DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

Case No. 00 CV 658, Division 2

RULING AND ORDER

CARLOS MARTINEZ,

Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF COLORADO,

Defendant.

On December 29, 2000, the Court took the following actions on the above-captioned case. The Clerk is directed to enter these proceedings into the register of action.

This matter comes before the Court on several different motions. Having considered the parties' briefs and applicable law, the Court enters the following Order.

I. FACTS AND PROCEDURAL HISTORY

On December 6, 1999, Andrea Goldblum, Director of the University of Colorado at Boulder's Office of Judicial Affairs, notified Carlos Martinez that the Office of Judicial Affairs received information that Martinez had violated various standards of the University's Code of conduct during the fall semester. Specifically, Martinez was accused of harassing staff in the Bursar's office and of driving his vehicle in a reckless manner on campus while avoiding accepting a parking ticket.[1] *See 12/6/99 Letter from Andrea Goldblum to Carlos Martinez* at ¶ 1.

In this letter, Goldblum ordered Martinez to refrain from any conduct with "staff in the Bursar's office that wrote statements or documented information." *Id*. at ¶ 2. Goldblum included a copy of the filed complaint with the letter and directed Martinez to attend a conference with her regarding the complaint by December 13, 1999. *See id* at ¶ 4. Goldblum wrote, "[t]he conference is an opportunity for me to clarify the allegations cited in the complaint and notice, to explain your rights within the disciplinary process, and to discuss the disciplinary procedures. Failure to meet the deadline ... will result in my making a decision on your case in your absence." *Id*. at ¶ 5-6. Goldblum's statement tracked the relevant language detailing University

[1] The code standards allegedly violated were: standard la, interfering with, obstructing or disrupting a University activity; standard 5, violating a state, federal, or local law; and, standard 12, harassing another person

adjudicatory procedure in the University's *Students' Rights and Responsibilities Regarding Standards of Conduct* (hereinafter "University Code"). *See Plaintiff's Motion for Partial Summary Judgment,* Exhibit 2, at 4.

Martinez and Goldblum ultimately scheduled a conference for December 30, 1999. Martinez did not attend, however, and Goldblum, pursuant to University Code procedure, decided the case in Martinez's absence. In a letter to Martinez, Goldblum set forth her findings: "It was found that you drove your vehicle in a reckless manner while avoiding accepting a parking citation. You were also found to have harassed staff in the Bursar's Office and disrupted their activity by creating a hostile or threatening environment." *12/30/99 Letter from Andrea Goldblum to Carlos Martinez,* at ¶ 2. Goldblum found that this conduct was in violation of University standards 1a, 5, and 12. *See id* at ¶ 3.

As a sanction for Martinez's alleged University Code violations, Goldblum suspended and excluded Martinez from the University from December 30, 1999 to May 12, 2000. *See id* In addition, Goldblum imposed the following behavioral sanctions:

> [A]s a condition of returning to the University you must have an evaluation with a licensed psychologist or counselor regarding the issues of anger and conflict management and must follow any recommendations made by the practitioner for further work. This correspondence must be on the practitioner's letterhead and must bear the original signature of the evaluator. It must be received by the Office of Judicial Affairs no later than June 5, 2000, It is your responsibility to set up and complete the evaluation. You are also responsible for any costs associated with this evaluation.

Id. at ¶ 4. Goldblum further notified Martinez of his right to request a review of the imposed sanctions. *Id.* at ¶ 6. Finally, Goldblum added, "Your sanction will be effective only after this administrative review has been exhausted or waived. If the results of the review uphold the sanction, it is effective December 30, 1999. . ." *Id.*

Martinez did not seek a review of Goldblum's sanctions. Instead, he requested a formal hearing before the Judicial Affairs Hearing Board ("JAHB"). *See 1/25/00 Case Disposition Selection Form.* Under the University Code, once Martinez requested the formal hearing Goldblum's sanctions were of no effect, and the disposition of the case was entirely in the hands of the JAHB. The hearing before the JAHB took place February 16, 2000. *See February 1, 2000 Letter from Andrea Goldblum to Carlos Martinez,* at ¶ 1.

The decision of the JAHB was issued on February 21, 2000 in the form of a letter from Goldblum to Martinez. *See 2/21/00 Letter from Andrea Goldblum to Carlos Martinez.* The JAHB found that Martinez had violated only two code standards [2] and sanctioned Martinez with one year of probation, rather than the one semester suspension meted out by Goldblum in the initial action. Goldblum also relayed the following, additional sanctions:

> 1. You are required to participate in an anger management class through Counseling Services . . . for the rest of the semester. On or before March 3 1, 2000 you must present to the Office of Judicial Affairs proof of enrollment on the

[2] The JAHB found Martinez violated standard la-interfering with, obstructing or disrupting a University activity and standard 12-harassing another person.

> letterhead of the program providing the class and it must bear the original signature of the presenter. Also, proof of completion must be provided to the Office of Judicial Affairs by the end of the semester. It is your responsibility to set up and complete the class.
> 2. You are required to submit an appropriately written letter of apology to the affected staff members of the Bursar's office. The letter must be submitted to Andrea Goldblum for review and approval by March 3, 2000 . . .
> . . . Please understand that compliance with and completion of these sanctions are your responsibility. Failure to complete the sanctions will result in further disciplinary action, including a hold being placed on your registration and transcripts and the possibility of suspension or expulsion from the University.

Id. at ¶¶ 5-6. The letter also informed Martinez of his right to appeal the JAHB decision by February 28, 2000, and that "[y]our sanction will be effective only after this administrative review has been exhausted or waived. If the results of the review uphold the sanction, it is effective, as previously noted in this letter." *Id.* at ¶ 7.

Goldblum's letter to Martinez relaying the Board's decision, however, differs from the original Board decision. The original decision, delivered by Board member Gary Chadwick, does not attach any deadlines to the completion of either the letter of apology or the anger management education. *See Plaintiff's Motion for Partial Summary Judgment*, at Exhibit 4. [3] In addition, the original JAHB decision divides the sanctions by the standard violated: for violating standard 1a, Martinez is given one year of probation; for violating standard 12 he is required to complete anger management education and write a letter of apology. *See id.*

On February 23, 2000, Martinez requested, and received, and extension of the review request due date to March 3, 2000. *See 2/23/00 Letter from Andrea Goldblum to Carlos Martinez*, at 11. Goldblum also informed Martinez on this date that the review, if requested, would be conducted by Robert Maust. *See id.* ¶ 2.

Martinez filed his request for review of the JAHB decision on May 3, 2000. On March 27, 2000, Maust issued his review. Maust upheld the JAHB's decision, finding:

> In regard to Mr. Martinez's case, I find that he was given proper notice of the charges being brought against him and at least a couple of opportunities to review the information that the JAHB would possibly consider when considering his case. He was also present at his hearing and had the opportunity to present information for consideration by the JAHB as well as hear and rebut information offered by others about matters before the JAHB. Since the JAHB is the finder of fact in this matter, I will not and should not review their decisions in this matter. However, I see no evidence that the JAHB acted unreasonably or with any bias in this case."

3/27/00 Review by Robert Maust, at 2.

[3] Martinez transcribed the decision himself from an audio recording. Martinez also submitted the audio recording itself, on CD-ROM. Unfortunately, the Court lacks the technology to listen to the CD-ROM. As the University has not objected to Martinez's transcript however, the Court has no reason to doubt its accuracy.

Martinez next heard from the University in a letter from Goldblum dated April 14, 2000, in which Goldblum wrote:

> Because of the time taken for the review, you are hereby granted an extension of the deadlines for your sanctions. The letter of apology will be due by 4:30 p.m. on April 18, 2000. The proof of enrollment in anger management class is due April 28, 2000. Proof of completion of the anger management class is due May 12, 2000. Failure to complete any of the sanctions will result in further disciplinary action, including a hold being placed on your registration and transcripts, as well as the possibility of suspension or expulsion from the University.

4/14/00 Letter from Andrea Goldblum to Carlos Martinez, at ¶ 1.

Martinez responded to Goldblum in an April 17, 2000 letter. In this letter, Martinez challenged Goldblum's authority to extend the deadlines and stated: "For all intents and purposes, the deadlines have passed. You are welcome to begin proceedings for further sanctions because you will not find compliance from me any time soon, if ever at all." *4/17/00 Letter from Carlos Martinez to Andrea Goldblum.*

Martinez did not submit a letter of apology by the April 18, 2000 deadline. On April 20, 2000, Goldblum expelled Martinez from the University for failure to timely complete the letter of apology:

> I have reviewed your sanction in accordance with the section "Sanction Review" [in the University Code], which states that additional sanctions may be levied .... You have indicated to me that you do not intend to comply with your sanctions lanytime soon, if ever at all.' Compliance with assigned sanctions is an expectation and requirement of students under the Code of Conduct. Therefore, since you have no intention of complying and have thus far not done so, you are being permanently expelled and excluded from the University ... effective at 4:30 p.m. on April 27, 2000.

4/20/00 Letter from Andrea Goldblum to Carlos Martinez, at ¶ 2. In addition, Goldblum notified Martinez of his right to request a review of the expulsion. As in the other instances, "[i[f you request a review your sanction will be effective only after this administrative review has been exhausted or waived. If the results of the review uphold the expulsion, it is effective retroactively to April 20, 2000." *Id.* at ¶ 3.

On April 27, 2000, before requesting a review of the expulsion decision, Martinez brought a C.R.C.P. 106(a)(4) action in Boulder County District Court, case number 00 CV 618, challenging the initial sanctions imposed by the JAHB.

Martinez requested a review of his expulsion on April 28, 2000, the day after challenging the original JAHB sanctions in District Court. The expulsion review was performed, again, by Robert Maust. On May 2, 2000, Maust issued his review of Goldblum's expulsion decision. In the review, he wrote:

> . . . I have considered what you have stated in your appeal that relates to the severity of the sanction given to you. I have also considered the authority and traditions of the Judicial Affairs Office in disciplinary cases such as yours.

> Furthermore, I have considered your behaviors and statements regarding your case, including your responses to the sanctions established for you by the JAHB and affirmed on earlier appeals. Based upon this review I have concluded that you have not made reasonable efforts to comply with the expectations established for you by the JAHB. In addition, I find that Ms. Goldblum has acted reasonably and both in the letter and the spirit of the authority vested in her office in responding to your case. Therefore, the decision of Ms. Goldblum, who is acting on behalf of the University community when she is determining your status as a member of the community, is affirmed.

5/2/00 Review of Robert Maust, at ¶ 3.

Martinez's initial District Court action was dismissed on May 4, 2000. A Rule 106(a)(4) action must be brought within thirty days of the final decision of the administrative body or officer. *See* C.R.C.P. 106(b) (2000). The final University decision regarding the initial sanctions was Maust's review issued March 27, 2000. Martinez's action was filed on April 27, 2000, 31 days after the final action. Martinez's action was dismissed with prejudice because, as it was untimely filed, the court lacked subject matter jurisdiction.

The following day, May 5, 2000, Martinez filed a second Rule 106(a)(4) action (this case), case number 00 CV 658, challenging his expulsion. As the final expulsion decision was entered just three days earlier, after Maust's review, this second action was filed well within the 30 day filing requirement of Rule 106(a)(4). On May 9, 2000, Martinez filed an amended complaint, adding a claim for declaratory relief. The declaratory relief claim alleges that the University's disciplinary procedures are unconstitutional.

Soon after filing the second action, Martinez moved to enjoin the University from enforcing the expulsion and his eviction from University housing. After conducting a hearing, on June 6, 2000 the Court issued a detailed ruling and order ("June 6th Order"). In the June 6th Order, the Court applied the six-factor *Rathke* test to determine whether a preliminary injunction should be granted under either the Rule 106(a)(4) claim or the declaratory relief claim. *See Rathke v. MacFarlane,* 648 P.2d 651 (Colo. 1982). Analysis of the first *Rathke* factor Plaintiff's reasonable success on the merits (of either claim)-took up the great majority of the Order.

To succeed on the merits of his Rule 106(a)(4) claim, Martinez would have to show that the "University's final decision to expel him exceeded its authority, was arbitrary and capricious or was an abuse of discretion as shown by the record available to the reviewing officer. " 616100 *Ruling and Order,* at 3-4. To succeed on the merits of the declaratory judgment claim, Martinez would have to show that "his interest in continuing in good standing at the University is a protected interest under the Fourteenth Amendment." Id at 7. Once this showing was made, Martinez would have to show that he did not receive due process before being deprived of the interest. *See id* The Court found that Martinez's University education implicated both liberty and property interests protected by the Fourteenth Amendment. *See id*

At issue, then, was whether the process afforded by the University satisfied the Fourteenth Amendment requirements. The Court went into great detail regarding the possible procedural deficiencies in the University review process, and added:

> It would appear to require minimal effort by the University to decrease this risk [of erroneous deprivation of constitutionally protected interests]. The student should at least be given access to all materials relied upon by the hearing officer and an opportunity to meet with the officer regarding these materials. This hearing could be informal and need not be an evidentiary hearing unless the circumstances so require, for example when there are allegations of new sanction violations. Similarly, prior to a Sanction Review, the student should have an opportunity to review all materials tendered to the reviewing officer in order to maximize the opportunity to rebut that evidence. As the review officer is limited to a paper review, the record should contain only those materials of which the student had prior notice and on which the hearing officer relied in deciding to expel.

Id. at 8.

The Court ultimately entered four orders in the June 6th Order: (1) the University was enjoined from evicting Martinez from University housing until resolution of the case; (2) Martinez was excluded from campus, except family housing, pending resolution of this case; (3) Martinez was to have no contact with complaining witnesses; and, (4) the University could hold Martinez's records until resolution of this case. In addition, the second order, regarding Martinez's exclusion from campus, included the following language: "This preliminary injunction does not prevent the Defendant from conducting a hearing as to a sanction for the alleged violation of Plaintiff's probationary status."

On June 22, 2000, the University filed a Motion to Dismiss. The University argued that Judge Sandstead's dismissal of case no. 00 CV 618 operated as *res judicata* on case no. 00 CV 658. On July 3, 2000, while the Motion to Dismiss was pending, the University filed a copy of the purported Record relied upon by Maust in reviewing Goldblum's expulsion decision. Martinez objected to this "Record" as being redundant and including material dated after the date the review was issued. On July 26, 2000, while still awaiting a decision on the Motion to Dismiss, Martinez filed a Second Amended Complaint, adding a claim for breach of contract and revising his claim for declaratory relief The University raised the same *res judicata* argument advanced in the Motion to Dismiss in its response to the Second Amended Complaint.

On September 8, 2000, the Court denied the University's Motion to Dismiss and ordered the University to answer Martinez's "amended complaint. " The Court did not specify whether the University was to answer Martinez's First or Second Amended Complaint. On September 12, 2000, the Court ordered the University to submit a proper Record together with an affidavit of Maust attesting that the documents were in fact the Record relied upon in reviewing the expulsion decision. The University submitted a revised Record on September 20, 2000, together with the ordered affidavit. Martinez filed an objection to the revised Record raising many of the same arguments he raised in his objection to the original Record. On September 25, 2000, the University filed an Answer to the First Amended Complaint.

Prior to an Answer having been filed, however, on September 19, 2000 Martinez filed a motion for partial summary judgment. In the motion, Martinez asserted that the true, original sanctions imposed were those contained in Gary Chadwick's announcement of the JAHB decision (the "JAHB sanctions"), not those relayed to Martinez by Goldblum (the "Goldblum sanctions"). As the JAHB sanctions contained no deadlines, asserts Martinez, a violation of those sanctions cannot possibly be found. The University argued in response that the motion was rendered moot by the University's conducting a second expulsion decision and review. [4]

The University's argument raised a difficult issue. Seizing on the language of the Court's June 6, 2000 Order that the preliminary injunction would not "prevent the Defendant from conducting a hearing as to a sanction for the alleged violation of Plaintiff s probationary status," during the late summer and early fall the University initiated a second sanction review process. The second sanction review was intended to incorporate many of the Court's procedural suggestions and replace the original Goldblum decision and Maust review.

Martinez reluctantly participated in this second review, and on October 10, 2000, Matthew Lopez-Phillips, an employee of the University Office of Judicial Affairs appointed to conduct the review, issued his opinion. *See 10/10/00 Letter from Matthew Lopez-Phillips to Carlos Martinez.* Lopez-Phillips, like Goldblum before him, decided to expel Martinez. *See id.* Then, on November 22, 2000, University employee Jean Delaney reviewed the Lopez-Phillips decision and reached a nearly identical result. [5] The University maintained that this second sanction review replaced the first, thus, rendering the legality of the first review nonjusticiable. In its November 13, 2000 Order, however, the Court found the second sanction review "irrelevant": "It is not contemplated by statute, by University rule or by this Court. It is of no effect as to this action and it does not render the May 2, 2000 decision moot." *11/13/00 Ruling and Order,* at 2. The Court then ordered the University to respond to Martinez's summary judgment motion on the merits.

The University filed a response on the merits together with a cross-motion for partial summary judgment on November 22, 2000. In its response, the University raised three arguments in opposition to the summary judgment motion. First, the University argued that the expulsion decision was supported by the "competent evidence" of numerous incidents of misconduct contained in the revised Record. *See University's Combined Response to Plaintiff's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment,* at 6-7 *("Combined Response").* Second, the University argued that Martinez's attack on the expulsion is, in fact, a collateral attack on the original sanction decision. The attack is barred by *res judicata,* therefore, because the original sanctions were upheld when Judge Sandstead dismissed case no. 00 CV 618. Third, the University argued in the alternative that the deadlines attached to

[4] The University also argued that summary judgment is not permitted in a Rule 106(a)(4) action. In the November 13, 2000 Ruling and Order, the Court found summary judgment permissible in a Rule 106(a)(4) action and ordered the University to respond to the merits of Martinez's partial summary judgment motion. *See 11/13/00 Ruling and Order,* at 2.

[5] The University asserts in its Reply in Support of University's Cross-Motion for Partial Summary Judgment that the Lopez-Phillips decision ultimately resulted in a different outcome than the Goldblum decision: "Pursuant to the new Sanction Review decision Plaintiff has now been suspended, not expelled." *Id*. at 5. The University's assertion is disingenuous. The "suspension" is actually a suspension and exclusion from campus for *six years. See 11122100 Letter from Jean Delaney to Carlos Martinez.* Certainly this punishment is the practical equivalent of an expulsion.

the JAHB sanctions by Goldblum did not alter the sanctions. Rather, the deadlines were necessary, administrative housekeeping functions necessary for the implementation of the sanctions.

In its cross-motion for summary judgment, the University again raised the issue of mootness, stating:

> If this Court were to rule in favor of Plaintiff on his Rule 106 claim and vacate his May 2, 2000 expulsion decision it would have no practical legal effect upon an existing controversy because the University has already vacated the May 2, 2000 expulsion decision.
>
> In order to preserve this issue for appeal it is raised here, and the University means no disrespect by again raising an argument that the Court has rejected. However, the University also urges the Court to reconsider the mootness argument as the University is not disputing that the May 2, 2000 decision was a final agency action, nor do we dispute that this Court has jurisdiction over such a claim. Instead, the University believes that an agency can rescind a final action and that the University has done so, thus mooting the Rule 106 claim.

Combined Response, at 10 (internal citations omitted).

II. MERITS

As the foregoing recitation of the history of this case should make clear, this case has been characterized by a torrent of filings that have managed to almost completely obscure the material issues. Currently, there are several ripe motions before the Court, and this Order resolves all of them.

Before resolving these motions, however, it is appropriate to briefly set forth the current posture of the case. The Complaint currently at issue is Plaintiff's First Amended Complaint. The Court has received a revised version of the Record relied upon by the reviewing officer in the original May 2, 2000 review of Plaintiff's expulsion. This Record is in dispute. In addition, each party has moved for summary judgment on Plaintiff's Rule 106(a)(4) claim. Finally, assuming the revised Record is accepted, both parties have stipulated to the Court's ruling on Plaintiff's Rule 106(a)(4) claim without benefit of further briefing. Disposition of the pending Motion to Amend has no effect on the Rule 106(a)(4) claim.

Being thus caught up to the present state of the case, the Court enters the following orders:

(1) Plaintiff's Motion to Amend is granted;
(2) Plaintiff's Objection and Motion to Strike Record Filed by University; Motion for Procedural Order is denied;
(3) Both parties' Motions for Summary Judgment are denied;
(4) Plaintiff's claim for relief under Rule 106(a)(4) is granted on the merits;
(5) Plaintiff's Motion to Reconsider Ruling is denied;

(6) Plaintiff's Motion for Preliminary Injunction/Stay Pursuant to C.R.C.P. Rule 106(a)(4XV) is denied-,
(7) Plaintiff's Motion to Dissolve Moot Portions of 6/6/00 Preliminary Injunction is . denied;
(8) Plaintiff's Motion for Extension of Time to Respond to University's Cross-Motion for Partial Summary Judgment is denied-,
(9) Plaintiff's Motion for Extension of Briefing Schedule is denied-,
(10) Plaintiff's Motion to Strike Pleadings Pursuant to Court's Order of 9/12/00 is denied;
(11) Plaintiff's Motion for Determination of Question of Law is denied;
(12) Plaintiff's Ex Parte Motion to Permit Service of Supplemental Pleading is withdrawn.

(1) Plaintiff's Motion to Amend

Both parties have recently asked the Court to rule on Plaintiff's Motion to Amend, filed July 26, 2000. That Motion was granted by the Court on September 8, 2000, and entered into the Clerk's register of actions on October 17, 2000, *See attachment.* Unfortunately, the Order was filed in a different case file and not discovered again until December 21, 2000. As both parties apparently never received a copy of the Order, the Court extends the deadline for Defendant to answer the Second Amended Complaint to twenty days from the issuance of this Order.

In addition, the Court notes that the Rule 106(a)(4) claim for relief in the Second Amended Complaint substantially duplicates the Rule 106(a)(4) claim in the First Amended Complaint which Defendant has already answered. Defendant's Answer, therefore, need only respond to Plaintiff's claims for declaratory relief and breach of contract. The Rule 106(a)(4) claim is at issue.

(2) Plaintiff's Objection and Motion to Strike Record Filed by University; Motion for Procedural Order

The revised Record filed by the University is accompanied by Robert Maust's signed affidavit in which he swears that the submitted documents represent the complete record he considered in his review of Goldblum's expulsion decision. Martinez objects to the revised Record, arguing that it is substantially similar to the initial, flawed Record filed by the University. In addition, Martinez asserts that "after reviewing the decision of Goldblum, and the decision of Maust, it would appear that they reviewed less than a dozen documents from the record." *See Plaintiff's Objection and motion to Strike Record Filed by University; Motion for Procedural Order,* at 16. Martinez presents no evidence, however, to support this second assertion. As to the similarity of the initial and revised Records, the Court finds that Plaintiff has not presented sufficient evidence to raise doubts regarding the veracity of the Maust affidavit. Therefore, Plaintiff's Objection and Motion to Strike Record Filed by University; Motion for Procedural Order is DENIED.

(3), (4) Plaintiff's Motion for Partial Summary Judgment;
University's Cross-Motion for Summary Judgment;
Merits of Plaintiff's Rule 106(a)(4) Claim.

Plaintiff's Rule 106(a)(4) claim for relief asks the Court to review the University's decision to expel Martinez. Martinez was expelled by Andrea Goldblum on April 20, 2000. The expulsion was upheld by Robert Maust on May 2, 2000. The Rule 106(a)(4) claim concerns *both* the initial expulsion decision and the Maust review. Martinez claims that *both* decisions were (1) made in excess of Goldblum's and Maust's authority; (2) arbitrary and capricious; and, (3) an abuse of discretion. *See First Amended Complaint,* at 121, 23. [6]

Both parties have filed motions for summary judgment on the Rule 106(a)(4) claim. As the Court's file is replete with argument on the Rule 106(a)(4) issues and as there is now a Record for the Court to review, the Court finds that it is in a position to rule on the claim without further briefing, regardless of the disposition of the parties' summary judgment motions. The parties have stipulated to such a ruling.

A . Summary Judgment Standard of Review

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and to save the time and expense connected with a trial. Summary judgment is a drastic remedy that is warranted only upon a clear showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Camacho v. Honda Motor Company, Ltd.,* 741 P.2d 1240 (Colo. 1987). In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Jones v. Dressel,* 623 P.2d 370 (Colo. 1981); *Casebolt v. Cowan,* 829 P.2d 352 (Colo. 1992). Even where it is extremely doubtful that genuine issues of material fact exist, summary judgment is not appropriate. *Mancuso v. United Bank of Pueblo,* 818 P. 2d 732 (Colo. 1991).

The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. C.R.C.P. 56(c); *Continental Air Lines, Inc. v. Keenan,* 731 P.2d 708 (Colo. 1987). The movant may satisfy this burden by demonstrating that there is an absence of evidence in the record to support the nonmoving party's case. *Id; Civil Service Comm'n v. Pinder,* 812 P.2d 645 (Colo. 1991). Once the movant makes a convincing showing that genuine issues of fact are lacking, the opposing party cannot rest upon the mere allegations or denials in his or her pleadings, but must demonstrate by specific facts that a controversy exists. *Sullivan v. Davis,* 474 P.2d 2218 (Colo. 1970). Where the facts are so certain as not to be subject to dispute, a court is in a position to determine the issue strictly as a matter of law. *Morlan v. Durland Trust* Co., 252 P.2d 98 (1952).

B. University's Cross-Motion for Partial Summary Judgment

In their cross-motion for partial summary judgment, the University argues that Martinez's Rule 106(a)(4) claim has been rendered moot by the second sanction review (hereinafter the

[6] Initially, the Court finds that both the Goldblum decision and the Maust review did not exceed either party's authority---both under the plain language of the University Code, both Goldblum and Maust are granted the power to expel.

"Lopez-Phillips review"). The Court addressed this issue in the November 13, 2000 Ruling and Order. There the Court found the Lopez-Phillips review irrelevant and of no effect and declined to find Martinez's Rule 106(a)(4) claim moot. Nevertheless, the University urges the Court to reconsider the ruling. In addition, Martinez has submitted several motions that rely, to differing extents, on the Lopez-Phillips review. *See, e.g. Motion for Determination of Law; Supplement Complaint; Ex Parte Motion to Permit Service of Supplement Complaint.* In the interest of preparing a more detailed record, the Court here addresses the issue of mootness again. For a second time, the Court finds that the Lopez-Phillips review is of no effect. The Rule 106(a)(4) claim is not moot and the Goldblum decision and Maust review stand as the University's final actions regarding the disciplining of Martinez.

The University urges the Court to recognize the Lopez-Phillips review because "the University believes that an agency can rescind a final action. . ." *University's Combined Response to Plaintiff's Motion for Partial Summary Judgment and Cross-Motion of Partial Summary Judgment ("University's Combined Response")*, at 10. The University does not cite any law, however, to support this "belief that an agency can rescind a final action." On the facts of this case, the Court finds the University incorrect and rules that the University's final—action Goldblum's decision and Maust's review—cannot be rescinded and replaced by the Lopez-Phillips review.

The burden on the University of demonstrating mootness "is a heavy one." *United States v. W. T Grant Co.*, 345 U. S, 629, 632-33 (1953). Here, the burden is not carried. The United States has formulated the following test for determining mootness:

> [J]urisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that there is no reasonable expectation. . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) *quoting United States v. W T Grant* Co., 345 U.S. at 633.

The test is stated in the conjunctive. Thus, if the University cannot show one of the elements, there can be no showing of mootness. Here, the University cannot plausibly argue that the second element is met. Interim events—the Lopez-Phillips review—have not completely and irrevocably eradicated the *effects* of the alleged violation. The *effect* of the allegedly illegal expulsion and expulsion review was the expulsion of Martinez. Regardless of whether or not the Lopez-Phillips review was conducted with heightened sensitivity to constitutional due process concerns, the *effect* of the Lopez-Phillips review was identical to both the Goldblum decision and the Maust review: expulsion. [7] Therefore, the second element of the *Davis* test is not met, and the claim of mootness must fail.

Moreover, the Court notes that the University's conduct clearly falls within the voluntary cessation of illegal activity exception to the mootness doctrine. That exception holds:

[7] *See supra* note 5.

> [A] defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice. This is so because there is no certainty that the defendant will not resume the challenged practice once the action is dismissed, thereby effectively defeating the court's intervention in the dispute.

United Airlines, Inc. v. City and County of Denver, 973 P.2d 647, 652 (Colo. App. 1998) ed 992 P.2d 41 (Colo. 2000). *See also Denver Post Corp. v. Stapleton Development Corp.*, 2000 Colo. App. LEXIS 2039, at 6.

The University's assertion of mootness here is particularly unusual because its conduct runs so completely contrary to the rationale stated in *United Airlines.* This is not merely a situation where "there is no certainty that the defendant will not resume the challenged practice once the action is dismissed"—rather, here the University has resumed the challenged practice while the case is pending and seeks to dismiss the action based on that resumption. Thus, there is not merely a risk, were the Goldblum decision/Maust review found moot, of the University "effectively defeating the court's intervention in the dispute"—that defeat is assured.

In addition, the University's "belief that an agency can rescind a final action" while that action is under judicial scrutiny is unfounded. The Court has found only one Colorado appellate decision that is remotely similar, but that decision holds the precise opposite of the University's position. *See Andreatta v. Kuhlman*, 600 P. 2d 119, 120 (Colo. App. 1979) (Town board granted Plaintiff variance from town board permitting Plaintiff to erect sign, and while Plaintiff was constructing sign, Board revoked the variance. The District Court held, and the Court of Appeals affirmed, that "the Board was without authority to revoke the variance once it was granted.")

Further, other jurisdictions have dealt with the similar situation of the effect of an administrative agency rescinding an order while judicial review of that order is pending, and have found such conduct untenable: "Courts are understandably reluctant to permit agencies to avoid judicial review, whenever they choose, simply by withdrawing the challenged rule." *Dow Chemical Co. v. EP.A.,* 605 F.2d 673, 678 (3rd Cir. 1979). Moreover, "when an administrative agency withdraws an order while still maintaining that the legal position is justified, repetition is likely and the claim should not be considered moot." *Natural Resources Defense Council v. United States Environmental Protection Agency,* 595 F. Supp 1255, 1263 (S.D.N.Y. 1984). *See also Armster v. United States District Court,* 806 F.2d 1347, 13 59 (9th Cir. 1986) ("[I]t has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct."); *Red River Corporation v. United States,* 793 F. Supp 942, 946-47 (D. Idaho 1992).

The University's attempt to rescind the Maust review and replace it with the Lopez-Phillips review is a blatant attempt at evading judicial review. Further, the University has never conceded that the Martinez expulsion was illegal. Instead, the Lopez-Phillips review essentially reached the same, allegedly illegal result as the Maust review. Repetition is not merely likely it has occurred. As the court in *Dow Chemical Co.* stated, "[w]e are reluctant ... to dismiss a genuine and concrete controversy for what in this case amounts to a technical reason, brought about by the party seeking such a dismissal." 605 F. 2d at 679. *See also United States v. W T*

Grant Co., 345 U.S. 629, 632 (1953) ("[T]o say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.").

For all of the above reasons, therefore, the Court reasserts its November 13, 2000 finding that the Lopez-Phillips review is of no effect. The Goldblum decision and Maust review are the final action for purposes of Plaintiff's Rule 106(a)(4) action. Therefore, the University's Cross Motion for Summary Judgment is DENIED.

C. Plaintiff's Motion for Partial Summary Judgment

Plaintiff's Motion for Partial Summary Judgment asserts the following argument: Martinez was expelled for failure to complete the sanctions imposed by the JAHB. *See Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment,* at Part III.b. Those sanctions were completion of an anger management course and a written letter of apology. *See* id at Part IV. The JAHB sanctions did not contain a deadline date for completion. *See id.* Because no deadline was imposed, Plaintiff's failure to complete the sanctions before the Goldblum expulsion decision cannot have been a sanction violation. *See id* at Part V.c. Thus, the decision of Goldblum, as a matter of law, either exceeded the University's jurisdiction or was an abuse of discretion. *See* id. at Part H.

Initially, the Court finds that there is no genuine issue of material fact regarding the sanction completion deadlines. There are several legal issues which the Court addresses below, but neither party disputes the following material facts: (1) the JAHB decision did not contain deadline dates and (2) Andrea Goldblum, the Director of Judicial Affairs, attached deadlines to the JAHB decision after receiving the decision. As there is no dispute of material fact relevant to Plaintiff's motion for partial summary judgment, the Court rules on the issue presented as a matter of law.

In ruling on this motion, the Court addresses each of the University's responsive arguments. The University first asserts that where the reviewing court in a Rule 106(a)(4) action finds in favor of the plaintiff, the proper remedy is a remand back to the defendant quasi-judicial body for a rehearing because "[t]his remedy has uniformly been ordered by Colorado's appellate courts. . ." *University's Combined Response to Plaintiff's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment ("Combined Response and Cross-Motion"),* at Part I. In support of this argument, the University cites three examples of Colorado appellate courts remanding Rule 106(a)(4) actions for rehearings. How the University makes the leap from three cases ordering rehearings, out of hundreds considering Rule 106(a)(4) claims, to uniformity, is unclear.

In any event, the argument is unpersuasive. The subsection of Rule 106(a)(4) relevant to this case makes no such restriction. In contrast, under subsection (a)(4)(IX) of Rule 106, when the certified record is incomplete the reviewing court is limited to remanding the case to the defendant body for a rehearing. The absence of such limiting language in subsection (a)(4)(I), where the scope of review for this case is set forth, strongly suggests that no such limitation is

intended. If the Court finds the expulsion an abuse of discretion, therefore, the remedy is not limited to a remand to the University to conduct another hearing.

The University's second argument is similarly unpersuasive. The University argues that Martinez's attack on the JAHB sanctions is a collateral attack on the decision in case no. 00 CV 618 and, thus, is barred by the doctrine of *res judicata. See Combined Response and Cross Motion*, at Part V.a.2. Based on the conclusions contained in the Court's September 8, 2000 Ruling and Order, the Court disagrees. There, the Court found the doctrine of *res judicata* inapplicable where a prior case was not decided on the merits. As 00 CV 618 was not decided on the merits, the doctrine of *res judicata* is inapplicable here. [8]

The University's remaining arguments all dispute the legal significance of the Goldblum deadlines. The University asserts (1) the expulsion is supported by competent evidence in the Record, *see Combined Response and Cross-Motion*, at Part V.a.1; (2) the Goldblum deadlines were standard practice and were not a "substantive" addition, *see id* at Part V.a.3; (3) Martinez's April 17, 2000 statement that he never intended to comply with the sanctions justified the April 20, 2000 expulsion, *see id.;* and, (4) Gary Chadwick, chairman of the JAHB, read, approved and authorized the Goldblum deadlines before the decision letter was mailed to Martinez, *see id.*

The Court finds the second argument persuasive [9]: the Goldblum deadlines were not substantive additions to the JAHB sanctions. In the analogous area of judicial review of an agency's statutory interpretation, the rule is well-settled: if "a statute is silent or ambiguous with respect to a specific issue, we give great deference to an agency's interpretation of the statute, looking only to whether the agency's regulation is based on a permissible construction of the statute." *Smith v. Farmers Insurance Exchange*, 9 P.3d 335, 340 (Colo. 2000); *see also, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

The University Code is silent on the issue of sanction completion deadlines. Due to this silence, the Court gives great deference to the University's interpretation of the Code. The University interprets the Code to permit the Director of Judicial Affairs to attach reasonable completion deadlines to JAHB sanctions. Further, the Code clearly contemplates sanctions being enforced—otherwise the Code would not include detailed provisions regarding the different types of sanctions available, the different individuals or bodies empowered to mete out those sanctions, and, most importantly, the authorization for the hearing officer to impose additional sanctions for failure to comply with any original sanctions.

Based on the foregoing analysis, the Court finds the University's interpretation reasonable. The Director of Judicial Affairs is permitted to attach reasonable deadlines to JAHB deadlines. Therefore, Plaintiff's Motion for Partial Summary Judgment is DENIED.[10]

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[8] *See 9/8/00 Ruling and Order* for further discussion

[9] The Court addresses the first and second arguments elsewhere in this Order. See infra Part II.3.F. The fourth argument, that Chadwick approved the deadlines, is irrelevant to the determination of any issue in this Order and is not addressed.

[10] Martinez argues in his Reply to Motion for Partial Summary Judgment that the University's Response should not be considered by the Court because it was not timely filed. *See Plaintiff's Reply to Motion for Partial Summary Judgment*, at This argument is incorrect. In the November 13, 2000 Ruling and Order, the Court granted the

D. Rule 106(a) (4) Standard of Review

> C.R.C.P. 106(a)(4) states, in pertinent part:
> (4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:
>
> (I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

C.R.C.P. 106(a)(4) (2000).

The one claiming the invalidity of a quasi-judicial decision has the burden of establishing its invalidity beyond a reasonable doubt. *See Coleman v. Gormley,* 748 P.2d 361, 364 (Colo. App. 1987). The weighing of evidence and the determinations of fact are functions of the quasi-judicial body and not matters for consideration by the reviewing court. *See id* In a Rule 106(a)(4) review, the "reviewing court engages in no fact finding; it exercises the same type of review of the tribunal's decision that an appellate court engages in when it reviews a trial court's decision based upon conflicting evidence." *Feldewerth v. Joint School Dist.* 28-J, 3 P. 3d 467, 470 (Colo. App. 1999).

"Abuse of discretion means that the decision under review is not reasonably supported by any competent evidence in the record." *Van Sickle v. Boyes,* 797 P.2d 1267, 1272 (Colo. 1990). "'No competent evidence' means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." C*ruzen v. Career Service Board of City and County of Denver,* 899 P.2d 373, 375 (Colo. App. 1995). C.R.C.P. 106(a)(4) review permits a district court to reverse a decision of an inferior body if there is no competent evidence to support the decision. *See id*

E. The University's Disciplinary Process

The Rule 106(a)(4) claim requires the Court to review the disciplinary actions taken by the University with respect to Carlos Martinez. Under Rule 106(a)(4), the Court's review is limited to "the evidence in the record before the defendant body." C.R.C.P. 106(a)(4)(1) (2000). In addition, the reviewing court must determine whether the quasi-judicial body misconstrued or misapplied its own law. *See Save Park County v. Board of County Comm'rs,* 969 P.2d 711, 714 (Colo. App. 1998) *aff'd on other grounds*, 990 P. 2d 3 5 (Colo. 1999). Clearly, then, the reviewing Court must consider the defendant body's quasi-judicial process as well as the record.

The University's disciplinary process is set forth in the "Students' Rights and Responsibilities Regarding Standards of Conduct," described elsewhere in this Order as the "University Code." What follows is a recitation of those provisions of the Code relevant to this action.

University an additional ten days to file a response. The University's response was filed November 22, 2000, nine days later, and is therefore timely.

The University Code contains 20 "standards" that students must follow. *See University Code* at 1-2. Complaints alleging student violations of any standards may be filed by anyone. *See id. at 4.* A hearing officer may also initiate charges. *See id.* The "conduct process" is initiated by the hearing officer sending notice of the charges to the student, and directing the student to set up a conference with the hearing officer within 5 working days. *See id. If* the student fails to attend the conference, the hearing officer can decide the disposition *of* the case on her own. *See id* at 5. When a student denies committing the violations, there are two options for case disposition: (1) an informal hearing in which the hearing officer determines whether or not the student committed the alleged violations and, if so, the hearing officer determines the sanctions; (2) a formal hearing in which the Judicial Affairs Hearing Board determines whether the student committed the alleged violations and, if so, the Board determines the sanctions. *See id.* at 5-6. The Board sanctioning process is described as follows:

> 10. The JAHB enters closed session deliberations.
>
> a. The JAHB decides whether or not the accused student has violated the *Standards of Conduct.*
>
> b. If a violation has occurred, the JAHB decides upon the sanction.
>
> 11. The chair notifies the director of the JAHB's decision. The director then notifies in writing the accused student and appropriate university officials of the JAHB decision.
>
> 12. The Office of Judicial Affairs keeps a record of the hearing. The record includes copies of all correspondence between the accused student and the university, an audio recording of the hearing, all documents and evidence admitted to the hearing, and the decision.

Id. at 6.

After reviewing the evidence, the hearing officer (in an informal hearing) or the JAHB (in a formal hearing) may dismiss the case, issue a reprimand, or assign a sanction. *See id.* "Sanctions imposed for misconduct must be based upon a consideration of all of the circumstances in a particular case. Mitigating or aggravating circumstances may be considered, Repeated violations are likely to result in progressively severe sanctions." *Id.* The available sanctions are: (1) community service; (2) probation; (3) suspension; *(4)* expulsion; and, (5) exclusion from all or part of campus. *See id.* Once sanctions have been imposed, the student may request a review by a review officer. *See id.* at 7.

"If a student does not comply with or complete any sanction, additional sanctions may be levied by the hearing officer." *University Code* at 6. The additional sanctions are only subject to review if they involve suspension or expulsion. *See id.*

Review, either of the initial sanctions or additional sanctions for non-compliance, is limited to one of three bases: (1) whether the establish conduct process was not followed; (2) whether the severity of the sanction imposed was not justified; and, (3) whether there is new information regarding the case which would have been material to the outcome. *See id.* at 7. In cases involving Administrative Dispositions, however, review is limited to basis (2), above. *See id.* "The purpose of a review is not to provide a second hearing for the case. The review will be done on the record of the case only. The review officer will not meet with student or rehear the

case." *Id.* Although the Code is silent on this issue, in cases where new information is submitted, presumably the review will be done on both the record *and* the new information.

The hearing officer's or JAHB's decision is to be given deference by the review officer. *See id*. After reviewing the case, the review office can choose one of four actions: (1) find that improper procedures were used and refer the case to the hearing officer or JAHB for a new decision; (2) affirm the initial decision; (3) "[r]educe the sanction if the review officer determines that the sanction imposed was too severe . . ." ; and, (4) refer the case to the hearing officer of JAHB to reconsider their decision in light of new information. *Id*.

F. Merits of Plaintiff's Rule 106(a) (4) Claim

As stated above, the parties have stipulated to the Court's immediately deciding Plaintiff's Rule 106(a)(4) claim. In reaching a decision on the Rule 106(a)(4) claim, the Court relies on the revised Record, arguments not heretofore addressed in the parties' respective summary judgment motions and other filings, and the Court file. The parties' have waived briefing the Rule 106(a)(4) issue further, even though such briefing is contemplated by Rule 106. *See also* C.R.C.P. 106(a)(4)(VIII) (2000) ("The court may accelerate ... any action which, in the discretion of the court, requires acceleration . . .").

In deciding the merits of Martinez's Rule 106(a)(4) claim, the Court relies on the following: (1) the certified revised Record; (2) the University Code; (3) the transcript of the JAHB decision; and (4) letters from Goldblum to Martinez not included in the Record.[11] For the reasons explained below, the Court finds that neither Goldblum's initial expulsion nor the Maust review of that expulsion are supported by competent evidence and each is therefore an abuse of discretion. The Court finds in favor of Martinez and against the University on Martinez's Rule 106(a)(4) claim,

(i) <u>The Goldblum Expulsion</u>

Andrea Goldblum expelled Martinez on April 20, 2000 for failing to complete the sanctions imposed upon him by the JAHB. Those sanctions were (1) a letter of apology to the

[11] Both the transcript of the JAHB decision and several letters submitted by Martinez are not included in the revised Record. The University argues that the Court should not consider the JAHB decision because it is not a part of the Record. *See Combined Response to Plaintiff's Motion for Partial Summary Judgment and Objection and motion to Strike Record,* at 2. On the facts before the Court, the Court finds that Rule 106(a)(4) review is not limited to the revised Record. This finding is based first, on the fact that the absence of both the JAHB decision and letters from Goldblum to Martinez from the revised Record is so clearly contrary to the University Code. The Code states, "[tlhe Office of Judicial Affairs keeps a record of the hearing. *The record includes copies of all correspondence between the accused student and the university, an audio recording of the hearing,* all documents and evidence admitted to the hearing, *and the decision." See University Code* at 6 (emphasis added). Second, this finding is based on Colorado case law permitting the Court to view matters outside the certified record when the plaintiff has made a showing that the defendant body's action was arbitrary and capricious. *See, e.g. City* of *Colorado Springs v. District Court of County of El Paso,* 519 P.2d 325, 327 (Colo. 1974); *see also Whelden v. Board of County Comm'rs,* 782 P.2d 853, 857 (Colo. App. 1989). Here, Martinez's showing that the revised Record does not include either the JAHB decision or some of the correspondence between Goldblum and Martinez contrary to the University Code requirements is a sufficient showing of facts that the decision was arbitrary and capricious to permit the Court to go outside the Record in determining the Rule 106(a)(4) claim.

aggrieved Bursar's Office workers, delivered to Goldblum by a date uncertain, and, (2) completion of an anger management course, by a date uncertain. As previously discussed, Goldblum acted within her discretion in imposing deadline dates for the completion of those sanctions. The Court finds that the deadline date she imposed for completion of the anger management class, however, was an abuse of that discretion. In Goldblum's April 14, 2000 letter to Martinez, she stated new deadlines for the completion of the sanctions: April 18, 2000 for completion of the letter of apology, proof of enrollment in an anger management class by April 28, 2000, and proof of completion of the class by May 12, 2000.

While the four days Martinez was given to complete the letter of apology is short, the Court cannot find that the deadline is not supported by competent evidence. There is no evidence in the Record or elsewhere that completion of the letter required outside assistance or would take more than a few hours. The Court finds, therefore, that Goldblum did not abuse her discretion in imposing a four-day deadline for completion of the letter. The deadline for the anger management class, however, is not supported by any competent evidence. Martinez asserts that he attempted to enroll in an anger management class on April 25, 2000, three days before the deadline, and was told that there were no additional classes for the semester. *See Plaintiff's Reply to Motion for Partial Summary Judgment,* at Exhibit 2. He further claims that the next class would not be held until the Fall, 2000 semester. *See id.* Therefore, according to Martinez, it was impossible to complete the anger management class by the Goldblum deadline.

Of course, there is no evidence in the Record or elsewhere in the Court file to corroborate or support Martinez's claims. However, by the same token, the University has submitted no evidence to show that Martinez could have completed the sanction by the deadline date imposed by Goldblum. In contrast to the letter of apology, Martinez obviously could not complete the anger management class on his own—he had to enroll in a class. The University's failure to submit any evidence that there was a class available for enrollment between April 14, 2000 (the date the revised deadlines were imposed) and May 12, 2000 (the date for proof of completion) is determinative. There is, indisputably, no competent evidence—indeed, no evidence whatsoever—in the revised Record to support the anger management class deadline imposed by Goldblum. As such, Goldblum abused her discretion in imposing the April 28, 2000 and May 12, 2000 deadline dates.

The finding of an abuse of discretion with respect to the anger management issue, however, does not end the Court's inquiry. It is undisputed that Martinez tendered no letter of apology by April 18, 2000. As Martinez failed to comply with this sanction, the University hearing officer was authorized to impose additional sanctions. While it might appear that expulsion for failure to write a letter of apology is somewhat extreme, Goldblum's decision was not limited to just the failure to comply. In the April 20, 2000 letter Goldblum wrote, "since you have no intention of complying and have thus far not done so, you are being permanently expelled and excluded from the University of Colorado. . ." *4/20/00 Letter from Andrea Goldblum to Carlos Martinez,* at 12; *Revised Record* doc. no. 3. Thus, Martinez was expelled because he failed to right a letter of apology and because he *threatened* to not comply with the anger management sanction.

Goldblum's reliance on this threatened noncompliance is simply not contemplated by the Code. The Code only authorizes additional sanctions if "a student does not comply with or complete any sanction." *University Code,* at 6. There is no authorization for additional sanctions if a student *threatens* to not comply with or not complete any sanction. Because threats of noncompliance are not contemplated as sanction violations by the Code, there is no competent evidence to support Goldblum's reliance on this conduct as a basis for expulsion. In a Rule 106(a)(4) action, the court must determine whether the quasi-judicial body misconstrued or misapplied its own law. *See Save Park County,* 969 P.2d at 714. Here, Goldblum clearly misapplied the University Code in imposing additional sanctions based on the threatened noncompliance.

Thus, the Court is left to determine whether the failure to right a letter of apology, standing alone, is sufficient "competent evidence" to support the expulsion. The Court finds that it is not. This finding is based, first, on the troublesome role Goldblum played in disciplining Martinez from the outset. Goldblum was the first person to attempt to discipline Martinez, and her initial decision was clearly overturned by the JAHB: where Goldblum found three Code standards violated, the JAHB found two; and, where Goldblum suspended and excluded Martinez from campus for one semester, the JAHB merely put Martinez on probation for one year. The University's use of Goldblum, then, to review the matter after the letter of apology was not written, is inexcusable. Especially since the ultimate punishment Goldblum imposed—expulsion—was so much closer to her original sanctions than the JAHB's sanctions. A disciplinary system must have the appearance of impartiality and fairness, neither of which were apparent in this case.

The finding is next based on the fact that the original JAHB sanctions were clearly separated based on the Code standard violation: for violating standard 1 a (interfering with University activity), Martinez was given one year of probation; for violating standard 12 (harassment), Martinez was required to write the letter of apology and enroll in an anger management class. This distinction is important because the sanction Martinez did not comply with was the letter of apology and the letter of apology was completely unrelated to the probation sanction. Goldblum's decision to increase Martinez's punishment to expulsion, then, was not merely a one-step increase from suspension to expulsion, or even a two-step increase from probation to expulsion as the University contends. Rather, it is an unbelievable leap from the punishment of writing a letter of apology to expulsion.

In sum, there is simply no competent evidence in the record to support Goldblum's decision to expel Martinez for failing to write the letter of apology. [12] "'No competent evidence'

[12] The University excerpted a portion of the June 6th Order to support the argument that the Goldblum decision was supported by competent evidence: "Certainly, the evidence presented at the hearing adequately supports Ms. Goldblum's decision to expel Mr. Martinez. *" Reply in Support* of *University's Cross-Motion for Summary Judgment,* at 3 *quoting 616100 Ruling* and *Order,* at 5. The Court notes that the quoted dicta is taken out of context. The section of the June 6di Order from which the quoted language was excerpted primarily concerned the Maust review, not the Goldblum decision. Moreover, the June 6th Order dealt with a preliminary injunction. As such, it was a preliminary decision. The Court has since received a certified Record and numerous additional exhibits, and has given the Goldblum decision more and fuller consideration. As such, the University's reliance on the quoted language is misplaced.

means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Cruzen v. Career Service Board of City and County of Denver,* 899 P.2d 373, 375 (Colo. App. 1995). Based on the foregoing considerations, the Court finds that the Goldblum decision was so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. Therefore, the Court finds that Goldblum abused her discretion in expelling Martinez for failing to write a letter of apology.

(ii) The Maust Review

Maust's review is likewise an abuse of discretion. Maust's decision to uphold Goldblum's arbitrary and capricious conclusions cannot escape the taint of those conclusions. Maust is essentially an intermediate appellate court in this process for which Goldblum is the trial court and this Court is the court of last resort. As this Court has overturned Goldblum's decision, Maust's review is irrelevant.

However, the Court addresses the University's argument that the Maust review was supported by competent evidence because of the troubling nature of that argument. The University asserts that Maust's review decision was based on Martinez's failure to comply *and* nine additional aggravating circumstances. *See Reply in Support of University's Cross-Motion for Partial Summary Judgment,* at 2. While the University Code clearly permits a sanction review to encompass any "[m]itigating and aggravating circumstances," the nine circumstances cited by the University should clearly not have been considered by Maust. *See University Code,* at 6.

Of the nine circumstances cited by the University,[13] seven occurred before the JAHB met. The Court finds that the circumstances which occurred before the JAHB met were considered by the JAHB in making its decision.[14] Based on this fact, the Court further finds that

[13] The nine "circumstances" are, briefly: (1) 9/21/99 call to Bursar's Office employee Natalie Gutierrez; (2) 9/21/99 call to Bursars Office employee Melissa Carney; (3) 9/29/99 altercation with University Parking Services employee Chris Arnold, (4) 9/29/99 conversation with University Parking Services employee Steven Charter; (5) 11/17/99 call to Gutierrez; (6) 11/17/99 call to Bursar's Office employee Marissa Contreras; (7) 12/3/99 incident with University employee Ken Schuetz; (8) 3/24/00 letter to University Writing Program employee Deborah Viles, and (9) 4/17/00 letter to Goldblum threatening noncompliance with the JAHB sanctions.

[14] Unfortunately, the Court is forced to reach this finding through informed speculation, rather than hard evidence. This is because, as exhaustive as the Record appears to be, it contains no transcript of the JAHB hearing, nor any communications from the JAHB to other University personnel regarding their decision. In fact, the one entry in the Record which might be relevant-no. 42: "Hearing materials provided with 1/25/00 memo"-is not what it purports to be. It is, in fact, a near duplicate of no. 38: "January 25, 2000 letter to Carlos Martinez from Andrea Goldblum." *See Affidavit of Robert Maust,* at 2; *Revised Record.* doc. nos. 3 8, 42. There is simply no way to glean from the Record what information the JAHB considered. Since the hearing was meant to replace the December 30, 1999 Goldblum decision, however, the Court must assume that the JAHB reviewed the same conduct reviewed by Goldblum. According to Goldblum's December 30, 1999 decision, she reviewed incidents that occurred on "September 21, 22, or 29, and November 17, 1999-. Driving you vehicle in a reckless manner while avoiding accepting a parking citation, harassing staff in the Bursars Office and/or disrupting their activity by creating a hostile or threatening environment. " 12130199 *Letter from Andrea Goldblum to Carlos Martinez,* at 11. That covers the first six "circumstances." There is no indication regarding the seventh circumstance, the December 3, 1999 incident with Schuetz. Since that incident occurred more than two months before the JAHB hearing the Court finds that it too was considered by the JAHB.

Maust's reliance on those circumstances as aggravating evidence is completely inappropriate because permitting a University hearing officer to reconsider the same evidence originally considered by the JAHB effectively places a student in double jeopardy for the same conduct. This is analogous to the criminal double jeopardy prohibited by both the state and federal constitutions. *See* Colo. Const. Art. Il § 18 - U. S. Const. Amend. V. *See also United States v. Halper*, 490 U.S. 433, 440 (1989) ("This Court many times has held that the Double Jeopardy Clause protects against ... multiple punishments for the same offense."); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

Further, the Court finds that the eighth alleged aggravating circumstance, the March 24, 2000 letter to Deborah Viles, has no significance. *See Revised Record*, doc. no. 10. The letter to Ms. Viles simply cannot be characterized as harassing. It is written in the recognized style of an attorney demand letter. If Martinez had hired a lawyer to write the exact same letter, the University would have no basis to allege harassment. This letter simply cannot be construed as an aggravating factor.

The ninth factor, Martinez's threatened noncompliance, was addressed above. Because threats of noncompliance are not contemplated as sanction violations by the Code, there is no competent evidence to support the University's characterization of these threats as an aggravating circumstance. Contrary to the University's position, then, *none* of the aggravating circumstances relied on by Maust should have been considered.

Thus, because of both the invalidity of the Goldblum decision, and because of Maust's improper reliance on the nine "aggravating" circumstances, the Court finds the Maust review decision supported by no competent evidence and an abuse of discretion.

(iii) Conclusion

Based on the foregoing findings, the Court finds in favor of Martinez and against the University on Martinez's Rule 106(a)(4) claim. The Court reverses the University expulsion decision and remands the case to the University for further proceedings as necessary with the following instructions:

(1) The JAHB sanction of one year of probation is reentered for the violation of Code standard 1a. Because of the delays caused by Martinez's appeals and this litigation, the probation sanction will begin Spring Semester 2000 and run for one calendar year.
(2) The JAHB sanction of completion of anger management education and writing a letter of apology is reentered for the violation of Code standard 12. Martinez is to enroll in and complete an anger management course and submit a letter of apology before the end of the next full semester for which he is enrolled in the University.
(3) For failure to write the letter of apology by the deadline date, Martinez is given the additional sanction of probation for one semester. This probation is to run after the completion of the probation described above, in paragraph (1).

In sum, the effect of this portion of the Order is allow Martinez to enroll as a student for the Spring Semester, 2001.

(5) Motion to Reconsider Ruling

Martinez moves the Court to reconsider the October 5, 2000 Ruling and Order wherein the Court declared that the following phrase from the June 6th Order to be the law of the case: "this preliminary injunction does not prevent the Defendant from conducting a hearing as to a sanction for the alleged violation of Plaintiff s probationary status. " This Motion has been rendered moot by the Court's decision, both in the November 13, 2000 Ruling and Order and in this Ruling and Order, that the second review hearing is of no effect. Therefore, Martinez's Motion to Reconsider Ruling is DENIED.

(6) Motion for Preliminary Injunction/Stay Pursuant to C.XC.P. Rule 106(a)(4)(V)

Martinez moves the Court to issue an preliminary injunction to enjoin the University from enforcing the October 10, 2000 suspension. The Court denies the motion for the simple reason that the June 6, 2000 preliminary injunction is still in effect and will remain in effect until the Court states that it is no longer in effect, and because the October 10, 2000 suspension is void as set forth herein. Motion DENIED.

(7) Motion to Dissolve Moot Portions of June 6,2000 Preliminary Injunction

Martinez moves the Court to lift two provisions of the preliminary injunction: (1) the exclusion of Martinez from campus; and, (2) the hold on Martinez's records. Martinez argues that these provisions have been rendered moot by the October 10,'2000 expulsion. As stated above, on both November 13, 2000 and in this Order, the Court has ruled the second review of no effect. Therefore, Martinez's argument that these two provisions are moot is incorrect, and the Motion is DENIED. However, the effect of the relief granted pursuant to the ruling on the Rule 106(a)(4) claim is to allow Martinez all of the same rights as any student on University probation.

(8) Motion for Extension of Time to Respond to University's Cross-Motion for Partial Summary Judgment

The Court has denied the University's cross-motion for summary judgment. Therefore, Martinez's reply is unnecessary. Motion DENIED.

(9) Motion for Extension of Briefing Schedule

Subsequent to filing this motion, the parties agreed to the parties determining the Rule 106(a)(4) claim without further briefing. Therefore, the Motion for Extension of Briefing Schedule is moot and is DENIED.

(10) Motion to Strike Pleadings Pursuant to Court's Order of September 12, 2000

The Court has denied Martinez's motion to strike the revised Record elsewhere in this Order. The Court's decision was not based on the University's supplemental response. Therefore, Martinez's Motion to strike the supplemental response is moot and is DENIED.

(11) Plaintiff's Ex Parte Motion to Permit Service of Supplemental Pleading

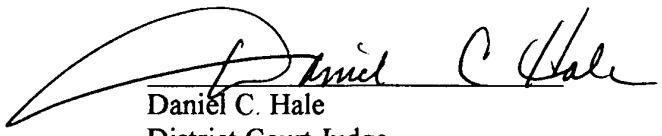
Plaintiff has withdrawn this motion.

(12) Plaintiff's Motion for Determination of Question of Law

The question of law Martinez asks relates to the supplemental complaint, which has been withdrawn. Therefore, this Motion is moot and is DENIED.

Done this 29 day of Dec, 2000.

BY THE COURT



Daniel C. Hale
District Court Judge

CERTIFICATE OF SERVICE:
I certify that I mailed the foregoing document by

DEC 29 2000

mailing same to all counsel and / or pro se party at addresses listed in file. D.C.