DEPARTMENT 24 LAW AND MOTION RULINGS

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Submission Instructions

1. Please notify the courtroom staff by email not later than 4:00 p.m. the day before the hearing if you wish to submit on the tentative ruling rather than argue the motion. The email address is SMCDEPT24@lacourt.org. Please do not use any other email address.
2. If you submit on the tentative, you must immediately notify the other side that you will not appear at the hearing. You must include the other parties on the email by "cc."
3. Include the word "SUBMISSION" in all caps in the Subject line and include your name, contact information, case name and number, date of hearing and the party you represent in the body of the email. If you submit on the tentative and elect not to appear at the hearing, the opposing party may nevertheless appear at the hearing and argue the motions.
4. Include the words "SUBMISSION BUT WILL APPEAR" if you submit, but one or both parties will nevertheless appear.
5. OFF-CALENDAR should appear in all caps in the Subject line where all parties have agreed to have a motion placed off-calendar and parties are ordered to cancel the reservation on CRS.
6. If all parties submit, the tentative ruling will become the final ruling after the hearing date. The moving party shall give notice of the final ruling.
7. Tentative rulings are not invitations or opportunities to file further documents relative to the hearing before the Court. Said document(s) will not be considered by the Court.

(Posted 7/11/18)

Case Number: BS173858 **Hearing Date:** August 19, 2019 **Dept:** 24

Reconsents Rick Caruso, Elizabeth A. Graddy, and the University of Southern California's demurrer to the Third Amended Petition is SUSTAINED.

On June 5, 2018, Petitioner Erick Guerrero ("Guerrero" or "Petitioner") filed his petition for writ of mandate against Respondents Rick Caruso ("Caruso"), as Chairman of the Board of Trustees; Elizabeth A. Graddy ("Graddy"), as Vice Provost for Academic and Faculty Affairs; and the University of Southern California ("USC") (collectively, "Respondents"). On December 7, 2018, the Court sustained Respondents' demurrer to the First Amended Petition ("FAP") and Second Amended Petition ("SAP"), with leave to amend. On June 18, 2019, Petitioner filed the operative Third Amended Petition ("TAP"), generally alleging the same facts.

As alleged in the TAP, as of January 2017, Guerrero was a social work researcher and associate professor at the USC Suzanne Dworak-Peck School of Social Work and USC Marshall School of Business. He also served as the dissertation chair of graduate student Karissa Fenwick's ("Fenwick") dissertation committee. In January 2017, Guerrero and Fenwick attended a social work and research conference in New Orleans. After their return, Fenwick filed a sexual misconduct claim against Guerrero.

USC's Office of Equity and Diversity ("OED") conducted a deficient investigation. The OED investigators did not record witness statements, they relied on rough notes of witness meetings in

the investigation file to prepare summaries of the witness statements, and they did not record questions asked or the verbatim responses. When Guerrero first learned of the accusations, OED refused to provide any evidence, statements, or specific information other than that he had allegedly made a sexual advance on January 13, 2017, but without touching Fenwick and without saying anything to her and then later tried to dissuade her from reporting the encounter. The Faculty Handbook requires that faculty members must have equal access to the information used by USC officials in the investigation. OED and USC refused to provide any evidence or records to Guerrero, and during the entire course of the investigation and appeal process only provided him with six pages of documents.

On May 11 and July 13, 2017, the OED investigator, Donna Wagner, improperly found that Guerrero violated the University policy on sexual harassment. On August 1, 2017, the Director of the OED, Karen Nutter, improperly concurred with the investigator's findings. On August 29, 2017, the Vice President of Research, Randolph Hall, improperly denied Guerrero's appeal. On September 7, 2017, Vice Provost and Senior Advisor to the Provost, Martin Levine, imposed the most severe sanctions against Guerrero, including suspension without pay for one semester, was imposed starting August 16, 2018. Dr. Levine also wrote that the "Provost regards your offenses as sufficiently serious that he considered bringing charges leading to your dismissal, but has decided not to do so in this instance." These decisions were based on evidence not provided to Guerrero and in the absence of substantial evidence supporting the finding of policy violations.

On September 18, 2017, due to the deficiencies in the investigation appeal process, Guerrero filed a grievance with the USC Faculty Senate pursuant to the Faculty Handbook. Following a December 1, 2017 hearing, the Faculty Senate Grievance Panel ("Panel") granted his grievance. In their December 11, 2017 decision, the Panel recommended, *inter alia*, that the entire investigation file be made available to the parties; the parties be invited to comment upon, challenge, or ask questions about the file; and Guerrero be allowed to re-present his appeal.

On February 20, 2018, then-USC president, C.L. Max Nikias, issued a letter accepting the Panel's recommendations and directed the matter remanded to OED for reconsideration based on any new appeal by Guerrero based on his review of the evidence that had been withheld from him and further questioning of the complainants. The letter further directed that "[s]anctions and correct actions will be considered anew if there is a conclusion of policy violation based on the expanded record and if it is sustained on appeal (or if no appeal is taken); the designated Provost, after appropriate consultation, will determine afresh on the basis of the expanded record whether the sanctions and corrective actions should be the same as, or greater or less than, the sanctions previously decided on."

The OED investigator, however, refused to provide copies of the evidence, some 375 pages, to Guerrero and insisted that he and his counsel could only review it at USC in the OED office under OED supervision. Thereafter, however, USC disclosed the OED investigation file and other relevant documents through discovery produced in the litigation Fenwick had previously filed against USC and Guerrero. The OED investigator also refused to allow Guerrero to question the complainants. USC only allowed him to submit proposed questions to the OED investigator, who would then pre-screen the questions, and would only ask the complainants, in private, the questions the OED investigator permitted. There would be no record of the questions asked or their responses. Since this process proposed by USC did not comply with the Faculty Handbook or California law, no proposed questions were submitted to the OED investigator.

On May 7, 2018, the OED Director and investigator abruptly closed the re-opened investigation without inviting the parties to comment upon, challenge, or ask questions about the OED investigation file. The OED Director and investigator stated there was no expansion of the original investigative file and simply accepted the same deficient opinion and decision issued previously, which were the subject of Guerrero's successful grievance. On May 8, 2018, Guerrero submitted objections to the OED's actions, but received no substantive response.

On May 10, 2018, Vice Provost Graddy granted Guerrero's request to submit his new appeal to the Office of the Vice Provost on May 18, 2018. On May 17, 2018, former USC President, Nikias, approved a change in the Faculty Handbook that modified the manner sanctions may be imposed against faculty members. On May 18, 2018, Guerrero submitted his new appeal. On May 25, 2018, Graddy summarily denied Guerrero's new appeal, without considering the merits, adopting the previous appeal decision of Dr. Randolph Hall stating that since there was no expansion of the original investigative file, OED did not issue new findings of fact or new conclusions; therefore, a new ruling on the appeal cannot be made on the basis of the expanded record, because the record was not expanded. Graddy also wrote that there were no procedural errors that had a material impact on the fairness of the investigation. Graddy concluded her letter by stating:

> The 2018 Faculty Handbook, www.usc.edu/facultyhandbook, provides additional appeal rights. After a decision by a Sanctioning Panel under Faculty Handbook 6AA-3, you or either of the reporting parties are entitled to appeal the sanctions and corrective actions to me within seven days under the new provisions of Handbook 6-F(1). There can be no additional appeal on the issues already decided on appeal.

The USC administrative disciplinary process regarding Guerrero's grievance was final and all administrative appeals were exhausted.

On June 13, 2018, Vice Provost Levine advised Guerrero that the Sanctioning Panel and the Provost had reviewed the OED investigative file and had determined sanctions. He further advised that the Provost had decided to move forward with dismissal proceedings and that the Sanctioning Panel imposed a set of sanctions, including a one-semester unpaid suspension, which would be in force until the dismissal proceedings are concluded, and to remain in place if the final decision is not to dismiss you. These more severe sanctions were based on the new "Faculty Handbook 2018", which would not be announced until the following day.

On June 13, 2018, USC Provost Michael Quick notified Guerrero that he had decided to bring formal charges for Guerrero's dismissal and notified Guerrero of the University's intent to initiate a dismissal hearing against him. Although prior USC decisions against Guerrero had been based on an investigation file that had not been expanded, Provost Quick stated that he took into account the Sanctioning Panel's deliberations base on the expanded file. Quick requested that the Committee on Faculty Tenure and Privileges Appeals convene a Hearing Board to recommend whether the proposed dismissal should occur, and to schedule a hearing within 30 days, or as soon thereafter as a hearing can be arranged. Quick announced the new Faculty Handbook 2018 on June 14, 2018.

On July 8, 2018, Guerrero submitted his grievance of the new sanctions imposed on June 13, 2018 after the remand to OED. The grievance has been accepted by the USC Academic Senate. USC was to convene a Hearing Board for the new grievance and dismissal charges on or before July 13, 2018. On November 2, 2018, a three-member panel consisting of Krzyszlof Pilch, Professor of Physics and Astronomy, Tania Modleski, Professor of English, and Sheila M. Sofian, Professor of Cinematic