Supreme Court

State of New York

JAMES P. McCLUSKY
Justice

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January 8, 2019

VIA E-MAIL AND USMAIL
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RE: Doe vs Syracuse University
Index No. 2018-1865; RJI No. 22-18-0762

Dear Counselors:

Enclosed please find a copy of the Order deciding the motions heard October 31, 2018 in the above matter. The original Order and any original papers will be forwarded to the Jefferson County Clerk's Office for filing.

Sincerely,

Barbara J. Wright
Secretary to Hon. James P. McClusky

Enclosure
cc: Jefferson County Clerk's Office (w/originals)

At a term of Supreme Court held in and for the County of Jefferson, in the City of Watertown, New York on the 31st day of October, 2018

PRESENT: HONORABLE JAMES P. McCLUSKY
Supreme Court Justice

STATE OF NEW YORK

SUPREME COURT COUNTY OF JEFFERSON

JOHN DOE "1", JOHN DOE "2", JOHN DOE "3", JOHN DOE "4", JOHN DOE "5", JOHN DOE "6", JOHN DOE "7", JOHN DOE "8", JOHN DOE "9", and JOHN DOE "10",

Petitioners,

-vs-

SYRACUSE UNIVERSITY,

Respondent.

MEMORANDUM DECISION AND ORDER

Index No. 2018-1865

RJI No. 22-18-0762

This matter commenced with the filing of a CPLR Article 78 petition seeking to annul the final determinations made in the disciplinary proceedings by Respondent Syracuse University (SU) as against John Doe "1" through John Doe "10".

The Court has considered the following: the Petition verified August 10, 2018, with attachments; the Affirmation of David Katz dated August 13, 2018; the Memorandum of Law by Karen Felter dated August 10, 2018, with attachment (Federal Court Memorandum of Law); the Affirmation of Karen G. Felter dated August 20, 2018, with attachments; the Memorandum of Law by Karen Felter dated August 20, 2018; the Verified Reply dated October 15, 2018, with attachments; the Memorandum of Law by Karen Felter dated October 15, 2018; the Affirmation of Karen G. Felter dated August 24, 2018, with

attachments; the Affirmation of Karen G. Felter dated August 28, 2018; the Affidavits of John Doe "1" through "10"; the Notice of Cross-Motion dated August 16, 2018; the Affirmation of John G. Powers dated August 16, 2018, with attachments; the Affidavit of Daniel J. French dated August 16, 2018; the Memorandum of Law by John Powers dated August 16, 2018; the Letter of John Powers dated August 24, 2018; the Affidavit of John Powers dated August 27, 2018; the Verified Answer dated September 26, 2018; the Affidavit of Eric Nestor dated September 26, 2018, with attachments; the Affidavit of Robert Hradsky dated September 26, 2018; the Affirmation of John Powers dated September 27, 2018, with attachments; the Memorandum of Law in Support of Defendant's Answer by John Powers dated September 27, 2018, the Certified Article 78 Record Volumes 1 and 2, and the oral argument heard October 31, 2018

The Petition is granted in part and denied in part.

The John Does are freshmen or sophomore students at Syracuse University and were prospective members/pledges of the Tau Chapter of Theta Tau fraternity. In the spring 2018 the John Does performed a roast of current fraternity members in the basement of the fraternity house. The roast was an attempt to make fun of the current members for the entertainment of the fraternity as a whole. The John Does performed live skits which were recorded and posted to the fraternity's private Facebook page. A third party gained access to the private Facebook page and shared copies of the skits with the Daily Orange (the School's student run newspaper). SU initiated student disciplinary proceedings against the Fraternity and the John Does. Hearings were held, appeals taken, and a final determination was made that indefinitely suspended the student petitioners.

The internal disciplinary procedures of private institutions, including private universities such as SU, are generally not subject to review by the Courts. Courts get involved when a private institution makes representations to its members regarding its disciplinary rules, and the members claim those rules were not followed . When Courts do get involved their role "is limited to whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary and capricious." *Rensselaer Society of Engineers v. Rensselaer Polytechnic Institute*, *260 AD 2d 992, 993.* In addition, the Court can review the facts and determination of the disciplinary process to see if the results shock the conscious. However, this is limited as well. When "a university, in expelling a student, acts within its jurisdiction, not arbitrarily but in the exercise of an honest discretion based on facts within its knowledge that justify the exercise of discretion, a Court may not review the exercise of that discretion." *Matter of Harris v. Trustees of Columbia University, 98 AD 2d 58,70.*

Petitioners each were found to have violated the Code of Student Conduct, Sections 2, 3, and 15. They were found not responsible for violations of Sections 1 and 10 Code of Student Conduct. The charges of sexual harassment under the Sexual Harassment, Abuse and Assault Prevention Policy were withdrawn. Six Does were indefinitely suspended with the right to reapply after one year and four were indefinitely suspended with the right to reapply after two years. All ten Does had identical requirements to complete if they desired to reapply. The students' objections to the procedures are manifold and they believe that individually the deficiencies are sufficient to overturn the outcome of the hearing and that the cumulative effect of the procedural errors are more than sufficient to overturn the final determination.

The Petitioners argue that not only did SU fail to follow their own procedures, but that Petitioners did not violate the rules and as such, their punishment shocks the conscious.

The Petitioners believe the disciplinary process was tainted by the inflammatory statements and actions of the SU administrators which served to fuel the outrage on campus. This included calling for criminal sanctions (even after the local District Attorney had announced no crime occurred), the firing of a non-tenured professor for challenging the concept that students had to be protected from thoughts they disagreed with, and the Petitioners inability to question the non-tenured hearing board on issues of potential bias. In response to the Petitioner's objections, the hearing board members said they could be fair and unbiased. Though these facts were all uncontroverted, the school must only show substantial compliance with its own procedures.

The procedural issues raised by Petitioners also include improper notice of the charges to the Petitioners. Initially they were advised of violating the Code of Student Conduct without specifying which sections were violated and merely that the violations occurred in the Spring of 2018. They did not receive an actual notice of the events upon which the charges were brought until just days before the hearing.

Under the circumstances the Court finds that it was clear upon what events the charges were based and the Court finds the school substantially complied with their procedures including giving notice of the charges, and so long as the University substantially complies with its own rules, their actions pass judicial muster. This is all to which the students are entitled. It is important to note that Respondent is not held to the

standards of due process generally expected by society and guaranteed by our constitution when dealing with public institutions.

Each Petitioner was found to have violated sections 2, 3 and 15 of the Code of Student Conduct. It is not the Court's job to review the evidence to see if the Court agrees with the finding of a violation, however the Court can review the decision to see if it lacks a rational basis.

Petitioners claim the speech contained within the skits was protected speech. They do not rely on the protections of the First Amendment but rather the protections included in the Student's Rules of Conduct, which states "students have the right to express themselves freely on any subject provided they do so in a manner that does not violate the code."

The first charge the students were accused of violating is section 2, "Harassment– whether physical, verbal or electronic, oral, written or video – which is beyond the bounds of protected free speech, directed at a specific individual(s), easily construed as 'fighting words' or likely to cause an immediate breach of peace." This section clearly exempts protected free speech. The University therefore can not punish under this section any statement solely on the content of that speech. This is an understandable position for an institution of higher learning to take. Harassment is not specifically defined in the Code of Student Conduct. Black's Law Dictionary defines harassment as 'words, conduct or action that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose." The record is devoid of any specific individual to whom the speech was directed that was harassed. Nor do the words

constitute "fighting words" or words that likely would cause an immediate breach of the peace. The University could show people were upset at the words used by Petitioners, but those words were not directed to the people who were upset. The only witness called by the school testified the words of the Petitioners were intended to roast the brothers of the Fraternity. Being upset is not the equivalent of being harassed. As the words are protected free speech, the Court finds that the violation of this section is not founded upon a rational basis and will not be sustained.

The students were also found guilty of section 3, which reads "Conduct - whether physical, verbal or electronic, oral, written, or video - which threatens the mental health, physical health or safety of any person or persons including, but not limited to hazing, drug or alcohol abuse, bullying, or other forms of destructive behavior." The Respondent's belief that this section was violated is founded upon the reaction of the student body to the videos that were released by the Daily Orange. The Petitioners are asking the Court to read this section to require the students to have done the "threatening" to specific individuals. Although the Does' position is rational, the Court can not state that the interpretation by the University is not rational. The Court can envision students having the same reaction of feeling "unsafe" after a debate on abortion, a debate on the support of Israel, or a debate on the confirmation of Justice Kavanaugh; issues upon which one would think an institution of higher education would encourage debate. However, the Court is not free to chose between two seemingly rational positions. The privilege of being a private institution allows the University to act with limited interference by the state and as such it is free to encourage or stifle the words and actions of its students as it deems appropriate. The Court will not overturn this finding.

The final charge is based on section 15 of the Student Rules of Conduct, which covers violations of any other rules published by the school. In particular it is alleged the students violated the University's anti-harassment policy and the Office of Fraternity and Sorority Affairs (FASA) guidelines. For the same reasons that the students did not violate section 2 of the Student Code of Conduct there is no violation of the anti-harassment policy. However, the Board found that the skits represented sexist and or sexually abusive behavior in violation of the "Sexual Abuse and Harassment" section on page 3 of the FASA guidelines. The section cites examples of banned behavior such as having strippers at a fraternity event. It is clear that the school does not require a showing that those in attendance of the Petitioners' performance were offended by the actions. The school's determination that the actions of Petitioners were sexist and or sexually abusive is rational and based on some evidence.

Based on the violations of the two rules and a punishment clearly within the guidelines, this Court will not disturb the punishment.

It is therefore

ORDERED that the finding that John Doe 1 through John Doe 10 violated section 2 of the Code of Conduct will be stricken, and it is further;

ORDERED that all other findings and determinations made by Syracuse University remain unchanged.

Dated: January 7, 2019
Watertown, NY
ENTER:

JAMES P. McCLUSKY
Supreme Court Justice