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

> 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 2.96 TDrmatio 2.96 TD2nd R (Martinimattou.44 Tw (

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 t that thjec

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 t

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 siyextendsiu3eation fohich Defeie BoD fc.l.1635 he( ) Tj -209.76 -12.72 T

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.

> [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. *Se*

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

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 lesi'4cc 0.026 Tw (and, ñ7

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. elStlits ow

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-

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 ta1 Tj 196The Universityaxnto ir35( ) Tj f4i

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'mànagtandards h.

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

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

(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.