SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: [redacted]AN CAHN
Justice

PART 49

J. Ebert

-v-

Yeshiva Univ.

INDEX NO. 115622/04

MOTION DATE 3/8/05

MOTION SEQ. NO. 002

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE ......

... notice of ... has not been ... by the County C... entry cannot be ... based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/21/05

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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EBERT, YISROEL,

Petitioner,

-against- Index No. 115622/2005

YESHIVA UNIVERSITY,

Respondent.

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CAHN, J.

Petitioner Yisroel Ebert brings this Article 78 proceeding to annul his disciplinary expulsion from respondent Yeshiva University (University), and for an order directing University to: (a) reinstate him as a student in good standing, (b) strike all references to his expulsion from his record, and (c) expedite the completion of such courses as petitioner must complete in order to be eligible to receive his undergraduate degree.

In an earlier proceeding, the court held that University had violated the guidelines set forth in its Undergraduate Disciplinary Rules (UDRs) by summoning petitioner to a disciplinary hearing without having informed him in advance of the charges against him. The court remanded the matter to University for a new hearing, "in accordance with the guidelines promulgated by the UDRs," and specifically, with adequate notice. Matter of Ebert v Yeshiva University, 4 Misc 3d 699, 703 (Sup Ct, NY County 2004). The underlying facts are set forth in the earlier opinion, and need not be repeated here.

As a result of the first hearing, petitioner withdrew from

University and registered at another university. After the conclusion of the second hearing, the hearing officer determined that petitioner would neither be allowed to return to University, nor to have the credits that he had earned elsewhere be counted toward a University degree. Petitioner appealed that determination to the University Vice President, who affirmed the hearing officer's determination.

Petitioner argues that the second hearing was faulty in that he was denied the assistance of an advocate, and in that the hearing was held before the same hearing officer who presided over the first hearing, and who, petitioner contends, had predetermined the issue.

Prior to the second hearing, petitioner requested that he be allowed to be assisted thereat by an attorney. That request was denied. The reason given was that the UDRs expressly bar the presence of an attorney or other advocate at disciplinary hearings. University now states that it might have allowed one of petitioner's parents, for example, to assist him.

The issue of whether a student has the right to be assisted at the hearing by an advocate, other than an attorney, is not before the court because petitioner did not request that anyone, other than his attorney, be allowed to assist him. While this court stated in its earlier decision that "it seems prudent for a student who is facing serious disciplinary charges ... to have an advocate of some sort present with him, to advise and counsel" (id. at 703), the court is not now prepared to hold that the "fundamental

fairness" that the UDRs promise requires that a student have the right to have an attorney present at a disciplinary hearing. The UDRs do not prevent students from obtaining such assistance as they wish in preparing for hearings. However, inasmuch as the hearings themselves are informal and the rules of evidence, either civil or criminal, are not applied, the exclusion of attorneys from the hearings does not prejudice students to the extent that they are denied fundamental fairness. The court notes that even in the context of student disciplinary hearings at public universities, at which students are entitled to the due process guarantees of the Fourteenth Amendment, students are not entitled to have attorneys take part in the hearings. Osteen v Henley, 13 F3d 221 (7th Cir 1993); Newsome v Batavia Local School Dist., 842 F2d 920 (6th Cir 1988); Gorman v University of Rhode Island, 837 F2d 7 (1st Cir 1988); but see, Black Coalition v Portland School Dist. No. 1, 484 F2d 1040 (9th Cir 1973).

It is noted that University is a private university. In any event, for the reasons so eloquently stated by Judge Posner in Osteen v Henley, supra, the court declines to find a right to have an attorney take part in the hearing.

Senior University Dean of Students Efrem Nulman served as the hearing officer in both of petitioner's disciplinary hearings. In an affidavit sworn to on December 29, 2004, Dr. Nulman states that, in preparing for the second hearing, he reviewed the notes of his interviews with the other students who had been involved in the incident about which petitioner had been charged, as well as the

reports that had been prepared by University security officers. Dr. Nulman candidly adds that his review of those materials refreshed his memory as to the credibility of the two students who had stated at the first hearing that petitioner had attacked them without physical provocation.

At the second hearing, petitioner submitted a written statement in which he contended, for the first time, that he had not struck either of the other two students. They "were leaving the room. That their backs were toward me as they left makes so forceful a blow to the face highly unlikely." Nulman Aff., Exh. F, ¶ 11. At the first hearing, petitioner had acknowledged that he had punched one of the other students in the face, but claimed that he had done so in self defense.

In addition, petitioner's written statement contended that, because he was the one who had reported the incident to the security officers, he should presumptively be viewed as the aggrieved party. However, according to the notes taken by the security officers, petitioner had not approached them. Rather, one of the officers had gone to petitioner's room, after a report of an argument there, and discovered a large amount of blood. He later returned and interviewed petitioner, after the Resident Advisor had informed him that petitioner had returned to his room.

When Dr. Nulman asked petitioner to explain his version of the incident, petitioner primarily referred to the contents of his written statement. Dr. Nulman concluded that petitioner had failed to present any credible facts or explanation that might have led

Dr. Nulman to change his determination that the other students had presented a more credible version of the incident than petitioner had. Indeed, petitioner had given further cause to doubt his credibility.

The court is troubled by the acknowledged fact that, at the second hearing, Dr. Nulman took his earlier determination as to the relative credibility of the three students who were involved in the incident as his starting point. However, the written statement that petitioner submitted at the second hearing contradicts the security officers' accounts of what petitioner had told them, as well as petitioner's own acknowledgment at the first hearing that he had hit one of the other students in the face. Petitioner has not provided any explanation of that contradiction. Accordingly, there is nothing in the record that casts doubt on Dr. Nulman's statement that "going into the second hearing ... [he] was completely open to evaluating any statement or issue that Ebert might advance and that would assist [Dr. Nulman] in coming to a decision." Nulman Aff., at 8. Indeed, Dr. Nulman avers that, prior to the second hearing, he consulted with several other University officials as to possible outcomes of the hearing, including the possibility of allowing petitioner to transfer the credits he had earned elsewhere so that he would qualify for a degree. An impartial decision maker is the bedrock of fundamental fairness in a disciplinary proceeding. See Winnick v Manning, 460 F2d 545 (2d Cir 1972). Petitioner has not shown that Dr. Nulman was not impartial with regard to the outcome of the second hearing.

Finally, in view of the fact that petitioner was already on probation, as the result of multiple altercations with other students, it was not arbitrary or capricious for Dr. Nulman to have determined that expulsion was the appropriate sanction for petitioner's role in the latest fight.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed.

Dated: June 21, 2005

ENTER:

J.S.C.