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Dealing with Online Harassment in Collective Bargaining Environments

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California Faculty Association

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In the Matter of the Arbitration Between)	
)	
CALIFORNIA FACULTY ASSOCIATION,)	
)	
Association,)	
)	OPINION AND AWARD
vs.)	
)	Eric Canin Discharge
CALIFORNIA STATE UNIVERSITY,)	
FULLERTON)	
)	
University)	
_____)	

APPEARANCES

For the University: Brian P. Villareal
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For the Association: V. Jesse Smith
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INTRODUCTION

The California Faculty Association (“the Association”) has challenged the decision of California State University, Fullerton (“the University”) to terminate the employment of Dr. Eric Canin. The termination was based on the University’s conclusion that Dr. Canin physically assaulted a student at a demonstration that the assault interfered with a student groups’ right to participate in a peaceful demonstration. The Association claims both that Dr. Canin did not commit the misconduct alleged and that there was no just

cause for the discipline imposed or for any proven wrongdoing.

The undersigned was selected by the parties as the arbitrator in this matter. A hearing was held on May 9, and May 10, 2017. Dr. Canin was present. Both sides were represented by counsel and given the opportunity to call witnesses and offer documentary evidence. The matter was taken under submission on June 29, 2017, upon receipt of the parties' closing briefs.

ISSUES

The parties were unable to agree to the precise statement of the issues. (T. 9-11.¹) I find the following to be the issues to be determined:

1. Did the University have just cause to terminate Dr. Canin's employment?
2. If there was not just cause to terminate Dr. Canin's employment, should the discipline be modified or completely overturned?
3. If the discipline is modified or overturned, what is the appropriate remedy under Art. 19.23 of the parties' collective bargaining agreement ("CBA")?

STATEMENT OF FACTS

Background

At all relevant times prior to his discharge, Dr. Eric Canin was a Lecturer in the College of Humanities and Social Sciences, Department of Anthropology, at California State University, Fullerton. As of the date of the incident leading to the discharge, he had been in that position for almost 20 years. (T. 295.) His primary duties have been to lecture

¹ References are to the transcripts provided by Debbie Strickland, CSR No. 9036. University Exhibits will be designated as "U-__"; Association Exhibits will be designated as "A-__."

for the Anthropology Department. (T. 296.) Dr. Canin testified that he enjoys teaching and has always received satisfactory teaching evaluations. (T. 297.) In addition, he has a discipline free record. (T. 322.)

The Incident on February 8, 2017

The incident giving rise to the discharge occurred on the Cal State Fullerton campus on February 8, 2017. (T. 125.) Most of the facts leading up to the incident and Dr. Canin's alleged misconduct are not in dispute.

On that day, a student organization called Students for Justice in Palestine was holding a rally/protest on campus. (T. 126.) Approximately 15-25 members of a group called the College Republicans attended the event with the intention of holding a counter-protest. (T. 77, 94, 115, 143.)

Dr. Tonantzin Oseguera is the University's Associate Vice President for Student Affairs. (T. 123.) She testified that the administration at the University supports these kinds of events by assisting with the planning. (T. 124.) There are also members of the Student Life and Leadership staff, known as the "Quad Squad," who attend rallies and demonstrations in order to monitor student safety. (T. 125.) Dr. Oseguera attended the February event to assist because the event was large and her support staff was "spread a little thin." (T. 127.)

The two groups at this event were kept about 50 yards apart by the Quad Squad and the University Police Department. (T. 78.) The College Republicans carried large signs. (T. 79.)

Anthony Pang is the Associate Director in the Office of Student Life and Leadership at the University. (T. 164.) Based on prior planning, his responsibility on the day of the protest was to work with any counter-protest group. (T. 165.) On the day of the event, he encountered 10-12 individuals from the College Republicans who had signs in opposition to the pro-Palestinian group. (T. 166.) He spoke with College Republicans who were in attendance and explained where they would be allowed to meet. According to Pang, they were compliant and understanding. (T. 167.)

After 40 minutes of speeches from the pro-Palestinian group and the College Republicans chanting in response to speakers, the two groups started to march around campus. (T. 81-82.) The Palestinians for Justice group marched and the College Republicans followed. The Quad Squad made sure the groups were separated.

At some point, Dr. Canin, who was on campus to teach a class, was walking beside the College Republicans. While walking next to this group, he failed to notice a bike rack in his path and he stumbled. What he did after he stumbled is in dispute and will be presented as testified to by each of the percipient witnesses other than Dr. Canin. His testimony will be presented under a separate heading.

Jared Lopez

Jared Lopez is a freshman at the University and a member of the College Republicans. (T. 76-77.) He testified that he first saw Dr. Canin when the group was standing in the humanities quad. According to Lopez, Dr. Canin accused them of being traitors and Russian spies because they supported Trump. (T. 80.) Lopez testified that

Bryce Ingalls, another member of the College Republicans, told Dr. Canin to leave them alone. (T. 80.) In response Dr. Canin walked away. (T. 81.)

Lopez testified that he saw Dr. Canin again near the student store. (T. 83.) Dr. Canin told the College Republicans that he was a professor and that they did not know anything. (T. 83-84.) Lopez testified that they ignored him. (T. 84.) At some point Dr. Canin stumbled into a bike rack, which he had not seen because he was walking while facing the College Republicans. (T. 84.)

Lopez did not believe that Dr. Canin fell all the way to the ground. (T. 84.) He testified that a few members of the College Republicans asked Dr. Canin if he was okay. (T. 84.) Others laughed at Dr. Canin. (T. 93.)

In response, Dr. Canin charged at him as if he were going to take away his (Lopez's) sign. (T. 85, 95.) At that point, Ingalls stepped in and there was a commotion. Lopez testified that Dr. Canin grabbed at and touched the sign he was carrying.² Lopez testified that he believed it was an "intentional grab." (T. 85.) He also testified that the Dr. Canin "bumped" him. (T. 85.)

Lopez also testified that Dr. Canin responded to Ingalls by hitting him in the face with an open hand. (T. 86.) A summary from a later interview has Lopez indicating that Dr. Canin's arms were swinging or flailing. (U-4, p. 47.)

After some commotion, Lopez saw Christopher Boyle, the President of the College Republicans, holding Dr. Canin in a headlock. (T. 86.) He testified that after the

² Lopez's sign said "Bricks for Harambe." He did not know what it meant. (T. 97.)

altercation, the College Republicans just stood around and did not continue to march. (T. 88-89, 96.) However, some continued to hold up their signs and chant. (T. 96-97.)

Bryce Ingalls

Ingalls is a second year student at the University and a member of the College Republicans. (T. 102.) He testified that his first interaction with Dr. Canin was while the group was still at the humanities quad. At that point, Dr. Canin said something facetious about the group being Russian spies and also said something about them being Jew haters. (T. 105.) Ingalls denied that anyone said anything negative toward Dr. Canin. (T. 117.)

Later, after the College Republicans started marching, Dr. Canin reappeared and confronted one of them saying that he was not going to respect them because they didn't respect people like him. (T. 106.) Then, while walking, Dr. Canin stumbled into the bike rack and fell down. (T. 107.)

Ingalls described Dr. Canin as being embarrassed. He testified that Dr. Canin then walked toward Lopez, put a hand on him, and tried to take Lopez's sign. (T. 107, 110, 114.) In response, Ingalls came over to get Dr. Canin away from Lopez. (T. 107, 111.) According to Ingalls, Dr. Canin then turned and hit him in the face with an "open fist" or "palm." (T. 107, 113.) Ingalls did not suffer any damage to his face and did not need medical treatment. (T. 119.)

Ingalls testified that he was not hurt but shocked. As he backed up, there was a "ruckus" and the Quad Squad appeared. Ingalls then saw Boyle restrain Dr. Canin. (T.

108.) Ingalls testified that the march stopped after the incident. (T. 109.) He testified that he spoke with the police but declined to press charges against Dr. Canin, even though Boyle wanted him to. (T. 117, 119-20.)

Dr. Tonantzin Oseguera

Dr. Tonantzin Oseguera testified that she did not really witness the fight. (T. 123.) At one point she saw someone later identified as Dr. Canin with his fist up. She also believed there had been contact with a student. (T. 130, 145.) She also observed a scuffle. (T. 130.) Her testimony also indicated that at the time she saw Dr. Canin with his fist raised, he was being held by someone. (T. 136.)

Dr. Oseguera testified that after the scuffle she held up the College Republicans to make sure they were all right. None needed medical attention. (T. 131.) Some were scared. (T. 131, 134.) One student said something like, “He got me pretty good” (presumably relating to Dr. Canin striking him). (T. 131.)

Dr. Oseguera refused to characterize the College Republicans as a “hate group” but acknowledged that others on campus referred to them that way. (T. 138.) She testified that one sign held up by members of the College Republicans had “Pepe the Frog” on it, which she believed is a symbol for hate. (T. 139-40.)

Nau Taufalele

Nau Taufalele is a first year graduate student at the University and a member of the Quad Squad. (T. 147-48.) She testified that she first noticed Dr. Canin as she was near the bookstore. He was walking along side the College Republicans and was engaged in

conversation. (T. 152.)

Taufalele saw Dr. Canin trip over the bike rack and go down on his knee. (T. 152, 158.) In response, students mocked and laughed at him. (T. 152, 158.) At that point, Dr. Canin lunged forward and tried to grab one of the signs that a student had been holding. (T. 152-53, 161.) Because the student pulled the sign away, Dr. Canin never actually had possession of the sign. (T. 161.)

According to Taufalele, Dr. Canin was not pushed into the student but moved of his own volition. (T. 153.) She also testified that when Dr. Canin moved forward, he had already recovered his balance after the fall. (T. 160.)

The student tugged the sign away, and Taufalele saw Dr. Canin's arm move toward the students. (T. 153.) At some point after, she also saw Boyle holding Dr. Canin back. (T. 154.) Taufalele testified that "everything just kind of happened really quickly." (T. 153.) Taufalele testified that there was a lot of pushing and shoving happening at the time. She herself had fallen to the ground after tripping on someone's leg. (T. 162.)

According to Taufalele, the police arrived and Boyle told the College Republicans to end the protest. (T. 155.)

Anthony Pang

Anthony Pang testified that he did not see Dr. Canin that day until after the planned speaking portion of the program ended, and the College Republicans were marching near the main entrance to the Pollak Library. (T. 170.) Pang, who was in front of the College Republicans, had looked back and noticed that Dr. Canin and some of the

College Republicans were engaged in a dialogue. (T. 171-72.)

Pang testified that he did not see Dr. Canin trip over the bike rack but heard a noise and then laughter and mockery. (T. 172.) Then he heard a commotion and saw the group “collapse” together. (T. 173.) Pang jumped in between Dr. Canin and someone he assumed to be another student. (T. 174.)

Pang also saw Boyle restraining Dr. Canin. (T. 174.) Pang had to twice request that Boyle release Dr. Canin. (T. 175.) Pang testified that he had not seen Dr. Canin grab a sign or hit anyone prior to being grabbed by Boyle. (T. 185.) He also testified that Dr. Canin was “visibly shaken,” and he saw some of Dr. Canin’s possessions on the ground. (T. 175-76, 192.)

Pang then checked to see that the members of the College Republicans were fine. (T. 176-77.) They indicated that they were but that they wanted to remain at the scene in order to hold people accountable for what had happened. (T. 177.)

Pang was shown one of the video clips from the event and was able to identify Dr. Canin, Boyle, and another faculty member (later identified as Professor Kenneth Walicki). (T. 182; U-4, video 2.mob.)

Four video clips were introduced into evidence. (U-4, Tab 4.) The first shows Dr. Canin walking with some students, smiling, and exchanging a few words. The video does not identify which group Dr. Canin is beside.

The second video also shows Dr. Canin walking beside some students and speaking with them. From some of the conversations it appears that he is with the College

Republicans. He asks the students, “How many of you are professors?” and says “Because professors actually know something.” One student responds by saying, “Professors are just liberal trash.” A few second later, Dr. Canin says, “I’m sorry, I forgot I’m with the trolls.” None of Dr. Canin’s comments seem to be said in anger or with any hostility. He also tells one of the students that what he or she is doing is not “respectful.” A few seconds later, someone says “hey, hey hey” and it appears that the incident at issue here occurs at this time. However, the camera doesn’t capture any of it.

The third video shows Dr. Canin after the incident. One person is heard saying, “You’re a professor? Oh, wow.” Another person is heard saying “It was a fucking assault.” Dr. Canin is shown on the video saying, “Who the fuck are you?” In context, it appears that this comment is addressed to Professor Walicki since Dr. Canin says, “I’m a professor, too.” Then another person says, “You assaulted a student,” and “You’re going to jail, asshole” (the later statement being repeated a number of times) as Pang escorts Dr. Canin away.

The fourth video is very short and also captures Dr. Canin saying, “Who the fuck are you.”

The University’s Investigation

At the time of the incident, Michelle Tapper was the Interim Director of Labor Relations. (T. 22, 50-51.) In that capacity, she conducted an investigation of the incident. (T. 23.) The investigation was prompted, in part, when the University received a report from the Fullerton Police Department regarding the incident related to battery on a

person. (T. 25-26; U-4, Tab 1.) Based on that report, on February 9, 2107³, Tapper sent Dr. Canin a notice of investigation and a notice of leave pending investigation. (T. 27; U-2.)

Tapper completed her investigation and issued a report on February 15, 2017. (U-4.) The report contains notes of the interviews she conducted on February 9, 2017, with Tonantzin, Pang, and Ingalls, the February 10, 2107, interviews she conducted with Dr. Walicki and Lopez, and the February 14, 2017, interviews of Boyle and Taufalele. (T. 28-30.)⁴ It also contains notes from her February 13, 2017, interview of Dr. Canin. (T. 29.) Tapper testified that as part of her investigation, she also considered a supplemental police report and a video of the incident. (T. 30.)

None of the witnesses were asked to or provided their own written statements. (T. 53-54.) Nor were any asked to review Tapper's notes from the interviews (as contained in her report) in order to verify the accuracy of Tapper's recitation of the information they provided at the interviews. (T. 55-56.) However, Lopez, Ingalls, Dr. Oseguera, Taufalele, and Pang testified that Tapper's summaries of their interviews were accurate or mostly accurate. (T. 90, 112, 133, 156-57, 159, 184.)

Tapper testified that she made credibility determinations. She found all of the

³ That same day, the University's Chief Communications Officer issued a tweet that said, in part, "Any violent incident, however isolated, cannot be tolerated." (A-9.)

⁴ Neither Boyle nor Walicki were called to testify. Professor Walicki did not have first hand knowledge regarding Dr. Canin's alleged assault. Boyle's statement, as reported by Tapper, was consistent with statements given by Lopez and Ingalls.

witnesses to be credible except for Dr. Canin. (T. 43-44.) The witness accounts were consistent with each other and with the video clips. (T. 44-45.)

Tapper concluded that Dr. Canin had grabbed a student's sign, struck a student in the face, and that his conduct disrupted and ultimately halted the College Republicans' demonstration. (T. 45.) She acknowledged, however, that the video clips did not show Dr. Canin striking anyone or grabbing a sign. (T. 62-63.)

Tapper's report concluded that Dr. Canin had violated the following University policies:

President's Directive No.5:

Speakers are not to be subjected to harassment, nor is the right of all to hear the speaker to be infringed.

. . . .

All students, and faculty and staff on their own time, are free to participate in demonstrations (U-4, Tab. 5.⁵)

President's Directive No. 8, Directive I (B):

Acts of violence and threats of violence severely impact the well-being of members of the university community and the open dialogue and free exchange of ideas intrinsic to higher education. Therefore, the university will not tolerate acts of threats of violence against members of this community or retaliation against an individual reporting a threat or act of violence. (U-4, Tab 6.⁶)

⁵ Tapper did not believe the College Republicans violated Directive No. 5 when they referred to Dr. Canin as "liberal trash." She believed that Dr. Canin stepped over the line with his physical acts. (T. 63-64.)

⁶ Section VI, C of Directive No. 8 also contains the following: "Substantial threats or acts of violence and/or retaliation by individual staff and administrators may result in disciplinary action taken pursuant to the applicable collective bargaining agreement. . . ." (U-4, p. 71.)

University Policy Statement 300.000:

1. Right of Freedom of Expression

- a. Every aspect of the educational process should promote the free expression of ideas. Students are free to pass resolutions, distribute leaflets, picket, circulate petitions, discuss, and take other lawful action respecting any matter which directly or indirectly concerns or affects them, subject only to reasonable time, place and manner considerations
- b. Students have the right of freedom of speech and assembly. They may publically assemble to demonstrate support for or opposition to causes or candidates. University control of campus facilities shall not be used to prevent the free exchange of ideas. The prescribed areas of public assembly shall not be isolated from the natural gathering points of the University.

. . . .

7. Right of Access to Relevant Education

- a. Students are entitled to an atmosphere conducive to learning and to equitable treatment in all aspects of the teacher-student relationship. Faculty must be mindful of the potential intimidating effect in the unequal power relationship between teacher and student.

. . . .

A. The University

It is the responsibility of the University faculty and administration to act in a manner which benefits the students at California State University, Fullerton. It is also their responsibility to uphold the rights of students and to obey the letter and spirit of such rights. (U-4, Tab 8.)

University Policy Statement 230.000

Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors

As members of their community, professors have the rights and obligations of other citizens. Professors measure the urgency of these obligations in light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote considerations of free inquiry and to further public understanding of academic freedom. (U-4, Tab 7.)

Tapper concluded the Students for Justice in Palestine and College Republicans had been approved to participate in protests and had complied with the time, place, and manner restrictions in Directive No. 5. She found that Dr. Canin's physical actions against students violated Directive No. 5 and No. 8. She found that Dr. Canin's actions inhibited the College Republicans in their right to free speech and assembly in contradiction of UPS 300.000, and that Dr. Canin failed to uphold the standards of UPS 230.000 when he identified himself as a professor and then engaged in a physical interaction with students while attempting to create the impression that he was acting as a representative of the University. (T. 46-47; U-4, pp. 51-52.)

In her report, Tapper indicated that Dr. Canin's actions had "halted" the College Republicans' demonstration. (U-4, p. 50; T. 72-73.) However, Tapper acknowledged that Lopez told her that after the incident with Dr. Canin, the College Republicans resumed holding up their signs and chanting. (T. 73.)

The Decision to Terminate Dr. Canin's Employment

Tapper presented her report to Dr. David Forgeus, Interim Vice President of Human Resources, Diversity, and Inclusion. (T. 47.) She testified that she engaged in discussions about discipline with Dr. Forgeus, the Dean of the College of Humanities and Social Sciences, and University Counsel. (T. 48.)

On February 22, 2027, the University issued a Notice of Pending Disciplinary Action which contained the University's decision that Dr. Canin be dismissed from his position with the University. (T. 48; U-5.)

Dr. Forgeus testified that in terms of discipline, Article 19.1 of the parties' CBA limits the choice of discipline to "dismissal, demotion, or suspension without pay." (T. 235-36; U-5, Tab1.) He testified that believed that Dr. Canin had engaged in unprofessional conduct. (T. 237.) He concluded that Dr. Canin had engaged in physical actions toward members of the College Republicans, specifically, grabbing a sign and striking a student in the face. (T. 238.) This violated Directives 300.000 and 230.000. (T. 240.)

Dr. Forgeus testified that the issue was discussed by the President's cabinet and a decision was made to recommend dismissal. (T. 241.) He testified that a suspension was considered but dismissal had been warranted because "the student speech was stopped . . . something we did not find acceptable . . . particularly from a faculty member." (T. 242.) The President agreed and asked Dr. Forgeus to carry out that decision. (T. 241.)

Dr. Forgeus testified that he was aware that Dr. Canin had a 20-year career with the University. However, he did not believe that was a sufficient mitigating circumstance to avoid dismissal. (T. 248-49, 253-54.) He also testified that the decision was not made in order to please a generous Republican donor to the University. (T. 256-57.)

Dr. Lisa Kirtman, Dean of the College of Education, conducted a *Skelly* hearing regarding the incident. (T. 195.) She testified that after reviewing the notice of pending discipline, medical records presented regarding Dr. Canin, and after hearing a statement presented by the CFA on behalf of Dr. Canin, she found that the University had grounds for believing that Dr. Canin had engaged in unprofessional conduct. (T. 196-206; U-6.)

She also testified that there were conflicts between assertions in Dr. Canin's statement and those of students and administrators, whose statements she found to be consistent. (T. 207.)

Dr. Kirtman testified that she believed that Dr. Canin had represented to the College Republicans that he was a professor at the University. This occurred both before and after the incident. (T. 209.) However, Dr. Kirtman acknowledged that Dr. Canin never stated that he was at the event as a representative of the University. (T. 216.)

Dr. Kirtman testified that she did not believe that Dr. Canin having been mocked by students was a mitigating circumstance. (T. 226.)

After a *Skelly* hearing, the proposed discipline was upheld. (T. 49, 247.)

Dr. Canin's Testimony

Dr. Canin testified that he is a "contemplative" person who thinks before he acts. He characterized himself as "by nature, nonviolent." (T. 298.)

Dr. Canin testified that he had been notified about the Students for Justice in Palestine event via a general email. (T. 299.) He also received an email about the event on February 5 from the organization's President. (T. 299; U-1.)

On the day of the event, he had arrived as the speaking portion of the event had ended. (T. 300.) When he walked from the parking lot to the humanities building, he saw a group of counter-protesters (the College Republicans). (T. 300.) He did not directly address the College Republicans. Instead, he joined in the anti-Trump chants from the pro-Palestinian group. (T. 300-01.)

Dr. Canin testified that he found the signs carried by the College Republicans to be offensive. He testified that Pepe the Frog is a meme associated with virulent anti-Semitism. According to Dr. Canin, the Anti-Defamation League considers it to be as offensive as a swastika. (T. 302.) He testified that Bricks for Harambe, printed on other signs, was another symbol of racist hate, associating African Americans with non-human primates. (T. 303.)

Dr. Canin denied that he told the College Republicans that he was a Russian spy. He testified that he told them that Donald Trump was a Russian spy. (T. 303-04.)

Dr. Canin testified that since the march was heading in the direction of his office, he continued to walk along. (T. 304.) Because he was not feeling well that day, he was not able to keep up with the pro-Palestinian group and was soon walking along side of the College Republicans. (T. 305.) He testified that there was some back and forth banter but nothing serious until he arrived at the bike rack. (T. 306.)

Dr. Canin testified that he stumbled on the bike rack and then started to “right himself” and regain his balance. (T. 307.) Then some students from the College Republicans started laughing and making derogatory comments mocking him. This upset him. (T. 308.) He testified that he also started to feel faint, which he thought might have been the product of his hypertension. (T. 308.)

Dr. Canin testified that he thought he was going to fall and took some steps forward in order to regain his balance. (T. 309.) He testified that he saw a demonstrator ahead of him and thought that he needed to either grab the sign or the person in order to

remain upright, so he reached out for the sign. (T. 309.) As soon as he made contact with the sign, he felt someone grab him from behind. (T. 310.) He later learned that he had been grabbed by Boyle. (T. 311.)

At first Dr. Canin thought that the person who grabbed him was trying to help. He then came to believe that the person was restraining him and not assisting him. (T. 313.) When he was released, he asked Pang to escort him away because he did not feel safe. (T. 314.)

Dr. Canin testified that he did not consider pressing charges against Boyle because he believed it was a small incident which would be resolved in a fair manner. (T. 315.) He testified that when interviewed by Tapper, he related the incident in accordance with what happened. (T. 318.)

Dr. Canin testified that when he read Tapper's report, it was a shock. He had assumed that his interview was not going to be the only interview conducted, just the first. (T. 319.) He testified that Lopez never asked him if he was okay. (T. 319.) He testified that he believed he had stumbled but he had told Tapper that he was not sure; he might have been pushed. (T. 320, 329-30.) However, in most respects, the statement Dr. Canin submitted at the *Skelly* hearing is similar to what Tapper wrote in her report. (T. 334-36; U-4, Tab 7 (A).)

Dr. Canin also testified that just after the incident he had a verbal exchange with Professor Walicki who confronted him and accused him of hitting a student. Dr. Canin denied having done so. He testified that he had identified himself to Walicki as a

professor because Walicki had stated that he was a professor. (T. 321.) However, in doing that, he was not intending to indicate that he had been representing the University. (T. 321.)

Dr. Canin also testified that after the incident, he received a great deal of hate mail, both physical mail and email sent to his University email address. (T. 322; A-6.) He attributed the hate mail to publicity by the College Republicans on its Facebook page that had been picked up by the alt-right media. (T. 325.)

Dr. Canin testified that he did not read his own statement at the *Skelly* hearing because at the time, he had been in very poor health. (T. 333.) Although his statement indicates that he had been “pushed and struck” by students, he did not believe that he was the recipient of a “sharp strike.” Rather, “there was jostling going on.” (T. 339.)

Dr. Canin also disagreed with Tapper’s report, which indicates that he told her that he “became angry.” (T. 344.) Dr. Canin testified that he told her that he was “upset.” (T. 344.) He also denied a statement attributed to him in an article in the Daily Titan. (A-9.) He testified that he never told the reporter that he had “lost it.” (T. 346.)

Additional Evidence

Jonathan Karp is a lecturer at San Jose State University and one of nine state-wide officers of the California Anthropology Association. (T. 267-68.) He is also a faculty rights expert from the California Faculty Association, which represents 28,000 faculty in the California State University system. (T. 268.) In that capacity, he has dealt with a variety of issues including faculty discharges. (T. 269.)

Karp testified that he has known Dr. Canin since 2008 when they met at an American Anthropology Association meeting. (T. 269.) In 2013, when Karp was President of the California Anthropology Association, he appointed Dr. Canin to be its Vice President. Dr. Canin subsequently became President of that organization and then a member of the Association's board. (T. 270.)

Based on his years of knowing Dr. Canin, Karp opined that Dr. Canin was passionate in his political beliefs but a non-violent follower of the teachings of Gandhi. (T. 272.) Karp testified that the assault Dr. Canin has been accused of is out of character for Dr. Canin. (T. 273.)

Carie Rael, who is a staff member at the Cal State Fullerton Center for Oral and Public History, testified as a character witness for Dr. Canin. (T. 284.) She has known him since she was an undergraduate student at the University. (T. 284.)

Rael testified that Dr. Canin is supportive of student causes and has always acted in a very calm, cool, and collected manner. (T. 285.) She testified that the articles she read describing the encounter with Dr. Canin are inconsistent with his character. (T. 293.)

Rael testified that when she was a graduate student, she was part of a group called Students for Quality Education, also known as SQE. (T. 284-85.) Rael testified that the College Republicans has created a fake SQE social media account in which they called themselves "Students for Quesadillas and Enchiladas" in honor of Cinco de Mayo. (T. 288, 291; A-12 [an article from the Daily Titan containing a screen shot of the flyer].) She characterized this posting as "racist." She also characterized the Pepe the Frog emblem,

which was on their signs on the day of the incident and is on their Instagram account, as “an all white AKA white supremacist insignia.” (T. 288-89.)

Finally, Barbra Erickson, the Chair of the Department of Anthropology testified on Dr. Canin’s behalf. (T. 348.) She has known Dr. Canin for 15 years and described him as student oriented. (T. 349.) He prefers live classes so that he can have student interaction, and he participates in student events more than other regular faculty. (T. 349.) Erickson testified that she has never heard any student or colleague say anything negative about Dr. Canin. (T. 350.) She, along with many colleagues, signed a petition calling for Dr. Canin’s “immediate reinstatement.” (A-8.)

RELEVANT SECTIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 19

DISCIPLINARY ACTION

Scope of Disciplinary Action

19.1 Sanctions imposed in a disciplinary action shall be limited to dismissal, demotion, or suspension without pay.

. . . .

Arbitration Rules and Procedures

. . . .

19.6 It shall be the function of the arbitrator to determine whether cause for disciplinary action existed and to affirm, modify, or deny the sanction or pending sanction.

. . . .

19.29 The University has the burden of proving the conduct by the preponderance of the evidence in all discipline cases.

THE POSITIONS OF THE PARTIES

The positions advocated in the briefs will be presented here in a summary fashion

and may not recite all of the specific factual information or case law referenced in support of each side's position. Notwithstanding the brevity of the summary, the parties should know that all arguments (along with supporting facts and authority) presented in the parties' respective briefs have been read and given careful consideration.

The University's Position

The University first argues that under Education Code § 89535 it has the right to dismiss a temporary Lecturer for unprofessional conduct. The preponderance of the evidence shows that Dr. Canin did engage in unprofessional conduct. Although the term professional misconduct does not have a precise definition, there is case law which indicates that the assault and disruption here would satisfy the definition.

The University also argues that Dr. Canin's actions in grabbing Lopez's sign and striking Ingalls violated Presidential Directive No. 8. Multiple witnesses supported the University's finding that Dr. Canin did assault both students.

The University also argues that Dr. Canin's actions interfered with the free speech rights of the College Republicans, which is a violation of Presidential Directive No. 5. Again, numerous witnesses testified to Dr. Canin's actions and the fact that his actions resulted in the end of the College Republicans' demonstration.

Citing California case law, the University argues that its choice of sanction should be upheld. Dr. Canin's actions result in "harm to the public service." His actions also resulted in an "irreparable injury" to the College Republicans' free speech rights. The fact that Dr. Canin has not accepted responsibility or apologized also supports the

University's decision.

The University argues that Dr. Canin has no valid defenses. The claim that the College Republicans engaged in hate speech is not a defense. Nor is Dr. Canin's subsequent receipt of hate mail.

Finally, citing *Coltran v. Rollins Hall Int'l*, 17 Cal.4th 93 (1998), the University argues that the proper inquiry is not whether Dr. Canin committed the misconduct. Instead, it is whether the University in making its decision "acted in good faith," and "had reasonable grounds for believing" that Dr. Canin had committed the misconduct.

The Association's Position

The Association first argues that the University failed to meet its burden of proof. There is insufficient evidence that Dr. Canin intentionally hit anyone, or attempted to grab a sign, or violated any campus policy. According to the Association, the video clips introduced in evidence do not show the acts alleged and the two witnesses who were members of the College Republicans have no credibility because they are biased against Dr. Canin.

The Association also argues that the University did not conduct a fair investigation. It sent out a tweet on February 9 condemning the violence before it had even conducted its investigation. Since there was no evidence of student violence, the tweet is evidence that prior to completing its investigation, the University had concluded that Dr. Canin had committed the misconduct. Citing appropriate arbitral case law involving the California Faculty Association and the California State University system,

the Association argues that announcing the results of an investigation prior to its completion violates due process.

The Association also criticizes the University's investigation because Tapper failed to get written statements from the witnesses. That failure is additional evidence that the University had a predetermined result.

The Association also criticizes the University's conclusion that because Dr. Canin identified himself as a professor, he was improperly representing that he spoke for the University. There was no evidence that Dr. Canin did anything more than identify who he was. He did not specifically state that he was a professor at the University and did not say anything which suggested that he was speaking on behalf of the University. In addition, the CBA grants faculty academic freedom, which includes the right to a free exchange of ideas between students and professors.

The Association also argues that in choosing the punishment, the University did not use progressive discipline and did not consider mitigating factors, such as his lack of prior discipline or good performance evaluations. Nor has the University shown that the discipline was proportionate to the offense committed by Dr. Canin.

DISCUSSION

“Cause” v. “Just Cause”

Before discussing whether there was “just cause” to terminate Dr. Canin's employment, I must address the University's contention that the standard is “cause” and not “just cause.” Although the University is correct in noting that the word “just” does not

appear in Article 19, there is almost universal agreement among arbitrators that there is no material difference between “cause” and “just cause” in the context of labor arbitration. (See, *Elkouri & Elkouri*, 7th Ed., p. 15-4.) As stated in *Worthington Corp.*, 24 LA 1, 6 (McGoldrick Sutton & Tribble, 1955): “[I]t is common to include the right to suspend and discharge for ‘just cause,’ ‘justifiable cause,’ ‘proper cause,’ ‘obvious cause,’ or quite simply for ‘cause.’ There is no significant difference between these various phrases.”

The same result has been reached by arbitrators in dealing with The University/CFA cases. For example, in 2002, Arbitrator Zigman used a “just cause” standard notwithstanding the fact that the CBA used the word “cause” as the standard. (*California Faculty Ass’n. & California State University, Long Beach* [re Slawomir Lobodzinski], AAA Case No. 72 300 00185 00 KJC.) More recently, Arbitrator Rosen used a “just cause” analysis in *California Faculty Ass’n. & California State University, San Jose* re [Jeffrey Mathis], AAA Case No. 74 390 00738 17 TAFL (2014).

The only case cited by the University in response is *Coltran v. Rollins Hall Int’l*, *supra*, 17 Cal.4th 93, 107-09. However, that case dealt with the jury’s role in an employment case, which the court held was limited to determining whether the employer reached a fair and honest decision in good faith. I have been appointed as the arbitrator under a collective bargaining agreement. Accordingly, I look to arbitral case law with regard to my role as an arbitrator and the “common law” or the workplace. The decision in *Coltran* is not supported or relevant in the context of labor arbitration. As stated by

Arbitrator DiFalco in *Weir Mineral and United Steel Workers Local No. 12-593* (12-1 ARB ¶ 5566 (Mar. 12, 2002), “In every case of discipline, especially when an employee is being discharged, the burden is on the Company to first prove the alleged infractions (and not simply determine whether the University acted in good faith in making its factual determinations).”

Arbitrators are called upon to make factual determinations based on live testimony which is subject to cross-examination. Arbitrators have the power to issue subpoenas to assist parties in obtaining relevant evidence that also helps us in our fact-finding role. To suggest that we should defer to a factual conclusion reached by an employer simply because it seemed correct at the time is a misunderstanding of the nature of labor arbitration.

Did Dr. Canin Commit the Misconduct Alleged?

As in most discipline cases, there are two critical questions that must be examined in order to determine whether there was just cause to support the discipline imposed. The first question is “What did the employee do?” The second is “What employment consequences appropriately flow from those actions?”

In answering the first question, I have to sort through conflicting testimony. This process is not uncommon, but is also not a very precise exercise. A person’s ability to perceive, record, and retrieve information about past events is far from perfect. Conflicts

in human recollection and recall have been documented in film⁷ and song⁸. In fact, one of the leading causes of wrongful convictions has been inaccurate eyewitness identifications.⁹

Knowing the flaws in human memory does not necessarily help the inquiry. However, suggests that conflicts in testimony do not necessarily mean that someone must be lying. Nor should a trier of fact also assume that a person should not be believed because the person may have an interest in the consequences of the testimony being given. It also means that witness demeanor might need to be given weight as should the question of whether the actions alleged are consistent or inconsistent with character traits of the people involved.

Based on the sworn testimony of the percipient witnesses, I do conclude that Dr. Canin attempted to grab a sign being held by Lopez. Even Dr. Canin admits doing this.

⁷ “Rashomon”, a 1950 Japanese film directed by Akira Kurosawa.

⁸ “The Boxer,” (Simon and Garfunkel): “Still, a man hears what he wants to hear And disregards the rest”; “I Remember it Well” (Alan J. Lerner).

⁹ Several researchers have studied cases in which defendants were wrongfully convicted but later exonerated based on DNA evidence. These case-studies show empirically that eyewitness identification is a significant cause of wrongful convictions, including convictions in capital cases. See, e.g., Samuel R. Gross, et al., Exonerations in the United States 1989 through 2003 (2004) (study of 328 exonerations based on D.N.A. evidence between 1989 and 2003, concluding: “[t]he most common cause of wrongful convictions is eyewitness misidentification”). (Amicus Brief in *Ford v. Dredke*, 2005 WL 3150493 (U.S.)). See also, National Institute of Justice, Eyewitness Evidence: A Guide to Law Enforcement 3 (1999): find that in the majority of the 28 cases of wrongful convictions studied, “[t]he most compelling evidence ... was the eyewitness testimony presented at trial.”

Dr. Canin testified that this was the product of a physical reaction and that he reached out and grabbed at the sign Lopez held in order to avoid fainting or falling. Given that Dr. Canin also made claims that he might have been pushed or tripped, I have trouble crediting any one of his explanations. Instead, I believe that he had an almost reflexive response to the fall and subsequent mockery.

I also conclude that Dr. Canin did at some point, in some way, use his hand to make physical contact with Ingalls' face. I do not believe that he attempted to punch Ingalls. Instead, the testimony from Ingalls suggests that Dr. Canin may have reacted when Ingalls moved toward Dr. Canin and tried to separate him from Lopez.

I do not believe that Dr. Canin violated UPS 230.000 merely because he identified himself as a professor. There is no specific evidence indicating that he said that he was affiliated with the University. Nor did he do or say anything that could reasonably be interpreted as his representing that he was acting or speaking on behalf of the University.

Again, there is no evidence that Dr. Canin *intended* to interfere with the rights of the College Republicans. At most, there was a momentary but most unfortunate and inappropriate loss of control. However, his actions *did*, in a limited way, interfere with the rights of the College Republicans.

What Discipline is Appropriate?

With regard to the judgment about what consequences can appropriately flow from misconduct, the leading treatise on arbitration suggests a split of authority:

Absent express limitations on their authority to modify penalties, two

general views historically have been held by arbitrators. One view is that an arbitrator may not modify a penalty absent arbitrary, capricious, or discriminatory reasons, and the other view is that an arbitrator may do so if the penalty does not meet a reasonable person test.

(*Elkouri & Elkouri*, 6th Ed., pp. 959-960.)

My own position has best been expressed by Arbitrator Kanner in *Caro Center* (1995) 104 LA 1092, 1095:

Given the myriad of situations . . . where such penalties have been expunged, modified, or sustained, one fact is clear. Each case can be differentiated by its particular facts so as to justify the Arbitrator's conclusion. In my opinion, . . . where the discipline/discharge appears unreasonable in light of all the facts, the Arbitrator has the authority to modify or vacate it. But I am also of the view that management's decision should not lightly be upset if within broad parameters of reasonableness.

That position is consistent with the "reasonable person" test used in *United Parcel Service*, 135 LA 757 (Jennings, 2015).

While I have concluded that Dr. Canin committed most of the misconduct alleged, I do not believe that there was just cause to dismiss Dr. Canin from his position.

Progressive discipline is the norm, and there are only limited circumstances under which a discharge for a first offense can be sustained. As stated in *Discipline and Discharge in Arbitration* (Brand & Birren, 3rd Ed.) p. 2-57: "There is general agreement that summary discharge may be warranted for severe misconduct, such as theft, dishonesty, serious threats, serious safety violations, striking a supervisor or similar types of serious misconduct."

While I do not in any way condone violence and while striking a student might in

many cases be the kind of serious misconduct that justifies discharge for a first offense, this is not such a case. There is nothing in Dr. Canin's work history or character that suggests that Dr. Canin's actions were anything other than a momentary lapse in judgment and control. His unblemished work record and the character witnesses who testified to his love of students and his peaceful nature, support this conclusion.

Again, while not in any way condoning a physical response to hateful rhetoric and taunts, it is clear that Dr. Canin was taunted and ridiculed by the College Republicans. To be clear, I am not blaming the "victim." The College Republicans did not invite a physical attack. However, they clearly intended to "provoke," i.e., "incite anger or resentment." (*American Heritage Dictionary*, 1981, p. 1054.)

The level of "violence" is another factor to be considered. Dr. Canin grabbed at an offending sign and probably used an open hand to push a student away, perhaps in response to being pushed by someone else. But he did not engage in anything resembling a fight and did not have any conscious intent to cause any harm to the students in question.

The University also sought to support its decision with the claim that Dr. Canin was responsible for "irreparable harm" to the College Republicans because his actions ended the College Republicans' march. However, in terms of getting their message out – which was the point of their counter-demonstration and march – Dr. Canin actually aided their cause. His actions created publicity which otherwise would not have occurred. That this publicity reached a sympathetic audience is amply demonstrated by the hate mail that

Dr. Canin received.

For all of those reasons, I cannot conclude that Dr. Canin's one momentary lapse in a 20-year career, which caused no tangible harm, and is most unlikely to ever recur, gave the University just cause to discharge Dr. Canin.

Under the authority granted to me in Article 19.16, the discharge shall be reduced and converted to a two-month suspension.

AWARD

The decision to terminate Dr. Canin's employment is overturned and shall be converted to a two-month suspension without pay.

The University shall immediately reinstate Dr. Canin to his former position. It is my understanding that Dr. Canin is still on the payroll. If so, the University may recoup its overpayment of wages for the two-month suspension via a payroll deduction, which, at Dr. Canin's request, may be spread out over a 12-month period following his reinstatement.

If I am incorrect in my understanding regarding Dr. Canin's pay status, he shall be reinstated with back pay (less a two-month unpaid suspension) to be calculated in accordance with Article 19.23.

I will retain jurisdiction should the parties have a dispute with regard to the implementation of the remedy ordered.

Date: July 9, 2017

Jan Stiglitz
Arbitrator