't reimbursed from the [WIG] grant, then it won't be reimbursed. If you're okay with that, it's your call." (AR 1828.)

As a result of her exchange with Petitioner, on May 22, 2019, Thomas informed department faculty in an email she believed Petitioner's actions have forced a "double standard" with respect to the approval of faculty funding. Thomas also expressed Petitioner caused her to be manipulated "into this borrower lender welfare queen status when the funds are sitting there gathering dust." (AR 1858.) She claimed Petitioner was "weaponizing" *Robert's Rules of Order* "and an absurd corporatism around it." (AR 1857.) Thomas also declared the department "is not a corporate boardroom."[2] (AR 1857.) Thomas also accused Petitioner of "pedantic stubbornness." (AR 1857.)[3]

Thomas' February 26, 2019 Request for $2,400 in Funding for the Innerlight Method Course

A week prior to her email complaining that *Robert's Rules of Order* had been weaponized, on May 15, 2019, Thomas emailed Petitioner requesting he approve her request for funding of $2,400 to permit her to register for a course supporting pedagogy and professional development (the Innerlight Method Course).[4] (AR 1830.) In the email, Thomas reminded Petitioner he had previously advised her to apply for a WIG grant to obtain the funds, and she had waited over two months for approval of the WIG grant with no response. (AR 1830.) Thomas also informed Petitioner that College was unable to provide her with an estimate of when the WIG grant request would be decided. (AR 1830.) Thomas stated her $2,400 request was "time sensitive" as she had repeatedly deferred payment of the course's registration fees. (AR 1830.)

On May 16, 2019, Petitioner responded to Thomas advising he did not "have the authority to approve requests for $1,000 and above." (AR 1829.) Petitioner stated Thomas' options were to make a request for such funding over $1,000 during a department meeting in September (when College would presumably reopen for the fall semester) or use her own opportunity funds. (AR 1829.) Petitioner stated for the time being, he "could approve a smaller amount if that would be useful." (AR 1829.)

On May 17, 2019, Thomas advised Petitioner the deadline to pay the registration fee for the course was June 9, 2019, less than a month away. (AR 1827.) Thomas reminded Petitioner the semester has not ended and requested Petitioner call an emergency meeting of the department to vote on approval of her funding request, or alternatively organize a vote by

[2] Thomas' email to the department was also informed by a series of emails discussed in the next section concerning a request for $2,400 which preceded Thomas' all department email.
[3] In response to Thomas' email, Petitioner wrote to the department: "Hello everyone[.] Let's save these issues for discussion with a mediator. Best wishes[.]" (AR 1857.)
[4] During argument, Petitioner suggested it was Thomas' colleagues who required that she apply for a WIG grant. That discussion, however, did not concern the Innerlight Method Course, it addressed travel to New York City "for an African American and Afrofuturism art exhibition for research purposes and to a Toni Morrison event . . . ." (AR 1202.)

email. (AR 1828-1829.) Thomas informed Petitioner that he was, once again, restricting her ability to use department funds, a permitted use under the rules. (AR 1828-1829.)

That same day, Petitioner responded to Thomas: "if people are willing to stick around after the [department] reception tomorrow, I'll try to get a quorum together. We can't take a vote by email. Such a vote would be invalid according to the rules we adopted in September 2018." (AR 533 [in person rule], 1828.)

Despite Petitioner's indication he would attempt to conduct an in-person meeting after a scheduled reception, Thomas did not appear the next day. (AR 1842.) Thomas did not receive the email about the meeting.[5] (AR 820, 1842.) Tompkins, who was present at the emergency meeting after the reception, requested to represent Thomas at the meeting; Tompkins was not allowed to do so.[6] (AR 1843.)

When Thomas realized she had missed the emergency meeting, she emailed the department requesting the department meet and vote remotely. (AR 820.) Petitioner responded by suggesting the possibility of adopting "a more casual procedure for voting on requests for money" in the future, but he warned that more lenient procedures could endanger department funding altogether. (AR 1842.)

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[5] During argument, Petitioner suggested Thomas took a break from reviewing her email communications after having received notice of the emergency meeting. The court cannot find that to be true. It appears Thomas took the break after receiving a communication from Petitioner at 3:53 p.m. on May 17, 2019. (See AR 1828, 1842.) At best, that 3:53 p.m. communication loosely suggested Petitioner would set up a meeting. Petitioner sent his email suggesting a meeting take place at 4:45 p.m. on May 17, 2019. On May 18, 2019, at 1:43 p.m. (after the meeting) Thomas acknowledged she was delayed in seeing the communication because of her break. (AR 1851.) Six minutes later Thomas described her situat on. (AR 1849.)

[6] Petitioner's unwillingness to allow Tompkins to represent Thomas' view led Tompkins to send an email to the members of the department. She wrote:

> "And incidentally, I'll just put it on the record that [Petitioner] was willing to represent Jonathan's point of view when he was absent from a tenure vote in the fall, but not [Thomas'] when she didn't get the email in time to attend today's meeting and ask for funds when she needs them. Nor mine when I couldn't attend an important meeting in the fall because of my joint appointment. Nor was I allowed to represent [Thomas'] information today when I asked if I could get the info and represent her. Now we won't meet to give our colleague the financial support she deserves. ¶ This is just straight up discrimination, albeit through the picayunities of small-p process. I suggest this goes to the Dean. Nobody should sit by when it would be so easy to simply be gracious and kind and support a colleague with money that we have, never mind our most senior colleague." (AR 1843.)

On May 22, 2019, Thomas emailed Petitioner, requesting Petitioner schedule a second emergency meeting after she learned her application for a WIG grant had been denied. (AR 2415.) Petitioner declined Thomas' request.

On May 30, 2019, College's Dean's Office approved a research grant for Thomas to pay the registration fee for the Innerlight Method Course.

College Retains Mediator to Address Department's Concerns

In June 2019, College hired Nyree Gray, Assistant Vice President for Diversity and Inclusion and Chief Civil Rights Officer at Claremont McKenna College, to serve as a mediator for the English Department. (AR 1815.) The purpose of the mediation was to assist the department in developing infrastructure and consensus regarding funding rules and procedures. (AR 1941.) In the early Fall of 2019, Gray met with Petitioner to address concerns raised by Thomas and Tompkins.

Petitioner's "Five American Authors" Course

On October 3, 2019, Petitioner informed Thomas that the Department needed a senior-level course for the Spring of 2020 and asked if she was interested in teaching a senior-level course. (AR 825, 2004.) Petitioner informed Thomas that, in the event she was unavailable to teach a senior-level course, Petitioner would "probably have to do it." (AR 2004.) Petitioner informed Thomas that his course "would be some version of the seminar [they] discussec in 2017—American writers who defend literature against sociological analysis (Ellison, Murray, Arendt, Jacobs, Kubler)." (AR 2004.) Thomas declined to teach the senior-level course. (AR 2003.) As a result, Petitioner indicated he would teach the proposed seminar and previewed his course to Associate Dean Mary Coffey the following day. (AR 825.)

Later on October 3, 2019, Thomas emailed Petitioner and the department, stat ng she did not endorse Petitioner teaching the course. (AR 2002.) Thomas reported that, while she may have endorsed Petitioner teaching the course in 2017, she had erred; Thomas felt as if she was backed "into a corner" and forced to silence her objections. (AR 2002.) Thomas maintained that Petitioner did not hold the expertise to teach such a course and had directly invaded the intellectual focus of her and Tompkins. (AR 2002.)

Despite Thomas' objections, on October 9, 2019, Petitioner submitted his course proposal to the Curriculum Committee, entitled "Five American Writers Who Had a Problem with the Social Sciences." (AR 568, 825, 2013, 2039.) During this time, Thomas submitted her own course proposal to the Curriculum Committee proposing to teach a course concerning Ralph Ellison. (AR 700, 2048, 2051.) On October 17, 2019, the Curriculum Committee approved Petitioner's course. (AR 2048.) The Curriculum Committee did not approve Thomas' course "because

[Petitioner] told [Coffey] that the course should not be approved because he was already offering a course on Ellison."[7] (AR 825-826.)

Thereafter, on October 18, 2019, Gray discussed her concerns regarding Petitioner teaching a course in competition with Thomas' proposed course. (AR 826.) Gray told Petitioner he did not need to teach the course because Thomas was willing to teach. (AR 826.) Petitioner told Gray "he was planning to teach his course because he believed he was being 'intellectually brave' and that he was 'tired of being bullied.' " (AR 826.)

College's Investigation, Determination, and Sanction of Petitioner

On October 3, 2019, Thomas filed a complaint against Petitioner regarding his actions as Chair of the department. (AR 652.) Petitioner learned of Thomas' complaint on November 12, 2019. (AR 571.)

On October 28, 2019, College retained Angela Reddock-Wright who conducted an investigation into Thomas' complaint from October 28, 2019 through March 17, 2020. (AR 652.) Following Investigator Reddock-Wright's retention, Tompkins filed a complaint against Petitioner. (AR 652.)

On December 4, 2019, Sue McCarthy, College's Associate Dean and Title IX Coordinator, sent an email to Petitioner. (AR 2780.) The email advised Petitioner that Thomas and Tompkins had filed "two complaints" against him, based upon "allegations that involved gender bias/harassment as well as race discrimination/harassment." (AR 2780.) The email advised Petitioner that Thomas and Tompkins alleged the incidents occurred "sometime last year and have persisted despite reports to administration and the involvement of external consult Nyree Gray." (AR 2780.) The email informed Petitioner his behavior might constitute a violation of College's Discrimination and Harassment Policy,[8] and College's Sexual Misconduct, Harassment and Discrimination Policy, which were included for reference through hyperlinks. (AR 2780-2781.) The email further advised Petitioner Investigator Reddock-Wright had been retained to investigate the complaints, and Investigator Redock-Wright would interview Petitioner. (AR 2781.) Finally, the email reported the investigator had conducted initial interviews with Thomas and Tompkins. (AR 2780.)

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[7] The facts concerning this issue are somewhat confusing. Thomas acknowledged on November 22, 2019 that her course had been approved. (AR 175.) It appears, however, Petitioner did not schedule the course so Thomas would teach it sometime later—after Petitioner had completed his course.

[8] College's complete policy is not provided in the administrative record. Nonetheless, "[s]ex/gender and raced-based discrimination, [is] defined in the Policy where someone is treated unfavorably because of that person's sex/gender or race." (AR 2781.) The policy defines retaliation as "the taking of an adverse action by any student, faculty or staff member against another individual as a result of that individual's exercise of a right under this Policy, including participation in reporting, investigation or hearing as provided in this Policy." (AR 2781.)

During Investigator Reddock-Wright's investigation, she interviewed Petitioner three times, Tompkins twice, and Thomas once. (AR 518.) Investigator Reddock-Wright advised Petitioner of the specific complaints made by Thomas and Tompkins during his interview. Petitioner provided a response to each specific allegation made. (AR 532-539.) Investigator Reddock-Wright interviewed fifteen additional witnesses, including department faculty, current and former administrators, and other third-party witnesses. (AR 518-519.)

On March 17, 2020, Investigator Reddock-Wright provided a 178-page confidential investigation report, which outlined the following adverse findings with respect to Thomas' and Tompkins' complaints: (1) Petitioner's implementation of *Robert's Rules of Order* was inconsistent and unnecessarily burdensome, and the inconsistencies and manner of implementation targeted and singled out Thomas and Tompkins, and Petitioner's actions were taken in retaliation for Thomas' protected assertions of racial discrimination; and (2) Petitioner's proposal to teach "Five American Authors" was in retaliation against Thomas, due to Thomas' repeated criticisms about Petitioner. (AR 521-522.)

On April 24, 2020, following a review of Investigator Reddock-Wright's Report and corresponding evidentiary documents, College issued a statement of policy violations. (AR 514-524.) College's statement amended Investigator Reddock-Wright's findings, somewhat, and came to the following conclusions: (1) Petitioner applied *Roberts Rules of Order* and other budgeting and administrative processes to Thomas in an inconsistent manner, in an effort to single out and retaliate against Thomas for her protected assertions of racial discrimination; and (2) Petitioner retaliated against Thomas by his "sustained effort to thwart Thomas' [own] efforts to teach her proposed course in favor of his own proposal," due to Thomas' "prior and sustained complaints regarding her sincerely held concerns over the race issues associated with his proposal and more generally within the Department." (AR 521-523.) College amended Investigator Reddock-Wright's findings, stating Petitioner did not commit the same impermissible acts against Tompkins—only against Thomas. (AR 521-523.)

On August 12, 2020, College imposed the following disciplinary actions against Petitioner based upon its findings Petitioner had violated College's policies: (1) Petitioner was required to undergo and complete Implicit Bias Training by May 31, 2021; (2) Petitioner was prohibited from holding the position of Chair of the English Department or any other academic department prior to the Fall of 2030; (3) Petitioner was required to undergo Leadership Training prior to being eligible to Chair a faculty committee; and (4) Petitioner was prohibited from having any role in the promotion activities of Tompkins. (AR 2510-2511.)

This proceeding ensued.

STANDARD OF REVIEW

Petitioner seeks an order compelling College to set aside its August 12, 2020 disciplinary decision requiring him to complete certain training and prohibiting him from holding the

position of Chair of the English Department prior to the Fall of 2030. He brings this action pursuant to Code of Civil Procedure section 1094.5.

Under Code of Civil Procedure section 1094.5, subdivision (b), the issues for review of an administrative decision 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 respondent 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. (Code Civ. Proc. § 1094.5, subd. (b).)

Where a petitioner contends the administrative agency's findings are not supported by the evidence, Code of Civil Procedure "section 1094.5, subdivision (c), does not establish a single standard for judicial review of the evidentiary basis for agency determinations." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 137; Code Civ. Proc. § 1094.5, subd. (c).) Rather, Code of Civil Procedure section 1094.5, subdivision (c) articulates two possible standards of review—independent judgment and substantial evidence. (Code Civ. Proc. § 1094.5, subd. (c).) The parties dispute the applicable standard here. That College is a private agency is not determinative on the standard of review to be used here. (See *Anton v. San Antonio Community College Hosp.* (1977) 19 Cal.3d 802, 816-817 [superseded by Code Civ. Proc. § 1094.5, subd. (d)].)

The independent judgment standard of review will apply where an administrative agency's decision "substantially affects a fundamentally vested right." (*Bixby v. Pierno*, *supra*, 3 Cal.3d at 144.) Where an agency's decision does not, however, "substantially affect a fundamentally vested right," the substantial evidence standard of review applies. (*Ibid.*)

"The courts must decide on a case-by-case basis whether an administrative decision or class of decisions substantially affects fundamental vested rights and thus requires independent judgment review." (*Ibid.*) To determine whether a right is fundamental, courts do not solely weigh the economic aspect of the right but consider the effect of the right in human terms and the importance of the right to the individual in the life situation. (*Id.* at 144-145.) A right will be considered "fundamental" where the right involves "the opportunity to continue the practice of one's trade and profession." (*Ibid.*) Additionally, while the Supreme Court in *Bixby v. Pierno* indicated independent judgment review is triggered only if the fundamental vested right in question was "substantially affected" by the agency decision, later case law "ha[s] not inquired into the *degree* to which the right in question was affected by the agency action." (Asimow, *et al.*, Cal. Practice Guide: Administrative Law (The Rutter Group, 2021) § 17:485.) "[T]he crucial question is not the actual amount of harm or damage in the particular case but the essential character of the right in human terms. Thus, the critical area of focus is the nature of the right . . . ." (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 751.)

Petitioner moves to set aside discipline imposed on him by College resulting from its finding Petitioner retaliated against Professor Thomas "based on Thomas' protected assertions of racial discrimination." (AR 521.) In addition to requiring Petitioner to complete certain training, the discipline imposed on Petitioner by College prohibits him from acting as chair of any

department at College until 2030. As noted by *Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 312-318, while the independent judgment standard applies to an agency's employee discharge decisions, all forms of employee discipline, including a mere reprimand, affect a fundamental right and are to be afforded independent judgment review. (*Ibid.*) As here, the discipline may affect future personnel and disciplinary decisions. Such discipline may also affect future opportunities for career advancement. (*Id.* at 316.)

The court finds the proper standard of judicial review here is independent judgment. The court is not persuaded by College's claim its discipline allows Petitioner to remain a member of its faculty and therefore substantial evidence review should apply. College's discipline affected Petitioner's fundamental right in that it impacts his ability to fully pursue his career and opportunities at College at least until the Fall of 2030. The discipline here "implicates a right that is important to [Petitioner] in his life situation even in the absence of an immediate economic impact." (*Ibid.*)

Further, the court is unpersuaded by College's reliance upon *Do v. Regents of University of California* (2013) 216 Cal.App.4th 1474, 1489 [*Do*]. College cites *Do* for the proposition that a party's fundamental rights are not involved where the party "has not [been] deprived of the right to work elsewhere." (*Do, supra*, 216 Cal.App.4th at 1489. [Employee "was not discharged in violation of any public policy, statutory or contractual right. [Citation.] Rather, he was dismissed because he failed to comply with University policy and core values. He has not been deprived of the right to work elsewhere, only at the University."])

Do is distinguishable. *Do* turned on the Regents of the University of California's status as an agency of constitutional origin. (*Id.* at 1485. ["A right to 'a full and independent judicial review' of an agency's decision to terminate an individual's public employment does not exist in the case of agencies 'of constitutional origin which have been granted limited judicial power by the Constitution itself.' [Citation.] Thus, 'It is established that when a review of a decision of an agency falling within [such] categories is sought pursuant to section 1094.5 of the Code of Civil Procedure, the court's scrutiny of the agency's factual findings is limited to a determination whether those findings are supported by substantial evidence in light of the whole record—and this is so whether or not the decision of the agency affects a fundamental vested right.' [Citation.] *Ishimatsu* and *Amluxen* . . . are generally accepted authorities stating that the California Constitution has granted the University [of California] quasi-judicial powers regarding matters falling within its broad powers to organize and govern the university, and this includes quasi-judicial adjudication of employment rights. [Citation.] Such University administrative decisions are subject to review under the substantial evidence rule."])[9]

[9] Where the proper standard of review is in issue, the "ultimate question in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking *judicial* power." (*Wences v. City of Los Angeles, supra*, 177 Cal.App.4th at 313 [citing *Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 780].)

~~This action does not involve the Regents of the University of California or any other agency of constitutional origin. *Do* is inapplicable here.~~

~~College's claim independent judgment occurs only in the context of governmental employment not private employers is not persuasive. That College is a private institution does not dictate substantial evidence review. (See, e.g., *Anton v. San Antonio Community College Hosp., supra,* 19 Cal.3d 802, 816-817 [superseded by Code Civ. Proc. § 1094.5, subd. (d); *Alpha Nu Association of Theta Xi v. University of Southern California* (2021) 62 Cal.App.5th 383, 408-411 [determining applicable standard of review for fraternity's discipline at private university].)~~

~~Independent judgment review prompts the court to decide whether the weight of the evidence supports the administrative findings (rather than whether substantial evidence supports the findings). (Code Civ. Proc. § 1094.5, subd. (c). ["Where it is claimed that the find ngs are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence."]) Thus, a trial court " 'not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence.' " (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816, fn. 8; *Bixby v. Pierno, supra*, 4 Cal. 3d at 143 [under independent judgment "the trial court not only examines the administrative record for errors of law, but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo"]. The court must draw its own reasonable inferences from the evidence and make its own credibility determinations. (*Morrison v. Housing Authority of the City of Los Angeles Bd. of Comrs.* (2003) 107 Cal. App. 4th 860, 868; *Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658 [independent judgment "does permit (indeed, [] requires) the trial court to reweigh the evidence by examining the credibility of witnesses"].)~~

The parties agree the courts' standard of review turns on the nature of the administrative decision and the rights impacted by that decision. The question becomes what did the agency decide, what does the decision do, and what rights, if any, does the decision impact. Where a right is impacted, the court must then determine whether the right is a fundamental vested one. "If . . . the administrative decision neither involves nor substantially affects a fundamental vested right, the trial court's review is limited to determining whether the administrative findings are supported by substantial evidence." (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313 [citing *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32].)

Where the proper standard of review is in issue, the "ultimate question in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking *judicial* power." (*Wences v. City of Los Angeles, supra,* 177 Cal.App.4th at 313 [citing *Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal.3d 770, 780].)

Petitioner contends the court should define his right impacted by College's discipline here broadly. The disciplinary decision, according to Petitioner, affects every aspect of his services as a professor at College. Petitioner urges the focus is not on the extent of harm but the nature of the right implicated. (See *Wences v. City of Los Angeles, supra,* 177 Cal.App.4th at 316.) According to Petitioner, the discipline imposed by College affected his fundamental vested right in his employment. Petitioner suggests College's decision subjects him to stigma as having retaliated against a colleague based on race and raises questions about particular subjects he may teach within College's English Department.

College argues the discipline impacted a right significantly more narrow than that alleged by Petitioner. College asserts it imposed ordinary discipline on Petitioner, and no evidence suggests his ability to purse his profession is implicated or that the discipline imposed will impact his promotability or career advancement at College. College also argues the discipline imposed had no financial impact on him. College reports Petitioner was never subject to termination, a process with "formal procedures, including a hearing . . . ." (Respondent's Further Briefing 3:24.) In fact, Petitioner "was promoted to full Professor [in 2021] during this litigation." (Opening Brief 5:3-4.)

Wences v. City of Los Angeles, supra, 177 Cal.App.4th at 314 addressed "whether a different standard of judicial review should apply in an administrative mandamus proceeding where the challenged discipline is solely a reprimand as opposed to a more severe penalty." *Wences v. City of Los Angeles* considered the issue in the context of public employment. (*Ibid.* ["public employee"].) In fact, the authorities relied upon by *Wences v. City of Los Angeles* all concerned public employees. (*Id.* at 316. See *Melkonians v. Los Angeles Civil Service Com.* (2009) 174 Cal.App.4th 1159, 1167 ["public employees"], *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 903 ["city employees"], *Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 500 ["city employment"], *Estes v. City of Grover City* (1978) 82 Cal.App.3d 509, 514 ["right in public employment"].) Thus, it is not clear *Wences v. City of Los Angeles* applies outside of the public employment context with discipline (like that here) imposed by private employers.

In *Wences v. City of Los Angeles, supra,* 177 Cal.App.4th at 316, the court advised the appropriate standard of judicial review for administrative disciplinary decisions did not turn on economic impact alone. The impact on the employee must also be considered in human terms. (*Ibid.*)

Wences v. City of Los Angeles, supra, 177 Cal.App.4th at 305 concerned a peace officer who had been disciplined with a formal reprimand. The Court of Appeal explained the impact in human terms on the officers right to employment:

> "The Department's official reprimand, based on a finding of administrative disapproval by the Board of Police Commissioners, is a part of Wences's employment record as a police officer. The reprimand may be considered by the Department in future personnel and disciplinary decisions, and based on its content, may adversely affect Wences's future opportunities for career

advancement. It therefore implicates a right that is important to Wences in his life situation even in the absence of an immediate economic impact." (*Id.* at 305.)

The discipline imposed on Petitioner by College did not have any economic impact upon him. The discipline required Petitioner to participate in certain training and removed him from his position as Chair of the English Department. The discipline imposed precludes Petitioner from acting as a chair of any department at College until 2030.

Petitioner reports he has indefinite tenure with College. (Petitioner's Further Brief 6:23.) According to Petitioner, "[t]he appointment for indefinite tenure provides that 'a continuation of the appointment will not require reappointment, and the appointment may be terminated only by following the procedures set forth in the By-Laws of College and the Faculty Handbook.' " (Petitioner's Further Brief 6:25-28.)[10]

The court finds on these facts substantial evidence review is appropriate here. College is a private employer. Petitioner did not suffer discharge, and Petitioner's rights in his ongoing employment are protected through the tenure system. There is no dispute Petitioner suffered no economic impact from the discipline. While the discipline impacted Petitioner in human terms—stigma, course subject matter issues, loss of chair status—the impact is not "of sufficient significance" such that its abridgement should be precluded by "a body lacking *judicial* power." (*Wences v. City of Los Angeles, supra,* 177 Cal.App.4th at 313.) In fact, the significance of the impact on Petitioner's rights is belied by his promotion "to full Professor [in 2021] during this litigation" after the discipline had been imposed. (Opening Brief 5:3-4.)

On substantial evidence review, "the trial court will affirm the administrative decision if it is supported by substantial evidence from a review of the entire record, resolving all reasonable doubts in favor of the findings and decision." (*M.N. v. Morgan Hill Unified School Dist.* (2018) 20 Cal.App.5th 607, 616.) The court must "accept all evidence which supports the successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold the [administrative decision]. [Citation.] Credibility is an issue of fact for the finder of fact to resolve [citation], and the testimony of a single witness, even that of a party, is sufficient to provide substantial evidence to support a finding of fact. [Citation.]" (*Doe v. Regents of the University of California* [*UCSD*] (2016) 5 Cal.App.5th 1055, 1074.)

Under this "deferential" standard of review, the court presumes the correctness of the administrative ruling. (*Patterson Flying Service v. California Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 419; see also *Doe v. Regents of the University of California, supra,* 5 Cal.App.5th at 1073 [substantial evidence standard is "extremely deferential standard of review"].)

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[10] College's objection to the Hathaway declaration and evidence it introduces is overruled.

Finally, the fairness of an administrative proceeding is reviewed as a question of law under the independent judgment standard. (*Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 634.)

~~An agency is also presumed to have regularly performed its official duties. (Evid. Code § 664.) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels, supra*, 20 Cal. 4th at 817.)~~

~~Under Code of Civil Procedure section 1094.5, Petitioner must demonstrate, by citation to the administrative record, that the weight of the evidence supports his position. (*See Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32; *Bixby v. Pierno, supra*, 4 Cal. 3d at 143.) The court is not required to search the record to ascertain whether it supports a petitioner's contentions, nor make the parties' arguments for them. (See *Inyo Citizens for Better Planning v. Inyo County Board of Supervisors* (2009) 180 Cal.App.4th 1, 14.)~~

ANALYSIS

Petitioner advances two arguments in support of his petition. First, Petitioner argues College's findings and resulting discipline must be set aside as College failed to provide Petitioner with a fair administrative hearing. (Code Civ. Proc. § 1094.5, subd. (b) ["fair trial"].) Second, Petitioner argues College's findings (and discipline flowing therefrom) must be set aside because the findings are not supported by the weight of the evidence.

Whether College Provided Petitioner a Fair Trial

Code of Civil Procedure section 1094.5, subdivision (b) provides a writ of mandate may issue where the administrative agency made a decision without a "fair trial." (Code Civ. Proc. § 1094.5, subd. (b).) " 'The statute's requirement of a 'fair trial' means that there must have been a 'fair administrative hearing.' [Citation.]" (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 239.) "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.' [Citation.]" (*Id.* at p. 240; see also *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445. ["Notice of the charges sufficient to provide a reasonable opportunity to respond is basic to the constitutional right to due process and the common law right to a fair procedure."])

"Fair hearing requirements are 'flexible' and entail no 'rigid procedure.' " (*Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1062. Disciplinary hearings "need not include all the safeguards and formalities of a criminal trial." (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1078.) " '[T]o comport with due process,' the university's procedures should ' "be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' [citation] . . . to insure that they are given a meaningful opportunity to present their case." ' " (*Ibid.*)

Petitioner argues College denied him a fair administrative proceeding for three reasons. First, Petitioner argues College did not provide him with adequate notice because the email College sent to Petitioner on December 4, 2019 did not apprise Petitioner of the factual basis for the complaints of Thomas or Tomkins. (Opening Brief 15:8-19.) Second, Petitioner argues College did not provide him with the evidence proffered against him until after Investigator Reddock-Wright and College made the findings. (Opening Brief 15:21-16:10.) Finally, Petitioner argues Investigator Reddock-Wright did not constitute an impartial decisionmaker. (*Id.* at p. 16:12-21.)

Fair Hearing: Notice

The College notified Petitioner of the investigation on December 4, 2019 through a lengthy email. (AR 2780-2781.) The email provided, in addition to other information, the following:

> "On Monday December 2nd, after the initial interviews conducted by assigned external investigator Angela Reddock-Wright, I received notice that two complainants had brought allegations that involved gender bias/harassment as well as race discrimination/harassment concerns. Specifically, reports received from Pomona College faculty members Valorie Thomas and Kyla Tompkins allege the following prohibited behaviors:
>
> - Environmental/hostile environment harassment (sex/gender and race based). Environmental/hostile environment is defined in the Policy as where an individual is subjected to a hostile or intimidating environment, in which verbal or physical conduct, because of its severity and/or persistence, is likely to interfere with an individual's work or education, or to affect adversely an individual's living conditions.
> - Sex/gender and race-based discrimination, defined in the Policy where someone is treated unfavorably because of that person's sex/gender or race.
> - Retaliation, defined as the taking of an adverse action by any student, faculty or staff member against another individual as a result of that individual's exercise of a right under this Policy, including participation in reporting, investigation or hearing as provided in this Policy.
> - Complainant Thomas alleges behaviors that include bullying, shaming, public reprimand, unequal access to funding and departmental resources, interrogation and positioning the complainant as a 'thief or con-artist or stereotypical welfare queen looking for handouts.' The complainant describes the severity and persistence of the alleged behavior as harmful, stressful, traumatic and as having a negative impact and adverse affect on her work and living conditions.
> - Complainant Tompkins alleges behaviors that include exclusion from departmental resources, bullying, retaliation, harassment, an inability to discuss race/gender/culture in departmental meetings, using process to prevent her and complainant Thomas from speaking out or making requests, and not providing complainant Thomas with requested funding. Complainant Tompkins describes

the severity and persistence of the alleged behavior as materially harmful, toxic, and discriminatory with adverse affects [*sic*] for students and faculty of color, and women." (AR 2780-2781.)

Thus, while College's email does not provide all of the specific factual allegations underlying the complaints against Petitioner, the email advised Petitioner of the general nature of the charges. The email advised Thomas believed, among other things, she had been denied equal access to department funding and resources, had been treated like a thief and had been bullied by Petitioner. The email explained Thomas alleged Petitioner retaliated against her pursuant to her "exercise of a right under this Policy, including participation in reporting, investigation or hearing as provided in" College's discrimination and harassment policies with a hyperlink to the relevant policies. (AR 2780-2781.)

The underlying allegations involved Petitioner and his interactions with Thomas and/or Tompkins. The email identified Thomas and Tompkins as the complaining parties. The email generally identified the issues and sufficiently apprised Petitioner of the nature of his alleged violations of policy.

Moreover, to the extent Petitioner contends he had no "reasonable or meaningful opportunity to respond to the charges and present a full defense," Petitioner had three different interviews with Investigator Reddock-Wright. (Opening Brief 15:18-19. AR 518.) The investigator's report undermines Petitioner's claim he had no meaningful opportunity to provide a complete defense. (AR 532-538 [Petitioner's response (denials and explanations) to allegations].) The investigator noted Petitioner provided her with "documents and information as part of his response" to the "allegations against him." (AR 671 n. 20.)[11] Petitioner submitted a substantial number of documents (147) to the investigator for consideration. (AR 671 n. 20.)

The court finds College sufficiently provided notice of the allegations against Petitioner when College began its investigation. While the December 4, 2019 email did not provide all of the specific factual information about the claims against him, the email provided Petitioner with sufficient information (given his own knowledge of his interactions with Thomas and Tompkins) to allow him to reasonably respond to the allegations.

Fair Hearing: Access to the Evidence

College's policy related to gender-based discrimination and/or harassment claims involving faculty does not provide for a hearing. The policy specifies: "For faculty, staff and third-party respondents, the Title IX Coordinator will refer cases to investigation, and, where appropriate,

[11] The report states: "During the investigation, [Petitioner] provided me with documents and information as apart of his response to Thomas' and Tompkins' allegations against him. Throughout the report, I reference and identify as exhibits the documents I believe to be relevant to the scope of the investigation. The documents [Petitioner] provided as part of the investigation are attached hereto as [list of 147 exhibits]." (AR 671-672.)

forward the case for a determination of sanctions/further proceedings as set forth in this Policy." (AR 31.) The policy contemplates faculty may "appeal the decision and/or sanctions made pursuant to [the] Policy." (AR 40.) The policy does not contemplate any ability to review a compilation of the evidence gathered prior to a finding the faculty member has violated College's policies.

College complied with its policy when it referred the complaints to an investigator. In fact, Petitioner does not assert College somehow failed to comply with its own rules concerning investigations of complaints. Petitioner asserts, however, fair hearing principles require College to allow Petitioner to review evidence compiled against him to rebut claims made.

Petitioner argues College deprived him of access to evidence it used to discipline him. (Opening Brief 15:20-16:10.) He contends he should have been given access to the names of witnesses and their statements. (Opening Brief 15:24-25.) Petitioner argues the first opportunity he had to respond to the evidence was in his mitigation statement after College made its decision he should be disciplined. (Opening Brief 16:8-9.)

Petitioner relies upon student misconduct cases as support for his claim. The court is not convinced student misconduct cases—and the requirements necessary for a fair hearing in that context—inform on and apply to faculty disciplinary proceedings. *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221 and *Doe v. Westmont College* (2019) 34 Cal.App.5th 622 are inapposite. In fact, consistent with the law, College has an entirely different disciplinary system established for student misconduct cases. (AR 31.)

"Fair hearing requirements are flexible and entail no rigid procedure." (*Alpha Nu Assn. of Theta Xi v. University of Southern California, supra,* 62 Cal.App.5th at 418 [*cleaned up*].) "To comport with due process, the university's procedures should be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case." (*Id.* at 419 [*cleaned up*].) "The minimum requirements are described in varying ways and may depend upon the action contemplated by the organization and the effect of that action in the individual." (*Hackethal v. California Medical Association* (1982) 138 Cal.App.3d 435, 442.)[12]

College's investigator interviewed Petitioner on three different occasions for nine hours. (AR 671, 2419.) All three of Petitioner's interviews occurred after Thomas' single interview. (AR

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[12] The reference in *Hackethal v. California Medical Association, supra,* 138 Cal.App.3d 435 at 442 to a requirement of "an opportunity to confront and cross-examine the accusers and to examine and refute the evidence" (as stated in *Cason v. Glass Bottle Blowers Assn.* (1951) 37 Cal.2d 134, 144) is inconsistent with recent authorities concerning administrative proceedings. (See, e.g., *Alpha Nu Assn. of Theta Xi v. University of Southern California, supra,* 62 Cal.App.5th at 421 ["common law right to a fair hearing typically does not require cross-examination"].)

671.) The investigator conducted only one other interview after the date of Petitioner's final interview.[13]

During his nine hours of interviews, Petitioner provided the investigator with 147 exhibits to support his statements to her. The investigator's report reflects a detailed overview of the allegations and Petitioner's response to those allegations. The investigator's report sets forth each allegation and Petitioner's response to the claims. (See, e.g., AR 738 [response to allegations], 741 [deliberation process and requests for funding with subcategories].)[14] Thus, while the investigation was ongoing, Petitioner had ample opportunity to respond to the specific allegations made against him.

Fair Hearing: Bias

Without question, a fair trial requires a neutral adjudicator. "The standard of impartiality required at an administrative hearing is less exacting than that required in a judicial proceeding. [Citation.]" (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219-220.) "[A] party seeking to show bias or prejudice on the part of an administrative decision maker [must] prove the same with concrete facts: ' "Bias and prejudice are never implied and must be established by clear averments." [Citation.]' " (*Id.* at 220.) In the administrative hearing context, in situations where there is an absence of evidence of financial or personal interest, a petitioner seeking "to prevail on a claim of bias violating fair hearing requirements . . . must establish 'an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims," "with concrete facts." (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.)

To meet his burden of demonstrating bias, Petitioner argues College "provided no evidence to suggest that any of its adjudicators were fair or impartial." (Opening Brief 16:15-16.) Petitioner asserts: "A review of the investigation report show the investigator was far from impartial and her findings so vague and utterly lacking in evidentiary support, [College] needed to amend them." (Opening Brief 16:16-18 [citing AR 517].) Petitioner also takes issue with the investigator's credibility findings and failure to conduct certain forensic evaluation. (Reply 10:16-21.)

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[13] The investigator had a second interview with Tompkins on the day after Petitioner's final interview. (AR 671.) College did not sustain any allegations concerning Tompkins.

[14] Petitioner's mitigation statement identified only two items he believed were inaccurate in the investigator's report. First, he took issue with the investigator characterizing Thomas' attempt to get the $300 for zines as an "extensive process." (AR 2411.) That Petitioner believed the characterization inaccurate (a conclusion) does not suggest the facts disclosed in the investigation report are incorrect. Second, Petitioner noted the investigator "misunderstood" what he said about Thomas' course proposal on Ellison. (AR 2419.) Petitioner indicated he did not know the proposal "was part of the investigation" but acknowledged he and the investigator discussed the issue, albeit briefly. (AR 2419.)

Petitioner appears to be relying in part on the following footnote made by College in its Statement of Policy Violations to support his bias claim: "On page 53 of Addendum B, Investigator Reddock states that she completed her investigation and submission [*sic*] her report on February 20, 2020. Thereafter, Reddock was asked to provide further detail and clarification of her findings, and to apply those findings to College policy. Reddock submitted her final report to the College on March 17, 2020." (AR 517 n. 3.)

Preliminarily, the court notes pursuant to its policies, the College "may refer back to the Investigators any questions that the Title IX Coordinator has concerning the report's contents or conclusions." (AR 21.) Thus, a request for clarification and information from the investigator is contemplated in the process.

The court finds Petitioner has failed to meet his burden of demonstrating bias. Petitioner's arguments are not evidence—nor do they rise to the level of reasonable inference. Accordingly, Petitioner has not demonstrated " 'an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims," "with concrete facts." (*Nasha v. City of Los Angeles*, *supra*, 125 Cal.App.4th at 483.)

Based on the foregoing, the court finds College provided Petitioner with a "fair" administrative hearing. The court rejects Petitioner's fair hearing claims based on notice, access to evidence and bias.

College's Findings and ~~the Weight of the~~ Substantial Evidence[15]

College made several findings based on the evidence before it. College rejected the investigator's findings of gender bias. College also rejected any claims related to Tompkins. (AR 521.) College found:

- First Finding: As to funding rules, Petitioner's "implementation of the rules was inconsistent and unnecessarily burdensome, and the inconsistencies and manner of implementation are found to have targeted and singled out Complainant Thomas; further there is no legitimate business reason supporting these inconsistencies and the challenges [Petitioner] posed to Thomas' various requests, and the College adopts the investigator's finding that [Petitioner's] actions were in retaliation for Thomas' protected assertions of racial discrimination." (AR 521 [emphasis added].)

- Second Finding: Petitioner exhibited retaliatory intent in his "sustained effort to thwart Thomas' efforts to teach her proposed course in favor of his own proposal, motivated at least in part by Thomas' prior and sustained complaints regarding

[15] As noted, the court finds the proper standard of judicial review here is substantial evidence, not the weight of the evidence as argued by Petitioner.

her sincerely held concerns over the race issues associated with his proposal and more generally within the Department." (AR 523.)

College's First Finding sounds in retaliation. College found Petitioner's actions related to funding requests made by Thomas demonstrate he retaliated against Thomas based on Thomas' assertions of racial discrimination.[16]

Petitioner contends the investigator's findings on the issue of retaliation "are not supported by the evidence or are downright false." (Opening Brief 18:27.) Petitioner contends there is no evidence that his acts were in retaliation for Thomas' protected assertions of racial discrimination. Specifically, Petitioner contends that there is no evidence to support a finding that Thomas made any protected remarks or reports which Petitioner was aware of for which he would have retaliated.

The parties have identified a single sentence in College's non-discrimination policies addressing retaliation: "The College will not retaliate, nor will it tolerate retaliation, against individuals who complain in good faith about harassment on the campus or in the workplace." (AR 853.) Unlike College's description of harassment, College's policy does not otherwise define retaliation. (See AR 852 [elements of harassment].) "[T]he appearance of an action being retaliatory, without more, [however,] is insufficient to support a finding of retaliation under College policy." (AR 523.)

The ordinary definition of retaliation is "[t]he act of doing someone harm in return for actual or perceived injuries or wrongs; an instance of reprisal, requital, or revenge." (Black's Law Dictionary, 11th ed. (2019) [emphasis added].) Thus, in the context here, there must be a causal link between the protected activity (Thomas' complaint of racial discrimination) and Petitioner's action (Petitioner's funding decisions). (Cf. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) College appears to recognize the necessity of a causal relationship. (AR 522 ["evidence supports a finding of the race-retaliation nexus"].)

Preliminarily, the court notes the investigator (and College) found Petitioner's intentions and motives for "proposing and implementing Robert's Rules and other budgeting and administrative processes, such as the deliberation and reimbursement processes, did not violate [College's] Policy." (AR 816, 521.) The department's adoption of a "loose" version of *Robert's Rules of Order* resulted from a "unanimous" vote of the department on September 11, 2018—Petitioner did not "implement" the rules.[17] (AR 1255, 817.) The department also

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[16] It appears Thomas first complained to other faculty she was being treated differently on May 22, 2019. (AR 1858.) The conflict over the zines funding occurred prior to Thomas' complaint to faculty. Thomas did not file a formal complaint with College until about four months later on October 3, 2019. (AR 652.)

[17] To be sure, Petitioner proposed the department adopt the rules. "[H]e did so with the intent and goal of creating more order and transparency in how budget, funding and other

unanimously voted to institute the funding rules—Petitioner would decide funding requests of $1,000 or less with the department deciding by majority vote requests exceeding $1,000. (AR 1255.) In addition, the department agreed a faculty member could not make mu tiple requests for the same project or purpose ("hot-dog slicing"). (AR 1255.) Thus, that Petitioner caused funding rules to be adopted did not evidence any misconduct. The funding policy, as adopted, was fair and legitimate. (AR 573.)

Further, there is ~~credible~~[18] evidence Petitioner "implemented new rules about budget so that he could avoid making decisions." (AR 810.) Gray believed Petitioner could avoid being blamed for any decisions made by requiring the department to follow the rules—he hid behind them. (AR 810.) In fact, Gray believed Petitioner instituted the rules "to make life more manageable" "because he did not have to make decisions based on his own discretion." (AR 810.)

Many faculty members described Petitioner as "inflexible" in his approach to funding. The investigator spoke to seven faculty members other than Thomas or Tompkins during her investigation. (AR 672-673.) According to the investigator, "[m]any faculty members stated that, while they appreciated [Petitioner's] reasons for wanting to create more transparency in the Department, that at times, they were disappointed that he was so inflexible in his approach, particularly since money and the ability to fund projects was not an issue for the Department." (AR 573.)

There is also ~~credible~~[19] evidence Thomas "does not follow rules." (AR 808.) Thomas did not have issues with "prior Department chairs because there were not rules set, but it [was] difficult under [Petitioner] because he managed based on rules." (AR 808.)

Whether ~~the weight of the~~ substantial evidence supports College's First Finding is made more complicated by the text of the investigator's report and the College's partial adoption of it. The investigator lumped her consideration of gender and race together in a single discussion. (See, e.g., AR 818.) College, however, expressly rejected the investigator's findings Petitioner was motivated by gender bias. (AR 522.) Given the investigator's discussion does not parse gender and race bias, the supporting rationale for a single finding of retaliation becomes significantly clouded.

The investigator (and College) relied on two incidents to support retaliation in the First Finding: Thomas' $300 funding request for zines and her $2,400 request for the Innerlight Method course. (AR 521.) The investigator concluded: "Although there were established rules, [Petitioner] made it unreasonably difficult for Thomas to receive basic funds, and at times, was

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administrative decisions and requests are made and determined within the Department." (AR 817.)

[18] The court has eliminated its finding of credibility to comport with substantial evidence review. That the court has stricken the word should not be read to imply the court did not find the evidence credible.

[19] See footnote 18, *supra.*

inconsistent in how he treated Thomas' funding requests compared to those of her non-Black male and female colleagues." (AR 818.)

$300 Zines Funding

The investigator focused on four aspects of the $300 zines funding to support her First Finding as adopted by College—(1) Professor Kirk's WIG grant funding; (2) Professor Raff's funding; (3) Petitioner's hot-dog slicing funding rationale with Thomas; and (4) a $15,000 start up package for a newly hired faculty member. These four instances, according to the investigator and College, demonstrate Petitioner's disparate treatment of Thomas and his apparent retaliation.

First, the investigator found Petitioner's proffered example of treating Kirk and Thomas similarly as to WIG grant funding not comparable. (AR 575.) Kirk (a "white, male colleague") applied for WIG grant funding in advance of obtaining money from the Department. (AR 575, 2321.) Kirk obtained his WIG grant funding and thereafter sought funding from the Department for the balance needed for his field trip. (AR 2321.) As the balance Kirk sought was $1,000, Kirk sought approval of the $1,000 fund request consistent with the department's adopted rules that the department decide the funding request together. (AR 2321. ["I will make a request of the department at our next meeting, then, if that makes sense."])

Thomas initially brought up the WIG grant on February 1, 2019 and advised Petitioner she would "be applying for WIG funds to cover" the $300 need for the zines—Petitioner did not require Thomas to apply for the funds. (AR 1418.) Ten days later, *Thomas* again indicated to Petitioner she intended to apply for a WIG grant. (AR 1418.) The following day, February 12, 2019, Petitioner suggested his opportunity funds be used for the zines with reimbursement to him if Thomas obtained the WIG grant.[20] (AR 1418.) Petitioner did not volunteer department funds to cover the $300 funding request which he had the authority to approve. The record is unclear on the decision of any WIG grant application submitted by Thomas to College. (AR 663.)

Thomas ultimately confronted Petitioner and argued she was not required to attempt to obtain WIG grant funding in advance of asking the Department for money. Petitioner explained to Thomas, however, it was she who originally suggested she try to obtain the grant. (AR 1828.) Petitioner believed Thomas should pursue the plan she "originally proposed," and he "originally approved." (AR 1828.)

While Kirk's situation may not have been identical to that of Thomas, Petitioner provided an example of a professor creating a plan to obtain WIG funding, following through on that plan and then asking the Department for additional funding inconsistent with the department's

[20] Petitioner advised the investigator he believed it was "politically helpful for the Department to continue to seek" WIG grants "in order to stay competitive with other departments." (AR 741.) There appears to be no evidence in the administrative record to contradict Petitioner's statement.

rules. While Petitioner's position with Thomas may have displayed unnecessary rigidity for a minimal amount of funding by a faculty member who reportedly had difficulty with rules, there is no evidence suggesting Petitioner acted in a manner designed to retaliate against Thomas. The conflict does not demonstrate retaliation. In fact, Petitioner advised Thomas she would obtain the funds for the zines by some manner.[21]

Thus, there was never any question Thomas would receive her requested $300 for zines, and she did receive such funds. (AR 1418, 1829.) Petitioner initially advised Thomas "we can find $300 to pay for the zines." (AR 1418.) Even when Thomas requested the $300 from the department, Thomas indicated she still intended to apply for the WIG grant and would reimburse the department. (AR 1418.) Voluntarily applying for WIG grant money in the first instance appears consistent with actions taken by at least one other faculty member. (AR 2321 [Kirk].)

The investigator, apparently giving no consideration to faculty members' characterization of Petitioner as unnecessarily rigid, found Petitioner not credible when he explained he wanted Thomas to be accountable for her initial suggestion that she would seek a WIG grant for the zines. (AR 818.) The investigator discounted Petitioner's position because "[b]y his own admission, [Petitioner] stated that there was no particular rule about what funding source a faculty member's funding request should come from." (AR 818.) The investigator also found Petitioner's explanation "insufficient" for why he suggested Thomas " 'borrow' " his opportunity funds "especially" since the department had funds of $1 million available and the department "never spends up to its annual budget for the fund." (AR 818.)

The investigator discounted evidence of other faculty members applying for WIG grants for funding because the evidence (emails) were "not persuasive on their own." (AR 819.) The investigator reported the evidence did not establish "whether these faculty members personally chose to use WIG grants or were told to apply for WIG grants." (AR 819.) The evidence establishes, however, department faculty turned to WIG grants for funding which is consistent with Petitioner's view obtaining such grants aided the department politically. The investigator's comment also implies Petitioner *required* Thomas to apply for a WIG grant when it was Thomas who initially indicated to Petitioner her funding path. (AR 1418.)

Similarly, in discounting the evidence of Kirk's request for funding as consistent with Thomas' experience, the investigator contrasts Kirk's request for a WIG grant as voluntary with Petitioner requiring Thomas to apply for a WIG grant. (AR 819. ["In Thomas' situation, unlike Kirk, she is directly asking to forego the WIG grant process completely."]) Thomas, however, indicated she intended to apply for a WIG grant; she only asked to forego applying for the grant after Petitioner told her he believed the department could "find $300 to pay for the zines." (AR 1418.)

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[21] It appears Petitioner believed a loan from his opportunity funds could be reimbursed with WIG grant funding obtained by Thomas. Thus, Thomas could continue to pursue the WIG grant funding, obtain the zines, and then reimburse Petitioner.

It is not entirely clear from the investigator's report (and College's adoption of it) whether she viewed the controversy concerning the zines funding as gender or race based, or both. The investigator noted the "incident may seem menial when viewed by itself," but she found the process "extensive" "amount[ing] to conduct against Thomas in violation of the Policy." (AR 820 [gender and/or race policy not specified].) While the investigator did not specify the provision of the policy, she noted: "At a minimum, the process [Petitioner] put Thomas through was degrading and belittling for a woman of her background, experience and contributions to the college." (AR 820.) The investigator did conclude, however, Petitioner's "requirement that she borrow $300 from him directly, instead of granting her access to the wealthy department budget, had the overall, adverse impact of targeting and singling Thomas out because of her race and gender." (AR 819-820.)

~~The weight of the~~ Substantial evidence does not support the investigator's conclusion Petitioner retaliated against Thomas based on her claims of racial discrimination in the context of the zines funding dispute. Certainly, there was an unnecessary conflict between Petitioner and Thomas over minimal funding. There is no specification, however, of a causal link between Thomas' claims of racial discrimination and Petitioner's actions. While Petitioner may have been excessively and unnecessarily rigid and Thomas too lax, College has not identified direct or circumstantial evidence to support a finding Petitioner exercised his rigidity or singled Thomas out because of Thomas' complaint of racial discrimination. ~~The weight of the~~ Substantial evidence does not support the investigator's (and College's) finding Petitioner singled Thomas out because of her race.

As to the second reason to support a finding of retaliation by Petitioner against Thomas made in the First Finding as to the $300 zines funding, the investigator erred in her assessment of the evidence as to funding used by Raff; the finding is not supported by and contrary to the evidence. The investigator found Petitioner granted "Raff $1,000 for a speaker honorarium without requiring a Department meeting, even though the request is '$1,000 or more.' " (AR 819.) ~~The weight of the~~ Substantial evidence, however, does not support such a finding. The *department* "voted to commit $2,000" to an event involving a speaker. (AR 2331.) Raff wrote to Petitioner to ask the appropriate amount of honorarium for the speaker from the $2,000 allowed by the department. (AR 2332.) Petitioner agreed with Raff's suggestion of $1,000 from the $2,000. (AR 2332 ["there will be enough in the $2000-minus-horonarium"].) Contrary to the investigator's understanding, Petitioner did not approve a $1,000 funding request from Raff.

The investigator did properly discounted Petitioner's explanation that Thomas' request for $300 constituted "hot-dog slicing." (AR 742.) Thomas sought only one source for the $300. She did not pursue multiple funding sources to avoid obtaining department approval of a $1,000 or more expense. Given the circumstances, Petitioner's claim Thomas' request constituted "hot-dog slicing" is unsupported and inconsistent with the department's view of multiple funding sources for a single request. Nonetheless, the issue relates to the conflict over zines funding. That Petitioner's "hot-dog slicing" rationale is unpersuasive does not inform on the lack of evidence related to a finding of retaliation. The "hot-dog slicing" claim does not demonstrate

retaliation based on Thomas' assertions of racial discrimination. Instead, it appears to be an attempt to find further justification about why Petitioner believed Thomas should pursue the WIG grant funding as she had initially planned.

Finally, the investigator noted "not long after [Petitioner] negotiated with Thomas over $300 in [zine] costs, Thomas discovered that [Petitioner] unilaterally agreed that the Department would contribute $15,000 toward Sharma's start-up package." (AR 820.) The investigator found Petitioner's actions "to be straying from his own process to help a different colleague." (AR 820.) The investigator reported, "Sharma is also a woman of color, but she is not African-American like Thomas." (AR 820.)

Sharma's start-up package and funding for it is distinct from ongoing funding needs for department faculty members. Sharma' start-up package was part of a negotiation to " 'clos[e] the deal' for someone [College] very much want[ed] to hire." (AR 1644.) The evidence demonstrates Petitioner attempted to navigate within the department's funding rules when considering Sharma's start-up package. (AR 1646.) Petitioner also sought advice from the prior department chair to ensure Petitioner had the authority to negotiate the start-up package and was acting consistent with department rules. (AR 1644-1645.) While the evidence is related to funding, it appears irrelevant to whether Petitioner retaliated against Thomas based on Thomas' assertions of racial discrimination. The evidence does not suggest Petitioner treated Thomas differently than Sharma because there never was an issue about start-up funding and Thomas. Further, there is no evidence the funding rules adopted by the department included start-up funding measures for recruiting faculty.

$2,400 Innerlight Method Course Funding

The investigator (and College) also found evidence Petitioner retaliated against Thomas based on Petitioner's response and action related to Thomas' request for $2,400 to pay her tuition for the Innerlight Method course.

On May 9, 2019, the department met and discussed various budget issues for the 2020 academic year. Petitioner along with all other faculty present voted to commit $31,500 to Thomas from the budget: $7,000 for an AfroFuturisms course, $7,000 for a Healing Narratives program, $2,500 for travel expenses to a conference in Hawaii and $15,000 for an AfroFuturisms exhibition. (AR 1395-1396.)

The following week, on May 15, 2019, Thomas emailed Petitioner requesting he approve her request for funding of $2,400 to permit her to register for the Innerlight Method course. (AR 1830.) Petitioner correctly advised Thomas he did not have the authority under the department's rules to authorize "requests for $1,000 and above." (AR 1829.) Petitioner stated he could help Thomas by approving a smaller amount within his authority if it would be useful. (AR 1829.)

The discussion between Petitioner and Thomas thereafter became more conflicted—not unlike the zines funding conflict. Thomas asked Petitioner to hold an emergency faculty meeting so she could obtain the funds; her tuition deadline was looming. Petitioner did not agree to conduct such a meeting but indicated "if people are willing to stick around after the [department] reception tomorrow, I'll try to get a quorum together. We can't take a vote by email. Such a vote would be invalid according to the rules we adopted in September 2018." (AR 1828.)

Thomas did not appear the next day at the reception because she did not see Petitioner's email asking faculty members to meet. (AR 820, 1842.) Petitioner also did not allow Tompkins to act as Thomas' proxy at the meeting. (AR 1843.) Therefore, the Department did not vote on Thomas' $2,400 funding request.

The investigator's report does not address the $2,400 funding request conflict in the context of retaliation. Instead, the investigator found Petitioner created an "unnecessarily hostile environment for Thomas . . . ." (AR 821.) The investigator also noted Petitioner violated "the College's foundation of respect and . . . sense of community vital to the College's educational enterprise." (AR 821.)

The investigator (and College) do not tie Petitioner's conflict with Thomas over funding for the Innerlight Method course to retaliation. While Petitioner may again have been unnecessarily rigid and tied to the rules, there is no suggestion Petitioner acted in retaliation against Thomas based on Thomas' assertions of racial discrimination. In fact, nothing in the investigator's report—other than the conflict itself—suggests how Petitioner's acts were retaliatory against Thomas.

In large part, the conflict concerning funding requests appears to have resulted from Petitioner's rigidity and "inflexible" approach to decision-making and Thomas' difficulty with rules. (AR 808.) In that context, Petitioner lacked awareness of how his decisions might be perceived and "underappreciated the impact of his decisions." (AR 809.) That Petitioner is rigid and Thomas lax without more does not support a finding Petitioner acted in retaliation against Thomas based on Thomas' assertions of racial discrimination.

Based on the foregoing, the court finds ~~the weight of the~~ substantial evidence does not support College's First Finding based on retaliation. ~~The weight of the~~ Substantial evidence does not support the finding Petitioner acted against Thomas based on Thomas' assertions of racial discrimination. Certainly, Petitioner was rigid and inflexible, and Petitioner and Thomas were conflicted. That, however, is not direct or circumstantial evidence of retaliation.

College's Second Finding sounds in retaliation as well. College notes "the appearance of an action being retaliatory, without more, is insufficient to support a finding of retaliation under College policy." (AR 523.) College found retaliatory intent in Petitioner's "sustained effort to thwart Thomas' efforts to teach her proposed course in favor of his own proposal, motivated at least in part by Thomas' prior and sustained complaints regarding her sincerely held concerns

over the race issues associated with his proposal and more generally within the Department." (AR 523.)

The investigator found Petitioner's "proposal to teach the Five American Authors course is not based on any discriminatory or retaliatory intent or motive toward" Thomas or Tompkins. (AR 580.) The investigator believed Petitioner's desire to teach the course "appear[ed] retaliatory toward [Thomas and Tompkins] for their complaints and criticisms *of his prior work and views*, along with his *management style*." (AR 580 [emphasis added].) After reviewing a timeline of acts related to Petitioner's course the investigator concluded:

> "Based on the surrounding facts and a preponderance of the evidence, the only reasonable conclusion is that [Petitioner] pushed for his course proposal, in lieu of others, to prove a point to Thomas and Tompkins based on their prior and repeated complaints and criticisms against him." (AR 582.)

The controversy concerning Petitioner's course began on October 3, 2019. At that time, Petitioner informed Thomas that the department needed a senior-level course for the Spring of 2020 and asked if Thomas was interested in teaching a proposed course. (AR 825, 2004.) Petitioner informed Thomas that, in the event she was unavailable to teach a senior-level course, Petitioner would "probably have to do it." (AR 2004.) Petitioner specifically informed Thomas that his course "would be some version of the seminar [they] discussed in 2017—American writers who defend literature against sociological analysis (Ellison, Murray, Arendt, Jacobs, Kubler)." (AR 2004.) Thomas initially advised Petitioner she would "get back to" him. (AR 2004.) About six hours later, Thomas declined to teach the senior-level course.[22] (AR 2003.) Thomas indicated she would be teaching two other courses.

Petitioner responded about 30 minutes later to Thomas: "Thanks Val. In that case, I will teach the 170 seminar." (AR 2003.)

Later that night, Thomas sent an email to Petitioner. (AR 2002.) Thomas copied all department faculty on the email and attached her prior communications with Petitioner about the senior-level course. (AR 2022.) Thomas wrote:

> "I find these emails about how you equate me teaching my planned spring courses with an endorsement of you teaching that Ellison course interesting. I think the conversation belongs in front of the department.
>
> My thought is this: not so fast with the fait accompli as if I just somehow endorsed your Ellison course. These are not yoked

[22] There is no question, when asked, Thomas declined to teach a senior-level course. Seven other faculty members also declined to teach the course. (AR 2015.)

decisions except as you pose them. I do not endorse you teaching that Ellison course as you well know, and neither does Kyla [Tompkins], the other actual PhD-holding, committed, experienced Americanist in the department..

I remind you I found out about your Ellison proposal only by accident, after you and the department went around me as the African Americanist in English, to advance it, and around Kyla. I never endorsed it, and don't endorse it now. Kyla and I - as the two credentialed professionals in the field of American Literature and race, and as (apparently semi-legitimate) faculty members - have given the department all the reasons that course should not go forward. At one point under pressure of my approaching review, the chair's requests, and the corrosive racial climate in English for which Kyla and I were being blamed after your Ellison proposal finally came to light, I did say in a moment of feeling forced into a corner that I would not continue to oppose you at that time. That grave error on my part while regrettable, was certainly not an endorsement of your proposal to teach Ellison, or of your framing of a major Black writer as a platform for directly invalidating my and Kyla 's PhDs, pedagogy, contributions to the curriculum, and the fields of American Literature, Africana Studies, African Diaspora Literature, African American Literature, Ethnic Studies, Critical Race Theory, Intersectionality theory, and Decolonial Studies that inform our methods. When I was asked earlier to fall back in discussions of your proposal and the epistemic violence embedded in it, that was me being pressured to sacrifice my professional integrity for the sake of preserving superficial civility in the department; but it was not me or Kyla being divisive. In any case that was then, this is now, so my answer - to the extent that you are running your Ellison course past me yet again - is still no. Had I been consulted on it in the first place I would have said no when you first proposed it but I was not informed that anything that obviously undermining and destructive was on the table. What you do with Ellison on your own time is of course your business and no concern of mine; but colonizing Ellison and African American literature through pedagogy is not your private playground and I do not support destructive dilettantism in my field. If you want to really vet the course (finally), let's vet the course." (AR 2002-2003.)

Early the next morning, Tompkins responded to Thomas' email with a copy to all faculty:

"If the department allows this course to go forward, it is not a department that deserves to survive or thrive for the very reason

> that the total lowering of professional standards in the delivery of teaching to our students will have finally taken away our credibility as teachers, scholars and members of a profession. The class is terrible and the proposal totally devoid of scholarly value. As a matter of reputation I do not want to be professionally affiliated with a department that has this course, with this professor, on the books." (AR 2002.)

Ultimately College's curriculum committee approved Petitioner's course. Both Thomas and Tompkins wrote letters to the committee "protesting" Petitioner's course proposal. (AR 581.) The curriculum committee rejected the "individual letters." (AR 581.)

During the conflict over Petitioner's course, on October 14, 2019, five days after Petitioner submitted his proposed course to the curriculum committee, Thomas volunteered to teach a course on Ellison. (AR 700, 2048.) The curriculum committee accepted Petitioner's course before having looked at the proposal Thomas sent. (AR 2047.) That the courses were similar did not prevent the curriculum committee from approving both courses. (AR 2050.)

Petitioner told Gray "he was planning to teach his course because he believed he was being 'intellectually brave' and that he was 'tired of being bullied.' " (AR 826.) ~~Based on the long-standing conflict between Petitioner and Thomas (and to a lesser extent Tompkins), the court finds Petitioner credible that he felt bullied. The weight of the evidence supports a finding pursued teaching the senior-level course in defiance of the vocal opposition of Thomas making him feel "intellectually brave."~~

Petitioner asked eight faculty members, including Thomas, to teach the senior-level course. Petitioner told Thomas in advance of her turning down the opportunity to teach the seminar if she did not want to teach, he would likely teach his Ellison class. After Thomas declined to teach the senior-level course, Petitioner agreed to do it. Thereafter, this episode of conflict surrounding Thomas and the course began.

While the investigator found Petitioner "pushed his own course proposal over Thomas'," ~~the weight of the~~ substantial evidence does not support such a finding.

First, Petitioner could not "push" his course over that of Thomas. Thomas did not submit her course proposal to the Curriculum Committee until the day the Curriculum Committee approved Petitioner's course. In fact, it was Thomas who acted to derail Petitioner's efforts to teach a course involving Ellison.

Second, Petitioner told the investigator he felt bullied by Thomas and elected to move forward with his course proposal despite opposition by Thomas.[23] Petitioner had deferred to Thomas

[23] ~~As noted, Petitioner's feeling of being bullied is supported by the weight of the evidence.~~ Thomas and Tompkins sent emails to department faculty complaining Petitioner should not be

and asked her whether she wished to teach a senior-level course. Petitioner advised Thomas if she did not teach, he would be required to do so. Petitioner specifically informed Thomas he would teach "some version of the seminar [they] discussed in 2017—American writers who defend literature against sociological analysis (Ellison, Murray, Arendt, Jacobs, Kubler)." (AR 2004.) Given that Thomas had all relevant information about the senior-level course if he taught, Petitioner's response to proceed in his view was reasonable—everyone else, including Thomas, had declined to teach the senior-level course.

~~The weight of the~~ Substantial evidence does not support College's finding Petitioner retaliated against Thomas based on racial discrimination. While Thomas may have had—as found by College—race issues associated with the department, ~~the weight of the~~ substantial evidence does not support College's finding Petitioner acted against Thomas because of her race-related complaints about him. (AR 523.) Thomas strongly believed Petitioner was unqualified to teach a course concerning Ellison. ~~The court believes Petitioner's assertion he did not capitulate because he did not want to succumb to his feeling of bullying by Thomas and Tompkins and felt intellectually defiant because of their opposition.~~ While College believes Petitioner "abused the authority associated with his role as Chair," ~~the court finds the weight of the~~ substantial evidence does not support a finding Petitioner acted in retaliation against Thomas based on her claims of racial discrimination. (AR 523.)

Finally, on the issue of Petitioner's alleged retaliation based on his willingness to teach a senior-level course eight other faculty members had declined to teach resulting in another conflict with Thomas, College found:

> **"[Petitioner] made no attempt to separate his own personal interests from his leadership and administration of the Department's business, including the conflict associated with the competing course proposals. As Chair, [Petitioner] was in a powerful position to avoid this specific conflict with Thomas and rise above the curriculum dispute by working *with her* to ensure that a [senior-level] course was offered in the Spring semester; this could have gone a long way toward healing the divide within the English Department.** Instead, the College finds that [Petitioner] abused the authority associated with his role as Chair and did everything in his power to thwart Thomas' interests and knowingly exacerbate her deep concerns about racism within the Department. (AR 523 [emphasis in original].)

While College's belief Petitioner "abused the authority associated with his role as Chair" and exacerbated Thomas' "deep concerns about racism in the Department," may violate some policy at College, such action by Petitioner is not retaliation. ~~The weight of the~~ Substantial

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teaching his proposed course which, in Tompkin's view, was "devoid of scholarly value," and which Thomas labeled as "destructive dilettantism." (AR 2002, 2003.)

evidence does not support College's finding Petitioner acted against Thomas based on Thomas' assertions of racial discrimination. ~~The weight of the~~ Substantial evidence also does not support the finding Petitioner~~'s~~ pursued teaching the senior-level course "motivated at least in part by Thomas' prior and sustained complaints regarding [Thomas's] sincerely held concerns over the race issues associated with his proposal and more generally within the Department." (AR 523.)

College's Findings and Substantial Evidence

Even assuming this court's review of College's findings is by substantial evidence, the results here would be no different.

As to the First Finding, substantial evidence does not support a finding of retaliation by Petitioner against Thomas based on Thomas' protected assertions of racial discrimination. College's reliance on four examples of alleged disparate treatment of Thomas by Petitioner related to the $300 in zines funding based on retaliation are unsupported.

As noted earlier, Petitioner did not treat Kirk and Thomas differently. Petitioner expected both Kirk and Thomas to pursue funding as planned. Petitioner did not require one action by Thomas and something different from Kirk. The circumstances with Raff's funding provides no support for College's decision because College misunderstood the facts concerning the $2,000 approved by the department, not Petitioner. In addition, funding related to persuading someone to become a faculty member as part of a start-up package is completely different than $300 of funding for a professor's course. There is also no evidence Petitioner violated any rule or department policy in attempting to create a tempting start-up package for a new hire.

Petitioner's hot-dog slicing funding rationale as grounds for holding Thomas to her commitment to obtain a WIG grant does not ring true. Nonetheless, such evidence standing alone is not substantial evidence Petitioner acted against Thomas in retaliation when she attempted to obtain $300 in funding for zines.

As for Thomas' $2,400 funding request for the Innerlight Method Course, substantial evidence does not support a finding of retaliation by Petitioner against Thomas. The investigator found Petitioner violated "the College's foundation of respect and . . . sense of community vital to the College's educational enterprise." (AR 821.) Substantial evidence, however, does not support College's finding of retaliation based on the $2,400 funding conflict. As noted earlier, Petitioner was rigid and inflexible about funding. Such rigidity and any alleged disrespectful impact may have violated some rule at the College. Without more, however, it is not substantial evidence of retaliation. As College recognizes, "the appearance of an action being retaliatory, without more, is insufficient to support a finding of retaliation under College policy." (AR 523.)

College's Second Finding that Petitioner acted in retaliation to prevent Thomas from teaching her course is also not supported by substantial evidence. Thomas only chose to teach her senior-level course after she decided Petitioner should not be teaching a course on Ellison. Petitioner submitted his course proposal to the Curriculum Committee because no other faculty

member would teach a senior-level course—substantial evidence does not support a finding Petitioner tried to thwart Thomas' efforts. The Curriculum Committee approved Petitioner's course the day Thomas submitted her competing course to the Curriculum Committee.

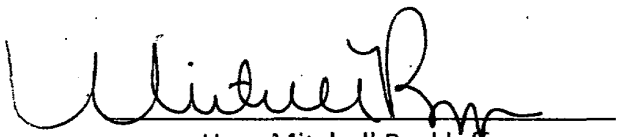
Substantial evidence does not support College's finding Petitioner pushed his course over that of Thomas, or that he did so to retaliate against Thomas based on her complaints of racial discrimination. After the spate of disparaging emails by Thomas and Tompkins, Petitioner felt bullied and intellectually brave by teaching the course. Substantial evidence does not support College's finding Petitioner acted with "retaliatory intent" against Thomas based on race.

CONCLUSION

Based on the foregoing, the petition is granted.

IT IS SO ORDERED.

November 3, 2022



Hon. Mitchell Beckloff
Judge of the Superior Court

11/04/2022