

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 82

**BS171704**

**JOHN DOE VS TIMOTHY P WHITE ET AL**

February 7, 2019

1:32 PM

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

CSR: A Martinez/CSR 8080  
ERM: None  
Deputy Sheriff: None

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**APPEARANCES:**

For Petitioner(s): Mark McClellan Hathaway, Esq. By: Jenna Parker (x)

For Respondent(s): William Casey Hsu (x)

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**NATURE OF PROCEEDINGS:** HEARING ON PETITION FOR WRIT OF MANDATE

Matter comes on for hearing.

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

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

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

**Factual Background**

This matter arose from a sexual misconduct investigation into allegations made by CSUN student Jane Roe against another student referred to as Actor 1. On November 28, 2016, Roe brought a complaint under CSU's Executive Order 1097 ("EO 1097") alleging that on October 27, 2016, Actor 1 engaged in sexual misconduct when he had sex with her in his on-campus apartment while she was incapacitated due to alcohol and without her affirmative consent. (AR 175.)

The sexual misconduct investigation of Roe's complaint was conducted by Barbara Reguengo of CSUN's Office of Equity and Diversity. (AR 175.) Reguengo interviewed Petitioner, who was Actor 1's roommate, as a percipient witness. (AR 190-192.) According to Reguengo's investigative report, she asked Petitioner about a phone conversation Petitioner had with Roe's friend, Ines Delleville. Reguengo then heard Petitioner say "I assume she found out about me and my roommate having sex with her." (AR 192, 208.) When asked for an explanation, Petitioner responded that it was a misstatement and he was "very tired." When asked directly,

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Petitioner denied having sex with Roe. (Ibid.)

On March 2, 2017, Reguengo sent Petitioner an email stating, “It has been brought to my attention that you may have engaged in behavior in violation of [EO 1097], which prohibits sexual misconduct.” (AR 106.) Reguengo subsequently interviewed Petitioner again, this time as a respondent. (AR 160.)

On April 26, 2017, Reguengo completed an investigation report finding that Petitioner had engaged in sexual misconduct with Roe in violation of EO 1097. (AR 203, 214-216.) Reguengo found “most compelling” Petitioner’s statement to her in the prior investigation that he had sex with Roe. (AR 214.) Reguengo did not find credible Petitioner’s explanation “that his being ‘tired’ caused him to make such an intelligible statement.” (AR 214.) Petitioner received a copy of the report. (AR 267, 269.)

On May 16, 2017, Petitioner submitted an administrative appeal which argued that the investigation findings were not supported by the evidence. (AR 293-297.) On June 15, 2017, Petitioner submitted a supplemental appeal, which argued that Petitioner suffers from Attention Deficit Hyperactivity Disorder (ADHD) and that this fact was not considered by the investigator with regard to whether he made the statement attributed to him. (AR 299-300.)

On October 13, 2017, William Watkins, Vice President for Student Affairs, placed Petitioner on disciplinary probation, with a suspension held in abeyance, for the remainder of his undergraduate enrollment at CSUN. 1 (AR 377-378.) Petitioner and Roe appealed the sanctions decision. On November 27, 2017, the CSU Chancellor’s Office denied Petitioner’s appeal, granted Roe’s appeal, and remanded the matter to CSUN with directions to expel Petitioner from all CSU campuses. (AR 428-429.)

#### Procedural History

On November 30, 2017, Petitioner filed a petition for writ of administrative mandate. On January 11, 2018, Respondents filed an answer. On December 6, 2018, Petitioner filed his opening brief in support of the petition. On January 14, 2019, Respondents filed an opposition. On January 23, 2019, Petitioner filed a reply. The court has received the administrative record and joint appendix.

On January 30, 2019, Respondent served a sur-reply on Petitioner by overnight delivery. The sur-reply was lodged with Department 82 on January 31, 2019, and apparently has not been filed with the court through its e-filing system.

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Standard of Review

Under CCP section 1094.5(b), the pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b); see *Topanga Assn. for a Scenic Community v. County of Los Angeles*, (1974) 11 Cal. 3d 506, 515.)

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

ANALYSIS

Petitioner contends that, for various reasons, the administrative procedure was unfair. (Opening Brief (OB) 11-17.) Petitioner further contends that the evidence does not support the findings. (OB 17-18.)

Mootness?

In its sur-reply, Respondents state that, on January 29, 2019, in light of *Doe v. Allee* (2019) 30 Cal.App.5th 1036, the CSU’s Chancellor’s Office remanded back to CSUN the Title IX investigation against Petitioner. Respondents state that the Chancellor’s Office instructed CSUN to vacate the investigation findings and any discipline against Petitioner; to provide appropriate notifications to the parties; and to adjudicate the matter in accordance with guidance forthcoming from the Chancellor’s Office regarding implementation of the principles established by the Allee decision.

Based on these representations, it appears that the writ petition, or parts thereof, may be moot. “California courts will decide only justiciable controversies. [Citations.] The concept of justiciability is a tenet of common law jurisprudence and embodies ‘[t]he principle that courts will not entertain an action which is not founded on an actual controversy....’” (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) “A case is considered moot when ‘the question addressed was at one time a live issue in the case,’ but has been deprived of life ‘because of events occurring after the judicial process was initiated.’” (*Id.* at 1574.) “The pivotal question in determining if a case is moot is therefore whether the court can

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grant the plaintiff any effectual relief.” (Ibid.)

“There are three discretionary exceptions to the rules regarding mootness allowing a court to review the merits of an issue: ‘(1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court’s determination.’” (Santa Monica Baykeeper v. City of Malibu (2011) 193 Cal.App.4th 1538, 1548; see also In re William M. (1970) 3 Cal.3d 16, 23.)

Because the information regarding vacation of the findings and sanction was only provided by way of sur-reply, Petitioner has not had an opportunity to address the impact of those actions on the petition. The parties should address at the hearing whether the writ petition, or any parts thereof, are moot. Subject to argument as to mootness, the court tentatively rules on the parties’ other contentions.

#### Exhaustion of Administrative Remedies

Respondents briefly argue that Petitioner failed to exhaust his administrative remedies because, in his administrative appeals, Petitioner “never claimed or suggested that any prejudicial procedural error occurred during the underlying investigation and decision.” (Oppo. 11.) At the same time, Respondents acknowledge the administrative procedure did not comply with changes in case law occurring after Petitioner was expelled, including the recent Allee decision. In their opposition and sur-reply, Respondents concede that the administrative decision must be vacated and remanded for further proceedings consistent with Allee. (Oppo. 13-14; Sur-Reply.)

Petitioner could not have raised arguments based on Allee and other case law that had not yet been decided at the time of the administrative proceedings. Therefore, at least with respect to procedural arguments based on Allee and other recent case law, Petitioner exhausted administrative remedies or the exhaustion requirement was excused. (See e.g. AR 293-300.)

#### Fair Procedure

“Generally, a fair procedure requires ‘notice reasonably calculated to apprise interested parties of the pendency of the action ... and an opportunity to present their objections.’” (Doe v. University of Southern California (2016) 246 Cal.App.4th 221, 240 [hereafter Doe v. USC].) “A university is bound by its own policies and procedures.” (Doe v. Regents of the University of California (2016) 5 Cal.App.5th 1055, 1078.)

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Opportunity to Question Complainants; Single Investigator Procedure

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

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

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

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

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

Thus, *Allee* held that when a student accused of sexual misconduct faces severe disciplinary

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sanctions, any witness whose credibility is central to the adjudication must be subjected to questioning, directly or indirectly, at a hearing before a neutral adjudicator. Furthermore, the neutral adjudicator cannot be the same individual that served as the investigator in the underlying matter. (See *Ibid.*; see also *Oppo*. 12.)

Here, as Respondents concede, the administrative procedure was unfair under Allee. Petitioner was accused of sexual misconduct and faced severe disciplinary sanctions. Petitioner's own credibility was central to the adjudication. In her investigation findings, Reguengo found "most compelling" Petitioner's statement to her in the prior investigation that he had sex with Roe. (AR 214.) Reguengo did not find credible Petitioner's explanation "that his being 'tired' caused him to make such an intelligible statement." (AR 214.) Thus, Reguengo's findings hinged on a credibility determination that Petitioner made the statement about having sex with Roe. A fair adjudication of the complaint against Petitioner could also turn on the credibility of other witnesses, including Roe (with whom he allegedly had sex), Actor 1 (a percipient witness), and Reguengo (a percipient witness to the alleged statement). Allee instructs that these witnesses must be subjected to questioning at a hearing before a neutral adjudicator. Under Allee, Reguengo, as the investigator, could not serve as the neutral adjudicator. 2

Based on the foregoing, the administrative procedure was unfair and the decision and sanction must be set aside. As the decision must be set aside, the court need not address Petitioner's remaining procedural arguments that CSUN failed to provide adequate notice, that CSUN withheld evidence, or that CSUN failed to comply with its own policies and procedures. On remand, Respondents must provide Petitioner all notices required by law and must comply with relevant case law and their own procedures.

#### Substantial Evidence Review

The court concludes that the substantial evidence test would apply to Respondents' findings. (See e.g. *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 238, 239, 248-249; *Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1073-1074.) However, because of the procedural errors discussed above, the court need not determine whether the findings are supported by substantial evidence.

#### Scope of Court's Writ

CCP section 1094.5(f) provides: "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's

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opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.”

In his conclusion section, Petitioner briefly argues that the court should issue a writ setting aside Respondents’ decision and “order no further administrative action.” (OB 18, citing *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 350-351.) *Ashford* does not provide much helpful guidance here. *Ashford* considered when an administrative action can be remanded for consideration of new evidence under CCP section 1094.5(e). The instant case does not involve an application of section 1094.5(e). *Ashford* did not hold that the court may issue a writ ordering no further administrative action based on procedural errors similar to those discussed above.

In *Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41, discussed at length in *Ashford*, the court held that remand for reconsideration was unnecessary where the administrative decision (involving a fundamental, vested right) was not supported by substantial evidence. The *Newman* court state: “Where there are errors in the admission of evidence before an administrative agency, it is proper to remand to the agency for reconsideration....[¶] But where, as here, the administrative agency errs not in the conduct of the hearing but in the results reached, there is no basis for reconsideration.” (Id. at 49-50.) *Newman* based its decision, in part, on CCP section 1094.5(f), not section 1094.5(e).

*Ashford* has been disapproved of by *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499:

*Ashford* and *Newman* illustrate circumstances in which due process principles entirely separate from section 1094.5 may preclude successive administrative proceedings. It may well be, as *Ashford* and *Newman* suggested, that there should be no second chance to muster sufficient evidence to impose administrative sanctions on a fundamental or vested right, such as the right against dismissal from tenured public employment except upon good cause....[¶] But we find no such categorical bar in section 1094.5 itself. (Id. at 535.)

In reply, Petitioner argues that the exception in *Ashford* and *Newman* applies in this case because the sexual misconduct charges could seriously damage a student’s reputation and therefore implicate a fundamental, vested right. (Reply 5.) Under existing case law, the standard of review for these types of petitions remains substantial evidence. (See e.g. *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 238, 239, 248-249; *Doe v. Regents of the University of California* (2016) 5 Cal.App.5th 1055, 1073-1074.) Thus, as analyzed in *Voices of*

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the Wetlands, Ashford and Newman do not apply. The court need not decide whether Respondents' findings are supported by substantial evidence, because the court has determined that Respondents' procedure was unfair. Neither Ashford nor Newman supports that the court may enjoin future administrative actions under section 1094.5 based on such procedural errors.

**Conclusion**

Subject to argument as to mootness, the petition is GRANTED. The court will issue a writ directing Respondents to set aside the administrative decision and the sanction of expulsion. Should Respondents elect to initiate new administrative proceedings against Petitioner, they shall do so in a manner consistent with a fair procedure and the views expressed herein.

**FOOTNOTES:**

1- Additional procedural history regarding the sanctions hearing and report of hearing officer Shelly Thompson is discussed in the parties' briefs and not directly relevant to the writ petition. (See OB 8-10.)

2- Furthermore, separate from Allee, a process which would allow Reguengo to serve as the key witness and the fact-finder would not appear to be a fair process.

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

Counsel for petitioner is to give notice and to prepare, serve and e-file the proposed judgment and proposed writ within ten days.

A status conference is scheduled for February 28, 2019, at 1:30 p.m. in Department 82. If there are objections to the proposed judgment and/or proposed writ, the court will address them on that date. If there are no objections, counsel are to notify the court and the status conference will be taken off calendar.