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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

JOHN DOE, an individual,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, a California corporation; and DOES 1 to 20 inclusive,

Respondents.

Case No.: 17CV03053

[Assigned to Hon. Donna D. Geck]

NOTICE OF ORDER FINDING REGENTS OF THE UNIVERSITY OF CALIFORNIA IN CONTEMPT OF THE COURT'S JUDGMENT GRANTING PETITION FOR WRIT OF ADMINISTRATIVE MANDATE

Date: August 10, 2018
Time: 9:30 a.m.
Place: Department 4

TO THE REGENTS AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that on August 10, 2018 at 9:30 a.m. the Order to Show Cause re Contempt came on for hearing before the Honorable Donna D. Geck in Department 4 of the above entitled court. Mark M. Hathaway, Werksman Jackson Hathaway & Quinn LLP, appeared for Petitioner; John B. Major, Munger Tolles & Olson LLP, appeared for Respondents.

The Court having read and considered the pleadings filed in support of the order to show cause re contempt and in opposition thereto and, having considered the argument of counsel both in support

and opposition to the order to show cause re contempt of the Regents, the Court adopted its tentative ruling, attached hereto, as the following final order of the court:

> The court finds respondent Regents of the University of California in contempt of the court's Judgment Granting Petition for Writ of Administrative Mandate.
>
> The court vacates respondent Regents of the University of California's Interpersonal Violence Appeal Review Committee's Appeal Decision: Reconsidered and Revised as of 2/5/18 and orders petitioner John Doe reinstated at the University of California, Santa Barbara, effective Fall Quarter of the 2018-2019 academic year. Regents shall facilitate Doe's enrollment and scheduling of classes.

WERKSMAN JACKSON
HATHAWAY & QUINN LLP

DATED: August 10, 2018 By: _____

Mark M. Hathaway, Esq.
Jenna E. Eyrich, Esq.
Attorneys for Petitioner
JOHN DOE

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

TENTATIVE RULING

Judge Donna Geck
Department 4 SB-Anacapa
1100 Anacapa Street P.O. Box 21107 Santa Barbara, CA 93121-1107

CIVIL LAW & MOTION

John Doe vs Regents of the University of California	
Case No:	17CV03053
Hearing Date:	Fri Aug 10, 2018 9:30

Nature of Proceedings: Order to Show Cause

Tentative Ruling: The court finds respondent Regents of the University of California in contempt of the court's Judgment Granting Petition for Writ of Administrative Mandate. The court orders as follows: The court vacates respondent Regents of the University of California's Interpersonal Violence Appeal Review Committee's Appeal Decision: Reconsidered and Revised as of 2/5/18 and orders petitioner John Doe reinstated at the University of California, Santa Barbara, effective Fall Quarter of the 2018-2019 academic year. Respondent shall facilitate Doe's enrollment and scheduling of classes.

Background: In this proceeding, petitioner John Doe, a student at the University of California Santa Barbara ("UCSB"), sought a writ of mandamus challenging his dismissal from UCSB, after he was accused of stalking a fellow student. Respondent is Regents of the University of California.

In a minute order dated December 22, 2017, the court found that the Interpersonal Violence Appeal Review Committee ("IVARC") panel considering petitioner's administrative appeal failed to base its findings on evidence at the appeal hearing as required by the University of California Sexual Violence and Sexual Harassment Policy ("SVHP"). Instead, the panel expressly limited its review to only the evidence in the Title IX investigative report.

The court granted a peremptory writ, and ordered: "The court sets aside the Appeal Decision of the Interpersonal Violence Appeal Review Committee, University of California, Santa Barbara, in Title IX Case #2016-0121. To be clear, this means that John Doe is again a student at the University of California, Santa Barbara. The Interpersonal Violence Appeal Review Committee shall reconsider the case in light of the court's opinion and judgment. The same panel of the Interpersonal Violence Appeal Review Committee may, though it need not, conduct a new hearing. It can consider the evidence before it, including the transcript of the hearing, and render a

new decision in accordance with the University of California Sexual Violence and Sexual Harassment Policy. Because credibility determinations must be made, if the same panel cannot be reconstituted, a new hearing will be necessary."

On January 8, 2018, the court entered judgment granting the petition and entered a peremptory writ of administrative mandate commanding Regents to file, no later than 30 days after the date the writ was served on Regents, a return to the writ setting forth what it had done to comply with the writ. Doe filed a proof of service indicating personal service of the writ on January 10, 2018.

On February 6, Doe filed a motion for order to show cause why Regents should not be held in contempt for failure to file a return, setting a hearing date of March 16. The court later continued the hearing date to March 23. On March 2, Regents filed a return and an opposition to the motion.

In the return, Regents indicates that, upon receipt of the writ, it began the process of vacating the sanction of dismissal, which was lifted on January 25. Regents began the process of reconvening the IVARC panel that had considered Doe's administrative appeal. The panel was informed that the court had given it the option of conducting a new hearing or reconsidering its decision in light of the court's opinion. The panel opted for reconsideration. On February 2, the panel met in person to re-evaluate the evidence and reconsider its prior decision. On February 5, the panel issued a revised and reconsidered decision rejecting Doe's appeal and re-imposing the sanction of dismissal. Doe's dismissal was put back into place effective February 27. On February 23, Regents mailed a copy of the panel's reconsidered and revised decision by mail.

On March 23, the court denied Doe's motion for an order to show cause based on the timeliness of the return. On April 12, Doe filed an objection to the return to the writ of mandate. On April 18, Regents filed an opposition to that objection and an amended return to the peremptory writ of mandate. At a CMC on April 27, the court instructed counsel for petitioner to proceed by noticed motion for allegations of failure to comply.

Contempt: On June 11, Doe filed an "Order to Show Case for Contempt." The name of the pleading notwithstanding, it is a motion for an order to show cause re contempt, not an order. Doe maintains that Regents has not complied with the court's peremptory writ. Regents opposed the motion.

On July 13, the court granted the motion for an order to show cause re contempt, stating: "The court exercises its continuing jurisdiction to make any orders necessary for complete enforcement of the writ and orders respondent Regents of the University of California to show cause why the court should not find respondent in violation of the court's Judgment Granting Petition for Writ of Administrative Mandate and make such orders as are necessary for complete enforcement of the writ. ... The court encourages both parties to address the appropriate orders necessary for complete enforcement of the writ and legal authority for such orders."

Both parties have submitted further briefing. Regents accepts, for purposes of this hearing, the court's decision that the IVARC panel's revised decision does not make clear whether the panel complied with the writ. Regents emphasizes that it endeavored to comply with the writ by reconvening the IVARC panel and having it issue a revised decision.

1. The IVARC "Appeal Decision: Reconsidered and Revised as of 2/5/18": With both its Return to Peremptory Writ of Mandate, filed on March 2, and its Amended Return to Peremptory Writ of Mandate, filed on April 18, Regents submitted the March 2 declaration of Suzette Perkin, Associate Dean in the Dean of Students Office at UCSB. Dean Perkin describes the university's actions as described above. She states:

The panel was informed that in light of the Court's opinion, it could either conduct a new hearing in this matter or reconsider its decision in light of the Court's opinion. The panel decided that the appropriate course of action was to reconsider its prior decision in light of the Court's opinion. On February 2, 2018, the panel met in person to re-evaluate the evidence and reconsider its prior decision. The panel was provided with all of the evidence that had been before it during the original administrative appeal hearing. On February 5, 2013, the panel issued a revised and reconsidered decision rejecting Petitioner's appeal and re-imposing the sanction of dismissal. [Perkin Dec. ¶5]

The court had found fault with the way the IVARC panel handled the second ground in petitioner's administrative appeal. Specifically, in evaluating Doe's second ground for appeal—whether decision was unreasonable based on the evidence—IVARC said it "evaluated whether the decision was unreasonable based on the evidence, using only the evidence in the Title IX investigative report." But the SVHP governing the procedure requires the panel to take into account the record developed by the investigator and the evidence presented at the hearing.

In the reconsidered and revised decision, the panel added this opening sentence with respect to Ground 2:

Under Ground 2, the appeals panel evaluated whether the decision was unreasonable based on the evidence, and considered all of the following when making their decision:

- The investigative report and testimony of the Title IX investigator
- The opening statement, closing statement, and arguments made by the Respondent
- The opening and closing statement of the Complainant
- All witness statements
- Any additional evidence submitted for consideration, as described under Ground 3

[Appeal Decision: Reconsidered and Revised as of 2/5/18 ("Revised Appeal Decision"), pp. 6-7] (The new "Ground 3" evidence consisted of "Health Data" on petitioner's cellphone.)

The IVARC panel then stated the same findings and conclusions it had reached before. The panel also restated language indicating it limited its review to the evidence in the Title IX investigative report. The Revised Appeal Decision includes: "With regard to the conduct outside Ellison Hall on April 28, 2016, Mr. [redacted] did not provide persuasive evidence from the fixed investigative report that the finding of responsibility was unreasonable." and "We found that Title IX came to a sensible and replicable conclusion based on the evidence in the Title IX Investigative Report and applying the preponderance of the evidence standard." [Revised Appeal Decision, pp. 7 & 8]

2. Analysis: In its judgment, the court ordered that IVARC "shall reconsider the case in light of the court's opinion and judgment." The court did not mandate a new hearing. Rather, the court stated that IVARC could consider the evidence before it, including the transcript of the hearing, and render a new decision in accordance with the SVPH. In the ruling, the court noted:

Following the SVPH, IVARC should have independently reviewed the evidence before the TIX/SHPC investigator and at the hearing, weighed the evidence, resolved conflicts in the evidence, drawn its own inferences, and made its own credibility determinations. IVARC cannot do that if it considers the issue based solely on the evidence in the TIX/SHPC investigative report.

In the introduction to its decision regarding, Ground 2, the IVARC panel expressly stated that it considered all witness statements, new evidence produced at the hearing, and the arguments of the parties. The panel stated this after having been made aware of this court's ruling. But the Revised Appeal Decision is internally consistent.

The court ordered IVARC to reconsider the case in light of the court's opinion and judgment, either by conducting a new hearing or considering the evidence before it, including the transcript of the hearing, and render a new decision in accordance with the SVHP. The language of the Revised Appeal Decision is identical in every respect to the original Appeal Decision, except for the introductory sentence regarding Ground 2. The contradictory statements in the discussion of Ground 2 indicate that the panel did not genuinely reconsider the case, but simply added language that would make the original decision look like a truly reconsidered decision.

Petitioner says: "On reconsideration, UCSB did not review the evidence independently. Regents concedes, 'In its reconsidered and revised decision, the panel reviewed whether the Title IX investigator's conclusions were unreasonable….' (Exhibit 6.) Reviewing the investigator's findings for reasonableness does not constitute an independent review of the evidence." [Motion 6:20-24] But petitioner confuses findings and conclusions. The IVARC panel's charge is to determine whether the investigator's decision is reasonable or unreasonable. In doing so, the panel makes its own findings from the evidence before it based on a preponderance of the evidence. In this respect, petitioner ignores his own ground for appeal. In the SVHP, the ground for appeal is "The decision was unreasonable based on the evidence." [Administrative Record ("AR") 1273; III.F.1.a.] That is how petitioner described his second ground for appeal. [Petition for Writ of Mandamus, 31:26-27]

Petitioner also contends the IVARC panel applied a substantial evidence standard of review rather than a preponderance of the evidence standard. Petitioner focuses on what counsel for Regents said in the return filed on March 2. Counsel said "the panel applied the substantial evidence standard…." [Return 2:20-21] Regents' counsel conceded this was an error and, as the IVARC's revised standard makes clear, the panel applied the preponderance of the evidence standard. [Amended Return 2:23-28, n2] The court is not concerned with Regents' counsel's characterization of what the IVARC panel did. The court considers only the IVARC panel's reconsidered and revised appeal decision. The panel did not mention the substantial evidence standard but, on three occasions, stated that it applied a preponderance of the evidence standard. [Revised Appeal Decision, pp. 2, 7, 8] In its ruling on the petition for writ of mandate, the court found that, because it relied only on the evidence in the Title IX investigator's report, the

IVARC panel effectively applied a substantial evidence standard. In light of the contradictory statements in the Revised Appeal Decision, that appears to still be the case.

The IVARC panel correctly sought to determine if the Title IX investigator's decision was reasonable based on the evidence. It correctly stated the preponderance of the evidence standard. However, because the IVARC panel contradicted itself regarding the evidence it considered and placed the burden on Doe to provide persuasive evidence from the fixed investigative report that the Title IX investigator's finding of responsibility was unreasonable, the Revised Appeal Decision does not comply with the court's mandate.

3. Appropriate Remedy: "The remedy in cases of refusal or neglect to obey a peremptory writ of mandate is that provided for in Code of Civil Procedure section 1097, and is in the nature of sanctions for contempt." (*Carroll v. Civil Serv. Comm'n*, 11 Cal.App.3d 727, 733 (1970). CCP § 1097 provides:

"If a peremptory mandate has been issued and directed to an inferior tribunal, corporation, board, or person, and it appears to the court that a member of the tribunal, corporation, or board, or the person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the writ, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ."

"The trial court that issues a writ of mandate retains continuing jurisdiction to make any orders necessary for complete enforcement of the writ. [Citations] If the petitioner or the court is dissatisfied with the return, the court may order the respondent to reconsider. [Citation]" (*Los Angeles Int'l Charter High Sch. v. Los Angeles Unified Sch. Dist.*, 209 Cal.App.4th 1348, 1355 (2012).)

a. Order for Enforcement of the Writ: The language of CCP § 1097, allowing the court to order compliance, is the least severe of the remedies and "only requires that a court find that such an order is necessary and proper under the circumstances." (*King v. Woods*, 144 Cal.App.3d 571, 578 (1983).)

Regents wants the court to simply order IVARC to further revise its decision. Regents says the panel is already in the process of revising the decision, though there is no admissible evidence to that effect.

The court instructed Regents to reconvene the IVARC panel or impanel another one if that was not possible. The reconvened panel had the option of relying on the record before it when it made its original decision. Regents chose this latter path, but the revised decision indicates there was no true *de novo* review. Rather, the IVARC panel's Revised Appeal Decision is merely a poorly rewritten decision that appears to be a justification for the earlier result. The Revised Appeal Decision does not demonstrate compliance with the court's decision. The offer to further change the wording of the decision misses the point. There is a flaw in the manner in which the IVARC panel reviewed the evidence before it.

Under the SVPH, the IVARC panel must independently review the evidence before the TIX/SHPC investigator and at the hearing, weigh the evidence, resolve conflicts in the evidence, draw its own inferences, and make its own credibility determinations. It is clear to the court that the IVARC panel has not done that and does not appear to be inclined to do so.

"[A]ny agency reconsideration must fully comport with due process, and may not simply allow the agency to rubber-stamp its prior unsupported decision." (*Voices of the Wetlands v. State Water Res. Control Bd.*, 52 Cal.4th 499, 528 (2011).)

Given the circumstances, the court must make an order necessary and proper for the complete enforcement of the writ. The appropriate order is to vacate the Interpersonal Violence Appeal Review Committee's Appeal Decision: Reconsidered and Revised as of 2/5/18 and order petitioner John Doe reinstated at the University of California, Santa Barbara, effective Fall Quarter of the 2018-2019 academic year. Regents shall facilitate Doe's enrollment and scheduling of classes. (Petitioner is willing to attend classes remotely, if UCSB is willing to permit that.)

The court is not adjudicating the merits of the charges of "stalking" in violation of the University's Interim Policy on Sexual Harassment and Sexual Violence (version dated 06/17/15) and the University's Sexual Harassment and Sexual Violence Policy (version dated 01/01/16). If Regents elects to pursue these charges, it must select an IVARC panel that consists of no members of the IVARC panel that issued decisions in February 2017 and February 2018, or any other University administrator involved with John Doe's case. A new IVARC panel must conduct an entirely new proceeding and may not rely on the record before the prior panel.

b. Fine and Imprisonment: Petitioner asks the court to impose a $1,000 fine and imprison Regents. Petitioner does not say what individuals should be fined or imprisoned. Without identification of a member of the inferior tribunal, corporation, or board has refused or neglected to obey the writ without just cause or excuse, the court cannot impose a fine under CCP § 1097. Similarly, the court does not know the identity of any person to be imprisoned.

These remedies would not be appropriate in this case. "[A]fter a writ of mandate has been issued, the issuing court should use care, in any necessary enforcement of its writ, to choose measures pointed toward assuring real compliance with official duties rather than rigidly to punish any individual." (*King v. Martin*, 21 Cal.App.3d 791, 796 (1971).)

c. Attorney Fees: Petitioner asks the court to order Regents to pay his attorney fees totaling $48,990. He offers no authority for an award of fees other than the language of CCP § 1097 authorizing "orders necessary and proper for the complete enforcement of the writ." An award of fees would not move the parties any nearer to complete enforcement of the writ.

"California follows the 'American rule,' under which each party to a lawsuit ordinarily must pay his or her own attorney fees." [Citation] [CCP § 1021] codifies the rule, providing that the measure and mode of attorney compensation is left to the agreement of the parties '[e]xcept as attorney's fees are specifically provided for by statute.'" (*Musaelian v. Adams*, 45 Cal.4th 512, 516 (2009).) "A trial court has inherent authority to punish for contempt and control its own proceedings, but a court does not have inherent power to impose monetary sanctions payable to an opposing party or counsel." (*Sagonowsky v. Kekoa*, 6 Cal.App.5th 1142, 1154 n9 (2016).)

There is no authority for an award of attorney fees.

4. Order: The court finds respondent Regents of the University of California in contempt of the court's Judgment Granting Petition for Writ of Administrative Mandate. The court orders as follows: The court vacates respondent Regents

of the University of California's Interpersonal Violence Appeal Review Committee's Appeal Decision: Reconsidered and Revised as of 2/5/18 and orders petitioner John Doe reinstated at the University of California, Santa Barbara, effective Fall Quarter of the 2018-2019 academic year. Regents shall facilitate Doe's enrollment and scheduling of classes.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 888 West Sixth Street, Suite 400, Los Angeles, California 90017.

On August 10, 2018, I served the foregoing document described NOTICE OF ENTRY OF ORDER on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Hailyn J. Chen
Munger Tolles & Olson LLP
350 South Grand Avenue, 50th Floor
Los Angeles, CA 90071
Telephone: (213) 683-9548
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GENERAL COUNSEL FOR RESPONDENTS

☐ **BY FACSIMILE TRANSMISSION** from FAX number (213) 624-1942 to the fax number set forth above. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

☒ **BY MAIL** by placing a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE** by delivering a copy of the document(s) by hand to the addressee or I cause such envelope to be delivered by process server.

☐ **BY EXPRESS SERVICE** by depositing in a box or other facility regularly maintained by the express service carrier or delivering to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served.

☒ **BY ELECTRONIC TRANSMISSION** by transmitting a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

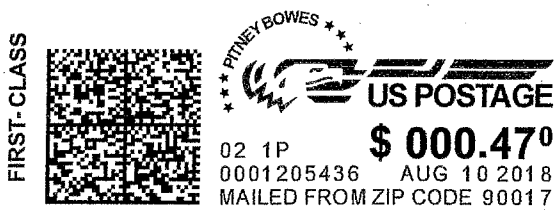
☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 10, 2018 in Los Angeles, California

Yesenia N. Alvarado

RKSMAN JACKSON
'HAWAY & QUINN LLP
/EST SIXTH STREET, FOURTH FLOOR
NGELES, CALIFORNIA 90017



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