State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 25, 2020 528959

In the Matter of ALEXANDER M.
Appellant-
Petitioner,

v

CHANTELLE CLEARY, as Former Title IX Coordinator at the State University of New York at Albany, et al.,
Respondents-
Respondents.

MEMORANDUM AND ORDER

Calendar Date: August 20, 2020

Before: Garry, P.J., Lynch, Aarons, Reynolds Fitzgerald and Colangelo, JJ.

Nesenoff & Miltenberg, LLP, New York City (Philip Byler of counsel), for appellant-petitioner.

Letitia James, Attorney General, Buffalo (Joel J. Terragnoli of counsel), for respondents-respondents.

Reynolds Fitzgerald, J.

(1) Appeal from an order of the Supreme Court (Nichols, J.), entered February 22, 2019 in Albany County, which, in a proceeding pursuant to CPLR article 78, denied petitioner's motion to direct discovery, and (2) proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of

respondent State University of New York at Albany finding petitioner in violation of said respondent's code of conduct.

On a Friday night in September 2017, petitioner, a student at respondent State University of New York at Albany (hereinafter UAlbany), allegedly engaged in nonconsensual sexual conduct with a female student (hereinafter the reporting individual) and distributed Xanax to her and two other students. Petitioner maintains that the sexual conduct was consensual, and that the reporting individual gave her verbal consent and actively participated in their encounter. The reporting individual avers that she has no memory of the sexual activity itself and very little memory of the events that took place on Friday evening. In fact, she informed petitioner about her lack of recall during a discussion that took place after they woke up on Saturday morning. However, later in the day, she texted petitioner, "Last night was amazing, we should do that again" and also reiterated, "Sorry to freak you out this morning, I just don't remember anything that happened," and, finally, a text suggesting that they "link up." The two met later in the day at the campus center to have dinner. During dinner, petitioner informed the reporting individual that his girlfriend from home was coming to campus that night. Later, both attended a party at petitioner's dorm and, although the reporting individual has a sparse memory of much of the night, she does recall a verbal altercation with petitioner's girlfriend, being pushed outside the door of the party, falling down the interior stairwell and being dragged back to the room and left to sleep on the floor of the "common area" of petitioner's dorm suite. On Sunday morning, she woke up and, upon seeing petitioner and his girlfriend in bed, threw a cup of water on them and left. The reporting individual returned to her dorm. Once there, she heard from some of her friends that there was a rumor that she "had sex in the bathroom" at a fraternity house on Friday night. They then advised her to go to the hospital to undergo a forensic sexual assault exam, which she did. After giving a statement to the UAlbany police, the reporting individual returned to campus and the incident was then reported to respondent Chantelle Cleary, who was the Title IX Coordinator at UAlbany.

Cleary provided written notice to petitioner that she was investigating the incident to determine whether he had engaged in sexual misconduct and drug offenses in violation of UAlbany's official code of conduct (hereinafter the student code).[1] During the ensuing investigation, Cleary and three other investigators interviewed both parties and several witnesses. Following the conclusion of the investigation, Cleary and the other investigators compiled and submitted a referral report to the Office of Community Standards, and a hearing was conducted before UAlbany's Student Conduct Board (hereinafter the Board). Petitioner and the reporting individual both attended the hearing and each was accompanied by an advisor. Petitioner, Cleary and the reporting individual were the only live witnesses. Petitioner was allowed to submit proposed questions to the Board and, if it thought the particular question was relevant, the Board would then put the question to the witness. The testimony of all other witnesses was confined to the statements given to investigators, which were contained in the referral report. At the conclusion of the hearing, the Board found petitioner to be in violation of the student code and expelled him from UAlbany.

Petitioner's administrative appeal was unsuccessful, with the administrative appeal board finding no "evidence of a procedural error, new evidence or evidence that the sanction was too severe." Petitioner thereafter commenced this CPLR article 78 proceeding challenging UAlbany's determination and seeking his reinstatement to UAlbany. Petitioner also moved for an order directing discovery on the issue of whether Cleary was biased against him during the investigation. Supreme Court denied the motion to direct discovery and, in a separate order, transferred the proceeding to this Court pursuant to CPLR 7804 (g). Petitioner appeals from the denial of his motion.

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[1] In particular, Cleary notified petitioner that he was being investigated for conduct that, if sufficiently proven, would amount to sexual assault I, sexual assault II, sexual harassment and drug offenses under the student code.

Initially, petitioner's appeal from the order denying his motion must be dismissed as no appeal lies as of right from a nonfinal order in a CPLR article 78 proceeding (see CPLR 5701 [b] [1]). However, this Court "may nevertheless review those issues raised regarding said order within the context of the transferred proceeding" (Matter of Robinson v DiNapoli, 172 AD3d 1513, 1515 n [2019], lv dismissed and denied 34 NY3d 1144 [2020]).

We agree with petitioner that Supreme Court erred in denying his motion for discovery. In a special proceeding such as this, discovery is available only by leave of court (see CPLR 408; Matter of Held v State of N.Y. Workers' Compensation Bd., 103 AD3d 1063, 1064 [2013]). "Among the factors weighed are whether the party seeking disclosure has established that the requested information is material and necessary, whether the request is carefully tailored to obtain the necessary information and whether undue delay will result from the request" (Matter of Suit-Kote Corp. v Rivera, 137 AD3d 1361, 1365 [2016] [citations omitted], appeal dismissed and lv denied 27 NY3d 1054 [2016]; see Matter of Entergy Nuclear Indian Point 2, LLC v New York State Dept. of State, 130 AD3d 1190, 1196-1197 [2015]). Petitioner's motion requested the disclosure of, among other things, "[r]ecordings of all meetings and interviews" between petitioner and the Title IX investigators, as well as "[r]ecordings of all interviews of all witnesses" conducted in furtherance of the investigation. Petitioner cited the alleged bias of Cleary, and the attendant bias on his guarantee of an impartial investigation, as the reason the requested discovery was "material and necessary"; respondents did not argue that the requested discovery was overbroad or would cause undue delay. Thus, we find that petitioner met the requirements for discovery under Matter of Suit-Kote Corp. v Rivera (137 AD3d 1361 [2016]). Supreme Court, however, denied petitioner's request finding petitioner's submissions in support of discovery had failed to identify the specific evidence that said discovery would contain.[2]

[2] Nothing in Matter of Suit-Kote Corp. demands that petitioner identify the specific discovery sought. Indeed, this

"It is beyond dispute that an impartial decision maker is a core guarantee of due process, fully applicable to adjudicatory proceedings before administrative agencies" (Matter of 1616 Second Ave. Rest. v New York State Liq. Auth., 75 NY2d 158, 161 [1990] [citations omitted]). Education Law article 129-B, known as the Enough is Enough Law, provides for the implementation by colleges and universities of, as relevant here, sexual assault policies and procedures. The rights of a student accused of sexual assault are found in Education Law § 6444 (5) (c) and are replicated within the student code. Among these rights is the right to an impartial investigation. "[T]he Enough is Enough Law requires that colleges and universities implement a 'students' bill of rights' that includes the right to '[p]articipate in a process that is fair [and] impartial'" (Matter of Jacobson v Blaise, 157 AD3d 1072, 1075 [2018], quoting Education Law § 6443). The requirements of the statute are the "minimum" all colleges and universities must provide (Matter of Jacobson v Blaise, 157 AD3d at 1075). Ensuring these minimum requirements is especially crucial in student disciplinary proceedings, an administrative arena where traditional due process guarantees are sometimes limited and where "there is no general constitutional right to discovery" (Matter of Agudio v State Univ. of N.Y., 164 AD3d 986, 990 [2018] [internal quotations marks and citation omitted]). In addition, "[u]nlike the constitutional right to confrontation in criminal actions, parties in administrative proceedings have only a limited right to cross-examine adverse witnesses as a matter of due process" (Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d 1429, 1432 [2017] [internal quotation marks and citation omitted]).

Further, we draw a distinction between the procedural rights actually afforded and their substantive underpinnings. Here, where the nonconsensual nature of the sexual activity was not predicated on the reporting individual's verbal and physical manifestation of nonconsent – but on her ability to knowingly consent due to excessive inebriation – and the reporting

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would be an impossible standard, as the purpose of discovery is to discover.

individual avers no memory of the activity, the Board's determination was necessarily heavily reliant on that part of the referral report that contained a summary of statements of persons who had observed the reporting individual during Friday evening, prior to her sexual encounter with petitioner. Notably, these are not sworn affidavits of the witnesses, but rather statements collected and compiled by the Title IX investigators. In that regard, Cleary freely admitted that her team "didn't include any information that was irrelevant to a finding for the referrals," a statement that begs the question — Who determined what was "relevant"? It bears noting that Cleary was the director of the Title IX office that prepared the report and personally submitted same. The dissent's observation that she was only one of four investigators and interviewed only a portion of the witnesses ignores her supervisory role and attendant influence on the work product of the office itself.

As to the possibility of individual bias, Cleary admittedly altered the facts as reported to her. The September 14, 2017 notice of investigation issued by UAlbany informed petitioner that he was alleged to have violated "Code 9: Sexual Assault I" of the student code in that he "did engage in oral sexual conduct with [the reporting individual] without her affirmative consent." The same charge (sexual assault I) in the referral report submitted to the Board by Cleary reads, "[I]t is alleged that on or about the late night of September 1, 2017 . . . [petitioner] did put his penis in [the reporting individual's] mouth without her affirmative consent." The student code defines sexual assault I as "sexual intercourse or any sexual penetration, however slight, of another person's oral, anal, or genital opening . . . without the active consent of the victim" (emphasis added). Petitioner, whose narrative of the incident is the only existent first person account, has always maintained that he was a passive participant, lying supine while the reporting individual actively undertook the sexual act. Cleary's phrasing portrays a significantly different rendering of the event. At the hearing, when Cleary was asked why she changed the wording, her response, in the words of Supreme Court's order denying petitioner's motion for discovery, "bordered on the incoherent." It is not unreasonable

to question whether Cleary changed the wording (and as such the alleged facts) to correspond with the definition of sexual assault I as found in the student code. The dissent's characterization of this change as a mere "rephrasing" of petitioner's account is an exercise in understatement.

In addition, petitioner presented an affidavit from his advisor, who was present with him in his meetings with Cleary. The advisor averred that, at said meetings, Cleary raised her voice, physically leaned toward petitioner and acted in an aggressive manner. Perhaps more importantly, the advisor avers that Cleary exceeded her role as an investigator and acted as a factfinder when, after hearing petitioner's recollection of events, she informed him that, although he stated that the reporting individual had twice kissed him, these acts constituted two additional offenses because Cleary had determined that the reporting individual "lacked the capacity to consent." The issue of consent or lack thereof lies at the heart of the charges against petitioner.

An impartial investigation performed by bias-free investigators is the substantive foundation of the entire administrative proceeding. This issue must be properly resolved before this proceeding can be considered by this Court (see Matter of Lally v Johnson City Cent. Sch. Dist., 105 AD3d 1129, 1132 [2013]). As such, we withhold decision, reverse the denial of petitioner's motion for discovery and remit to Supreme Court for said discovery to occur.

Garry, P.J., Aarons and Colangelo, JJ., concur.

Lynch, J. (dissenting).

I respectfully dissent. Raising concerns as to whether respondents conducted an impartial investigation, the majority has concluded that Supreme Court erred in denying petitioner's motion for disclosure of the underlying investigative documentation. For the reasons that follow, I perceive no abuse

of discretion on the court's part in denying the discovery request.

Discovery is available in a special proceeding only by leave of court, with Supreme Court having "broad discretion" in granting or denying the requested disclosure (Matter of Held v State of N.Y. Workers' Compensation Bd., 103 AD3d 1063, 1064 [2013]; see CPLR 408). The party seeking the disclosure bears the burden of demonstrating that the request is likely to produce material and necessary information (see Matter of Suit-Kote Corp. v Rivera, 137 AD3d 1361, 1365 [2016], appeal dismissed and lv denied 27 NY3d 1054 [2016]; Matter of Entergy Nuclear Indian Point 2, LLC v New York State Dept. of State, 130 AD3d 1190, 1196-1197 [2015]).

In his motion, petitioner requested the disclosure of, among other things, "[r]ecordings of all meetings and interviews" between petitioner and the Title IX investigators, as well as all witness interviews conducted in furtherance of the investigation. This demand ties into the acknowledged testimony of Chantelle Cleary, the Title IX Coordinator at respondent State University at Albany (hereinafter UAlbany), that she redacted the witness statements when compiling the investigation report to remove any irrelevant information. Notably, petitioner did not specify what information he expected to discover from the recordings other than to speculate that they "w[ould] establish whether [investigators] failed to include any exculpatory evidence in the final investigation report." The implication here is that Cleary redacted potentially exculpatory information from the witness statements. The flaw in that thesis is that none of the witnesses actually observed the encounter between petitioner and the reporting individual. Rather, the majority of the witnesses consistently corroborated the reporting individual's contention that she was intoxicated prior to the encounter. Although two witnesses stated that the reporting individual seemed "fine" at the beginning of the party, others observed her in an intoxicated state, describing her as off balance and slurring her words. Another witness recalled hearing petitioner offer the reporting individual "more Xans" when they were leaving the party. A

witness who spoke to the reporting individual for "[10] or [15] minutes" before she entered petitioner's room recalled that she seemed "off." In this context, it is my view that Supreme Court did not abuse its discretion in denying petitioner's motion (see Matter of Suit-Kote Corp. v Rivera, 137 AD3d at 1365; Matter of Zulu v Egan, 1 AD3d 649, 649 [2003]; compare Matter of Loveless v DiNapoli, 136 AD3d 1193, 1196 [2016]).

I am also satisfied that petitioner was afforded an impartial investigation. "It is beyond dispute that an impartial decision maker is a core guarantee of due process, fully applicable to adjudicatory proceedings before administrative agencies" (Matter of 1616 Second Ave. Rest. v New York State Liq. Auth., 75 NY2d 158, 161 [1990] [citations omitted]). In that respect, UAlbany's official code of conduct affords students charged with misconduct the right to an impartial investigation (see Education Law § 6443; Matter of Jacobson v Blaise, 157 AD3d 1072, 1075 [2018]). However, "[a]n appearance of impropriety is insufficient to set aside an administrative determination; the petitioner must provide factual support for his or her claim of bias and prove that the outcome flowed from that bias" (Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d 1429, 1433 [2017] [internal quotation marks and citations omitted]; see Matter of Sunnen v Administrative Rev. Bd. for Professional Med. Conduct, 244 AD2d 790, 791 [1997], lv denied 92 NY2d 802 [1998]). Although petitioner's verified petition asserted that Cleary used an intimidating – and, at times, improper – tone with petitioner during her investigatory questioning of him, and he submitted an affidavit from his advisor corroborating such contention, that conduct alone does not demonstrate bias calling into question the integrity of the referral report. In any event, the record reflects that the determination of UAlbany's Student Conduct Board (hereinafter the Board) did not flow from any bias or impropriety on the part of Cleary (see Matter of Weber v State Univ. of N.Y., Coll. at Cortland, 150 AD3d at 1433; Matter of Sunnen v Administrative Rev. Bd. for Professional Med. Conduct, 244 AD2d at 791). Cleary was one of four investigators on the case, conducted merely a third of the interviews and repeatedly explained to the Board that the investigation report was a

compilation of the evidence collected and that it was the Board's province to make findings of fact.

As for petitioner's claim that Cleary mischaracterized the allegations underlying the charge of sexual assault I, she explained her rationale for doing so, and this issue was fully explored during the hearing. However ill-conceived Cleary's rephrasing was with respect to that charge, I am satisfied that the Board made its own findings of fact as to the nature of the encounter.

For all the foregoing reasons, I find that Supreme Court did not abuse its discretion in denying petitioner's motion to direct discovery.

ORDERED that the appeal from the order is dismissed, without costs.

ADJUDGED that the decision is withheld, and matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision.

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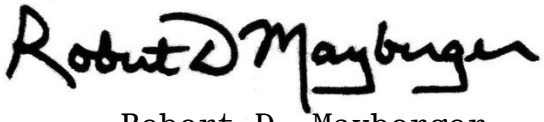

Robert D. Mayberger
Clerk of the Court