

Matter of Awad v University

2019 NY Slip Op 32353(U)

July 29, 2019

Supreme Court, New York County

Docket Number: 153826/17

Judge: Nancy M. Bannon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42**

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In the Matter of

**AHMAD AWAD, SOFIA DADAP, SAPPHIRA
LURIE, and JULIE NORRIS,**

Index No. 153826/17

Petitioners,

**DECISION, ORDER
& JUDGMENT**

v

FORDHAM UNIVERSITY,

**MOT SEQ 001, 002
003, 004**

Respondent.

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this proceeding pursuant to CPLR article 78, Ahmad Awad, Sofia Dadap, Sapphira Lurie, and Julie Norris ("the petitioners"), seek to review a determination of the respondent, Fordham University ("Fordham" or "the University"), dated December 22, 2016, denying their request to organize a club known as Students for Justice in Palestine at Fordham University ("SJP"), and to have the club recognized as a "registered organization" that is sanctioned by the University (SEQ 001). Fordham moves pursuant to CPLR 7804(f) and 3211(a)(1) and (7) to dismiss the petition (SEQ 002). The petitioners move to preliminarily enjoin Fordham from interfering with an earlier determination of Fordham's United Student Government ("USG")

Executive Board and Senate, dated November 16, 2016, approving the organization for recognition (SEQ 003). By separate motion, the petitioners move pursuant to CPLR 3025(b) to amend the petition to add Veer Shetty as an additional petitioner (SEQ 004).

The petitioners' motion to amend the petition is granted. The respondent's cross motion to dismiss the petition is denied, the petition is granted, the respondent's determination is annulled, and the petitioner's motion for a preliminary injunction is denied as academic.

II. BACKGROUND

On November 19, 2015, several undergraduate students at Fordham University, including the petitioner Ahmad Awad, applied for recognition of SJP as student club at Fordham's Lincoln Center campus. In accordance with Fordham's published rules, the students submitted all of the required paperwork, including a proposed constitution, which recited that the group's mission was "to build support in the Fordham community among people of all ethnic and religious backgrounds for the promotion of justice, human rights, liberation, and self-determination for the indigenous Palestinian people." It also stated that "SJP is organized around the principles of the call by Palestinian civil society for Boycott, Divestment and Sanctions of Israel."

Fordham's published rules include Section 2(a) of the

Fordham University Lincoln Center Campus United Student Government Operations Committee Club Guidelines ("the Guidelines"), which provides that a club's purpose, as set forth in the club's constitution, must state "how th[e] Club will benefit the Fordham community." Section 2(e) requires a "[s]tatement that the Club will not restrict membership based upon national origin, race, religion, creed, gender, sexual orientation, age, or physical handicap." Section 8(h) of the Guidelines provides that the Dean of Students has a right to veto any new club, but the Guidelines do not articulate or enumerate any grounds on which the Dean may exercise such a veto. Moreover, the Guidelines themselves are unclear as to whether that veto must be exercised prior to a vote by the USG Executive Board and Senate.

However, Section I of the 2016-2017 Fordham University Lincoln Center Campus United Student Government Operations Committee Club Registration Process provides, in relevant part, that:

"The Operations Committee will work with you in editing your constitution. After all revisions to the constitution have been made in accordance with constitutional guidelines, the packet will be submitted to the Director of the Office for Student Involvement and then to the Dean of Students.

"Once a club's constitution is approved by the Director of the Office for Student Involvement and the Dean of Students, the packet is to be forwarded to the USG Senate for their recommendations and final approval.

"Upon approval by above-mentioned parties, the club is considered a registered organization of F[ordham] C[ollege] L[incoln] C[enter] and G[abelli] S[chool of] B[usiness]."

On April 5, 2016, Awad wrote to Dr. Dorothy Wenzel, Director of the Office of Student Leadership and Community Development and New Student Orientation, seeking a response to the application from Fordham's administration. On April 26, 2016, Wenzel and a student, who was then the Vice President of Operations for USG, told Awad and another student that some minor, standard modifications needed to be made to the constitution, and that SJP should be set to be approved in autumn 2016.

Over the next several months, email correspondence was exchanged between Awad, the outgoing and incoming USG Vice-Presidents, and Wenzel concerning, among other things, whether the Fordham chapter of SJP was obligated to obtain any approvals from the national SJP organization before it could begin operations.

On October 5, 2016, Awad and other students met with Wenzel, Dean of Students Keith Eldredge, and the new Vice President of Operations for USG. At the meeting, Wenzel and Eldredge expressed concern that SJP's presence on campus and its potential support for boycott, divestment, and sanctions would "stir up controversy," and referenced a controversy that occurred when Professor Norman Finkelstein, whose scholarship supports

Palestinian rights, spoke at Fordham in 2009. Wenzel and Eldredge again asked about any requirements that the national SJP organization might impose upon the Fordham chapter, and also asked if the students would consider not using the name "Students for Justice in Palestine." The students responded that they had chosen the name Students for Justice in Palestine to connect the group to the broader movement for justice in Palestine, and that they wished to retain the name.

Wenzel added that she spoke to several Jewish faculty members about SJP in the previous academic year, and requested their opinion on whether the administration should permit SJP to be established at Fordham. Over the course of the next few weeks, Awad and other students interested in organizing SJP responded to requests for further edits to the club constitution and questions about the national organization from Eldredge, Wenzel, and USG members.

On October 27, 2016, Awad, Lurie, Dadap, and other students, along with their proposed faculty advisor Glenn Hendler, met with the USG Operations Committee. At the meeting, the USG Vice President of Operations asked if Governor Cuomo's executive order that purports to punish entities that engage in boycott, divestment, and sanctions activities aimed at Israel, or the New York City Council resolution condemning such boycott, divestment, and sanctions activities, prevented the formation of SJP at

Fordham, since SJP's constitution mentions support for such activities. The students explained to the USG's Vice President that boycotts are protected speech activity, and that such legislation could not legally prohibit their advocacy of boycott, divestment, and sanctions. The USG's Vice President told the petitioners that she would make sure that the USG held a vote on whether to approve SJP in the upcoming weeks. She also said that she would inform the Jewish Student Organization (JSO) about the upcoming vote on the recognition of SJP, as Wenzel had instructed her to let that organization provide its opinion on the question of the approval of SJP. In response, Awad and other supporters of SJO told Wenzel that it was inappropriate for another student organization to have a say in the establishment of SJP.

Prior to November 17, 2016, the Director of the Office for Student Involvement and the Dean of Students approved SJP's constitution, and forwarded the relevant packet to the USG, thus clearing the way for the USG to vote on a resolution for final approval.

On November 17, 2016, the USG Executive Board and Senate voted to approve SJP as a club at the Fordham University Lincoln Center Campus. The USG wrote to the newly formed SJP that diverse viewpoints and critical inquiry are consonant with the University's stated mission. In its determination, the USG wrote as follows:

"United Student Government invited representatives from both Students for Justice in Palestine and the Jewish Student Organization to hear their perspectives and ask questions to both groups.

"After careful deliberation, United Student Government has faith that this chapter of Students for Justice in Palestine at Fordham and its members will positively contribute to the Fordham community in such a way that is sensitive to all students on campus. United Student Government is dedicated to the safety of all students and has faith that Students for Justice in Palestine can function on campus respectfully. This chapter of Students for Justice in Palestine at Fordham fulfills a need for open discussion and demonstrates that Fordham is a place that exemplifies diversity of thought. Their presence will help to create a space for academic discussion and promote intellectual rigor on campus. We do not believe that the presence of Students for Justice in Palestine will take away from efforts to promote a safe environment on our campus.

"As with all United Student Government decisions, we welcome all students to voice their concerns and participate in the open dialogue which USG promotes."

Subsequent to the USG's vote of approval, Dean of Student Eldredge then wrote to Awad, Dadap, Lurie and other students, stating that he was informed of the decision to approve the SJP club and that he "now need[ed] to review the request before it is finalized." On the last day of the fall semester's classes in 2016, Eldredge requested a meeting with the students who were attempting to organize SJP. The meeting was conducted on December 12, 2016, with Eldredge, Wenzel, Lurie, and another student in attendance. Eldredge and Wenzel asked the students their views on boycott, divestment, and sanctions against Israel, whether the use of such activities meant the dissolution of

Israel, why students might use the term "apartheid" to describe Israel, and whether the student organizers would work with national advocacy groups Jewish Voice for Peace, J Street, and Seeds of Peace. At the meeting, Lurie and the other student explained that boycott, divestment, and sanctions are non-violent tactics meant to pressure the Israeli government to respect Palestinian rights, and they offered several examples of discriminatory laws and practices in Israel that they believed fit within the legal definition of apartheid. The two students also replied that they would like to work with Jewish Voice for Peace.

On December 22, 2016, Eldredge issued the following determination:

"After consultation with numerous faculty, staff and students and my own deliberation, I have decided to deny the request to form a club known as Students for Justice in Palestine at Fordham University. While students are encouraged to promote diverse political points of view, and we encourage conversation and debate on all topics, I cannot support an organization whose sole purpose is advocating political goals of a specific group, and against a specific country, when these goals clearly conflict with and run contrary to the mission and values of the University.

"There is perhaps no more complex topic than the Israeli-Palestinian conflict, and it is a topic that often leads to polarization rather than dialogue. The purpose of the organization as stated in the proposed club constitution points toward that polarization. Specifically, the call for Boycott, Divestment and Sanctions of Israel presents a barrier to open dialogue and mutual learning and understanding."

The petitioners thereafter commenced this CPLR article 78 proceeding, seeking to annul that determination, and compel the respondent to recognize SJP as a sanctioned club in accordance with the USG's vote of approval.

The respondent moves to dismiss the petition on the grounds that documentary evidence provides a complete defense to the proceeding, and that the petition fails to state a cause of action.

By separate motion, the petitioners move pursuant to CPLR 3025(b) to amend the petition to add Veer Shetty as an additional petitioner.

III. DISCUSSION

A. MOTION TO AMEND THE PETITION

The petitioners move pursuant to CPLR 3025(b) to amend the petition to add as an additional petitioner, Veer Shetty, a sophomore student enrolled at the respondent University. The respondent opposes the motion. The motion is granted for the reasons set forth the petitioners' motion papers.

It is well settled that leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d

643 (1st Dept. 2013). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015). The court finds the respondent's arguments in opposition, i.e. that the proposed additional petitioner lacks standing and the claim is untimely, to be unpersuasive, and it has failed to establish any prejudice or surprise resulting from the amendment.

B. MOTION TO DISMISS THE PETITION

"Courts have a restricted role in reviewing determinations of colleges and universities. A determination will not be disturbed unless a school acts arbitrarily and not in the exercise of its honest discretion, [or] it fails to abide by its own rules." Matter of Powers v St. John's Univ. Sch. of Law, 25 NY3d 210, 216 (2015) (internal quotation marks and citation omitted). Thus, a judicial challenge to a university's alleged failure to comply with its own internal regulations properly lies pursuant to CPLR article 78, and review is appropriate under the "arbitrary and capricious" standard of CPLR 7803(3). See id.; Maas v Cornell Univ., 94 NY2d 87 (1999); Matter of Harris v Trustees of Columbia Univ., 62 NY2d 956 (1984), rev'd for reasons stated in dissenting op of Kassal, J., 98 AD2d 58, 67-73 (1st Dept. 1983).

"In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a)(7) and 7804(f), all of the

allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference." Matter of Eastern Oaks Dev., LLC v Town of Clinton, 76 AD3d 676, 678 (2nd Dept. 2010); see Leon v Martinez, 84 NY2d 83 (1994); Matter of Gilbert v Planning Bd. of Town of Irondequoit, 148 AD3d 1587 (4th Dept. 2017); Matter of Schlemme v Planning Bd. of City of Poughkeepsie, 118 AD3d 893 (2nd Dept. 2014); Matter of Ferran v City of Albany, 116 AD3d 1194 (3rd Dept. 2014); Matter of Marlow v Tully, 79 AD2d 546 (1st Dept. 1980). "In determining motions to dismiss in the context of [a CPLR] article 78 proceeding, a court may not look beyond the petition . . . where, as here, no answer or return has been filed." Matter of Scott v Commissioner of Correctional Servs., 194 AD2d 1042, 1043 (3rd Dept. 1993); see Matter of Ball v City of Syracuse, 60 AD3d 1312 (4th Dept. 2009). "Whether a plaintiff [or petitioner] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 (2005). As long as the petition alleges specific facts "giving rise to a fair inference" that the determination was arbitrary and capricious (Matter of Vyas v City of New York, 133 AD3d 505, 505 [1st Dept. 2015]), dismissal for failure to state a cause of action is not warranted.

The petition here more than satisfies that standard, as it clearly alleges that Fordham procedurally violated its own rules

concerning the recognition of student clubs by permitting a dean to overrule a vote of the USG, and imposed a newly identified factor in considering whether approval is warranted or not, namely whether a group may add to the "polarization" of persons with differing opinions on contested topics of the day.

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 88 (1994); see Ellington v EMI Music, Inc., 24 NY3d 239 (2014). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and "essentially undeniable." Dixon v 105 W. 75th St., LLC, 148 AD3d 623, 629 (1st Dept. 2017), citing Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). The documentary evidence here, consisting of the administrative record itself, does not conclusively establish that the challenged decision was not arbitrary and capricious.

Generally, the denial of a motion to dismiss the petition in a CPLR article 78 proceeding is followed by the service and filing of an answer and administrative record, or return. See Matter of Kickertz v New York Univ., 25 NY3d 942 (2015). However, where "it is clear that no dispute as to the facts exists and no prejudice will result" a court, upon a respondent's motion to dismiss, may decide the petition on the merits. Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of

Nassau County, 63 NY2d 100, 102 (1984); see Matter of Arash Real Estate & Mgt. Co. v New York City Dept. of Consumer Affairs, 148 AD3d 1137 (2nd Dept. 2017); Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y., 115 AD3d 427 (1st Dept. 2014); Matter of Kuzma v City of Buffalo, 45 AD3d 1308 (4th Dept. 2007).

Under the circumstances presented here, service of an answer is not necessary, as the facts have been fully presented in the parties' papers, and no factual dispute remains. See Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. Of Nassau County, supra; Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y., supra; Matter of Camacho v Kelly, 57 AD3d 297 (1st Dept. 2008).

C. MERITS OF THE PETITION

A determination is arbitrary and capricious where is not rationally based, or has no support in the record. See Matter of Gorelik v New York City Dept. of Bldgs., 128 AD3d 624 (1st Dept. 2015). A determination may also be annulled as arbitrary and capricious where the decision maker considers inappropriate factors in coming to his or her decision. See Matter of Rossakis v New York State Bd. of Parole, 146 AD3d 22 (1st Dept. 2016); Matter of Kaufman v Incorporated Vil. of Kings Point, 52 AD3d 604 (2nd Dept. 2008). In addition, a determination of a university,

acting in its administrative capacity, may be set aside where the university does not abide by its own rules. See Matter of Powers v St. John's Univ. Sch. of Law, supra.

A court's review of administrative determinations is limited to the record made before the decision maker. See Matter of Featherstone v Franco, 95 NY2d 550 (2000); Matter of Levine v New York State Liquor Auth., 23 NY2d 863 (1969); Matter of Pascazi v New York State Bd. of Law Examiners, 151 AD3d 1324 (3rd Dept. 2017). A court reviewing an administrative determination "must judge the propriety of that determination solely upon the grounds invoked" by the decision maker, "and the court is powerless to affirm the [determination] through reasoning it deems more appropriate." Matter of Stern, Simms & Stern v Joy, 48 AD2d 788, 788 (1st Dept. 1975); see Matter of Weill v New York City Dept. of Education, 61 AD3d 407 (1st Dept. 2009). "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." Matter of Scherbyn v Wayne-Finger Lakes Bd. of Cooperative Educ. Servs., 77 NY2d 753, 758 (1991); see Securities & Exch. Comm. v Chenery Corp., 332 US 194 (1947); Matter of Blum v D'Angelo, 15 AD2d 909 (1st Dept. 1962).

Here, Fordham did not abide by its own published rules governing the approval and recognition of student clubs, inasmuch as it seemingly imposed an additional tier of review, by a dean,

of an approval already rendered by the USG. This deviation from usual practice is particularly notable here, since the USG was only empowered to vote for approval of a club in the first instance where prior approval has already been granted by the Director of the Office for Student Involvement and the Dean of Students. Indeed, the Dean's abrupt change from preliminary approval to rejection was made without a rational explanation or any change in circumstances. In the context of administrative determinations, "[a] change in something from yesterday to today creates doubt. When the anticipated explanation is not given, doubt turns to disbelief" (Sierra Club v United States Army Corps of Engrs., 772 F2d 1043, 1046 [2nd Cir. 1985]), and such an unexplained change necessarily requires the conclusion that the ultimate determination was arbitrary. See id.

Moreover, the ground for overruling the USG, as articulated by Dean Eldredge, was the potential "polarization" of the Fordham community were SJP to be formally recognized. Although the Dean, in determining whether to veto any new club, has discretion to evaluate whether the club will promote Fordham's mission, this discretion is neither unlimited nor unfettered. The issue of whether a club's political message may be polarizing is not enumerated or identified as a relevant factor in any governing or operating rules, regulations, or guidelines issued by Fordham, and appears to have been arbitrarily considered by Dean Eldredge after input from others who are critical of SJP's political

beliefs. Importantly, consideration of whether a group's message may be polarizing is contrary to the notion that universities should be centers of discussion of contested issues.

"The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders, trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v Board of Regents 385 US 589, 603 (1967).

Contrary to Fordham's contention, its status as a private university does not mandate dismissal of the petition. Although Fordham is not a public university, and thus not expressly subject to First Amendment limitations on its right to restrict opinions that might be controversial or unpopular (see e.g. Mitchell v New York Univ., 129 AD3d 542 (1st Dept. 2015); Matter of Panarella v Birenbaum, 37 AD2d 987 [2nd Dept. 1971], affd 32 NY2d 108 [1973]), Fordham's own rules, regulations, and guidelines do not empower the Dean of Students to restrict the university's recognition of a student club based on its potential for raising issues or taking political positions that might be controversial or unpopular with a segment of the university community. Indeed, Fordham's 2005 mission statement, in relevant part, provides that:

"Fordham strives for excellence in research and teaching, and guarantees the freedom of inquiry required by rigorous thinking and the quest for truth. Fordham affirms the value of a core curriculum rooted in the liberal arts and sciences. The University seeks to foster in all its students life-long habits of careful observation, critical thinking, creativity,

moral reflection and articulate expression.

"In order to prepare citizens for an increasingly multicultural and multinational society, Fordham seeks to develop in its students an understanding of and reverence for cultures and ways of life other than their own."

In other words, the consideration and discussion of differing views is actually part of Fordham's mission, regardless of whether that consideration and discussion might discomfit some and polarize others.

In his determination, Dean Eldredge does not provide a rational basis for concluding that SJP might encourage violence, disruption of the university, suppression of speech, or any sort of discrimination against any member of the Fordham community based on religion, race, sex, or ethnicity. His only articulated concern was that SJP singled out one particular country for criticism and boycott. Again, this is not an established ground for denying recognition to a student club. To the extent that Dean Eldredge claims authority to reject any club that criticizes a particular country, that same rule could be applied to students protesting or criticizing China's occupation and annexation of Tibet, Russia's occupation of the Crimea, or Iraq's one-time occupation of Kuwait.

Since there is nothing in the record of Dean Eldredge's determination supporting his authority to reject an application of a student club because it criticized the policies of only one nation, the determination must be annulled as arbitrary and

capricious. Even if he had such authority, there is nothing in the record of his determination requiring Fordham to apply such a rule consistently. Therefore, it must be concluded that his disapproval of SJP was made in large part because the subject of SJP's criticism is the State of Israel, rather than some other nation, in spite of the fact that SJP advocates only legal, nonviolent tactics aimed at changing Israel's policies. This also renders his determination arbitrary and capricious, since the defense of a particular nation is not a factor countenanced by Fordham's rules, regulations, and guidelines for the approval of student clubs.

At present, there is no need to remand for further administrative action, since the administrative record is sufficiently developed for judicial consideration of whether SJP followed all applicable rules, regulations, and guidelines in applying for approval, and whether Fordham arbitrarily and capriciously failed to abide thereby, and arbitrarily considered inappropriate factors in reaching its ultimate determination. See Matter of Pantelidis v New York City Bd. of Stds. & Appeals, 43 AD3d 314 (1st Dept. 2007).

D. MOTION FOR A PRELIMINARY INJUNCTION

Since the court is granting the petition and annulling Fordham's determination, the petitioners' motion to preliminarily enjoin Fordham from interfering with the USG's approval has been

rendered academic.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the petitioners' motion to amend the petition to add Veer Shetty as a petitioner (SEQ 004) is granted and the amended petitioner in the form annexed to the moving papers shall be deemed served upon the respondent upon service of this order with notice of entry, and it is further,

ORDERED that the respondent's motion to dismiss the petition (SEQ 002) is denied; and it is further,

ORDERED and ADJUDGED that the petition (SEQ 001) is granted, the determination of Dean Keith Eldredge dated December 22, 2016, disapproving the application of Students For Justice in Palestine at Fordham University to be recognized as a student club is annulled, and Fordham University is directed to recognize Students For Justice in Palestine at Fordham University as a university-sanctioned club in accordance with the approval of the United Student Government Executive Board and Senate dated November 17, 2016; and it is further,

ORDERED that the petitioners' motion to preliminarily enjoin the respondent from interfering with the approval of the United Student Government Executive Board and Senate dated November 17, 2016, pending hearing of the petition herein (SEQ 003), is denied as academic.

This constitutes the Decision, Order, and Judgment of the court.

Dated: July 29, 2019

ENTER:



J.S.C.

HON. NANCY M. BANNON